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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35037

MARK LANGE—PETITION FOR DECLARATORY ORDER

Decided: January 24, 2008

On May 21, 2007, pursuant to an order from the Circuit Court of Winnebago County, WI, Mr. Mark Lange (Lange) seeks a declaratory order from the Board that the state law claims and the remedies sought in the lawsuit brought by Lange in state court against Wisconsin Central, Ltd. (WCL)—to have WCL remove a fence and equipment from property allegedly owned by Lange—are not preempted by 49 U.S.C. 10501(b).[1] In this decision, to provide guidance to the court and the parties, we address the relevant court and agency case law in light of the facts of this case, and deny Lange's request for institution of a declaratory order proceeding.

BACKGROUND

On August 10, 2005, Lange purchased a plot of land in Neenah, WI (the property), that is on the east side of track owned by WCL. After purchasing the property, Lange became aware that a portion of it, a strip approximately 13 feet wide by 192 feet long, is separated from the remainder by a chain link fence owned by WCL,[2] and that pieces of railroad equipment, also owned by WCL, are on the property. WCL has been using the property, which is adjacent to its track, since before Lange acquired it. WCL says it erected the fence "to prevent trespassing."[3] According to Lange, WCL has refused to remove the fence and equipment following requests by Lange. Lange thus filed a trespass suit against WCL and CN in Winnebago County, Wisconsin Circuit Court, seeking immediate possession of the land or, in the alternative, approximately $20,000. The court dismissed CN as a party with prejudice, leaving WCL as the only defendant.

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[1] Section 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers," including related facilities and activities that are part of rail transportation. See 49 U.S.C. 10102(9). Rail operations are also protected by the Commerce Clause of the U.S. Constitution from state or local interference. However, railroads are not entitled to federal preemption to the extent they are engaged in activities that are not part of transportation.

[2] According to WCL, it sometimes does business under the name "CN" and Lange repeatedly refers to Canadian or Canadian National in his petition. However, WCL acknowledges that it is the owner of the fence and equipment and that Canadian National Railway Company (CN) has no interest in and does not operate on the property. WCL Reply, Guthrie V.S. at 3.

[3] WCL Reply, Guthrie V.S. at 2.

Lange v. Canadian Nat'l R.R., Inc. and Wis. Central Ltd., No. 05 CV 1365 (Wis. Cir. Ct. 2006) (trespass suit). In response to a motion by WCL, the court directed Lange to petition the Board for a ruling regarding the extent to which the controversy involves issues that come within the scope of the Board's jurisdiction.

In his petition, Lange argues that the controversy here does not concern economic regulation of railroads, and that therefore his lawsuit, brought under Wisconsin law, is not preempted by the Interstate Commerce Act (ICA), as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA). Rather, Lange contends, it is a property dispute best suited for resolution in state court pursuant to state law. According to Lange, the operations that WCL performs on this portion of Lange's property are only incidental to WCL's rail-related switching activities. Lange also asserts that WCL owns land on the other side (i.e., to the west) of the tracks, which it can use to access its switching tracks instead of going through Lange's property.

In its reply, filed June 8, 2007, WCL states that its predecessor in interest, the Soo Line Railroad, and itself (since 1987) have used the property for various railroad purposes since at least 1978, most recently to: (1) access areas where railroad personnel perform maintenance on switching lead tracks and associated hydraulic switches; (2) access areas where snow removal activities at rail facilities take place; (3) access areas where WCL train crews perform the switching, and (4) use as a walkway for conductors while walking alongside trains in the performance of their switching duties. WCL argues that all of these activities constitute "transportation," as broadly defined in the ICA,[4] and therefore qualify for federal preemption under 49 U.S.C. 10501(b). According to WCL, without the use of the property to perform the above-listed functions, it could no longer safely use the switching tracks. Finally, WCL notes that Lange has not provided any evidentiary support for his contention that WCL could perform these operations from property it owns on the other side of the track. To the contrary, WCL argues that the property it owns west of the track is not large enough to support the required operations.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. We see no need to institute a declaratory order proceeding to determine whether the claims in Lange's trespass suit are preempted by federal law. Rather, based on the information that Lange and WCL have provided, it is clear that the state law claims presented in his trespass suit (1) are preempted to the extent that Lange seeks to eject WCL from the property or seeks monetary compensation under tort claims for alleged harm arising from WCL's rail operations on the property, but (2) are not preempted to the extent that Lange seeks monetary relief under Wisconsin's inverse condemnation statute for an alleged taking of his property by WCL.

[4] "Transportation" is defined to include "property . . . related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use," as well as "services related to that movement." 49 U.S.C. 10101(9).

In ICCTA, Congress broadened the Board's jurisdiction to include not only all rail transportation and rail facilities that are part of the interstate rail network, but also the construction, acquisition, operation, abandonment, or discontinuance of ancillary track such as "spur," "industrial," "team," or "switching," tracks. 49 U.S.C. 10501(b)(2). The Board's jurisdiction over such matters is "exclusive." Id. Moreover, "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." Id. The purpose of this express federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. at 807-08.

