

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35752

GRAFTON & UPTON RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision finds that federal law preempts state and local preclearance regulations and other requirements that would prohibit or unreasonably interfere with the Grafton & Upton Railroad Company’s construction and operation of a liquefied petroleum gas transload facility in Grafton, Mass.

Decided: September 17, 2014

On July 24, 2013, Grafton & Upton Railroad Company (G&U) filed a petition seeking a declaratory order to clarify that a liquefied petroleum gas (propane) transload facility it plans to construct and operate on a five-acre parcel adjacent to its existing rail yard in Grafton, Mass., constitutes transportation by rail carrier and, therefore, is shielded from most state and local laws (including zoning laws) by 49 U.S.C. § 10501(b).² In reply, the Town of Grafton (the Town or Grafton) asked the Board to institute a declaratory order proceeding.³ G&U then filed a petition

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 The Board previously determined that G&U’s construction and operation of a new rail yard and storage tracks on the parcel (as opposed to the transload facility that is the subject of this proceeding) was entitled to § 10501(b) preemption. See Grafton & Upton R.R.—Pet. for Declaratory Order (Grafton I), FD 35779 (STB served Jan. 27, 2014).

³ The American Short Line and Regional Railroad Association filed a letter in support of the petition for declaratory order on August 12, 2013, and the Commonwealth of Massachusetts Department of Fire Services (DFS) filed a letter in support of the institution of a declaratory order proceeding on August 23, 2013. See Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779 (STB served Mar. 28, 2014) (corrected decision clarifying DFS’ position). Also on August 23, 2013, the Massachusetts Department of Environmental Protection (DEP) filed a reply, asking the Board to deny G&U’s petition for declaratory order insofar as it pertains to DEP. In the petition, G&U states that “DEP issued a unilateral administrative order determining that G&U failed to apply for permits in order to perform site work at the yard and prohibiting further work” and that DEP might contend that “G&U must obtain certain state and local permits prior to construction and operation of the transloading facility.” Pet. for Declaratory Order at 3,

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for leave to file a supplement to its declaratory order petition (along with the supplement), and the Town filed a reply in opposition. In the interest of a complete record, the supplement and reply will be accepted into the record.

The Board, in a decision served on January 27, 2014, instituted this declaratory order proceeding. At that time, the Board determined that the record was not clear as to whether G&U itself would finance, own, and operate the proposed transload facility, and the Board therefore directed G&U to submit additional information. See Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 2 (STB served Jan. 27, 2014). G&U submitted additional information on February 28, 2014, the Town filed a reply on March 20, 2014, and G&U filed a motion for leave to file a reply (as well as the reply) on April 1, 2014.⁴ After examining the record in this case, including the information submitted in response to the January 2014 decision, we find that G&U's activities at its planned transload facility would be part of G&U's rail transportation operations. Therefore state and local permitting and preclearance requirements, including zoning requirements, are preempted with regard to the construction and operation of the facility pursuant to 49 U.S.C. § 10501(b).

BACKGROUND

G&U owns and operates a rail line (the Line), extending 16.5 miles between its connection with a CSX Transportation, Inc. (CSXT) line in North Grafton and another CSXT line in Milford, Mass. The parcel at issue is located in North Grafton immediately adjacent to G&U's Line and existing rail yard. G&U states that it intends to construct a transload facility on the parcel and use it to transfer propane received by tank car in North Grafton first to storage tanks and then to trucks for delivery to propane dealers across New England. Pending the completion of the transload facility construction project, G&U intends to use portable equipment to transload the propane.

