

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35779

GRAFTON & UPTON RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision declares that preclearance regulations and other requirements of the Town of Grafton, Mass., that would prohibit or unreasonably interfere with the proposed construction and operation of an additional rail yard and storage tracks in the town are preempted by federal law.

Decided: January 22, 2014

On October 25, 2013, Grafton & Upton Railroad Company (G&U) filed a petition seeking issuance of a declaratory order to clarify that state and local permitting and preclearance statutes and regulations are preempted pursuant to 49 U.S.C. § 10501(b) in connection with its construction of an additional rail yard and storage tracks on a five-acre parcel (Parcel) in the Town of Grafton, Mass. (Grafton or the Town), at North Grafton.² The American Short Line and Regional Railroad Association filed a letter in support of the petition on November 6, 2013. Grafton filed a reply on November 7, 2013, asking the Board to dismiss the petition as moot, and G&U filed a response on November 19, 2013.³ For the reasons discussed below, we find that G&U's construction project is preempted from the state and local permitting and preclearance statutes, regulations, and other requirements that would unreasonably interfere with G&U's ability to construct and operate the railroad facility at issue here.

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 In addition, G&U requests the immediate entry of an interim order authorizing it to continue with its construction and use of the rail yard pending a final decision on the scope of federal preemption for the additional yard and storage tracks. Given our decision here, G&U's request for an interim order is moot.

³ On December 5, 2013, CSX Transportation, Inc. (CSXT), also filed a letter in support of G&U's petition. In reply, Grafton filed a letter requesting that CSXT's letter be rejected as late-filed and a comment reiterating its argument that the petition is moot and should be dismissed. These filings will be accepted in the interest of a more complete record.

BACKGROUND

G&U owns and operates approximately 16.5-miles of rail line (Line) extending between its connection with a CSXT line in North Grafton, and another CSXT line in Milford, Mass. The Parcel is located in North Grafton immediately adjacent to G&U's Line and existing rail yard. Noting that all of its rail traffic is interchanged with CSXT at North Grafton, G&U claims that its existing rail yard, consisting of three interchange tracks, is no longer able to keep up with the increasing traffic volume. According to G&U, its existing rail yard has become a choke point and additional tracks are needed to support existing and future operations. Specifically, G&U claims that approximately 200 rail cars were interchanged in 2010 and that approximately 2,000 rail cars would be interchanged in 2013. G&U projects that 3,500 rail cars will be interchanged in 2014, excluding the tank cars that would move to and from a proposed liquefied petroleum gas (propane) transload facility that G&U also seeks to construct on the Parcel.⁴ In addition to the increasing traffic volume, G&U asserts that up to three days of rail cars must be stored at the yard at any given time because it is not unusual for CSXT to provide interchange service only three times a week. Moreover, G&U contends that the yard must be used to handle CSXT's inbound and outbound trains, test air brakes, switch out bad order cars, and hold empty cars to meet the needs of existing and future customers. G&U states that the yard will be used exclusively to facilitate the interchange of rail cars with CSXT and the movement of rail cars to and from customers on G&U's line, and that there are no plans to use the yard for transloading or any other activities besides temporarily parking rail cars before or after interchange. See Petition at 13.

The new rail yard, according to G&U, would have 4 tracks initially, totaling approximately 2,300 linear feet and accommodating 35-40 rail cars, and sufficient space to build additional track as necessary. G&U claims that it does not own any other property along its right-of-way where additional track could be constructed. G&U states that excavation and earth removal to grade the Parcel to the level of its existing yard and prepare it for the construction of track began and was accelerated in an effort to complete the project prior to the onset of winter, if possible.