Section 10501(b) thus shields railroad 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 Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (environmental and land use permit processes categorically preempted) (Green Mountain); City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (same). The federal preemption also applies to any attempted regulation of a matter directly regulated by the Board, such as a state statute dictating when a train can traverse a road crossing. See Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443-44 (5th Cir. 2001). But section 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 prevent or unreasonably interfere with interstate commerce, and localities retain certain police powers to protect public health and safety. See Green Mountain, 404 F.3d at 643; Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass 2002) (Town of Ayer).

In his trespass suit, Lange seeks immediate possession of the disputed property and the removal of the railroad's fence and other equipment. Granting this relief would deprive WCL of the ability to continue to use the property, which WCL maintains is needed for its rail operations. Accordingly, to the extent that Lange's trespass suit seeks to dispossess WCL of property that is being used for railroad operations, the state law claims would effectively regulate rail transportation, and thus are preempted under section 10501(b). See Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 12, 2004), aff'd, City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (Lincoln).

Lange argues that, because the activities WCL conducts on the property are "remote to the operation of the switch," Lange's attempt to remove WCL from the property does not fall within the scope of the federal preemption. But WCL has shown that it uses the property for rail maintenance and snow removal activities and access to switching lead tracks and switches, as well as for conductors to walk alongside trains while they perform switching duties. Denying WCL access to the property would interfere with or prevent these activities, all of which are part of "transportation" by rail under 49 U.S.C. 10102(9).

Finally, Lange asserts that WCL could access the switch from land it owns on the other side of its tracks. However, WCL states that it does not own enough land on the other side of the

switch to conduct the rail-related activities it now conducts on the property. The burden is on Lange to show that ejecting WCL from the property would not unreasonably interfere with the carrier's rail operations, and Lange has not rebutted WCL's evidence. Therefore, such relief is preempted. E.g., Lincoln, 414 F.3d at 861-62.

As an alternative to an order ejecting WCL from the property, Lange seeks to recover approximately $20,000, under state common law theories such as trespass, nuisance and negligence, as redress for the alleged harm to Lange arising from WCL's use of the property for rail operations. But these state law remedies are not available here because the remedies afforded under 49 U.S.C. 10101-11908 concerning rail transportation are "exclusive and preempt" all other remedies. 49 U.S.C. 10501(b); see Friberg, 267 F.3d at 444 (negligence claim preempted); Guckenberg v. Wisconsin Central Ltd., 178 F. Supp. 2d 954, 959-60 (E.D. Wis. 2001) (nuisance claim preempted); Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57, 67 (N.J. 2000) (same); State v. Illinois Central R.R. Co., 928 So.2d 60, 74 (La. App. 2005) (trespass claim preempted); cf. Town of Ayer, slip op. at 11 (local ordinance declaring automobile unloading facility to be a "noisome trade" preempted).

Finally, the prayer for relief in Lange's state court action requests $20,000 for "the land." Even though the amended complaint does not cite Wisconsin's inverse condemnation statute, Wis. Stat. 32.10, this prayer for relief could be construed by the state court as raising an inverse condemnation claim. Wisconsin, like many states, has incorporated into its eminent domain laws a provision that allows railroads to exercise the state's condemnation authority. See Wis. Stat. 32.02(3). Such provisions facilitate rail transportation by enabling railroads to acquire the property needed for their rail transportation activities. See Dakota, Minnesota & Eastern R.R. Corp., 236 F. Supp. 2d 989, 1009 (D.S.D. 2002 (noting that railroad was wholly dependent on state-delegated eminent domain power to acquire land to complete rail construction project), aff'd in part, vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004). A corollary to a state's delegation of its condemnation authority, however, is that, just as a state must compensate persons for the taking of private property under the Fifth and Fourteenth Amendments to the United States Constitution, so must a railroad compensate the owner for the land taken when it exercises its eminent domain power. See Muhlker v. New York & Harlem Ry. Co., 197 U.S. 544, 569 (1905) (McKenna, J., plurality opinion) (stating that a state cannot give railroad the power to invade private property without payment of compensation). Therefore, an award of just compensation for an alleged taking of the property—assuming such compensation has not already been paid[5]—would not unreasonably interfere with rail operations and would not be preempted. See Suchon v. Wisconsin Central Ltd., No. 04-C-0379-C, 2005 WL 568057, at *2-4 (W.D. Wis. Feb. 23, 2005) (finding a Wisconsin property owner's nuisance claim preempted while addressing inverse condemnation claim against railroad on merits). We leave it to the Wisconsin state courts to determine under state law whether Lange has, in fact, pled such a claim.

[5] We cannot discern from the materials before us whether or not WCL or a predecessor in interest paid a former owner for access to the property or perhaps acquired the disputed property through a condemnation proceeding under Wisconsin law. These are matters we leave to the Wisconsin state courts, should they become relevant.

While the Board enjoys broad discretion to institute a declaratory order proceeding to eliminate a controversy or remove uncertainty, such a proceeding is not needed here. The parties' submissions contain facts sufficient to enable us to provide appropriate guidance. Accordingly, Lange's request for institution of a declaratory order proceeding will be denied.

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

It is ordered:

1. Lange's request for a declaratory order proceeding is denied and this proceeding is discontinued.

2. This decision is effective on the date of service.

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

Anne K. Quinlan
Acting Secretary