

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35701

NORFOLK SOUTHERN RAILWAY COMPANY—PETITION FOR DECLARATORY  
ORDER

Digest:<sup>1</sup> The Board declares that the claims raised against Norfolk Southern Railway in certain Virginia state court lawsuits are preempted by federal law.

Decided: November 4, 2013

Norfolk Southern Railway Company (NSR) is a defendant in 18 substantially identical<sup>2</sup> lawsuits pending in the Circuit Court of Roanoke County, Va. Plaintiffs in the state lawsuits are property-owners who live in a neighborhood near a railroad line owned and operated by NSR in Roanoke County (“Owners”).<sup>3</sup> In their lawsuits, these Owners assert claims against NSR for damage to their properties allegedly caused by “noise and vibration as well as the discharge of smoke, dust, dirt and other particulates” from the trains operating on the NSR line. NSR has filed a Petition for Declaratory Order with the Board asking the Board to declare that the claims raised against NSR in the state lawsuits are preempted under federal law.

For the reasons discussed below, this decision grants NSR’s request for a declaratory order and finds that the claims raised against NSR in the Virginia lawsuits are federally preempted.

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<sup>1</sup> 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).

<sup>2</sup> The complaints all allege the same underlying facts and causes of action. The only difference among them is the specific location of the property of the individual plaintiffs.

<sup>3</sup> The plaintiffs in the Virginia lawsuits are: David W. Jones, Sandra Atkins, Roy A. Richardson, Linda R. LeFever, Michael and Deborah Agee, James A. Hill, Dianne M. Maxey, Dale and Dee Pfeiffer, Sakhone Manivong, Richard and Barbara Schilling, Nancy and Susan Doyle, Katherine A. Durham, Joshua Wilkinson, Joseph and Jennifer Burtch, Angelo and Robin Juliano, Matthew and Cynthia Owens, Ronald and Christine Sustakoski, and David and Elizabeth Weisman. For consistency with the terminology in the state court complaints, these plaintiffs will be referred to as Owners.

## BACKGROUND

According to NSR’s petition, in 1890 NSR’s predecessor condemned the right of way on which the NSR line at issue now operates, and, between 1890 and 1900, it constructed the rail line and began railroad operations over it. NSR states that the line has been in active use ever since and that operations on the rail line predate the development of the neighborhood in which Owners’ properties are located.

The Appalachian Power Company (APCO) owns a strip of property that is adjacent to the rail line and lies between the rail line and Owners’ properties.<sup>4</sup> According to the Owners’ state court complaints, in 2009, APCO began removing “dense old growth hardwood stands of trees”<sup>5</sup> and erecting electrical transmission towers and lines on its land—that is, between the NSR rail line and Owners’ properties. Each complaint alleges that “[p]art of the clearing process included cutting down and uprooting trees that insulated Owner’s home from the damaging effects of [NSR’s] public use of property for its rail operations, which includes transporting large quantities of coal.”<sup>6</sup> As a result, each complaint alleges, “[s]ince APCO cleared the land to build its towers and transmission lines, Owner’s property has been and is substantially damaged by the operation of [NSR’s] rail line. Owner’s property has experienced noise and vibration as well as the discharge of smoke, dust, dirt, and other particulates from the rail line onto Owner’s property.”<sup>7</sup>

Owners’ complaints claim that “[t]he operation of [NSR’s] rail line now constitutes a nuisance.”<sup>8</sup> They further claim that the alleged damages to Owners’ properties were caused pursuant to a public use—namely, operation of NSR’s rail line—and that “[b]efore taking and/or damaging Owner’s property, [NS] failed to engage in lawful condemnation procedures to allow Owner to receive just compensation for the damage and/or taking that the rail line caused to his property within the meaning of Article I, Section 11 of the Constitution of Virginia,”<sup>9</sup> which provides that “no private property shall be taken or damaged for public use without just compensation” to the property owner. Va. Const. art I, § 11. NSR does not dispute that its operation of the rail line constitutes a public use but contends that Owners’ claims are preempted under 49 U.S.C. § 10501(b).

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<sup>4</sup> APCO is a co-defendant in the Virginia lawsuits. Because APCO is not a rail carrier providing transportation subject to the jurisdiction of the Board, see 49 U.S.C. § 10501(a) and (b), this decision pertains only to the claims brought against NSR.

<sup>5</sup> Pet., Ex. 1 (Compl.) ¶ 8.

<sup>6</sup> Id. ¶ 14.

<sup>7</sup> Id. ¶ 15.

<sup>8</sup> Id. ¶ 16.

<sup>9</sup> Id. ¶¶ 17-18.

In a decision served on December 12, 2012, the Board instituted a declaratory order proceeding and set a procedural schedule. Owners submitted an opposition to which NSR filed a reply.

### 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 Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). NSR seeks an order declaring that the state court lawsuits are preempted under 49 U.S.C. § 10501(b).