G&U claims that it was contacted by Grafton on October 7, 2013, about the ongoing excavation work, and it responded, assuring Grafton that the work was unrelated to the proposed transload facility at issue in FD 35752. Since then, according to G&U: (1) Grafton's building inspector inspected the Parcel at G&U's invitation; (2) G&U voluntarily discontinued excavation activities, apparently in response to Grafton's alleged threat to take legal action; (3) Grafton informed G&U that the excavation activity was not permitted because the Parcel was within the

⁴ In a separate decision also served today, the Board instituted a declaratory order proceeding at G&U's request to determine whether state and local permitting and preclearance statutes and regulations are preempted in connection with G&U's construction and operation of a propane transload facility also on the Parcel. See Grafton & Upton R.R.—Pet. for Decl. Order, FD 35752 (STB served Jan. 27, 2014).

Town's Water Supply Protection Overlay District, which, Grafton asserts, is intended to protect the Town's aquifer, and because G&U had not obtained a necessary permit or complied with the Town's earth removal bylaw, which requires the filing of excavation plans and groundwater elevations; and (4) Grafton requested additional information specified in its excavation bylaw, including a soil analysis and an engineer's opinion as to the potential impact on the aquifer, and asked that G&U test the water in the vicinity of the Parcel and pay the costs to clean dust off the homes impacted by the earth removal activities.

G&U alleges that Grafton threatened to enter a cease and desist order and/or seek injunctive relief in court to block construction of the new rail yard if G&U did not comply with these requests and requirements. G&U claims that it responded to Grafton in a letter dated October 18, 2013, explaining its position that federal preemption applied and that its excavation and construction activities were undertaken with appropriate safeguards to protect nearby streams and ponds, the nearest of which is approximately 100 feet away from the proposed yard. In addition, G&U noted that a natural 10 to 15-foot berm had been left in place to separate the proposed yard from water resources, and that a representative from the Massachusetts Department of Environmental Protection (MDEP) had visited the site and did not raise concerns about adverse effects on nearby water resources. Further, G&U explained that a hydrologist had inspected the site and concluded in a written report that the entire Parcel is not within Grafton's aquifer or water shed protection area, and that the site will be in compliance with a Grafton bylaw that requires a five-foot separation between surface ground water and the final grade of property.

In its reply, Grafton contends that G&U's petition for declaratory order should be dismissed as moot because there is no dispute or controversy between the parties. Grafton states that it will not take any action to enjoin the construction project and that this information was communicated to G&U on October 18, 2013. Grafton acknowledges that "it has no right to assert any preclearance requirements against G&U where the railroad is undertaking an activity that constitutes transportation." Grafton reply at 3. Rather, Grafton claims it is only acting pursuant to its right, notwithstanding federal preemption, to require the rail carrier to notify it, and provide it with a site plan and some level of information, about an undertaking for which a non-railroad entity would require a permit.

Asserting that Grafton's reply is tantamount to a motion to dismiss, G&U filed a reply requesting that the motion be rejected and that the Board issue a declaratory order affirming that federal preemption applies to the construction and use of the proposed rail yard. G&U states that it and the Town are continuing to discuss the potential applicability of, and compliance with, regulations Grafton argues are within the Town's police powers, but that the issues raised by the Town have not yet been resolved. Accordingly, G&U asks the Board to retain oversight over the proceeding out of concern that Grafton might eventually use local health and safety regulations as a pretext to prevent completion of the construction of the proposed rail yard. Grafton then filed a reply requesting that CSXT's letter be rejected and a comment reiterating the Town's position that the petition should be dismissed as moot.

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.⁵ We have received evidence and argument from the parties on the reach of federal preemption in connection with the proposed rail yard. While Grafton acknowledges that its preclearance regulations and permitting requirements are federally preempted, the parties have not resolved the limits of federal preemption as it pertains to the Parcel (e.g., what type of state and local statutes, regulations, and other requirements are not preempted, and what information G&U may reasonably be expected to provide to the Town.) Therefore, we will issue this declaratory order to provide guidance to the parties to the extent the record before us permits.

