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SERVICE DATE – SEPTEMBER 10, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35625

CITY OF MILWAUKIE—PETITION FOR DECLARATORY ORDER

Decided: September 7, 2012

The City of Milwaukie, Or. (the City), filed a petition for declaratory order on June 29, 2012 (Petition), requesting that the Board declare that 49 U.S.C. § 10501(b) does not preempt certain municipal regulations regarding the scattering of rubbish and the blocking of vehicular and pedestrian traffic along the border of the Oregon Pacific Railroad Company's (OPRC) train maintenance facility and in a public right-of-way. For the reasons discussed below, the request to institute a declaratory order proceeding will be granted.

BACKGROUND

On June 29, 2012, the City filed a petition for declaratory order. On July 3, 2012, OPRC filed a letter with the Board noting its opposition to the Petition and requesting 30 days to prepare its case in opposition should the Board institute a proceeding. OPRC's letter included no substantive support for why it opposed the Petition and, to date, OPRC has not submitted anything more to the Board.

The Petition requests that the Board find the City is not preempted from enforcing two municipal regulations that the City claims protect the public and ensure the public's health and safety. The regulations prohibit (1) scattering rubbish, and (2) obstructing vehicular and pedestrian traffic. Milwaukie, Or. Mun. Code §§ 8.04.120, 10.44.030 (2011). According to the City, OPRC owns a train maintenance facility on approximately 0.78 acres within the City. The City claims that along the border of OPRC's property, and in the public right of way, OPRC stores rails, railroad ties, piles of gravel, and other large "debris." The City argues that this debris is a hazard for drivers, pedestrians, and cyclists and violates the two above regulations; the City has cited OPRC at least twice.

The City argues that it should be permitted to enforce the regulations for the safety of its citizens and that there is no reason why the regulations should be preempted by federal law. It claims the ordinances are of general applicability, are not directed at or limited to railroads operating within the City, and are not directed at OPRC's use of its own property. It further claims that the regulations are within its traditional police power and that their enforcement will not affect transportation by a rail carrier.

In a letter to the City, OPRC claims “[m]unicipal interference with railroad operations is pre-empted by USC 10501 (b); therefore, the City has no jurisdiction over these matter [sic] as they apply to Interstate Commerce.”<sup>1</sup> The record shows that OPRC has contested the second set of citations in the Municipal Court for the City of Milwaukie and that a trial was set for July 23, 2012. No update has been filed with the Board since the scheduled trial date. OPRC has also indicated it intends to appeal the fine for the first set of citations.

## 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 a controversy or remove uncertainty in a matter related to the Board’s subject matter jurisdiction.<sup>2</sup> Questions of preemption are often fact specific determinations, particularly when addressing whether land use restrictions interfere with railroad operations.<sup>3</sup>

The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, 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).

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of pleadings. This will ensure that the record is complete on the issue of whether the activities occurring in the right-of-way are part of “transportation” by a “rail carrier” and therefore could be preempted by § 10501(b).

The Board will consider this matter under the modified procedure rules at 49 C.F.R. pt. 1112. The City’s detailed Petition will serve as its opening statement. Replies will be due 30

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<sup>1</sup> Petition, V.S. Salyers, Exh. I.

<sup>2</sup> See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); see also Intercity Transp. Co. v. United States, 737 F.2d 103, 106-07 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989).

<sup>3</sup> See Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999) (“whether a particular land use restriction interferes with interstate commerce is a fact-bound question”).

days from the date of service of this decision. The City's rebuttal will be due 45 days from the service date of this decision.

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

It is ordered:

1. A declaratory order proceeding is instituted.
2. Replies are due by October 10, 2012.
3. The City's rebuttal statement is due by October 25, 2012.
4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.