

STB FINANCE DOCKET NO. 33466

BOROUGH OF RIVERDALE
— PETITION FOR DECLARATORY ORDER —
THE NEW YORK SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION

Decided September 9, 1999

The Board issues a decision summarizing court precedent on railroad preemption and seeking more information on whether the railroad operations involved in this case are preempted.

BY THE BOARD:

On September 8, 1997, the Borough of Riverdale (the Borough), a New Jersey municipal corporation, filed a petition for a declaratory order in this case. The Borough seeks a determination regarding the extent to which certain facilities constructed and operated in Riverdale by The New York, Susquehanna and Western Railway Corporation (NYSW) are covered by the federal preemption provisions contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995 Pub. L. No. 104-88, 109 Stat. 803, 807 (1995) (ICCTA).

The Borough contends, among other things, that the railroad's construction of a truck terminal and corn processing plant in a residential zone in Riverdale without first obtaining approval from the municipal Planning Board raises health and safety concerns. It asks for a ruling regarding whether the facilities are subject to federal jurisdiction, and, if so, the extent to which local laws and regulations (specifically zoning ordinances) apply. NYSW did not file a reply.¹ As discussed below, we will (1) grant the Borough's request that we institute a declaratory order proceeding, (2) summarize relevant recent agency and court cases construing the ICCTA and its effect on state and local regulation, to assist the parties and the court in resolving some of the preemption questions raised in

¹ The Borough did not include in its petition a certificate showing service on NYSW. *See*, 49 CFR 1104.12. We will serve a copy of the Borough's petition (including attachments) and a copy of this decision on NYSW.

this case, and (3) establish a schedule for the submission of further pleadings by the Borough, NYSW and other interested persons.²

BACKGROUND

This controversy arises from the Borough's opposition to NYSW's construction and use of certain facilities within or between two residential zones of Riverdale. The facts, as represented by the Borough in the material furnished to us (its complaint and other material from the Borough's civil action seeking injunctive relief in New Jersey State court),³ are as follows.

The facilities in question, a truck terminal, weigh station, and corn processing plant, evidently were constructed either within NYSW's right-of-way or on property that it owns adjacent to the right-of-way. The right-of-way, which is 100 feet wide, is situated on 3.59 acres within Riverdale. In addition to the right-of-way, NYSW owns a small parcel of land immediately adjacent to and west of the northernmost portion of the right-of-way, with 28 feet of frontage on the Paterson-Hamburg Turnpike. An asphalt parking area provides access to a former railroad passenger depot located within the right-of-way. The 1,080-foot portion of the right-of-way to the north is within the Riverdale central business area, while the 485-foot portion of the right-of-way to the south is between two residential zones.⁴

A water pipe installed within the right-of-way apparently has 20 or more outlets to transfer hot water to standing railroad tank cars for the purpose of heating the materials inside the tank cars to facilitate transfer of the materials to trucks. The outlets are located on the west side of the track, and there is a 20-foot wide paved area to accommodate the trucks that separates the track from the adjacent residences. The Borough is concerned about the potential for spills and malfunctions in the heat transfer process that could result in adverse environmental impacts. The Borough further states that NYSW has also

² The material we have before us at this point does not permit a resolution of every one of the many preemption issues raised. We have only the Borough's initial filing, which consists principally of copies of New Jersey State court records and related documents. Nevertheless, the filing is sufficient to permit us to explain how certain preemption issues would be resolved under the statute; to support a determination that a question exists for which declaratory relief is appropriate; and to warrant institution of a declaratory order proceeding.

³ *Borough of Riverdale v. NYSW*, No. MRS-L-2297-96 (Superior Court of New Jersey, Law Division - Morris County) (*Riverdale*). The Board was not a party in that court case.

⁴ These residential zones evidently were established in September 1991 by Riverdale's Planning Board under its Master Plan. The boundary line between the two zones was set at the center of NYSW's right-of-way.

established a corn processing facility that would bring 10 to 20 tanker trucks to the site per day to off-load its rail cars. These activities allegedly violate Riverdale's land use and permissive zoning ordinances as prohibited uses within this residential district.

In addition to these activities, the truck weigh station, which is located adjacent to the eastern edge of NYSW's property approximately 158 feet from where the property intersects with the Paterson-Hamburg Turnpike, allegedly poses a risk of injury to the public because of the proximity of large tractor trailers to high tension power lines. Concern was also expressed that NYSW's construction activities may cause flooding, disrupt traffic, and produce unacceptable noise levels for the town's firehouse and library located next door.

According to the material filed by the Borough, NYSW's construction activities took place without appropriate municipal approvals and permits and have resulted in noncompliance with local ordinances.⁵ The Borough states that NYSW's agents, asserting that their activities were permitted under Federal law, opened local hydrants, filled its paver machines, and paved from Hamburg Turnpike to Post Lane, thereby connecting NYSW's property to local streets and county roads. The Borough also alleges that the improvements violate the landscaping buffer regulations that require 10-foot width buffer adjacent to and parallel with any street and provide for a buffer not less than 25 feet in width for lots contiguous to any residentially zoned lot.

In the Borough's civil suit, the court, by decision entered September 7, 1996, ordered: (1) NYSW to file a Site Plan Application with the Borough's Planning Board; (2) the Borough to review the application, subject to its standard procedures, but in a way that would not inappropriately obstruct the operation of NYSW's facility; and (3) the Borough to approve the application by January 31, 1997, or report back to the court for further proceedings. The court also directed NYSW to: (1) stop further construction except for emergency measures that were to be reported to Riverdale; and (2) comply with "applicable safety, health and welfare regulations." At the same time, the court determined that NYSW is not "bound by Local Zoning regulations as to Land Use and Utilization," which the court found to be preempted by the ICCTA. The court added that the Borough "shall not use regulatory measures regarding safety,

⁵ The Borough states that NYSW applied to the Morris County Soil Conservation Board for approval and that, after Morris County notified the Borough, the railroad informed the Borough that it wished to bring trailers to the site. Subsequently, a Borough engineer conducted a site inspection. The Borough then advised that the planned activities required a site plan and variances. The railroad evidently took the position that it could proceed with work construction pursuant to federal law.

environmental or health matters as a device for getting rid of NYSW's [Riverdale facilities]." Nor, in the court's words, can the Borough "preclude or interfere with [NYSW's] operation of the facilities."⁶

DISCUSSION AND CONCLUSIONS

We will exercise our discretionary authority to institute a declaratory order proceeding pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721 to eliminate the controversy and remove uncertainty on the preemption questions raised in this case. We will express our understanding of the nature and effect of the preemption in 49 U.S.C. 10501(b) as it relates to the appropriate role of state and local regulation (including the application of local land use or zoning laws or regulations and other state and local regulation such as building codes, electrical codes, and environmental laws or regulations) regarding the construction and operation of NYSW's facilities in Riverdale.

We did not attempt to move this proceeding forward sooner because of the pendency of the "Stampede Pass" litigation.⁷ Now that that litigation has concluded, we will establish in this decision a schedule for the submission of opening statements and replies by the Borough and the railroad.⁸ We are providing the opportunity for further filings to ensure that we have the specific information we need to address the issues to which interested parties may seek an answer. As noted, the record consists mainly of material from a state court proceeding decided in 1996, before many of the recent Board and court decisions addressing the reach of the ICCTA preemption provisions were issued. Moreover, the record before us at this point does not reflect what has taken place in Riverdale following the issuance of the New Jersey state court's September 1996 decision.

⁶ The court also severed the Borough's complaint challenging NYSW's right to cross public roads, and transferred it to the Chancery Division of the Superior Court of New Jersey. This part of the complaint was predicated upon the theory that NYSW does not have an easement over these streets, which were termed "public rights-of-way." The complaint seeks an order directing NYSW to remove all rail and related fixtures "placed in the public domain without appropriate rights-of-way."

⁷ *King County, WA — Pet. for Declar. Order — Stampede Pass Line*, 1 S.T.B. 731 (1996), clarified, *Auburn and Kent, WA — Pet. for Declar. Order — Stampede Pass Line*, 2 S.T.B. 330 (1997) (*Stampede Pass*), aff'd, *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S. Ct. 2367 (1999) (*City of Auburn*).

⁸ A notice that we are instituting this proceeding also will be published in the *Federal Register*.

In any event, to provide guidance, we will summarize here recent relevant agency and court decisions concerning the reach of the express statutory preemption in section 10501(b). This precedent gives us a basis, with the material provided by the Borough, to now address certain issues raised by the *Riverdale* case where the law has become well settled as to how preemption applies. Other issues presented in this case involving what types of state and local regulation of railroad facilities and activities may be appropriate under the ICCTA have not yet been directly addressed by the agency or the courts. As to these types of issues, we are providing our preliminary conclusions, in light of the existing court precedent, as to how a court would likely apply the preemption provisions. Our preliminary conclusions, of course, could change depending on our understanding of the facts after we have reviewed the parties' comments, evidence and arguments. Finally, there may be additional unresolved preemption issues as to which parties believe the Board should provide clarification that involve the extent to which state and local governments may regulate a railroad's construction plans or the operation of its facilities.

I. *Existing Precedent.*

When it finds it necessary to do so, Congress has the authority to preempt, that is, to provide for the application of federal rather than state or local law. State and local railroad regulation has long been preempted to a significant extent. See, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (historically, the Interstate Commerce Act was recognized as "among the most pervasive and comprehensive of federal regulatory schemes.").

In 1980, Congress adopted "an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers [Rail] Act of [1980]." H.R. Rep. No. 104-311, reprinted in 1995 U.S.C.C.A.N. 807-08 (ICCTA Conference Report). In 1995, in the ICCTA, Congress broadened the express preemption, so 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 provided under Federal or State law." 49 U.S.C. 10501(b). See, *City of Auburn*, 154 F.3d at 1029-31.

A. *Court Rulings.* Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to

upgrade an existing line or to construct unregulated spur or industrial team track.⁹ In such cases, we can provide advice about how preemption applies, but we have no direct involvement in the process. Thus, the interpretation of the preemption provisions has evolved largely through court decisions in cases outside of our direct jurisdiction and in which we were not a party.

One court that has addressed the issue concluded that zoning ordinances and local land use permit requirements are preempted by 49 U.S.C. 10501(b) where the facilities are an integral part of the railroad's interstate operations. In particular, in *Norfolk Southern Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997) (*Austell*), the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. The court held that "a city may not * * * attempt to regulate land use and planning via local laws when Congress' intent to preempt such local laws is clear and manifest." Similarly, other courts have viewed the preemption provisions broadly. See, *CSX Transp., Inc. v. Georgia Public Service Com'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (*Georgia*) ["It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in 49 U.S.C. 10501(b)]; *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D. Mont. 1997) (the preemption provisions in ICCTA show an intent to occupy the entire field of regulation).¹⁰

B. *Board Rulings.* Where railroad activities have required Board approval, the Board has had occasion to address the scope of the Federal preemption law. In the *Stampede Pass* cases, the Board found that state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations. The Ninth Circuit, in reviewing the matter, agreed and specifically rejected (as contrary to the statutory text and unworkable in practice) the argument that the statutory preemption in section

⁹ See, *Nicholson v. ICC*, 711 F.2d 364, 368-70 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984).

¹⁰ See also, *Georgia Pub. Serv. Comm'n v. CSX Transp. Inc.*, 481 S.E.2d 799, 801 (Ga. Ct. App. 1997); *In re Burlington N.R.R.*, 545 N.W.2d 749, 751 (Neb. 1996).

10501(b) is limited to state and local "economic" regulations. *City of Auburn*, 154 F.3d at 1029-31.¹¹

At the same time, in *Stampede Pass* we expressed our view that not all state and local regulations that affect railroads are preempted.¹² In particular, we stated that state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.¹³ We also explained that state and local agencies can play a significant role under many federal environmental statutes. We offered the following examples of state and local regulation that in our view would not be preempted.¹⁴

[E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, * * * a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Finally, in the *Stampede Pass* cases we noted that, where Board authorization is required, state and local governments can participate in the Board's environmental review process under NEPA and related laws. We further concluded that Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.

¹¹ The court explained that "* * * if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn*, 154 F.3d at 1031. Although it recognized that some statutes limit preemption as to state and local environmental regulation, the court found preemption under provisions such as section 10501(b) to be broad. *Id.*

¹² We also determined in *Stampede Pass* that section 10501(b) does not nullify the Board's own obligation to follow the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), and related federal environmental laws in contexts where they are applicable. *See*, 49 CFR 1105.1. Because the Board itself controls the proceedings in which it applies those requirements, there is no risk of interference with our jurisdiction over rail transportation.

¹³ *See*, H.R. Conf. Rep. No. 104-422 at 167, reprinted in 1995 U.S.C.A.A.N. 850, 852 (identifying criminal law prohibitions on bribery and extortion as examples of the police powers that the Act does not preempt); *Richard D. Robey, Juniata Valley Railroad Company, et al. — Petition for Declaratory Order — Allen J. Levin and Lewistown Central Railroad Company*, STB Finance Docket No. 33420 (STB served June 17, 1998).

¹⁴ *Stampede Pass*, at 339.

II. *The Application of This Precedent To Riverdale's Petition.*

The Riverdale petition involves construction activities that do not require our regulatory approval. Nevertheless, we can issue a declaratory order explaining how we believe those issues might be analyzed by a court with appropriate jurisdiction.

A. *Local Zoning Ordinances.* The Borough has specifically requested that we address whether local zoning ordinances apply to the facilities constructed by NYSW in Riverdale. Given the broad language of section 10501(b) and the recent court and agency decisions construing it, it is well settled that, as the New Jersey state court determined, the Borough can not apply its local zoning ordinances to property used for NYSW's railroad operations. The Borough suggests in its petition that NYSW should have located its transloading facilities not in Riverdale but in a nearby industrial zone and that one of NYSW's alleged zoning violations is "non-permitted use of land." But as the court found, the zoning regulations that the Borough would impose clearly could be used to defeat NYSW's maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce. As the courts have found, this is the type of interference that Congress sought to avoid in enacting section 10501(b). *See, Austell*, at 22 (local zoning ordinance and land use permitting requirements "frustrate and conflict with Congress' policy of deregulating and rejuvenating the railroad industry"); *Georgia*, 944 F. Supp. at 1583.

B. *Local Land Use Restrictions.* Local land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (*e.g.*, that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. *Austell; City of Auburn*. Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question. In that regard, the material provided by the Borough indicates that the Borough would require a 25-foot landscaped buffer between residential zones and NYSW's transportation facilities. As the railroad has not been involved in our proceeding, and as we know few specifics about the buffer issue, we cannot say at this time whether such a requirement, if applied in such a way as not to discriminate against railroads, would significantly interfere with NYSW's railroad operations and

interstate commerce. Parties may file further information and comment on this issue.

C. *Environmental and Other Public Health and Safety Issues.* Similarly, recent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.¹⁵ *City of Auburn*, 154 F.3d at 1029-31; *Stampede Pass*, at 339-40. That means that, while state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.¹⁶ We cannot go beyond these general principles here without more information as to the particular police power issues that may be involved in this case. Parties may file further information and comment on these issues.

D. *Building Codes.* Given the broad language of 49 U.S.C. 10501(b) and the case law interpreting it, our preliminary view is that local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause.¹⁷ At the same time, we believe local authorities can take actions that are necessary and appropriate to

¹⁵ Railroads are required to provide adequate facilities for their traffic. See, *Interchange of Freight at Boston Piers*, 253 I.C.C. 703, 707 (1942). Moreover, an incident of the right to construct and operate a line is the right to maintain it and keep it in good operating condition. See, *Detroit/Wayne v. ICC*, 59 F.3d 1314, 1317 (D.C. Cir. 1995). Accordingly, interfering with such activities could interfere with a railroad's right to operate its lines.

¹⁶ Notwithstanding the usual presumption to the contrary [see, *Shanklin v. Norfolk Southern Ry.*, 173 F.3d 386, 394 (6th Cir. 1999), citing, *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)], even health and safety regulation is preempted where Congress intended to preempt all state and local law. As explained in *City of Auburn*, 154 F.3d at 1030-31, congressional intent to preempt a state or local permitting process for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it.

¹⁷ The Borough evidently seeks to require NYSW to obtain building permits for all construction activity, and a certificate of occupancy for NYSW's depot.

address any genuine emergency on railroad property, and that interstate railroads such as NYSW are not exempt from certain local fire, health, safety and construction regulations and inspections.

Specifically, under the law enacted by Congress, as interpreted by the courts, it appears to us that state and local entities can enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities. With regard to the kinds of inspections that are permissible on property owned or used by interstate railroads, the potential for interference depends on the nature of the action by the state or local government and the effect on rail transportation and Board remedies; we see no simple, clear line of demarcation that has been or could be drawn, except that the inspection requirements or local regulations must be applied and enforced in a non-discriminatory manner and that preclearance permitting requirements plainly are preempted. *E.g., City of Auburn; Stampede Pass.* Again, we cannot go beyond these general principles here without more information about particular inspection and similar requirements that may be at issue in this case. Parties may file further information and comment on these issues.

E. *Other Issues As to Which Comments May Be Filed.* The Borough has also raised complaints about NYSW's facilities that concern surfacing, fence height, site distance for ingress and egress, roads, train utility stations, the truck weigh station, and the truck depot. We do not have enough information to determine whether the non-discriminatory application of state or local regulation regarding those matters would unduly restrict NYSW's ability to provide transportation-related facilities and service. Parties may file further information and comment as to these matters, and any other unresolved preemption issues as to which parties believe the Board should provide clarification.

F. *Non-Transportation Facilities.* Finally, it should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to

provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities. See, *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 227 (1941). We cannot determine from the current record whether this facility is actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services. Accordingly, NYSW, in its opening statement, should describe the exact nature of this facility.

G. Summary. In this decision, we have (1) expressed our views on the local zoning ordinance issues raised; (2) expressed some general views and authorized the filing of additional information as to certain local land use issues; (3) expressed some general views and authorized the filing of additional information about environmental and similar issues, and about building codes; (4) authorized the filing of further information about the physical characteristics of the NYSW facilities; and (5) sought additional information about the corn processing plant. The views that the Board has expressed are based primarily on the interpretation by the courts of the statutory provisions on preemption.

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

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by interested persons. All persons submitting comments must comply with the Board's Rules of Practice.

2. NYSW must file an opening statement by November 9, 1999.

3. The Borough must file an opening statement by November 9, 1999.

4. Other interested persons may file comments by December 9, 1999.

5. NYSW and the Borough may file replies by December 29, 1999.

6. This decision, which, along with the Borough's petition (including attachments), will be served on NYSW, is effective on September 10, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.