In December 2012, G&U notified the Town that four 80,000 gallon propane storage tanks were about to be delivered to its rail yard to be used in connection with the construction of the transload facility. Citing its municipal zoning and permitting ordinances, the Town issued a cease and desist order requiring G&U to halt construction and filed a complaint in the Superior Court for Worcester County, Mass. (Superior Court), arguing that construction of the transload facility would violate the Town's zoning laws. The state court case was removed by G&U to the United States District Court for the District of Massachusetts (District Court), which determined that it lacked jurisdiction. The District Court remanded the case back to the Superior Court

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20. In its reply, DEP advises that it has entered into a settlement agreement with G&U regarding claims involving the Massachusetts Wetlands Protection Act, and asserts that this renders moot G&U's request that the Board declare DEP's administrative order preempted. Given the parties' settlement agreement, it is unnecessary to address whether DEP's original administrative order would be preempted under § 10501(b).

⁴ G&U's motion for leave to file a reply was not opposed and will be granted in the interest of a more complete record.

without addressing any preemption issues. The Superior Court subsequently entered two orders on June 12, 2013, which: (1) enjoined the delivery of the storage tanks, (2) directed G&U to comply with the Town's cease and desist order, (3) stayed court proceedings pending a determination by the Board concerning whether 49 U.S.C. § 10501(b) preempts the Town's application of its permitting and preclearance requirements to the facility, and (4) directed G&U to file a petition for declaratory order with the Board on the preemption issue.

In its petition, G&U describes the history of its acquisition of the parcel and its plans for the transload facility. G&U states that it bought the parcel in January 2012 following discussions with consultants, CSXT, and propane dealers in the New England area, and initially retained LPG Ventures, Inc. (LPG) (a firm specializing in propane transload facilities) to design and build the facility. To complete construction, estimated at \$5 million, G&U planned to invest \$1.8 million of its own funds and to raise capital for the remainder of the cost.

G&U further states that in October 2012 it entered into agreements with four companies for the financing, construction, and operation of the transload facility: Spicer Plus, Inc. (Spicer),⁵ and three other companies formed and equally owned by Spicer and NGL Supply Terminals Co. (NGL), a Canadian propane supplier and wholesaler. The three other companies were: All American Transloading, LLC, which was to perform the transloading as a subcontractor; GRT Financing, LLC (GRT), which was to purchase the storage tanks and other equipment and lease them to G&U; and Patriot Gas Supply, LLC, which would guarantee the delivery of a certain volume of rail cars containing propane.⁶

Following the Superior Court's order directing G&U to comply with the Town's cease and desist order, G&U states that it decided to build and operate the transload facility by itself. G&U states that it terminated its arrangements with the Propane Companies by issuing notices of termination on July 15, 2013. G&U then entered into new agreements on August 14, 2013, that included: (1) an Equipment Purchase Agreement Assignment of Contracts & Termination Agreement, between G&U and the Propane Companies, which, among other things, transferred title to the propane storage tanks and other equipment from GRT to G&U in a bill of sale; (2) a nonrecourse equipment note from G&U to GRT, financing the sale of the storage tanks and other equipment; and (3) a security agreement by G&U, giving GRT a first security interest in the storage tanks and other equipment. Three contracts relating to the construction of the transload facility, including a contract between GRT and LPG, were assigned to G&U.⁷

⁵ Spicer, a Connecticut propane dealer, does business as Spicer Advanced Gas Inc.

⁶ Spicer and the three other companies it formed with NGL are collectively referred to as "the Propane Companies."

⁷ Copies of the four notices of termination, as well as the new agreements and contracts, were appended to the supplement to the petition for a declaratory order that G&U filed on September 9, 2013.

G&U also submitted verified statements from Jon Delli Priscoli (G&U's owner, president, and chief executive officer) and Lawrence Chesler (president of Spicer), both of whom attest to the termination of all of the previous agreements.⁸ According to G&U, these statements conclusively demonstrate that the Propane Companies no longer have any role in the financing, construction, and operation of the facility.

