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SERVICE DATE FEBRUARY 22, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35536

LOUISVILLE & INDIANA RAILROAD—PETITION  
FOR DECLARATORY ORDER

Decided: February 22, 2012

Louisville & Indiana Railroad (L&I), a class III rail carrier, has filed a petition requesting that the Board institute a declaratory order proceeding to resolve a dispute between L&I and the City of Jeffersonville, Ind. (the City). The dispute centers on the City's plans to extend an existing road, which include construction of an at-grade crossing over tracks owned by L&I. As discussed below, a declaratory order proceeding is being instituted to resolve certain questions related to the dispute.

BACKGROUND

In March 2010, the City petitioned the Indiana Department of Transportation Rail Office (INDOT) for approval of an at-grade crossing over L&I's railway tracks.<sup>1</sup> This petition was approved by INDOT on January 18, 2011. Subsequently, on February 4, 2011, L&I filed with INDOT a petition for review and stay of effectiveness of the order approving the crossing. There, L&I argued, *inter alia*, that INDOT's jurisdiction to approve the crossing at the proposed location was preempted under federal law. On June 24, 2011, INDOT issued an order affirming its approval of the City's petition. In the order, INDOT stated that it had considered only L&I's petition on the merits, as it was not qualified to make a legal determination on the jurisdictional issue.

On July 20, 2011, L&I filed the petition to institute a declaratory order that currently is before the Board. In its petition, L&I asks the Board to institute a declaratory order proceeding to address whether the at-grade crossing is preempted under federal law. According to L&I, the proposed road would bisect L&I's railroad property, which is the only parcel of land in the area available to L&I for use as a transload site or rail yard. L&I states that it is currently considering

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<sup>1</sup> L&I asserts that the City filed the petition with INDOT on March 17, 2010, whereas the City asserts that it petitioned INDOT on March 5, 2010.

plans to develop and utilize that property as a marshaling and cargo transfer yard, and has expended effort toward that end. The proposed road and crossing at its current location would, it asserts, effectively prevent development of the marshaling and cargo transfer yard, or any other efforts to develop the property for railroad transportation purposes, and would unreasonably interfere with its current and future railroad operations. L&I has therefore offered an alternate location for the crossing that, according to L&I, would allow a road to cross its railroad property without interfering with rail operations. As such, L&I asks the Board to institute a declaratory order proceeding and to declare that INDOT's approval of the crossing at the current location is preempted by 49 U.S.C. § 10501(b).

On August 12, 2011, the City filed its response.<sup>2</sup> According to the City, the proposed at-grade crossing is part of a project to extend an existing north-south route through an area which currently has no effective north-south corridor. The City argues that INDOT's approval of the crossing at its current location is not preempted by federal law because the crossing would not unreasonably interfere with current or future rail operations. Specifically, the City argues that the crossing would not unreasonably interfere with current operations because rail traffic on L&I's tracks is minimal (ten trains per week at an approximate speed of ten miles per hour). With respect to L&I's future rail operations, the City claims that L&I has not provided any evidence to demonstrate that the railroad's future plans are more than mere speculation. Additionally, with respect to L&I's proposed alternate route, the City argues that it would not meet the purposes of the road extension and would negate the City's intention of creating a through corridor. Thus, the City argues that approval of the crossing at the current location is not preempted.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. It is appropriate here to institute a declaratory order proceeding to provide clarification on the question presented: whether and to what extent federal law preempts INDOT's approval of the at-grade crossing over L&I's railroad tracks.

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<sup>2</sup> The City filed a petition to intervene as a party in this case, with its response to the petition for a declaratory order proceeding attached as an exhibit. The City's petition will be granted. The Board typically accepts filings in response to petitions for declaratory order proceedings without requiring an intervention request. Although the City's response was filed three days after the 20-day deadline, see 49 C.F.R. § 1104.13(a), the Board will accept the City's late filing as no party will be prejudiced thereby.

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). This jurisdiction covers railroad tracks, including the tracks located at the sites of crossings with public or private roads. 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 § 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, if they would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-specific determination. See Borough of Riverdale—Petition for Declaratory Order, FD 35299, slip op. at 2 (STB served Aug. 5, 2010).

In the present case, the Board must therefore determine whether the proposed at-grade crossing would unreasonably burden or interfere with rail transportation, which involves a fact-specific inquiry. The existing record in this case, however, is insufficient for the Board to make that determination. Pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board will therefore institute a proceeding to resolve the controversy here. The Board will consider this matter under the modified procedure rules at 49 C.F.R. part 1112.

At the outset, however, the Board believes that a meeting between L&I and the City, facilitated by Board staff, could be beneficial. The Board believes that it is in the best interests of all parties to this controversy to explore options that may help to resolve this dispute. Therefore, the parties will be contacted by Board staff to establish an acceptable meeting date.<sup>3</sup> The meeting will be treated as confidential, and Board staff who participate in this meeting will not participate in any decision-making process.

L&I requests expedited handling of this case and proposes a 55-day procedural schedule. The City also requests an expedited briefing schedule, although it neither specifically objects to nor concurs in the proposed schedule set forth by L&I. The procedural schedule submitted by L&I is similar to those adopted by the Board in other decisions instituting a declaratory order proceeding. The Board will therefore adopt L&I’s proposed procedural schedule, with one

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<sup>3</sup> INDOT will also be contacted to ascertain whether it wishes to participate in the meeting.

modification. In order to allow time for the parties to meet pursuant to this decision, petitioner's opening statement will be due 45 days from the date this decision is served. Respondent's reply statement will be due 20 days after petitioner's opening statement, with petitioner's rebuttal statement due 15 days after that.

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

It is ordered:

1. The City's petition to intervene is granted.
2. A declaratory order proceeding is instituted.
3. A meeting of the parties will be convened at the Board's headquarters at 395 E Street, S.W., Washington, DC. INDOT will also be contacted to ascertain whether it wishes to participate in the meeting.
4. A procedural schedule is adopted, as discussed above.
5. This decision is effective on its service date.

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