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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36017

WASHINGTON & IDAHO RAILWAY—PETITION FOR DECLARATORY ORDER

Digest:[1] Washington & Idaho Railway requests an order declaring that federal law preempts state and local laws that would prohibit or unreasonably burden or interfere with a planned rail transload facility project in Spokane County, Wash. The Board denies the petition for a declaratory order but provides guidance on the question of preemption.

Decided: March 15, 2017

On April 15, 2016, Washington & Idaho Railway (WIR), a rail carrier, filed a petition seeking issuance of a declaratory order finding that the application of state and local preclearance and permitting requirements to WIR's proposed construction and operation of a rail transload facility[2] (as well as additional yard and storage tracks) are categorically preempted under 49 U.S.C. § 10501(b). WIR also seeks confirmation that all local zoning requirements, including site plan approvals, conditional use permits, or rezoning requirements are preempted by federal law.

WIR states that the transload facility project would serve a diverse customer base, address local shipper needs, alleviate highway congestion, grow local communities, and provide additional rail revenues to contribute to WIR's continued viability as a rail freight service provider for farmers, grain elevators, and communities in eastern Washington State and southwestern Idaho.

On May 25, 2016, the local government whose regulations WIR is challenging, Spokane County (the County), filed a reply. The County contends that the petition should be denied. The County argues that WIR's request is premature, speculative, overly broad, and lacking sufficient information and necessary details to allow the Board to make a reasoned preemption determination because WIR has not disclosed the scope of activities, design, and specifics of the transload facility it seeks to build. The County further asserts that provisions within the County's code that are directed to public health and safety and would not unreasonably interfere with interstate commerce are not preempted.

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Transload facilities are facilities used to transfer commodities between rail and truck.

For the reasons discussed below, the Board will deny WIR's petition but provide the parties guidance on the preemption issue.

BACKGROUND

WIR is a local shortline railroad serving eastern Washington. WIR leases and operates approximately 86.9 miles of rail line from Pullman, Wash., to an interchange with BNSF at Marshall (near Spokane), with adjoining branches. (WIR Pet. 4.) The main line that would connect to the proposed transload facility is owned by the State of Washington.[3]

WIR states that a transload facility would enable it to secure a diversified customer base so that its continued viability is not dependent solely on the seasonal grain rush. (WIR Pet. 5.) WIR explains that the only suitable property it has found on which it could build a transload facility is a parcel of approximately 60 acres, which lies at the junction of four-lane U.S. Highway 195 and WIR's mainline track just north of Spangle, Washington. According to WIR, that property is currently zoned Large Tract Agricultural (LTA) under the County's zoning code. (WIR Pet. 6.) However, in the County, rail transload facilities for general freight are allowed only on land zoned as Heavy Industrial. (WIR Pet. Ex. B, Minutes of the Spokane Cty. Planning Comm'n, 1-2 (Feb. 12, 2015).)

In August 2014, WIR sought to address the County zoning code prohibition by seeking an amendment to the code "to allow general rail transload as a 'limited' use in agricultural areas pursuant to objective criteria." (WIR Pet. 8.) Several shippers and shipper groups, along with the Port of Whitman County, supported WIR's zoning amendment proposal and the building of the transload facility. (WIR Pet. Ex. C.) The Washington Department of Commerce and Futurewise, a non-profit environmental organization seeking to protect farmlands, opposed WIR's amendment, arguing that the Washington State Growth Management Act (Growth Management Act) imposed a duty on the County to assure the conservation of designated agricultural resource lands. (WIR Pet. 9 and Ex. B.) The City of Cheney asked that permission to build any rail transload facility be by special use permit for each individual proposal rather than through WIR's proposed amendment to the county zoning code. (WIR Pet. Ex. B.) On March 10, 2015, the Planning Commission formally recommended to the County's Board of Commissioners that it adopt the City of Cheney's proposal that a rail transload facility only be permitted pursuant to a special use permit issued by the Board of Commissioners. (WIR Pet. Ex. D.)

Concerned that no special use permit for a transload facility would ever be issued (as it would potentially conflict with the Growth Management Act), WIR and other Washington railroads sought an amendment to that state statute to permit the construction of rail transload facilities. (WIR Pet. 11.) Although two bills were introduced, the state legislature adjourned in March 2016 without amending the Growth Management Act. (WIR Pet. 11.) WIR states that it

[3] See Wash. State Dep't of Transp.—Acquis. Exemption—Palouse River & Coulee City R.R., FD 35024 (STB served May 30, 2007); Wash. & Idaho Ry.—Lease & Operation Exemption—Wash. State Dep't of Transp., FD 35028 (STB served May 30, 2007).

now "assesses favorable action as doubtful," because the County's Board of Commissioners is reluctant to incur the risk of a lawsuit on the ground that a special use permit process would violate the Growth Management Act. (WIR Pet. 12.) Even if the County Commissioners were to proceed under the special use permit process, WIR argues that that process could be used to deny or indefinitely delay requests for special use permits. (Id.)

