

SURFACE TRANSPORTATION BOARD SUMMARIZES COURT DECISIONS ON PREEMPTION, OPENS DECLARATORY ORDER PROCEEDING TO ADDRESS "RIVERDALE" CASE

Surface Transportation Board (Board) Chairman Linda J. Morgan announced that the Board today has issued a decision summarizing the various court decisions on "preemption," and opening a declaratory order proceeding to address preemption issues in a case involving the Borough of Riverdale, N.J. (the Borough), and The New York, Susquehanna and Western Railway Corporation (NYSW).

When it finds it necessary to do so, Congress may "preempt" by providing for the application of federal rather than state or local law. State and local railroad regulation has long been preempted to a significant extent. In the Staggers Rail Act of 1980, and again in the ICC Termination Act of 1995, Congress broadened the express preemption provision so that most state and local regulation of transportation and transportation facilities is preempted.

In this case, the Borough asked the Board for a determination regarding the extent to which certain railroad facilities constructed and operated in Riverdale by NYSW are covered by the federal preemption provisions. Because construction and operation of the facilities involved would not be subject to the Board's regulatory review, in its analysis of the preemption provisions, the Board relied largely on judicial precedent interpreting the statute and the Congressional intent behind it.

The Board noted that the courts have construed the preemption provisions broadly. In particular, the courts have found that Federal railroad laws preempt local land use or other permitting processes (including environmental permitting) because such processes could interfere with interstate commerce by giving a state or local body the ability to delay or deny a railroad the right to construct facilities or conduct operations. Accordingly, as to some of the specific issues raised in the Riverdale case, the Board indicated that a court would likely find local zoning ordinances; local land use restrictions, such as those limiting where a railroad facility can be located; and local permitting requirements, such as those requiring building permits, to be preempted.

The Board noted, however, that state and local jurisdictions can exercise their police powers in health and safety matters in other ways, and pointed out that laws such as local waste dumping laws can be enforced. The Board also noted that state and local jurisdictions can, through inspections, enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not require permits as a prerequisite to the construction or improvement of railroad facilities. Finally, the Board noted that federal environmental statutes, such as the Clean Air Act and the Clean Water Act, are not preempted.

Because it had only limited information available to it concerning the Riverdale matter, the Board in its decision provided only preliminary conclusions about how preemption might apply, and permitted additional public comments. After it reviews comments received, the Board will issue a final decision in the matter.

The Board's decision was issued today in *Borough of Riverdale--Petition For Declaratory Order--The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466. It is available on the Board's web site at www.stb.dot.gov.

###