

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36654

TENTH AVENUE NEIGHBORS—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board denies a premature request for a declaratory order on whether a rail spur owned by Pitman Family Farms, and/or its affiliate Bel's Poultry, LLC, is subject to the Board's jurisdiction, but provides general guidance on the circumstances under which state or local regulation may be preempted by 49 U.S.C. § 10501(b).

Decided: May 8, 2024

Tenth Avenue Neighbors (TAN) is a California-registered unincorporated resident association comprised of families residing in the City of Hanford (the City) and County of Kings, Calif. On December 20, 2022, TAN filed a request with the Board seeking a declaratory order that a rail spur (Pitman Spur) owned by Pitman Family Farms, and/or its affiliate Bel's Poultry, LLC (together, Pitman Farms), at its Hanford feed mill "is not a 'rail carrier' within the meaning of 49 U.S.C. § 10102(5) and, therefore, does not fall under the Board's regulatory jurisdiction." (TAN Petition for Dec. Order 4.) TAN filed its petition for declaratory order after the City allegedly refused to assert regulatory authority over the Pitman Spur in response to certain noise complaints made by TAN. There is no ongoing state action or attempted regulation involving the Pitman Spur.

For the reasons explained below, the Board concludes that issuing a declaratory order at this time would be premature. However, the Board will provide guidance on preemption under 49 U.S.C. § 10501(b).

BACKGROUND

The Pitman Spur consists of a 1.7-mile closed loop that connects to a rail line owned and operated by BNSF Railway (BNSF), a common carrier, and is otherwise located exclusively within Pitman Farms' property. It solely serves Pitman Farms' facilities in Hanford. (TAN Pet. 6, 7; Pitman Farms Reply 1-3.) TAN alleges that the Pitman Spur is used primarily to transport feed to be used and stored on Pitman Farms' Hanford property. (TAN Pet. 7.) Pitman Farms asserts that the Pitman Spur serves its feed mill and is used to transport poultry feed

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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

products for nationwide distribution. (Pitman Farms Reply 1-3.) Pitman Farms further asserts that BNSF serves the facility by providing common carrier rail service to transport commodities including distiller's grain, soybean meal, and feed products to and from third parties. (*Id.* at 2-3, 8.) Pitman Farms states that it is obligated per the terms of its agreement with BNSF to offload deliveries in a tight timeframe, requiring Pitman Farms to operate 24-hours-per-day. (*Id.* at 3.)

TAN formed in April 2021 to seek redress for ongoing noise and vibrations allegedly caused by rail operations on the Pitman Spur immediately adjacent to, and across the street from, TAN members' homes. (TAN Pet. 4, 9.) On May 25, 2021, the attorney for the City, responding to TAN's complaints, advised TAN that operations on the Pitman Spur are governed by federal law and are not subject to state or city regulation. (*Id.* at 9, Attachment 4.) According to an email exchange between a member of TAN and a representative of the Federal Railroad Administration (FRA), TAN also filed a complaint with that agency. The FRA representative responded that the agency would not regulate noise from rail car coupling activities under the U.S. Environmental Protection Agency's regulations at 40 C.F.R. Part 201 ("Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers") because Pitman Farms "is not a railroad." (*Id.* at 10, Attachment 5.)

On December 20, 2022, TAN filed a petition for a declaratory order with the Board. TAN asserts that the City's statement that it does not have regulatory jurisdiction over the Pitman Spur creates an actual ongoing controversy that the Board should resolve. (*Id.* at 8.) TAN further argues that the City's conclusion is incorrect, and that the Board does not have jurisdiction under 49 U.S.C. 10501(a)(1) over the Pitman Spur because it is a private track operated by a private rail carrier. (*Id.* at 12, 13, 16.)

Pitman Farms late-filed a reply on January 17, 2023, asserting there is no actual controversy and no uncertainty for the Board to resolve. (Pitman Farms Reply 4-5.) Pitman Farms states that TAN's complaints arise out of state and local law and argues that California state courts could resolve these issues in conjunction with any preemption arguments. (*Id.* at 5-6.) Pitman Farms also requests that, if the Board exercises its discretion to consider the merits, the Board should find that any attempt by state and local authorities to regulate operations on the track is preempted under 49 U.S.C. § 10501(a). (*Id.* at 9-10.) Pitman Farms argues that TAN seeks to restrict the loading and unloading of railcars, which Pitman Farms asserts qualifies as transportation under the auspices of BNSF, a rail carrier. Pitman Farms argues that such transportation includes "handling" and other "services related to [rail] movement" under 49 U.S.C. § 10102(9)(B). (*Id.*)

On March 28, 2023, TAN filed a reply in opposition to Pitman Farms' reply, arguing that Pitman Farms' reply was not timely filed² and urging the Board to disregard many of Pitman Farms' legal arguments as a result.

