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SERVICE DATE – SEPTEMBER 21, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35581

BUDDY AND HOLLEY HATCHER—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board declares that the Hatchers' California state lawsuit is not barred by federal law.

Decided: September 19, 2012

This decision grants a request for a declaratory order by Buddy and Holley Hatcher (Hatchers). In so doing, the Board finds that the lawsuit filed in California state court by the Hatchers against various railroad defendants is not federally preempted.

BACKGROUND

On October 27, 2011, the Hatchers filed a complaint in California state court² seeking to recover damages sustained by them for alleged violations of state law by the following entities: RailAmerica, Inc., RailAmerica Operations Shared Services, Inc., RailAmerica Operations Support Group, Inc., San Joaquin Valley Railroad Company (SJVR) (collectively, RailAmerica), and Union Pacific Railroad Company (UP) (RailAmerica and UP are referred to, collectively, as Railroad Defendants).³ On December 12, 2011, the Hatchers filed a petition for declaratory order requesting that the Board declare that their California state court claims against the Railroad Defendants are not preempted under federal law. The Hatchers further request that, if the Board finds it has jurisdiction here, the Board provide any remedies it is authorized to

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 The claim was subsequently removed to federal court and then remanded to California state court.

³ In addition to the Railroad Defendants, the Hatchers also seek damages from the City of Porterville, Cal. and Tulare County, Cal.

provide. On January 3, 2012, UP filed a reply. On January 4, 2012, RailAmerica⁴ (including SJVR) filed a reply.⁵

The record provides the following facts: the Hatchers owned real property (their home) at 476 West Westfield Avenue, Porterville, Cal. A line of railroad ran adjacent to this property. SJVR leased the line and acquired operating rights for it in 1992⁶ from UP's predecessor, Southern Pacific Transportation Company (SPT). In 1993, SJVR purchased the line and leased the underlying right-of-way from SPT.⁷ The Board later determined that the sale relieved UP of its common carrier obligation regarding the line,⁸ even though UP retained the underlying property.⁹ The Board authorized the line for abandonment in 2008,¹⁰ and SJVR subsequently consummated the abandonment¹¹ and salvaged the tracks.

⁴ RailAmerica is a shortline railroad holding company that controls SJVR. San Joaquin Valley R.R.—Aban. Exemption—In Tulare Cnty., Cal., AB 398 (Sub-No. 8X), slip op. at 3 (STB served June 6, 2008).

⁵ Replies were due on January 3, 2012. RailAmerica requested permission to late-file its reply. We will accept this late-filed reply in the interest of compiling a complete record and because no party will be prejudiced.

⁶ San Joaquin Valley R.R.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 31993 (ICC served Jan. 23, 1992).

⁷ San Joaquin Valley R.R.—Acquis. & Lease Exemption—S. Pac. Transp. Co., FD 31993 (Sub-No. 1) (ICC served Oct. 4, 1993).

⁸ “We note that a decision of the Board’s predecessor, the Interstate Commerce Commission (ICC), in Southern Pacific Transportation Company—Abandonment Exemption—In Fresno County, CA, Docket No. AB-12 (Sub-No. 179X), et al. (ICC served May 8, 1995), involving another line that SJVR acquired from SPT in the transaction that was authorized by the ICC in Finance Docket No. 31993 (Sub-No. 1) . . . determined that SPT did not retain a common carrier obligation over the line. The ICC’s reasoning in that decision would appear to apply equally here.” San Joaquin Valley R.R.—Aban. Exemption—In Tulare Cnty., Cal., AB 398 (Sub-No. 7X), slip op. at 7 n.20 (STB served June 6, 2008).

⁹ Id. at 2.

¹⁰ San Joaquin Valley R.R.—Aban. Exemption—In Tulare Cnty., Cal., AB 398 (Sub-No. 7X) (STB served Sept. 10, 2008) (terminating the OFA process and making the abandonment effective on the service date of the decision). In 2009, the Board reopened the proceeding and removed the Section 106 historic preservation condition. San Joaquin Valley R.R.—Aban. Exemption—In Tulare Cnty., Cal., AB 398 (Sub-No. 7X) (STB served Nov. 20, 2009).

¹¹ SJVR letter of Nov. 24, 2009.

The Hatchers allege in their state court complaint that, during salvage, the Railroad Defendants blocked the drainage infrastructure near the tracks and the Hatchers' property.¹² The complaint also alleges that the Railroad Defendants graded, lowered, and widened the railroad bed after the removal of the tracks.¹³ According to the Hatchers, the blockage of the drainage system and changes to the railroad bed diverted surface water to their property, resulting in flooding and damage. The complaint claims unreasonable diversion of surface water, inverse condemnation, trespass, nuisance, and negligence under California state law.

UP replies to the Hatchers' Board petition by arguing that because it was relieved of its common carrier obligation on the line, it has no responsibility for subsequent actions by SJVR. UP also argues that, in any event, all of the Hatchers' state law claims against it are preempted because the Board has exclusive jurisdiction over transportation by rail carriers and remedies provided with respect to their facilities and construction of track. To support this argument, UP cites cases in which courts have found that state law claims against railroads alleging negligence in design, construction, and maintenance of railroad track were preempted under 49 U.S.C. § 10501(b).¹⁴

In its reply to the Hatchers' Board petition, RailAmerica (including SJVR) points out that SJVR indicated in its environmental report, which it filed with the Board as part of its request in 2008 for abandonment authority, that abandonment of the line would result in salvage, including "the removal of the rail, crossties and possibly the upper layer of ballast."¹⁵ RailAmerica notes that SJVR further stated that it did "not intend to disturb any sub grade or sub grade structures and [did] not intend to remove any bridge structures."¹⁶ According to RailAmerica, although SJVR complied with the Board's notice and service requirements, no one raised the issue of flooding during the abandonment proceeding or in comments on SJVR's environmental report or the Board's environmental assessment. In addition, RailAmerica notes that the California Public Utilities Commission (CPUC) requested conditions on salvage, the Board imposed a condition requiring SJVR to consult with the CPUC prior to salvage in response to that request, and SJVR asserts that it complied with that condition.¹⁷ RailAmerica argues that therefore the state court complaint would intrude upon the Board's exclusive jurisdiction because the Board's abandonment decision fully addressed salvage of the line and SJVR complied with the Board's conditions.¹⁸

¹² Petition, Exh. 1 at 4.

¹³ Id.

¹⁴ Pere Marquette Hotel Partners, L.L.C. v. United States, No. 09-5921 (E.D. La. March 10, 2010); Maynard v. CSX Transp., Inc., 360 F.Supp.2d 836, 841-42 (E.D. Ky. 2004), A&W Props., Inc. v. Kan. City S. Ry., 200 S.W.3d 342, 343, 346 n.5, 349 (Tex. Ct. App. 2006).

¹⁵ RailAmerica Reply at 4.

¹⁶ Id.

¹⁷ RailAmerica Reply at 5.

¹⁸ Id.

RailAmerica claims that the Hatchers' action seeks to substitute California law for the Board's abandonment decision, seeks to intrude upon the Board's regulation of rail transportation, and seeks to deny SJVR the ability to proceed with a Board-authorized activity (i.e., salvage).

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. 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). We find that a controversy exists between these parties and, consequently, will grant this request for a declaratory order.¹⁹

The Interstate Commerce Act, as revised, vests in the Board broad jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). The preemption provision in the Board's governing statute states 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).

Under 49 U.S.C. § 10501(b), two broad categories of state regulation are categorically preempted for rail 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. E. Ala. Ry.—Petition for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012). Categorical preemption includes preemption of actions intruding upon the Board's regulation of abandonments and its regulation of the instrumentalities of transportation. § 10501(b); § 10102(9) (defining transportation to include instrumentalities and facilities); see also CSX Transp., Inc.—Petition for Declaratory Order, FD 34662, slip op. at 3 (STB decided May 3, 2005). In a categorical, or facial, preemption analysis, the Board considers “the act of regulation itself,” rather than the reasonableness of the state or local action. CSX Transp., Inc., slip op. at 3.

State and local actions may also be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); E. Ala. Ry.—Petition for Declaratory Order, slip op. at 4. The Board analyzes the facts of the case to determine whether the action is preempted. E. Ala. Ry.—Petition for Declaratory Order, slip op. at 4.

¹⁹ Although RailAmerica has requested that we institute a proceeding, we see no need for additional evidence and arguments from the parties, and we will instead issue findings based on the record before us.

In addition, state and local action is preempted where a private party cannot comply with both state and federal law, or where a state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hillsborough Cnty., Fla. v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985). This type of preemption, known as conflict preemption, applies even where, as with § 10501(b), Congress has also created an express preemption clause. Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1129 (10th Cir. 2007).

We find that § 10501(b) does not categorically preempt the Hatchers’ state court action. First, no permitting or preclearance requirements are involved. Second, the action is not an intrusion into matters regulated by the Board, including the Board’s regulation of abandonments and the instrumentalities of transportation. In an abandonment proceeding, the Board determines whether a railroad line may be removed from the national rail network, which would end any common carrier obligation over the line. See 49 U.S.C. § 10903. The Board may impose conditions on abandonments it approves. § 10903(e)(1)(B). Here, the Hatchers’ state court action does not undermine the Board’s completed analysis and authorization of the abandonment, including the Board’s authority to impose conditions on the abandonment, because the “act of regulation” (the Board’s authorization of the abandonment) is not affected. See CSX Transp., Inc., slip op. at 3. Rather, the state court action addresses the manner in which the Railroad Defendants conducted salvage and only seeks to hold them accountable for the damage they allegedly caused to the Hatchers’ property as a result of such salvage.

RailAmerica cites Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co., 450 U.S. 311 (1981), for its holding that the ICC (the Board’s predecessor agency) had exclusive jurisdiction over abandonments, and argues that the decision supports its claim that the Hatchers’ state court action intrudes upon the Board’s abandonment authority. That decision, however, serves to illustrate our point that the Hatchers’ state cause of action does not interfere with our authority over abandonments. In Kalo Brick, a railroad filed with the ICC for abandonment after the line at issue was damaged by a mud slide. Id. at 314. While the matter was pending before the ICC, a shipper filed an action in Iowa state court claiming that the railroad violated a state statute and common law “by refusing to provide cars on the branch line, by negligently failing to maintain the roadbed, and by tortiously interfering with respondent’s contractual relations with its customers.” Id. at 315. The ICC granted the abandonment while the state action was pending. Id. at 315-16. In Kalo Brick, the Court found that the state action was an attempt to “litigate the issues underlying the . . . abandonment,” because the shipper was essentially arguing that the railroad was obligated under state law to continue providing service; the state court action, the Court found, was therefore preempted. Id. at 324-31.

Here, the Hatchers’ state court action makes no attempt to challenge the Board’s prior abandonment decision, including any conditions imposed by the STB, nor does it seek to require a federally regulated carrier to continue to operate. Consequently, the state court’s consideration of the Hatchers’ action would not undermine or second guess the Board’s abandonment decision.

As indicated, the Hatchers’ complaint seeks only to hold the Railroad Defendants liable under California law for the manner in which they salvaged the line. In this regard, we point out

that the Board's authorization of the abandonment did not amount to a blanket approval to conduct salvage operations without regard to state and local laws, or to insulate the carrier from all consequential effects arising out of salvage activity. The Board's authorization of an abandonment and imposition of conditions on that abandonment is not a license for railroads to take, or neglect to take, whatever actions they wish in exercising abandonment authority and any subsequent salvage. The Board cannot anticipate, and will not issue, a laundry list of all possible actions railroads cannot do or must do in the course of completing an abandonment; such a list would inevitably be incomplete. See Emerson, 503 F.3d at 1132 (regarding railroad's claim of preemption of a state tort claim involving flooding allegedly caused by railroad's improper disposal of waste: "[T]he Railroad's argument has no obvious limit, and if adopted would lead to absurd results. If the [Interstate Commerce Act] preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street."). Rather, in the course of exercising abandonment authority, the railroad must comply with state and local laws to the extent they are not otherwise preempted. See id. at 1130-31 (concluding that state law applies to a railroad's property or actions unless displaced).

RailAmerica argues that the Hatchers should have commented during the abandonment process (including environmental review) to raise their concerns about the impact of the abandonment on the drainage system. According to RailAmerica, the abandonment proceeding is the only place the Hatchers could raise their claims regarding future salvage activities due to the Board's exclusive jurisdiction over abandonments. However, the state court action is not categorically preempted simply because the Board engaged in the environmental review process during the abandonment proceeding, or because the Hatchers did not raise any concerns about potential flooding during that process. The Hatchers' state tort action does not attempt to regulate whether SJVR was properly authorized to abandon the line or whether the Board placed appropriate conditions on the abandonment. Nor does it seek to undo SJVR's already consummated abandonment.

RailAmerica also argues that, because salvage here could only be carried out as authorized by the Board, and SJVR complied with the Board's conditions, one of which required consultation with the CPUC prior to salvage, the Hatchers' claims are preempted.²⁰ But RailAmerica misconstrues the Board's role in the salvage process. The Board's authorization of the abandonment permitted, but did not require, SJVR to salvage the track as part of consummating the abandonment. See Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Envtl. Conditions, EP 678, slip op. at 4 (STB served Apr. 23, 2008). To the contrary, as discussed below, the Board specifically declined to require in its abandonment decision that the rails be removed within any timeframe, or at all. SJVR chose to salvage the tracks, and the Hatchers' state court action cannot prevent salvage because it has already been completed.

²⁰ RailAmerica Reply at 5.

RailAmerica also argues that the Board has exclusive jurisdiction over the routes and facilities of rail carriers. Here, however, the Hatchers' state court action does not intrude upon the Board's exclusive jurisdiction over rail transportation. While the claims incidentally relate to railroad tracks and property, the acts complained of by the Hatchers (or failures to act) are alleged "tortious acts . . . by a landowner [or tenant] who happens to be a railroad company." Emerson, 503 F.3d at 1130. For these reasons, this state court action is not categorically preempted.

Section 10501(b) also does not preempt the Hatchers' state court action under the Board's as-applied analysis, because there is no evidence that the action would unreasonably burden interstate commerce or interfere with rail transportation. The Railroad Defendants make no arguments and provide no facts supporting a finding that the state court action should be preempted under an as-applied analysis. Moreover, in this case, rail operations are no longer occurring on the line, the line has been abandoned, and the line is no longer serving a rail transportation purpose; therefore, the complaint does not interfere with rail transportation or unreasonably burden interstate commerce.

Conflict preemption does not prevent the state court action from proceeding.²¹ While the Board's decision permitting abandonment placed conditions on the abandonment (requiring compliance with the historic preservation process and consultation with the CPUC regarding potential safety hazards created by abandoned tracks, San Joaquin Valley Railroad—Abandonment Exemption— In Tulare County, Cal., AB 398 (Sub-No. 7X), slip op. at 12 (STB served June 6, 2008)), the Board's abandonment decision did not contain any specific conditions that governed how salvage should be conducted, and that could serve as the basis for federal conflict preemption, once the historic preservation condition imposed by the Board was removed and the required consultation with the CPUC had taken place. Accordingly, we can discern no reason why the Railroad Defendants could not have complied with both the Board's conditions and also taken action consistent with California state law (the latter determination to be made by the state court). As noted above, abandonment authority does not require the abandoning railroad to salvage the line in order to consummate the abandonment. Consummation of Rail Line Abans., slip op. at 4. Here, while the CPUC requested that the Board require SJVR to remove the tracks, the Board declined that request and instead ordered consultation with the state. San Joaquin Valley R.R.— In Tulare Cnty., Cal., slip op. at 10. SJVR undertook salvage here of its own volition, and, as discussed, the California state court may rule on the defendants' liability for those actions.

We will not address UP's argument that any claims regarding design, construction, or maintenance actions taken when UP had a common carrier obligation over the line are preempted. Rather, we will limit our discussion of the Hatchers' state court action to the claims

²¹ The Railroad Defendants do not specifically claim conflict preemption but, because their arguments are somewhat vague, we will address conflict preemption in order to clarify that it does not apply here.

the Hatchers appear to be making—that the Railroad Defendants are liable for actions taken in the course of salvage and after the Board’s authorization of the abandonment.

The status of UP’s common carrier obligation here is not relevant light of our determination that the Hatchers’ claims relate solely to possible violations of state law that are not preempted. Whether UP is properly defendant in the state court action by virtue of its ownership of the underlying property will be an issue for the state court to resolve.

For all of these reasons, we find that the Hatchers’ state court claims are not federally preempted.

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

It is ordered:

1. The Hatchers’ request for a declaratory order is granted to the extent discussed above.
2. This decision is effective on the date of service.

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