38974
EB

SERVICE DATE – SEPTEMBER 26, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35057

TOWN OF BABYLON AND PINELAWN CEMETERY—PETITION FOR DECLARATORY ORDER

Decided: September 24, 2008

In this decision, we are denying a motion to dismiss the declaratory order petition in this proceeding and petitions for reconsideration of our decision served on February 1, 2008 (February 2008 Decision) in this proceeding.

BACKGROUND

In the February 2008 Decision, the Board granted a petition filed by the Town of Babylon, NY (Babylon) and Pinelawn Cemetery (Pinelawn) for a declaratory order finding that, to the extent the New York and Atlantic Railway Company (NYAR) has authorized Coastal Distribution LLC (Coastal) to build and operate the Farmingdale Yard transload facility for construction and demolition debris on property owned by Pinelawn, such activities do not qualify for Federal preemption under 49 U.S.C. 10501(b) and, therefore, are fully subject to state and local regulation.[1] The Board rejected the argument that Coastal's activities were preempted because Coastal was acting as the agent of a carrier—NYAR. On February 20, 2008, Coastal filed a petition for reconsideration of the Board's decision.[2] On February 21, 2008, NYAR filed

[1] As discussed in more detail in our prior decision, the petition for declaratory order followed years of dispute and litigation regarding whether the transloading facility operations come within the Board's jurisdiction. The U.S. District Court for the Eastern District of New York issued a preliminary injunction against Babylon's attempt to apply its zoning regulations to the Farmingdale Yard operations. Coastal Distribution, LLC v. Town of Babylon, No. 05-CV-2032 (E.D.N.Y. Jan. 31, 2006). On appeal, the United States Court of Appeals for the Second Circuit modified the district court's injunction to permit petitioners to seek a declaratory order from the Board on whether the activities at Farmingdale Yard constitute "transportation by a rail carrier" so as to come within the Board's jurisdiction. Coastal Distribution, LLC v. Town of Babylon, 216 Fed. Appx. 97, 100, 103 (2d Cir. 2007).

[2] Coastal and NYAR also filed petitions for judicial review, which the Court dismissed for lack of jurisdiction because the pending petitions for reconsideration had rendered the February 2008 Decision non-final. See New York & Atlantic Ry. Co., et al. v. STB, No. 08-1048 (D.C. Cir., May 9, 2008).

a motion to dismiss and, in the alternative, a petition for reconsideration.[3] Babylon and Pinelawn filed a reply on March 24, 2008.

DISCUSSION AND CONCLUSIONS

Motion to Dismiss. NYAR asks the Board to reopen the docket and dismiss the petition for declaratory order. Petitioner argues that the Board's grant of declaratory relief was not for the reasons stated in the February 2008 Decision, i.e., Coastal's activities were not integral to rail transportation and therefore not subject to the Board's jurisdiction. Rather, it suggests that the Board decided the case the way it did to avoid a loss of funding. NYAR cites to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) (the Appropriations Act), which provides in relevant part:

> None of the funds appropriated or otherwise made available under this Act to the Surface Transportation Board of the Department of Transportation may be used to take any action to allow any activity described in subsection (b) in a case, matter, or declaratory order involving a railroad, or an entity claiming or seeking authority to operate as a railroad, unless the Board receives written assurance from the Governor, or the Governor's designee, of the State in which such activity will occur that such railroad or entity has agreed to comply with State and local regulations that establish public health, safety, and environmental standards for the activities described in subsection (b), other than zoning laws or regulations.

Id. (Subsection (b) enumerates various activities occurring at solid waste rail transfer facilities.) NYAR reasons that a Board finding of jurisdiction over Coastal would result in the authorization of activities prohibited by the Appropriations Act, as it would enable Coastal to ignore the local ordinance that prohibits its activities. According to NYAR, the Board was placed in the untenable position of either ruling against petitioners or risking the loss of its Congressional funding and the Board chose the former.

