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CITY OF FORT BRAGG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation,

Plaintiff,

v.

MENDOCINO RAILWAY AND DOES 1–10, inclusive

Defendants.

Case No. 21CV00850

NOTICE OF LODGING OF FEDERAL AGENCY OPINIONS CITED IN SUPPORT OF OPPOSITION TO DEMURRER

JUDGE: Hon. Clayton Brennan
DEPT.: Ten Mile

DATE: **February 24, 2021**
TIME: **2:00 p.m.**

TO THIS HONORABLE COURT AND ALL PARTIES OF RECORD HEREIN:

PLEASE TAKE NOTICE that Defendants hereby lodge the following Federal Agency Opinions cited in Defendants' Opposition to Plaintiffs' Demurrer, for the Court's convenience, copies of which accompany only the filed copy of this notice:

Federal Agency Opinions

A. *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Western Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999)

B. *Cities of Auburn and Kent, WA--Petition for Decl. Order--Burlington Northern RR Co. --Stampede Pass Line*, STB Finance Docket 33200, 1997 STB LEXIS 143, 2 S.T.B. 330 (1997)

C. *Maumee & Weste.rn RR Corp. and RMW Ventures, LLC -- Petition for Decl. Order*, STB Finance Docket 34354, 2004 STB LEXIS 140 (2004)

D. *Norfolk Southern Railway Co.--Petition for Decl. Order*, Docket FD 35950, 2016 STB LEXIS 61 (2016)

Dated: February 8, 2022

JONES MAYER

By: _____

Krista MacNevin Jee,
Attorneys for Plaintiff
CITY OF FORT BRAGG

EXHIBIT A

4 S.T.B. 380; 1999 STB LEXIS 531

Surface Transportation Board

September 9, 1999

STB Finance Docket No. 33466

Surface Transportation Board Decisions

Reporter
1999 STB LEXIS 531 *; 4 S.T.B. 380

BOROUGH OF RIVERDALEPETITION FOR DECLARATORY ORDER THE NEW YORK SUSQUEHANNA AND WESTERN RAILWAY CORPORATION

Core Terms

railroad, borough, preemption, preempt, has, local regulation, zoning, right-of-way, interstate commerce, declaratory order, truck, transport, local law, section, corn, local land use, interstate, was, local zoning ordinance, preemption provision, further information, processing plant, residential zone, land use, ordinance, adjacent, inspect, station, buffer, site

Service Date: September 10, 1999

Opinion By: **[*1]** MORGAN; CLYBURN; BURKES

Opinion

DECISION

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 **[*2]** 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

[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.

some of the preemption questions raised in 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 **[*3]** 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 **[*4]** 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 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.

[*5]

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 **[*6]** not less than 25 feet in width for lots contiguous to any residentially

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[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.

[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.

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, **[*7]** 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, 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* **[*8]** 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 **[*9]** 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.

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 **[*10]** 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.

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[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--Petition for Declaratory Order--Burlington Northern Railroad Company--Stampede Pass Line, STB Finance Docket No. 33095 (STB served Sept. 25, 1996), clarified, Cities of Auburn and Kent, WA--Petition for Declaratory Order--Burlington Northern Railroad Company--Stampede Pass Line, STB Finance Docket No. 33200 (STB served July 2, 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.

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 **[*11]** 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 **[*12]** 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 **[*13]** 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 **[*14]** 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 10501(b) is limited to state and local "economic" regulations. *City of Auburn, 154 F.3d at 1029-31*. [11] **[*15]**

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

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[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)*.

[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.

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] **[*16]** Even 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.

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

The Riverdale **[*17]** 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 **[*18]** 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 **[*19]** 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,*

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[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); Robey et al. -- Petition for Declaratory Order -- Levin et al., STB Finance Docket No. 33420 (STB served June 17, 1998).

[14] Stampede Pass, slip op. at 7.

[15] Railroads are required to provide adequate facilities for their traffic. 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

154 F.3d at 1029-31; Stampede Pass, slip op. at 6-7. 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. **[*20]** [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. **[*21]**

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 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 **[*22]** 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 **[*23]** 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 **[*24]** 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.

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* (6<th> 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.

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 **[*25]** 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 its service date.

Surface Transportation Board Decisions

End of Document

EXHIBIT B

2 S.T.B. 330; 1997 STB LEXIS 143

Surface Transportation Board

July 1, 1997

STB Finance Docket No. 33200

Surface Transportation Board Decisions

Reporter
1997 STB LEXIS 143 *; 2 S.T.B. 330

CITIES OF AUBURN AND KENT, WA--PETITION FOR DECLARATORY ORDER--BURLINGTON NORTHERN RAILROAD COMPANY--STAMPEDE PASS LINE

Core Terms

preempt, was, railroad, interstate commerce, transport, declaratory order, environmental review, permitting process, local law, traffic, mitigate, upgrade, track, federal law, section, rail line, interstate, preemption, northern, route, land use, abandonment, carrier, license, train, has, environmental review process, intervene, repair, lack

Panel: DECISION; By the Board, Chairman Morgan and Vice Chairman Owen.

Service Date: July 2, 1997

Opinion

On October 11, 1996, the Cities of Auburn and Kent, WA (the Cities or petitioners) requested a declaratory order to the effect that state and local environmental, building, and land use permitting authority can be imposed on improvements associated with the modernization by the Burlington Northern Railroad Company (BN) [1] of its Stampede Pass railroad line in the state of Washington, and is not preempted by federal law. Specifically, the Cities contend that their local land use and environmental permitting authority is not preempted by the ICC Termination Act of 1995 (ICCTA) or the environmental review process undertaken by this agency pursuant to the National Environmental Policy Act (NEPA). BN replied, opposing the Cities' petition. [2] The Cities then responded to BN's reply, as did BN to the Cities' response.

BACKGROUND

1. The Nature of the Case. Because BN owned and operated two other main line routes serving the Seattle-Tacoma, WA area, BN **[*2]** sold the eastern portion of its Stampede Pass main line--a 151-mile segment between Cle Elum and Pasco, WA--and several branch lines to the Washington Central Railroad Company (WC) in 1986. [3] After the sale, BN continued to provide

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[1] Now, the Burlington Northern and Santa Fe Railway Company.

[2] King County, WA filed a petition to intervene as an interested party. That request will be granted.

some local service over the western approximately 78-mile portion of the line between Auburn and Cle Elum. Due to increases in rail traffic after the sale, however, BN proposed to reacquire the Stampede Pass lines from WC and reestablish the Stampede Pass as a third main line route. Accordingly, in June 1996, BN and its affiliates sought our approval under 49 U.S.C. 11323-25 to acquire control of WC and operate WC's 151-mile segment of the Stampede Pass line in concert with its western portion. [4] That proceeding--which is not directly at issue here--was docketed as STB Finance Docket No. 32974. [5] See p. 5-6, infra.

[*3]

After 12 years of limited use, the Stampede Pass line was in need of modernization, repairs, and improvements. This **[*4]** work included (1) replacement of track sidings, (2) replacement of maintenance-of-way buildings and snow sheds, (3) improvement of the Stampede Pass tunnels, and (4) installation of communication towers. BN initially submitted certain permit applications for these projects to local authorities. During the permit review process, however, BN suggested that any environmental review of the project should exclude railroad operations, which are regulated exclusively by the federal government.

In light of BN's position, King County, WA (the County), on May 8, 1996, asked the Surface Transportation Board (Board) for an informal opinion as to whether ICCTA preempts the County's authority to evaluate or condition BN's proposed operations of the Stampede Pass rail line within the County and to issue grading, building or conditional use permits for construction. BN joined in the County's request for an informal opinion on May 31, 1996, requesting expedited action so that, if the railroad obtained a favorable decision, the repairs and improvements to the Stampede Pass line could begin by July 1, 1996. [6] BN recognized that the states retain their police powers with respect to railroad safety. **[*5]** However, it stated that the County's powers over its repairs and upgrades are extremely limited due to broad federal preemption of railroad transportation. Citing ICCTA, judicial, and Interstate Commerce Commission (ICC) precedent, it asserted that allowing localities to regulate rail line maintenance and upgrading through an environmental review and permitting process would paralyze the national rail transportation system.

On June 20, 1996, the Secretary of the Board issued to the County and BN an informal, nonbinding opinion that the County's permitting process was preempted by ICCTA. [7] The Secretary noted that the County, if allowed to subject BN to the permitting process, could delay or deny BN authority to undertake the improvements to the Stampede Pass line and thus could in effect prevent BN from operating the line. As a result, he concluded that the state or local permitting process appeared to interfere with the federal licensing program and unreasonably **[*6]** burden interstate commerce. At the same time, the Secretary

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[3] See Washington Central Railroad Company, Inc.--Exemption Acquisition and Operation--Certain Lines of Burlington Northern Railroad Company, Finance Docket No. 30916 (ICC served Oct. 3, 1986).

[4] BN and its affiliates also proposed to acquire certain of WC's branch lines and assume WC's obligation to operate over Union Pacific Railroad Company's Yakima Branch line between Kennewick and Yakima, WA.

[5] In that proceeding, BN explained that the Stampede Pass line would provide an important link to international markets in the Pacific Rim and that rail freight traffic to be transported on this line would be important to the future economic growth of the Pacific Northwest. Its proposal to put the Stampede Pass route back in service was supported by the Ports of Seattle and Tacoma, the State Department of Transportation, and communities in the eastern part of the state. None of the commenters to BN's proposal raised any competitive concerns. Indeed, many of the commenters recognized the benefits to be derived from BN's ability to offer a shorter route for certain traffic and, at the same time, reduce congestion on other BN routes for time sensitive traffic. The Cities participated in our proceeding. They did not oppose the project, although they expressed concern about the potential environmental impacts that could result from increased traffic and requested environmental conditions during the course of our environmental review process to mitigate those impacts.

[6] BN explained that, if work did not begin by that date, it would seriously jeopardize the railroad's ability to complete the repairs and improvements before the onset of winter ended the work season in the area.

[7] While the Secretary limited the scope of his opinion to preemption under ICCTA, he noted (Informal Opinion at 2, n.2) that BN also must comply with the safety and environmental requirements imposed by other federal statutes, such as the Clean Water Act's National Pollution Discharge System program involving water quality issues relating to spills into lakes or streams. Train noise also is subject to federal jurisdiction, and local standards may not be imposed unless identical to federal standards. *42 U.S.C. 4916(c)*; 49 CFR Part 210.

recognized that state and local governments were entitled to protect the health and safety of their citizens through means other than the permitting process. [8]

On August 21, 1996, the County petitioned for a formal declaratory order similar to the one currently sought by the Cities. The County argued, as the Cities maintain here, that BN was required to obtain local permits before undertaking improvements to the Stampede Pass rail line. **[*7]** In King County, WA--Petition for Declaratory Order--Burlington Northern Railroad Company--Stampede Pass Line, STB Finance Docket No. 33095 (STB served Sept. 25, 1996) (King County), [9] we determined (slip op. at 4) that ICCTA wholly preempts the County's permitting of construction relating to the reopening of the Stampede Pass:

> 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.

No stay of King County was sought from us or from the Ninth Circuit.

[*8]

The Cities were not parties to the County's petition, and did not initially seek to formally intervene in our King County proceeding. On September 17, 1996, however, the City of Auburn sent a letter to the Board as an "interested party." In that letter, the City of Auburn requested that it be designated a party of record in King County, and asked that we defer action in King County until we had the opportunity to consider the City of Auburn's position on this matter. The City of Kent also requested a ruling from us on local government preemption.

