

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket Number 35157

**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

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ATTORNEYS FOR THE CITY OF
ALEXANDRIA, VIRGINIA

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**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
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The City of Alexandria, a municipal corporation of the Commonwealth of Virginia (the "City"), by counsel, hereby petitions the Surface Transportation Board for a declaratory order finding that the ethanol transloading facility in the City of Alexandria operated by RSI Leasing, Inc. ("RSI") on property apparently leased from Norfolk Southern Railway Company ("Norfolk Southern"), does not constitute "transportation by rail carrier," and that the City's zoning and other regulatory authority is therefore not preempted under 49 U.S.C. §10501(b).

NATURE OF THE PROCEEDING

This is a petition by the City of Alexandria, Virginia made pursuant to 5 U.S.C. § 554(e) and 49 U.S.C § 721(b)(4) to determine whether it has authority to regulate an ethanol transloading facility recently opened in the City. Norfolk Southern owns the property on which the facility is operated, and has claimed that the operations are not subject to the City's zoning and other regulatory jurisdiction by virtue of the federal preemption set forth in 49 U.S.C. §10501(b). In support of this claim, Norfolk Southern represented to the City, prior to the commencement of operations, that the transloading was offered by the railroad, through RSI Leasing as its contractor and agent, as part of the railroad's common carrier service. See Exhibit A. Based on these representations, the City acceded to Norfolk Southern's preemption claim.

However, in fact and contrary to Norfolk Southern's representations, the facility commenced and is being operated by RSI and not by Norfolk Southern. As a result, the operation of the facility is not subject to preemption because it is being operated by a private, non-rail carrier operator.

Accordingly, the City brings this petition seeking discovery pursuant to 49 C.F.R. §§1114.21, *et seq.*, and a declaratory order determining that the City's authority over this operation is not preempted by federal law, and that the operation is fully subject to the City's traditional zoning and safety regulations.

STATEMENT OF FACTS

A. Identity and Addresses of the Parties

The City of Alexandria is a municipal corporation of the Commonwealth of Virginia. Its address is 301 King Street, Suite 1300, Alexandria, Virginia 22314.

Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation, which is a corporation organized pursuant to the laws of the Commonwealth of Virginia. Norfolk Southern Railway Company's offices are located at 8 North Jefferson Street, Roanoke, Virginia 24042. Norfolk Southern Corporation's offices are located at Three Commercial Plaza, Norfolk, Virginia 23510-2191. Unless otherwise indicated, references to "Norfolk Southern" herein shall mean Norfolk Southern Railway Company.

RSI Leasing, Inc., is a Michigan Corporation, authorized to transact business in Virginia, and having its principal place of business at 4131 Okemos Road, Okemos, Michigan 48864.

B. The Transloading Operation

On or about April 9, 2008, ethanol transloading operations commenced at the subject facility in the City of Alexandria. The operation is conducted at a location within one half-mile of an elementary school, extensive residential communities, major local and interstate roadways, including

the Capital Beltway and I-95, and a commuter transit train line and station. The transloading facility proper can accommodate 20 rail tank cars, the associated trackage can accommodate the storage of at least 30 additional rail tank cars. See Exhibit B. Each tank car holds between 29,000 and 30,000 gallons of ethanol. The facility has the capacity to generate well in excess of 50 full tank truck trips leaving from the site each day. Norfolk Southern claims the right, and has expressed the intent, to operate 24 hours per day, seven days per week. Under the City's zoning ordinance, the transloading use would require approval of a special use permit, after public hearing and consideration by the Alexandria Planning Commission and City Council. Neither Norfolk Southern nor RSI provided any public information or outreach prior to commencing the operation. Indeed, the operation started at a point in time when the railroad knew that the City (as well as all other jurisdictions in the region) lacked even the most basic equipment and material to fight an ethanol-fueled fire.

The transloading operation takes place on track owned by Norfolk Southern, and located on the railroad's property. Rail tank cars containing ethanol are delivered to, and empty cars are switched and removed from, the site by a local Norfolk Southern train. The contents are off-loaded directly into tanker trucks for transportation to various locations in the Northern Virginia area. The off-loading appears to be conducted under the name of, managed and supervised by RSI Leasing, Inc. According to the railroad's public statements, no Norfolk Southern employees are involved in conducting or supervising the off-loading. No permanent ethanol storage tanks are utilized in the transloading operation; the fuel is off-loaded directly from railway tank car to roadway tanker trailers with no intervening containment. See Exhibit C.

While Norfolk Southern owns the track and real estate on which the transloading operation takes place and has asserted that the operation is part of its common carrier rail services, the identity

of the operator and the manner in which the operation is conducted indicate otherwise. Accordingly, determination of the controlling facts through discovery, and review of the operation by this Board are required to determine the extent to which the City has authority to regulate the transloading operation. Based on the limited facts that Norfolk Southern has made available to date, the operator appears to be an independent business operated by a non-rail carrier, subject to the City's zoning and other authority, not a rail carrier operation that is protected by federal preemption pursuant to 49 U.S.C. §10501(b).

ARGUMENT

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, this Board may issue a declaratory order to terminate a controversy or remove uncertainty. This Board has broad discretion in determining whether to issue a declaratory order. See *InterCity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority-Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

In this instance, the Board should exercise its authority and undertake these proceedings in order to determine if the ethanol transloading operation which Norfolk Southern and RSI unilaterally decided to commence in the heart of a populous and heavily traveled area within the City of Alexandria is subject to the City's zoning and safety regulatory authority, or is exclusively subject to this Board's jurisdiction.

