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June 15, 2004

**ENTERED
Office of Proceedings**

JUN 16 2004

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Public Record**

**JUN 16 2004
RECEIVED**

Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Petition for a Declaratory Order by Hi-Tech Trans, LLC
Finance Docket No. FD34192

Dear Secretary Williams:

This firm represents respondents Hudson County Improvement Authority and Essex County Utilities Authority in the above-referenced matter. An administrative appeal is presently pending before the Board regarding the decision issued by the Surface Transportation Board on August 14, 2003, which was filed by Hi Tech Trans, LLC ("Hi Tech"). We write to bring to the Board's attention the recent decision of the Appellate Division of the State of New Jersey, which relates to issues raised in Hi Tech's appeal. A copy of the Appellate Division's decision, dated June 11, 2004, is attached hereto as Exhibit A. To place that decision in context, a brief recap of the procedural history leading up to the Appellate Division's decision appears to be necessary since some of those events arose after the parties had fully briefed the Board on Hi Tech's STB appeal.

As the Board will recall, on May 28, 2003, the State of New Jersey Department of Environmental Protection ("NJDEP") issued a Cease and Desist Order that required Hi Tech to discontinue its solid waste operations at the Oak Island Yard in Newark, New Jersey, for failing to obtain the necessary permit and approvals required by the solid waste laws and regulations of the State of New Jersey. In response to the Cease and Desist Order, Hi Tech filed a petition for declaratory relief with the STB, seeking a ruling on whether it was required to comply with New Jersey's solid waste laws and regulations, or whether its

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operations were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). Hi Tech also simultaneously initiated a state administrative appeal regarding the Cease and Desist Order, which was referred to the State of New Jersey Office of Administrative Law ("OAL") for initial review.

On the same day the STB issued the August 14 decision that is the subject of this pending STB Appeal, the OAL issued a conflicting decision on the preemption issue. However, the OAL decision was subject to review by the NJDEP Commissioner for the Commissioner's adoption, rejection or modification, as provided by state administrative law procedures. N.J.A.C. 1:1-18.6. By Final Decision dated September 29, 2003, the NJDEP Commissioner accepted, in part, and rejected, in part, the OAL's initial decision.¹ Most importantly, the NJDEP Commissioner found the August 14 decision issued by the STB "to be persuasive," and rejected the portion of the OAL's decision that concluded Hi Tech's operations were preempted by the ICCTA. See Exh. B at 8.

Following the NJDEP Commissioner's decision, Hi Tech filed an appeal with the Appellate Division. The parties briefed the preemption issue, as well as other legal issues, in connection with the Appellate Division proceedings, and the Court heard oral argument on May 26, 2004. By decision dated June 11, 2004, the Appellate Division affirmed the DEP Commissioner's Final Decision for the reasons set forth in the Commissioner's decision, thereby rejecting Hi Tech's federal preemption claim. In its opinion, the Appellate Division noted the NJDEP Commissioner's reliance on the August 14, 2003 decision issued by the STB.

If there is any additional information that would further update the Board regarding the status of Hi Tech's state administrative appeal of the NJDEP Cease and Desist Order, please advise.

Thank you.

Respectfully yours,

DeCotiis, FitzPatrick, Cole & Wisler, LLP
Attorneys for Respondents Hudson County Improvement
Authority and Essex County Utilities Authority

By: 
Victoria A. Flynn

¹ Briefing on Hi Tech's STB Appeal was complete by this point; thus, the papers filed by respondents did not include a discussion of the Final Decision of the NJDEP Commissioner. A copy of that decision, dated September 29, 2003, is attached hereto as Exhibit B.

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c: James A. Fletcher, Esq.
Edward D. Greenberg, Esq.
James Martin, DAG

EXHIBIT A

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-929-03T3

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, SOLID WASTE
COMPLIANCE AND ENFORCEMENT,

Petitioner-Respondent,

and

ESSEX COUNTY UTILITIES
AUTHORITY and HUDSON COUNTY
IMPROVEMENT AUTHORITY,

Intervenors-Respondents,

vs.

HI TECH TRANS, LLC and DAVID
STOLLER,

Respondents-Appellants.

Argued: May 26, 2004 - Decided: JUN 11 2004

Before Judges Kestin, Cuff and Lario.

On appeal from the Department of
Environmental Protection, SWE PEA 0300001-
U131.

