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BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Docket No. FD 36770

TOWNSHIP OF PILESGROVE, NJ
PETITION FOR DECLARATORY ORDER

**COMMENTS OF
THE AMERICAN SHORT LINE
AND REGIONAL RAILROAD ASSOCIATION**

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PROCEDURAL HISTORY AND BACKGROUND

Salem County, N.J. (the “County”) awarded SMS Rail Services, Inc. (“SMS”) a lease for the maintenance and operation of the Salem County Railroad.¹ The Rail Service Line Agreement sets forth the terms and agreement between the parties, providing that SMS would “maintain, market, and operate the rail line and to provide exclusive rail service at the property.”² The County authorized SMS to seek authority from the Board to operate as a common carrier on the line. The rail line in question is comprised of approximately 19.4 miles of rail line, including the 1.2-mile Glass House Branch Spur (the “Salem Branch Line”).³ It appears after beginning freight operations in August 2022, SMS began operating a tourist and excursion service in 2023, and installed certain structures to support SMS’s expanded rail

¹ See *SMS Rail Service, Inc.—Change in Operator Exemption Including Acquisition By Lease—Salem Branch Line in Salem and Gloucester Counties, N.J.*, FD 36529 (STB served July 15, 2022) (“*SMS Decision*”).

² See Township of Pilesgrove’s Petition for Declaratory Order, p. 2, filed May 1, 2024, in *Township of Pilesgrove, N.J.—Petition for Declaratory Order*, FD 36770 (“*Petition for Declaratory Order*”).

³ See *SMS Decision*.

service, over the Salem Branch Line. Pilesgrove (and Mannington in its intervention) claim that to service “fun rides” SMS has placed structures upon the Salem Branch Line including but not limited to a ticketing booth and a gift shop.⁴ Beyond an assertion, neither Pilesgrove and Mannington provide any evidence that such structures are used solely for excursion operations and had no nexus to freight service.⁵ Both municipalities are asking the Board to clarify whether structures and improvements place upon the Salem Branch Line for purposes of “fun rides” fall within the Surface Transportation Board's jurisdiction when they are solely for purposes of entertainment.

Per the Petition for Declaratory Order, SMS, through its representative, Jim Pfieffer, by letter dated October 12, 2023, took the position that its “abundant freight operations provide a sufficient nexus to interstate commerce to permit Federal regulation of its intrastate operations, claiming that the local zoning and land use regulations are preempted by Federal law.” *Id.* at 3.

On May 1, 2024, The Township of Pilesgrove, New Jersey (“Pilesgrove”), filed a petition for a declaratory order asking the Board to determine whether and to what extent 49 U.S.C. § 10501(b) preempts certain local and state laws regarding land use and land development by SMS. On June 10, 2024, the Township of Mannington, New Jersey (“Mannington”), filed a petition for leave to intervene, asserting that it has a legitimate interest in the proceeding because the Salem Branch also extends through Mannington, and Mannington has similarly attempted to enforce its municipal land regulations on SMS and its apparent operational affiliate Woodstown

⁴ See Petition for Declaratory Order 3.

⁵ Several of ASLRRA’s short line railroad members have diverse transportation offerings. Often these carriers use the same tracks, stations, offices, maintenance shops, and employees to provide freight and passenger commuter/excursion service. ASLRRA understands several of its members also plan to file comments in this proceeding.

Central Railroad (“WCR”). On September 13, 2024, the Board initiated a declaratory proceeding to rule upon the controversy surrounding the scope of preemption over activities performed by SMS in both Pilesgrove and Mannington, which has implications for how the townships can regulate those activities.

ASLRRA’S INTEREST IN THIS PROCEEDING

The American Short Line and Regional Railroad Association (“ASLRRA”) is a national trade association representing the interests of short line and regional railroad members in legislative and regulatory matters. Both in legislative matters before Congress and in regulatory and legal proceedings before the Board, other federal agencies, and the courts, ASLRRA advocates for enlightened public policies which promote a strong regional and short line rail component for the national transportation infrastructure.

As a Class III short line railroad, SMS is part of the national U.S. freight rail network. Made up of over 600 individual railroads, the network facilitates transportation over 135,000 freight miles. Railroads are the most efficient way to move freight over land, as on average, railroads move one ton of freight nearly 500 miles on one gallon of fuel. Additionally, one train can carry as much freight as several hundred trucks. In fact, the Association of American Railroads (“AAR”) estimates that it would have taken approximately 872,000 additional trucks to handle the 15.7 million tons of freight that moved by rail in New Jersey in 2021.⁶

Today’s short lines come in all shapes and sizes. Some are members of rail holding companies, some are large regional entities, and many are small, family-owned businesses. Together they represent a diverse, dynamic and entrepreneurial collection of small businesses

⁶ Association of American Railroads, “Freight Rail in Your State.” Last accessed Dec. 11, 2024. Available at aar.org/data-center/railroads-states/.

that make wise use of the resources available to them. Short lines operate nearly 30% of the national freight network, serving customers who otherwise would be cut off from the national railroad network. These small businesses operate the most vulnerable segments of the railroad system and, in some cases, are the lifeline to the nation's marketplace for many rural businesses. They succeed by competing aggressively for business and investing significant revenues in rail infrastructure.

COMMENT

I. Short lines work tirelessly to chase the American Dream – carload by carload.

In 2022, the Salem County Board of Chosen Commissioners (“County Board”) provided a letter of support in favor of SMS’s Verified Notice of Exemption proposing a change in railroad operators of the Salem Branch Line to SMS. *See* FN 1. The County Board stated that the Salem Branch Line “has been underutilized for decades, with rail traffic of only approximately two to three railcars per year over the last five to six years.” The County Board expressed a desire to add commerce, which it intended to do by hiring SMS as the Salem Branch Line operator, believing that SMS “is capable of improving, maintaining, and providing service on the Rail Line that will help attract and develop the active and robust commerce the County desires.”⁷ As the new operator of the Salem Branch Line, SMS actively markets itself to freight and transloading customers on its website. *See* smsrail.com/locations/#NJ. SMS has worked to market and grow carloads on the Salem Branch Line since it began operations. SMS shared with

⁷ According to SMS, at the time it acquired the Line it has suffered the ill effects of ineffective operators and economic downturns, which had driven away almost all carload business on the line. The line was rife with problems; vegetation overgrowth, non-compliant crossings, and washouts, to name a few, made the line impassable.

ASLRRA that in 2022, the Salem Branch Line had no carloads; in 2023, the Salem Branch Line moved three revenue carloads; in 2024, the Salem Branch Line moved 45 revenue carloads.⁸

To provide the Board with some perspective, this is not that unusual. While the typical smallest short line carriers have entrepreneurial spirit in abundance, they often also have a business model that would be viewed by many in the financial world as less than ideal and have very low densities of traffic, at least at the beginning. It is not uncommon for the smallest short lines to operate “**in the red**” for the first three to five years or more as they grow business customer-by-customer and carload-by-carload. To add to the burden, these smallest rail carriers must simultaneously address decades of deferred maintenance, while trying to grow carload volume.⁹ At the end of the day, these small, light-density short line carriers attempt to remain financially viable by supplementing freight revenues with other lines of business. For example, it is widely known in the railroad community that when freight rail services are down, car storage demand is up and vice versa.

As ASLRRA testified during the recent STB hearing entitled Growth in the Freight Rail Industry (“EP 775”), growth in the freight rail business is essential to short line railroads. Carload volume is the lifeblood of the short line industry. Short lines keenly focus on retaining and growing carload volume – and will partner with anyone to better serve a customer or build out a rail option for a new customer. Whether it is one carload of scrap a year that is hauled for a one-man scrap sorter who contacts the railroad, or several hundred carloads a week – there is NO

⁸ While certain railroads would classify growth from zero to 45 carloads as insignificant, many railroaders would agree that give the high cost of railroad operations, such growth is at least a start to a future success story.

⁹ The Consolidated Rail Infrastructure and Safety Improvements (CRISI) Program, which is highly competitive, was created to help short lines address such challenges. Unfortunately, the need for funding exceeds the available funding every year by billions.

customer that our industry will not work to serve and grow business with. ASLRRRA firmly believes that the way short lines do business is the reason short lines grow business so successfully. Growing business where little existed before is at the heart of the short line story – this is what short line executives go to bed and wake up thinking about.

As some of ASLRRRA’s members testified, smaller light-density short line rail carriers are continuously trying to reinvent themselves and remain financially viable by supplementing freight revenues via other lines of business.¹⁰ Since the Staggers Act jumpstarted the modern short line industry, short lines have turned the most neglected rail lines in America into a thriving collection of small businesses where carload growth has been the lifeblood of success. ASLRRRA is concerned that the Board’s holding as to “whether and to what extent 49 U.S.C. § 10501(b) preempts certain local and state laws,” in this proceeding could potentially undermine the future ability of some of the nation’s smallest short line railroads to provide freight rail service to shippers. ASLRRRA recognizes potential downstream implications and is submitting these comments to ensure that the Board is mindful as well.

