

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35832

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> This decision denies CSX Transportation, Inc.'s petition to reconsider a Board decision served on July 31, 2015, because CSXT has failed to present new evidence, demonstrate substantially changed circumstances, or show material error. This decision does, however, clarify certain elements of the July 31, 2015 decision in response to CSXT's August 20, 2015 petition for reconsideration.

Decided: February 24, 2016

CSX Transportation, Inc. (CSXT), requests that the Board reconsider, or clarify, the July 31, 2015 decision (July 31 Decision) denying CSXT's petition for a declaratory order. For the reasons discussed below, the Board denies CSXT's petition for reconsideration, but clarifies the July 31 Decision in response to CSXT's August 20, 2015 petition for reconsideration and/or clarification.

BACKGROUND

HAMP, Inc. (HAMP), owner of Holly Acres Mobile Home Park (Holly Acres), filed a lawsuit in the Circuit Court of Prince William County, Va., seeking compensation for property damage allegedly caused by CSXT in connection with a flood that occurred in September 2011. In response to the complaint, CSXT filed a motion to stay the state court action to allow it to file a petition for declaratory order with the Board. (HAMP Reply Ex. 2.) On June 3, 2014, CSXT filed a petition for declaratory order requesting that the Board find that the state court claims filed by HAMP alleging negligence, nuisance, trespass, inverse condemnation, and violation of various sections of the Virginia Code, were preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act, as broadened in the ICC Termination Act of 1995 (ICCTA). HAMP replied on June 23, 2014, arguing that its state law claims were not federally preempted.

Holly Acres is located in Prince William County, Va., adjacent to the CSXT rail line at issue (the Line). In its petition for declaratory order, CSXT stated that it had maintained the Line

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<sup>1</sup> 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).

on which it operates trains in the area across a 40-foot tall and 150-foot wide berm that crosses Marumsc Creek (the Creek). (CSXT Pet. for Declaratory Order 1.) CSXT also stated that it constructed a 12-foot concrete arch culvert through the berm to permit the flow of the Creek. (*Id.* at 1-2.) HAMP alleged that CSXT had not maintained the culvert, which HAMP believed had resulted in the culvert's filling up with sediment, rocks, and debris. (HAMP Reply 3.) HAMP further alleged that CSXT had not widened the culvert, nor had it built additional tunnels through the berm to support the natural flow of the Creek. (*Id.*) The parties both acknowledged that on September 8 and 9, 2011, Tropical Storm Lee produced significant rainfall in Prince William County. (CSXT Pet. for Declaratory Order 2; HAMP Reply 4.) HAMP alleged that, as a result of CSXT's failure to maintain the berm and culvert or widen the culvert, the natural flow of water from the Creek was impeded, which in turn led to flooding that destroyed much of Holly Acre's infrastructure, water and sewer pipes, concrete pad sites, and 67 mobile homes. (HAMP Reply 4.)

In its petition for declaratory order, CSXT asserted that HAMP's claims are preempted by § 10501(b), because the HAMP complaint essentially asks the state court to regulate CSXT's railroad activities directly, including the design and operation of its culverts and bridges. (CSXT Pet. for Declaratory Order 3.) In response, HAMP argued that its claims are not preempted, because § 10501(b) does not strip state and local governments of certain police powers to protect public health and safety, and consequently that its state law claims can proceed. (HAMP Reply 8-9.)

In the July 31 Decision, the Board denied CSXT's petition for a declaratory order but provided guidance on the question of preemption. The July 31 Decision referenced a number of Board and court cases finding state and local attempts to regulate the design, construction, and maintenance of rail lines and rail transportation facilities federally preempted. The Board then explained that whether § 10501(b) preempts HAMP's claims of negligence, trespass, nuisance, and inverse condemnation under Virginia state law, as well as its request for a declaratory judgment under Virginia Code §§ 8.01-184 and 187, will likely depend on how the facts and circumstances – as determined by the state court – fit within the case law discussed in the July 31 Decision. *See, e.g., 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).

In its petition for reconsideration and/or clarification, CSXT argues that the Board's decision in *Tubbs* is controlling and thus requires a holding that HAMP's state law claims are categorically preempted. CSXT argues that the Board has “muddied the waters” and the controlling *Tubbs* precedent by suggesting that federal preemption “will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above.” Finally, CSXT asserts that the Board is uniquely qualified to judge issues of federal preemption arising in the railroad industry, and thus the Board should not defer to the state court. (CSXT Pet. for Reconsideration/Clarification 4.) CSXT requests that the Board clarify that *Tubbs* is controlling precedent; otherwise, CSXT argues, the July 31 Decision could be read to suggest that the question of whether HAMP's claims are preempted should be

determined by an “as applied” analysis rather than “categorically” preempted. (CSXT Pet. for Reconsideration/Clarification 2, 8-9.)<sup>2</sup>

In its opposition to CSXT’s petition for reconsideration and/or clarification filed on September 14, 2015, HAMP argues that Tubbs is factually distinguishable from the instant case and that the trial court can ably determine whether HAMP’s claims are preempted by § 10501(b).<sup>3</sup> (HAMP Opposition 4-8.) Additionally, HAMP argues that the Board properly made no determination in the July 31 Decision regarding whether this matter is categorically preempted or preempted as applied. (HAMP Opposition 8-10.)

Finally, CSXT filed a letter on September 19, 2015, in response to HAMP’s opposition. CSXT argues that, in asserting that Tubbs does not control, HAMP illustrates the uncertainty created when the Board did not find HAMP’s claims categorically preempted. For the reasons discussed below, we will deny CSXT’s petition to the extent that it seeks reconsideration, but will clarify the July 31 Decision.

#### DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass’n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not grant reconsideration. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int’l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

CSXT does not present new evidence or changed circumstances, and even if its petition could be construed as raising a claim of material error, it has not shown that the July 31 Decision was in error. However, due to the apparent confusion that has arisen over the Board’s holding in that decision, we will provide clarification.

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<sup>2</sup> The distinction between “categorical” and “as applied” preemption is discussed in more detail below.

<sup>3</sup> Although HAMP’s opposition to CSXT’s petition for reconsideration and/or clarification was not timely filed, CSXT did not oppose the filing, and, in the interest of a complete record, the Board accepts HAMP’s opposition.

As stated in the July 31 Decision, state or local action is categorically, or *per se*, preempted under § 10501(b) if it intrudes upon 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. For example, the Board and the courts have found that state and local permitting or preclearance requirements, including building permits and zoning ordinances, are categorically preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Otherwise, state and local authorities could deny or unreasonably delay a railroad's 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., Inc.—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,” meaning the actions are not preempted by their nature (like zoning and preclearance requirements) but may still be preempted if they are being carried out in a manner that has 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). For example, state condemnations that are applied to railroad property are not categorically preempted, but may be preempted “as applied” if the condemnation unreasonably interferes with rail transportation.<sup>4</sup>

Contrary to CSXT's argument, the Board did not state in the July 31 Decision that the determination as to whether HAMP's claims are preempted should be determined by an “as applied” as opposed to “categorically preempted” analysis. Instead, the Board provided guidance and explained that whether § 10501(b) preempts HAMP's claims of negligence, trespass, nuisance, and inverse condemnation under Virginia state law, as well as its request for a declaratory judgment under Virginia Code §§ 8.01-184 and 187, will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed in the July 31 Decision, including Tubbs. In the July 31 Decision, the Board decided that it was appropriate to leave the case with the state court, as the determination on preemption turned on a factual dispute that was already pending in the state court.

