

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35583

EASTERN ALABAMA RAILWAY LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision declares that the proposed condemnation of certain railroad property owned by Eastern Alabama Railway LLC by the Utilities Board of the City of Sylacauga, Ala., for underground water and sewer lines is not federally preempted.

Decided: March 8, 2012

On January 27, 2012, the Board instituted a proceeding to resolve a controversy between Eastern Alabama Railway LLC (EARLY), a Class III rail carrier, and the Utilities Board of the City of Sylacauga, Ala. (Utilities Board) regarding the proposed condemnation of certain EARLY property by the Utilities Board for underground water and sewer lines. EARLY requests that we declare that 49 U.S.C. § 10501(b) preempts the Utilities Board's proposed condemnation. We find that the proposed condemnation is not federally preempted.

BACKGROUND

On August 23, 2011, the Utilities Board filed a complaint for condemnation in the Probate Court of Talladega County, Ala., seeking to condemn an easement across EARLY's property for subterranean water and sewer lines.² The underground pipelines that are the subject of the condemnation action would be located beneath an existing public street crossing of EARLY's track at Hill Road on the southwest side of Sylacauga, Ala.³

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 EARLY Pet. at 17. The Utilities Board seeks to acquire two pipeline easements, one for a water line and one for a sewer line. The water line already exists and was included in the condemnation action in order to formally establish the Utilities Board's legal right to use the water line. Utils. Bd. Reply to Pet. at 7. The sewer line is a proposed line that would require construction. The proposed line would provide sewer service to a roofing products company called IKO. Util. Bd. Reply to Pet. at 6. Evidently, IKO will also be a shipper using EARLY's rail service. EARLY Appeal at 3.

³ Utils. Bd. Reply to Pet. at 6, 17; Utils. Bd. Reply Statement at 5.

On September 2, 2011, EARY filed a notice of removal to the United States District Court for the Northern District of Alabama, and subsequently, on November 15, 2011, it filed a motion to refer that case to the Board.⁴ This matter was referred to the Board by the court on November 17, 2011. Utils. Bd. of City of Sylacauga v. E. Ala. Ry., No. 1:11-CV-03192 (N.D. Ala. Nov. 17, 2011).

On December 16, 2011, EARY filed a petition for declaratory order, asking the Board to institute a proceeding and find that the proposed condemnation is federally preempted. On January 19, 2012, the Utilities Board filed its reply, arguing that the condemnation of an easement for an existing underground water line and a new underground sewer line is not preempted, and requesting that the Board take expedited action due to the impending startup of operations at IKO's new manufacturing facility in Sylacauga.

By decision served on January 27, 2012, the Board, through the Acting Director of the Office of Proceedings, instituted a proceeding to resolve the controversy at issue and, because the Utilities Board reported that IKO has requested sewer service by April 1, 2012,⁵ adopted an expedited procedural schedule.⁶ EARY submitted its opening statement to the Board on February 9, 2012, the Utilities Board submitted its reply on February 13, 2012, and EARY filed its rebuttal statement on February 21, 2012.⁷

EARY argues that the Utilities Board's condemnation action is preempted by 49 U.S.C. § 10501(b) for four reasons. First, EARY contends that certain broad language in the complaint for condemnation filed in the Probate Court for Talladega County will give the Utilities Board the right to go across and over (as well as under) the active railroad operations.⁸ Second, EARY

⁴ EARY Pet. at 25-33, 46-48.

⁵ Util. Bd. Reply to Pet. at 6.

⁶ EARY subsequently filed an appeal of that decision pursuant to 49 C.F.R. § 1011.6(b), arguing that the Board's setting of an expedited schedule with no provision for discovery was a clear error of judgment and would create manifest injustice. The Board denied EARY's appeal by decision served on February 22, 2012.

⁷ Additionally, Paducah & Louisville Railway, Inc. (P&L) filed comments on February 15, 2012, the R.J. Corman Railroad Group (Corman Group) filed comments on February 23, 2012, and the American Short Line and Regional Railroad Association (ASLRRRA) filed comments on February 29, 2012. Both P&L and the Corman Group state that they do not take a position on the merits or ultimate outcome of this particular case, but indicate that they have experienced similar disputes with utility companies regarding the installation of utility crossings. ASLRRRA states that it is concerned about these types of condemnations by utility companies. The Utilities Board responded to P&L and the Corman Group by letters filed on February 21, 2012, and February 23, 2012, respectively. These comments are not directly applicable to the specific dispute before us in this case, and, as such, we will not address them here.