The Federal preemption provision contained in 49 U.S.C. 10501(b) shields certain railroad operations from the application of most state and local laws and reserves jurisdiction on those matters exclusively for the Board. Section 10501(b) expressly provides that the "jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive." Section 10501(b) also expressly provides that "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." However, the fact that activity is taking place on

railroad property does not mean that such activity automatically constitutes “transportation by rail carriers.” Rather, to be subject to the Board's jurisdiction and qualify for federal preemption under section 10501(b), the activities at issue 1) must be “transportation”, and 2) that transportation must be performed by, or under the auspices of, a "rail carrier." The term "transportation" has been defined expansively to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail including "receipt, delivery," transfer in transit, "storage," and handling of property. 49 U.S.C. 10102(9). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation ..." 49 U.S.C. 10102(5). Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination.

The Interstate Commerce Commission (ICC), this Board's predecessor, developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers. *See, Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647 (5th Cir. 1967); *Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut*, 8 I.C.C.2d 280, 290-95 (1992). The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party's operations. *Compare, Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 640-42 (2d Cir. 2005) (transloading and temporary storage of bulk salt, cement and non-bulk foods by a rail carrier preempted) and *Lone Star* and *P&C Dock* (so long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad is deemed to hold itself out to the public), *with, Town of Milford, MA-Petition for Declaratory Order*,

STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (Board lacked jurisdiction over non-carrier operating a rail yard where it transloaded steel pursuant to an agreement with the carrier but the transloading services were not being offered as part of common carrier services offered to the public); *Hi Tech Trans, LLC Petition for Declaratory Order-Newark, NJ*, STB Finance Docket No. 34192 (Sub-No. 1) (STB served Aug. 14, 2003) (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail carrier) and *Town of Babylon and Pine Lawn Cemetery Petition for Declaratory Order*, STB Finance Docket No. 35057 (STB served February 1, 2008)(no STB jurisdiction where tenant of licensed rail carrier, not rail carrier itself, had exclusive right to conduct transloading operation for construction and demolition debris and exclusive responsibility to construct and maintain facilities and to market and bill public for services.)

In this case, Norfolk Southern claims that the ethanol transloading operation is being conducted by or on behalf of the railroad, and that local regulation is preempted. However, the facts of the operation demonstrate otherwise. Norfolk Southern appears to be simply a landlord renting to an independent operator. As a result, preemption is not applicable. Without the protection of Section 10501(b) preemption, the City has the authority to regulate the activity under its zoning and other powers.

A review of the applicable railroad operating and safety regulation, 49 CFR 174.304, when applied to the operation in Alexandria confirms that the ethanol transloading operation is being conducted as if the ethanol tank cars are being unloaded by a private operator, not by the railroad.

Section 174.304 provides that:

§ 174.304 Class 3 (flammable liquid) materials in tank cars.

A tank car containing a Class 3 (flammable liquid) material, other

than liquid road asphalt or tar, may not be transported by rail unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is to be delivered and unloaded (see §171.8 of this subchapter) or to a party using railroad siding facilities which are equipped for piping the liquid from the tank car to permanent storage tanks of sufficient capacity to receive the entire contents of the car.

The referenced definition in 49 CFR 171.8 provides that:

Private track or Private siding means: (i) Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way, or (ii) Track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee and/or a general system railroad for purpose of moving only cars shipped to or by the lessee, *and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage* (emphasis added).

See also 49 CFR 173.10.

At the Alexandria facility, the ethanol from the railway tank cars is directly offloaded to the roadway tanker trailers. Under US DOT regulations ethanol is a Class 3 flammable material. 49 CFR 172.101. The operation is being conducted as if the railway tank cars are being unloaded by a private operator, not a rail carrier. Moreover, under the controlling law, Norfolk Southern as lessor can have no control over or responsibility for the operation. RSI's president publicly stated in January 2008 that the subject facility is his company's "newest terminal in Alexandria, Virginia, which will open early next year and be dedicated exclusively to the shipment of ethanol." Exhibit D. Thus, the facts in this case are, contrary to the railroad's representations to the City, directly analogous to the facts in *Town of Milford, Hi Tech Trans*, and *Town of Babylon, supra*, and preemption is not applicable.

Based on the foregoing, the City of Alexandria respectfully requests this Board to:

- (1) institute a declaratory order proceeding;
- (2) allow the City to conduct any appropriate discovery, including depositions, document production and other discovery pursuant to 49 C.F.R. §§1114.21, *et seq.*; and
- (3) proceed to determine that the City's proper regulatory authority over this facility is not preempted by federal jurisdiction.

In the alternative, if the Board determines that this operation is subject to its exclusive jurisdiction, and that the City's authority is thus preempted, the Board should direct Norfolk Southern forthwith to cease operation of the facility, until such time as the rail carrier complies with the federal operating and safety regulations set forth in 49 CFR 174.304 and 49 CFR 173.10.

Conclusion

For the foregoing reasons, the City of Alexandria respectfully requests that the Board grant this petition, and award the City the relief requested.

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corporation of Virginia
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