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June 18, 2002

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

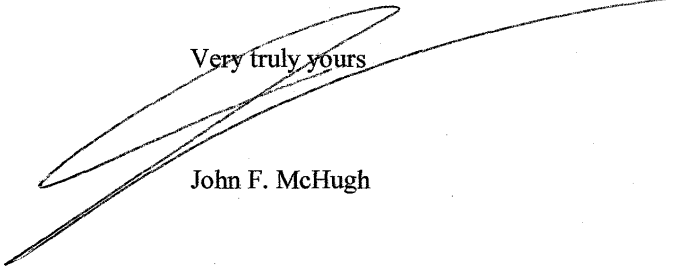
RE; *Hi Tech Trans, LLC-Petition for a Declaratory Order- Hudson County,*
New Jersey
Finance Docket No. 34192

Dear Secretary Williams:

Enclosed please find the original and ten copies of the motion of the petitioner to strike the response of the State of New Jersey Department of Environmental Protection. Also enclosed please find a 3 1/2 disk with these documents on Microsoft Word 6.0.

Thank you for your attention to this matter

Very truly yours


John F. McHugh

Cc: Edward J Fishman
Benjamin Clarke
Carolyn V. Wolski

ENTERED
Office of the Secretary

JUN 20 2002

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192



HI TECH TRANS, LLC, - PETITION FOR A DECLARATORY ORDER - HUDSON
COUNTY, NEW JERSEY,

PETITIONER'S MOTION TO STRIKE THE REPLY OF THE STATE OF NEW
JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Petitioner seeks a declaratory order that the Surface Transportation Board has exclusive jurisdiction over Petitioner's activities and those of its customers who seek to utilize rail services and nullifying the administrative actions of Hudson County, New Jersey which render shipping waste by rail unlawful. The State of New Jersey Department of Environmental Conservation has intervened in this matter seeking to assert a bar to this proceeding under the Eleventh Amendment of the United States Constitution.

Petition seeks only prospective relief and does not seek to impose any fine or penalty on the State of New Jersey or any agency thereof, nor does it seek to nullify any law of that State but only a county's program which seeks to regulate and thus, forbid rail service to customers in that county. Indeed, this petition seeks only a declaratory order that the County's administrative actions which require designation by the county for a facility to receive waste, can not be applied to the operations of the Petitioner. Therefore, neither the petitioner nor its customers can be held subject to a penalty for violation of an administrative action which is void.

AUTHORITY OF THE SURFACE TRANSPORTATION BOARD

The State seeks to rely upon the recent ruling of the Supreme Court in Federal maritime Commission v South Carolina State Ports Authority, No. 01-46,535 ___U.S.__(May 28, 2002) in arguing that this Board does not have jurisdiction over this matter as it involves the actions of its agent, Hudson County. The South Carolina case was an action seeking affirmative relief which could have resulted in the imposition of penalties against that State. States have long been held not to be subject to such suits.

HI Tech seeks only prospective declaratory relief. It seeks a determination by this Board that a administrative procedures which would require HI Tech to obtain county and state authority to handle waste shipped by county residents is a nullity. All regulation of the carriage of cargo by rail is preempted by federal law. Where, as here, an order is sought simply declaring a county action invalid due to its conflict with federal law, there is no violation of the Eleventh Amendment where a party seeks to enjoin enforcement of such a law. The Supreme Court restated that principal of law in Verizon Maryland, Inc. v. Public Service Commission of Maryland etc. ___U.S. ___ Nos. 01-1531, 00-1711, 122 S. Ct. 1753, 1760 (May 20, 2002). The Verizon court held that where, as here, an agent of the State, seeks to enforce an act of the state which is unconstitutional, the Federal Courts and thus, Federal Agencies assigned by Congress the task of hearing such matters as to particular subjects of federal concern, have jurisdiction to do so. Enjoining the enforcement of such laws, i.e. prospective relief, does not offend the Eleventh Amendment.

The Verizon Court deems that principal to have been established in Ex Parte: Edward T. Young, 209 U.S. 123, 155 (1907). That case is similar in many respects to the matter before the Board. It involved the imposition of fines and penalties by the state on a railroad and its employees if the railway failed to revise its freight and passenger rates as dictated by the state. That court found that where, as here, an agent of the State is seeking to enforce an unconstitutional state law, a suit enjoining that agent is not a suit against the State. Here the suit is against Hudson County which is seeking to enforce its own administrative rules which it is, at best, allowed but not required to enact under State law. A federal agency seeking to declare such enforcement to be preempted does not offend the Eleventh Amendment.

