

BEFORE THE
SURFACE TRANSPORTATION BOARD

208274 / 208277
FINANCE DOCKET NOS. 34192 AND 34192 (SUB-NO.1)

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



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REPLY ON BEHALF OF RESPONDENTS HUDSON COUNTY
IMPROVEMENT AUTHORITY AND ESSEX COUNTY
UTILITIES AUTHORITY TO PETITIONS

Pursuant to 49 C.F.R. §§1104.13 and 1111.5, respondents Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") hereby submit the following reply to the two Petitions filed on behalf of Hi Tech Trans, LLC ("Hi Tech") in the above-referenced matter. For the reasons that follow, ECUA and HCIA (hereafter, "the County Authorities") respectfully submit that the Surface Transportation Board ("STB" or "Board") should affirm its previous denial of Hi Tech's request for commencement of a declaratory order proceeding, and dismiss the petitions.

STATEMENT OF FACTS

On April 4, 2002, Hi Tech Trans, LLC, a company that operates a solid waste transfer station (or, as Hi Tech prefers to call it, a solid waste "transload facility") in Newark, New Jersey, filed a petition for declaratory relief with the Board. In its petition, Hi Tech asserted that its transfer station, and its customers' utilization of that transfer station, were exempt from State environmental and solid waste laws because the station was located on a rail yard and had rail

capacity. The County Authorities, in opposition to the petition, asserted that Hi Tech was simply a solid waste transfer station operator, and was not engaged in “transportation by a rail carrier.” See 49 U.S.C. §10501(b). The County Authorities were joined in that opposition by the State of New Jersey, Department of Environmental Protection (“NJDEP”).

In July 2002, with its petition still pending before the Board, Hi Tech commenced a suit against the County Authorities in the United States District Court for the District of New Jersey. In that suit, Hi Tech raised the same claim of federal preemption it had raised in its Board petition, and sought the same declaratory relief. The federal court initially deferred action in the suit to allow the Board a full opportunity to address Hi Tech’s petition.

On November 19, 2002, the Board issued a decision dismissing Hi Tech’s petition. The Board held that Hi Tech’s operations – even accepting Hi Tech’s disputed description of them – did not fall within the Board’s exclusive jurisdiction. The Board wrote:

The particular activities at issue here are not integrally related to rail transportation services. To the contrary, the impact of HCIA’s single, truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments. Hi Tech’s attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech’s theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board’s jurisdiction.

Hi Tech, in a deliberate tactical choice, determined not to appeal the Board's decision. Instead, it chose to pursue its federal suit. Back before the District Court, the County Authorities contended that the Board's decision was dispositive of Hi Tech's preemption claim. Hi Tech, in response, conceded that the Board's decision disposed of its preemption claim as originally pled, but sought leave to amend its complaint to assert a re-framed preemption claim. On review of Hi Tech's tendered pleading, the District Court (Hon. Faith S. Hochberg, U.S.D.J.) determined that it was a legal futility, and denied Hi Tech's request for leave to amend its complaint. See Verified Statement of David Stoller, dated June 16, 2003, Exhibit D.

Through all of these proceedings, Hi Tech continued to operate its solid waste transfer station in open violation of state law. On May 27, 2003, roughly two months after the District Court found Hi Tech's preemption claim to be a legal futility, the NJDEP issued a cease and desist order to Hi Tech, providing it with twenty days in which to stop its violation of state law and/or file an administrative appeal of the order (Stoller Statement, Exh. E).

On June 6, 2003, Hi Tech commenced a new and separate federal lawsuit against NJDEP, asking the federal court to overturn NJDEP's order. That second federal suit was promptly dismissed on Eleventh Amendment and abstention grounds. On June 17, 2003, Hi Tech filed an appeal with the United States Court of Appeals for the Third Circuit, which the court has placed on an expedited track. Hi Tech has now twice requested emergent relief from that appellate body. As this submission goes to print, Hi Tech's second request for emergent relief remains

pending before the Third Circuit, and Hi Tech and NJDEP have both submitted merits briefs on Hi Tech's appeal.

By notice dated June 18, 2003, Hi Tech also filed an administrative appeal with NJDEP of its cease and desist order, and requested that agency to stay its order pending appeal. By order dated June 30, 2003, NJDEP agreed, on specified conditions, to defer enforcement of its cease and desist order pending an expedited resolution of Hi Tech's administrative appeal of the agency's order.

Into this self-created maelstrom of duplicative litigation, Hi Tech asks this Board to throw itself. For the reasons that follow, the Board should decline that request, and should instead dismiss Hi Tech's petition for lack of jurisdiction.

ARGUMENT

POINT I

THE BOARD LACKS JURISDICTION OVER THIS MATTER ON MULTIPLE GROUNDS.

A. Under the Eleventh Amendment, the Board Lacks Jurisdiction Over NJDEP.

It has long been the law that, under the Eleventh Amendment to the Constitution of the United States, state agencies may not be sued in federal court unless they voluntarily submit themselves to the jurisdiction of the court. See, e.g., Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1974). More recently, the Supreme Court has also held that the Eleventh Amendment likewise bars suits or complaints filed against state agencies in federal administrative fora. See Federal Maritime Commission v. South Carolina State

Ports Authority, 535 U.S. 743, 760 (2002) (“The affront to a State’s dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.”) It is clear that Hi Tech’s petition runs afoul of that rule. Accordingly, the Board should, and indeed must, dismiss the petition.

Federal Maritime Comm’n, supra.

B. The Board Lacks Jurisdiction to Sit in Appellate Review of the District Court’s Rulings.

Hi Tech couches its petition as a request for declaratory and injunctive relief against NJDEP – a state agency that, as discussed in Point I(A), supra, is beyond the Board’s reach under the Eleventh Amendment. Sub silentio, however, Hi Tech is also asking the Board to resuscitate a preemption claim that the District Court has now dismissed in the ongoing federal litigation. Knowing that the Board would not consciously interfere with an ongoing federal lawsuit, Hi Tech has donned a bit of legal camouflage, but in an unguarded moment it reveals that the District Court’s ruling remains a focus and target of its attack. Thus, at page 7 of its petition for emergency relief, Hi Tech writes,

Earlier this year, however, [the federal] case took a bizarre turn – a turn that ultimately has resulted in Hi Tech’s need for emergency relief from the Board. In April, 2003, the court in the Lawsuit issued an order denying a Hi Tech motion for leave to amend its complaint. ...

The court’s order and, specifically its interpretation of the Board’s Hi Tech I decision, caused DEP to reconsider its position concerning the application of preemption under ICCTA to the Hi Tech rail transloading facility ... As a consequence, on May 28, 2003, DEP served a cease and desist order on Hi Tech. [Hi Tech Petition for Emergency Order at 7-8.]

As the Board well knows, it is untrue that NJDEP “reconsidered” its position on preemption after the issuance of the District Court’s order; to the contrary, NJDEP’s position before the Board on Hi Tech’s previous petition was that Hi Tech’s operations were subject to state regulation – a position vindicated by the Board’s dismissal of Hi Tech’s petition. This passage does reflect, however, Hi Tech’s design to draw the Board into a review of the District Court’s dismissal of Hi Tech’s preemption claim. While Hi Tech may believe the District Court’s interpretation to be legally “bizarre” (it is nothing of the sort), Hi Tech has two, and only two, avenues of legal recourse if it wishes to challenge that order: it can seek relief from the District Court under Fed.R.Civ.P. 60, or it can seek appellate relief from the United States Court of Appeals for the Third Circuit.

Hi Tech evidently recognizes that the Board would never knowingly take the jurisdictionally improper step of purporting to exercise appellate review of the District Court’s order – hence Hi Tech’s hasty withdrawal of the ill-considered “Petition for Clarification” that it filed with the Board on June 6, a petition that overtly asked the Board to interfere with the District Court proceedings. Despite the procedural subterfuge that Hi Tech has now adopted, its re-styled Petition seeks exactly the same result as its withdrawn Petition for Clarification, and suffers from exactly the same jurisdictional defect: jurisdiction to review the District Court’s order lies elsewhere, and not with the Board. See 28 U.S.C. §§1291 and 1292.

POINT II

THE BOARD CORRECTLY RULED IN ITS PREVIOUS DECISION THAT HI TECH'S ACTIVITIES DO NOT FALL WITHIN ITS EXCLUSIVE JURISDICTION, AND NO CAUSE EXISTS TO REVISIT OR MODIFY THAT RULING.

For the reasons set forth above, it is respectfully submitted that, at this juncture, the Board lacks jurisdiction to entertain Hi Tech's petition or to issue the relief it seeks. Even if insurmountable jurisdictional obstacles did not stand in the Board's way, however, a simple review of the photographs attached as Exhibit A to the accompanying affidavit of Benjamin Clarke should make clear that the Board's decision of November 19, 2002, rejecting Hi Tech's overbroad preemption claim, should be left unmodified. The photographs show, in a way that words cannot, that Hi Tech is simply a solid waste transfer station (a poorly run one at that) with rail capacity – an attribute that is insufficient to trigger the Board's exclusive jurisdiction or to exempt Hi Tech from State environmental laws of general applicability.

In this regard, the County Authorities must point out that the documentary record developed in the pending federal litigation shows that, for the past three years, Hi Tech has provided the Board with false and misleading information in a calculated, cynical, scheme to elicit favorable informal opinions from the Board's Secretary, which it then used in support of a frankly fraudulent pattern of marketing conduct. See Clarke Aff., Exhibits B, C and D.

Thus, for example, in a letter dated April 24, 2000, Hi Tech advised the Board Secretary that it intended to construct a \$3 million “transshipment” facility, where trucks carrying construction and demolition waste and soils would drive up a “moveable loading ramp,” from which they would tip their loads directly into “a hopper to be transferred by conveyor directly into the [rail] gondola car,” with the entire facility to be covered by a “mobile rigid-ribbed canvass cover ... [to] prevent visual impacts ... and limit dust impacts.” Clarke Aff., Exh. B(1). Hi Tech further advised that the “only site work will be laying of rail for these mobile pieces of equipment,” *id.* – rail that has never been laid, and equipment that has never materialized. The submission apparently included an artist’s rendering conforming to Hi Tech’s narrative description, a description that, to put it mildly, does not square with photographs of the actual “facility.” The photographs show a “facility” consisting, in its entirety, of two open-air, stationary dumping areas (with stationary ramps), a scale for trucks, a trailer, two pieces of leased Caterpillar equipment, leased gondola rail cars, a rail siding, and lots of litter and detritus. Clarke Aff., Exh. A.

Similarly, in its second submission of September 29, 2000, Hi Tech advised the Board Secretary that it intended to open an “intermodal transloading” facility, where trucks “carrying sealed intermodal containers” would have their containerized loads (“sludge and solid waste”) lifted directly “from the truck trailer onto a flat-bed rail car,” without any dumping of their loads. Clarke Aff., Exh. B(2). In perhaps its most egregious lie of all, Hi Tech advised, “The Facility will operate in conformity with all regulations bearing on health and safety issues

which have been established by the New Jersey Department of Environmental Protection applicable to the handling of such materials in similar situations in a non-discriminatory manner.” Id. No such Facility exists; no such compliance has occurred.

Based on these materially false submissions – submissions that also misrepresented the true nature of the relationship between Hi Tech and Canadian Pacific Railway, a relationship that can accurately be described as that of a customer that leases space from Canadian Pacific to receive and store goods for shipment – Hi Tech was able to elicit three favorable informal opinions from the Board Secretary regarding the applicability of 49 U.S.C. §1050(b) to the described operation. Clarke Aff., Exhs. C(1) – C(3). In a fatal miscalculation, however, Hi Tech then made the mistake of seeking a fourth opinion – an opinion regarding the applicability of section 10501 to Hi Tech’s trucking customers, an opinion that Hi Tech stated “should be an extrapolation of your favorable responses to our previous inquiries.” Clarke Aff., Exh. B(4), at 1. The Board Secretary, refusing to be taken in by Hi Tech’s blithe presentation of the issue, advised Hi Tech,

Based on the information you have provided, it would seem that the movement of trucks operated by CDD haulers over public roads en route to the Facility is sufficiently separate from the rail activity at the facility that it falls outside the definition [of “transportation by rail carriers”]. Therefore the section 10501(b) preemption would not appear to apply to the truck movements. [Clarke Aff., Exh. C(4), at 2.]

Confronted with this adverse opinion, Hi Tech showed its true colors by actively, and fraudulently, suppressing it. In two letters that Hi Tech sent to its

customers in August and October 2002, it falsely advised them that they (the customers) were exempted from State laws by the Board's exclusive jurisdiction, contrary to the Secretary's opinion. In the first letter, Hi Tech wrote,

HI TECH TRANS IS LEGALLY OPERATING WITH THE AUTHORITY OF THE UNITED STATES SURFACE TRANSPORTATION BOARD. UNDER THIS FEDERAL EXEMPTION, WE AND YOU ARE ENTITLED TO FREE ACCESS OF INTERSTATE COMMERCE AS AUTHORIZED BY CONGRESS. [Clarke Aff., Exh. D(1); emphasis in original.]

In the second letter, Hi Tech provided its customers with copies of the three favorable opinions it had received from the Board Secretary, but failed to provide them with a copy of, or even mention, the Board Secretary's fourth and final opinion, advising that Hi Tech's customers enjoyed no protection from state environmental laws. Hi Tech thus used the Secretary's informal opinions to promote a blatant and widespread pattern of fraudulent marketing practices.

Hi Tech continues its reprehensible looseness with the facts on this application. Thus, we now have Hi Tech's CEO, David Stoller, falsely swearing that "Hi Tech operates a rail transloading facility for D&H," Stoller Verified Statement at 2, when in fact Hi Tech operates a solid waste transfer station for itself. Notably, Steven Lawrance of Canadian Pacific, in his Verified Statement, does not endorse or repeat Mr. Stoller's assertion that Hi Tech operates its facility "for D&H." Rather, he states that "Hi Tech has become a significant customer generally for D&H and is the largest shipper served by D&H." Lawrance Verified Statement at 3. Factually and legally, that is no small difference.

At this juncture, while there is very reason for the Board to feel ill-used by Hi Tech, there is no reason or need for the Board to delve into the extensive history of false information that Hi Tech has previously tendered to it, or to scrutinize the many falsehoods in Mr. Stoller's Verified Statement (e.g., "Hi Tech neither stores nor processes any of the C&D debris that is delivered [to it] ... and has never done so at any time since the rail transloading facility was opened in September of 2001"; compare Clarke Aff., Exh. A). Fortunately, even with Hi Tech's many factual distortions and misrepresentations, the Board was able to discern, in its decision of November 19, 2002, that Hi Tech's operations were not "integrally related to rail transportation services." Hi Tech, for its own tactical reasons, chose not to appeal or seek timely reconsideration of that decision, and instead chose to pursue relief in federal court. Having met with a response, and ruling, in federal court that it does not like, Hi Tech cannot now jump back to this forum in the hope of drawing some more favorable response to its factually unfounded and legally erroneous preemption claim.

The Board's previous decision comports with established Board precedents and case law. Federal courts have often recognized that the collection and handling of solid waste is a matter peculiarly within the sphere of state and local regulation – particularly since no federal regulatory scheme exists to fill the health and safety void that would be left by the displacement of such local authority. As the Ninth Circuit recently stated in rejecting a preemption argument raised by a trash hauler under the Federal Aviation Administration Act ("FAAA") of 1994, 49 U.S.C. §14501(c):

Congress has recognized that waste hauling is a traditional state and local function subject to state regulation. See 42 U.S.C. §6901(a)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies"). Our precedent has recognized the strong local governmental interest in regulating garbage collection. Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995). One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field.

AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir. 2002); see also Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 110 Cal. Repr.2d 708, 91 Cal. App. 4th 678, 690, 695 (Ct. App. 2001)(finding that it would be "inconceivable" that Congress intended to preempt local solid waste regulations; rejecting preemption defense asserted by haulers in violation of local regulations).

In New Jersey, with its high population density and small land mass, the collection, handling and disposal of solid waste are matters of "grave concern," and are "thoroughly affected with the public interest." See N.J. Stat. Ann. 13:1E-2 (declaring solid waste matters to be a local health, safety and welfare concern). In light of that strong public policy, the ICCTA should not be interpreted, as Hi Tech would have the Board do, to oust state and local agencies of their authority to regulate solid waste facilities. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (discussing the general presumption against preemption of local police

powers; that presumption, the Court noted, is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety"); see also New York Blue Cross v. Travelers Ins., 514 U.S. 645, 654 (1995) (exercise by local authority of historic police power is not to be "superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

The Board's rejection of Hi Tech's attempt to create a federal haven for its solid waste transfer station is squarely in accord with pre-ICCTA case law. See People v. Conrail Corp., 613 N.E.2d 784, 794 (Ill. App. Ct. 1993) (holding that the Interstate Commerce Act did not preempt the Illinois Environmental Protection Act, which prohibited the siting of solid waste transfer stations within 1,000 feet of residences; "No provision of the Commerce Act exclusively grants jurisdiction over the transportation of waste from inception to disposal"). It also squares with more recent, post-ICCTA decisions. See Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (lessee of a rail carrier engaged in an aggregate distribution business was not exempt from local regulation under ICCTA because it was not in the railroad business but rather in the business of distributing its own product); In re Vermont Ry., 769 A.2d 648, 651-52 (Vt. 2001) (discussing legislative history of ICCTA, and finding that the Act did not preempt local regulation of a railroad's salt shed facility); Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co., 24 P.3d 365 (Ok. Civ. App. 2000) (discussing legislative history of the ICCTA, and finding no preemption of state's right to ensure safety of its citizens by directing railroad to repair or replace fence located along right of way).

More generally and recently, the Board has recognized in its own decisions that the preemptive scope of §10501 is limited to railroad activities that are "integrally related to providing transportation services." Borough of Riverdale - Petition for Declaratory Order, STB Finance Docket No. 33466 (Sept. 9, 1999), at 9. In Riverdale, where a railroad proposed to construct a truck terminal and corn processing plant in a residential zone, the STB stated that, if the proposed project

is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. [STB] jurisdiction, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation services[.]
[Id.]

As the above cases show, the regulation of solid waste has never been viewed to fall within the jurisdiction of the ICC or STB, and solid waste transfer stations have never been viewed to enjoy a federal exemption from state and local laws. In this regard, the Board itself has stated:

[T]here are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, even in cases where we approve a construction or abandonment project, a local law prohibiting a railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, [] a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of

the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted. Cities of Auburn and Kent, WA - Petition for Declaratory Order - Burlington Northern Railroad Company - Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997).

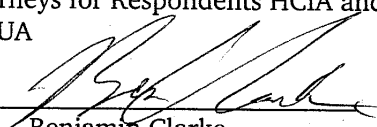
The Board's decision of November 19, 2002, in addition to being doctrinally sound, is now final and non-appealable. The District Court's order of April 1, 2003, and NJDEP's Order of May 27, 2003, which give force to that decision, are beyond the jurisdiction of the Board. Thus, at this juncture, there is no reason, or place, for the Board to re-examine, modify, or clarify its previous decision, and Hi Tech's petitions should accordingly be dismissed.

CONCLUSION

For the foregoing reasons, Hi-Tech's request for initiation of a declaratory order proceeding should be denied, and its petitions should be dismissed.

Respectfully submitted,

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By: 

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