In view of the County's and BN's requests for expedition in King County, we denied the Cities' requests to intervene in King County, and declined to delay the issuance of our declaratory order in that proceeding (which was decided on September 25, 1996. only 8 days after the date of the City of Auburn's letter). See King County, at 1 n.2. However, we invited the Cities to submit their own petition for declaratory order in a separate docket (id.), and on October 11, 1996, the Cities accepted our invitation and filed the instant petition requesting a declaratory order similar to the one previously requested by the County. The Cities' petition, **[*9]** in effect, is a petition for reconsideration of our decision in King County, and we will treat it as such. [10]

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[8] Based on the Secretary's opinion, BN withdrew its pending grading, building, and shoreline application permits that had been filed with the County.

[9] The City of Auburn also filed a lawsuit in King County Superior Court seeking a declaratory judgment that BN's proposed improvements to the Stampede Pass line are subject to state and local permitting and a writ of mandamus directing the County and Kittitas County to order construction stopped until permits are obtained. At BN's request, that case was removed to the United States District Court for the Western District of Washington on September 30, 1996. City of Auburn v. King County Et Al., No. C96-1565-Z. BN then moved to dismiss the district court case for lack of jurisdiction, explaining that the action constituted a collateral attack on King County, which could only be challenged in a United States Court of Appeals under the Hobbs Act, *28 U.S.C. 2321(a)* and 2342. On January 7, 1997, the district court granted the motion to dismiss.

The City of Auburn, which had not been a party to the administrative proceeding in King County, filed a petition for judicial review of King County in City of Auburn v. STB, U.S.C.A. 9th Cir. No. 96-71051 (pet. for review filed November 22, 1996). BN then filed a motion to dismiss the lawsuit (which we supported), explaining that City of Auburn was not a "party aggrieved" within the meaning of *28 U.S.C. 2344* and therefore lacked standing to file a petition for judicial review. By order dated March 26, 1997, the court granted BN's motion to dismiss in part. The court agreed that because City of Auburn was not a party to the proceedings below, it lacked standing to obtain review on the merits of King County. However, noting that it may have jurisdiction to review our denial of City of Auburn's request to intervene in King County, the court directed the parties to brief that issue. That court proceeding remains pending in the Ninth Circuit.

[10] In their petition for declaratory order, the Cities alternatively ask the Board to vacate King County to permit the matter to be resolved judicially. That request will be denied. It is appropriate for us to issue a declaratory order addressing the jurisdictional questions presented here, subject, of course, to the right of a dissatisfied party to seek judicial review. See, e.g., *5 U.S.C. 554(e)*; *49 U.S.C. 721(a)*; *Gray Lines*

Subsequently, in a decision served October 25, 1996, we approved BN's proposed control of WC and operation of WC's segment of the Stampede Pass rail line. In that proceeding, we conducted an environmental review under NEPA of BN's proposed operation of the entire Stampede Pass line. See Burlington Northern Sante Fe Corporation, BNSF Acquisition Corp., and Burlington Northern Railroad Company--Control--Washington Central Railroad Company, STB Finance Docket No. 32974 **[*10]** (STB served Oct. 25, 1996), pending review in City of Auburn v. United States, U.S.C.A. 9th Cir. 97-70022 (pet. for review filed December 20, 1996) (BNSF Control). [11]

[*11]

2. The Parties' Claims. In their petition for declaratory order, the Cities concede that local law is preempted by Federal law if: (1) Congress expressly preempts such activity; (2) Federal law so thoroughly occupies a legislative area that is reasonable to conclude that Congress intended to prohibit local regulation of the activity; (3) Federal law or regulation actually conflicts with state or local law; or (4) State or local law discriminate against or unreasonably burden interstate commerce. Petitioners maintain, however, that none of these criteria apply to BN's proposed improvements to the Stampede Pass line. According to the Cities, there is nothing in ICCTA that directly preempts state or local law with respect to railroad transactions such as this one. Any incidental effect of local law on interstate commerce, the Cities argue, is legitimately within their police power and justified by the benefits accruing to the local populace and environment.

Petitioners complain that our decisions in King County and BNSF Control have allowed BN's Stampede Pass improvements to be virtually unregulated. The mitigation measures imposed on the carrier in BNSF Control, the Cities maintain, **[*12]** lack substance and do not adequately address their environmental or safety concerns. The Cities assert that the Board's decision in King County is not binding on local agencies or the courts because the decision is merely advisory and the Board lacks expertise in state and local environmental matters.

BN by contrast argues that all state and local permitting regulations for BN's improvements to the Stampede Pass are preempted by federal law.

DISCUSSION AND CONCLUSIONS

We will exercise our discretionary authority to issue a declaratory order in this proceeding to eliminate controversy and remove uncertainty on the preemption issue raised by petitioners. [12] *5 U.S.C. 554(e)* and *49 U.S.C. 721*. We will not attempt here to

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Tour Co. v. ICC, 824 F.2d 811, 815 (9th Cir. 1987); *Texas v. United States, 866 F.2d 1546 (5th Cir. 1989)* (agencies have jurisdiction to determine the scope of their jurisdiction).

[11] As required by our environmental rules for proceedings where (as in this case) the railroad has demonstrated that the particular proposal would involve operational changes that meet the agency's thresholds for environmental review but were not expected to result in a significant environmental impact (see *49 CFR 1105.6(b)(4)*, 1105.6(d)) an Environmental Assessment (EA) was prepared. The EA was based on the information provided by BN or the third-party consultant, consultation with appropriate environmental agencies, and independent investigation and verification by the Board's Section of Environmental Analysis (SEA). The EA also assessed and developed environmental mitigation to address potential environmental impacts based on an increase in traffic to the City of Auburn. (Our environmental documentation did not address the potential effects of upgrading, maintaining, or rehabilitating the line because those actions were within the railroad's management discretion and did not require our approval. See BNSF Control at 9.)