⁸ EARY Opening Statement at 10, 13.

argues that the actual construction of the sewer line will unreasonably interfere with EARY's railroad operations.⁹ Third, EARY is concerned that the Utilities Board will construct substandard pipes under its railroad line.¹⁰ Last, EARY asserts that, based on the Utilities Board's past actions, it is reasonable to expect that the Utilities Board's actions during construction and maintenance of the lines will impede railroad operations or safety.¹¹

The Utilities Board counters that the proposed condemnation is not preempted by federal law. It argues that the "on, across, under and over" language in the complaint for condemnation is standard terminology, and that the complaint for condemnation makes clear that the "uses and purposes" for which the easements are to be condemned are limited to "subterranean water and sewer pipes."¹² Further, the Utilities Board argues that the evidence shows that its construction and operation of the underground water and sewer lines will not unreasonably interfere with rail operations or pose undue safety risks.

PRELIMINARY MATTERS

On February 22, 2012, the Utilities Board filed a motion to strike certain portions of EARY's rebuttal evidence. The Utilities Board argues that EARY improperly submitted new evidence, proffered irrelevant and immaterial information, and asserted the incorrect legal standard applicable to this proceeding. On February 24, 2012, EARY submitted a letter in response and, on February 29, 2012, it filed a formal reply in opposition to the Utilities Board's motion to strike.

We will deny the Utilities Board's motion to strike. Taking into consideration the evidence proffered by EARY, we are nevertheless concluding that the condemnation of the underground pipelines is not preempted by federal law. Moreover, EARY is entitled to offer arguments regarding the legal standard applicable to this proceeding. Therefore, the Utilities Board will not be prejudiced by the admission of the arguments and evidence.

Additionally, in its reply statement, the Utilities Board argues that we should not give any weight to EARY's factual assertions because they are not verified.¹³ EARY responds that its opening statement does not need to be verified because it was signed by an attorney.¹⁴ Our rules permit us to rely on pleadings signed by a party's counsel, and it is within our discretion to determine how much weight to accord evidence submitted by parties or their counsel. 49 C.F.R. § 1104.4(a); Norfolk S. Ry.—Pet. for Exemption—In Baltimore City & Baltimore Cnty., Md., AB 290 (Sub-No. 311X), slip op. at 10 (STB served Jan. 27, 2012). Affording equal weight to

⁹ Id. at 13, 15-16.

¹⁰ Id. at 10, 15.

¹¹ Id. at 13, 15.

¹² Utils. Bd. Reply Statement at 15.

¹³ Id. at 18.

¹⁴ EARY Rebuttal Statement at 4 n.4.

the pleadings of both parties, we are concluding, as explained below, that the condemnation of the underground pipelines is not preempted by federal law.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, we have discretion to issue a declaratory order to terminate a controversy or to remove uncertainty in a matter related to our subject matter jurisdiction. As indicated, we instituted a proceeding in this matter and received evidence and arguments from the parties.

Generally, the proponent of an agency order bears the burden of proof. 5 U.S.C. § 556(d). EARY argues that, because this proceeding is by court referral, the Utilities Board should bear the burden of proof on the issue of preemption, as it was the moving party for the condemnation.¹⁵ EARY, however, is the proponent of federal preemption as an affirmative defense to the condemnation action, and so it is EARY that bears the burden in the court from which this proceeding was referred. See Fifth Third Bank v. CSX Corp., 415 F.3d 741, 745 (7th Cir. 2005). It is therefore unnecessary here to decide whether § 556(d) governs proceedings by court referral, as EARY bears the burden of proof in this proceeding because it is the proponent of both the declaratory order and preemption as an affirmative defense.

The Interstate Commerce Act, as revised, vests in the Board broad jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). The preemption provision in the Board’s governing statute states 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 49 U.S.C. § 10501(b), two broad categories of state regulation are wholly preempted for rail 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 intrude into matters that are regulated by the Board. 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, which involves a fact-specific determination. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); Borough of Riverdale—Pet. for Declaratory Order, FD 35299, slip op. at 2 (STB served Aug. 5, 2010).

Condemnation of railroad property can be a form of regulation by the state and thus could be preempted under 49 U.S.C. § 10501(b). Dakota, Minn., & E. R.R. v. South Dakota, 236 F.Supp.2d 989, 1005-08 (D.S.D. 2002), aff’d in part, vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004); Wis. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); see also Norfolk S. Ry. & Ala. Great S. R.R.—Pet. for Declaratory Order, FD 35196, slip op. at 3 (STB served Mar. 1, 2010). This is not to say, however, that all eminent

¹⁵ Id. at 8.

domain actions against railroad property are impermissible. “Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.” Maumee & W. R.R. & RMW Ventures, LLC—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004).

