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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34599

MID-AMERICA LOCOMOTIVE AND CAR REPAIR, INC.–
PETITION FOR DECLARATORY ORDER

Decided: June 6, 2005

By petition filed October 26, 2004, Mid-America Locomotive and Car Repair, Inc. (Mid-America or petitioner) asks the Board to institute a declaratory order proceeding to consider questions referred to the Board by the Vandenburg County Superior Court (Superior Court) in Mid-America Locomotive & Car Repair, Inc. v. Indiana Southwestern Railway Co., Cause No. 82D03-0308-PL-3530. In that proceeding, Mid-America filed a quiet title action against Indiana Southwestern Railway Co. (ISW), alleging that, pursuant to state law, it has a prescriptive easement or "way of necessity" to use a gravel access road located on ISW's property that runs adjacent to ISW's rail line.

In its court complaint, Mid-America alleged that the road is the only way to access its car repair facilities at Harwood Yard in Evansville, IN.[1] Mid-America claims that, when it acquired the Harwood Yard property from the Evansville Terminal Company (ETC) in 1996, it also acquired an easement or way of necessity to use the road running over ETC's adjoining property to access its facilities from Allens Lane in Evansville.

According to Mid-America, it initially used ETC for rail service and has used the road to access its facilities since 1986, when it began operating the car repair facilities at Harwood Yard. In 2000, ETC sold to ISW a 17.2-mile rail line from Evansville to Poseyville, including the

[1] The record indicates that ISW's property consists of a 66-foot-wide strip of land containing the rail line and the adjacent gravel access road. The rail line generally runs at or near the center of the 66-foot-wide strip. The access road is approximately 15 feet wide and runs parallel to the railroad track for the entire length of ISW's property.

access road and track adjacent to Mid-America's property.[2] Mid-America claims that the conveyance from ETC to ISW of the rail line and the adjacent property was subject to the existing easement or way of necessity permitting Mid-America to continue using the access road.

Mid-America continued to operate the car repair facilities, but subsequently transferred its rail yard property to Harwood Properties and entered into a lease with Ohio Valley Railroad Company (OVR) to provide common carrier service over its track from the connection with ISW to its car repair facilities at Harwood Yard. See Ohio Valley Railroad Company–Acquisition and Operation Exemption–Harwood Properties, Inc., STB Finance Docket No. 34486 (STB served Apr. 22, 2004, Sept. 28, 2004, and Feb. 23, 2005).[3]

According to petitioner, the road has been used since the 1970's to access facilities of predecessor railroads and the car repair facilities at Harwood Yard. Evidently, the road is used by Mid-America's employees, by the company pick-up truck during business hours and by United Parcel Service or Federal Express vehicles making pick-ups or deliveries at Mid-America. The road also is used by OVR employees to access the carrier's facilities at Harwood Yard. Mid-America contends that its use of the access road has not unreasonably obstructed or interfered with operations on the rail line. Mid-America states that it has unsuccessfully attempted to arrange alternate access to its facilities. The record indicates that portions of the access road also are located on property owned by the Evansville Sewage Utility and industries identified as Howell/McFadden/Kemper Group. Mid-America states that it has reached agreements with the other owners to use the road, but has been unable to reach agreement with ISW.

In an order issued on August 11, 2004, the Superior Court referred two questions to the Board:

> 1. Should a determination as to whether [Mid-America's] claim to a prescriptive easement or way of necessity, under state law, over real estate owned by [ISW], a common carrier railroad, is preempted by Federal law, specifically, the [ICC]

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[2] ISW operates the rail line pursuant to a notice of exemption. See Indiana Southwestern Railway Co.–Acquisition and Operation Exemption–Evansville Terminal Company, Inc. and AB Rail Investments, Inc., STB Finance Docket No. 33859 (STB served Mar. 28, 2000).

[3] The Board recently ordered ISW to restore a switch necessary for OVR to connect to the national rail system and to provide rail service to Mid-America's car repair facilities through interchange with ISW. See Ohio Valley Railroad Company–Petition to Restore Switch Connection and Other Relief, STB Finance Docket No. 34608 (STB served Feb. 23, 2005). On February 25, 2005, ISW notified the Board that it had restored the switch connection at Harwood Yard between ISW and OVR.

Termination Act, 49 U.S.C. 10101 et seq., be made by this Court, or is such a determination to be made by the . . . Board?

2. If the preemption issue is to be determined by this Court, what factual determinations are to be made and what legal standards are to be applied by this Court in making such a determination?

In its petition, Mid-America asserts that its use of the road to access its facilities will not unreasonably interfere with or burden ISW's common carrier operations and that there is no overriding federal interest here to justify preempting state property law. It points out that the dispute involves issues of state property law and that the Board usually leaves such issues to state courts to resolve.

In a letter filed on December 15, 2004, ISW indicates that it has no objections to the institution of a declaratory order proceeding by the Board, but believes that the Board's decision in City of Lincoln–Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 12, 2004)[4] (City of Lincoln) (finding a city's plans to condemn a 20-foot-wide strip in the outer portion of a railroad's 100-foot-wide right-of-way for use as a recreational trail preempted), is dispositive. ISW further asserts that a permanent easement, if imposed by the Board, would pose safety and security threats to its railroad operations.

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. However several of the Board's rulings in declaratory order cases have noted that issues involving the federal preemption provision contained in 49 U.S.C. 10501(b) can be decided either by the Board or the courts in the first instance. Here, there is no need for the Board to institute a proceeding. Instead, the Board will assist the court by summarizing existing law with regard to the section 10501(b) preemption.

Section 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers," and the term "transportation" is defined broadly by the Interstate Commerce Act, at 49 U.S.C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. The Board and court decisions that have addressed the Federal preemption provision contained in section 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), mostly have involved situations where state or local governments seek either to regulate when

[4] Pending judicial review in City of Lincoln v. STB, No. 04-3453 (8th Cir. filed Oct. 8, 2004).

and where railroads can conduct their rail transportation activities,[5] or to acquire railroad track or right-of-way that is needed for rail operations under eminent domain powers.[6] The cases are clear that section 10501(b) categorically blocks two broad types of state and local actions: actions by states or localities that would impinge on matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines—or any form of permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct its rail operations or to proceed with activities that the Board has authorized. See CSX Transportation, Inc.–Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005), pet. for reconsideration denied (STB served May 3, 2005) (CSXT), and cases cited therein.

For state or local actions that are not per se preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation. E.g., DM&E (revisions to state eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads); Ayer (explaining the types of measures that might be permissible, i.e., conditions requiring railroads to share their plans with the community, or to comply with local codes for electrical, building, fire, and plumbing).

While the section 10501(b) preemption is broad and far-reaching, there are, of course, limits. See CSXT. 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) (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

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[5] See, e.g., 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), rev'd solely on attys' fee issue, 338 F.3d 12 (1st Cir. 2003) (Ayer); Auburn & Kent, WA–Pet. for Declar. Order–Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd, City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998); Green Mountain R.R. v. State of Vermont, No. 04-0366 (2d Cir. Apr. 14, 2005); Freiburg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001).

[6] See, e.g., City of Lincoln; Maumee & Western Railroad Corporation and RMW Ventures, LLC–Petition for Declaratory Order STB Finance Docket No. 34354 (STB served Mar. 2, 2004) (Maumee); Dakota, Minnesota & Eastern R.R. v. South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002) aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (DM&E); Wisconsin Central LTD. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000).

Order—Hudson County, NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (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.

Here, the circumstances differ from most other preemption cases addressing the reach of section 10501(b), in that there is no governmental entity seeking to regulate railroad transportation or rail-related activities. Rather, the dispute involves whether generally applicable state property law governing prescriptive easements or ways of necessity on railroad-owned property adjacent to a rail line is preempted by section 10501(b). While ISW asserts that future use of the access road by Mid-America would interfere with its operations and that, as a result, the application of state property law is federally preempted, the threshold issue is whether Mid-America obtained a prescriptive easement under state law when it acquired the Harwood Yard property, or whether it otherwise qualifies for access to the road under state law. At bottom, Mid-America is seeking a determination from the Superior Court that it has a right under state property law to continue using an access road that has been used for more than 30 years as the only means to access the now land-locked rail car repair facilities at Harwood Yard. Given these circumstances, it is reasonable for the Superior Court to interpret any state or local property interests applicable to this property and to resolve the parties' dispute in the first instance. See Maumee.

If the Superior Court determines that, under state property law, Mid-America is entitled to use the subject road to access its facilities at Harwood Yard, then the Superior Court would need to address the impact, if any, of the section 10501(b) preemption. In doing so, the Superior Court should be guided by the precedent set forth in CSXT and the other Board and court precedent interpreting section 10501(b) to determine whether continued use of the road would unreasonably interfere with ISW's railroad operations.

Accordingly, petitioner's request for institution of a declaratory order proceeding will be denied.

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

It is ordered:

1. Mid-America's request for a declaratory order is denied.

2. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary