

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35625

CITY OF MILWAUKIE—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision discusses whether two local ordinances are preempted by federal law. Because a final decision on preemption depends upon resolution of a state property law matter, which was brought to the Board's attention after the Board instituted this proceeding, the Board does not resolve the preemption issue but provides guidance to the court that will address the state law question.

Decided: March 20, 2013

On September 10, 2012, the Board instituted a proceeding to address a controversy between the City of Milwaukie, Or., (the City) and the Oregon Pacific Railway Company (OPRC) regarding the City's proposed enforcement against the railroad of two municipal regulations. The City requests that we find that 49 U.S.C. § 10501(b) does not preempt enforcement of the local ordinances at issue. While we provide guidance in this decision to the court and parties on federal preemption as it relates to railroads, because there are outstanding state property law issues that must be decided first, we will not resolve the preemption question presented here at this time.

BACKGROUND

On June 29, 2012, the City filed a petition for declaratory order requesting that the Board declare that two municipal regulations are not preempted by federal law and that it can enforce them against OPRC. On July 3, 2012, OPRC filed a letter with the Board noting generally its opposition to the petition. By decision served on September 10, 2012, the Board instituted a proceeding and established a procedural schedule. Pursuant to the procedural schedule, on October 10, 2012, OPRC filed its reply, and on October 25, 2012, the City filed its rebuttal.

The municipal regulations at issue prohibit (1) scattering rubbish, and (2) obstructing vehicular and pedestrian traffic. Milwaukie, Or. Mun. Code §§ 8.04.120, 10.44.030 (2011). In its petition, the City states that OPRC owns a train maintenance facility on approximately 0.78

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).

acres within the City and that OPRC stores rails, railroad ties, piles of gravel, and other large “debris” along the border of the facility on a public right-of-way.² The City claims that OPRC’s use of the public land to store materials may constitute a serious risk and hazard to the general public.³ The City argues that under its traditional police powers, it may protect the health and safety of the public by enforcing the two ordinances.⁴ The City also argues that any effect on OPRC and the federal regulatory scheme is merely peripheral and that enforcement of the ordinances would not unreasonably interfere with interstate commerce.⁵ It adds that the regulations are not directed at the railroad or OPRC’s use of its own property.⁶

Following the Board’s decision to institute a proceeding, OPRC for the first time introduced the argument that it has lawfully appropriated the right to use the public land pursuant to Oregon’s appropriation law,⁷ and that the regulations are preempted by federal law because their application to OPRC would unduly interfere with railroad operations.⁸ OPRC states that it is a small railroad that grew significantly after intense marketing efforts.⁹ OPRC asserts that it must use the public land adjacent to its maintenance facility to store replacement track materials, because it is essential that it be able to access such materials by forklift, and that OPRC does not own or control other property adjacent to its facility on which to do so.¹⁰ It argues that enforcement of the ordinances would penalize it for conducting activities that are part of rail transportation and would effectively preclude OPRC’s use of the land because it would be unable to pay the substantial fines imposed by the City under the ordinances.¹¹

On rebuttal, the City argues that OPRC has no right to use the public land and that this type of storage is not “transportation” under 49 U.S.C. § 10102(9)(B) and, thus, its regulations

² Petition 2-4.

³ Id. at 4.

⁴ Id. at 11.

⁵ Id.

⁶ Id.

⁷ OPRC Reply 6.

⁸ Id. at 3, 7.

⁹ Id. at 4.

¹⁰ Id. at 5.

¹¹ Id. at 7.

are not preempted.¹² It maintains that the two ordinances are not directed at regulating railroads, but at ensuring public safety.¹³

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has discretionary authority to issue a declaratory order to eliminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. Before we can reach the preemption issue presented here, however, it is appropriate for a state or municipal court to resolve the parties' property law dispute relating to Oregon's appropriation law. The court may also resolve the preemption issue in the first instance, by applying existing Board and court precedent on the § 10501(b) federal preemption provision. Jie Ao & Xin Zhou—Petition for Declaratory Order (Ao Zhou), FD 35539, slip op. at 2, 8 (STB served June 6, 2012); CSX Transp., Inc.—Petition for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005). To assist the court, we will summarize existing law with regard to the reach of § 10501(b).

General Preemption Precedent. The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, vests in the Board broad jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). Moreover, the statute defines “railroad” broadly to include switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). The preemption provision in the Board's governing statute states that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b).