Andrew L. Indeck argued the cause for
appellants (Scarinci & Hollenbeck,
attorneys; Mr. Indeck, of counsel; Marc T.
Wietzke, on the brief).

James H. Martin, Deputy Attorney General, argued the cause for respondent Department of Environmental Protection (Peter C. Harvey, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Rebecca Hobbs, Deputy Attorney General, on the brief).

Benjamin Clarke argued the cause for respondents Essex County Utilities Authority and Hudson County Improvement Authority (DeCotiis, FitzPatrick, Cole & Wisler, attorneys; Michael R. Cole, of counsel; Mr. Clarke and Victoria A. Flynn, on the brief).

PER CURIAM

Appellants Hi Tech Trans, LLC, and David Stoller appeal from a final order of the Commissioner of the Department of Environmental Protection (NJDEP) which upheld an administrative order citing appellants with various violations of the Solid Waste Management Act, N.J.S.A. 13:1E-1 to -4B, and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 to -13. The Commissioner ordered appellants to immediately cease and desist their operations at the Oak Island Rail Yard and vacated the order directing the Office of Enforcement to forbear from instituting judicial enforcement of the administrative order. In reaching this decision, the Commissioner adopted in part the initial decision of the Administrative Law Judge to whom this matter had been referred but rejected that aspect of the decision that dismissed the administrative order based on preemption by federal law. In doing so, the Commissioner relied

on a recent ruling sought by appellants from the federal Surface Transportation Board that held that Hi Tech Trans, LLC, was not a rail carrier and that its relationship to Canadian Pacific is that of a shipper. Therefore, the Commissioner determined that regulation by the NJDEP of appellants' activities at the rail yard is not preempted by federal law.

We affirm substantially for the reasons expressed by the Commissioner in his September 29, 2003 Final Decision.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

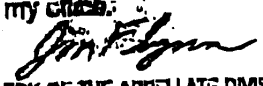

CLERK OF THE APPELLATE DIVISION

EXHIBIT B



State of New Jersey

mes E. McGreevey
Governor

Department of Environmental Protection

Bradley M. Campbell
Commissioner

FINAL DECISION
OAL DOCKET NO. ESW 05815-03
AGENCY DOCKET NO. SWE PEA030001-U131

STATE OF NEW JERSEY, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION, SOLID WASTE :
COMPLIANCE AND ENFORCEMENT, :
Petitioner, :
and :
ESSEX COUNTY UTILITIES :
AUTHORITY and HUDSON COUNTY :
IMPROVEMENT AUTHORITY, :
Intervenors, :
v. :
HI TECH TRANS, LLC and DAVID :
STOLLER, :
Respondents. :

INTRODUCTION

This matter involves an appeal of an Administrative Order dated May 28, 2003 issued by the Department of Environmental Protection ("Department"), Solid Waste Compliance and Enforcement Unit ("Office of Enforcement") to Hi Tech Trans LLC and David Stoller, individually and in his capacity as Chairman and Chief Executive Officer of Hi Tech Trans LLC (collectively "Hi Tech" or "Respondent"), for violation of provisions of the Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1 et seq., and the Solid Waste Utility Control Act ("SWUCA"), N.J.S.A. 48:13-1 et seq., by constructing and operating a solid waste facility at the Oak Island Rail Yard, Newark ("OIRY") without obtaining a Solid Waste Facility

Permit and by engaging in the business of solid waste collection or disposal without obtaining a Certificate of Public Convenience and Necessity. Hi Tech was ordered to cease and desist its illegal operations at the OIRY solid waste facility within 20 days.

Procedural History

Subsequent to issuance of the Administrative Order, Hi Tech applied to the United States District Court for the District of New Jersey for emergency relief. Hi Tech's request for relief was denied by the District Court, and its subsequent appeal to the Third Circuit was also denied. Hi Tech also filed a request with the Surface Transportation Board ("STB") for a clarification of a prior decision of the STB, issued in November 2002.* Hi Tech asked the STB to find that regulation by DEP of Hi Tech's operation of its solid waste facility at the Oak Island Rail Yard was preempted pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), specifically 49 U.S.C. §10501(b). In addition, Hi Tech asked the Department for a stay of the Administrative Order and requested an administrative hearing. Shortly thereafter, a joint motion to intervene was filed with the Department by the Essex County Utilities Authority and the Hudson County Improvement Authority. The motion to intervene was granted.** On June 30, Hi Tech's request for a stay was addressed in an Order Granting Emergency Relief which provided that the Department would forebear from seeking judicial enforcement of the Administrative Order for sixty days, or until further order of the Department vacating or

* The STB is the federal body charged with regulating the economic aspects of railroading. 49 U.S.C. 10501; Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp., 163 N.J. 446, 449 (2000).