In its petition to the Board, WIR argues that the County and the State of Washington, through the Growth Management Act, are attempting to regulate railroad facilities that are an integral part of rail transportation in violation of 49 U.S.C. § 10501(b). (WIR Pet. 17-18.) WIR also argues that state and local zoning requirements, preconstruction permitting, and preclearance requirements in general are preempted as they relate to WIR's transload facility project. (WIR Pet. 3, 21.)

In its reply, the County argues that WIR's petition is not ripe for review by the Board because the County lacks sufficient information to ascertain which portions of its regulations would apply to a potential WIR facility. (Cty. 2.) The County also argues that WIR has failed to serve and include two necessary parties, the Washington Department of Commerce and the Washington State Department of Transportation. (Id.)[4] The County further argues that WIR has not provided enough evidence to determine whether all activities at the proposed transload facility would constitute transportation by rail carrier. (Id.) Finally, the County argues that provisions of the zoning code that do not unreasonably interfere with rail operations are not preempted. (Id.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction.[5] While the parties acknowledge that "the preemption regime under ICCTA is broad,"[6] they dispute the scope of preemption and the extent to which it applies to WIR's proposed rail transloading facility project. Due to the lack of specific information about the project in the record, the Board will deny WIR's petition but provide the parties with guidance on the preemption issue.

The Interstate Commerce Act (Act) is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), expressly provides that the jurisdiction of the Board over "transportation by rail

[4] The Board notes that WIR served a copy of its petition on the Washington State Department of Justice and that the State did not file a reply.

[5] See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

[6] See WIR Pet. 15; Cty. 8.

carriers" is "exclusive." 49 U.S.C. § 10501(b). The statute defines "transportation" expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use," as well as "services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation preempt the remedies provided under Federal or State law." Id.; see Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097-98 (9th Cir. 2010). Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08; Norfolk S. Ry.—Pet. For Declaratory Order, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013); City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998).

Courts and the Board have found that state or local actions that "'have the effect of managing or governing,' and not merely incidentally affecting, rail transportation are expressly or categorically preempted" under § 10501(b). Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012) (quoting Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410 (5th Cir. 2010) (en banc). Two broad categories of state and local actions are subject to this per se form of preemption: (1) state or local permitting or preclearance requirements that by their nature could be used to deny or unreasonably delay a railroad the ability to conduct rail operations; and (2) state or local regulation of matters that are directly regulated by the Board, such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-07); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-28); and railroad rates and service (see 49 U.S.C. §§ 10501(b), 10701-47, 11101-24). As a result, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements are categorically preempted as to any facilities that are an integral part of rail transportation.[7] See City of Auburn, 154 F.3d at 1027-31; Green Mountain, 404 F.3d at 643; Soo Line R.R. Co.—Petition for Declaratory Order, FD 35850 (STB served Dec. 23, 2014) (federal law preempts state and local permitting requirements and other state and local laws that would prohibit or unreasonably burden or interfere with railroad's track extension project).

Other state actions may be preempted as applied if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-bound determination. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts "state laws that may reasonably be said to have the effect of managing or

[7] Preemption applies to attempted regulation of railroad operations and facilities even where the Board does not license or actively regulate the activity involved. See Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188-89 (10th Cir. 2008); Green Mountain R.R. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005).

governing rail transportation," while permitting "the continued application of laws having a more remote or incidental effect on rail transportation"); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500, 507-508 (2001), recons. denied (STB served Oct. 5, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387-389 (1999).

Not all state and local regulations that affect rail carriers are preempted by § 10501(b). Rather, state and local regulation is appropriate where it does not interfere with rail operations, and localities retain their reserved powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. Green Mountain, 404 F.3d at 643; Denver & Rio Grande Ry. Historical Found—Pet. for Declaratory Order, FD 35496, slip op. at 9 (STB served Aug. 18, 2014). Electrical, plumbing, and fire codes are generally applicable, and states and towns may exercise their traditional police powers over the development of rail property to the extent that the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." Green Mountain, 404 F.3d at 643.

