

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34915

LINCOLN LUMBER COMPANY—PETITION FOR DECLARATORY ORDER—  
CONDEMNATION OF RAILROAD RIGHT-OF-WAY FOR A STORM SEWER

Decided: August 10, 2007

By a petition filed on July 26, 2006, Lincoln Lumber Company (LLC) seeks the institution of a declaratory order proceeding to determine whether a condemnation proceeding by the City of Lincoln, NE (Lincoln), to acquire portions of land in LLC's rail right-of-way for a storm sewer pursuant to state law, is preempted by 49 U.S.C. 10501(b). On August 11, 2006, Lincoln filed a notice of intent to participate and a reply. For the reasons discussed below, LLC's request for institution of a declaratory order proceeding will be denied.

BACKGROUND

LLC owns and operates a line of railroad between 19th Street and 24th Street in Lincoln, NE (the line). Lincoln desires to construct and operate a storm sewer that would run longitudinally beneath a portion of LLC's right-of-way. Lincoln seeks a temporary easement over a portion of the right-of-way for construction and a permanent easement underneath part of the right-of-way for the operation of the sewer. This is the second petition for a declaratory order concerning this line. In the first, Lincoln asked the Board to declare that condemnation under state law of a 20-foot-wide, longitudinal strip of the right-of-way would not be federally preempted under 49 U.S.C. 10501(b). At that time, Lincoln sought the land for both a storm sewer and a recreational trail, and LLC stated that it did not oppose condemnation for a storm sewer but did oppose it for the trail. By decision served on August 12, 2004, the Board found that the proposed state-law condemnation would be preempted as to the trail because Lincoln had not provided convincing evidence that the trail would not interfere with LLC's transportation needs. City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 12, 2004) (Trail Proceeding). Because there was no dispute between the parties at that point as to the storm sewer, the Board did not rule on this aspect of the city's proposal.

On judicial review, the court of appeals affirmed the Board's finding as to a trail. City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005). The court also found that the storm sewer project did not raise a dispute that needed resolution. Id. at 863.

On February 2, 2006, Lincoln instituted a proceeding in a Nebraska state court to condemn the portion of the right-of-way needed for the storm sewer. LLC then removed the case to the United States District Court for the District of Nebraska. Lincoln then moved to

remand the case to the State court, and the Federal court granted Lincoln's motion. City of Lincoln v. Lincoln Lumber Company, No. 4:06CV3046 (D.Neb. May 23, 2006). After the remand, LLC filed a motion in the State court seeking, under the doctrine of primary jurisdiction, referral to the Board of the issue of whether the proposed condemnation of the railroad right-of-way is federally preempted. According to LLC, on July 6, 2006, the State court denied LLC's motion for referral and stay. LLC stated that it intended to appeal the denial of that motion. LLC apparently filed this petition so that the Board's views would be available to the State court.

By letter filed on July 30, 2007, Lincoln urges the Board not to institute a proceeding, and attaches a decision issued on July 18, 2007, by the District Court of Lancaster County, NE. In that decision, the court denied LLC's motions (a) for a preliminary injunction to prevent Lincoln from entering LLC's property for purposes of constructing the storm sewer and (b) to stay proceedings pending a ruling by the Board. City of Lincoln v. Lincoln Lumber Company, No. CI06-3821 (Neb. Dist. Ct. 2007). By letter filed on July 27, 2007, LLC, maintaining that the Board should initiate a proceeding, asserts that, in denying the motions, the court did not rule on the merits of the case.

#### 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. Here, however, there is no need for the Board to institute a proceeding.

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. See Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA, 5 S.T.B. 500, 507-08 (2001); New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. at 9 (STB served July 10, 2007). Thus, acquisition by eminent domain of a temporary easement over part of LLC's railroad right-of-way (for construction) and a permanent easement under that part of LLC's right-of-way (for operation) would not implicate the section 10501(b) preemption unless it would prevent or unreasonably interfere with railroad operations.

LLC's primary argument here is that section 10501(b) would preempt Lincoln's use of state eminent domain power because the area to be condemned runs longitudinally along the entire length of LLC's railroad right-of-way, and, therefore, the storm sewer would interfere with LLC's rail operations and pose safety risks. Courts have held that Federal preemption can shield

railroad property from state eminent domain law where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations. See, e.g., Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (state eminent domain action preempted where passing track necessary to railroad's operations would have been eliminated). But neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible. Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks. Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for Declaratory Order, STB Finance Docket No. 34354, slip op. at 2 (STB served Mar. 3, 2004) (Maumee & Western).

Courts can, and regularly do (sometimes with input from the Board through referral) make determinations as to whether proposed eminent domain actions such as this would interfere with railroad operations. The uses that LLC has raised concerns about here are common and of the type that the courts are well-suited to address. See Maumee & Western. While the Board enjoys broad discretion to institute a declaratory order proceeding to eliminate a controversy or remove uncertainty, the particular facts of this case do not suggest that further Board involvement is needed here.

Accordingly, petitioner's request for institution of a declaratory order proceeding will be denied.

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

It is ordered:

1. Petitioner's request for a declaratory order proceeding is denied.
2. This decision is effective on the date of service.

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

Vernon A. Williams  
Secretary