The Town contends that G&U's new plans to finance, construct, and operate the transload facility on its own are neither credible nor feasible. The Town questions whether G&U will actually own and operate the transload facility, asserting that the agreements with the Propane Companies were canceled only after G&U realized during the District Court proceedings that state and local permitting and preclearance requirements likely would not be found to be preempted for the facility based on the rail carrier's original plans with the Propane Companies. The Town also points to the fact that G&U's executives suggested in their District Court testimony that participation by the Propane Companies was necessary for the construction and operation of the facility. The Town further takes issue with G&U's statements that it has the financial ability to build, and the knowledge and experience to operate, the facility.

In response, G&U asserts that it will in fact be the owner and operator of the transload facility, that it has the financial ability to complete the project on its own, and that it can and will hire the people with the necessary expertise to properly operate the facility.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty.⁹ We have received evidence and argument on the reach of federal preemption in connection with the proposed facility. The parties do not dispute that the actions of the Town constitute local permitting and preclearance actions that are generally preempted with regard to facilities under the Board's jurisdiction. The parties, however, disagree as to whether the proposed transload facility would be part of G&U's transportation by rail carrier entitled to federal preemption, or rather a third-party transload operation run by non-railroads that may be regulated by states and localities. In

⁸ Priscoli's verified statement was submitted with G&U's petition for a declaratory order. Chesler's verified statement was submitted with G&U's February 28, 2014 filing. In his verified statement at 9, Priscoli states as follows:

As a result of the Termination Agreements, G&U has eliminated any participation or role of the Propane Companies in the construction or operation of the transload facility. The equipment lease is not in effect, and the financing to be provided by one of the subsidiaries of the Propane Companies will not be provided. The subcontract pursuant to which an affiliate of the Propane Companies would have operated the facility on behalf of G&U has been terminated, and the transportation contract providing for minimum volumes has also been voided.

⁹ 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).

addition, DFS requests that we clarify that G&U’s construction, maintenance, and operation of the transload facility is subject to Massachusetts’ fire safety code¹⁰ and relevant provisions of Massachusetts’ aboveground storage tank construction codes.¹¹ We issue this declaratory order to provide guidance to the parties.

Preemption. The Board has jurisdiction over “transportation by rail carrier.” 49 U.S.C. § 10501(a). Section 10501(b), as modified by Congress in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that, where the Board has jurisdiction over transportation by rail carriers, which includes the carriers’ facilities,¹² that jurisdiction is “exclusive” and state and local laws are generally preempted. The Board and the courts have found that federal preemption shields railroad operations that are subject to the Board’s jurisdiction from local zoning and permitting laws, and laws that have the effect of managing or governing rail transportation.¹³ To qualify for federal preemption under § 10501(b), the activities at issue must constitute “transportation,” and must be performed by, or under the auspices of, a “rail carrier.”¹⁴

Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. See City of Alexandria, Va.—Pet. for Declaratory Order (City of Alexandria), FD 35157, slip op. at 2 (STB served Feb. 17, 2009). In determining whether transloading activities (i.e., the transfer of material to or from rail at a transloading facility) come within the Board’s jurisdiction or are part of an independent business, the Board and the courts have considered factors including, but not limited to: (1) whether the rail carrier holds itself out as providing transloading service; (2) whether the rail carrier is contractually liable for damage to the shipment during loading or unloading; (3) whether the rail carrier owns the transloading facility; (4) whether any third party that performs the physical transloading receives compensation from the rail carrier or the shipper; (5) the degree of control

¹⁰ 527 CMR 1.00, et seq.

¹¹ M.G.L. Ch. 148, § 37; 502 CMR 5.00, et seq.

¹² 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,” and “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).

¹³ See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 643 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010); Grafton I; New England Transrail, LLC—Construction, Acq. & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797 (STB served July 10, 2007) (addressing the scope of §10501(b) preemption).

¹⁴ See Hi Tech Trans LLC—Pet. for Declaratory Order—Newark, N.J. (Hi Tech), FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003). A rail carrier is a “person providing common carrier railroad transportation for compensation” 49 U.S.C. § 10102(5).

retained by the rail carrier over the third party; and (6) other terms of the contract between the rail carrier and the third party.¹⁵

Here, the Town focuses chiefly on the degree of control retained by G&U and the terms of the former contracts between G&U and the Propane Companies. The Town advances a number of arguments as to why the transload facility would not be part of G&U's rail transportation, but fails to demonstrate that, under the current proposal, an entity other than G&U will be financing, constructing, and/or controlling operations at the facility. The Town points out that G&U's original proposal delegated control of the facility to the Propane Companies. While G&U does not dispute this point, it does provide evidence that those arrangements have been terminated and that G&U now plans to construct and control the facility and the activities to be conducted there, and buttresses this evidence with verified statements from the principals involved. The Town does not dispute the legality of the termination agreements and the new contracts submitted by G&U. Rather, the Town alleges that there must be an undisclosed vehicle that subverts the proffered agreements and maintains control of the facility in the hands of the Propane Companies. To support this allegation, the Town cites Priscoli's testimony in the District Court, which describes the benefits of the previous agreements. However, the Town's unsupported allegation is insufficient to support the declaration it seeks. G&U had the right to revise its initial plans by terminating its agreements with the Propane Companies and assuming control over the proposed facility and any transload operations conducted there.

The Town's argument, that G&U restructured its plans for financing, constructing, and operating the facility to qualify for preemption of the Town's permitting and preclearance requirements, may be correct. But parties are free to structure their transactions to meet their needs, and the Board generally examines proposals as they currently exist when determining whether they are part of rail transportation.

¹⁵ Compare Green Mountain, 404 F.3d at 640, 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier found to be part of rail transportation); City of Alexandria (ethanol transloading service conducted by third party was an integral part of the railroad's operations and therefore qualified for federal preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967), and Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 290-95 (1992) (when the service in question is part of the total rail common carrier service that is publicly offered, the agent providing it for the offering rail carrier is deemed to hold itself out to the public) with Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the rail carrier, but the transloading services were not being offered as part of common carrier services offered to the public); Hi Tech, slip op. at 7 (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057, slip op. at 5 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services directly to customers).

The Town argues that NGL did not sign a termination agreement and therefore may still be involved in activities related to the facility. G&U explains, however, that NGL was not a party to the original agreements. Rather, NGL was a co-owner with Spicer in three of the companies that signed the agreements. Because NGL never cosigned the original agreements, there is no reason it should have signed any of the termination agreements. The Town also thinks it suspicious that NGL, “one of the biggest propane companies in the country . . . would agree to terminate its involvement and abandon its investments of time and money in the facility.”¹⁶ However, the Town has not presented any evidence to suggest that NGL may still be involved in the project.

The Town also challenges the ability of the rail carrier and its owner, Mr. Priscoli, to finance the project. The financial structure underlying a facility can be relevant to determining whether the facility is controlled and operated by a rail carrier or its agent, and therefore is entitled to federal preemption, or whether the facility instead is a third-party independent business fully subject to state and local regulation. Here, however, G&U has provided evidence that the rail carrier and its owner intend to finance the project. Moreover, the Town provides no evidence that another entity will in fact finance the facility’s construction.

In contrast, there is substantial evidence in the record demonstrating that Priscoli has sufficient assets to finance the project as it is currently planned. Priscoli’s verified statement demonstrates that he has sufficient assets. In addition, the record contains evidence that the sale of propane in New England is expected to be profitable and that the demand for propane is both significant and increasing. Furthermore, G&U has submitted evidence rebutting the Town’s claims that Priscoli’s assets are too heavily encumbered to complete the project.¹⁷

The Town further argues that the proposed facility would be the largest of its kind in Massachusetts but asserts that G&U has no knowledge of, or experience in, handling propane or dealing with the regulations of the Pipeline and Hazardous Materials Safety Administration of

¹⁶ Grafton March 20, 2014 Reply at 4-5.

