

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35950

NORFOLK SOUTHERN RAILWAY CO.—PETITION FOR DECLARATORY ORDER

Digest:¹ Norfolk Southern Railway Company requests an order declaring that claims of an adjacent property owner seeking to recover damages against the railroad related to flooding are preempted by federal law. The Board denies the petition for declaratory order but provides guidance on the question of preemption.

Decided: February 24, 2016

Norfolk Southern Railway Company (NSR) seeks an order from the Board declaring that the state court claims filed by Dugan Professional Building and Rental, LLC, Doctors Dugan and Dugan, LLC, and James L. Dugan II (collectively Dugan), seeking to recover damages from and an injunction against NSR under Tennessee common law theories of negligence, nuisance, and trespass, are preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act, as broadened in the ICC Termination Act of 1995 (ICCTA). For the reasons discussed below, the Board denies NSR's petition but provides guidance on the question of preemption.

BACKGROUND

Dugan filed a lawsuit July 31, 2014, in the Circuit Court in McMinn County, Tenn., in which it claims that it experienced substantial flood damage caused by the alleged negligence of NSR when it discarded and failed to remove clear cut vegetation debris from its drainage ditch and culvert, causing the debris to accumulate in its drainage infrastructure. Dugan is seeking monetary damages and an injunction requiring NSR to repair, reconstruct, and redirect its drainage culvert and drainage infrastructure.

On August 3, 2015, NSR filed a petition for declaratory order asking the Board to find that the state court claims filed by Dugan to recover damages from NSR under Tennessee common law theories of negligence, nuisance, and trespass are preempted by 49 U.S.C. § 10501(b). Dugan replied on August 18, 2015, arguing that its state claims are not federally preempted.

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).

The Dugan property (the Property) is adjacent to, and downhill from, a railroad mainline owned and operated by NSR. The Property has had a dental practice office located on it since 1978. (Dugan Reply 3.) Dugan alleges that in 2012, NSR clear cut vegetation located above and on the opposite side of the rail line from the Property and negligently discarded the debris, allowing logs, tree limbs, and other materials to clog the drainage infrastructure that extends to and under the Property. (*Id.*) Dugan asserts that in 2013, the dental office building on the Property experienced substantial flooding and that Dugan made repeated requests to NSR to alleviate the problem, but that NSR refused to take any action. (*Id.* at 4.) According to Dugan, the Property incurred substantial damages, including damage to the building's foundation, ductwork, and heating and air conditioning. (*Id.* at 5.)

Dugan argues that the state court action in this case involves issues of disputed fact, and the Board should decline to issue a declaratory order and allow the preemption determination to be made by the Circuit Court for McMinn County, Tennessee. (*Id.* at 7.) Alternatively, Dugan argues that, if the Board decides to issue a declaratory order, it should find the claims are not preempted by 49 U.S.C. § 10501(b) because the claims do not unreasonably burden interstate commerce or interfere with rail transportation. (*Id.*) Rather, Dugan states that its claims seek redress for tortious acts by a landowner who happens to be a railroad company. (*Id.* at 9.) Dugan asserts that Emerson v. Kansas City Southern Railway, 503 F.3d 1126, 1133 (10th Cir. 2007) controls the analysis here. (Dugan Reply 11.) In Emerson, the plaintiff landowners sued a railroad alleging trespass, nuisance, negligence, and other state law claims after the railroad allegedly discarded railroad ties and vegetation debris in a drainage ditch, which resulted in flooding on the landowner's adjacent property. Emerson, 503 F.3d at 1133. The court held that § 10501(b) did not preempt the landowners' claims involving the disposal of railroad ties and debris into the drainage ditch. *Id.* at 1131.

NSR acknowledges that in May 2012 and July 2012, it clear cut vegetation and conducted related clearance of vegetation debris in order to remove vegetation that could impair track safety, track visibility, and overall rail operations. (NSR Pet. for Declaratory Order 2-3.) In its petition for declaratory order, NSR explains that vegetation control is required by Tennessee state laws and Federal Railroad Administration safety regulations. (*Id.* at 3.) NSR argues that Dugan's alleged damages stem from NSR's vegetation control and NSR's design and maintenance of its drainage culvert, which are necessary and integral aspects of NSR's rail operations. (*Id.* at 5.) NSR states that the Board has exclusive jurisdiction over the operation of rail lines and as a result, § 10501(b) preempts Dugan's claims against NSR. (*Id.*)

