

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35853

SEA-3, INC.—PETITION FOR DECLARATORY ORDER

Digest:¹ SEA-3, Inc. (SEA-3), a non-carrier, asks the Board to find that appeals by the City of Portsmouth, N.H., of a zoning decision—which approved SEA-3’s construction of additional rail berths at the liquefied petroleum gas transload facility it owns and operates in the Town of Newington, N.H.—are preempted by federal law. The Board provides guidance on the issue but denies the petition for declaratory order because the law about the extent to which 49 U.S.C. § 10501(b) preemption applies to transload facilities is clear.

Decided: March 16, 2015

By petition filed on August 4, 2014, SEA-3, Inc. (SEA-3), seeks a declaratory order holding that all claims made by the City of Portsmouth, N.H. (the City or Portsmouth), in certain zoning litigation are preempted by 49 U.S.C. § 10501(b).² SEA-3 states that Portsmouth has appealed zoning decisions that approved SEA-3’s plan to construct five additional rail berths at the liquefied petroleum gas (LPG or propane) transload facility it owns and operates on land it leases in the Town of Newington, N.H. (Newington). Portsmouth, in a reply filed on August 20, 2014, asks the Board to dismiss the petition for lack of standing or, in the alternative, to deny the petition and find that the City’s appeals do not involve regulation of transportation by rail carrier or preclearance requirements that are federally preempted. On September 30, 2014, Boston and Maine Corporation and Springfield Terminal Railway Company d/b/a Pan Am Railways (Pan Am), the rail carrier serving the transload facility, filed comments in support of SEA-3’s petition.³ On January 20, 2015, Norfolk Southern Railway Company (NS) submitted comments

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 SEA-3 Pet. 20.

³ In a decision served on August 29, 2014, the Board granted Pan Am’s request for leave to intervene and for a two-week extension to file substantive comments. Pan Am subsequently notified the Board that the parties were engaged in discussions to resolve the issues and requested a further extension to September 30, 2014. The Board granted that extension request in a decision served on September 5, 2014. Pan Am filed its comments on September 30, 2014, after negotiations proved unsuccessful.

as amicus curiae in support of SEA-3's petition. On February 10, 2015, the Propane Gas Association of New England (PGANE) also submitted comments as amicus curiae in support of SEA-3's petition. On February 12, 2015, CSX Transportation, Inc. (CSXT) submitted a petition to intervene and comments in support of SEA-3's petition.⁴

For the reasons discussed below, SEA-3's petition for a declaratory order will be denied.

BACKGROUND

SEA-3 states that Pan Am's Newington Branch is the only rail line serving the transload facility, which is one of only two propane storage and distribution terminals in New England and the only one with rail access. The facility, according to SEA-3, has been in continuous operation since 1975 and has a storage capacity of 560,000 barrels. While the majority of the propane delivered to the facility historically moved from overseas sources by ship, SEA-3 states that the facility has three rail berths that allow it to offload six rail cars of domestically produced propane per day. SEA-3 seeks to reconfigure and expand the facility by constructing five additional rail berths on land leased from Pan Am. SEA-3 claims that this is necessary because recent market changes have made the cost of overseas-produced propane prohibitively expensive. Asserting that the expansion project would allow it to satisfy the majority of its propane requirements from domestic sources, SEA-3 contends that the additional rail berths are essential if it is to continue supplying the New England market with propane.

According to SEA-3, the Newington Planning Board (Planning Board) approved SEA-3's application to expand the facility on May 19, 2014, and on June 16, 2014, Portsmouth filed an appeal with the Newington Zoning Board of Adjustment (NZBA). Also on June 16, 2014, according to SEA-3, Portsmouth filed with the New Hampshire Superior Court (Court) a petition to overturn the Planning Board's decision, or in the alternative to require a study of the rail effects of the expansion project.⁵ SEA-3 contends that Portsmouth has been opposed to the expansion project since it received notice of the application from the Planning Board, and that Portsmouth's sole objective is to block additional LPG rail car traffic from moving through the City.