The Interstate Commerce 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 Act, as revised 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). The statute defines “transportation” expansively to encompass any property, facility, structure or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 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). Section 10501(b) expressly 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.” Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Bos. & Me. Corp.—Pet. For Decl. Order, FD 35749 (STB served July 19, 2013); H.R. Rep. No. 104-311, at 95-96 (1995).

In interpreting the reach of § 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. Thus, 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, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. v.

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

Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation,” while permitting “the continued application of laws having a more remote or incidental effect on rail transportation”); Joint Pet. for Decl. Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), reconsideration denied (STB served Oct. 5, 2001); Borough of Riverdale—Pet. for Decl. Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Decl. Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999).

State and local regulation, including environmental regulation, has been found to be preempted in those cases where the Board has licensing authority over rail carrier activities, as well as cases where, as here, it does not.⁶ G&U’s construction and use of the Parcel for rail carrier operations does not require our licensing authority because the construction of ancillary tracks and facilities is excepted from licensing by 49 U.S.C. § 10906.⁷ Nonetheless, the express statutory preemption of § 10501(b) applies here to prevent Grafton from imposing environmental and land use regulations and permitting requirements that could be used to deny or unreasonably delay the rail carrier’s ability to use its property for railroad operations. See Green Mountain, 404 F.3d at 643; Ayer, 5 S.T.B. at 507.

It should be noted, however, that not all state and local regulations that affect rail carriers are preempted. State and local regulation is appropriate 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. Thus, the Board has stated that it is reasonable for states and localities to request rail carriers to: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. See Ayer, 5 S.T.B. at 511. 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 Decl. Order, FD 34662, slip op. at 5 (STB served May 3, 2005). In short, states and towns may exercise their traditional police powers over the development of rail property to the extent

⁶ See, e.g., Green Mountain, 404 F.3d at 642; Freiberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2002).

⁷ Under 49 U.S.C. § 10906, “The Board does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”

that the regulations “protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.” Green Mountain, 404 F.3d at 643.

Finally, the Board and the courts have concluded that federal environmental statutes such as the Clean Air Act, the Clean Water Act (CWA), and the Safe Drinking Water Act are outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads. Assn. of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1098 (9th Cir. 2010); Ayer, 5 S.T.B. at 508. Thus, the lack of a specific environmental remedy at the Board or at the local level as to construction projects over which the Board lacks licensing power does not mean that there are no environmental remedies under other federal laws. See, e.g., United States v. St. Mary’s Ry. W, LLC, CV 513-28 (D. Ga. Dec. 4, 2013)) (§ 10501(b) does not preempt the permitting requirements of the CWA for activities that are part of rail transportation).

Applying these well-established preemption principles here, we find that Grafton’s preclearance regulations and permitting requirements are categorically preempted by § 10501(b) in connection with G&U’s construction and operation of an additional rail yard and storage tracks on the Parcel. Grafton, however, may request information from G&U and G&U’s cooperation so long as the Town’s actions do not unreasonably burden interstate commerce and/or hold up or defeat G&U’s right to construct and operate the new rail yard. We note, however, that G&U already appears to be providing the kind of access and information that, in cases such as Ayer, we have found reasonable for a locality to require. The Town has raised concerns about water quality with G&U and suggests that these concerns should be addressed here. But the record shows that the MDEP, an expert agency, evidently raised no concerns about the rail carrier’s plans after a visit to the Parcel and that G&U’s hydrologist found no water quality or aquifer concerns. We encourage the parties to work together to resolve any remaining water quality issues here, consistent with Board and court precedent interpreting § 10501(b), and any future issues that may arise in connection with the construction and operation of the new rail yard.

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

It is ordered:

1. CSXT’s letter in support of G&U’s petition and Grafton’s reply are accepted into the record.
2. The petition for declaratory order is granted to the extent discussed above.
3. This decision is effective on the date of service.

By the Board, Chairman Elliott and Vice Chairman Begeman.