**Hi Tech subsequently moved for reconsideration of the grant of intervention, arguing that the "HCIA and ECUA will not contribute in any way to this proceeding other than by filing a redundant legal brief on the preemption issue." As Hi Tech elected to have the matter decided solely on the papers, and all papers from the intervenors, the Office of Enforcement and Hi Tech are a part of the record, Hi Tech's objections are now moot and its motion is hereby denied. However, having reviewed Hi Tech's motion, I am satisfied that my original determination that the intervenors met the standards for intervention set forth in N.J.A.C. 1.1-16.3 was correct, and the motion to intervene was properly granted.

amending the order for emergency relief, provided that Hi Tech comply with a series of conditions.

The matter was then transferred to the Office of Administrative Law ("OAL") for hearing. The Acting Director of the OAL, Administrative Law Judge ("ALJ") Jeff S. Masin, agreed to expedite the matter and issue his initial decision within 50 days of the transmittal. Pursuant to a conference with the parties, ALJ Masin determined that the sole issue before him "was whether the DEP's attempt to regulate the activities of Hi Tech that are the subject of the Administrative Order was preempted by the Federal Government's authority and jurisdiction over operations such as that of the respondent, which it characterizes as those of 'a rail transload facility.'" Hi Tech did not challenge any of the factual findings in the Administrative Order. Accordingly, those findings are deemed admitted.

ALJ Masin issued his Initial Decision on August 14, 2003.

On August 25, I extended the June 30, 2003 Order Granting Emergency Relief, including all conditions contained therein, in full effect until issuance of this Final Decision.

Exceptions to the Initial Decision were filed by intervenors on August 19, 2003 and the Office of Enforcement on August 25, 2003. No exceptions were filed by Hi Tech. The record was closed on August 25.

Discussion

Hi Tech's Objections to DEP and OAL Consideration of the Case.

In the Initial Decision, ALJ Masin first examined Hi Tech's claim that neither the Department nor OAL had jurisdiction to hear the case. Examining the facts and the issues as defined by the parties, he correctly found that Hi Tech's challenge was not to the constitutionality of the statutes which the Department sought to enforce against it, but rather that the application of those statutes to Hi Tech violated the preemption doctrine. Therefore, he found the challenge to be an "as applied" challenge to the application of the law, and appropriate for administrative review.

Further, he rejected Hi Tech's claim that the Commissioner must be disqualified because he was a defendant in a federal lawsuit brought by Hi Tech.

The findings of the Initial Decision on these points are adopted for the reasons stated by Judge Masin.

Hi Tech's Operations

As set forth in the Administrative Order, and expanded upon in the briefs and appendices filed by the parties, Hi Tech operates a solid waste facility at the Oak Island Rail Yard in Newark. The OIRY is owned by Consolidated Rail Corporation, which leases a portion of it to the Canadian Pacific Railway ("CP"). Hi Tech has entered into an "operational license agreement" with CP, which allowed Hi Tech to utilize a portion of the railyard for the transloading of non-hazardous construction and demolition debris.

Hi Tech collects the waste materials from its customers and brings it by truck to the OIRY, where it is discharged into a "hopper" which Hi Tech has installed at the OIRY, and then is loaded by Hi Tech into rail cars provided by CPR and shipped to out-of-state disposal sites.

Preemption

In the Initial Decision, ALJ Masin set out a comprehensive description and analysis of the federal preemption argument raised by Hi Tech. He accurately characterizes Hi Tech's position in the various fora that have considered this matter as being that the State has a limited basis to regulate Hi Tech's operation because federal legislation has preempted most state and local regulation of railroads and of activities carried on by "rail carriers," a status to which Hi Tech has made claim. Before engaging in a very thorough analysis of the preemption doctrine, he specifically noted Hi Tech's concession that it "remains subject to the traditional police powers of state agencies" and noted approvingly Hi Tech's statement that Hi Tech "is most certainly required to comply with environmental regulations regarding the continued operation of its transload rail facility...."

