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THOMAS F. MCFARLAND



November 11, 2005

By UPS overnight mail
(Monday delivery)

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34776, *National Solid Wastes Management Association, et al.* -- *Petition For Declaratory Order*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petition For Declaratory Order, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Progressive Rail, Incorporated

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Office of Proceedings
NOV 14 2005
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BEFORE THE
SURFACE TRANSPORTATION BOARD

NATIONAL SOLID WASTES	)	
MANAGEMENT ASSOCIATION, ET AL.	)	FINANCE DOCKET
-- PETITION FOR DECLARATORY	)	NO. 34776
ORDER	)	

**REPLY IN OPPOSITION TO
PETITION FOR DECLARATORY ORDER**

PROGRESSIVE RAIL, INCORPORATED
21778 Highview Avenue
Lakeville, MN 55044

Replicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1194
(312) 236-0204

Attorney for Replicant

DUE DATE: November 14, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

NATIONAL SOLID WASTES	)	
MANAGEMENT ASSOCIATION, ET AL.	)	FINANCE DOCKET
-- PETITION FOR DECLARATORY	)	NO. 34776
ORDER	)	

**REPLY IN OPPOSITION TO
PETITION FOR DECLARATORY ORDER**

Pursuant to 49 C.F.R. § 1104.13(a), PROGRESSIVE RAIL, INCORPORATED (PGR), a Class III rail carrier, hereby responds in opposition to a Petition for Declaratory Order (Petition) filed by National Solid Wastes Management Association (NSWMA) and various New Jersey state and local interests on October 23, 2005.

IDENTITY AND INTEREST OF PGR

PGR is a Class III rail carrier subject to Board jurisdiction. Its corporate headquarters are located at Lakeville, Minnesota. It operates rail lines in Minnesota and Wisconsin.

The service of transloading commodities from rail to truck and from truck to rail is of critical importance to PGR. Approximately 40 percent of PGR's revenues are derived as a result of such transloading rather than originating or terminating rail shipments at the facilities of shippers or receivers of freight. PGR has transloaded pipe, lumber, brick, landscaping rock, woodchips, boulders, paper, canned goods, aluminum coil, steel, liquid de-icer, chemicals, calcium chloride, feed ingredients and many other commodities. Transloading of solid waste constitutes a significant potential source of needed additional revenues for PGR.

Numerous rail abandonments since the enactment of the Staggers Act have left large numbers of shippers and receivers of freight without direct rail service. Correspondingly, transloading of commodities between railcars and trucks has assumed greatly increased importance as a means of providing those shippers and receivers with a substitute for the rail service that they lost as a result of abandonment.

PGR is concerned that the Board might enter a broad declaratory order in this proceeding that would have an adverse effect on the ability of rail carriers to transload commodities between railcars and trucks. Any such broad order would have a material adverse effect on PGR; on other Class III rail carriers who rely on transloading for a large portion of their revenues; and on the numerous shippers and receivers who rely on transloading as a substitute for the rail service that they lost to abandonment. In other words, a broad declaration here that would harm transloading would be very much contrary to the public interest.

ARGUMENT IN OPPOSITION TO PETITION

I. The Petition Should Be Denied In Deference To A Pending Judicial Action Presenting the Same Issue

The Petition seeks a Board declaration that New Jersey and local laws relating to solid waste transfer facilities are not federally preempted under 49 U.S.C. § 10501(b), as applied to activities performed at a facility owned by the New York, Susquehanna & Western Railway Corporation (NYSW) at 16th Street and Secaucus Road in North Bergen, NJ (the Site) at which solid waste is transloaded from trucks to railcars. (Petition at 7).

Petitioners failed to advise the Board that the same issue is presented in a case pending before the United States District Court for the District of New Jersey in *New York, Susquehanna*

and *Western Ry. Corp. v. Campbell, et al.*, Civil Action No. 05-4010 (KSH).^{1/} A copy of an Order of the Court in that case, entered on November 1, 2005, is attached to this Reply as Appendix 1. The Site is referred to on page 2 of that Order as “16th Street” in North Bergen, NJ. It is evident from that Order that NYSW’s judicial action was pending at the time that the Petition was filed with the Board. There has been no order by the Court in that case referring the issue of federal preemption or any other issue to the Board.

It thus appears that the Petition has been filed in an attempt to circumvent the jurisdiction of the United States District Court. That is improper. The Board should deny the Petition on that basis, as it did in *Green Mountain RR Corp. -- Petition for Declaratory Order*, 2002 STB LEXIS 322 at *8 (Finance Docket No. 34052, decision served May 28, 2002) (“But GMRC has also sought judicial relief, and the District Court, which has enforcement authority, has made clear its desire to resolve the issues raised without referring the matter to the Board. Given these circumstances, GMRC’s request that the agency issue a declaratory order will be denied.”); *Accord: PCI Transp., Inc. v. Fort Worth & Western R. Co.*, 2005 STB LEXIS 530 at *2 (Docket No. 42094, decision served Oct. 31, 2005).

II. If The Petition Is Not Denied, The Board’s Declaration Should Be Limited To Activities Conducted At The Site

The Petition seeks a Board declaration of no-federal-preemption as to activities being conducted at the Site “and any other similarly situated facility and activity.” (Petition at 7 and at numerous additional pages).

^{1/} Oblique reference was made to that case in notes 1 and 2 on pages 11 and 12 of the Petition.

Any such declaration would be unlawfully broad. The determination of whether a particular facility or activity constitutes "transportation by rail carrier" under 49 U.S.C. § 10501(b) depends on the particular facts and circumstances at each such facility. *See Hi Tech Trans., LLC -- Petition for Declaratory Order -- Newark, NJ*, 2003 STB LEXIS 475 at *11 (Finance Docket No. 34192 [Sub-No. 1], decision served Aug. 14, 2003) ("Whether a particular activity constitutes transportation by rail carrier under Section 10501(b) is a case-by-case and fact-specific determination.").

The only facts and circumstances in this record relate to the facility located at the Site and to the activities conducted at that facility. There would be no factual basis for the Board to conclude that any facility other than that located at the Site or any activity performed at such other facility is a "similarly situated facility and activity" in relation to the Site. The Board should refrain from making that kind of factually-unsupported declaration sought in the Petition.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Petition should be denied; if the Petition is not denied, the Board's declaration should be limited to activities conducted at the Site.

Respectfully submitted,

PROGRESSIVE RAIL, INCORPORATED
21778 Highview Avenue
Lakeville, MN 55044

Replicant

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1194
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Attorney for Replicant

DUE DATE: November 14, 2005

WOLFF & SAMSON PC

John A. McKinney, Jr., Esq. (JAM-3635)

One Boland Drive

West Orange, New Jersey 07052-3698

973-530-2036

Counsel for Plaintiff The New York, Railroad and Western

Railway Corporation and Third-Party Defendant Susquehanna Bulk Systems, Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

NEW YORK, SUSQUEHANNA AND	:	Civil Action No. 05-4010 (KSH)
WESTERN RAILWAY CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
BRADLEY M. CAMPBELL, in his	:	
official capacity as Commissioner of the	:	ORDER CONTINUING RESTRAINTS,
New Jersey Department of Environmental	:	DENYING APPLICATIONS FOR
Protection, NEW JERSEY	:	PRELIMINARY INJUNCTION
MEADOWLANDS COMMISSION, et al.,	:	WITHOUT PREJUDICE AND
	:	GRANTING LEAVE FOR LIMITED
	:	DISCOVERY
Defendants/Counterclaimants/	:	
	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
MHF LOGISTICAL SOLUTIONS, INC.,	:	
SLANE RAIL TRANSPORT, LLC,	:	
PRECISE CONSTRUCTION	:	
CONTRACTING, INC., RAIL-TECH, LLC,	:	
HUDSON-NATIONAL, LLC, CARDELLA	:	
TRUCKING CO., INC., ON TRACK	:	
LOADING COMPANY, INC.	:	
MILLENIUM RESOURCE RECOVERY,	:	
LTD., X-PRESS RAIL TRANSFER, LLC	:	
d/b/a 94th STREET RAIL TRANSFER,	:	
LLC, SCOTT EXCAVATING, LLC,	:	
CROSSROADS RECYCLING, INC. and	:	
SUSQUEHANNA BULK SYSTEMS, INC.	:	
Third Party Defendants.	:	

THIS MATTER having been opened to the Court by Wolff & Samson PC, attorneys for Plaintiff The New York, Susquehanna & Western Railway Corporation ("NYS&W") and

Susquehanna Bulk Systems, Inc., on notice to Defendants; and the Court having entered the Order to Show Cause with Temporary Restraints on August 16, 2005 which, *inter alia*, compelled Defendant Bradley Campbell, Commissioner of the New Jersey Department of Environmental Protection ("Campbell"), to cease and desist (a) from implementing, enforcing, or permitting the implementation or enforcement of the July 27, 2005 Administrative Order and Notice of Administrative Penalty Assessment ("AONOCAPA") against NYS&W, (b) from attempting to collect penalties assessed in the AONOCAPA or from calculating interest or additional penalties, and (c) from otherwise implementing, enforcing, or permitting the implementation or enforcement of the N.J.A.C. 7:26-2D-1 et seq. (the "Transload Facility Regulations") against NYS&W in any way; and NYS&W seeking a preliminary injunction on the return date similarly restraining and enjoining Defendant Campbell during the pendency of this action; and Defendants having filed opposition to NYS&W's application for preliminary injunctive relief, having filed a Counterclaim & Third-Party Complaint, and having moved for (a) a preliminary injunction enjoining NYS&W and the Third-Party Defendants from conducting any activities at the facilities located in North Bergen, New Jersey, specifically, 5800 West Side Avenue, 2480 Secaucus Road, 16th Street, 43rd Street, and 94th Street (collectively, the "NYS&W facilities"), other than removal of existing waste at the sites, until said facilities are in compliance with the Transload Facility Regulations and until NYS&W fully complies with a certain Stipulation entered into in March, 2001, and (b) for leave to conduct limited expedited discovery with respect to the Third-Party Defendants on the issue relating to the control of said facilities; and NYS&W having filed opposition to Defendants' motion; and the Court having reviewed the submissions of the parties, having heard arguments of counsel, and for the reasons more specifically set forth on the record on October 24, 2005,

IT IS on this 1st day of November, 2005, **ORDERED** as follows:

1. The restraints contained in the August 16, 2005 Order to Show Cause with Temporary Restraints shall remain in full force and effect until further order of this Court;
2. NYS&W's application for a preliminary injunction is denied without prejudice;
3. Defendants' motion for a preliminary injunction is denied without prejudice;
4. Defendants' motion for leave to conduct expedited discovery is granted;
5. Defendants are granted leave to conduct limited discovery, under the direction of Magistrate Judge Mark Falk, of the Third-Party Defendants on the issue of the role of the Third-Party Defendants in NYS&W's freight rail operations, said discovery to be conducted by the Defendants in a method that minimizes the Third Parties' costs in connection with said discovery;
6. Reasonable inspections of the NYS&W facilities by New Jersey Department of Environmental Protection during normal business hours, or at any time during an emergency at the facility, will be permitted until further order of this Court;
7. A hearing will be held on December 12, 2005 at 10:30 a.m. and December 13, 2005 at 10:00 a.m. for the purpose of providing to the Court information concerning the current and planned conditions of the NYS&W facilities as of that date and by the end of the year, the Defendants' position as to said conditions and as to any additional changes to the facilities to be requested of the NYS&W by Defendants, if any, and the Parties' positions as to the preemption of the Transload Facility Regulations. Counsel shall exchange witness lists by December 1st anticipating that live testimony will be completed within the two hearing dates provided;
8. The Plaintiff and Defendants, simultaneously, shall file written submissions in conjunction with the hearing set down in paragraph 7 no later than December 1st. Any reply

documents, which must be limited to matters deemed strictly necessary for the Court to know about, shall be filed no later than December 8, 2005. Courtesy copies (2) of electronically filed submissions shall be supplied to the Court by directing hard copies to the Clerk's Office, Attn. Judge Hayden.

9. A Copy of this Order shall be served upon all parties of record within 5 days Wolff & Samson PC's receipt of this Order.

/s/ Katharine S. Hayden

HON. KATHARINE S. HAYDEN, U.S.D.J.

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2005, I served the foregoing document, Reply In Opposition To Petition For Declaratory Order, by UPS overnight mail, on Stephen M. Richmond, Esq., Beveridge & Diamond, P.C., 45 William Street, Suite 120, Wellesley, MA 02481-4004.

Thomas F. McFarland

Thomas F. McFarland