Therefore, the State's argument in attempting to deny the Surface Transportation Board jurisdiction to decide whether the administrative regulations of Hudson County are preempted is simply contrary to long established precedent and should be stricken.

THE STATE'S ATTEMPT TO ASSERT THAT HI TECH TRANS IS NOT A RAIL
CARRIER SHOULD BE STRICKEN

The Delaware and Hudson Railroad obtained its operating rights into Newark N.J. pursuant to the creation of Conrail, a transaction approved by the Interstate Commerce Commission. Pursuant to 49 U.S.C. § 11321(a) the Delaware and Hudson, is a rail carrier and is a "person participating in that approved or exempted transaction..." and "...is exempt from the anti trust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the

transaction, hold, maintain and operate property and exercise control of the franchisees acquired through the transaction.” It its reply the Delaware and Hudson has made it clear that it has chosen to “operate property and exercise control of the franchise” utilizing the services of Hi Tech for the purpose of obtaining and loading Construction and Demolition waste onto its trains on the Delaware and Hudson’s property.

Petitioner Hi Tech is a licensee of CPR. Pursuant to agreements between Hi Tech and CPR, High Tech obtains construction and demolition debris (C&D), transfers it from truck to rail at CPR’s transload facility, and then ships the C&D in interstate commerce on CPR’s lines. Hi Tech is an integral component of CPR’s movement of this particular type of freight by rail. Many producers of C&D cannot access rail transportation without the use of trucks. Furthermore CPR relies heavily upon Hi Tech to perform duties that are essential to the successful marketing of its rail services in the highly specialized area of C&D transportation”

Submission of Delaware and Hudson Railway Company , June 5, 2002, Page 1.

It is respectfully submitted that Hi Tech engaged in traditional rail transloading or multi modal operation and is not a transfer station. Hi Tech is used by CPR to obtain and load cargos for shipment on that railway. HI Tech is “regardless of ownership” engaged in services related to that movement, i.e., the “receipt, delivery, elevation,” ...”transfer in transit”, “handling” of property, 49 U.S.C. §10102 (9) (B). Hi Tech is a rail carrier as that term is defined in the Act and therefore the portion of the State’s reply seeking to assert the opposite should be stricken.

THE STATE'S ASSERTION THAT C&D WASTE IS NOT PROEPRTY SHOULD BE
STRICKEN

The Interstate Commerce Commission determined that materials being moved in long distance interstate commerce, as opposed to short haul local truck operations, are property and are covered by the Act. In Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 MCC 578, 580 (1979) the Commission held that waste moving in long distance commerce was property within the meaning of the act as property means ownership and not just value. Thus, the State seeks to put forth a proposition long rejected by the Interstate Commerce Commission that lack of value is determinative. More recent cases relied upon by the State involve the Federal Aviation Commission Authorization Act which is not in issue here. Unlike the FACAA there is no legislative history under the ICC Termination Act to evidence any intent by Congress to exempt any commodity from the exclusive grant of jurisdiction contained in 49 U.S.C. §10501(b) and the specific exemption from the effect of any other law, including State law, contained in 49 U.S.C. §11321(a). Unlike the legislative history relied on by courts interpreting the FACAA "(t)he... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public

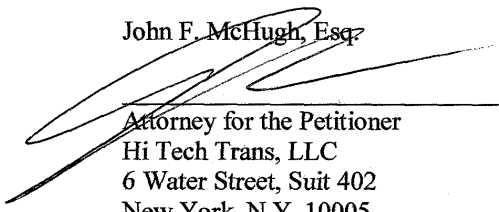
Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996).

CONCLUSION

For the reasons stated above the reply of the State of New Jersey should be stricken.

Dated, New York, N.Y.
June 18, 2002

John F. McHugh, Esq.



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CERTIFICATION OF SERVICE

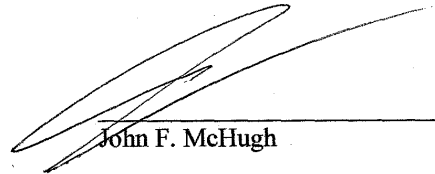
John F. McHugh certifies that on June 18, 2002 I served a copy of this motion to strike the reply of the State of New Jersey Department of Environmental Protection by Federal Express on:

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Dated, New York, N.Y.
June 17, 2002



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