

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35380

SAN LUIS & RIO GRANDE RAILROAD—PETITION FOR A DECLARATORY ORDER

Digest:¹ San Luis & Rio Grande Railroad (SLRG) has filed a petition asking the Board to examine the preemptive effect of federal law on its proposed transload facility in Antonito, Colorado. The facility would be used as part of the movement of contaminated materials from New Mexico to Utah. SLRG asks that we find that a local land use law is preempted and therefore not applicable to the proposed operations, and that the Clean Railroads Act would not apply. Because of a related court settlement requiring additional environmental review before the contaminated materials can move through the transload facility, we are dismissing the petition as premature. In view of the required additional environmental review, it is unclear whether the shipments will ever happen, and if they do, whether they will resemble the activities SLRG proposes at this time.

Decided: July 21, 2011

San Luis & Rio Grande Railroad (SLRG) filed a petition for declaratory order concerning its ownership and operation of a containerized truck-to-railroad solid waste transload facility in Antonito, Conejos County (County), Colorado.² SLRG plans to use the facility to transload contaminated materials shipped in containers by the United States Department of Energy (DOE). The railroad asks the Board to find that 49 U.S.C. § 10501(b) preempts the railroad from having to comply with the County's land use code. In addition, SLRG requests that the Board find the proposed operations are not subject to the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2), 10908-10910 (CRA).

This decision dismisses the petition without prejudice. Since the railroad filed the petition, DOE has agreed as part of a court settlement not to move shipments through the facility until additional environmental analysis is completed. This development renders SLRG's 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 Transloading involves the transfer of shipments between 2 transportation modes (typically truck and rail).

regarding such movements premature and speculative. Based on its environmental review, DOE ultimately might decide not to ship via the Antonito facility or to ship the materials in a different manner than currently proposed.

BACKGROUND

This proceeding arises from an effort by DOE to remove contaminated materials (materials)³ from Los Alamos National Laboratory (LANL) in New Mexico and to send the materials to a storage facility in Clive, Utah. To aid in this effort, DOE contracted with EnergySolutions, Inc. (ES), a nuclear services company, to process, transport, and dispose of the materials.

ES proposed to truck the materials from New Mexico to a transload facility in Antonito, Colorado. At Antonito, the shipments would be loaded onto SLRG railcars, and SLRG would haul the cars to Walsenburg, Colorado for interchange. The Union Pacific Railroad Company would then transport the shipments to their final destination at Clive.

ES and SLRG began discussions with Conejos County officials in 2009 regarding the transload facility. Although the record indicates that SLRG may have transloaded some of the materials at the Antonito facility that year, SLRG agreed to postpone further use of the facility after objections from County officials. SLRG then engaged County citizens and officials in discussions in an attempt to explain that operation of the facility would not pose any safety or health hazard to local citizens. In response, County officials asked that SLRG and ES seek several permits under Conejos County's land use code. SLRG claimed that the facility was exempt from the land use code under the preemption provision at 49 U.S.C. § 10501(b). The County disagreed. Attempts to resolve the issues failed, and a group of concerned individuals and the County filed lawsuits in Conejos County District Court to enjoin the railroad from conducting the proposed transload operations.⁴

In response, SLRG filed its petition for a declaratory order on May 25, 2010. SLRG seeks an order from the Board declaring that, as a result of federal preemption under 49 U.S.C. § 10501(b), the facility is not subject to the County's land use code. According to SLRG, the facility meets the requirements for § 10501(b) preemption because the proposed activities are transportation, and they would be performed under the auspices of a rail carrier. SLRG argues that transportation includes activities integrally related to transportation, such as its plans here to

³ These materials consist of soil, wood, and metal from conventional explosive tests. The record indicates that some of these materials are contaminated with very low levels of depleted uranium and PCBs (polychlorinated biphenyls). The cargo is limited to Department of Transportation criteria designations Class 7, 9, or Unregulated and must meet Nuclear Regulatory Commission classification as Low Level Class A waste. The materials are to be transported in sealed bags or metal containers.

⁴ SLRG removed the litigation to federal court in Denver, and the Conejos County District Court dismissed all proceedings before it. These cases were subsequently dismissed without prejudice to allow for further settlement negotiations, which again were unsuccessful.

load, unload, and temporarily store the materials. Further, SLRG asserts that it is a rail carrier, noting that we authorized it to acquire and operate a line of railroad in 2003.⁵

In addition, SLRG argues that the proposed operations at its facility are not subject to the CRA, which, if applicable, would restrict our jurisdiction over the facility. First, SLRG states that the materials would remain in their original shipping containers, and it argues that the CRA only applies to transloading of materials outside of original shipping containers. 49 U.S.C. § 10908(e)(1)(H)(i). Second, SLRG claims that the soil involved here is not subject to the CRA because it is “government-generated dirt” as opposed to industrial waste. 49 U.S.C. § 10908(e)(1)(D).⁶

In response to SLRG’s petition, we instituted a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 on August 12, 2010, to determine whether § 10501(b) preempts the land use code that might otherwise apply to SLRG’s proposed operation of the transload facility. San Luis & Rio Grande R.R.—Petition for a Declaratory Order, FD 35380 (STB served Aug. 12, 2010) (August decision).

In the August decision, we opened the matter for public comment, given the novel issues raised, and gave SLRG the opportunity to supplement its filing. We requested that the filings focus on issues related to the CRA, including whether SLRG’s containers are original shipping containers under 49 U.S.C. § 10908(e)(1)(H)(i), and whether certain of the materials — contaminated soil — that SLRG plans to transload and transport is subject to the CRA. The August decision also established an initial procedural schedule. We received comments from the County, Conejos County Clean Water, Inc. (CCCW), Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, the Embudo Valley Environmental Monitoring Group, Tri-Valley Communities Against Radioactive Environment, and several individuals. These comments generally opposed the transload activities. The commenters’ primarily argued that the CRA does apply to the operations as described, and that therefore, the County’s land use code would be applicable to the transload facility.

In order to receive additional comments on the issues presented, Board staff held a public meeting in Conejos County on February 17, 2011. At that meeting, Board staff heard comments from dozens of local citizens and interested groups. Many opposed the project based on grounds already presented in the written comments. Several commenters supported the project, primarily arguing that it would help the railroad remain viable.

On March 29, 2011, CCCW filed an update to advise us of a settlement agreement in an environmental lawsuit brought against DOE in the United States District Court in Colorado.

⁵ San Luis & Rio Grande R.R.—Acquis. and Operation Exemption—Union Pac. R.R., FD 34350 (STB served July 18, 2003).

⁶ The American Short Line and Regional Railroad Association (ASLRRA) asks to intervene in the proceeding. ASLRRA supports SLRG’s petition to the extent that the short line seeks a narrow reading of the CRA. Based on our decision here to dismiss the petition for declaratory order as premature, we deny ASLRRA’s petition to intervene as moot.

CCCW and others had challenged the adequacy of the environmental review performed by DOE for failure to conduct a site-specific analysis of the impacts on the Antonito area from its shipments and the transloading activities, and for failure to provide adequate public notice and opportunity to participate. In the settlement, CCCW explains that DOE has agreed not to ship through the Antonito facility and will not authorize the resumption of shipments through that transfer point until DOE has conducted an environmental analysis of the possible impacts of such shipments under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 to 4370(f), including giving public notice and the opportunity to comment. Based on this settlement, CCCW argues that the use of the facility for the instant DOE shipments is speculative, and that the declaratory order proceeding should thus be dismissed.

On March 31, 2011, SLRG replied to the update. SLRG opposes dismissal. It claims that dismissing the proceeding now would only lead to the parties having to refile their submissions once DOE's environmental analysis is complete. SLRG states that it expects the parties opposing the transload facility to attempt to use the land use code again to seek to block the operation of the facility. SLRG also states that it intends to market the facility to traffic beyond the DOE movements.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, we have discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. Given the present record, we will not issue a declaratory order here, and we will dismiss SLRG's petition without prejudice. The instant petition involves the transportation of contaminated materials through the SLRG transload facility in Antonito. But, given DOE's agreement not to move the shipments until after a NEPA review, it is not clear when, or even if, these movements will resume or what the shipping circumstances would be. Even assuming that DOE completes the planned environmental review and does decide to route its shipments through the Antonito facility, we cannot determine at this time whether the CRA would apply to those activities. How the materials may be shipped and transloaded might be altered based on the environmental review and any mitigation conditions.

SLRG asserts that it wishes to attract other freight shippers to use the facility. Even if such business develops, a declaratory order on preemption under 49 U.S.C. § 10501(b) would probably be unnecessary for commodities not subject to the CRA; the law is well settled that the application of local land use codes is generally preempted under 49 U.S.C. § 10501(b). See Borough of Riverdale—Petition for Declaratory Order, FD 35299 (STB served Aug. 5, 2010); City of Alexandria, Va.—Petition for Declaratory Order, FD 35157 (STB served Feb. 17, 2009); Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158-60 (4th Cir. 2010); Green Mountain R.R. v. Vt., 404 F.3d 638, 642-43 (2d Cir. 2005). In any event, there is no evidence that a dispute even exists for the transloading of commodities at the Antonito facility, other than the contaminated materials moving from LANL. If a disagreement arises concerning SLRG's transloading of other commodities there in the future, it can seek a determination from us as to those activities at that time.

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

It is ordered:

1. As described above, this proceeding is discontinued, and SLRG's petition for a declaratory order is dismissed without prejudice.
2. ASLRRRA's petition to intervene is denied as moot.
3. This decision is effective on its date of service.

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