While § 10501 is broad and far-reaching, there are, of course, limits. The Board and courts have recognized that federal law does not preempt all state and local regulation affecting transportation by rail carrier. N.Y. Susquehanna & W. Ry. v. Jackson (Jackson), 500 F.3d 238, 252 (3d Cir. 2007). Instead, it preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” Id. (citation omitted). For example, § 10501(b) preemption does not apply to state or local actions under their retained police powers, as long as those actions do not unreasonably interfere with railroad operations or the Board's regulatory programs. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-808; H.R. Conf. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 852.

¹² Rebuttal 2.

¹³ Id. at 12-13.

Section 10501(b) preemption does, however, prevent states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, abandonment, etc.). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized. Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements are categorically preempted. Ao Zhou, slip op. at 4-5.

State and local actions not preempted on their face may be preempted “as applied”—that is, if the action would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-specific determination. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); E. Ala. Ry.—Petition for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012); Borough of Riverdale—Petition for Declaratory Order, FD 35299, slip op. at 2 (STB served August 5, 2010). The fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations. See Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1132 (10th Cir. 2007) (regarding a railroad’s claim of preemption of a state tort law claim involving flooding allegedly caused by the railroad’s improper disposal of waste: “[T]he Railroad’s argument has no obvious limit, and if adopted would lead to absurd results. If the [Interstate Commerce Act] preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street.”). Rather, the railroad must comply with generally applicable state laws to the extent they are not otherwise preempted. See id. at 1130-31 (concluding that state law applies to a railroad’s property or actions unless specifically displaced); Buddy & Holley Hatcher—Petition for Declaratory Order, FD 35581, slip op. at 7 (STB served Sept. 21, 2012).

Fines for failure to comply with local regulations have been found to be appropriate in certain situations. See, e.g., Joint Petition for Declaratory Order—Bos. & Me. Corp., FD 33971, slip op. at 12 n.35 (STB served May 1, 2001). Moreover, because the states’ police powers are not entirely preempted by § 10501(b), railroads can be required to comply with certain health and safety rules, such as fire and electric codes, if they are applied without discrimination. However, states are not free to impose any requirements they wish in the name of their police power. It is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad’s ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce. CSX Transp., Inc.—Petition for Declaratory Order, FD 34662, slip op. at 4-5 (STB served May 3, 2005).

This Case. If the court determines that OPRC does not have a state law property interest in the land, and is therefore using public land for storage of its equipment without authorization, the City could eject or fine the railroad for its use of the land in violation of local regulations in the same manner it would eject or fine any other person. Otherwise, the railroad’s unauthorized

use of public land would be absolute and unrestrained.¹⁴ See, e.g., Emerson, 503 F.3d at 1132 (noting that if federal law preempted claims regarding improperly dumped ties, there could be no limit to the railroad's illegal dumping).

On the other hand, should the court determine that OPRC properly appropriated the land, and thus has a sufficient property interest therein, then the court could address the preemption issue raised here in the first instance and determine if application of the local regulations would unreasonably interfere with railroading. Regulation of the type at issue here would not be categorically preempted because it does not involve permitting or preclearance and the regulation does not intrude into matters regulated by the Board. Not all railroad maintenance activities are necessarily transportation by rail carrier, and, as noted above, the states' police powers allow localities to require railroads to comply with some health and safety rules on railroad property. However, the storage of rail maintenance equipment may constitute part of transportation by rail carrier under § 10501(a)(1) if it is integrally related to the provision of interstate rail service. See Emerson, 503 F.3d at 1134 (noting that maintenance may be an integral part of running a railroad); City of Lincoln v. STB, 414 F.3d 858, 861-62 (8th Cir. 2005) (affirming the Board's finding that land used for storage of materials and access to tracks is part of rail transportation); see also Jackson, 500 F.3d at 247; New England Transrail, LLC—Constr., Acquis. & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797, slip op. at 2 (July 10, 2007); Green Mountain R.R. Corp.—Petition for Declaratory Order, FD 34052, slip op. at 4 (STB served May 28, 2002).

In sum, we conclude that it is appropriate for the state or municipal court applying state law to resolve the parties' underlying property dispute. Given the record before us, it would also be appropriate for the state or municipal court to resolve the parties' preemption dispute applying the existing precedent discussed above. Should the court require assistance in assessing the preemption dispute, the Board remains available.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's request for a declaratory order is granted to the extent discussed above, and this proceeding is discontinued.

¹⁴ OPRC seems to claim that regardless of the court's determination on the property law issue, it must have access to the land. OPRC Reply 5, 7. OPRC cites no case that supports the claim that a railroad may appropriate public land at will.

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

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.