

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

Decided: June 25, 2007

By petition for declaratory order filed on July 24, 2006, DesertXpress Enterprises, LLC (DesertXpress) asks the Board to issue a declaratory order finding that its proposed construction of an interstate high speed passenger rail system is not subject to state and local environmental review and land use and other permitting requirements because of the Federal preemption in 49 U.S.C. 10501(b). The request for a declaratory order will be granted, as discussed herein.

BACKGROUND

DesertXpress' petition for declaratory order concerns its proposed project to construct an approximately 200-mile interstate high speed passenger rail system between Victorville, CA, and Las Vegas, NV. Petitioner states that the project would involve the construction of significant lengths of new track and ancillary facilities, including two passenger stations and a 50-acre train maintenance and storage facility and operations center. DesertXpress states that the proposed route is planned alongside or within the median of Interstate 15 and would provide an alternative to automobile travel on that highway. Petitioner anticipates that the project would utilize European high-speed trains that would operate at speeds up to 125 miles per hour and would travel between the two termini in under 105 minutes.

Petitioner states that it has already met with both the Federal Railroad Administration (FRA) and the Board's Section of Environmental Analysis about the project and supplied sufficient information to allow the process of preparation of an Environmental Impact Statement (EIS) to begin under the National Environmental Policy Act (NEPA) and related laws.¹ (The Board is participating as a cooperating agency in that process. See 40 CFR 1501.6.) DesertXpress states that, in the near future, it will seek from the Board the necessary authority

¹ FRA, which has primary regulatory authority over safety aspects of the proposed line, will be the lead agency in preparing the EIS. The Board is participating in preparing the EIS as a cooperating agency. The EIS, when completed, should give the Board the environmental information it needs to take the requisite hard look at any environmental concerns related to the proposal. See 40 CFR 1501.6(a)(2).

under 49 U.S.C. 10901 to construct the new line and related facilities and to conduct rail operations over the line.

DesertXpress argues that this project presumptively falls within the Board's exclusive jurisdiction over transportation by rail carriers as set forth at 49 U.S.C. 10501 and accordingly qualifies for the preemption from most state or local laws provided in section 10501(b). Petitioner seeks an order from the Board declaring that this project is not subject to state and local land use restrictions, and other permitting requirements in California and Nevada, or to state and local environmental laws, including the California Environmental Quality Act, Cal. Pub. Res. Code 21000 et seq. Petitioner points out, however, that state and local agencies will be encouraged to participate in the ongoing EIS process.

On August 31, 2006, the Board instituted a declaratory order proceeding and sought public comments to determine whether its jurisdiction preempts state and local environmental laws, land use restrictions, and other permitting requirements that might otherwise apply to DesertXpress' project.

On October 16, 2006, the International Brotherhood of Teamsters Rail Conference and its affiliated organizations, the Brotherhood of Locomotive Engineers and Trainmen Division/IBT, and the Brotherhood of Maintenance of Way Employees Division/IBT, filed comments in support of DesertXpress' petition, stating that they believe DesertXpress would be a rail carrier subject to the Board's jurisdiction and that preemption therefore would apply.

Also on October 16, 2006, the New Jersey Department of Environmental Protection (NJDEP) and the New Jersey Meadowlands Commission (NJMC) filed comments in response to the petition. NJDEP and NJMC, which take no position concerning the project described by DesertXpress, maintain that the Board should not issue a declaratory order or otherwise enunciate any general principles concerning the proper scope of Federal preemption under section 10501(b) on this record. They argue that there is neither a particular controversy for which Board guidance is required nor any uncertainty concerning the role to be played by state and local government bodies with respect to this project. NJDEP and NJMC express concern that, if the Board issues broad statements regarding preemption, parties in future or even existing controversies unrelated to this proceeding could mischaracterize those statements in an attempt to mislead governmental bodies or courts concerning the scope of section 10501(b).

