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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36148

ADRIAN & BLISSFIELD RAIL ROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Digest:[1] Adrian & Blissfield Rail Road Company requests a declaratory order that the initiation of a Michigan state court condemnation proceeding by Consumers Energy Company is preempted under 49 U.S.C. § 10501(b). In this decision, the Board denies the petition for declaratory order but provides guidance on the question of preemption for the court and the parties.

Decided: January 30, 2018

On October 30, 2017, Adrian & Blissfield Rail Road Company (ADBF) filed a petition for declaratory order seeking a determination that a complaint filed in Consumers Energy Company v. Adrian & Blissfield Rail Road Company, Case No. 16-5626-CC (State Complaint), by Consumers Energy Company (Consumers), in the Circuit Court in Lenawee County, Mich., is preempted under 49 U.S.C. § 10501(b). In the State Complaint, Consumers seeks to exercise its power of eminent domain under the Michigan Uniform Condemnation Procedures Act, MCL 213.51, et seq., and MCL 486.252, to acquire an approximately 2.5-mile non-exclusive easement over ADBF's property to maintain electrical power lines and support poles that have been in place along ADBF's right-of-way since 1996. Consumers filed its complaint after negotiations with ADBF for a permanent easement were unsuccessful.

As explained below, the Board and courts have concurrent jurisdiction to determine whether state law claims are preempted under § 10501(b). Because this dispute is currently pending before a state court and the court has not referred any issues to the Board, the Board will deny ADBF's petition. The Board, however, will provide guidance on the preemption issue for the court and the parties.

BACKGROUND

ADBF owns and operates approximately 18.91 route miles of railroad track in and through Lenawee County, Mich. (ADBF Pet., V.S. Dobronski ¶ 2.) In 2000, ADBF acquired the property relevant to this proceeding from the Michigan Department of Transportation

[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).

(MDOT). See Adrian & Blissfield Rail Road—Acquis. Exemption—Mich. Dep't of Transp., FD 33938 (STB served Nov. 3, 2000). At that time, and continuing until 2016, there was a 2.5 mile-long easement over the property that MDOT had leased to Consumers in 1996 for a term of 20 years (1996 Lease). (ADBF Pet., Ex. A.) The 1996 Lease required Consumers to pay a one-time fee of $12,500 for the property rights. (Id.)

Consumers is a Michigan corporation and regulated public utility. Pursuant to the 1996 Lease, Consumers' College Park and Solvay power lines run over ADBF's property and provide service to approximately 10,000 customers in the City of Adrian and the surrounding communities in Lenawee County. (Consumers Reply 3-4.)

Before the 1996 Lease expired, the parties began negotiating for a permanent easement. (See ADBF Pet. 4-5; Consumers Reply 5.) According to ADBF, Consumers opened negotiations with a $100,000 offer. ADBF states that it countered with $660,000 and that Consumers responded with an offer of $600,000.[2] At that point, ADBF asserts, it "learned of a misrepresentation made by Consumers concerning the number of wires and voltages located on the utility poles . . . ." (ADBF Pet., V.S. Dobronski ¶ 9.) ADBF then offered Consumers a revocable license for $1,750,000. Consumers responded by offering $660,000 for a permanent easement. According to Consumers, ADBF did not respond to its last offer. (Consumers Reply, V.S. Parker 5.)

Consumers filed the State Complaint on July 9, 2016, seeking to establish a non-exclusive permanent easement under state law by eminent domain. Asserting federal question jurisdiction based on the position that Consumers' State Complaint is completely preempted by 49 U.S.C. § 10501(b), ADBF removed the case to the Federal District Court for the Eastern District of Michigan, Southern Division. On December 8, 2016, the federal court ruled that complete preemption did not apply and, therefore, remanded the case back to the state court.[3]

On October 30, 2017, ADBF filed its petition for a declaratory order before the Board. ADBF argues that if Consumers succeeds on its State Complaint, it will affect ADBF's present operations and proposed improvements. (ADBF Pet. 14.) Specifically, ADBF claims that any easement to Consumers will affect ADBF's ability to upgrade its engine house, limit its ability to transload, restrict the number of cars it can interchange, impede its desire to add additional tracks, and obstruct it from building a radio tower. (Id. at 14-16.) ADBF also states that the easement Consumers seeks would give Consumers "an absolute veto over how ADBF could use its right of way." (Id. at 5.)

[2] Consumers generally agrees with these facts, although it states that its opening offer was $116,000. (See generally Consumers Reply, V.S. Parker 4.)

[3] ADBF argues that the federal court went beyond the scope of review of a petition for removal by making findings beyond the issue of complete preemption. (ADBF Pet. 7.) Whether or not the federal court went beyond the scope of review is not relevant to our decision here.

Consumers replied on November 20, 2017, stating that the easement would require that it accommodate "existing or actually planned railroad operations" and that Consumers' access must "not interfere with the safety of [ADBF's] railroad operations." (Consumers Reply 7.) Consumers also states that the "sole discretion" language that ADBF characterizes as an absolute veto is subordinate to the other provisions in the easement concerning possible interference with railroad operations and that "it does not supersede Consumers' relocation obligations." (Id.) Thus, according to Consumers, the proposed easement does not unreasonably interfere with current or future railroad operations and is not preempted.

On November 29, 2017, ADBF filed a petition seeking leave to file a reply to a reply. Consumers opposed that petition on December 1, 2017. ADBF filed a letter supplementing its petition for leave to file on December 11, 2017, and Consumers opposed this supplement in a letter dated December 12, 2017.

On December 21, 2017, the American Short Line and Regional Railroad Association (ASLRRA) filed a petition to intervene pursuant to 49 C.F.R. § 1112.4, along with initial comments in support of ADBF's petition for a declaratory order. ASLRRA states that many short lines railroads are in a position like ADBF in that "their rights of way are crossed by or burdened with licenses, leases, and easements for utilities" that were often conveyed to larger railroads who formerly owned the properties. (ASLRRA Comment 3.) Forced easements through condemnation proceedings present "significant safety and operating issues for the railroad industry," according to ASLRRA. (Id. at 2.) Consumers filed a reply in opposition on January 10, 2018, claiming that ASLRRA should not be allowed to intervene because its comments broaden the issues before the Board. (Consumers Reply to Pet. to Intervene 1-2.) Consumers also argues that ASLRRA's position runs contrary to the law and that ASLRRA distorts the facts. (Id. at 2-4.)[4]

PRELIMINARY MATTERS

In its November 29, 2017 petition for leave to file a reply, ADBF argues that Consumers' reply contains "inaccurate assertions" and that ADBF should be allowed to reply "as a matter of simple fairness." (ADBF Pet. to File Reply 2-3.) Although ADBF does not include its reply with the petition, it outlines the arguments it intends to make on reply, all of which are rebuttals to the arguments made by Consumers and none of which are necessary to develop a more complete record. Thus, ADBF has not demonstrated good cause for waiving the Board's prohibition on replies to replies, 49 C.F.R. § 1104.13(c), and ABDF's petition for leave to file a reply will be denied. The Board will, likewise, reject ADBF's December 11, 2017 letter supplementing its petition to file a reply.

[4] By letter dated January 18, 2018, Representative Gary Glenn of the Michigan House of Representatives submitted a letter in support of ADBF's petition.

In addition, because the Board declines to institute a proceeding in this matter, ASLRRA's petition to intervene will be denied as moot. However, the Board will accept the ASLRRA's filing as a reply comment in support of ADBF's request for a declaratory order.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp., Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). For the reasons explained below, the Board will decline to exercise its discretionary authority to issue a declaratory order here.

The preemption issue in this case arises from a dispute that is currently before a Michigan state court. In the court case, Consumers seeks an easement pursuant to state condemnation law following unsuccessful contractual negotiations with ADBF. As the Board has explained, and contrary to ASLRRA's suggestion, issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and the courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. For Declaratory Order, FD 35819, slip op. at 4 (STB served Aug. 28, 2014). The Michigan court has not referred any issues to the Board, and it can address whether Consumers' condemnation claim for a non-exclusive easement is preempted by § 10501(b). See Ingredion Inc.—Pet. For Declaratory Order, FD 36014, slip op. at 3 (STB served Sept. 30, 2016) (denying request to issue a declaratory order on preemption where case was remanded back to state court based on the federal court's finding of no complete preemption); see also Brookhaven, FD 35819, slip op. at 4 (declining to address preemption issue where federal court had not referred the dispute to the Board). However, we offer the following guidance on preemption under § 10501(b) to the court and the parties to assist in the resolution of this dispute.

The Interstate Commerce Act, as amended by the ICC Termination Act of 1995, provides that the Board's jurisdiction over "transportation by rail carriers" is "exclusive" and 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).[5] The purpose of this express federal preemption is to prevent a patchwork of local and state regulations from unreasonably interfering with interstate commerce. See Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd 812 F.3d 1141 (8th Cir. 2015).

