STB FINANCE DOCKET NO. 33966

FRIENDS OF THE AQUIFER, CITY OF HAUSER, ID, HAUSER LAKE WATER DISTRICT, CHERYL L. RODGERS, CLAY LARKIN, KOOTENAI ENVIRONMENTAL ALLIANCE, RAILROAD AND CLEARCUTS CAMPAIGN

Decided August 10, 2001

The Board finds that the planned construction by The Burlington Northern and Santa Fe Railway Company of a refueling terminal and other associated changes in its operations does not constitute an "extension of a railroad line" requiring licensing authority under 49 U.S.C. 10901(a) and environmental review under the National Environmental Policy Act.

BY THE BOARD:

In a petition filed November 30, 2000, Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, and Railroad and Clearcuts Campaign (Petitioners) seek a declaratory order proceeding to determine whether the planned construction by The Burlington Northern and Santa Fe Railway Company (BNSF) of a refueling terminal at Hauser, ID, and other associated changes in BNSF's operations elsewhere in the Pacific Northwest (in particular, the closing of a Seattle fuel terminal and modification of rail usage in the Seattle railroad tunnel), constitute an "extension of a railroad line" requiring licensing authority under 49 U.S.C. 10901(a) (and an environmental review under the National Environmental Policy Act, 42 U.S.C. 4332 (NEPA)). Petitioners also ask that we find that the determination of whether to begin such a declaratory order proceeding is itself a "major Federal action" triggering an environmental review. They argue that the proposed refueling terminal puts at risk the Spokane Valley-Rathdrum Prairie Aquifer (Aquifer), the only source of drinking water for more than 400,000 people in the region, because of the danger from spills from diesel fuel storage tanks, tank cars, and the locomotive fuel cars that would arrive each month at the facility.

In a reply filed December 15, 2000, BNSF opposes the request for a declaratory order proceeding. It notes that Kootenai County approved the project last year and argues (1) that the project is not a line extension within the meaning of section 10901(a)(1); and (2) that a proceeding to inquire whether

Board authorization is needed for a project does not trigger environmental review under NEPA.[1]

BACKGROUND

BNSF states that its locomotives serving the Pacific Northwest obtain fuel and service at several locations, many of which are congested and not centrally located. Thus, BNSF decided to create a central locomotive servicing facility for the region at the Hauser Yard in Kootenai County, ID, located next to a short rail corridor between Sandpoint, ID, and Spokane, WA, where BNSF's lines coming from the East and its lines fanning through Washington and Oregon converge. According to Petitioners, the facility will include a tank farm consisting of two 250,000-gallon storage tanks for holding diesel fuel, as well as a 20,000-gallon storage tank for bulk lube oil, a 27,000-gallon ground waste oil storage tank, and a 210,000-gallon industrial wastewater storage tank.[2] All of these tanks will be above ground and will be situated over a portion of the Aquifer.

BNSF states that it has worked closely with local authorities to take public concerns into account in designing the facility. Although BNSF believes that it was not required to obtain local permits to build a locomotive servicing facility that is integrally related to its rail operations,[3] BNSF nevertheless applied in 1997 to Kootenai County for land use permits for the Hauser rail yard construction. In 1998, a county hearing examiner recommended that a conditional use permit application be denied. BNSF withdrew its application and in 1999 filed a revised application and took part in evidentiary proceedings in which the public had the opportunity to review BNSF's plans. Another county hearing examiner recommended that the application be denied, expressing concern about the location of the Hauser terminal over the Aquifer. The Kootenai County Board of Commissioners, however, reviewed the hearing examiner's decision and voted 2-1 on March 6, 2000 (with a written decision issued on April 20, 2000), to approve BNSF's final plans with a number of

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[1] On June 6, 2001, Petitioners submitted a supplemental brief together with two declarations in support of the brief. BNSF replied.

[2] Evidently, the facility will also include a fueling facility for locomotives, with a four-track fueling bay, a platform for unloading diesel fuel or lube oil from up to 18 tank cars to the on-site storage tanks, and various other structures such as an administration building and two "bad order" tracks.

[3] *See* 49 U.S.C. 10501(b) and the court and agency decisions interpreting it.

conditions to which BNSF agreed,[4] in addition to the environmental protections BNSF had built into its plans. The County Board concluded that "[t]he levels of containment, leak detection, emergency shut off programs, engineering above and beyond present requirements, including earthquake requirements, and the training programs for the employees make this a very safe Facility and significantly reduce any risk to the aquifer." BNSF reply, attach. 3, at 14.

On March 7, 2000, Cheryl Rodgers and Thomas Flynn filed an action in the United States District Court for the Eastern District of Washington, arguing that Kootenai County did not have the authority to issue the conditional use permits, and that BNSF must apply to the Board for rail construction authority under 49 U.S.C. 10901. Plaintiffs sought an injunction against BNSF proceeding with the project until we have acted and a NEPA review has been conducted. In *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp.2d 1186, 1190-93 (E.D. Wash. 2000) (*Flynn*), the court granted BNSF's motion to dismiss. The court noted (*id.* at 1193) that, "Plaintiffs appear to have a viable opportunity to raise their environmental concern regarding the Hauser Facility before the STB." But the court expressly found that we "would be obligated to consider NEPA and possibly require [environmental documentation] regarding the Hauser facility only if [we] exerted [our] regulatory authority over the project." *Id. See also id.* at 1189-90. Petitioners then filed this declaratory order request.

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, we have discretion to issue a declaratory order to terminate a controversy or remove uncertainty. 5 U.S.C. 554(e). *See also* 49 U.S.C. 721. We will grant Petitioners' request in part by resolving the controversy here. The record and the issues are sufficiently clear to permit us to provide guidance to the parties without further pleadings.

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[4] Among the conditions, BNSF will: construct an inspection pit for bad order tracks and the refueling platform with aquifer protection measures such as sealed concrete, composite liner, and wastewater collection; comply with certain requirements of the Idaho Division of Environmental Quality; fund a full time staff position in the Division's aquifer protection program for a period of 10 years; donate a fire truck costing $200,000 to the local fire department; make and maintain 3 groundwater monitoring wells; and provide a $5 million environmental protection bond to cover costs of the county. Furthermore, the facility will be constructed in conformance with the Kootenai County Comprehensive Plan and the county's zoning ordinances. BNSF reply at 8-9 and attach. 3 at 30-35.

As discussed below, it is our view, based on the evidence presented by the parties, and on Board, Interstate Commerce Commission (ICC),[5] and court precedent, that the construction of the Hauser fuel terminal, abandonment of the Seattle fuel terminal, and modification of rail usage in the Seattle railroad tunnel do not come within section 10901.[6] Because we lack licensing authority over the project, the environmental review provisions of NEPA do not apply.

I. *The General Parameters of Preemption Under Section 10501(b).*

Under 49 U.S.C. 10501(b)(2), as broadened by ICCTA, the Board has exclusive jurisdiction over rail transportation, including "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." Section 10501(b) further provides 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." *See City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (*City of Auburn*); *Borough of Riverdale — Petition for Declaratory Order*, 4 S.T.B. 380 (1999) (*Riverdale I*) at 384. As several courts have held, this broad statutory preemption applies to the construction of ancillary facilities under section 10906, even though we lack licensing authority over such projects.[7] *See Flynn*, 98 F. Supp. at 1189-90, and cases cited in *Pet. for Declaratory Order — Boston & Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500 (2001) (*Ayer*) at 506; *Riverdale I* at 384-89; and *Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (STB served Feb. 27, 2001) (*Riverdale II*) at 3.

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[5] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), abolished the ICC, revised the laws previously administered by the ICC, and transferred all remaining rail regulatory functions to the Board, effective January 1, 1996.

[6] At times Petitioners refer only to the Hauser refueling facility. At other times they include the abandonment of the Seattle terminal and the alteration of tunnel usage in their theory of the case, and argue that "BNSF's proposal must be viewed in its entirety." Under any approach, there is no support for finding that the project constitutes an extension of a line of railroad under section 10901.

[7] Under 49 U.S.C. 10906, "[T]he Board does not have [licensing] authority * * * over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

The courts also have found, in addressing the scope of 49 U.S.C. 10501(b), that, under the broad preemption provision enacted in ICCTA, zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations. *Norfolk Southern Rwy. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997); *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57 (N.J. 2000) (*Ridgefield Park*).[8] As the court stated in *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b).

Nevertheless, not all state and local regulations that affect railroads are preempted. *See Ayer* at 506-07 and the cases cited there. While exempt from traditional permitting and zoning processes, railroads are not necessarily exempt from other generally applicable laws.[9] *See Stampede Pass; Riverdale I; Ridgefield Park; Flynn;* and *Ayer.* For example, communities can enforce their local codes for electrical, building, fire, and plumbing unless the codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. Moreover, railroads may not deny towns access in emergencies and for reasonable inspection of the railroad facilities. And to the extent a railroad is

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[8] Court and agency precedents interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, state and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. *Auburn and Kent, WA — Pet. for Decla. Order — Stampede Pass Line*, 2 S.T.B. 330 (1997) (*Stampede Pass*), *aff'd, City of Auburn*. The argument that the statutory preemption in section 10501(b) is limited to state and local "economic" regulation was rejected by the court of appeals in *City of Auburn*, 154 F.3d at 1029-31, as contrary to the statutory text and unworkable in practice.

[9] In *Stampede Pass*, 2 S.T.B. at 339, the Board offered the following examples of state and local regulation that would not be preempted:

[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.

willing to undertake an activity or restriction, the activity or restriction generally should be seen as reflecting the carrier's own determination that the condition is reasonable and will not unduly interfere with interstate commerce. *See Township of Woodbridge, NJ, et al. v. Consolidated Rail Corp.*, 5 S.T.B. 336 (2000).[10]

Additionally, the Board has concluded that nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce. *Ayer* at 508-10.[11] Thus, the lack of licensing and conditioning authority at the Board or at the local level does not mean that there are no environmental remedies under other Federal laws. *See also Flynn*, 98 F. Supp. at 1189.

II. *Section 10901 and Section 10906.*

The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and, as part of our regulatory review of such proposals, we conduct an environmental review of such activities under NEPA and adopt appropriate environmental mitigation. *See* 49 CFR 1105.6; *Ayer* at 503, n. 14.[12] However, there is no statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets. *See Nicholson v. ICC*, 711 F.2d 364, 368-70 (1983), *cert. denied*, 464 U.S. 1056

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[10] As indicated, BNSF has agreed to a number of Kootenai County Board conditions. In their supplemental brief, Petitioners express concern over the enforceability of these and future conditions. BNSF asserts that there is no allegation that it has failed to comply with the conditions, and thus no controversy. In any event, we stated in *Ayer* at 508 that "a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments * * *."

[11] Section 10501(b) also does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C. 20101 *et seq. See Tyrrell v. Norfolk Southern Railway Company*, 248 F.3d 517 (6th Cir. 2001); *Riverdale II* at 2 n.4.

[12] Under 49 U.S.C. 10901(a), a license from the Board is required for a railroad's construction of "an extension to any of its railroad lines * * * [or] * * * an additional railroad line * * *." The terms "extension" and "additional railroad line" are not defined in the statute. These terms have been interpreted, however, in *Texas & Pacific v. Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 278 (1926) (*Texas & Pacific*), to refer to those tracks that enable a railroad to penetrate or invade a new market. *See Union Pacific RR Co. — Petition — Rehabilitation of MO-KS-TX RR*, 3 S.T.B. 646 (1998) (*Jude*).

(1984); *Riverdale I*. Railroads also do not require Board authority to upgrade an existing line, or to increase the level of traffic on a line, *Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995) (*Detroit/Wayne*), and, as noted, the law explicitly provides under 49 U.S.C. 10906 that no authority from the Board is required to construct "spur," "industrial," or "switching" tracks. Where no license is required, there is no environmental review conducted by the Board. *E.g., Jude*. But the absence of environmental review by the Board does not mean that a project is open to environmental review at the state or local level. As the court noted in *Flynn*, 98 F. Supp.2d at 1189-90, "There is an important distinction between the STB having jurisdiction over a facility [pursuant to 49 U.S.C. 10501(b)] and the STB regulating the construction of the facility * * *. Should the STB determine that the Hauser Facility is an ancillary facility on a spur or side track, the STB may decide that while it has jurisdiction, it does not have regulatory authority over the facility." In other words, the Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but state and local activity is preempted under 49 U.S.C. 10501(b) because of the Board's exclusive jurisdiction over rail transportation.

III. *This Case*.

Petitioners do not directly address the "invade new territory" standard established in *Texas & Pacific* and *Jude, see* note 10, but contend that, in determining whether federal regulatory approval (and an environmental review by us) are required, we should look to "the totality of the proposal and the intended use of the facility" and consider "the integral nature of fueling operations to BNSF's ability to transport goods." Pet. at 18-19. Specifically, they argue that we should consider the degree to which the proposal contributes to through transportation, citing *Duluth, South Shore & Atlantic Railroad Co. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 307 I.C.C. 311, 315 (1959) (*Duluth*), and whether the proposed facility is integral to the railroad's transportation functions, citing *Railroad Comm. of California v. Southern Pac. Co.*, 264 U.S. 331 (1924) (*RCC*), and *Boston Term. Co. Reorganization*, 312 I.C.C. 373, 377 (1960) (*Boston Terminal*).[13]

The cases cited by Petitioners do not support a finding that section 10901 applies here. In *Duluth*, the ICC found that it had certification authority under

[13] Petitioners also cite *Growers Marketing Co. v. Pere Marquette Railway Co.*, 248 I.C.C. 215 (1941), but they themselves acknowledge that that case involved a non-transportation facility over which the ICC found it had no jurisdiction. *Cf. Riverdale I* at 389.

section 10901 because constructing interchange and connecting tracks allowed the carriers to compete in territories they had not previously served. 307 I.C.C. at 315. *See also Jude* at 651, n.6. In *RCC*, the Supreme Court's determination similarly was consistent with the new territory standard: "[t]he extensions of the lines and main tracks of these railways * * * are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers." 264 U.S. at 346. Finally, in *Boston Terminal*, the ICC found that the abandonment of a railroad terminal building did not involve a line of railroad, and that the ICC had no jurisdiction over this matter.[14]

Petitioners also suggest that, because of the "cost and expense of the facility," we should find section 10901 applicable in this case. Pet. at 19. They have not shown, however, that BNSF's activities will enable it to invade a new territory, which they would need to do to bring this project within section 10901. *See, e.g., Jude* (no authority under section 10901 required to rehabilitate and reactivate previously abandoned track where reactivated line would not invade or penetrate new territory); *City of Detroit v. Canadian National Ry. et al.*, 9 I.C.C.2d 1208, 1214-16 (1993), *aff'd, Detroit/Wayne* (building a second mile-long tunnel 90 feet parallel to old tunnel that it would replace did not require ICC license); *Nicholson*, 711 F.2d at 369 ("nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly. It is the purpose and not the cost, of such projects which determines whether Commission approval is required.").

Finally, Petitioners argue that we should find that this project comes within section 10901 because of the environmental concerns they have regarding the Aquifer in this case.[15] Citing *City of Auburn*, 154 F.3d at 1029-31, and *Stampede Pass*, Petitioners claim that our "authority to evaluate environmental impacts was a meaningful factor in the resolution of cases involving BNSF's proposal to

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[14] Petitioners cannot successfully rely on *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966) (*New Orleans*). As the ICC later stated, "the *New Orleans* court does not address the issue [of whether construction of track that is part of a line of railroad requires Commission approval] in detail, nor does it explain the basis of its statements concerning our jurisdiction." *City of Stafford, TX v. Southern Pacific Transportation Co.*, Finance Docket No. 32395 (ICC served Nov. 8, 1994) at 6 (footnotes omitted).

[15] We note, however, that the record here shows that BNSF worked with the Kootenai County Commission, that BNSF revised its plans to meet local concerns (including concerns that had been raised by petitioners), and that the County ultimately approved BNSF's proposal, with conditions. As we noted in *Ayer* at 511 and 512 n.38, we encourage railroads and communities to reach reasonable solutions to localized environmental concerns that do not unreasonably interfere with interstate commerce, as appears to have been done in this case.

re-activate its Stampede Pass line." Pet. at 20. They also contend that our determination as to whether to exercise jurisdiction is subject to analysis under NEPA, citing *United Transp. Union v. Bessemer & L.E.R. Co. & P&C*, 342 I.C.C. 849 (1974) (*Bessemer*). There, the ICC, in making a jurisdictional analysis, issued an environmental disclaimer[16] indicating that a NEPA analysis was unnecessary. Here, Petitioners contend, the proposal of BNSF "poses environmental risks so significant that the Board must consider those risks as a part of its decision whether to assert its regulatory authority." Pet. at 22.

That argument presumes, however, that the agency has regulatory authority that it could choose to assert. That is not the case here. It is clear that the potential significance of an environmental issue, by itself, does not confer regulatory authority on the Board. *See Jude* at 653 ("The extent of, or intensity of debate over, a project's environmental and safety issues, however, does not by itself, confer jurisdiction on the Board.").[17] Thus, our environmental rules at 49 CFR 1105.5(b) specifically provide that "[a] finding that a service or transaction is not within the STB's jurisdiction does not require an environmental analysis under the National Environmental Policy Act * * *." Further, under 49 CFR 1105.6(c)(2)(iii), "[n]o environmental documentation will normally be prepared * * * for * * * [d]eclaratory orders * * *." In *Stampede Pass*, the evaluation of the environmental impacts was undertaken because BNSF was required to seek our authority for a related acquisition. In *Bessemer,* the ICC simply issued an environmental disclaimer after finding that it had jurisdiction. The case does not stand for the proposition that, if environmental risks are alleged to be significant, they must be considered by the Board in determining "whether to assert * * * regulatory authority." Thus, Petitioners have not

[16] "We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." 342 I.C.C. at 858.

[17] In their supplemental brief, Petitioners assert that on February 27, 2001, a derailment of approximately 29 cars occurred about one-half mile from the proposed BNSF fuel terminal near Rathdrum, ID, spilling about 3000 gallons of crude oil. According to Petitioners, initial reports indicated that the spill did not contaminate the Aquifer because "freezing weather and the viscosity of the crude oil apparently prevented seepage into the soil horizon and into the [A]quifer." Supplemental brief at 2. According to BNSF, however, the derailment occurred at a location very different from the Hauser facility, where, it asserts, fuel spills are prevented from reaching the Aquifer because of multiple levels of containment. In any event, as indicated in *Jude*, the potential threat to the environment does not give us regulatory authority over this matter absent our jurisdiction under section 10901.

supported their argument that NEPA could or should be applied in the absence of any requirement that BNSF obtain federal authority for the project.[18]

It is ordered:

1. Petitioners' request for a declaratory order proceeding is granted to the extent indicated in this decision, and is denied in all other respects.

2. This decision is effective September 14, 2001.

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

[18] As BNSF notes, the courts uniformly have rejected the notion that, simply because there is *some* federal involvement by the Board, NEPA must apply. *See, e.g., Goos v. ICC*, 911 F.2d 1283, 1292-96 (1990) (NEPA does not apply to the ICC's essentially ministerial issuance of authority under the Trails Act, as the ICC had little, if any, discretion in the matter), and the other cases cited in BNSF's reply.