NYAR's claim—that, rather than relying on the law and facts, the Board determined that the transloading facility was subject to state and local regulation in order to retain its funding under the Appropriations Act—is incorrect. First, NYAR's interpretation of the Appropriations Act language is inaccurate. The Board does not "risk its funding" under the Act; rather, the Act prevents the Board from taking certain actions. As we will discuss in a moment, the facts of Coastal's relationship with NYAR did not trigger the Appropriations Act's prohibition. As reflected in the February 2008 Decision, at 5-6, the Board engaged in a thorough, objective, fact-specific analysis of the relationship between Coastal and NYAR based on record evidence provided by the parties and concluded, based on that evidence, that, "[b]ecause Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has

[3] Coastal and NYAR will collectively be referred to here as petitioners.

assumed no liability or responsibility for Coastal's transloading activities, NYAR's involvement with Coastal's transloading operations . . . is insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by 'rail carrier.'" Id. The Board's analysis was not based on, or dependent on, the Appropriations Act.

Nor is the Appropriations Act a prohibition on deciding cases or finding preemption. The Act permits the Board to authorize the solid waste transloading activities described in the Act, provided that the Board receives written assurance from the governor (or the governor's designee) of the affected State stating that the operator of a transloading facility for solid waste that is subject to the Board's jurisdiction has agreed to comply with local and state laws. Indeed, the Board has made it clear that it will continue to review filings involving transloading facilities and will ensure compliance with the Appropriations Act by requiring the written assurances referenced in the Act before authorizing any solid waste disposal activities. See Consolidated Appropriations Act, 2008–Solid Waste Rail Transfer Facilities, STB Ex Parte No. 675 (Jan. 15, 2008).

Had the Board determined that the activities at issue here were within its jurisdiction, it then would have considered whether there was a letter from the governor providing assurance that the transloading facility would comply with local and state laws, as required by the Appropriations Act. If the record failed to include such assurance from the governor for whatever reason (including the veto discussed below), the Board would have had to withhold authorization of the proposed transloading activities, as it has done in prior cases. See, e.g., JP Rail, Inc.–Lease and Operation Exemption, STB Finance Docket No. 35090 (STB served Jan. 18, 2008) (denying authorization of JP Rail's transloading activities because no written assurance from the governor had been submitted).

In short, the Board's hands were not tied in deciding this case, and petitioners have not been denied due process. We therefore deny NYAR's motion to dismiss.

Petitions for Reconsideration. Under 49 CFR 1115.3(b), a petition for reconsideration will be granted only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances, or (2) involves material error. Here, petitioners base their petitions for reconsideration on both purported new evidence and allegations of material error on the agency's part. But petitioners have failed to make the showing that would be required to warrant reconsidering our decision.

Coastal and NYAR assert that a veto statement issued by then-Governor Elliot Spitzer of New York on December 5, 2007, is "new evidence" that provides a basis for granting reconsideration. The statement accompanied the veto of a New York bill that attempted to give Babylon control over waste handled on rail lines owned by New York's Metropolitan Transportation Authority. In the veto message, the governor expressed concern that, absent preemption, local regulation could cause the closure of the rail facility in question and result in

significant additional trailer dump truck traffic on New York roads, causing adverse effects on traffic congestion, bridge wear and air quality.

We find no reason to reopen the February 2008 Decision on the basis of that veto statement. First, the veto statement is not "new evidence" for purposes of seeking reconsideration. Evidence does not qualify as "new" if it could have been placed before the Board in the original proceeding. Town of Springfield v. STB, 412 F.3d 187, 189 (D.C. Cir. 2005). Here, the parties could have sought to supplement the record with the veto statement before the Board reached its decision in February 2008.

Moreover, even if the veto statement were "new evidence" for purposes of reconsideration, nothing in that statement would materially affect our prior jurisdictional determination in any event. First, the veto message, while recognizing the desire of local governments to regulate rail facilities operating within their boundaries, goes on to state, without analysis, that "as a general rule such local laws and ordinances are preempted by the federal Interstate Commerce Commission Termination Act (ICCTA)." In our February 2008 Decision, however, we carefully analyzed the specific facts of this case, including the activities undertaken by Coastal and the relationship between Coastal and NYAR, and we explained in detail why those facts demonstrate that the Board lacks jurisdiction over Coastal's activities and that federal preemption therefore does not apply in this case. The veto statement's generalized assertion about preemption does not change the Board's detailed, fact-specific analysis.

Second, the veto message notes a New York State Department of Transportation estimate that "closure of the rail facility in Babylon would result in an additional 39,500 loaded 20-ton trucks - and an equal number of empty returning trucks - traveling on downstate roads and bridges each year." But that estimate, even if accurate, is irrelevant to our jurisdictional inquiry under 49 U.S.C. 10501, which is whether the activities conducted by Coastal constitute "transportation" conducted by, or under the auspices of, a "rail carrier." See February 2008 Decision, at 4. In sum, nothing in the veto statement suggests that the Board's jurisdictional analysis would have been different if the veto statement had been before the Board.

Petitioners further allege that the Board committed material error here by not conducting an environmental review. Petitioners argue that the granting of the declaratory order will cause Coastal to close its transload facility rather than comply with the Town's zoning regulations, and that closure, in turn, will cause a significant increase in truck traffic on state roads. As such, they assert that the denial of federal jurisdiction could have a major environmental impact requiring an environmental review under the National Environmental Policy Act (NEPA).

Petitioners have not shown that environmental review was required here. A finding that a service or transaction is not within the STB's jurisdiction does not require an environmental analysis under the National Environmental Policy Act. See 49 CFR 1105.5(b). Moreover, the Board's rules also state that environmental documentation will not normally be prepared for declaratory orders. 49 CFR 1105.6(c)(2)(iii). Where there is no Board jurisdiction, there is no

role for the Board to play, and there is thus no Board action that would necessitate consideration of potential environmental impacts. In other words, the Board's analysis of the reach of its jurisdiction could not be based upon or influenced by its assessment of the environmental impacts either way. Because the February 2008 Decision resulted in a "no jurisdiction" finding in a declaratory order proceeding, there was no reason to conduct an environmental review.

As an additional ground for material error, petitioners claim that the Board improperly analyzed the principal-agent relationship between NYAR and Coastal here and misapplied its precedent in evaluating issues of jurisdiction and preemption. Specifically, NYAR asserts that the Board has exclusive jurisdiction over construction of a railroad facility, without regard to who operates the facility. In support, NYAR cites 49 U.S.C. 10501(b):

> The jurisdiction of the Board over—
>
> (2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

But while section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over "transportation by rail carrier." Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier." See New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (STB served July 10, 2007) (citation omitted). For an activity to be subject to the agency's jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not just one as suggested by NYAR.[4] The Board reasonably applied the record evidence in this case to its existing precedent to conclude that Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation.[5] Simply put, where, as here, a non-rail

[4] See Hi Tech Trans LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004). See also Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1) (STB served Aug. 14, 2003); Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004).

[5] See February 2008 Decision, at 4.

carrier is operating a transload facility for its own benefit, it is not subject to the Board's jurisdiction.

Petitioners charge that the Board was wrong in its determination that Coastal is not acting as NYAR's agent. But the Board carefully considered the agency issue in the February 2008 Decision, and petitioners' arguments on reconsideration merely rehash their earlier arguments and provide no basis for us to hold differently here.

For all of the above reasons, petitioners fail to demonstrate grounds for us either to dismiss the declaratory order petition or to reconsider our prior decision. Consequently, the relief sought by petitioners will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss the declaratory order petition is denied.

2. The petitions for reconsideration of the Board's February 2008 Decision are denied.

3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary