

STB FINANCE DOCKET NO. 33095¹

KING COUNTY, WA--PETITION FOR DECLARATORY ORDER--
BURLINGTON NORTHERN RAILROAD COMPANY--
STAMPEDE PASS LINE

Decided September 25, 1996

The Board finds that ICCTA preempts King County's requirement that the Burlington Northern Railroad Company obtain local permits before reactivating and operating the Stampede Pass line in the State of Washington.

BY THE BOARD:²

By petition filed August 21, 1996, in Finance Docket No. 33095, King County, WA (County), seeks institution of a declaratory order proceeding to determine whether the ICCTA preempts the County from requiring that the Burlington Northern Railroad Company (BNRR) obtain permits from the County before undertaking certain improvements on BNRR's Stampede Pass line in King County, Washington. The County states that it is a municipal subdivision of the State of Washington, and is authorized under its constitutional

¹ This case embraces STB Finance Docket No. 32974, *Burlington Northern Santa Fe Corporation, BNSF Acquisition Corp., and Burlington Northern Railroad Company -- Control -- Washington Central Railroad Company*.

² The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10501 and 10901.

police powers to adopt and enforce land use and environmental laws and to conduct land use planning and permit review.³

BACKGROUND

According to the petition, BNRR and its predecessors have operated the Stampede Pass line between Auburn and Pasco, WA, since 1888 as a main line route serving the Pacific Northwest. In 1983, BNRR allegedly downgraded the Stampede Pass line to carry local traffic. In 1986, BNRR sold a segment of the Stampede Pass line between Cle Elum and Pasco, WA, together with several branch lines, to the Washington Central Railroad Company (WCRC). BNRR continued to provide limited local service over the remaining segment of the Stampede Pass line between Auburn and Cle Elum (including the portion of the line within the County).

Because of an asserted increasing demand for rail service, BNRR is now proposing to reacquire the segment sold to WCRC and reestablish the Stampede Pass line as a main line for through traffic. To that end, in an application filed June 17, 1996, in STB Finance Docket No. 32974, the Burlington Northern Santa Fe Corporation, (BNSF), BNSF Acquisition Corp. (BNSF Acquisition), BNRR and WCRC (collectively, applicants) are seeking approval under 49 U.S.C. 11323-25 for BNSF to continue in control of BNSF Acquisition, its noncarrier subsidiary, after BNSF Acquisition acquires the common stock of, and subsequently merges with, WCRC. Applicants are also seeking approval under 49 U.S.C. 11323 for BNRR to operate WCRC's segment of the Stampede Pass Line between Cle Elum and Pasco, WA, and connected branch lines.

³ The City of Auburn has filed a pleading stating that it is an interested party with respect to King County's petition and that, in furtherance of these interests, the City is preparing its own petition to the Board, to be filed in STB Finance Docket No. 33095. The City further requested that we defer action on the County's petition until we have had an opportunity to consider the City's position.

While the City is free to seek a declaratory order, if it wishes, it has offered no reason for the Board to delay responding to King County's petition. The answer to the question presented by King County is sufficiently straightforward that we need not seek or consider public comment in issuing our order. The City of Auburn is not prejudiced by our issuing a prompt response to King County's petition, because, as noted, the City may file its own, in a separate docket.

On September 4, 1996, the Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) of BNRR's proposed operation over the Stampede Pass line, including the segment of the line within the County. The EA did not consider any proposed construction or improvements to the line but addressed the anticipated impacts of an increase in train traffic on the entire Stampede Pass line. Based on a projected increase of 10 trains per day on the line, SEA concluded that the proposal would not have significant environmental impacts if the mitigation measures recommended in the EA are implemented. The County and a number of other governmental organizations were consulted by SEA in preparing the EA. Comments on all aspects of the EA are due October 4, 1996. SEA will issue final recommendations after reviewing the comments, which we will consider in our final decision on the application.

As part of the proposed operation over the Stampede Pass line, BNRR apparently is also planning to repair and upgrade portions of the Stampede Pass line within the County, including: (1) replacing track sidings; (2) replacing maintenance-of-way buildings; (3) raising heights of tunnels; (4) replacing snowsheds and (5) installing communications towers.

The County contends that some of the line repairs planned by BNRR would ordinarily require permits after environmental review under state environmental laws. It asserts that while BNRR initially submitted permit applications for the line improvements, the carrier now contends that the County's review process is preempted by the Board's authority under the ICCTA.

On May 8, 1996, the County asked the Board for an informal opinion as to whether the ICCTA preempts the County's authority to evaluate or condition BNRR's proposed operations of the Stampede Pass line within the County and to issue grading, building or conditional use permits for construction. BNRR joined the County's request on May 31, 1996.

On June 20, 1996, the Secretary of the Board issued an informal opinion indicating that the County's permitting process appeared to be preempted by the ICCTA. The Secretary noted that the County, through the permitting process, could deny BNRR authority to undertake the improvements to the Stampede Pass line and thus could inhibit BNRR from carrying traffic on the line. As a result, he concluded that the state or local permitting process appeared to interfere with the federal licensing program and unreasonably burden interstate commerce. The opinion further stated that, under its local police powers, the County could nonetheless continue to police certain deleterious actions, such as

dumping waste and could issue citations or seek damages if there were a spill of harmful substances while a railroad line was being constructed or upgraded. The County states that shortly after the informal opinion was issued, BNRR withdrew its pending permit applications in the County.

In its petition for declaratory order, the County submits that the Secretary's informal opinion has not resolved the question of preemption in this case. It requests that the Board clarify whether and to what extent the County is preempted from permit review and directing mitigating measures for construction associated with the Stampede Pass project.⁴ Specifically, the County asks us to clarify whether it is preempted from requiring permit applications from BNRR: (1) to mitigate noise impacts of rail line operations in residences located near the line by installing natural or artificial noise barriers; (2) to mitigate traffic congestion impacts of rail line operations by building overpasses or underpasses or other means; (3) to demonstrate the structural integrity of snowsheds to be built at the Stampede Pass tunnel; (4) to provide contingent mitigating plans for potential discharge or spill of material transported along lakes and streams and other segments of the line; and (5) to study and mitigate impacts on wetlands, streams, or other natural systems along the rail right-of-way within the County.

DISCUSSION AND CONCLUSIONS

The Board's authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory decision is discretionary. We will exercise that authority here to eliminate controversy and remove uncertainty over our view of the appropriate role of state and local government entities and this Board in regulating the environmental effects of BNRR's planned reactivation of its Stampede Pass line.

We agree with the Secretary's informal opinion that the County's permitting process for prior approval of this project of necessity impinges upon the federal regulation of interstate commerce. The power to authorize the construction of rail lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by section 10901 of the ICCTA. The ICCTA abolished the ICC, established the Board as the successor to the ICC, and revised the Interstate Commerce Act, all effective January 1, 1996. The Board now has

⁴ The Cities of Kent and Auburn also have requested a ruling from us on local government preemption.

exclusive jurisdiction over the construction and operation of rail lines that are part of the interstate rail network, pursuant to 49 U.S.C. 10501 and 10901. The ICC and court precedents cited herein regarding the ICC's preemptive authority now apply to the Board's authority. *See*, ICCTA Section 205.

In the Transportation Act of 1920, Congress established a comprehensive scheme of federal regulation of track additions and deletions by interstate railroads like BNR. ⁵ *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981) (*Kalo Brick*) (ICC abandonment authority is "plenary" and "exclusive"); *Transit Comm'n v. United States*, 289 U.S. 121 (1933) (*Transit Comm'n*) (same for construction). Thus, any state or local statute that requires a railroad to obtain state or local approval before construction (or abandonment) of a line would appear, on its face, to conflict with the ICCTA and is preempted.

Moreover, under the Commerce and Supremacy Clauses of the United States Constitution, direct regulation of interstate commerce by the states is prohibited. *E.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982); *Kalo Brick*, 450 U.S. at 318; *Missouri Pac. R.R. v. Stroud*, 267 U.S. 404, 408 (1925) ("there can be no divided authority over interstate commerce * * * the Acts of Congress on that subject are supreme and exclusive"). Indeed, Congress in the ICCTA has confirmed that the jurisdiction of the Board over transportation by rail carriers like BNR is exclusive and preempts the remedies provided under federal or state law. 49 U.S.C. 10501(b).

Preemption, however, does not withdraw from the states the "power to regulate where the activity regulated [is] a merely peripheral concern" of federal law, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). In other words, the ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads. But the local law is preempted when the "challenged state statute 'stands as an obstacle to the accomplishment and execution to the full purposes and objections of Congress.'" *Perez v. Campbell*, 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

A key element in the preemption doctrine is the notion that only "unreasonable" burdens are stricken down. Not all state and local regulations that affect interstate commerce fail. Only those that "conflict with" federal

⁵ The BNR line through Stampede Pass was built before Congress gave the ICC the authority to approve the construction of rail lines, but authority for the line was "grandfathered" under the provisions of the statute.

regulation, "interfere with" federal authority, or "unreasonably burden" interstate commerce are preempted.

In short, where the state or local law can be applied without interfering with the federal law, the courts have done so. Thus, in *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), the Supreme Court held that a state proceeding to condemn railroad property did not interfere with the Interstate Commerce Act because the state process followed the abandonment of the line pursuant to the ICC's process and the line was no longer part of the national rail network.

While it is difficult to draw the line between what type of regulation is, and is not, preempted without a thorough analysis of the particular ordinances at issue, it appears that requiring a permit for BNRR's operations or maintenance and upgrading plans for the Stampede Pass line would go too far. An incident of a carrier's receipt of authority to construct a line is the right to maintain and improve it to keep it in operable condition. This is necessary to remedy wear and tear and to meet the changing needs of the market for rail services by, for example, enlarging or raising tunnels to accommodate bigger cars, raising towers to employ new communications systems, or replacing sidings to accommodate more traffic.

Moreover, the permitting process implies the power to deny authorization and thereby to frustrate the activity that must be sanctioned. If BNRR were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of environmental issues, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that the county permitting process contemplated for this project would both interfere with the federal licensing program and unreasonably burden interstate commerce. Accordingly, it would be preempted by the ICCTA.

In addition to reiterating the overall question of federal preemption that the County propounded in its request for an informal opinion, the County asked five specific questions on Board preemption of County permitting requirements directed at mitigating five specific environmental impacts. Although the objects of each request differ, the method to be employed is the same: obtaining a permit from the County. Because, as noted, the permitting process by its nature impinges upon federal regulation, that process itself is objectionable, regardless of its objectives.

It should be noted that the Board is conducting an environmental review of BNRR's proposed operation of the *entire* Stampede Pass line in STB Finance Docket No. 32974, including the segment within the County. The Board has thereby assumed the exclusive role in imposing mitigating conditions in connection with its consideration of the application before it. The EA, which was issued on September 4, 1996, considered the environmental impacts of BNRR's proposed operation of the Stampede Pass line. Among the impacts considered in the EA were those on traffic, noise, safety, and other matters, which are the same impacts the County seeks to regulate through its permitting process. The EA has recommended certain mitigating conditions addressing traffic and safety concerns, which would require BNRR to notify towns along the line of its expected schedule of train operations and work with them on emergency response measures. BNRR also would be required to consult with appropriate state and local government agencies to discuss funding options and develop a priority list for upgrading crossing signals and to transport all hazardous materials in compliance with federal standards. The County has the opportunity to comment on SEA's recommendations for mitigation as well as other aspects of the EA by October 4, 1996.⁶ SEA will consider these comments and the environmental record in making its final recommendations. The Board will then consider those recommendations in imposing environmental conditions upon any final decision approving the application. Absent conditions imposed by the Board, requiring approval by a state or local government agency, such agencies are totally preempted from regulating the environmental consequences of the transaction.

The informal opinion issued by the Secretary presupposed that there would be no federal approval of the proposal to upgrade and modernize the Stampede Pass line. Had BNRR's proposal not required federal approval, we agree with the view expressed therein that a state or local government has a limited role under other federal statutory schemes, such as the Clean Air Act, involving protection of the environment and, to some extent, as a result of the state's recognized police powers, to protect the health and welfare of its citizens. But

⁶ We note that SEA extended to October 4, 1996, the original time period for filing comments to the EA. This extension has been made to ensure that petitioner has the opportunity to comment on the EA, and SEA's recommended mitigating conditions, as well as to propose additional mitigating conditions that it believes are necessary. This extension of the EA comment period will delay our decision in STB Finance Docket No. 32974 by 10 days. We now expect to issue a final decision on the application by October 25, 1996, with an effective date of October 30, 1996.

outside of that limited role, a state or local government may not use its permitting authority to impede or unreasonably interfere with interstate commerce. However, where, as here, approval of a transaction is required at the federal level with the result that the environmental effects of that approval are required to be assessed at the federal level, there is no role for state and local agencies to play other than by participation in the Federal environmental review process.

Accordingly, we will deny the County's petition.

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

It is ordered:

1. The County's petition for declaratory order in STB Finance Docket No. 33095 is denied.
2. This decision is effective on September 25, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.