

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34997

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER

Decided: May 1, 2008

In a petition filed on February 9, 2007, James Riffin (petitioner) requests that the Board institute a declaratory order proceeding to address the reach of federal preemption under 49 U.S.C. 10501(b) in connection with petitioner's desire to perform certain activities allegedly related to rail transportation at two separate locations in Maryland: (1) the construction and operation of a purported maintenance-of-way (MOW) facility located in Cockeysville, MD (Cockeysville property); and (2) the performance of maintenance to repair track on a line of railroad owned by petitioner located in Allegany County, MD (Allegany line). On March 5, 2007, Maryland Transit Administration (MTA) and the Maryland Department of the Environment (MDE) (collectively, respondents) filed a reply, arguing that petitioner has failed to show that issuance of a declaratory order here is warranted. The parties have presented enough information for the Board to determine that the law on the scope of federal preemption for the types of activities at issue here is clear. Therefore, the request for institution of a declaratory order proceeding will be denied.

PRELIMINARY MATTER

A declaratory order proceeding is intended to clarify the law as it applies to particular issues. In order to clarify the law regarding the issues before it, the Board generally considers the facts as presented by petitioner.<sup>1</sup> Here, petitioner has presented himself as a Class III rail carrier owning a line of railroad (the Allegany line) in Allegany County. Respondents challenge petitioner's statement that he is a Class III rail carrier. To be a carrier, petitioner must hold himself out as available to provide for hire transportation to the public for compensation upon

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<sup>1</sup> See Effingham RR Co.—Pet. For Declaratory Order, 2 S.T.B. 606, 610 (1997), reconsideration denied, Effingham Railroad Company—Petition for Declaratory Order—Construction at Effingham, IL, et al., STB Docket No. 41986 (STB served Sept. 18, 1998), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606 (7th Cir. 1999); Michelin North America, Inc.—Petition for Declaratory Order—Certain Rates and Practices of PJAX, Inc., STB Docket No. 42011, slip op. at 2 (STB served Jan. 28, 1998) (both cases stating that the decision was based on the facts as stated or presented in the declaratory order petition).

reasonable request.<sup>2</sup> While respondents raise questions as to whether petitioner meets these requirements, they do not show that petitioner is not, or cannot become, a Class III carrier with respect to the Allegany line. For purposes of clarifying the law regarding the issues before us in this proceeding, it is not necessary to resolve petitioner's carrier status. Therefore, petitioner will be assumed to be a rail carrier with respect to the Allegany line, as he contends.<sup>3</sup>

## BACKGROUND

### Cockeysville Property.

In April 2003, petitioner purchased two Cockeysville properties adjacent to the Cockeysville Industrial Track (CIT), intending to use them as a MOW facility. Since July 2003, petitioner has attempted to acquire and operate portions of the CIT, without success.<sup>4</sup> Despite possessing no right to provide freight service on the CIT, petitioner began construction of a MOW facility on the Cockeysville property in February 2004.

In August 2004, MDE and Baltimore County brought a suit against petitioner in the Baltimore County Circuit Court. The suit sought injunctive relief and civil penalties for petitioner's alleged violations of various state and local environmental regulations stemming from petitioner's construction activities on the Cockeysville property, which is near protected waterways. Petitioner attempted to remove the case to federal district court, arguing that section 10501(b) completely preempts all state and local regulation of transportation by a rail carrier. After a hearing, the district court found that "there is simply not complete preemption here," and remanded the case back to the Circuit Court for Baltimore County.<sup>5</sup> See Respondents' Reply, Exhibit 1, p. 57. The circuit court then issued the injunctions requested by MDE and Baltimore County. Petitioner appealed, and continued to develop the Cockeysville

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<sup>2</sup> See American Orient Express Railway Company LLC—Petition for Declaratory Order, STB Docket No. 34502, slip op. at 4 (STB served Dec. 29, 2005), aff'd, 484 F.3d 554 (D.C. Cir. 2007); Pennsylvania R. Co.—Merger—New York Central R. Co., 347 I.C.C. 536, 549 (1974).

<sup>3</sup> In James Riffin D/B/A the Raritan Valley Connecting Railroad—Acquisition and Operation Exemption—On Raritan Valley Connecting Track, STB Finance Docket No. 34963 (STB served Dec. 20, 2006), the Board identified petitioner as a Class III rail carrier, but petitioner's assertion was not questioned by the parties in that case.

<sup>4</sup> See James Riffin d/b/a NCCR L.L.C.—Construction, Operation and Trackage Rights Exemptions—in Baltimore County, MD, STB Finance Docket No. 34375 (STB served July 16, 2003); James Riffin d/b/a The Northern Central Railroad—Acquisition and Operation Exemption—in York County, PA, and Baltimore County, MD, STB Finance Docket No. 34484 (STB served Apr. 20, 2004); James Riffin d/b/a The Northern Central Railroad—Acquisition and Operation Exemption—in York County, PA, STB Finance Docket No. 34501 (STB served Feb. 23, 2005).