SEA-3 argues that any attempts by localities or states to direct rail traffic or impose preclearance requirements on transload facilities are federally preempted under § 10501(b). Section 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). Section 10501(b) also explicitly states that "the

⁴ Pan Am, NS, PGANE, and CSXT will be referred to as "Petition Supporters."

⁵ City of Portsmouth v. Newington Planning Bd., Rockingham County Superior Court Docket No. 218-2014-CV00654. Under New Hampshire law, according to SEA-3, any appeal of a zoning decision by a town's Planning Board must first be resolved by the town's Zoning Board of Adjustment (ZBA). SEA-3 states that when dual appeals are filed, as in this case, court action is stayed pending a ZBA decision, and if the ZBA decision is appealed, the two appeals are consolidated in the court.

remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” SEA-3 asks the Board to find that the claims Portsmouth has made to the NZBA and the Court, including any claims that are derived from, or depend on, allegations that Portsmouth would be adversely affected as a result of increased rail transportation, are preempted.

Portsmouth requests that the proceeding be dismissed for lack of standing, contending that SEA-3 is not a rail carrier; that SEA-3 built, owns, controls, insures, and advertises the facility; and that SEA-3 is the sole applicant for approval of, and is solely responsible for all of the costs of the instant expansion project. In the alternative, Portsmouth requests that the Board find the City’s appeals, which include a request for a safety/hazard study of the SEA-3 expansion site, are not federally preempted preclearance requirements. Portsmouth denies: (1) that it is seeking a safety study of Pan Am’s rail operations, as opposed to a study of the SEA-3 expansion site; (2) that it is seeking to deprive SEA-3 of its right to receive rail services; and (3) that it is using local site plan review regulations and zoning ordinances to regulate rail transportation.

Portsmouth contends that there is no conflict between its request for a safety/hazard study of the planned expansion of the facility and SEA-3’s use of Pan Am for common carrier rail service. In appealing and filing for court review of the Planning Board’s decision approving the expansion project, Portsmouth contends it “is simply asking Newington to comply with its site review regulations and zoning ordinances as they apply to the site itself, not the rails . . . in order to assess whether the project promotes the health[,] safety and welfare of the residents of Newington and [the] other affected communities.”⁶ Noting that similar studies were performed the last time SEA-3 expanded its facility in 1996, Portsmouth asserts that, in its zoning appeals, it merely seeks the ability to review and comment on a safety/hazard assessment, claiming that this “would not subject SEA-3 to an unreasonable delay and is not unreasonably burdensome, nor does it discriminate against railroads.”⁷

Pan Am argues that Portsmouth’s appeals to the NZBA and the Court are preempted by § 10501(b) because they would not have been filed absent a potential increase in rail traffic. Pan Am contends that Portsmouth, notwithstanding its denials, is in fact attempting to regulate rail transportation by Pan Am through litigation that would frustrate and delay increased rail service to SEA-3’s transload facility. Pan Am also claims that Portsmouth remains adamantly opposed to the expansion project, even though Pan Am has provided substantial information to the community throughout the Planning Board’s process, attended all Planning Board meetings, met with representatives of Portsmouth and surrounding communities on several occasions, and solicited input from the Federal Railroad Administration (FRA) and the New Hampshire Department of Transportation (NHDOT). Further, Pan Am states that during this community outreach it has pointed out that rail service on the Portsmouth and Newington Branches has continued for decades with at least four active customers now being served in Newington; that the only change in operations that would result from the expansion project would be an increase in rail service from two to potentially six days a week; and that FRA, NHDOT, and emergency

⁶ Portsmouth Reply 10-11.

⁷ *Id.* at 16.

responders “have reviewed the potential impact of an increase in rail service [and have] informed the Planning Board, Portsmouth, and other neighboring municipalities that no significant safety concerns exist.”⁸ Finally, Pan Am asserts that it has already begun work to upgrade the Portsmouth and Newington Branches from marginal FRA Class 1 to FRA Class 2 standards and that this work should be completed in the summer of 2015.

NS, in its amicus filing, states that it has an interest in this case because SEA-3 is its customer. NS argues that Portsmouth is attempting to regulate rail commerce and that therefore Portsmouth’s position in this case is contrary to the Board’s preemption precedent. NS also raises concerns that Portsmouth’s “attempts to regulate the flow of commerce”⁹ are part of a trend of localities enacting regulations that are preempted under § 10501. Similarly, PGANE argues that Portsmouth is seeking to interfere with the flow of interstate commerce by rail, and Portsmouth’s actions would lead to a patchwork of conflicting local regulations over rail operations. CSXT, in its comments, asserts that Portsmouth is attempting to regulate the use of a railroad line through the zoning process, which is one of the most invasive forms of regulation and is clearly preempted under § 10501(b).

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 controversy or remove uncertainty in a matter related to the Board’s subject matter jurisdiction.¹⁰ Where the law is clear, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue presented, and it is appropriate to do so here. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).¹¹

The Interstate Commerce Act (Act) is “among the most pervasive and comprehensive of federal regulatory schemes.” Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The federal preemption provision contained in § 10501(b) bars the application of most state and local laws to railroad operations that are subject to the Board’s jurisdiction.¹²

⁸ Id. at 5-6.

⁹ NS Comments 1.

¹⁰ See, e.g., Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989).

¹¹ We also note that, according to Pan Am, the NZBA held a hearing on September 15, 2014, and denied all of Portsmouth’s claims. Pan Am Reply 3 n.1 & Ex. A. Thus, it appears that SEA-3 has prevailed at every stage of the zoning process to date.

¹² State or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005). Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir.

(continued . . .)

Because the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a), to be subject to the Board’s jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be “transportation” and must be performed by, or under the auspices of, a “rail carrier.” The statute defines “transportation” expansively to encompass any property, facility, structure or equipment of any kind related to the movement of passengers or property, or both, by rail, and services related to that movement, including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. See, e.g., Diana Del Grosso.—Pet. for Declaratory Order, FD 35652, slip op. at 5 (STB served Dec. 5, 2014).

The Board’s jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations.¹³ The record presented to the Board in this case, however, does not demonstrate that SEA-3 is a carrier or that it is performing transportation-related activities on behalf of Pan Am or any other rail carrier at the transload facility.

(. . . continued)

2007); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500, 507-508 (2001), reconsideration denied (STB served Oct. 5, 2001). Even where § 10501(b) preemption applies, there are limits to its scope. Overlapping federal statutes are to be harmonized, with each statute given effect to the extent possible. Moreover, states retain police powers to protect the public health and safety on railroad property so long as state and local regulation do not unreasonably interfere with interstate commerce. Green Mountain, 404 F.3d at 643.

¹³ Id. Compare Green Mountain, 404 F.3d at 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier qualified for preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967), and Ass’n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C. 2d 280, 290-95 (1992) (an agent undertaking the obligations of a common carrier (i.e., performing services as part of the total rail service contracted for by a member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation), with Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the rail carrier, but the transloading services were not being offered as part of common carrier services offered to the public); High Tech Trans, LLC—Pet. for Declaratory Order—Newark, N.J., FD 34192 (Sub-No. 1), slip op. at 7 (STB served Aug. 14, 2003) (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057, slip op. at 5 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services directly to customers).

Citing Norfolk Southern Railway v. City of Alexandria (Alexandria), 608 F.3d 150 (4th Cir. 2010), and Boston & Maine Corp.—Petition for Declaratory Order (Winchester), FD 35749 (STB served July 19, 2013), SEA-3 argues that any attempt by localities or states to direct rail traffic or impose preclearance requirements on this facility are federally preempted under § 10501(b). SEA-3 and the Petition Supporters further argue that Portsmouth is attempting to use its appeals of the Planning Board’s decision to interfere with Pan Am’s rail operations and to intrude into matters directly regulated by the Board. Portsmouth’s sole objective, Pan Am and PGANE claim, is to prevent an increase in rail service to SEA-3 by blocking additional propane shipments from traveling through the City. Pan Am contends that Portsmouth will use the results of any litigation to impose restrictions on SEA-3’s ability to use, and Pan Am’s ability to provide, rail transportation. In support of preemption, Pan Am, NS, and CSXT also cite Winchester, which they assert has facts almost identical to those at issue here, and Pan Am and PGANE similarly rely on Ayer.