Here, CSXT suggests that there was no reason to allow the case to proceed in the state court because such fact-finding is only needed in the context of “as applied” preemption, while HAMP's state law action is categorically preempted, which does not require any factual determinations. We clarify here that an examination of the facts and circumstances is not only necessary when determining whether claims are preempted “as applied,” but may also be necessary in certain cases where we are determining whether categorical preemption applies; such as those where state or local actions concerning matters under the Board's jurisdiction may

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<sup>4</sup> Compare E. Ala. Ry.—Pet. for Dec. Order, FD 35583 (STB served Mar. 9, 2012) (finding condemnation action is not preempted), with City of Lincoln—Pet. for Dec. Order, FD 34425 (STB served Aug. 12, 2004), aff'd 414 F.3d 858 (8th Cir. 2005) (finding condemnation action is preempted).

have the effect of managing or governing rail transportation.<sup>5</sup> Thus, in order to determine whether a party's claims are preempted—regardless of whether the defense is characterized as categorical or as applied preemption—the Board or a court must know the basic facts about the party's claims. Those basic facts enable the Board or a court to determine whether the state or local action falls within a category subject to categorical preemption, or is subject to as applied preemption, or is not subject to preemption at all.

For example, in Tubbs, the parties had completed discovery at the state court level before the Board's proceeding, and the facts concerning the Tubbses' claims had been fully developed. It was evident from the record before the Board in Tubbs that the state law claims at issue were based on harms stemming directly from the actions of a rail carrier in designing, constructing, and maintaining an active rail line (which includes the embankment and associated drainage structures). The Board found that, whether reviewed under an as applied or a categorical approach, those sorts of activities clearly are part of "transportation by rail carriers" and therefore subject to the Board's exclusive jurisdiction under § 10501(b)—and that if those claims were allowed to proceed, they would have the effect of managing or governing rail transportation. Tubbs, slip op. at 4.<sup>6</sup> However, if the Tubbses had shown that, as part of its "maintenance" program, the carrier's practice was to discard debris into a drainage ditch, then it is possible that neither form of preemption would have applied. See Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1130 (10th Cir. 2007) (finding that the railroad's act of discarding old ties and vegetation debris into a drainage ditch was not part of rail transportation under § 10102(9)); see also Tubbs, 2015 WL 9465907 at \*4 (distinguishing Emerson); Tubbs, slip op. at 5.

Here, unlike in Tubbs, the facts have not been fully developed and, as we stated in the July 31 Decision, we believe that the state court is an appropriate forum to engage in such fact-finding. Once the facts have been developed, the state court – relying on the guidance that the Board has provided in the July 31 Decision – should be well-equipped to determine whether the claims here challenge activities that are subject to categorical preemption or as applied preemption. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014) (questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts applying existing precedent); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005). Depending on the state

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<sup>5</sup> The courts and the Board have found that state or local actions that "have the effect of managing or governing," and not merely incidentally affecting, rail transportation, are expressly or categorically preempted under § 10501(b). See Wichita Terminal Ass'n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). However, cases involving state or local permitting and zoning laws that regulate rail transportation do not typically require any examination of the facts, as any state and local permitting can be used to deny or unreasonably delay rail transportation. City of Auburn, 154 F.3d at 1033.

<sup>6</sup> The Eighth Circuit recently affirmed the Board's decision in Tubbs, but only on the grounds of as applied preemption. 2015 WL 9465907 at \*3-4. The court did not address the Board's determination that categorical preemption may have applied as well.

court's determination of the facts, it is possible that Tubbs may be controlling. Specifically, if the state court determines that HAMP's state law claims are based on harms stemming directly from the actions of CSXT in designing, constructing, and maintaining an active rail line (including the associated drainage structures), they would be preempted, as those subject areas are within the Board's jurisdiction over rail transportation.

In conclusion, CSXT has not presented new evidence or changed circumstances, and we find no material error warranting reconsideration of the July 31 Decision. Thus we will deny CSXT's request to reconsider the July 31 Decision.

It is ordered:

1. CSXT's petition for reconsideration is denied.
2. The July 31 Decision is clarified as discussed above.
3. This decision is effective on its date of service.

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