

31927  
DO

SERVICE DATE - MAY 28, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34052

GREEN MOUNTAIN RAILROAD CORPORATION–PETITION FOR  
DECLARATORY ORDER

Decided: May 24, 2002

In a petition filed on February 12, 2002, Green Mountain Railroad Corporation (GMRC) requests that the Board vacate its October 18, 2001 decision in this proceeding. In that decision, at GMRC's request, the Board held in abeyance a proceeding instituted in response to GMRC's petition for a declaratory order determining whether a statute of the State of Vermont (Vermont) is preempted as applied to GMRC's plans to develop its facilities in Rockingham, VT. GMRC now requests that the Board reinstitute the proceeding and issue a declaratory order. For the reasons discussed below, the request now before the Board to issue a declaratory order will be denied.

BACKGROUND

GMRC is a Class III railroad that operates 52 miles of track between Rutland, VT, and Cold River, NH. In connection with this activity, it owns and operates a facility known as Riverside, located on its main line in Rockingham, VT. This property is bounded on the west by a state highway and by GMRC's main line and on the east by the Connecticut River. In the mid-1990s, GMRC decided to expand its Riverside facility. According to GMRC, none of its other properties could accommodate the needed expansion. Therefore, in 1996 GMRC acquired 62 acres of land, increasing the Riverside site to approximately 66 acres.

Vermont has a statute that requires a permit for various forms of land development. Commonly known as "Act 250," it states that:

No person shall . . . commence construction on a subdivision or development, or commence development without a permit.

Vt. Stat. Ann. Tit. 10, § 6081(a) (2001). Anyone subject to this law must file an application for a permit with a regional three-person district commission that evaluates the environmental impacts of a

proposed development using ten criteria set forth at § 6086(c). If the commission grants a permit, it may impose reasonable conditions under § 6086(c).

In 1997, GMRC and its then tenant PMI Lumber Transfer, Inc. sought and received Permit 2W0038-2, which authorized the construction of a small office building and the operation of a forest products distribution yard. Twenty-seven conditions accompanied this permit, including the condition that:

The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas.

In order to prepare for the expansion, GMRC arranged for the installation of extended electrical service. Although most of the development was located near the tracks, a connection had to be made to underground wires situated within the 100-foot buffer zone prior to the issuance of the 1997 permit. In order to make this connection, GMRC installed four utility poles within the buffer zone, and this installation required that electrical service vehicles enter the zone.

In 1999, Vermont issued Permit 2W0038-3 to GMRC, authorizing the construction and operation of a salt storage shed, conveyor pit, rail siding, and truck scale at Riverside. Twenty-four conditions accompanied this permit, including conditions requiring that the building be rectangular, that it be located next to the rail, and that it be “either brown or dark green in color.” GMRC concluded that compliance with these conditions would cost more than other marketplace alternatives; therefore, it decided not to construct such a salt shed but to instead purchase a prefabricated Quonset-style shed of slightly different color than that permitted. This salt shed was placed in the same location and used in the same manner as the originally contemplated salt shed.

On March 12, 2001, the Attorney General of Vermont notified GMRC’s counsel that Vermont alleges “multiple violations of the 100-foot buffer zone contained in land use permit #2W0038-2.” GMRC has since been informed by the Attorney General’s staff that GMRC had allegedly violated the buffer zone by conducting activities in the zone that include storage of assorted materials such as brick, lumber, and train parts, entrance of utility vehicles, and installation of utility poles. This March 13 notice also stated that GMRC had constructed a salt storage shed without an Act 250 permit. Finally, the notice mentioned possible enforcement measures (including substantial civil penalties and injunctive action), although it expressed a desire for a settlement. GMRC has interpreted this language as a threat to sue.

GMRC now intends to construct a new facility at Riverside for the purpose of transloading bulk cement. The cement facility will require alterations to existing track, a truck scale, and modification of

vehicle access. In addition, to accommodate existing and anticipated increases in business, GMRC requires the construction of a spur track at Riverside within the 100-foot buffer zone. GMRC insists that this location is the only land at Riverside suitable for a spur track of the necessary length (approximately 1000 feet). Based on prior statements by Vermont concerning enforcement of Act 250 with respect to existing violations, GMRC anticipates that Vermont will attempt to enforce Act 250 with respect to these planned developments as well.

On June 5, 2001, GMRC filed with the Board its request for a declaratory order. On June 6, 2001, GMRC filed in the United States District Court for the District of Vermont a complaint for injunctive and declaratory relief. On September 26, 2001, the District Court issued a ruling denying GMRC's motion to stay the court proceedings and to refer the case to the STB. The Court also found that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the [ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA)],"<sup>1</sup> but declined to make a specific determination in this case without further development of the record.<sup>2</sup> On October 4, 2001, Vermont asked the Board to deny GMRC's declaratory order petition based on the Court's ruling. On October 5, 2001, GMRC requested that the Board hold this proceeding in abeyance pending disposition of the District Court proceeding. On October 18, 2001, the Board issued a decision granting GMRC's request to hold the proceeding in abeyance.

On February 12, 2002, GMRC submitted a petition requesting that, to provide some certainty, the Board vacate its October 18, 2001 decision and promptly issue a declaratory order addressing whether ICCTA preempts Vermont's Act 250. On March 4, 2002, Vermont submitted a reply in opposition. On March 13, 2002, GMRC filed a petition for leave to file a reply to Vermont's March 4, 2002 submission, along with a reply.<sup>3</sup>

---

<sup>1</sup> Green Mountain Railroad Corporation v. State of Vermont, Vermont Agency of Natural Resources, and William H. Sorrell as Attorney General of the State of Vermont, No. 1:01-cv-181, slip op. at 10.

<sup>2</sup> On March 1, 2002, Vermont filed a Motion for Clarification asking the Court a series of specific questions related to its September 2001 ruling. On March 21, 2002, the Court denied the motion on grounds that it provided no additional factual information which would assist the Court in further developing the record.

<sup>3</sup> Because GMRC's request for issuance of a declaratory order is being denied here, the parties' substantive arguments will not be considered. Accordingly, GMRC's petition for leave to file a reply to Vermont's reply will be denied as moot.

On April 22, 2002, Vermont submitted a letter informing the Board of the proposed discovery  
(continued...)

## DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, “the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. 544(e). See also 49 U.S.C. 721. But GMRC has also sought judicial relief, and the District Court, which has enforcement authority, has made clear its desire to resolve the issues raised without referring the matter to the Board. Given these circumstances, GMRC’s request that the agency issue a declaratory order will be denied.

Nevertheless, to provide guidance to the Court and to the parties, this decision will summarize relevant court and agency case law addressing similar situations. In 49 U.S.C. 10501(b)(2), as broadened by ICCTA, Congress gave the Board exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, **“even if the tracks are located, or intended to be located, entirely in one State.”** (Emphasis added). Section 10501(b)(2) further specifically provides that both “the jurisdiction of the Board over transportation by rail carriers” and “the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law.” See City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn); Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5; Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, Railroad and Clearcuts Campaign, STB Finance Docket No. 33966 (STB served Aug. 15, 2001) (Friends of the Aquifer) at 4. Courts have observed that “it is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (Austell) at 15, quoting CSX Transp. v. Georgia Public Service Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In addressing the scope of 49 U.S.C. 10501(b), the courts have found that, under this broad preemption provision, zoning ordinances and local land use permit requirements are preempted as to facilities that are an integral part of rail transportation. Austell at 17, n.6; Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (Ridgefield Park); Friends of the

---

<sup>3</sup>(...continued)

schedule it had submitted to the Vermont Federal District Court in the pending court case. This letter also asked that the Board abstain from ruling on GMRC’s petition for a declaratory order until the Court has ruled on the issues before it. On April 18, 2002, GMRC submitted a letter in which it opposed Vermont’s request that the Board abstain from ruling until after the Court’s decision, arguing that the Board has jurisdiction to hear the case, and that the added delay of a Court hearing would further harm its business.

Aquifer. The argument that the statutory preemption in section 10501(b) is limited to state and local “economic” regulations has been rejected as contrary to the statutory text and unworkable in practice. City of Auburn 154 F.3d at 1029-31. State and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with rail transportation by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. Auburn and Kent, WA — Petition for Declaratory Order — Burlington N.R.R. — Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff’d, City of Auburn.

State and local environmental regulation has been found to be preempted in those cases where the Board has licensing authority over railroad activities, as well as where it does not. The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and it conducts an environmental review of such activities under the National Environmental Policy Act (NEPA), and can adopt appropriate environmental mitigation conditions in response to concerns of the parties, including local authorities. See Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (Ayer) at 4, n.14.<sup>4</sup> Even in situations that do not require a Board license — for example, a carrier building or expanding facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets,<sup>5</sup> or constructing ancillary tracks and facilities excepted from licensing by 49 U.S.C. 10906<sup>6</sup> — in which the Board therefore does not conduct its own environmental review, the courts have held that the express statutory preemption of section 10501(b) applies. See Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000) (Flynn); Ayer at 8; Riverdale I

---

<sup>4</sup> Under 49 U.S.C. 10901(a), a license from the Board (and an appropriate environmental review) is required for a railroad’ construction of “an extension to any of its railroad lines . . . [or] . . . an additional railroad line . . .” The terms “extension” and “additional railroad line” are not defined in the statute. These terms have been interpreted, however, in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926), as those tracks that enable a railroad to penetrate or invade a new market. See Union Pacific Railroad Company — Petition for Declaratory Order — Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998) (Rehabilitation of M-K-T).

<sup>5</sup> See Nicholson v. ICC, 711 F.2d 364, 368-70 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); Riverdale I. Railroads also do not require Board authority to upgrade an existing line. See Rehabilitation of M-K-T.

<sup>6</sup> Under 49 U.S.C. 10906, “The Board does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”

at 5-9; Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Feb. 27, 2001) (Riverdale II) at 3; Friends of the Aquifer at 4.

It should be noted, however, that the Board's view, as expressed in Stampede Pass, Riverdale I, Ayer, and Friends of the Aquifer, is that not all state and local regulations that affect railroads are preempted.<sup>7</sup> Rather, the Board has stated that state and local regulation is appropriate where it does not interfere with rail operations. Furthermore, localities retain certain police powers to protect the public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. Riverdale I at 8-9; Flynn. As previously mentioned, however, it is well settled that state and local permitting and preclearance requirements are preempted, because otherwise the state or local body could deny the carrier the right to conduct its operations. See City of Auburn, 154 F.3d at 1031.

Finally, the Board has concluded that “nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” Friends of the Aquifer at 5-6.<sup>8</sup> Thus, the lack of a specific environmental remedy at the Board or at the local level as to construction projects over which the Board lacks licensing power does not mean that there are no environmental remedies under other Federal laws. Friends of the Aquifer at 5-6. Whether a particular Federal environmental statute, local land use

---

<sup>7</sup> In Stampede Pass, 2 S.T.B. at 338, the Board offered the following examples of state and local regulation that would not be preempted:

a local law prohibiting the 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.

<sup>8</sup> Section 10501(b) also does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C. 20101 et seq. See Tyrrell v. Norfolk S. Ry., 248 F.3d 517 (6th Cir. 2001); Riverdale II at 2, n.4.

restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Id.<sup>9</sup>

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

It is ordered:

1. GMRC's request that the Board vacate its October 18, 2001 decision and issue a declaratory order in this matter is denied.
2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

---

<sup>9</sup> The Board has indicated, Ayer at 10, that:

individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.