The EA was made available for public comment. SEA then issued a detailed Post Environmental Assessment (Post EA) based on its investigation of the comments received. The Post EA recommended final environmental mitigation measures and concluded that, if the mitigation recommended in the Post EA were imposed and implemented, the project would not have significant environmental impacts. The comments to the EA, the EA, and the Post EA were forwarded to us for consideration in making our decision in the case. We then issued our October 1996 decision granting the application with various environmental mitigating conditions to address environmental concerns raised by petitioners and others. We concluded that, as conditioned, the BNSF Control proceeding would not have significant environmental impacts. The Cities then filed their environmental court challenge of BNSF Control, which remains pending in the Ninth Circuit.

[12] It should be noted, however, that at this point there may be little need for our guidance. As discussed above, no stay of King County was sought from us or from the Ninth Circuit, and it is our understanding that the improvements to the Stampede Pass line largely have been completed.

analyze any particular ordinances or local regulatory requirements; the review of individual ordinances or state or local regulations is beyond the scope of our limited inquiry in this case and is more appropriately an issue for the courts. However, we will set out in this decision our view of our role, and the appropriate role of state and local regulation, in regulating BN's reactivation of the Stampede Pass line.

[*13]

At the outset, we reaffirm here our determination in King County (at pp. 3-5) that a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted. The power to authorize the construction of railroad lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by *49 U.S.C. 10901*. The ICCTA abolished the ICC, established the Board as the successor to the ICC, and revised the law as it existed in the former Interstate Commerce Act, all effective January 1, 1996. The Board now has exclusive authority over the construction and operation of rail lines that are part of the interstate rail network, pursuant to *49 U.S.C. 10501(b)* and 10901. The ICC and court precedents 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 BN. [13] *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981)* (Kalo Brick) (ICC abandonment authority is plenary and exclusive); *Transit Comm'n v. United States, 289 U.S. 121 (1933)* (same for constructions). Moreover, under the Commerce and Supremacy Clauses of the United States Constitution, "there can be no divided authority over interstate commerce * * *. The acts of Congress on that subject are supreme and exclusive." *Missouri Pac. R.R. v. Stroud, 267 U.S. 404, 408 (1925)*. See also *Edgar v. MITE Corp., 457 U.S. 624, 640 (1982)*; *Kalo Brick, 450 U.S. at 318*. Indeed, Congress in ICCTA confirmed that the Board's jurisdiction over transportation by rail carriers like BN is exclusive and preempts the remedies under Federal or state law. *49 U.S.C. 10501(b)(2)*. See also *49 U.S.C. 11321(a)* (a transaction approved under 49 U.S.C. 11323-25 is exempt from state or local law "as necessary to let that rail carrier . . . carry out the transaction . . . and operate property"). Thus, any state or local statute that requires an interstate railroad like BN to obtain state or local approval before construction or abandonment of a line, or a merger or acquisition of control, would appear, on its face, to conflict with **[*15]** ICCTA and is preempted.

In King County, we indicated that, in transactions such as BNSF Control requiring Federal approval and federal environmental review, there is no role for state and local agencies to play other than to participate in the Federal environmental review process under NEPA for the proposed action. Because there are significant roles for state and local agencies under various federal statutes, including environmental statutes, we want to clarify that statement here. For example, the Clean Air Act requires states to implement plans to protect and enhance air quality so as to promote the public health and welfare. See *42 U.S.C. 7401 et seq.* Rather than relegating state and local agencies to the periphery in implementing Federal law, the statutory scheme gives individual states the responsibility of developing and enforcing air quality programs that meet or exceed the national standards within their borders. [14] See *Chevron v. U.S.A. Inc., Hammond, 726 F.2d 483, 489 (9th Cir. 1984)* (Hammond), cert. denied, *471 U.S. 1140 (1985)*. Nothing in King County or this decision is intended to interfere with the role of the states and local entities in implementing these federal laws.

Moreover, as explained in King County and the Secretary's informal opinion, not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only "unreasonable" burdens, i.e., those that "conflict with" Federal regulation, "interfere with" Federal authority, or "unreasonably burden" interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law. *Medtronic Inc. v. Lora Lohr, 116 S. Ct. 2240, 2250 (1996)*. Also, preemption does not deprive the states of 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.*

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[13] The BN line through Stampede Pass was built before Congress gave the ICC the authority to approve the construction of rail lines, but authority to approve the construction of the line was "grandfathered" under the provisions of the 1920 Act.

[14] See also comparable state responsibilities under the Federal Water Pollution Control Act, *33 U.S.C. 1251 et seq.*, and the Safe Drinking Water Act, *Pub. L. No. 93-523*.

236, 243 (1959). See *CSX Transportation v. Easterwood, 507 U.S. 658 (1993)* (federal regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act preempt negligence action only insofar as it was alleged that petitioner's train was traveling at an excessive speed).

In short, where the state or local law can be applied without interfering with the Federal law, the courts have done so. See *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984)* (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 transportation system). Local law, however, is preempted when the challenged state statute "stands as an obstacle to the accomplishment and execution to the full purposes and objectives of Congress." *Perez v. Campbell, 402 U.S. 637, 649 (1971)*, quoting *Hines v. Davidowitz, 312 U.S. 52, 67 (1941)*. Local law also is preempted where there is a compelling need for uniformity. *Hammond, 726 F.2d at 491*. We believe that there is such a need in connection with the interstate rail system, which spans every state **[*18]** in the Continental United States.

As a result, we believe that state or local laws that would impose a local permitting or environmental process on BN's operations on, or maintenance or upgrading of, the Stampede Pass line are preempted to the maximum extent permitted by the Constitution. As explained in King County and the Secretary's informal opinion, an incident of the carrier's receipt of authority to construct a line is the right to maintain and improve it to keep it in operable condition. [15] 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 communication systems, or replacing sidings to accommodate more traffic. Moreover, a state or local permitting process implies the power to deny authorization, which could frustrate the activity that is subject to federal control. If BN 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 a state or local permitting or environmental process, its ability to carry rail traffic **[*19]** over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that state or local permitting or environmental requirements would both interfere with the federal licensing program and unreasonably burden interstate commerce.

At the same time, we agree with the Secretary's informal opinion that there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, even 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, as noted by the Secretary, 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 **[*20]** 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. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted.

We also agree with the Cities that state or local laws providing for permitting and environmental review, in other areas, need not be found to discriminate against interstate commerce. This process, initiated in the state legislature or local governing body, is ordinarily within the localities' legitimate policing powers. However, where the local permitting process could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted. Here, the Cities' admitted goal is to constrain BN's train operations that we have already approved in BNSF Control in order to force BN to fund infrastructure improvements related to the line. For example, Charles **[*21]** A. Booth, mayor of the City of Auburn, has indicated that:

> We do not appreciate having to devote substantial effort to thwarting the Railroad's plans but their actions leave little other choice.

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[15] See, e..g., *Detroit/Wayne Port Authority v. ICC, 59 F.3d 1314, 1317 (D.C. Cir. 1995)* (while initial construction of a rail line requires authority from the Board, improvements to existing lines do not require an additional license or environmental review).

> We are told the benefit of separated grade crossings accrue mostly to the citizens, therefore, the expense of constructing such should be a local responsibility. All the City has ever asked is that those who benefit or profit from the "improvements" be responsible for cleaning up the mess and mitigating the negative impacts upon the City. [16]

See also, the County's petition for declaratory order in King County, filed August 27, 1996, where, in view of the City of Auburn's threatened court action against the County, the County requested our formal decision on whether BN can be required, through the local permitting process, to construct overpasses, underpasses, and natural or artificial noise barriers to mitigate the effects of increased train traffic through the City.

Petitioners' claim that we ignored or overlooked their local concerns is unfounded. As noted (see supra note 11), in BNSF Control **[*22]** the Board engaged in an appropriate environmental review under NEPA and our environmental rules and adopted environmental mitigation conditions to address the environmental concerns that had been raised during the environmental review process by petitioners and others, including mitigation in the City of Auburn. [17] Petitioners cannot use this declaratory order proceeding to mount a collateral attack on, or seek to substitute a state or local environmental review process for, the agency's environmental review under NEPA in BNSF Control. [18] See *Toye Bros. Yellow Cab Co. v. Irby, 437 F.2d 806, 810 (5th Cir. 1971)*. Rather, what we said on the environmental issues that were addressed there is conclusive, subject to the right of the Cities (or any other interested parties) to seek judicial review, under the appropriate standards, if they are dissatisfied with the scope or outcome of the agency's NEPA process. [19]

[*23]

We did not review the construction aspects of BN's improvements because BNSF Control was an inter-carrier consolidation under 49 U.S.C. 11323-25, rather than a construction project under *49 U.S.C. 10901*. We therefore appropriately limited our environmental review to the operational changes that we were approving. Had this been a construction case, any reasonable concerns relative to BN's compliance with local land use and building codes would have been considered in detail in our environmental review and our decision.

Petitioners complain that our decision in King County creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority. As an example, petitioners maintain that states have residual regulatory authority over spur or switching tracks that are excepted from our jurisdiction pursuant to *49 U.S.C. 10906*. Under section 10501(b)(2) of ICCTA, however, we have **[*24]** "exclusive" jurisdiction over spur or switching tracks located entirely in one state. When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of auxiliary tracks entirely to railroad management. See Conference Report on ICCTA, explaining that section 10501(b)(2) was added "in light of the exclusive Federal authority over auxiliary tracks and facilities * * *." H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. 167 (1995). [20] Thus, although we may not regulate the construction and

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[16] City of Auburn letters to the Board, dated May 15 and October 21, 1996.

[17] The environmental impacts on the City of Kent were not considered because SEA found that Kent was not on the Stampede Pass line and would incur no direct environmental impacts. Moreover, evidence of record in that case showed that rail traffic in Kent will decrease by an average of one train a day as a result of the reopening of the Stampede Pass line to transcontinental traffic.

[18] It is noteworthy here that the State is not attempting to apply its own environmental review.

[19] As noted, the Cities' environmental court challenge of BNSF Control is currently pending in the Ninth Circuit.

[20] The Cities' reliance on *Illinois Commerce Comm'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989)*, is misplaced. In that case, the court concluded that the states had jurisdiction over abandonments of spur track under section 10907(b)(1) of the former Interstate Commerce Act. Illinois Commerce Comm'n, however, was expressly overruled by Congress in ICCTA through the enactment of section 10501(b)(2).

The Cities incorrectly suggest that the local permitting they seek to impose is only peripheral to and not in conflict with the Board's jurisdiction. As we stated in King County, at p. 4:

disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either. [21] See, e.g., *Morales v. Trans World Airlines, 504 U.S. 374 (1992)*; *Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988)*; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986)*; *G&T Terminal Packaging Co. v. Consolidated Rail Corp., 830 F.2d 1230 (3d Cir. 1987)*, cert. denied, *485 U.S. 988 (1988)*.

[*25] [*26]

As BN states, Congress would not have totally preempted the states from regulating the construction, operation, and abandonment of spur and switching tracks in ICCTA if it had intended to permit continued state regulation -- through a permitting process or otherwise -- of main line interstate trackage, such as the Stampede Pass line, which has a significant impact on interstate commerce. See H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 95 (1995) ("Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.")

Finally, we note that none of BN's Stampede Pass construction projects criticized by petitioners is located within their municipal boundaries or jurisdiction. [22] As noted, it is apparent that petitioners' primary concern is the increased level of train traffic through their respective cities. After reviewing **[*27]** the Cities' concerns in this regard, we specifically addressed the operational impacts of BN's acquisition in BNSF Control and imposed appropriate environmental mitigation measures. The Cities are clearly dissatisfied with the environmental mitigation we imposed, but that does not justify their application of local land use and building codes to force BN to make additional concessions. We think that their effort to do so results in an unreasonable burden on interstate commerce. In addition, the Cities' attempt to use local law in such a manner constitutes an improper collateral attack on our decision in BNSF Control. Therefore, while we have clarified King County to make it clear that state and local entities have important roles in implementing various federal statutes, we agree with that decision's ultimate ruling that state or local permitting or environmental review of BN's upgrading of the Stampede Pass line goes too far, and that Congress intended to preempt all regulation of this project under state law or local ordinances to the maximum extent permitted by the Constitution.

[*28]

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

It is ordered:

1. The request to intervene by King County, WA, is granted.

> the permitting process implies the power to deny authorization and thereby to frustrate the activity that must be sanctioned. If BN[] 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.

[21] The Cities concede that section 10501 contains express preemption language, but argue that the section does not govern the local environmental, land use, or building permit regulatory authority they seek to have enforced. However, section 10501(b)(2) grants the Board exclusive jurisdiction over rail transportation and the "practices, routes, services, and facilities" of rail carriers. Section 10102(9) in turn broadly defines "transportation" as including "a locomotive, car, vehicle, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, and services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property...." The Stampede Pass line plainly is "property," a "facility," or a "route" used in "transportation by [a] rail carrier." Moreover, BN's operations over, and repair and upgrading, that line are "services related to the movement . . . of . . . property." In short, the Stampede Pass line constitutes property and facilities subject to the exclusive jurisdiction of the Board. That jurisdiction encompasses the original licensing and construction of the line, subsequent maintenance and upgrade projects on the line, and BN's operations over the line.

[22] The proposed snow sheds, communications towers, service facilities buildings, and parking lots are located outside petitioners' city limits.

2. The Cities' petition for declaratory order will be treated as a petition for reconsideration of King County.

3. King County is modified to the extent discussed above. In all other respects, the petition for reconsideration of King County, and the Cities' petition for declaratory order, are denied.

4. This proceeding is terminated.

5. This decision is effective 30 days from the date of service.

Surface Transportation Board Decisions

End of Document

EXHIBIT C

2004 STB LEXIS 140

Surface Transportation Board

March 2, 2004

STB Finance Docket No. 34354

Surface Transportation Board Decisions

Reporter
2004 STB LEXIS 140 *

MAUMEE & WESTERN RAILROAD CORPORATION AND RMW VENTURES, LLC -- PETITION FOR DECLARATORY ORDER

Core Terms

railroad, federal preemption, declaratory order, easement, preempt, railroad property, eminent domain action, eminent domain law, at-grade, has, eminent domain, federal court, impermissible, acquisition, section, street, reply, track

Panel: DECISION; By the Board, David M. Konschnik, Director, Office of Proceedings

Service Date: March 3, 2004

Opinion By: By the Board

Opinion

By a petition filed on May 6, 2003, Maumee & Western Railroad Corporation (Maumee) and RMW Ventures, LLC (RMW) (collectively, petitioners) jointly seek the institution of a declaratory order proceeding to determine whether local condemnation proceedings by the City of Napoleon, OH (City), to acquire an easement for a road crossing over and subsurface utilities under an 8,000 sq. ft. parcel of main line right-of-way, which is owned by RMW and operated by Maumee, are preempted by *49 U.S.C. 10501(b)*. [1] On May 23, 2003, the City filed a reply. On June 9, 2003, petitioners filed a motion for a procedural order, and, on June 23, 2003, the City replied. For the reasons discussed below, petitioners' request for institution of a declaratory order proceeding will be denied.

BACKGROUND

Petitioners own and operate approximately 51 miles of rail line from Liberty Center, OH, to Woodburn, **[*2]** IN, running through the City (the line). The City desires to construct a two-lane public street to connect a planned industrial park with the City. By resolution, the City authorized the acquisition of an easement over RMW's property so that it may construct a public at-grade crossing over the line. After the parties failed to reach an agreement concerning the at-grade crossing, the City, on May 16, 2003, petitioned the Common Pleas Court of Henry County, OH (the Ohio court), to acquire an easement over the line by eminent domain pursuant to Ohio statute. Petitioners sought to have the court proceeding removed to the United States

[1] Petitioners filed a similar petition with the Board on October 21, 2002, but, upon the request of petitioners, the proceeding was discontinued in a decision served on December 5, 2002.

District Court for the Northern District of Ohio (Western Division). Neither the Ohio court nor the Federal court has, to date, sought the Board's opinion regarding this matter.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under *5 U.S.C. 554(e)* and *49 U.S.C. 721* to issue a declaratory order to eliminate a controversy or remove uncertainty. Here, however, there is no need for the Board to institute a proceeding.

The Federal preemption provision contained in *49 U.S.C. 10501* **[*3]** (b), as broadened by the ICC Termination Act of 1995, *Pub. L. No. 104-88, 109 Stat. 803* (1995), protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See *City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998)*, cert. denied, *527 U.S. 1022 (1999)*. But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. See Joint Petition for Declaratory Order -- Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9 (STB served May 1, 2001). Thus, acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of *49 U.S.C. 10501* **[*4]** (b) unless it would prevent or unreasonably interfere with railroad operations.

Maumee's primary argument here is that section 10501(b) would preempt any exercise of state eminent domain power with respect to railroad property, but this interpretation is overbroad. Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations. See, e.g., *Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000)* (state eminent domain action preempted where passing track necessary to railroad's operations would have been eliminated); *Dakota, Minnesota & Eastern R.R. v. South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002)* (recently added sections of state's eminent domain law that would have unreasonably interfered with future railroad operations preempted). But neither the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible. Rather, **[*5]** routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.

These crossing cases are typically resolved in state courts. When federal preemption issues are raised they may be removed to federal court. In either case, courts can, and regularly do (sometimes with input from the Board through referral), make determinations as to whether proposed eminent domain actions would impermissibly interfere with railroad operations. The concerns that Maumee has raised here are generalized and of the type that the courts are well-suited to address. Should the court request Board assistance in assessing those issues, the Board remains available. In the meantime, however, Board involvement does not appear to be necessary or appropriate.

Accordingly, petitioners' request for institution of a declaratory order proceeding will be denied.

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

It is ordered:

1. Petitioners' request for a proceeding is denied.

2. This **[*6]** decision is effective on the date of service.

Surface Transportation Board Decisions

End of Document

EXHIBIT D

2016 STB LEXIS 61

Surface Transportation Board

February 24, 2016

Docket No. FD 35950

Surface Transportation Board Decisions

Reporter
2016 STB LEXIS 61 *

NORFOLK SOUTHERN RAILWAY CO.--PETITION FOR DECLARATORY ORDER

Core Terms

railroad, preempt, declaratory order, vegetate, preemption, debris, rail line, state court, drainage, carrier, drainage ditch, transport, discard, has

Panel: DECISION

Service Date: February 29, 2016

Opinion By: By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

Opinion

Digest: [1] Norfolk Southern Railway Company requests an order declaring that claims of an adjacent property owner seeking to recover damages against the railroad related to flooding are preempted by federal law. The Board denies the petition for declaratory order but provides guidance on the question of preemption.

Norfolk Southern Railway Company (NSR) seeks an order from the Board declaring that the state court claims filed by Dugan Professional Building and Rental, LLC, Doctors Dugan and Dugan, LLC, and James L. Dugan II (collectively Dugan), seeking to recover damages from and an injunction against NSR under Tennessee common law theories of negligence, nuisance, and trespass, are preempted by *49 U.S.C. § 10501(b)* of the **[*2]** Interstate Commerce Act, as broadened in the ICC Termination Act of 1995 (ICCTA). For the reasons discussed below, the Board denies NSR's petition but provides guidance on the question of preemption.

BACKGROUND

Dugan filed a lawsuit July 31, 2014, in the Circuit Court in McMinn County, Tenn., in which it claims that it experienced substantial flood damage caused by the alleged negligence of NSR when it discarded and failed to remove clear cut vegetation

[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).

debris from its drainage ditch and culvert, causing the debris to accumulate in its drainage infrastructure. Dugan is seeking monetary damages and an injunction requiring NSR to repair, reconstruct, and redirect its drainage culvert and drainage infrastructure.

On August 3, 2015, NSR filed a petition for declaratory order asking the Board to find that the state court claims filed by Dugan to recover damages from NSR under Tennessee common law theories of negligence, nuisance, and trespass are preempted by *49 U.S.C. § 10501(b)*. Dugan replied on August 18, 2015, arguing that its state claims are not federally preempted.

The Dugan property (the Property) is adjacent to, and downhill from, a railroad **[*3]** mainline owned and operated by NSR. The Property has had a dental practice office located on it since 1978. (Dugan Reply 3.) Dugan alleges that in 2012, NSR clear cut vegetation located above and on the opposite side of the rail line from the Property and negligently discarded the debris, allowing logs, tree limbs, and other materials to clog the drainage infrastructure that extends to and under the Property. (Id.) Dugan asserts that in 2013, the dental office building on the Property experienced substantial flooding and that Dugan made repeated requests to NSR to alleviate the problem, but that NSR refused to take any action. (Id. at 4.) According to Dugan, the Property incurred substantial damages, including damage to the building's foundation, ductwork, and heating and air conditioning. (Id. at 5.)

Dugan argues that the state court action in this case involves issues of disputed fact, and the Board should decline to issue a declaratory order and allow the preemption determination to be made by the Circuit Court for McMinn County, Tennessee. (Id. at 7.) Alternatively, Dugan argues that, if the Board decides to issue a declaratory order, it should find the claims **[*4]** are not preempted by *49 U.S.C. § 10501(b)* because the claims do not unreasonably burden interstate commerce or interfere with rail transportation. (Id.) Rather, Dugan states that its claims seek redress for tortious acts by a landowner who happens to be a railroad company. (Id. at 9.) Dugan asserts that *Emerson v. Kansas City Southern Railway, 503 F.3d 1126, 1133 (10th Cir. 2007)* controls the analysis here. (Dugan Reply 11.) In Emerson, the plaintiff landowners sued a railroad alleging trespass, nuisance, negligence, and other state law claims after the railroad allegedly discarded railroad ties and vegetation debris in a drainage ditch, which resulted in flooding on the landowner's adjacent property. *Emerson, 503 F.3d at 1133*. The court held that § 10501(b) did not preempt the landowners' claims involving the disposal of railroad ties and debris into the drainage ditch. *Id. at 1131*.

NSR acknowledges that in May 2012 and July 2012, it clear cut vegetation and conducted related clearance of vegetation debris in order to remove vegetation that **[*5]** could impair track safety, track visibility, and overall rail operations. (NSR Pet. for Declaratory Order 2-3.) In its petition for declaratory order, NSR explains that vegetation control is required by Tennessee state laws and Federal Railroad Administration safety regulations. (Id. at 3.) NSR argues that Dugan's alleged damages stem from NSR's vegetation control and NSR's design and maintenance of its drainage culvert, which are necessary and integral aspects of NSR's rail operations. (Id. at 5.) NSR states that the Board has exclusive jurisdiction over the operation of rail lines and as a result, § 10501(b) preempts Dugan's claims against NSR. (Id.)