The Interstate Commerce Act, as revised (ICA), 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 ICA vests in the Board exclusive jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), which broadly extends to property, facilities, instrumentalities, equipment, or services “related to the movement of passengers or property, or both, by rail,” 49 U.S.C. § 10102(9). Moreover, the ICA specifically provides that “the 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.” 49 U.S.C. § 10501(b).

Under § 10501(b), two broad types of state regulation are categorically preempted as to transportation by rail carriers: (1) permitting or preclearance requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized; and (2) attempts to regulate matters that are regulated by the Board (such as, for example, the construction, operation, and abandonment of rail lines). See E. Ala. Ry.—Petition for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012) (E. Alabama); CSX Transp., Inc.—Petition for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005) (CSX). State and local actions may also be preempted “as applied”—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc). “[I]t is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad’s ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.” CSX, slip op. at 5 (citing Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001) and Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005)). In determining whether an action under state law, as applied, would unreasonably burden interstate commerce or unreasonably interfere with railroad operations we inherently exercise our policy-based judgment; that determination is a fact-specific one, based on the circumstances of each case. See E. Alabama, slip op. at 4.<sup>10</sup>

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<sup>10</sup> For example, in a recent case involving state law claims of inverse condemnation, trespass, nuisance, and negligence, arising out of water runoff damage to homeowners’ property allegedly caused by a railroad’s salvage of nearby track, the Board found those state law claims

(continued . . . )

Here, the state action at issue is the assertion of state law claims raised in the lawsuits Owners have brought against NSR based on the alleged damage to Owners' property caused by dust, vibration and noise generated by trains operating on NSR's rail line. Owners claim that these effects of NSR's rail operations constitute a common law nuisance and that they violate the provision of the Virginia Constitution prohibiting "damage" to property as a result of a public use without compensation to the property owner.

Under the facts and circumstances here, we find Owners' claims against NSR preempted as applied under 49 U.S.C. § 10501(b). In reaching this conclusion, we are guided by the purpose and intent of section 10501(b), see infra n.14, and Congress' instruction that we seek "to ensure the development and continuation of a sound rail transportation system . . ." 49 U.S.C. § 10101(4). First, it is undisputed that NSR is a rail carrier and that NSR's activity that Owners allege is damaging their property—operating freight trains over NSR's line near Owners' neighborhood—constitutes "transportation by rail carrier" subject to the Board's exclusive jurisdiction under § 10501(b). See 49 U.S.C. §§ 10102(5) & (9)(A). Moreover, the harms alleged by Owners directly result from NSR's rail operations. Subjecting NSR to claims based on the alleged byproducts (such as noise, vibration, and various discharges) of conventional and routine rail operations on the rail carrier's own property—which could be invoked by owners of property near operating rail lines anywhere—would unduly burden interstate commerce and significantly hinder NSR's ability to function as a rail carrier, amounting to impermissible state regulation of NSR's operations. Accordingly, Owners' claims against NSR are preempted under 49 U.S.C. § 10501(b). See, e.g., Pace v. CSX Transp., Inc., 613 F.3d 1066, 1069 (11th Cir. 2010) (nuisance claim seeking monetary damages from noise and smoke arising out of construction and use of a side track is preempted); Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (claims that rail cars blocked access to plaintiffs' property and that the side track allowed drainage from other properties to run off onto plaintiffs' property are preempted); Rushing v. Kansas City S. Ry. Co., 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001) (nuisance claim against a railroad for noise and vibration is preempted); Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (nuisance claim alleging that noise and smoke from rail cars unreasonably interfered with the use and enjoyment of plaintiff's property is preempted); Vill. of Ridgefield Park v. N.Y., Susquehanna & W. Ry., 750 A.2d 57, 67 (N.J. 2000) (state common law nuisance claims concerning noise and air pollution from railroad operations preempted); see also, Pejepsco Indus. Park, Inc. v. Maine Cent. R.R. Co., 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("[A]wards of damages pursuant to state tort claims may qualify as state 'regulation' when applied to restrict or burden a rail carrier's operations" and, thus, may be preempted.); Cities of Auburn & Kent, Wash.—Petition for Declaratory Order—Burlington N. R.R. Co., FD 33200, slip op. at 10 (STB served July 2, 1997) (where a state or

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( . . . continued)

*not* preempted, because the state court action would not unreasonably burden interstate commerce or interfere with rail transportation. See Buddy & Holley Hatcher—Petition for Declaratory Order, FD 35581, slip op. at 7 (STB served Sept. 21, 2012).

local law “could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted”).

Owners maintain that their claims are not preempted because, rather than asserting a common law nuisance theory, they are asserting “inverse condemnation” claims under Article I, § 11 of the Constitution of Virginia. Owners argue that in Mark Lange—Petition for Declaratory Order, FD 35037 (STB served Jan. 28, 2008) (Lange), the Board held that inverse condemnation claims are not preempted.<sup>11</sup> NSR responds that if the Board were to adopt Owners’ interpretation of Lange, the “‘inverse condemnation’ exception [would] swallow[] the entire preemption provision.”<sup>12</sup>

In Lange, a landowner (Lange) petitioned the Board for an order declaring that his state law claims against Wisconsin Central, Ltd. (WCL) were not preempted. Lange discovered, after having purchased a plot of land in Wisconsin, that a portion of his land was separated from the rest of it by a chain link fence owned by WCL. The Board held that Lange’s state law tort claims were preempted by § 10501(b). The Board went on, however, to note that Lange’s request in his state court action for compensation for “the land” “could be construed” as raising an inverse condemnation claim; the Board said it would “leave it to the Wisconsin state courts to determine under state law” whether Lange had, in fact, pleaded such a claim. Lange, slip op. at 4.

Lange, however, is significantly different, both factually and legally, from the present case. Lange involved an alleged actual, physical taking of property, and the Wisconsin law at issue, unlike Virginia’s constitutional provision, is limited to property “occupied”—not merely damaged—by a person possessing condemnation power. Compare Wis. Stat. § 32.10 with Va. Const. art I, § 11. Moreover, while the Board in Lange left the door open to a court finding that an inverse condemnation claim survived preemption based on the specific facts and circumstances of the case, the Board did not find that all inverse condemnation claims survive the ICA’s preemption provisions. Nor did the Board conclude that an action brought under a state inverse condemnation provision cannot be a form of regulation by the state and thus preempted under § 10501(b). In Lange, the railroad had placed a fence across a piece of property to which Mr. Lange asserted he held legal title. The railroad had been using the fenced-off property, which was adjacent to the railroad’s line, since before Mr. Lange acquired it. See Lange, slip op. at 1. Based on the record presented to it in that case, the Board determined that, had Mr. Lange raised an inverse condemnation claim as to that property, it would not necessarily have been preempted. Id. at 4; see also CSX, slip op. at 4-5 (discussing as applied preemption test); E. Alabama, slip op. at 4 (same); see also Allegheny Valley R.R. Co. – Pet. for Declaratory Order – William Fiore, FD 35388, slip op. at 3-4 (STB served April 21, 2011) (finding that the determination of the size and width of a railroad easement should be decided by a state court in proceedings involving potential inverse condemnation).

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<sup>11</sup> See Owners’ Brief in Opp’n 5-8.

<sup>12</sup> NSR’s Rebuttal Statement 1.

Here, in contrast to Lange, there is no allegation of an actual occupation of Owners' property for the conduct of railroad operations. Examining the "true nature of [Owners'] action[s]," Katz v. Cisneros, 16 F.3d 1204, 1207 (Fed. Cir. 1994), it is clear that Owners are seeking damages sounding in nuisance related to NSR's normal rail operations on NSR's own property—the types of claims that, as discussed above, have long been held preempted under § 10501(b) by both the Board and the courts. It would be inconsistent with the Board and court precedent discussed above<sup>13</sup> for states to make an end run around the well-settled federal preemption of nuisance claims involving the effects of normal rail operations by applying their inverse condemnation statutes to property that has suffered some damage from adjacent rail operations; such action would be no less a state law remedy preempted under § 10501(b) than are common law tort claims that seek compensation for the same alleged harms. To find otherwise would allow states to circumvent the purpose and intent of § 10501(b).<sup>14</sup> Given the true nature of Owners' claims here—state law claims for alleged damages caused by the byproducts of conventional rail operations, we find that these claims are preempted regardless of whether they are brought as nuisance claims or under a "property damage" provision contained in Virginia's inverse condemnation clause, because such claims unreasonably burden interstate commerce and unreasonably interfere with railroad operations. Absent federal preemption, all railroads on the interstate rail network could be subject to inverse condemnation actions from adjacent landowners throughout the country based upon the effects of normal railroad operations. The broad preemption provisions in § 10501(b) foreclose such an unreasonable result.

Lastly, Owners suggest that if their inverse condemnation claims are preempted by § 10501(b), then a railroad's use of a state eminent domain condemnation statute to acquire the property needed for rail transportation activities would also be preempted because such actions "are opposite sides of the same eminent domain coin."<sup>15</sup> As explained above, however, the relevant inquiry for as-applied preemption under § 10501(b) is whether the application of state or local regulation would unreasonably burden interstate commerce or unreasonably interfere with railroad operations. Under that fact-based inquiry, some condemnation proceedings are preempted and others are not – regardless of whether the condemnation proceedings are undertaken as railroad eminent domain proceedings or as landowner inverse condemnation actions.

For all of these reasons, we find that Owners' state court claims are federally preempted.

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

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<sup>13</sup> See cases cited supra pp. 4-5.

<sup>14</sup> "The purpose of this express federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce." Lange, slip op. at 3 (citing H.R. Rep. No. 104-311, at 95-96 (1995)).

<sup>15</sup> Owners' Brief in Opp'n 7-8.

It is ordered:

1. NSR's request for a declaratory order is granted to the extent discussed above.
2. This decision is effective on the date of service.

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