[5] The statute defines "transportation" expansively to encompass a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . 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, [or] a freight depot, yard [or] ground, used or necessary for transportation." 49 U.S.C. § 10102(6).

Under 49 U.S.C. § 10501(b), two broad categories of state regulation are categorically preempted with respect to 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. Even if state actions are not categorically preempted, they 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 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). State law action is preempted where it would unreasonably interfere with the railroad's current or future operations. See, e.g., City of Ozark, Ark.—Pet. For Declaratory Order, FD 36104, slip op. at 5 (STB served July 28, 2017), reconsideration denied, FD 36104 (STB served Dec. 8, 2017). Recent decisions have found that state-law condemnation cases involving railroad property are not categorically preempted but may be preempted "as applied" if the condemnation unreasonably interferes with rail transportation. CSX Transp., Inc.—Pet. for Declaratory Order, FD 35832, slip op. at 4 (STB served Feb. 29, 2016); see also Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675, 679-80 (7th Cir. 2011).

Section 10501(b) thus shields railroad property and operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served Mar. 1, 2010) (city condemnation action preempted when it would interfere with present and future rail operations); see also 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (adverse possession claim preempted where railroad needed the contested property to accommodate future rail transportation needs and 14500 Ltd. sought to exclude the railroad from the property); Jie Ao—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (adverse possession claim regarding rail-banked property preempted because such a seizure of railroad property would interfere with possible future reactivation and rail use). But § 10501(b) does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not have the effect of regulating rail transportation or unreasonably interfering with interstate commerce. See E. Ala. Ry.—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (condemnation action to install two underground pipelines is not preempted because no unreasonable interference with rail operations would result); see also Jie Ao, FD 35539, slip op. at 7-8 (prescriptive easement claim not necessarily preempted because the information before the Board showed that the easement could possibly coexist with rail operations); JGB Properties—Pet. for Declaratory Order, FD 35817 (STB served May 21, 2015) (state court findings concerning easements and other state property law matters not preempted because they did not unreasonably interfere with rail transportation). Indeed, "routine, non-conflicting uses, such as non-exclusive easements for at-grade 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..—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served March 3, 2004); see also Lincoln Lumber—Pet. For Declaratory Order, FD 34915, slip op. at 3 (STB

served Aug. 13, 2007) (permanent easement for operation of a storm sewer would not be preempted "unless it would prevent or unreasonably interfere with railroad operations").

Here, ADBF seeks a declaratory order finding that if the Michigan state court allows Consumers to condemn an easement over ADBF's property, that condemnation action would be preempted under § 10501(b), either categorically or as applied. (Pet. 9.) A condemnation action is generally evaluated under an "as applied" preemption analysis, looking to whether condemnation will unreasonably interfere with present or future rail operations based on the facts and circumstances of the case. See, e.g., Franks Inv. Co., 593 F.3d 404; E. Ala. Ry., FD 35539 (STB served June 6, 2012); Lincoln Lumber, FD 34915 (STB served Aug. 13, 2007); Maumee & W. R.R.., FD 34354 (STB served March 3, 2004).

ADBF argues that Consumers' taking would unreasonably interfere with its future operations; specifically, it claims that Consumers' taking would deprive ADBF "of control over its rail line and facilities and forever constrain its ability to expand its railroad and facilities without Consumers' approval." (Pet. 6; see also ASLRRA Comment 6 ("this easement . . . will permanently impede the railroad's ability to plan and build facilities it and this Board expect will support the fulfillment of its common carrier obligation.").) Consumers counters, however, that the easement it seeks would not cause unreasonable interference, as there is language that would still allow ADBF to conduct its operations and to make Consumers relocate its facilities if necessary for ADBF to conduct any future operations. (Consumers Reply 6-7.) The Michigan court can determine under the appropriate Board and court precedent whether the easement Consumers seeks would unreasonably interfere with ADBF's current or future operations and thus, whether there would be preemption under an as-applied analysis.[6]

For the reasons discussed above, ADBF's petition for a declaratory order will be denied.

It is ordered:

1. ADBF's petition to file a reply is denied.

2. ASLRRA's petition to intervene is denied as moot, but its comments are accepted as a reply to the petition for a declaratory order.

3. ABDF's petition for declaratory order is denied.

[6] ASLRRA also raises concerns that the forced taking of easements through condemnation can make it difficult for railroads to meet their common carrier obligations. The Board understands ASLRRA's concerns about the overall effect of state utility condemnations over railroad property. As previously stated, condemnation actions are generally evaluated on the facts and circumstances of each case to determine if condemnation would unreasonably interfere with present or future rail operations.

4. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.