² The Board will accept Pitman Farms' reply, even though it failed to meet the 20-day filing deadline, and TAN's March 28 filing, even though the Board's rules prohibit a reply to a reply. It is within the Board's discretion to permit late-filed or otherwise impermissible filings, and it is appropriate to do so here. Both Pitman Farms' reply and TAN's March 28 filing

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board in its discretion will decline to issue a declaratory order here.

Contrary to TAN’s argument, the Board need not exercise its discretion to issue a declaratory order to terminate a controversy or resolve uncertainty here.³ TAN asserts that because both local (i.e., the City) and federal authorities (i.e., the Federal Railroad Administration) have disclaimed jurisdiction over the Pitman Spur, only a declaration from the Board can provide TAN the clarity it needs to effectively pursue its members’ interests. (TAN Pet. 11.) TAN’s claim of uncertainty does not warrant the Board’s exercise of discretion here. No local or state government entity has attempted or proposed any regulation of the Pitman Spur. As a result, there is no information on what any such regulation might entail or even to what activities it might apply. Thus, the Board declines to speculate on whether an abstract, hypothetical state or local regulation would be preempted. Moreover, there is no indication in the record that TAN has pursued any claims in California state court; and if it were to do so, an appropriate court could address any preemption arguments under its concurrent jurisdiction with the benefit of a well-developed factual record. See, e.g., Brookhaven Rail Terminal—Pet. For Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014); 14500 Ltd.—Pet. for Declaratory Ord., FD 35788, slip op. at 2 (STB served June 5, 2014).

Under these circumstances, the Board will deny TAN’s request for a declaratory order and decline to institute a proceeding. However, the Board will provide general guidance on the nature and extent of § 10501(b) preemption.

The Interstate Commerce Act, as amended by the ICC Termination Act of 1995, provides that the Board’s jurisdiction over “transportation by rail carriers” is “exclusive” and that “the remedies provided under [49 U.S.C. §§ 10101-11908] 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). A principal purpose of this express federal preemption is to prevent a

provide a more complete record, clarify the arguments, will not prejudice any party, and do not unduly prolong the proceeding. BNSF Ry.—Discontinuance of Trackage Rts. Exemption—in Peoria & Tazewell Cntys., Ill., AB 6 (Sub-No. 470X) et al., slip op. at 5 n.9 (STB served Apr. 21, 2011).

³ TAN argues that there is a controversy between itself and the City over whether the City has authority to regulate operations over the Pitman Spur. (TAN Petition for Dec. Order 8.) The statute does not define “controversy” or expressly establish that it must involve a pending legal action. See 5 U.S.C. § 554(e). But even assuming for purposes of argument that a pending legal action is not required, the Board would exercise its discretion to deny the petition for the reasons stated here.

patchwork of local and state regulations from unreasonably interfering with interstate commerce. See Tubbs—Pet. for Declaratory Ord., FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff’d, 812 F.3d 1141 (8th Cir. 2015).

Because the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a), to be subject to the Board’s jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be “transportation” and must be performed by, or under the auspices of, a “rail carrier.” The statute defines “transportation” to encompass any property, facility, structure or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). “Railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6).

Under 49 U.S.C. § 10501(b), with respect to transportation by rail carriers, two broad categories of state regulation are categorically preempted “regardless of the context or rationale for the action”: (1) permitting or preclearance requirements that, by their nature, could be used to deny a railroad the right to conduct some part of its rail operations or proceed with activities the Board has authorized; and (2) attempts to intrude into matters that are regulated by the Board. CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005). Moreover, even if state actions are not categorically preempted, they may be preempted as applied—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation, a fact-specific determination. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts state laws that may reasonably be said to have the effect of managing or governing rail transportation); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc). Under Section 10501(b), state or local action is preempted if it would unreasonably interfere with railroad operations or property that is subject to the Board’s jurisdiction. See, e.g., City of Ozark, Ark.—Pet. For Declaratory Ord., FD 36104, slip op. at 5 (STB served July 28, 2017), reconsideration denied, FD 36104 (STB served Dec. 8, 2017).

However, federal law does not preempt local and state application of laws having a “more remote or incidental effect on rail transportation.” N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007). Under § 10501(b), state and local action may be permissible where it does not have the effect of regulating rail transportation or unreasonably interfering with interstate commerce. See E. Ala. Ry.—Pet. for Declaratory Ord., FD 35583 (STB served March 9, 2012) (condemnation action to install two underground pipelines was not preempted because no unreasonable interference with rail operations would result).

Whether preemption applies to any potential state or local regulation of the Pitman Spur or operations conducted on it would depend upon the nature of that regulation, i.e., what the state or locality is attempting to regulate and how it is attempting to do so. While the legal status of the Pitman Spur, i.e., whether it is within or without the Board’s jurisdiction, would be relevant to the inquiry of whether any potential or local regulation is preempted, it is only one of many relevant factors. Such a fact-specific determination can only be made when more information on such attempted regulation is available.

For the reasons discussed above, TAN's petition for a declaratory order will be denied.

It is ordered:

1. TAN's petition for declaratory order is denied, as explained above.
2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.