On November 6, 2006, DesertXpress filed a reply in response to the comments from NJDEP and NJMC. Petitioner states that there is in fact lingering uncertainty on its part and that of state and local authorities² regarding the scope of the Board's exclusive jurisdiction and the

² Petitioner attaches a letter signed by seven California state and local officials asking the Board to clarify the jurisdictional issues and confirm the preemptive authority of the Board over the proposed project.

extent of DesertXpress' obligations to those state and local authorities. DesertXpress also argues that the magnitude of the rail construction and the significant financial undertaking of private investors for this unique project justify the issuance of a declaratory order here. Petitioner maintains that Board guidance regarding this project would assist it with its efforts to secure the private investment necessary to move the project forward and would mitigate future project development risks. Finally, petitioner notes that the Board has issued declaratory orders on many occasions to resolve uncertainty and provide guidance to parties.³

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). In this case, there is uncertainty regarding the scope of the Board's jurisdiction over this project and the role of state and local government bodies. Moreover, the request for clarification comes not only from petitioner but from a number of state and local officials as well. NJDEP and NJMC's concern that any Board statements regarding preemption might be mischaracterized in unrelated proceedings is unwarranted, as our findings here are relevant only to the specific project DesertXpress is proposing and the individual facts and circumstances at issue here. In sum, it is appropriate for the Board to issue a declaratory order here.

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) (ICCTA), shields railroad operations that are subject to the Board's jurisdiction from the application of most state and local laws.⁴ Section 10501(b) expressly provides that the "jurisdiction of the Board over . . .

³ In support, petitioner cites The New York City Economic Development Corporation—Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004); Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (STB served Feb. 6, 2006); and Georgia Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34665 (STB served Apr. 14, 2005).

⁴ The courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action: any form of state or local permitting or preclearance that, by its nature, could be used to deny the railroad the ability to conduct its operations or to proceed with activities that the Board has authorized, and state or local regulation of matters directly regulated by the Board (such as the construction, operation, and abandonment of rail lines). Otherwise the section 10501(b) preemption analysis requires a factual assessment of whether a particular action would have the effect of preventing or unreasonably interfering with railroad transportation. See, e.g., City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use

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transportation by rail carriers” over any track that is part of the interstate rail network “is exclusive.” Section 10501(b) also expressly provides that the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt the remedies provided under State law.⁵ We therefore now examine whether the particular activities contemplated by DesertXpress constitute transportation by a rail carrier under section 10501, and clarify the kinds of laws that are and are not preempted involving this project.

As noted, the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. 10501(b). Accordingly, to be subject to the Board’s jurisdiction and qualify for Federal preemption under section 10501(b), there must be transportation, and that transportation must be provided by a rail carrier, which is defined as “a person providing common carrier railroad transportation for compensation,” 49 U.S.C. 10102(5).⁶ Here, DesertXpress intends to carry passengers by rail in interstate transportation. Moreover, it will be providing this transportation as a common carrier, offering service to the general public. Thus, this project clearly involves transportation by a rail carrier. See American Orient Express Railway Company v. STB, No. 06-1077, slip op. at 4, 6 (D.C. Cir. Apr. 20, 2007), aff’g American Orient Express Railway Company, LLC—Petition For Declaratory Order, STB Finance Docket No. 34502 (STB served Dec. 27, 2005) (rail carrier may provide railroad transportation by transporting passengers over its own tracks). Accordingly, the Board has exclusive jurisdiction over the planned new track, facilities, and operations and the Federal preemption under section 10501(b) attaches.

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permitting are preempted); Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), aff’d, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002) (state and local permit requirements and environmental review of construction and operation of railroad intermodal facility preempted); N. San Diego County Transit Dev. Bd.—Pet. For Decl. Order, STB Finance Docket No. 34111 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment).

⁵ As the ICCTA legislative history makes clear, the states’ police powers are not entirely preempted by section 10501(b). Thus, for example, railroads can be required to comply with some health and safety rules, such as fire and electric codes. Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189-90 (E.D. Wash. 2000).

⁶ See also 49 U.S.C. 10102(9) (“Transportation” defined expansively to embrace “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . .,” as well as “services related to that movement”).

This means that Federal environmental statutes, such as NEPA,⁷ the Clean Air Act, and the Clean Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal. See, e.g., City of Auburn, 154 F.3d at 1031-33; Friends of the Aquifer, et al., STB Finance Docket No. 33966, slip op. at 4-6 (STB served Aug. 15, 2001). However, state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted. See City of Auburn, 154 F.3d at 1031. But state and local agencies and concerned citizens will have ample opportunity to participate in the ongoing EIS process under NEPA and related laws.

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

It is ordered:

1. DesertXpress' petition for declaratory order is granted.
2. This proceeding is discontinued.
3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon Williams
Secretary

⁷ As noted, NEPA review has already begun in this case.