However, the facts in the cases relied on by SEA-3 and the Petition Supporters are very different from those at issue here. The cited cases involved local regulation of transloading performed by the rail carrier or under its auspices (Alexandria and Ayer), or local regulation of the railroad’s ability to conduct common carrier transportation (Winchester). Alexandria involved an ethanol transload facility constructed and owned by Norfolk Southern Railway Company and operated under its auspices. Ayer involved the construction and operation of an automobile unloading facility by Boston and Maine Corp. and Springfield Terminal Railway Co., and their corporate parent, Guilford Transportation Industries, Inc. (now Pan Am). SEA-3 and the Petition Supporters do not allege that SEA-3 is a rail carrier, or that its transloading is performed under the auspices of a rail carrier,¹⁴ as was the case in Alexandria and Ayer.

Winchester involved a local regulation that would have prohibited a rail carrier (Pan Am) from operating trains over the line in question. The Board determined that § 10501(b) preempted this regulation because it prevented the rail carrier from conducting its operations in interstate commerce. Here, SEA-3 and the Petition Supporters have not identified an attempt by Portsmouth to regulate *Pan Am’s* operations, as was the case in Winchester.¹⁵ Instead, Portsmouth’s litigation challenging the Planning Board’s decision involves permitting of the expansion of SEA-3’s facility, and as noted, it is undisputed that SEA-3 is not a rail carrier or acting under the auspices of a rail carrier.¹⁶ Thus, it appears that the only regulatory action at issue in this case is a local government’s participation in zoning litigation over the expansion of a non-carrier facility. Without more, this situation does not reflect undue interference with

¹⁴ See n.13, *supra*.

¹⁵ NS is incorrect when it suggests that Winchester addressed a “contested municipal zoning ordinance . . . applied to the shipper facility . . .” NS Comments 3. As noted above, the municipal ordinance at issue in Winchester would have prohibited *the rail carrier* from operating trains over the line in question. See Bos. & Me. Corp.—Pet. for Declaratory Order, FD 35749, slip op. at 4-5 n.17 (STB served Oct. 31, 2013) (observing that the Winchester decision applied to the rail carrier’s operations over the line, not to the shipper facility).

¹⁶ See SEA-3 Pet. 20 (requested declaratory order would find preemption only with respect to “claims made in Portsmouth’s Superior Court Petition and ZBA Appeal”).

“transportation by rail carriers.” See 49 U.S.C. § 10501(b). Accordingly, SEA-3 and the Petition Supporters have not demonstrated on this record that preemption under § 10501(b) applies to Portsmouth’s zoning appeals.

If Portsmouth or any other state or local entity were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with Pan Am’s common carrier operations, those actions would be preempted under § 10501(b). See, e.g., Bos. & Me. Corp.—Pet. for Declaratory Order, FD 35749 (STB served Oct. 31, 2013) (confirming that the Town of Winchester’s directive prohibiting Pan Am from conducting transportation over a rail line was preempted). As the Board and the courts have explained, Portsmouth may apply non-discriminatory regulations to protect public health and safety, but only provided that its regulations do not have the effect of foreclosing or unduly restricting Pan Am’s ability to conduct operations over its Newington and Portsmouth Branches, or otherwise unreasonably burden interstate commerce.¹⁷

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

It is ordered:

1. SEA-3’s petition for declaratory order is denied, and this proceeding is discontinued.
2. This decision is effective on the date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

¹⁷ As discussed above, state and local regulation is not preempted where it does not interfere with rail operations. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. See Green Mountain, 404 F.3d at 643. Electrical, plumbing, and fire codes also are generally applicable. See Green Mountain, 404 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier’s ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).