EARY argues that the proposed condemnation should be preempted because it will impede rail operations and pose undue safety risks.¹⁶ EARY first contends that, because the Utilities Board seeks a right-of-way “on, across, under and over” EARY’s tracks in the complaint for condemnation, the Utilities Board will claim that it has the right to go “across and over” the tracks.¹⁷ We are not persuaded, however, that the language of the condemnation action will lead to unreasonable interference with rail operations or pose undue safety risks. The language in the complaint is limited by the uses and purposes of the condemnation, which are clearly stated in the complaint as being for “the construction, operation and maintenance of subterranean water and sewer pipes, lines[,] facilities and other appliances necessary and convenient in connection therewith.”¹⁸ As the Utilities Board points out, the complaint would not give it unlimited or unfettered access to the EARY right-of-way because such access is not necessary or appropriate to the operation or maintenance of the underground water and sewer pipelines.¹⁹

We are similarly not persuaded by EARY’s second argument, namely, that the construction of the sewer line underneath Hill Road would interfere with rail operations or pose undue safety risks. EARY’s rail operations generally consist of one train, traveling at 10 miles per hour, leaving Sylacauga at 8:00 p.m. each weeknight and then returning to its own yard before daylight the following morning, as well as one round-trip hi-rail vehicle inspection per day.²⁰ The Utilities Board states that the sewer line would be constructed using a tunnel boring method, and that no surface occupancy is anticipated other than to surface-paint the underground pipes.²¹ A similar method was used in constructing two underground pipelines across EARY’s right-of-way in June 2010, and the record indicates that this construction was completed in two days and there was no interference with rail operations during that time.²² Moreover, the Utilities Board asserts that it is willing to cooperate with EARY in scheduling its construction work.²³ Specifically, the Utilities Board states:

¹⁶ Id. at 9.

¹⁷ EARY Opening Statement at 5, 10, 13; EARY Rebuttal Statement at 5.

¹⁸ EARY Opening Statement, Ex. F (emphasis added). The complaint for condemnation also prays that “an order will be made . . . condemning to the uses and purposes of [the Utilities Board], all the rights, authority and power sought and described herein” Id.

¹⁹ Utils. Bd. Reply to Pet. at 14 n.13.

²⁰ Utils. Bd. Reply to Pet. at 15, 17; Utils. Bd. Reply Statement at 4-5.

²¹ Utils. Bd. Reply to Pet. at 2-3, 16-17.

²² Id. at 6, 15, Ex. 3.

²³ Id. at 3, 17.

As already stated by the Utilities Board, and in a spirit of cooperation and to ensure safe construction and operation, the Utilities Board will follow specifications of the American Railway Engineering and Maintenance-of-Way Association ("AREMA") as a minimum, will follow reasonable safety precautions of EARY, and will cooperate with EARY to establish a reasonable timeline for construction. See Reply to Petition at 17.²⁴

Nevertheless, EARY contends that, if the Utilities Board is not required to seek input from EARY on its construction schedule, EARY will not be able to “plan around the construction thereby creating the least disruption to its operations.”²⁵ As the above representation indicates, however, the Utilities Board has already agreed to cooperate with EARY to establish a reasonable timeline for construction. Moreover, our concern here is whether the proposed construction would *unreasonably* interfere with EARY’s operations. Based on these facts, we conclude that the proposed construction will not.

Additionally, EARY raises concerns about the construction standards that are to be used, stating that it “expects the Utilities Board to [construct substandard pipes under the railroad line] since it does not believe it must comply with EARY’s engineering requirements.”²⁶ Again, the Utilities Board has already represented that it will follow appropriate industry standards, a representation that we will accord due weight. In addition, while we are not in a position to declare what is or is not standard with respect to engineering requirements of subterranean pipelines in this proceeding, based on the record here, we believe state law is adequate to address any concerns by EARY with respect to the construction standards of these pipelines.

Lastly, EARY argues that, because the Utilities Board’s past actions demonstrate a disregard for railroad operations and safety, it expects the Utilities Board to engage in self-help when maintaining the lines in the future and to act with a similar disregard for railroad operations and safety. EARY cites several incidents between April 2009 and November 2011 as evidencing the Utilities Board’s propensity to impede rail operations and disregard railroad safety. Although the parties in their pleadings have engaged in a back-and-forth in terms of how to properly characterize these events, we need not resolve the factual controversy surrounding them. The types of sporadic incidents involving maintenance or construction described in the record do not rise to the level of unreasonably interfering with rail operations or creating an undue safety risk such that they would implicate federal preemption.²⁷

In sum, we conclude that, based on the record before us, the Utilities Board’s condemnation of EARY’s property for two underground pipelines will not unreasonably burden

²⁴ Utils. Bd. Reply Statement at 12.

²⁵ EARY Opening Statement at 16.

²⁶ Id. at 10.

²⁷ The parties also dispute the amount of compensation for the easement, but compensation is not relevant to whether the proposed condemnation is preempted here.

or interfere with rail operations or pose undue safety risks. Accordingly, the proposed condemnation is not preempted by federal law.

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

It is ordered:

1. The Utilities Board's motion to strike is denied.
2. This request for a declaratory order is granted, but, as discussed above, the condemnation is not preempted by federal law.
3. This decision is effective on its service date.
4. Copies of this decision will be mailed to:

The Honorable Robert B. Propst
United States District Court for the Northern District of Alabama
Eastern Division
Hugo L. Black United States Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

Re: Civil Action No. 1:11-CV-03192

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