

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35468

PINELAWN CEMETERY—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision explains that a portion of a rail yard remains part of the national rail system even if it is used by a lessee that is not a rail carrier unless the Board authorizes removal from its jurisdiction, notwithstanding the owner’s claim that the lease under which the rail property is operated has terminated.

Decided: April 20, 2015

On February 3, 2011, Pinelawn Cemetery (Pinelawn) filed a petition for declaratory order asking the Board to declare (1) that rail track in Farmingdale Yard, a rail facility located in Babylon, N.Y., is not now, nor has it ever been, a “railroad line” over which the Board has exclusive jurisdiction; and (2) that Pinelawn therefore need not seek Board permission to evict the New York and Atlantic Railway Company (NY&A) and The Long Island Rail Road Company (LIRR) (collectively, the Railroads) from the property under state law.² In its petition Pinelawn recognized that the track is ancillary track as described in 49 U.S.C. § 10906 (rather than a rail line), but it asserted that § 10906 track is not only excepted from the Board’s licensing authority,³ but is also entirely outside the Board’s jurisdiction.

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 general, a rail carrier must seek the Board’s authority to abandon a railroad line that is part of the interstate rail network. 49 U.S.C. § 10903. The Board has exclusive authority to determine whether such a line should be or has already been abandoned. See Thompson v. Tex. Mexican Ry., 328 U.S. 134, 144 (1946). A non-rail carrier may seek “adverse abandonment” authority under § 10903 when a railroad line is no longer needed or being used for rail purposes. See id. at 145; City of S. Bend v. STB, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

³ Although railroad lines are subject to licensing, a rail carrier does not need the Board’s prior approval to construct, operate, or abandon track that is excepted from licensing under § 10906. Such track, also known as ancillary track, is excepted from the Board’s approval requirements because it simply augments the capacity of existing mainline operations that have already been authorized. Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4-5 (STB served Feb. 19, 2014).

In March 2011, the United States Court of Appeals for the Second Circuit, in a decision concerning a related docket, determined (as other courts had previously) that § 10906 track, while excepted from licensing, is subject to the Board's general jurisdiction under 49 U.S.C. § 10501(b)(2).⁴ After that court ruling, Pinelawn amended its petition, and it now seeks a declaration that the subject track is private track rather than excepted § 10906 track, and that, for that reason, the Board has no jurisdiction over the Farmingdale Yard.⁵ NY&A and LIRR filed separate replies, and the New York Department of Transportation filed a verified statement. The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) filed letter-comments.⁶

Pinelawn filed its petitions because the New York State courts concluded that Pinelawn's efforts to evict the Railroads from the Yard, on the ground that the lease for the property had terminated, are preempted by the Interstate Commerce Act, and therefore Pinelawn must obtain Board permission before proceeding in state court. We agree with the New York courts that federal preemption under the Interstate Commerce Act applies to "excepted" railroad facilities that are used as part of the national rail system. We reject Pinelawn's argument that the Farmingdale Yard constitutes private track, as explained below. Therefore, if a state court were to determine that the lease has terminated, Pinelawn could not force the Railroads off the property unless it seeks and receives a ruling from the Board concluding that the property is not needed as part of the national rail system.

⁴ N.Y. & Atlantic Ry. v. STB, 635 F.3d 66 (2d Cir. 2011) (affirming *inter alia* Town of Babylon—Pet. for Declaratory Order (Coastal I), FD 35057 (STB served Feb. 1, 2008)). In Coastal I the Board determined that Coastal Distribution, LLC, which was conducting a transloading service on a portion of the Farmingdale Yard, was an independent operator and not subject to the Board's jurisdiction or entitled to federal preemption because it was not a rail carrier nor was it operating as the agent of or on behalf of one. As part of its ruling, however, the Board (and later the court) confirmed that excepted track, although not subject to entry and exit licensing, is subject to the Board's general jurisdiction.

⁵ Private track is non-jurisdictional track that is owned, constructed, and maintained by a shipper to serve its own facility. A person operating private track makes no holding out to serve other shippers. *See, e.g., B. Willis, C.P.A., Inc.—Pet. for Declaratory Order*, 6 S.T.B. 280 (2002), *aff'd sub nom., B. Willis v. STB*, 51 Fed. App'x 321 (D.C. Cir. 2002).

⁶ We will accept and consider all the filings in the interest of compiling a complete record. NY&A's motion to strike Pinelawn's response to certain late-filed comments thus will be denied.

BACKGROUND

The Farmingdale Yard consists of two parcels of land located in Farmingdale, N.Y. The history of rail operations at the yard spans over 100 years. In 1904, LIRR leased from Pinelawn a 2.1-acre tract of land directly adjacent to the LIRR mainline, and in 1905 Pinelawn leased another tract of land to LIRR—a 2.8-acre parcel immediately north of the first parcel. The leases had initial terms of 99 years with the right to renew for another 99 years. LIRR installed track on both of the parcels and used the yard to turn locomotives and rail cars and to transload freight between rail and trucks.

LIRR continued to operate the Farmingdale Yard until 1997, when NY&A acquired all of LIRR's freight operations, including its interest in the Yard, under a 20-year agreement with certain renewal rights. N.Y. & Atl. Ry.—Operation Exemption—Long Island Rail Road, FD 33300 (STB served Jan. 10, 1997). The agreement provides that all facilities and structures built on the Yard become and remain the property of LIRR, and that, after its termination, the exclusive use of the Yard (and the common carrier obligation to carry freight on LIRR's lines) will revert to LIRR.

In 2002, NY&A entered into an agreement with Coastal, under which Coastal would conduct transload operations at the Farmingdale Yard. Coastal began constructing a structure for the purpose of transloading construction and demolition debris on a portion of the Yard covered by the 1904 lease. On March 29, 2004, the Town of Babylon, N.Y., issued a stop-work order to Coastal, which had failed to obtain a zoning permit. The dispute moved to federal court, after which it was referred to the Board so that the Board could decide whether the Town's stop-work order was preempted. In Coastal I, the Board found that Coastal's transload operations were not within the Board's jurisdiction and thus did not qualify for federal preemption under 49 U.S.C. § 10501(b). The Board reasoned that, to come within the Board's jurisdiction, an activity must constitute "transportation" and must also be performed by or under the auspices of a "rail carrier." The Board concluded that, while Coastal's planned transloading operations fell within the broad definition of "transportation" at 49 U.S.C. § 10102(9)(A), the facts of the case failed to establish that Coastal's activities were being offered by or under the control of a rail carrier. Therefore, the Board found that Coastal's operations at the yard were fully subject to state and local regulation.⁷

Further litigation ensued in federal court, and again the matter came before the Board. In Town of Babylon—Petition for Declaratory Order, FD 35057 (STB served Oct. 16, 2009), the Board reviewed an amended agreement between NY&A and Coastal and determined that this agreement too failed to demonstrate that NY&A exercised sufficient control to bring Coastal's activities at the Farmingdale Yard within the Board's jurisdiction.

⁷ Petitions for reconsideration were denied in Town of Babylon—Petition for Declaratory Order (Coastal II), FD 35057 (STB served Sept. 26, 2008).

As directly pertinent here, in April 2004, Pinelawn commenced an action in New York state court against the Railroads, the Metropolitan Transit Authority (MTA),⁸ and Coastal. Pinelawn, the owner of the property, alleged that the 1904 lease, concerning the portion of the Yard on which Coastal's transload facility sits, had expired and was not properly renewed.⁹ Consequently, Pinelawn went to state court to evict the occupants of the Farmingdale Yard. Following a number of procedural rulings in the New York State courts, the New York Appellate Division, Second Department, reversed an earlier grant of summary judgment against Pinelawn, it held that the case should have been stayed pending a determination by the Board on whether the abandonment of the yard should have been permitted and remanded the case to the Suffolk Supreme Court. Pinelawn Cemetery v. Coastal Distribution, LLC, 74 A.D.3d 938, 941, 906 N.Y.S.2d 565, 568 (App. Div. 2d Dep't 2010). Subsequently, the Suffolk Supreme Court directed Pinelawn to seek the Board's guidance. In response, Pinelawn filed its two requests for declaratory relief, ultimately asking the Board to find that the state court contract claims are not preempted because the track within the Yard is private track over which the Board lacks jurisdiction.

POSITIONS OF THE PARTIES

In its amended petition, Pinelawn argues that the track at issue is non-jurisdictional private track. Its position is that because the Board concluded in Docket No. 35057 that Coastal is not conducting its operations as a rail carrier or an agent of a rail carrier, there is insufficient "rail activity" on the property to bring it within the Board's jurisdiction. Therefore, Pinelawn argues that it need not file a third-party request for "adverse" abandonment under 49 U.S.C. § 10903 before it can go to state court to seek to evict the occupants of the Yard.

In response, LIRR asserts that the Farmingdale Yard is not and never was private track. LIRR states that the Yard has been used continuously for freight and ancillary railroad operations for 100 years. It adds that the Yard "has been and will continue to be a unique and vital piece of railroad infrastructure that must continue to be available for future generations of shippers on Long Island."¹⁰ LIRR explains that its interest in the Yard predates the agreement in which it (LIRR) gave NY&A the right to operate the rail line and to use the Yard for rail purposes. LIRR asserts that its interest would continue even if that agreement were to terminate, and that LIRR retains a common carrier obligation on the rail line that connects to the Yard. For these reasons, LIRR argues that the Board should not allow Pinelawn to permanently remove the Yard from railroad use.

⁸ MTA is the parent of LIRR and apparently is the actual party to the leases at issue in the state court proceeding.

⁹ The 1905 lease, which covers an adjacent portion of the Yard, is not in dispute.

¹⁰ LIRR Reply 3.

NY&A also disputes Pinelawn's claim that this track is private track. NY&A asserts that the track is excepted ancillary track under § 10906 and is thus subject to the Board's jurisdiction, despite the fact that the Board lacks jurisdiction over Coastal's current (not-by-rail) transloading operations on a portion of the property. NY&A explains that the Yard is an existing, active, and essential rail transportation facility, and that, in addition to Coastal's transloading operations, it conducts its own train operations daily in the Yard, "pulling and spotting cars and maintaining the tracks."¹¹ NY&A further explains that it "actively operates every week night on and over the tracks at Farmingdale," and moves over 5,500 tons of freight each week.¹² NY&A emphasizes that removing the "throat of the Yard" from the national rail transportation system, as Pinelawn seeks to do, would deprive that traffic of railroad transportation.¹³

NY&A contends that, because the Farmingdale Yard is a railroad facility, the Board's exclusive jurisdiction over the Yard continues to preempt Pinelawn's effort unilaterally to remove this essential, active, and unique piece of railroad infrastructure. According to NY&A, this property has become Long Island's largest single generator of rail freight traffic¹⁴ that has already removed hundreds of thousands of truck trips from the region's highways since it opened. NY&A notes that both it and LIRR are committed to the continued use of the Yard for railroad transportation purposes long into the future. NY&A explains that, should the lease arrangement with Coastal terminate, NY&A could resume direct operation of the transload facility or restructure its arrangement with Coastal to bring that operation under the Board's jurisdiction. NY&A states that it would also continue to use the track within the facility for switching, car storage, and other railroad purposes.¹⁵ Thus, NY&A asserts that the Yard has never been abandoned; that it is needed for current and future rail transportation use; and consequently, that its removal from the national transportation rail system would unreasonably interfere with potential future railroad operations and would be contrary to the public interest.

AAR asserts that the matter before the Board has "the potential to raise an issue of significant importance to the rail industry as a whole."¹⁶ In AAR's view, permission given by a carrier to a noncarrier for temporary, limited-term use of rail facilities does not signal an intention by that carrier to abandon railroad use of the property, nor does it transform the rail facility into private track outside of the Board's jurisdiction. ASLRRRA supports AAR's position

¹¹ NY&A Reply at 30, 40.

¹² Id. at 40.

¹³ Id.

¹⁴ According to NY&A, more than a quarter million tons of freight are being shipped by rail through the Farmingdale Yard annually. Id. at 18.

¹⁵ NY&A Reply at 19.

¹⁶ AAR Letter 1.

and explains that interim noncarrier use of rail property can promote rail transportation by giving short line railroads flexibility and necessary revenue.

DISCUSSION AND CONCLUSIONS

Declaratory Order Jurisdiction. The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 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). The Board has, on many occasions, used the declaratory order process to address issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b). See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662 (STB served May 3, 2005). Pinelawn seeks declaratory relief here because a state court has stayed its adjudication of Pinelawn’s state contract law claims to allow the Board to provide guidance on the extent to which it has jurisdiction over the Yard. We will issue this declaratory order to address Pinelawn’s amended claims, as discussed below.

Rail Lines, Excepted Track, and Private Track. Under the Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.*, the Board has exclusive jurisdiction over rail lines over which railroads provide point-to-point “common carrier” line-haul service to shippers. See Suffolk & S. Rail Road LLC—Lease & Operation Exemption—Sills Road Realty, LLC, FD 35036, slip op. at 1 (STB served Nov. 16, 2007). The federal government has licensed rail-carrier entry and exit since 1920. Thus, the Board and its predecessor agency, the Interstate Commerce Commission (ICC), have long had exclusive jurisdiction and plenary authority over the abandonment of rail lines. See Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). A railroad may not abandon a rail line—*i.e.*, permanently close the line and discontinue common carrier rail service—without obtaining prior authorization from the agency. 49 U.S.C. § 10903.

Certain rail track, however, can be added or removed from the system without a license from the Board. Specifically, many rail operations require additional trackage for loading, reloading, classification, storage, and switching operations that are “incidental to, but not actually and directly used” in the carrier’s line-haul transportation. Nicholson v. ICC, 711 F.2d 364, 367-68 (D.C. Cir. 1983) (quoting Detroit & Mackinac Ry. v. Boyne City, 286 F. 540, 546 (E.D. Mich. 1923)). Although this incidental trackage is necessary for line-haul services, it is known as “excepted track” because, under 49 U.S.C. § 10906, the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks” (and related facilities) is statutorily excepted from the entry and exit licensing requirements of 49 U.S.C. §§ 10901-10905, as well as the sales and acquisition licensing requirements of

49 U.S.C. §§ 11321 et seq.¹⁷ Nevertheless, because it is part of the national rail system, excepted track is subject to federal regulation.

Finally, certain rail track, although used to facilitate the movement of rail cars, is neither rail line nor excepted track. Such track, which is known as private track, “is used exclusively by the track’s owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line.” B. Willis C.P.A., Inc., 6 S.T.B. at 281. In contrast to railroad lines and excepted track, the Board has no jurisdiction over private track, and it is generally fully subject to state and local regulation.

Is the Farmingdale Yard Private or Excepted Track? Pinelawn’s amended claim, which it presented after the Second Circuit rebuffed its initial claim that excepted track is outside the Board’s jurisdiction, is that LIRR built the Farmingdale Yard track as private track.¹⁸ Pinelawn rests this argument on the Board’s prior decisions concerning Coastal, alleging that the Board has already determined that Coastal’s operation of a transload facility at the Yard did not constitute rail transportation. Pinelawn argues, therefore, that the Board should find that the track in the Farmingdale Yard is neither a railroad line that must be authorized for abandonment under § 10903, nor excepted track under § 10906 over which the Board has jurisdiction (albeit no entry or exit licensing authority).¹⁹

But Pinelawn misreads Coastal I and Coastal II. Those decisions deal only with whether Coastal’s activities are subject to the Board’s exclusive jurisdiction under § 10501(b). The Board (and the reviewing court) found that, because Coastal’s activities were not performed by or on behalf of a rail carrier, they were subject to state and local regulation. But neither the Board nor the reviewing court ruled on whether the track itself was private or excepted track.

Here, in contrast to the Coastal cases, the issue is not whether Coastal’s activities are being performed by or under the control of a rail carrier, thus implicating federal preemption for those particular activities. Rather, because the property is held (and used) by the railroads, the issue before us is whether the Farmingdale Yard itself (and the track within it) is excepted track under § 10906, and if it is, whether the Interstate Commerce Act gives the Railroads the right to continue in possession of the Yard if the state court were to determine that the 1904 lease has terminated.

¹⁷ See Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4-5 (STB served Feb. 19, 2014) (citing Tex. & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266 (1926)).

¹⁸ Pinelawn Amended Pet. 17.

¹⁹ Id. at 19.

We find that the Farmingdale Yard is a railroad facility and that the facility and its excepted ancillary track are subject to our jurisdiction under 49 U.S.C. § 10906. As NY&A explains, the Yard must be considered excepted track and cannot be considered private track “because it is not owned or maintained by any shipper.”²⁰ The fact that Coastal began using a portion of this rail property for non-jurisdictional transloading operations pursuant to an agreement entered into with NY&A does not convert the Yard and its track from excepted track to private track.²¹ This is nothing like a situation where a shipper builds track on its own property solely to bring its own traffic to a main line for line-haul transportation. Thus, cases like Devens, on which Pinelawn relies, are inapposite. Devens Recycling Ctr. LLC—Pet. for Declaratory Order, FD 34952 (STB served Jan. 10, 2007) (private track is track used exclusively to serve the owner of the track under a contract between the rail operator and the owner).

Nor is there any support for Pinelawn’s contention that the Yard has always been private track. The record shows that LIRR, a rail carrier, constructed track at the Yard to serve the shipping public shortly after leasing the two parcels from Pinelawn.²² LIRR used that track as team track for transloading freight such as telephone poles, brick, and plastic pellets, and for turning locomotives and trains.²³ The Yard track also took delivery of ballast and was used in intermodal transportation.²⁴ Later, LIRR used the Yard as a waste transfer station and a place to store materials used by its maintenance-of-way and signal departments.²⁵ Moreover, since 1997, pursuant to an agreement with LIRR, NY&A—also a rail carrier—has performed various rail operations on the property, such as pulling and spotting cars and maintaining the tracks within

²⁰ NY&A Reply at 28.

²¹ See Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (stating that auxiliary track is subject to Board’s jurisdiction); accord Joseph R. Fox—Pet. for Declaratory Order, FD 35161, slip op. at 4 (STB served May 18, 2009), aff’d sub nom., Joseph R. Fox v. STB, 379 Fed. App’x 767 (10th Cir. 2010); Tri-State Brick & Stone of N.Y.—Pet. for Declaratory Order, FD 34824, slip op. at 6 (STB served Aug. 11, 2006) (“[W]hile a facility [here the Yard] may be subject to our jurisdiction, not all activities within that facility [here, Coastal’s operations] fall under our jurisdiction.”).

²² No regulatory authority was necessary because the Interstate Commerce Commission (ICC) (the Board’s predecessor) did not obtain licensing authority until 1920. Transportation Act of 1920, 41 Stat. 456, 477 (1920). Moreover, as the Yard contains only excepted track, it would not have been subject to ICC or STB licensing in any event. 41 Stat. at 477-78.

²³ LIRR Reply, Curcio V.S. ¶¶ 3-4.

²⁴ Id.

²⁵ Id.

the Yard at its own expense.²⁶ LIRR views the Yard as critical to current rail operations on Long Island, in part, because it is the only location where a locomotive can be turned.²⁷

In short, even though the contractual relationship between NY&A and Coastal is such that Coastal's current transloading operation on a portion of the Yard is not subject to the Board's authority, that does not mean that the Farmingdale Yard and its track are themselves entirely outside the Board's jurisdiction.

If the Underlying Lease of a Rail Facility Has Terminated, Has an Abandonment Occurred? Does the expiration of a lease under which a carrier (here, LIRR through NY&A) operates excepted track remove the property from the Board's jurisdiction and place it solely within the authority of the state courts? In Thompson, 328 U.S. at 144, the Supreme Court long ago held that rail lines cannot be removed from the national rail system without authorization from the ICC even if their underlying leases have expired. See Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539, slip op. at 7 (STB served June 6, 2012) (state law adverse possession claim barred where railroad needed "railbanked" right-of-way (i.e., property that was subject to STB licensing) for maintenance of the right-of-way and possible future rail use).

We recognize that Thompson dealt with licensed rail lines, whereas this case involves excepted track and related facilities, which are not subject to the Board's entry and exit licensing.²⁸ But the Court also recognized, 328 U.S. at 143, that cases where contracts for the use of track have expired "involve not only the interests of the two parties . . . , but phases of the public interest." Because ancillary track and facilities are critical components of the national rail system, the rationale of Thompson applies equally to cases such as this one even though this case involves excepted track. Moreover, a conclusion that federal rather than state law ought to govern here even if the state court finds that the 1904 lease at issue has terminated is further supported by more recently developed principles of federal preemption.

Congress and the courts have long recognized the need to regulate railroad operations at the federal level. See City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). Before 1995, courts sometimes found that states had the authority to regulate the abandonment of excepted track. See, e.g., Ill. Commerce Comm'n, 879 F.2d at 922-24 (rejecting ICC's pre-1995 position that Congress had occupied the field and intended to preempt state authority over excepted track). However, exercise of that authority led to conflicts with federal regulation and sometimes produced anomalous results. See, e.g., Consol. Rail Corp. v. Pa. Pub. Util. Comm'n, 565 F. Supp. 153 (Reg'l Rail Reorg. Ct. 1983) (state had jurisdiction over spur track and could require Conrail to provide service on the spur even though the ICC had already authorized

²⁶ NY&A Reply at 27, 30.

²⁷ LIRR Reply, Curcio V.S. ¶ 11.

Conrail to abandon service on the branch line connecting the spur to the rail transportation network). To resolve such conflicts, Congress, in the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), gave the Board exclusive jurisdiction over “transportation by rail carriers,” including “exclusive jurisdiction” over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.” 49 U.S.C. § 10501(b)(1), (2).

It is by now well settled that the provisions of 49 U.S.C. § 10501(b) preempt permitting or other laws or legal processes that try to regulate rail transportation directly or that could be used to deny a railroad’s ability to conduct rail operations. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (laws are preempted if they have the effect of managing or governing rail transportation); Cities of Auburn & Kent, Wash.—Pet. for Declaratory Order, 2 S.T.B. 330 (1997), *aff’d sub nom.*, City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3-4 (STB served May 3, 2005); ICCTA Conf. Rpt., H.R. Rep. No. 311, 104th Cong., 1st Sess. at 95-96 (1995). This preemption bar applies without regard to whether the Board lacks licensing authority over the property. 49 U.S.C. § 10501(b)(2); *see* Port City Props., 518 F.3d at 1188 (finding that Congress intended to occupy the field and preempt state jurisdiction over excepted track, even though Congress allowed rail carriers to construct, operate, and abandon such facilities without Board approval); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005). Thus, even though the state or public entity may have its own public purpose for wanting to regulate the rail carrier or its property, absent the carrier’s agreement, federal preemption typically bars state and local regulation.

This case is a bit different from many preemption cases because, instead of looking at the authority of a public body to regulate a rail carrier under state and local law, this case involves the rights of a private party to remove a rail carrier under contract law. But the principle is the same. Finding that a landowner, under state law, could remove a rail carrier conducting vital operations at an ancillary facility needed for rail transportation could—and here, based on the record developed in this proceeding, would—give the landowner the right to completely cut off shippers and prevent the common carrier from carrying out its obligation to serve them. Just as state regulatory laws must yield to federal law under § 10501(b), the expiration of a contract between a railroad and a landowner does not, by itself, amount to an abandonment. Rather, even for § 10906 track, something more would be required on the part of the railroad in order for an abandonment to occur.

The key consideration here is whether or not the carrier has continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public. The railroads’ failure to timely execute an extension of the 1904 lease would be a factor to be considered in that determination, but it is only one factor. Even if a court were to find that the 99-year lease was not properly renewed, this would not be a case in which the railroad, by contract, intentionally abandoned its interest in the property. It is clear by the Railroads’ conduct throughout this case and the related proceedings that they believe that they need this property to continue their interstate rail operations.

A rail carrier's intent to abandon § 10906 track cannot be determined by a single act, or failure to act, when there is overwhelming evidence that a carrier intends the opposite outcome. Here, the Railroads have continued to conduct rail operations over the track from before the lease expired to the present. Moreover, LIRR states that it "formally exercised its option to renew the November 1905 Lease, but the time for renewing the August 1904 Lease had as a technical matter passed, through the inadvertence and delay occasioned by locating and researching these very old instruments."²⁹ LIRR believed that it had come to an understanding with Pinelawn to renew the 1904 Lease. Because the rail on the 1905 leased land would become a stranded segment without access provided by the 1904 leased parcel, it follows that LIRR's renewal of the 1905 Lease is further evidence of its intent to maintain rail service.

For these reasons, we conclude that no abandonment of the § 10906 track at issue occurred, and thus the yard is still within the Board's jurisdiction. Therefore, even if the state court were to find that the 1904 Lease was not renewed, Pinelawn could not use that ruling to evict the Railroads from the property.³⁰ Rather, Pinelawn would need to ask the Board to remove its jurisdiction through a declaratory order.³¹ For the Board to remove its jurisdiction, Pinelawn would need to demonstrate that the Yard is no longer needed for the interstate rail system.³²

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

It is ordered:

1. The requests by AAR and ASLRRA to file their letter-comments late are granted and the letter-comments are accepted.
2. NY&A's motion to strike Pinelawn's response to the letter-comments is denied.

²⁹ LIRR Reply, Curcio V.S. ¶ 8.

³⁰ This decision does not preclude the state court from issuing a ruling on the validity of the 1904 Lease or prescribing remedies that do not interfere with rail operations.

³¹ As discussed earlier, because the track at issue is yard or spur track, it is excepted from the Board's abandonment authority, which includes adverse abandonments. As a result, the proper vehicle for removing the Board's jurisdiction would be through a declaratory order proceeding.

³² Although Pinelawn argued here that the Railroads had effectively abandoned the property (an argument that we have rejected), it did not seek to show that the property is not needed for rail service.

3. Pinelawn's petition for declaratory order is granted to the extent provided in this decision.

4. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.