NSR attempts to distinguish Dugan's claims from those in Emerson on grounds that the carrier in that case did not establish that proper disposal of railroad ties was a necessary part of its rail operations. (NSR Pet. for Declaratory Order 10.) In contrast, NSR states, it has a transportation-related interest as a rail carrier in vegetation control, especially with respect to the heavy vegetation that surrounds this portion of its track, as too much vegetation can have a direct effect on safety and operations. (*Id.* at 11.) Because there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance,

we will deny NSR's petition for a declaratory order, but will provide general guidance on the issue of preemption.²

DISCUSSION AND CONCLUSIONS

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances, are categorically, or *per se*, preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. Id. at 1031; CSX Transp.—Pet. for Declaratory Order, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005). State and local actions also may 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. (Franks), 593 F.3d 404, 414 (5th Cir. 2010) (en banc).

The Board and the courts have found that state law claims pertaining to the design, construction, and maintenance of an active rail line (including the embankment and associated drainage structures that support the rail line) are preempted. See Thomas Tubbs—Pet. for Declaratory Order (Tubbs), FD 35792 (STB served Oct. 31, 2014), aff'd—F.3d—, 2015 WL 9465907 (8th Cir., Dec. 28, 2015), and cases cited therein. In Tubbs, after a full factual record had been developed in the state court, the Board found that the actions of a rail carrier in designing, constructing, and maintaining an active rail line are clearly part of “transportation by rail carriers” and therefore subject to the Board's exclusive jurisdiction and entitled to federal preemption under § 10501(b). Tubbs, slip op. at 4. But if the Tubbses' claims instead involved the discarding of railroad ties and vegetation debris into a drainage ditch they would not necessarily have been preempted. See Tubbs, 2015 WL 9465907 at *4 (agreeing with the way the Board had distinguished Emerson).

Therefore, if Dugan's state law claims are based on harms stemming directly from the actions of NS in designing, constructing, and maintaining an active rail line (including the

² On October 6, 2015, NSR filed a supplement notifying the Board that on October 2, 2015, it filed a motion to stay the proceeding in state court pending a decision from the Board on the preemption issue. NSR filed a second supplement on November 23, 2015, to notify the Board that the court held a hearing on the motion on October 29, 2015, and that the court decided not to hold any further hearing or trial on Dugan's claims until the court receives the Board's “direction and directive.” (NSR Suppl. 2, Nov. 23, 2015.) NSR explains that although the court “technically denied” NSR's motion to stay, it granted a de facto stay for the purposes of this Board proceeding by asking the Board to determine whether Dugan's claims against NSR are preempted. (Id. at 1-2.) On December 7, 2015, Dugan also filed a supplement to notify the Board that the state court denied NSR's motion to stay. (Dugan Suppl. 1, Dec. 7, 2015.)

associated drainage structure), they would be preempted, as those subject areas are within the Board's jurisdiction over rail transportation. Indeed, to the extent Dugan's claims involve the cutting and clearing of vegetation, which would be rail line maintenance facilitating the safe operation of trains, they would likely be preempted. However, if Dugan's claims against NSR involve actions that would generally not be considered part of rail line maintenance (e.g., the discarding of vegetation debris, see Emerson), they would not likely be considered part of rail transportation, and thus would not likely be preempted.

Questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005). In this case, because the matter is already pending in state court and there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance, we believe the state court is the appropriate place to determine the full nature and extent of Dugan's claims, and to apply the relevant Board and court precedent discussed above.

Accordingly, the Board denies NSR's petition for declaratory order.

It is ordered:

1. NSR's petition for a declaratory order is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

Although we are leaving the fact-finding to the court in this instance, the record raises the concern that NSR improperly disposed of the debris in the drainage ditch. If so, it would be another instance in, what to me, is the frustrating trend of railroads showing a disregard for how their actions affect those that live adjacent to their lines and in the communities that they serve. Even in instances where a railroad's actions are indisputably protected by Federal preemption, in my mind that does not excuse the carriers from exercising a higher degree of care where it is reasonable. It also troubles me when railroads are quick to use preemption as an excuse not to even listen to communities that have concerns about rail activities. I find it particularly frustrating when disputes result in litigation that might have been avoided had the carrier taken steps to minimize damage or engage the community, even if not legally bound to do so.

While railroads need and merit the protection that ICCTA preemption affords, in my view they also need to consider how their actions may impact neighbors when carrying out maintenance procedures and implementing design standards. Just because railroads are not required to do something because of preemption, it doesn't mean that they shouldn't do so.