<sup>5</sup> See Maryland Dept. of the Environment, et al. v. James Riffin, et al., Civil No. RDB-04-2848 (D. Md. Sept. 8, 2004).

property in defiance of the court's injunction and in alleged violation of the Clean Water Act, as well as state and local environmental regulations. MDE and Baltimore County then initiated contempt proceedings. Respondents state that petitioner is now attempting to remove the case for a second time to federal court by appealing the federal district court's remand to the United States Court of Appeals for the Fourth Circuit.<sup>6</sup>

Allegany Line.

On December 14, 2005, the Board authorized WMS, LLC (WMS), a corporate affiliate of the petitioner, to acquire and operate the Allegany line.<sup>7</sup> Before that transaction was completed, petitioner moved to be substituted for WMS, and the Board granted the request.<sup>8</sup> On June 20, 2006, petitioner or an entity he controls acquired the Allegany line.<sup>9</sup> Petitioner has determined that the Allegany line track needs maintenance work to repair sections of the track eroded by a nearby creek. He states that the work necessitates adding ballast and ties to the trackage. Petitioner asserts that Maryland and Baltimore County's environmental departments have asserted that he must obtain a permit from those departments prior to doing any work on the Allegany line, which is located in a floodplain. Petitioner asserts that maintenance work on the Allegany line is subject to the exclusive jurisdiction of the Board and that Maryland and Baltimore environmental laws are completely preempted under 49 U.S.C. 10501(b).<sup>10</sup>

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<sup>6</sup> On December 17, 2007, petitioner moved for an administrative stay, requesting that the Board stay an order issued by the Circuit Court for Baltimore County, which ordered, among other things, petitioner to remove all vehicles and MOW equipment from the Cockeysville property. Respondents filed a reply on January 7, 2008. Because the Board has no authority to stay an order issued by a court, petitioner's motion will be denied.

<sup>7</sup> See CSX Transportation, Inc.—Abandonment Exemption—in Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Dec. 14, 2005). In a subsequent filing, Riffin informed the Board that, although the initial pleadings did not identify it as such, "WMS" was an acronym for the company Western Maryland Services, LLC, and that WMS, LLC, was not a legal entity at the time of the initial offer of financial assistance filing. (CSX Transportation, Inc. (CSXT) does not dispute Riffin's claim.) According to a motion to compel filed by Riffin on January 14, 2008, Riffin acquired a 98% ownership interest in Western Maryland Services, LLC in or around February 2006, and, on May 26, 2006, Riffin chartered "WMS, LLC," as a legal entity in Maryland.

<sup>8</sup> See CSX Transportation, Inc.—Abandonment Exemption—in Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Aug. 18, 2006).

<sup>9</sup> In his motion to compel, Riffin states that the deed to the Allegany line was issued to WMS. He also notes that he has requested that the former owner of the line, CSXT, issue a new deed to Riffin. Because Riffin has a controlling ownership interest in WMS, for the purposes of this petition for declaratory order only, Riffin will be assumed to own the Allegany line.

<sup>10</sup> In a supplemental filing made on November 28, 2007, petitioner states that his request for a temporary restraining order enjoining Allegany County from attempting to regulate

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In their joint reply in opposition to Riffin’s petition, respondents argue that the petition for declaratory order relief should be denied because it is not supported by law or facts.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board, in its discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Here, however, the law is clear as to the reach of the federal preemption. Therefore, there is no need to institute a declaratory order proceeding.

To provide guidance to the parties, this decision will first briefly summarize the relevant court and agency case law addressing similar situations. Under 49 U.S.C. 10501(b)(2), as broadened by ICCTA, Congress gave the Board “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.” Section 10501(b) specifically provides that both “the jurisdiction of the Board over transportation by rail carriers” and the “remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies under Federal or State law.” See King County, WA—Pet. for Declar. Order—Stampede Pass Line, 1 S.T.B. 731 (1996), clarified Auburn & Kent, WA—Pet. for Declar. Order—Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff’d sub nom. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (City of Auburn). As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” See CSX Transp. v. Georgia Public Service Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In addressing the scope of 49 U.S.C. 10501(b), the courts and the Board have found that any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad its ability to conduct its operations or to proceed with activities that the Board has authorized, is preempted as to the facilities and activities that are part of rail transportation. See City of Auburn, 154 F.3d at 1030-31; Green Mountain R.R. v. State of Vermont, 404 F.3d 638, 641-43 (2d Cir. 2005). Nor can there be state or local regulation of matters directly regulated by the Board, such as a state statute dictating when a train can traverse a crossing or otherwise conduct its railroad operations. See Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1014 (W.D. Wis. 2000).

At the same time, however, the Board has consistently made clear that not all state and local regulations that affect rail transportation are preempted. Rather, state and local regulation is applicable where it does not have the effect of preventing or unreasonably interfering with interstate commerce. Localities also retain certain police powers to protect public health and safety. See Stampede Pass, 2 S.T.B. at 337-38; Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 740 A.2d 57 (N.J. 2000). Thus, for example, a railroad can be required

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petitioner’s construction activities was denied by the Allegany County Circuit Court on October 17, 2007. Respondents filed a reply on December 18, 2007.

to comply with fire and electrical codes. Localities can also require a railroad to allow the local government to inspect the property and to notify the local government when it is undertaking an activity for which a non-railroad entity would require a permit.

Moreover, where there are overlapping federal statutes, they are to be harmonized to the extent possible. Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001). This includes Federal environmental programs that are implemented, in part, by the state, such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act. See Joint Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA, 5 S.T.B. 500, 508 (2001) (Ayer), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002), rev'd solely on attys' fee issue, 330 F.3d 12 (1st Cir. 2003); Stampede Pass, 2 S.T.B. at 337.

Finally, whether a particular state or local regulation is being applied so as not to restrict unduly the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-specific determination. Ayer, 5 S.T.B. at 508.

Respondents contend that petitioner has not provided sufficient factual information for the Board to come to a decision on the preemption questions raised by petitioner. While it is true that petitioner provides only limited facts, they are sufficient for the Board to determine that a declaratory order proceeding is unnecessary because the law is well-settled concerning the preemption issues presented here.

To come within the Board's jurisdiction and thus be covered by the section 10501(b) preemption, an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier." See 49 U.S.C. 10501(a)(1); Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004); Fla. E. Coast Ry. v. City of Palm Beach, 266 F.3d 1324 (11th Cir. 2001). "Transportation" is defined to include a "facility" related to the movement of property by rail. 49 U.S.C. 10102(9)(A). To be within the Board's jurisdiction, a facility must be closely related to, and indeed part of, a railroad's ability to provide direct rail service. Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ, STB Finance Docket No. 34192, slip op. at 4 (STB served Nov. 20, 2002) (Hi-Tech); Borough of Riverdale—Petition for Declaratory Order, 4 S.T.B. 380, 389 (1999).

#### Cockeysville Property.

The activities proposed by petitioner for the Cockeysville property would not be considered to be part of or integral to rail transportation by a rail carrier, and thus would not come within the Board's jurisdiction. Petitioner's statements make clear that he cannot operate as a rail carrier on the CIT. The Cockeysville property is disconnected from any line of railroad over which petitioner may have authority to operate as a rail carrier. Even if petitioner were to ship his MOW equipment and materials by rail over the CIT to a rail line that he owns or operates, petitioner would have to arrange transportation with another rail carrier. In that situation, petitioner would likely be no more than a shipper on the CIT. Accordingly, the section 10501(b) preemption would not apply to any of petitioner's planned activities at the

Cockeysville property. See Hi Tech, slip op. at 3-4 (trucking cargo to truck-to-rail transloading facility not part of rail “transportation”).

Allegheny Line.

In contrast, track maintenance by a rail carrier within its right-of-way on a line that it operates is necessary to provide rail service over that rail line. Repair of a line by adding ballast and ties, as petitioner states that he has done on the Allegheny line, would constitute track maintenance and, therefore, would constitute part of rail transportation by rail carrier. Thus, assuming, for purposes of this proceeding, that petitioner is a rail carrier with respect to the Allegheny line, the application of many state and local laws that would otherwise apply would be preempted under section 10501(b) as to maintenance on the Allegheny Line.

Here, MDE contends that, based on the section 10501(b) preemption, petitioner has taken the position that he need not engage in dialogue with state or local authorities about the proposed maintenance work on the Allegheny line or the methods petitioner intends to use to protect water quality within the adjacent stream. However, as discussed above, even where section 10501(b) preemption applies, there are limits to its scope. Federal environmental laws, including those that may be implemented or enforced by state and local authorities, typically are not preempted. Moreover, the states’ police powers are not preempted entirely. Thus, for example, state and local authorities can require a railroad to allow the locality to inspect the facility or to notify the locality of when the railroad is undertaking an activity for which a non-railroad entity would require a permit. Petitioner may not use the Board’s jurisdiction over transportation by rail carrier as a shield to avoid the application of overlapping federal environmental laws and state and local regulations that do not unreasonably interfere with interstate commerce.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.<sup>11</sup>

It is ordered:

1. Petitioner’s request to institute a declaratory order proceeding is denied.
2. Petitioner’s December 17, 2007 motion for stay is denied.

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<sup>11</sup> Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ‘solid waste’ is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary