

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34376

CITY OF CREEDE, CO–PETITION FOR DECLARATORY ORDER

Decided: May 3, 2005

This decision responds to a petition for declaratory order filed by the City of Creede, CO (City), pursuant to an order of the U.S. District Court for the District of Colorado (U.S. District Court) referring to the Board three questions related to the issue of federal preemption of the City’s zoning laws as applied to the outer portions of the railroad right-of-way (ROW) for a line of the Denver & Rio Grande Railway Historical Foundation (D&RGHF), a Class III railroad.

BACKGROUND

In Union Pacific Railroad Company–Abandonment Exemption–in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 11, 1999) (May 1999 Decision), the sale of a 21.6-mile rail line known as the Creede Branch (the line) from Union Pacific Railroad Company (UP) to D&RGHF was approved pursuant to the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904 and 49 CFR 1152.27. The line, located in Rio Grande and Mineral Counties, CO, extends from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede. It historically served local mines, but had not been operated for many years prior to the sale. The portion of the line’s ROW that runs through the City of Creede is 100 feet wide. D&RGHF’s existing track is located on the 25-foot wide strip in the center of the ROW, which court documents refer to as the “clear space.” This “clear space” accommodates the tracks and side clearance on both sides of the tracks. The remainder of the ROW consists of strips on both sides of the clear space, each 37.5 feet wide.

In a decision served on May 24, 2000, the Board denied a petition to reopen the May 1999 Decision filed by the City, finding that it had not made the showing required by 49 U.S.C. 722(c) and 49 CFR 1115.4 to reopen an administratively final proceeding. The sale of the line was also consummated on May 24, 2000.

On November 2, 2000, the City filed an action against D&RGHF in state court, seeking a declaration that a City residential zoning ordinance applied to the ROW, except for the “clear space.” City of Creede v. Denver & Rio Grande Railway Historical Foundation, Dist. Ct., Mineral County, Colo., No. 00-CV-4. The case was removed to the U.S. District Court. In City of Creede v. Denver & Rio Grande Railway Historical Foundation, No. 01-RB-318 (CBS) (D. Colo. May 9, 2003), the U.S. District Court, under the doctrine of primary jurisdiction, referred the following questions to the Board:

“A) Is the land in the outer portions of [D&RGHF’s] 100 feet wide railroad [ROW] in South Creede, Colorado, each of which is 37.5 feet wide, necessary for the safe and convenient use of the central portion of the [ROW], which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?

B) If the answer to question A is negative, are the City of Creede’s zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF’s] 100 feet wide railroad [ROW], each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. §10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?

C) If the answer to question A is affirmative, are the City of Creede’s zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF’s] 100 feet wide railroad [ROW], each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. §10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?”

On July 2, 2003, the City filed a petition for declaratory order with the Board pursuant to the U.S. District Court’s order referring the preemption issue to the Board. As part of its referral order, the U.S. District Court ordered the parties to submit to the Board, within 80 days, all portions of the court record relevant to the preemption issues that were referred. Pursuant to this order, on October 14, 2003, the City submitted to the Board over 400 pages of materials (largely unrelated to the preemption issues), along with a request that the Board reopen the abandonment exemption proceeding in STB Docket No. AB-33 (Sub-No. 132X), to revoke the “OFA rights” obtained by D&RGHF. The Board treated the request as another petition to reopen the May 1999 Decision, and in a decision in STB Docket No. AB-33 (Sub-No. 132X), served on June 22, 2004 (June 2004 Decision), denied the petition. On November 5, 2004, the Concerned Citizens of Creede and Mineral County, CO, filed another petition to reopen prior decisions in the OFA proceeding. A decision on that petition is being issued today in STB Docket No. AB-33 (Sub-No. 132X).

By a decision also served on June 22, 2004, the Board instituted the instant declaratory order proceeding on the preemption issues and set a procedural schedule, which was modified in a decision served on August 19, 2004. The City filed its opening statement on August 11, 2004, D&RGHF filed its reply on September 13, 2004, and the City filed its rebuttal on October 4, 2004.

#### PRELIMINARY MATTER

By petition filed on September 13, 2004, the Association of American Railroads (AAR) requests leave to intervene as amicus curiae. In support of its request, AAR states that it has an interest in the outcome of this proceeding and that the Board’s acceptance of AAR’s amicus curiae brief will not disrupt the schedule of filings or unduly broaden the issues. According to AAR, both the City and D&RGHF have consented to AAR’s filing. Because AAR has shown

good cause for its intervention as amicus curiae and apparently neither party objects, AAR's petition will be granted and its amicus curiae brief will be accepted for filing.

### POSITIONS OF THE PARTIES

The City, which contends that no traffic has moved over the City of Creede portion of the line since 1972 and the entire line since 1985, argues that D&RGHF has neither the capability nor the plans for providing rail service on this line. Accordingly, the City argues that the rail line in question is not an active rail line and, therefore, that it should not be protected by federal preemption. The City further alleges that D&RGHF plans to establish commercial enterprises on the ROW (including a restaurant and hotel facilities) that would be unrelated to any railroad use. (This claim was also made by the City in its original complaint before the Colorado state court, although those assertions were denied by D&RGHF in its answer.)

In its reply, D&RGHF contends that, as a matter of law, a railroad is entitled to exclusive possession of its ROW, and that, as a matter of fact, D&RGHF intends to use the full width of its ROW for rail activities. Specifically, D&RGHF states that it needs the full width of the ROW to rehabilitate the rail yard (consisting of four tracks) and a depot that currently lie within the ROW. According to D&RGHF, it plans to use this rail yard and depot for "spotting empty freight cars; delivering loaded freight cars; loading and unloading of freight shipments; storage of freight and passenger railcars; switching and staging of freight and passenger train movements; and for general railroad purposes."<sup>1</sup> D&RGHF also notes that it needs the 37.5-foot strips on both sides of the track for access to the track by maintenance vehicles and personnel, as well as for the storage and marshaling of track materials used in maintenance. Finally, D&RGHF states that it is exploring the possibility of adding sidetrack facilities for the transloading of commodities from truck to rail. Based on these intended transportation uses, D&RGHF argues that local zoning laws are preempted by 49 U.S.C. 10501(b), which gives the Board exclusive jurisdiction over not only railroad operations, but also the facilities, structures, property, equipment, and services needed in conjunction with those operations. See 49 U.S.C. 10102(9).

AAR also argues that the City's zoning regulations should be found to be preempted, as a rail carrier is presumptively entitled to full use of its ROW. AAR supports D&RGHF's position that it needs the outer portions of its ROW for rail-related activities. In addition, AAR notes that railroads often need substantial width "to maintain the track, to repair equipment, to store materials, to build access roads, to minimize property damage and personal injury from derailments, to act as a buffer against trespassers and noise, and to maintain sight lines for safe operation."<sup>2</sup>

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<sup>1</sup> D&RGHF's Reply at 5 and 11.

<sup>2</sup> AAR's Amicus Curiae Brief at 3 and 13-14.

## DISCUSSION AND CONCLUSIONS

Before turning to the specific questions referred by the U.S. District Court, we will address the scope of the ICC Termination Act (ICCTA) preemption, in order to assist the court.

The Scope of the ICCTA Preemption.

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is “among the most pervasive and comprehensive of federal regulatory schemes.” Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims).

Although the ICA has long included a preemption clause, Congress further broadened the Act’s express preemption in 1995. Section 10501(b) now expressly provides that “the jurisdiction of the Board over transportation by rail carriers” over any track that is part of the interstate rail network is “exclusive.” And the term “transportation” is defined expansively in the ICA 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 . . . property . . . by rail” as well as “services relating to that movement.” 49 U.S.C. 10102(9). Section 10501(b) also expressly provides that “the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers” are “exclusive and preempt the remedies provided under Federal or State law.” Thus, section 10501(b) does not leave room for state and local regulation of activities related to rail transportation.

As we recently noted in CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005) (CSXT), in summarizing the court and Board precedent, the courts have observed that “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” than that contained in section 10501(b). CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping. And, as particularly pertinent here, the courts have made it clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted. City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use regulation preempted); Green Mountain R.R. v. State of Vermont, No. 04-0366 (2d Cir. April 14, 2005) (Green Mountain) (preconstruction permitting of railroad transload facility necessarily preempted); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (Austell) (local zoning and land use regulations preempted); Soo Line R.R. v. City of

Minneapolis, 38 F. Supp.2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted). Accord Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna & Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (local zoning and land use constraints on the railroad’s maintenance, use, or upgrading of its lines preempted).

The agency’s broad and exclusive jurisdiction over railroad operations and facilities also has been found to prevent application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use. Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (attempt to use a state’s general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S.S.D. 2002), aff’d on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state’s eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state “regulation” of railroads); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted). Accord Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 34090 (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). See also CSXT (state or local power to determine how a railroad’s hazardous materials traffic should be routed preempted under 49 U.S.C. 10501(b)); North San Diego County Transit Development Board—Petition for Declaratory Order, STB Finance Docket No. 34111 (STB served Aug. 21, 2002) (California Coastal Commission regulation of construction and operation of rail siding preempted).

While the section 10501(b) preemption is broad and far-reaching, there are, of course, limits. For example, section 10501(b) preemption does not apply to operations that are not part of the national rail network. Thus, application of city zoning and licensing ordinances to an aggregate distribution plant operated by a non-railroad entity has been found not to be preempted, despite the fact that the plant was located on railroad-owned property. Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (Florida East Coast) (because the railroad’s involvement ended with delivery to the shipper’s plant, the plant itself was not part of “rail transportation” or a rail “facility”). See also Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (Hi Tech Trans) (no preemption for activity that is not part of “rail transportation”). Additionally, the section 10501(b) preemption does not apply to state or local actions under their retained police powers so long as they do not interfere with railroad operations or the Board’s regulatory programs. See CSXT at 9-10.

## The Questions Referred by the U.S. District Court

### I. Initial Question.

The first question posed by the U.S. District Court is whether the outer portions of D&RGHF's ROW are "necessary for the safe and convenient use of the central portion of the ROW, which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?"

Many railroad lines have a wider ROW than might appear to be used, but that does not mean that all of the property is not needed for rail operations. As noted by D&RGHF and AAR, extra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more tracks and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. See Midland Valley R.R. v. Jarvis, 29 F.2d 539, 541 (8th Cir. 1928).

In City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 11, 2004),<sup>3</sup> we recently rejected an attempt by the City of Lincoln, NE (Lincoln), to condemn a 20-foot-wide strip in the outer portion of a railroad's 100-foot wide ROW for use as a recreational trail. In that decision, we held that, where, as here, the railroad opposes a plan to take part of a ROW and claims that the property is or will be needed for the conduct of rail operations, the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes. Finding that Lincoln had not made that showing, we concluded that the proposed taking under state eminent domain law was federally preempted.

Similarly, in this case the City has not met its burden of showing that the full width of the ROW is not, and will not be, needed for rail use. In fact, the City has not even addressed the issue. Instead, the City argues that D&RGHF will never provide rail freight service on this line. This argument is essentially a restatement of the arguments from its petition to reopen in STB Docket No. AB-33 (Sub-No. 132X) that D&RGHF had no intention of providing rail freight service when it purchased the line and that D&RGHF lacks the finances necessary to restore the line to service. The Board, however, recently rejected those very claims in the June 2004 Decision in that proceeding. There, we found that "D&RGHF's intent to operate the line has been demonstrated by its continued efforts to rehabilitate the line."<sup>4</sup> We observed that "[t]he City [had offered] nothing compelling to warrant a challenge to the . . . determination of D&RGHF's financial responsibility . . ."<sup>5</sup> We will not revisit those conclusions here.

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<sup>3</sup> Pending judicial review in City of Lincoln v. STB, No. 04-3453 (8th Cir. filed Oct. 8, 2004).

<sup>4</sup> June 2004 Decision, slip op. at 7.

<sup>5</sup> Id. at 6.

We are mindful that, at the present time, D&RGHF is not using any of the ROW for rail service, as it is still in the process of rehabilitating the line. However, as the June 2004 Decision explains, the legal status of the Creede Branch under the statute is that of an active rail line with all the rights and obligations attendant to that designation.<sup>6</sup> Moreover, D&RGHF recently has cleared the line of vegetation and debris and has shored up the roadbed adjacent to a river. D&RGHF has also installed hundreds of cross-ties, rail lengths, angle bars, tie plates, and spikes; has brought the majority of the line back into gauge; has replaced three road crossings; and has installed a new crossing.<sup>7</sup> There would be little incentive for D&RGHF to have taken these steps if it did not intend to operate the line.

D&RGHF has indicated that, once rehabilitation is complete, it will resume rail freight service, and that it intends to use the full width of the ROW for the conduct of rail operations. Inasmuch as the City has failed to show that this property is not now and will not likely be needed for rail uses, and the railroad has explained why it needs the full width of its ROW for current and future rail operations, we determine that the 37.5-foot wide outer portions of the ROW are necessary for railroad purposes.

## II. The Remaining Preemption Question.

The U.S. District Court further asks that we determine if the outer portions of the ROW are subject to the City's zoning ordinances, which restrict use of the land to residential purposes, or if these ordinances are preempted by 49 U.S.C. 10501(b) or invalidated by the Commerce Clause of the U.S. Constitution.

To come within the Board's jurisdiction and the federal preemption provision, an activity must be both "transportation" and offered by a "rail carrier." E.g., Florida East Coast; Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444, slip op. at 2 (STB served Aug. 12, 2004) (Town of Milford). The term "transportation" is defined broadly in the ICA to expressly include property and facilities related to the movement of passengers or property by rail. See 49 U.S.C. 10102(9)(A); Green Mountain. That term also includes all of the services related to that movement, including receipt, delivery, transfer and handling of property. See 49 U.S.C. 10102(9)(B). As discussed above, zoning ordinances have been found to be preempted on their face to the extent they apply to "transportation" by rail carriers because by their nature they could be used to deny a railroad the right to conduct its operations. E.g., City of Auburn, 154 F.3d at 1030-31; Austell; Borough of Riverdale.

Conversely, state and local laws are not preempted where the activity is not "transportation" or is not offered by a "rail carrier." For example, if the property were being used for a restaurant or hotel or some other non-transportation purposes, then there would be no preemption under section 10501(b) and the City's zoning ordinance would apply. Similarly, even if the property is being used for transportation purposes, the activity must be performed by

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<sup>6</sup> Id. at 8.

<sup>7</sup> Id. at 7.

a duly authorized rail carrier. E.g., Florida East Coast; Hi Tech Trans; Town of Milford. The center of this dispute—whether an activity is “transportation” offered by a “rail carrier”—is often a fact-specific determination.

The City argues that preemption does not apply because D&RGHF has not engaged in railroad transportation and will not engage in railroad transportation because it has neither the intent nor the capability to provide rail service on this line. In its rebuttal, the City suggests that, because D&RGHF will not be providing rail service, “the Board has no basis to appropriately exercise its jurisdiction to make any determination relating to the questions referred to the Board by the [U.S.] District Court.” City’s Rebuttal, filed Oct. 4, 2004, at 5. The City also asserts in its petition for declaratory order that D&RGHF plans to establish commercial enterprises on the ROW. But the City has provided no evidence to support its claim that D&RGHF plans to use any portion of the ROW for such purposes. D&RGHF states that it plans to use the outer portions of the ROW to construct a rail yard, depot, and possibly additional sidetrack—all of which are transportation purposes—and the City has not shown that D&RGHF intends to use its property otherwise.

D&RGHF is a licensed railroad that holds itself out as a common carrier and that has not sought abandonment or discontinuance authority from the Board. Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment. Atchison, Topeka & Santa Fe Ry. – Abandonment Exemption – in Lyon County, KS, Docket No. AB-52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991). And, as in City of Lincoln, the City has not met its burden of demonstrating that D&RGHF is engaging in activities that are not transportation; at this juncture, it has merely alleged that D&RGHF plans to establish commercial non-transportation enterprises along its ROW. However, regardless of whether the City has at this time shown that D&RGHF has current plans to use its ROW for non-transportation activities, the general rule articulated above will apply. Should D&RGHF engage in activities that are not considered transportation pursuant to 49 U.S.C. 10102(9), then the City’s ordinance would not be preempted as to those activities whenever they should arise.

Based on this record, we find that D&RGHF’s planned activities on the entire ROW are part of rail transportation and, accordingly, that the City’s local zoning laws are federally preempted with respect to those activities.

Because we have found that the City’s zoning laws are preempted under 49 U.S.C. 10501(b), we need not further address the second part of the court’s question regarding preemption pursuant to the Constitution under the Commerce Clause.

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

It is ordered:

1. AAR’s petition for leave to intervene as amicus curiae in this proceeding is granted.

2. This proceeding is concluded.
3. This decision is effective on its date of service.
4. A copy of this decision will be served on:

The Honorable Robert E. Blackburn  
United States District Judge  
United States Courthouse A741  
909 19th Street  
Denver, CO 80294

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

Vernon A. Williams  
Secretary