II. ICCTA preemption should apply as broadly as possible to protect freight rail operations.

Congress defined “transportation” in the Interstate Commerce Commission Termination Act (“ICCTA”) more broadly than the term’s ordinary meaning. ICCTA defines transportation as including a yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail and services related to that movement, including receipt, delivery transfer in transit handling, and interchange of passengers and

¹⁰ Smaller carriers that seek to continue to provide common carrier service by supplementing freight revenues via other lines of business ranging from car storage to transporting passengers, to excursion services, and more.

property. 49 U.S.C. § 10102(9)(A)–(B).¹¹ ICCTA grants “exclusive” authority to the Board to regulate matters falling within ICCTA’s broad scope, and preempts state laws that manage, govern, burden, interfere with, or discriminate against rail transportation.¹² See 49 U.S.C. § 10501(b). The preemptive scope of 49 U.S.C. § 10501(b) has been characterized by the courts as broad and sweeping.¹³ State and local laws are either categorically preempted or may be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation. See *Del. v. STB*, 859 F.3d 16, 18 (D.C. Cir 2017).¹⁴ State permitting laws

¹¹ 49 U.S.C. § 10102(5) defines a “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. All board-licensed carriers are part of the general system of rail transportation.

¹² Per 49 U.S.C. § 10501(b), the Board has exclusive jurisdiction over: “**(1)** transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 *et seq.*] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and **(2)** the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, **even if the tracks are located, or intended to be located, entirely in one State.**”

The Board’s jurisdiction “is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 *et seq.*], the remedies provided under this part [49 U.S.C. §§ 10101 *et seq.*] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b) applies to all tracks and facilities owned by a jurisdictional carrier, whether used in part or whole to provide freight services, and even if the freight carrier utilizes the tracks for other ancillary railroading purposes.

¹³ See *San Pedro Peninsula Homeowner’s United Inc., John Tommy Rosas Tribal Administrator, Tongva Ancestral Territorial Tribal Nation – Petition for Declaratory Order*, FD 36065, slip op. at 3-4 (STB served March 6, 2017) (“San Pedro”) (“The primary purpose of § 10501(b)’s broad preemption provision is to prevent a patchwork of state and local regulation from interfering with interstate commerce.”); see also H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (noting the need for “uniformity” of federal standards for railroads and the risk of “balkanization” from state and local regulation);

¹⁴ In interpreting the reach of preemption under § 10501(b), certain activities directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment) are categorically preempted. Other state actions may be preempted as applied, that is, only if they would have the effect of unreasonably burdening, interfering with, or discriminating against rail transportation, which is a fact-specific determination based on the circumstances of each case. See *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-54 (3rd Cir. 2007); *Boston & Maine Corp. & Town of Ayer*, MA, 5 S.T.B. 500, 510-12 (2001); *Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry.*, FD 33466, slip op. at 2 (STB served Feb. 27, 2001); and *Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna and Western Railway Corporation*, 4 S.T.B. 380, 387 (1999).

and safety laws that seek to regulate operations of a rail carrier that provides transportation (freight, excursion, and other rail carrier provided services) over jurisdictional trackage, such as those cited by Pilesgrove, unreasonably burden rail transportation. ASLRRA's member railroads, including SMS, depend upon a uniform national regulatory scheme for their operations.

In the Petition for Declaratory Order, Pilesgrove (and Mannington in its intervention) cite certain cases where the Board has found that entities providing exclusively excursion service or predominantly excursion service were not subject to the Board's jurisdiction.¹⁵ Both Pilesgrove and Mannington conveniently ignore the dicta in *Magner* noting that the Board would have jurisdiction over a railroad lying wholly within one state if it participated in the movement of passengers or freight from one state to another under common arrangements with connecting carriers, i.e., by means of through-ticketing or the movement of interstate freight. Further, both Pilesgrove and Mannington ignore that in **all** the cases cited in both the Petition for Declaratory Order and Mannington (in its intervention), the entities did not publish tariffs, hold themselves out to all freight customers interested in service upon reasonable demand, market and promote and grow freight business.¹⁶

¹⁵ See *Napa Valley Wine Train, Inc.—Pet. for Declaratory Order*, 7 I.C.C. 2d 954, 965-68 (1991) (“*Wine Train*”) (finding an excursion entity that utilized a line acquired pursuant to an OFA to handle less than one carload of freight a month for certain wineries, with no regularly scheduled freight service, or marketing for freight, and was not providing transportation subject to the Board's jurisdiction; see also *Magner—O'Hara Scenic Ry.—Operation in the State of Michigan* (not printed), served May 12, 1981, *aff'd sub nom. Magner—O'Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir.1982) (“*Magner*”).

¹⁶ See *Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order*, FD 35496, slip op. at 9-10 (STB served Aug. 18, 2014) (“*Denver & Rio Grande*”) (finding that for 14 years the railroad, which was acquired pursuant to an OFA, was only used to provide seasonal entirely intrastate movement of passengers and recreational rafts (freight movement on the Creede Branch was limited to the transportation of river rafts and other gear for excursion passengers; moreover, river rafts and other gear moved with the passengers as a package; and there was no separate freight rates) was outside the Board's jurisdiction), recons. denied *Denver & Rio Grande Ry. Hist. Found.*, FD 35496 (STB served Mar. 24, 2015); see also *Napa Valley Wine Train, Inc.—Pet. for Declaratory Order*, 7 I.C.C. 2d 954, 965-68

SMS is distinguishable, it has clearly made an effort to grow business and has been successful. In just over two years, carload volume has increased from zero carloads in the fall of 2022 to 52 carloads in 2024. SMS serves two shippers and is working to expand transloading operations.¹⁷ SMS is a “rail carrier” providing “transportation” pursuant to 49 U.S.C. § 10102(5) over the interstate rail system, which has expanded operations to include excursion services.¹⁸ Notwithstanding any tourist or excursion services provided on the line, SMS demonstrates with its growth in freight rail service since obtaining the line in 2022 that it is performing more than “minimal” freight operations in interstate commerce, and therefore falls within ICCTA’s broad scope. The fact that SMS has expanded operations to provide excursion operations does not have any negative impact on its common carrier obligations.

III. Short lines rely on preemption to grow and thrive.

While SMS has made significant progress in two years, the path before it remains challenging as it seeks to both increase carloads and address deferred maintenance needs over the Salem Branch Line. The Board understands that low-density short line freight railroads are often dependent on revenue from other railroad operations such as car storage, transloading, and

(1991) (“*Wine Train*”) (finding a predominantly excursion entity that utilized a line acquired pursuant to an OFA to handle less than one carload of freight a month for certain wineries, with no regularly scheduled freight service, or marketing for freight, and limited ability to connect to Amtrak (nearest connection 30 miles away and bus service would be required for passengers to move between Wine Train and Amtrak) was not providing transportation subject to the Board’s jurisdiction); *see also Fun Trains, Inc.--Operation Exemption--Lines of CSX Transp.*, FD 33472 (STB served March 5, 1998) (“*Fun Train*”) (finding the Board did not have jurisdiction over an excursion passenger train in Florida that operated pursuant to trackage rights granted by CSX Transportation, Inc., which was marketed primarily to tourists and did not connect to Amtrak directly); *but cf. Yakima Interurban Lines Association – Abandonment Exemption – In Yakima County, WA*, AB 600 (Sub-No. 1x) (STB served October 27, 20006) (finding YILA a carrier subject to the Board’s jurisdiction even though the Railroad Retirement Board found YILA to be an excursion railroad as YILA became a carrier to the Board’s jurisdiction when it acquired the rail line in 1999 by invoking the Board’s authority).

¹⁷ SMS has purchased 93 acres in order to develop transloading on the line, intending to restore manufacturing and freight rail service to the people and businesses on its line.

¹⁸ *See* Petition for Declaratory Order at p. 5.

transporting passengers (commuter and excursion) to help subsidize their continued offering of freight services to their communities (e.g., when there isn't sufficient freight traffic alone to pay for all of the costs that are incurred in operating a freight railroad, such as maintenance and repair costs, equipment costs, insurance costs, employee costs, etc.). Preemption is intended to prevent a patchwork of state and local regulations from interfering with interstate commerce. Hamstringing a carrier's avenues for earning adequate revenues interferes both with the ability of the railroad to earn adequate revenues, but more importantly its ability to continue to operate.

The bottom line is that short lines rely on preemption to grow and thrive. Artificially bifurcating freight and excursion operations conducted by a rail carrier would expose short lines to local ordinances and regulations, including zoning and planning requirements, simply because the rail expanded operations to include excursion service. This would destroy the ability of some smaller freight railroads to invest in their infrastructure and fulfill their common carrier obligations, and result in more smaller freight railroads shutting down to the detriment of interstate commerce.

CONCLUSION

The short line rail industry is nimble, necessary, and noted for its attentive and customized service. To promote freight rail growth, the Board should deny Pilesgrove's petition for a declaratory order. ASLRRA appreciates the opportunity to present its views on this important issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sarah Yurasko".

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December 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served on the following persons by electronic mail this date:

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