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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35196

NORFOLK SOUTHERN RAILWAY COMPANY AND THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Decided: February 26, 2010

On November 4, 2008, Norfolk Southern Railway Company (NSR) and The Alabama Great Southern Railroad Company (AGSR) (collectively, NS) filed a petition for declaratory order following a referral from the United States District Court for the Northern District of Alabama (Alabama District Court). NS requests that we determine that 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), preempts a proposal by the City of Birmingham, AL (Birmingham or the City) to condemn certain railroad property for use as a public park. The City replied in opposition to NS's petition. We find that the railroad requires the property at issue in connection with its rail operations. Therefore, the proposed taking would be federally preempted.

BACKGROUND

On April 29, 2008, Birmingham filed a condemnation complaint (Case No. 200454) in the Probate Court of Jefferson County, AL, to acquire from NS by means of a state law eminent domain proceeding approximately 18.86 acres[1] to create a public park, with an amphitheater, theater, walking trail, and children's playground.

NS removed the action to the Alabama District Court on June 6, 2008. In the court proceeding, NS resisted the City's attempt to take approximately 3.4 acres of that larger parcel held in fee, as well as certain other strips of land held by NS by way of easement (hereafter the Property), [2] arguing that the proposed condemnation would interfere with its rail operations and would raise safety concerns. The City contended that there is no federal preemption here.

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[1] See Article IV of the condemnation complaint for a detailed description of the property that the City seeks to acquire by condemnation. Basically, the City seeks to condemn "Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South."

[2] The Property begins at a property line about 2 feet south of a retaining wall, which abuts NS's active rail lines, extends 85 feet south, and is approximately 1600 feet in length. It runs westward from 18th Street and then narrows for a distance of 250 feet to a point at 14th Street.

On July 9, 2008, the Alabama District Court referred the case to the Board. On November 4, 2008, NS filed its petition for declaratory order with the Board. On November 25, 2008, Birmingham filed its reply.[3]

NS asserts that it needs the Property for rail transportation purposes. It explains that the major portion of the Property was acquired by the railroad in the mid-1880s and has track on it that formerly served an NS produce depot. NS explains that, though not currently in use for actual rail service, the Property is adjacent to, parallel to, and at a lower grade than seven elevated rail lines, including two NS mainlines over which NS moves between 25 and 30 trains per day, consisting of both freight and Amtrak passenger trains. According to NS, the rail lines are held in place by a retaining wall. NS asserts that it uses the Property to maintain the tracks and structure and retaining wall and that its long-term plans include use of virtually all of the Property to construct an embankment to replace the retaining wall. NS further states that it is in the process of replacing signal towers that serve the elevated lines, and that the new rail signal structures will occupy a portion of the Property. NS also asserts that the Property could eventually be needed to support NS's Crescent Corridor project (involving expanded rail capacity between Birmingham and New Orleans). Finally, because the City's plans show that an amphitheater and walking path would abut the retaining wall, NS asserts that the City's plans raise potential safety concerns and would leave NS insufficient room for equipment needed for track maintenance and clearing derailments.

For its part, Birmingham contends that its proposed condemnation action would not interfere with rail use because NS does not now use the Property as part of its active rail operations. Birmingham also relies on case law finding that federal preemption under section 10501(b) is not "complete," but displaces only state laws that have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. See Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (Florida East Coast). Birmingham further asserts that, because there are six other public parks adjacent to active rail lines in the City, the construction of a park on the Property would not pose a safety hazard. Finally, it questions NS's ownership interest in the Property.

## DISCUSSION AND CONCLUSION

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we have discretion to issue a declaratory order to terminate a controversy or remove uncertainty. For the reasons discussed below, we will grant NS's petition and will resolve the controversy here. Based on the record before us, we find that the City's proposed taking of the disputed property under state eminent domain law would unreasonably interfere with rail transportation and therefore would be federally preempted.

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[3] On December 4, 2008, NS filed a motion for leave to file a reply to Birmingham's reply, and attached its reply to Birmingham's arguments. The Board normally does not consider replies to a reply, 49 CFR 1104.13(c), and NS has not shown why we should allow it to file a reply to a reply in this case. Accordingly, NS's motion for leave to file its reply to Birmingham's reply is denied.

Under section 10501(b), as broadened by ICCTA, the jurisdiction of the Board over transportation by rail carriers and associated property[4] and the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt the remedies provided under federal or state law. See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). This preemption is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations. See CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); see also City of Auburn, 154 F.3d at 1030; Green Mountain RR. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005); Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001); CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005), reh'g denied (STB served May 3, 2005); Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA, 5 S.T.B. 500 (2001), aff'd sub nom. Boston & Me. Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002), rev'd on other grounds, 330 F. 3d 12 (1st Cir. 2003).

Condemnation can be a form of regulation, and using state eminent domain law to condemn railroad property or facilities for another use that would conflict with the rail use "is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9)." Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000). See 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) (City of Lincoln) (city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Dakota, Minn & E. RR. v. State of South Dakota, 236 F. Supp. 2d 989, 1005-08 (D.S.D. 2002) (DM&E), aff'd in part, vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state regulation of railroads). Therefore, under section 10501(b) and relevant precedent, we must consider whether the taking proposed by the City would prevent or unduly interfere with railroad operations and interstate commerce. If the taking would cause such undue interference, then it is federally preempted.[5]

Because Birmingham is a government entity that represents the interests of all its citizens, its views are an important element in proceedings involving railroad property within the City's boundaries. We have a separate responsibility, however, to ensure proper regulation and oversight of the carrier activities within our jurisdiction. See New York Cross Harbor R.R. v.

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[4] The Board's governing statute defines "transportation" broadly to include, among other things, a property, facility, instrumentality or equipment of any kind, related to the movement of property by rail. 49 U.S.C. 10102(9).

[5] Of course, after railroad property has been lawfully abandoned, state condemnation laws can be applied since the agency's regulatory mission has come to an end. Hayfield N. RR v. Chicago & N.W. Transp. Co., 467 U.S. 622, 632-33 (1984). NS, however, has never sought authority to abandon the property at issue here.

STB, 374 F.3d 1177, 1184 (D.C. Cir. 2004). Here, the record shows that Birmingham's condemnation of the Property would prevent or unreasonably interfere with how NS operates its trains and conducts its rail transportation activities. NS explains that it is in the process of modernizing a signal structure at milepost 143.3, the foundation of which will necessarily extend to the property the City seeks to condemn. See NS Petition, Appendix C, Smith V.S. According to NS, the proposed condemnation also would impair the railroad's ability to maintain its present track structure. As shown in the pictures at Appendix C, Appendix D, and Appendix E to NS's petition, the tracks here are elevated. For rail safety, NS must maintain the retaining wall, which NS does via the Property. Condemnation would therefore interfere with NS's ability to maintain the retaining wall and create a safety risk. Moreover, the proposed condemnation would prevent NS from going forward with its plan to support the elevated tracks with an embankment when the retaining wall needs to be replaced. According to NS, because this project would require the use of substantially all of the Property, the park, amphitheater, and walking path that Birmingham intends to construct on the Property would encroach upon the proposed embankment.[6] Additionally, the Property may be needed to support additional freight and passenger service between Birmingham and New Orleans as part of NS's Crescent Corridor project.

NS also has presented evidence showing that the park proposed by the City would create serious safety hazards for pedestrians, concert goers and children, because park goers would be close to active rail lines. NS explains that the amphitheater and walking trails that Birmingham proposes would leave insufficient room for equipment needed for track maintenance or for a timely response in the event of a derailment.

The fact that NS is not now actively operating trains on the Property does not mean that the property is not now, or may not later be, needed for railroad purposes, or that the Property should be made available for another public use. As the court stated in City of Lincoln, 414 F.3d at 862, which involved facts similar to this case,[7] "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses."[8] See also Midland Valley R.R. v. Jarvis, 29 F.2d 539, 541 (8th Cir. 1928).

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[6] According to NS, in order to provide the stability needed to support the track structure, the embankment would extend outward horizontally 15 feet from the centerline of the track closest to the retaining wall and then out two feet for every one foot in height. See NS Petition, Appendix G, Carter V.S.

[7] In City of Lincoln, the court affirmed the Board's decision to consider the railroad's future plans in determining that a 20-foot longitudinal strip at the edge of a railroad's right-of-way was needed in connection with the railroad's present and future rail operations, and therefore the city's proposed use of its power of eminent domain to create a pedestrian and bicycle trail on the 20-foot strip was federally preempted. 414 F.3d at 862.

[8] Thus, the Board's practice is to consider both current and future transportation plans in determining whether a railroad has proposed a bona fide rail operation. See Riverview Trenton Railroad Company—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040, slip op. at 11 (STB served

(continued . . . )

As the City notes, condemnation pursuant to state eminent domain laws is not necessarily preempted. E.g., DM&E, 236 F. Supp.2d at 1005-08; Lincoln Lumber Company-Petition for Declaratory Order—Condemnation of a Railroad Right-of-Way for a Storm Sewer, STB Finance Docket No. 34915, slip op. at 6 (STB served Aug. 13, 2007) (Lincoln Lumber). Neither the Board nor the courts, however, have found that cities can entirely take from a railroad land the railroad has slated for present or future rail use. Rather, non-conflicting and non-exclusive easements across railroad property for at-grade road crossings, wire crossings, sewer crossings, etc. are routinely accommodated so long as they would not interfere with rail operations or pose undue safety risks. See, e.g. Franks Investment Co., LLC v. Union Pacific R.R. Co., slip op at 13, 2010 U.S. App. LEXIS 227 (5th Cir. 2010); New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321, 333 (5th Cir. 2008), quoting Maumee & W. R.R. Corp. and RMW Ventures, LLC—Petition for Declaratory Order, STB Finance Docket No. 34354, slip op. at 2 (STB served Mar. 3, 2004) (Maumee).

In short, the right to proceed under state law is conditioned upon the action taken under state law not unreasonably interfering with railroad operations or interstate commerce, and not constituting regulation of the railroad's operations. DM&E, 236 F.Supp.2d at 1005-08 (overturning only the particular revisions of a state's eminent domain statute that amounted to regulation of a railroad).

Here, the record shows that this Property abuts an existing rail corridor; that NS has plans for significant improvement and increased rail traffic volume; and that the park the City proposes to build would interfere with or prevent these transportation activities, as well as prevent the railroad from properly conducting railroad maintenance activities and clearing derailments. Thus, this case is distinct from Maumee (easement for an at-grade crossing and subsurface utility under a rail right-of-way not federally preempted) or Lincoln Lumber (no preemption for sewer line).

Birmingham also relies on Florida East Coast to buttress its assertion that preemption does not apply here. In that case, the court found that the aggregate distribution plant at issue was not protected by section 10501(b) preemption where the plant, although located on railroad-owned property, was not itself railroad-owned or railroad-operated and thus was not part of "rail transportation" within the Board's jurisdiction under section 10102(9)). But that finding, which

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( . . . continued)
May 15, 2003), aff'd, City of Riverview v. STB, 398 F.3d 434 (6th Cir. 2005) (petition to revoke acquisition and operation exemption denied on grounds that railroad had developed plans for constructing intermodal facility); Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286), slip op. at 5 (STB served Feb. 14, 2008), aff'd, City of South Bend v. STB, 566 F.3d 1166, 1169-70 (D.C. Cir. 2009) (adverse abandonment application denied in part on grounds that, despite city's desire to condemn rail lines for use as storm sewer, line had potential to be rehabilitated and rail operations restored within a reasonable amount of time). See also Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995) (recognizing that it is not unusual that, as railroad traffic changes and grows, railroad facilities may need to be upgraded).

is consistent with rulings of the Board,[9] is not applicable to the factual situation here. Here the property, facilities, and operations involved are without question those of a railroad, and not of a non-railroad entity like that involved in Florida East Coast.

The City suggests that NS's claims that the proposed park would present a safety hazard and would not leave enough room for equipment used in track maintenance and in clearing derailments are contrived, because other parks in Birmingham are located near rail lines. The fact that other parks may be so situated, however, does not diminish the significant safety concerns that would result from a situation like this, where a park would be located below, and a mere few feet from, elevated active rail lines that carry 25 to 30 trains a day.

Finally, the City suggests that the taking it wishes to implement would not be preempted, because Birmingham could not determine by its title search whether NS actually owns the Property. It is common, however, for railroads to hold various types of property interests in the land that constitutes their rights-of-way. NS's evidence includes verified statements by employees of its real estate department asserting that NS owns the Property primarily in fee, and holds an easement interest in the additional portions. See NS Petition, Appendix F. The City has proffered no evidence showing that NS lacks the title it needs to perform all of the contemplated rail transportation. The Board has jurisdiction over rail transportation, regardless of whether the property upon which that transportation is being conducted is owned, leased, or held in easement by the operating railroad.

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

It is ordered:

1. NS's motion for leave to file a reply to a reply is denied.

2. The petition for a Declaratory Order is granted, as discussed above.

3. NS must submit a copy of this served decision to the United District Court of the Northern District of Alabama within 5 business days.

4. This decision is effective on its service date.

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

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[9] See Hi Tech Trans LLC – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002).