The ALJ followed this introduction with a detailed discussion of the preemption doctrine as specifically applied to this case. He noted Hi Tech's multiple requests to the Surface Transportation Board for advice regarding the scope of federal preemption of local and state zoning and environmental permit requirements for the facility and operations at the OIRY. He also addressed the various federal court rulings generated by Hi Tech's litigation in that forum, and concluded that as of the date of his decision, neither the STB nor the federal court had made a binding determination regarding whether Hi Tech's operations within the OIRY qualify as those of a "rail carrier," and hence Hi Tech was not precluded from contending that it is a "rail carrier," as that term is defined by the ICCTA, and that its operation is not subject to local and state licensing requirements.

Based on this analysis, the ALJ proceeded to conduct a comprehensive review of the existing caselaw and STB decisions

... parsing the extent of federal preemption of state and local regulations on the activities of rail carriers. He concluded that under these precedents, Hi Tech's facility meets the definition of a rail carrier, and therefore is sheltered from such state and local laws as require permits. Accordingly, he recommended that the Administrative Order be dismissed.

The preemption issue considered by ALJ Masin is one that has, in a relatively few years, generated a number of court and STB decisions, yet considerable lack of clarity. On the one hand, the language in the ICCTA is extremely sweeping in its scope, and courts have been properly deferential to the intent of Congress to encourage interstate commerce in general and the freight railroad industry in particular. On the other hand, the very real regulatory concerns of states and localities cannot be ignored, and both the STB and the courts have acknowledged the validity of those concerns, and have wrestled with the need to accommodate them. As a result, the decisions to date have been narrowly tailored to the facts presented in the specific matter before the court or agency.

One New Jersey case has directly addressed the preemptive effect of the ICCTA, and the role of the STB in making preemption determinations. Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp., 318 N.J.Super. 385 (App. Div. 1999), modified and remanded 163 N.J. 446, 449 (2000). While finding rulings from the STB instructive, the Supreme Court reversed an Appellate Division ruling that the Village must first seek relief from the STB, prior to bringing an action in the state courts. The Village had sued the railroad for constructing a maintenance yard and other facilities along railroad right of way that was bordered by residential zones, without first seeking zoning and building code approvals from the Village. When negotiations with the railroad failed, the Village sought relief from the Superior Court. In its discussion of the preemption issue, the Appellate Division found that under the statutory scheme, the Village must first seek relief from the STB. The Supreme Court quoted extensively from this portion of the appellate decision and then proceeded to an analysis of an STB decision issued subsequent to the Appellate Division's decision. 163 N.J. at 456, discussing Borough of Riverdale Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation - STB Finance Docket No. 33466 (STB September 9, 1999). The Court observed that in its Riverdale decision, a case which raised issues similar to those before the Court, the STB had found its jurisdiction to be less preemptive than the Appellate Division's Village of Ridgefield Park decision, "but otherwise analytically consistent with the Appellate Division's interpretation of the ICCTA." Id at 459. Observing that the STB was engaged in "an

ongoing effort to describe more specifically the preemptive effect of the ICCTA" the Court said it was premature to attempt to resolve comprehensively the ICCTA's preemptive effect. Id at 460. Nevertheless, it determined that it could grant the Village some of the relief it sought, and held that although the Village could not require the railroad to obtain zoning permits, or sue the railroad for common law nuisance violations, the railroad must grant the Village access for inspection of its facility and must notify the Village when it is undertaking an activity for which another entity would require a permit. Further, the Village could enforce its local fire, health, plumbing, safety and construction regulations to the extent necessary to protect the public interest. Id at 460.

In its Village of Ridgefield Park decision, the Court balanced the legitimate concerns of the Village with the Congressional determination that localities could not be allowed to interfere in the economic regulation of the railroad freight industry. The Court took the approach of identifying those areas of local concern which could be accommodated without impeding the railroad's operation of its facilities, while at the same time expressing the expectation that further clarification of these issues would be forthcoming from the STB.

In the present case, within hours of ALJ Masin's Initial Decision, the STB issued a determination of Hi Tech's latest petition for a declaratory order. Hi Tech Trans, LLC - Petition for Declaratory Order - Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1) (STB served August 14, 2003) ("Hi Tech II"). Hi Tech had asked the STB to address the identical issue under consideration by ALJ Masin: whether this Department's attempted regulation and closure of the transloading facility, through the issuance of a cease and desist order, is preempted by the STB's exclusive jurisdiction.

In the first instance, the STB found that it "does not have jurisdiction over truck-to-rail transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services." Hi Tech II at 5. The decision observed that the STB has jurisdiction over "transportation by rail carrier.", Ibid, citing 49 U.S.C. 10501(a). Although "transportation" is broadly defined to include a "facility" related to the movement of property by rail and "services" related to that movement by rail, including receipt, delivery, transfer and handling of property, "rail carrier" is more narrowly defined as a person providing "common carrier railroad transportation for compensation." To come within the preemptive

scope of 49 U.S.C. 10501(b), these activities must be both (1) transportation; and (2) performed by, or under the auspices of, a rail carrier. Ibid.

The STB then reviewed the facts related to the Hi Tech facility and operations, noting that Hi Tech had "muddied the waters by seeking and receiving multiple informal staff opinions under various hypothetical fact situations favorable to Hi Tech, and then using them, or parts of them, to its advantage." The STB's careful analysis of Hi Tech's actual operations, however, resulted in "the conclusion that its truck-to-rail transloading operations do not fall within the Board's exclusive jurisdiction over rail transportation." Ibid.

The STB decision rejects Hi Tech's argument that the proper test of whether its facility is considered transportation by rail carrier is whether it is integrally related to interstate rail service, and that there is essentially no legal distinction between a transloading facility operated by a noncarrier licensee and one operated by a rail carrier. This is the argument that the ALJ found persuasive. The STB dismissed it in the following words:

By Hi Tech's reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier. The Board and its predecessor, the Interstate Commerce Commission, have indicated that the jurisdiction of this agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail service. In every case, jurisdiction was found and local regulations relating to transportation facilities preempted only when those facilities have been operated or controlled by a rail carrier. (citations omitted). Here, Hi Tech's activities are not performed by a rail carrier.

The facts of this case establish that Hi Tech's relationship with CP is that of a shipper with a carrier. Hi Tech brings cargo and loads it onto rail cars, and CP, under the Transportation Agreement, hauls it to a destination designated by Hi Tech. In fact, CP describes Hi Tech as its largest shipper at

the Oak Island Yard, and Hi Tech boasts the same. Moreover, CP disclaims any agency or employment relationship with Hi Tech and, under the License Agreement, the parties all but eliminate CP's involvement in the operation of the transloading facility and its responsibility for it. There is no evidence that CP quotes rates or charges compensation for use of Hi Tech's transloading facility. Thus, CP's level of involvement with Hi Tech's transloading operation at its Oak Island Yard is minimal and insufficient to make Hi Tech's activities an integral part of CP's provision of transportation by rail carrier.

In sum, Hi Tech's activities at its transloading facility at CP's Oak Island Yard and related activities are not part of "transportation by rail carrier" as defined under 49 U.S.C. 10501(a). Hi Tech is merely using CP's property to transload cargo. Thus, the Board does not have jurisdiction over those activities, and section 10501(b) preemption does not apply to the state and local regulations at issue here. Therefore, Hi Tech's petition to institute a declaratory order proceeding will be denied.

[Hi Tech II at 6-7].

I find the reasoning of the STB to be persuasive. Hi Tech is not a rail carrier, and its relationship to CP is that of a shipper. As pointed out by the Office of Enforcement in its exceptions, to extend the preemption doctrine to include Hi Tech, under these facts, would mean that any shipper could avoid regulation simply by placing its facilities alongside a rail line. Companies dealing in toxic or hazardous materials could thus evade state and local permitting and regulatory requirements essential to protect the public health and welfare. As the STB has made perfectly clear, that is not the law.

CONCLUSION

For the reasons set out above, that portion of the Initial Decision upholding the jurisdiction and appropriateness of the Department and OAL to hear this matter is ADOPTED, and dismissal of the Administrative Order is hereby REJECTED. The Administrative Order is affirmed. Hi Tech is ordered to immediately

cease and desist its operations at the Oak Island Rail Yard and the Order Granting Emergency Relief which directed the Office of Enforcement to forebear from instituting judicial enforcement of the Administrative Order is hereby VACATED.

IT IS SO ORDERED.

Date:

9/29/03

Joanna Susan Damsen
Deputy Commissioner, for
Bradley M. Campbell
Commissioner
New Jersey Department of
Environmental Protection

State of New Jersey Department of Environmental
Protection, Solid Waste Compliance and Enforcement,
Petitioner, and Essex County Utilities Authority and Hudson
County Improvement Authority, Intervenor, v. Hi Tech Trans, LLC
and David Stoller, Respondents.

OAL Dkt No. ESW 05815-03

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