Preemption under § 10501(b) applies only to matters over which the Board has jurisdiction under 49 U.S.C. § 10501(a): transportation activities performed by, or under the auspices (i.e., control) of a rail carrier. Specifically, in determining whether particular transloading activities are performed by, or on behalf of, a rail carrier, the Board and the courts have looked at such factors as: whether the rail carrier owns the transloading facility; whether the rail carrier holds out transloading as part of its common carrier service; whether the facility is operated by the carrier itself or by a third party operator; and, if operated by a third party, whether the railroad is contractually liable for damage to the shipment during loading or unloading, whether the third party is compensated by the carrier or the shipper, the degree of control retained by the carrier over the third party, and the other terms of the contract between the carrier and the third party. The transloading and temporary storage of certain commodities by a rail carrier (or an agent of a rail carrier) have been found to be part of transportation by rail carrier. See, e.g., Green Mountain, 404 F.3d at 640 (finding that transloading and temporary storage of bulk salt, cement, and non-bulk foods to be rail transportation); N.Y. Susquehanna, 500 F.3d at 249-50 (transloading is transportation for the purposes of § 10501(b)); City of Alexandria, Va.—Pet. For Declaratory Order, FD 35157 (STB served Feb. 17, 2009); aff'd sub nom. Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010) (federal preemption applies because transloading company was an integral part of the railroad's operations). Federal preemption does not apply to a transload facility, however, where the activities are not being performed by or on behalf of a rail carrier, even if those activities fall "within the broad definition of transportation." See N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 74 (2d Cir. 2011) (facility not within Board's exclusive jurisdiction because facility operator was not acting as agent of rail carrier).

Here, although WIR explains that its ultimate goal is to construct a rail transload facility, it does not provide extensive details about its plans. In broad terms, it appears that the proposed

transload facility project — at least as described by WIR — would potentially constitute "transportation by a rail carrier." In particular, WIR states that the facility would facilitate the transloading of general freight between truck and rail. WIR also represents that it would build, own, and operate the facility (rather than do so through a third party). In those circumstances, the County's zoning ordinances and special use permit process, which by their nature are preclearance requirements, would be categorically preempted by § 10501(b). See City of Auburn, 154 F.3d at 1027-31; Green Mountain, 404 F.3d at 643; City of Alexandria. However, without a clearer understanding of how the operations and ownership of the facility would be structured, the Board cannot provide a definitive conclusion that preemption would apply.

In addition to the fact that the preclearance requirements may be preempted as they apply to the rail facility, other state and local regulations may also be preempted with regard to activities at the proposed facility to the extent those activities qualify as "transportation by rail carrier." However, not every activity that might take place at a rail transload facility would necessarily be considered "transportation by rail carrier." See, e.g., Del Grosso v. STB, 804 F.3d 110, 118-119 (1st Cir. 2015); New England Transrail—Construction, Acquis. & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797, slip op. at 10 (STB served July 10, 2007) ("[M]anufacturing and commercial transactions that occur on the property owned by a railroad that are not part of or integral to the provision of rail service," are not embraced within the term "transportation" and thus are not within the scope of § 10501(b) preemption); Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444 (STB served Aug. 12, 2004) (cutting and welding steel that occurred after rail transportation but before the steel was loaded onto trucks found to be not "transportation"). Again, the record in this case does not describe the specific activities that may take place at the proposed facility, and the Board therefore cannot conclude whether federal preemption would apply to every activity contemplated. The facility's activities would need to each be assessed to determine (1) whether the activity is considered part of "transportation" and (2) whether the operator in control of the activity is a "rail carrier," a rail carrier's agent, or a third party under the control of a rail carrier.

Even though the preclearance requirements and other state and local regulations may be preempted, the County could still exercise its police powers over the project. However, the County can only exercise its police powers to the extent that its regulations, such as electrical, plumbing, and fire codes, protect public health and safety and do not unreasonably interfere with or discriminate against rail operations, and provided that its regulations entail no extended or open-ended delays. Green Mountain, 404 F.3d at 643. The County could not use its police powers to indirectly regulate matters reserved to the Board, nor could it take any action that would have the effect of foreclosing or unduly restricting WIR's ability to construct and operate the transload facility or would otherwise unreasonably burden interstate commerce. Id.

Because the record does not contain specific information about what activities are planned for the transload facility, the Board will deny WIR's petition for declaratory order.

It is ordered:

1. The petition for declaratory order is denied.

2. This decision is effective on the date of service.

By the Board, Board Members Begeman, Elliott, and Miller.