¹⁷ For example, in response to a claim by the Town that G&U is obligated on a \$6 million mortgage in favor of First Colony Development Co. (First Colony), G&U argues that Priscoli owns First Colony, and so the mortgage should not be considered debt to an outside party. As to three properties the Town claims are over-leveraged, G&U contends that the Town’s analysis is based on incomplete and inaccurate public information, which the Town either misunderstood or misinterpreted. According to G&U, the property on Crowley Drive is appraised by the bank holding the mortgage “at a value substantially in excess of the assessed value for property tax purposes and of the amounts advanced pursuant to the construction loan [and that this does not include] the additional 19.74 acres of commercially zoned land on Crowley Drive that Mr. Delli Priscoli owns in a different entity.” G&U April 1, 2014 Reply at 2-3. With regard to the properties on Brigham Street, G&U claims that “a nationally recognized real estate brokerage firm [recognized that] the equity in [these properties] is substantial [and] generates substantial cash flow over and above the amount needed to service the debt.” *Id.* at 3. G&U adds that traditional commercial financing should be available once the transload facility begins to generate the anticipated income stream.

the United States Department of Transportation, and that Priscoli admitted as much in his testimony before the District Court. G&U, however, adequately responds that it can and will hire the people with the necessary expertise to properly operate the facility on its own.

In short, the evidence of record now before the Board demonstrates that G&U's current plans call for the transloading facility to be an integral part of its operations as a rail carrier. Therefore, operation of the facility will constitute "transportation by rail carrier" within the meaning of the statute, and as such it comes within the Board's jurisdiction and qualifies for federal preemption under § 10501(b). See, e.g., City of Alexandria, slip op. at 5.

Fire safety and aboveground storage tank construction. The Town argues that G&U submitted to the State Fire Marshall's Office a Fire Safety Analysis (FSA) that: (1) contained a conceptual drawing that was several months out of date, (2) significantly overstated the number of available first responders, (3) relied on safety measures not included in the FSA, and (4) referenced a different version of the National Fire Protection Association Standard 58 Liquefied Petroleum Gas Code than the one Massachusetts uses. DFS requests that we clarify that, even if G&U is not required to apply for a construction permit under Massachusetts' aboveground storage tank construction codes, G&U's construction, maintenance, and operation of the transload facility is nevertheless subject to Massachusetts' fire safety code and relevant other provisions of the aboveground storage tank construction codes. These codes require, among other things, the production of documents, including plans, drawings, and test results, and provide for the inspection of the tank construction.

Massachusetts' aboveground storage tank construction permit requirement is categorically preempted by § 10501(b) with respect to the facility at issue here, as it constitutes a permitting or preclearance requirement. See, e.g., Green Mountain, 404 F.3d at 643. That does not mean, however, that all state and local regulations affecting rail carriers are preempted with respect to the facility in question. State and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect public health and safety as long as their actions do not discriminate against rail carriers or unreasonably burden interstate commerce. Id. Thus, the Board has stated that it is reasonable for states and localities to request that rail carriers: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. See Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500, 511 (2001). State and local electrical, plumbing, and fire codes typically have been found to be applicable even when preemption applies. See Green Mountain, 404 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).

Thus, states and towns may exercise their traditional police powers over the development of rail facilities like the one at issue here 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.” See Green Mountain, 404 F.3d at 643. Accordingly, unless applied in a discriminatory manner, id., provisions of the Massachusetts fire safety code and the above-ground storage tank construction codes that fit within the local police power exception to federal preemption, as described above, would be applicable to this project, notwithstanding our finding that the facility will constitute transportation by rail carrier entitled to federal preemption under § 10501(b).

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

It is ordered:

1. G&U’s request for leave to file a supplement to the petition for declaratory order is granted and the supplement is accepted into the record.
2. G&U’s motion for leave to file a reply is granted and the reply is accepted into the record.
3. The petition for declaratory order is granted to the extent discussed above.
4. This decision is effective on the date of service.

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