NSR attempts to distinguish Dugan's claims from those in Emerson on grounds that the carrier in that case did not establish that proper disposal of railroad ties was a necessary part of its rail operations. (NSR Pet. for Declaratory Order 10.) In contrast, NSR states, it has a transportation-related interest as a rail carrier in vegetation control, especially with respect to the heavy vegetation that surrounds this portion of its track, as too much vegetation can have a direct effect on safety and operations. (Id. **[*6]** at 11.) Because there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance, we will deny NSR's petition for a declaratory order, but will provide general guidance on the issue of preemption. [2]

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[2] On October 6, 2015, NSR filed a supplement notifying the Board that on October 2, 2015, it filed a motion to stay the proceeding in state court pending a decision from the Board on the preemption issue. NSR filed a second supplement on November 23, 2015, to notify the Board that the court held a hearing on the motion on October 29, 2015, and that the court decided not to hold any further hearing or trial on Dugan's claims until the court receives the Board's "direction and directive." (NSR Suppl. 2, Nov. 23, 2015.) NSR explains that although the court "technically denied" NSR's motion to stay, it granted a de facto stay for the purposes of this Board proceeding by asking the Board to

[*7]

DISCUSSION AND CONCLUSIONS

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances, are categorically, or *per se*, preempted. *City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998)*. Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. *Id. at 1031*; CSX Transp.--Pet. for Declaratory Order, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005). State and local actions also may be preempted "as applied"--that is, if they would have the **[*8]** effect of unreasonably burdening or interfering with rail transportation. See *Franks Inv. Co. v. Union Pac. R.R. (Franks), 593 F.3d 404, 414 (5th Cir. 2010)* (en banc).

The Board and the courts have found that state law claims pertaining to the design, construction, and maintenance of an active rail line (including the embankment and associated drainage structures that support the rail line) are preempted. See Thomas Tubbs--Pet. for Declaratory Order (Tubbs), FD 35792 (STB served Oct. 31, 2014), aff'd--F.3d--, 2015 WL 9465907 (8th Cir., Dec. 28, 2015), and cases cited therein. In Tubbs, after a full factual record had been developed in the state court, the Board found that the actions of a rail carrier in designing, constructing, and maintaining an active rail line are clearly part of "transportation by rail carriers" and therefore subject to the Board's exclusive jurisdiction and entitled to federal preemption under § 10501(b). Tubbs, slip op. at 4. But if the Tubbses' claims instead involved the discarding of railroad ties and vegetation debris into a drainage ditch they would not necessarily have been **[*9]** preempted. See Tubbs, 2015 WL 9465907 at *4 (agreeing with the way the Board had distinguished Emerson).

Therefore, if Dugan's state law claims are based on harms stemming directly from the actions of NS in designing, constructing, and maintaining an active rail line (including the associated drainage structure), they would be preempted, as those subject areas are within the Board's jurisdiction over rail transportation. Indeed, to the extent Dugan's claims involve the cutting and clearing of vegetation, which would be rail line maintenance facilitating the safe operation of trains, they would likely be preempted. However, if Dugan's claims against NSR involve actions that would generally not be considered part of rail line maintenance (e.g., the discarding of vegetation debris, see Emerson), they would not likely be considered part of rail transportation, and thus would not likely be preempted.

Questions of federal preemption under *49 U.S.C. § 10501(b)* can be decided by the Board or the courts. See, e.g., 14500 Ltd.--Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX **[*10]** Transp., Inc.--Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005). In this case, because the matter is already pending in state court and there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and

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determine whether Dugan's claims against NSR are preempted. (Id. at 1-2.) On December 7, 2015, Dugan also filed a supplement to notify the Board that the state court denied NSR's motion to stay. (Dugan Suppl. 1, Dec. 7, 2015.)

VICE CHAIRMAN MILLER, commenting:

Although we are leaving the fact-finding to the court in this instance, the record raises the concern that NSR improperly disposed of the debris in the drainage ditch. If so, it would be another instance in, what to me, is the frustrating trend of railroads showing a disregard for how their actions affect those that live adjacent to their lines and in the communities that they serve. Even in instances where a railroad's actions are indisputably protected by Federal preemption, in my mind that does not excuse the carriers from exercising a higher degree of care where it is reasonable. It also troubles me when railroads are quick to use preemption as an excuse not to even listen to communities that have concerns about rail activities. I find it particularly frustrating when disputes result in litigation that might have been avoided had the carrier taken steps to minimize damage or engage the community, even if not legally bound to do so.

While railroads need and merit the protection that ICCTA preemption affords, in my view they also need to consider how their actions may impact neighbors when carrying out maintenance procedures and implementing design standards. Just because railroads are not required to do something because of preemption, it doesn't mean that they shouldn't do so.

maintenance, we believe the state court is the appropriate place to determine the full nature and extent of Dugan's claims, and to apply the relevant Board and court precedent discussed above.

Accordingly, the Board denies NSR's petition for declaratory order.

It is ordered:

1. NSR's petition for a declaratory order is denied.

2. This decision is effective on its date of service.

Surface Transportation Board Decisions

End of Document

Fort Bragg v. Mendocino Railway
Case No. 21CV00850

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835. On February 9, 2022, I served the foregoing document(s) described as **NOTICE OF LODGING OF FEDERAL AGENCY OPINIONS CITED IN SUPPORT OF OPPOSITION TO DEMURRER,** on each interested party **listed below**/on the attached service list.

Paul J. Beard, II
Fisherbroyles LLP
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
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___ (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

I am readily familiar with Jones & Mayer's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at La Habra, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

XX (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s) listed above to the e-mail address(es) of the person(s) set forth above. The transmission was reported as complete and without error. See Rules of Court, Rule 2.251.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 9, 2022 at Fullerton, California.

WENDY A. GARDEA