

SERVICE DATE – JANUARY 4, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36412

TRUSTEES OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56—PETITION FOR
DECLARATORY ORDER

Digest:¹ The Board declines to issue a declaratory order relating to a dispute concerning the proposed construction of a culvert crossing under a rail line in Iowa.

Decided: December 31, 2020

On June 19, 2020, the Boards of Supervisors of Floyd County and Cerro Gordo County, Iowa, acting as Trustees of Joint Drainage District Nos. 6 and 56 (collectively, JDD), petitioned the Board for a declaratory order relating to the proposed construction of a culvert in a rail line embankment of Iowa Northern Railway Company (INRC). For the reasons discussed below, the Board will decline to issue a declaratory order.

BACKGROUND

JDD requests that the Board issue a declaratory order finding that its proposed installation of a culvert in an embankment of INRC is not preempted under 49 U.S.C. § 10501(b). (Pet. 2, 11.) JDD seeks to install the culvert pursuant to §§ 468.109–468.113 of the Iowa Code, which pertain to the construction of culverts or bridges when waterways cross railroad rights-of-way. (Pet. 2, 11.)

INRC responded to the petition on July 30, 2020,² contending that the Board should either deny the petition or find that the proposal is preempted. (INRC Reply to Pet. 2, 8-10, 15-16.) INRC argues that, if the Board chooses to address the issue, it should find that JDD's proposal is preempted because other drainage abatement options were identified by JDD's consulting engineer that are safer and less intrusive. (Id. at 2-5.) INRC contends that JDD selected this particular project in an effort to improperly shift drainage remediation costs and burdens associated with the proposed abatement to the railroad and away from itself. (Id. & Ex. B (V.S. Schierloh) at 6-8 (asserting that existing drainage infrastructure is adequate for current

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 Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² By decision served July 2, 2020, the reply deadline was extended at the unopposed request of INRC.

purposes, that the proposed project artificially diverts water and creates potential risks that INRC should not be required to bear, and that JDD is improperly seeking to shift costs to INRC.) INRC asserts that JDD has identified other options to address its drainage needs—including one recommended by JDD’s consulting engineer—that would not implicate cost-shifting issues. (See id. at 4-5 & Ex. B (V.S. Schierloh) at 5-6.)

On August 18, 2020, JDD filed a reply to INRC’s response, which included a verified statement, directed to some of INRC’s claims. (JDD Reply 5-8, Aug. 18, 2020.) The reply notes JDD’s duty to provide landowners with adequate drainage and reiterates its request for a declaratory order that its plan to proceed with the proposed project pursuant to §§ 468.109-468.113 of the Iowa Code is not preempted by 49 U.S.C. § 10501(b). (JDD Reply 4, 8.)

On September 8, 2020, INRC filed a motion to strike JDD’s August 18 filing or, in the alternative, a response to JDD’s surreply in the event the Board were to accept it. INRC reiterates its site-specific safety concerns with the remediation option being pursued by JDD and that it is amenable to allowing a different drainage remediation effort to proceed. (INRC Mot. 4-5, 7.) JDD responded on September 14, 2020, contending that its August 18 filing was permissible and reiterating prior arguments.³

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to eliminate controversy or remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proc., 5 I.C.C.2d 675 (1989).

Here, JDD contends that the method by which it would construct the proposed improvement is appropriate, (see Pet. 4, 10-11 & related exhibits; JDD Reply 4-6 & related exhibits, Aug. 18, 2020; JDD Reply 3-4, Sept. 14, 2020), but does not, in its several pleadings, address INRC’s assertions about cost-shifting. JDD’s own consulting engineer prepared a report with three drainage options. Although the engineer recommended that JDD approve and adopt Option 1 (where JDD would have responsibility for the costs), JDD instead pursued Option 2 (where, according to the report, INRC would have the responsibility for significant costs). (INRC Reply to Pet. 5; id. Ex. C at 10 & App. B.) INRC asserts that JDD’s apparent motivation in seeking to install the culvert in INRC’s embankment as part of Option 2 is to shift drainage abatement costs to the railroad. (INRC Reply to Pet. 5.) JDD does not deny this assertion in its pleadings, nor has it explained why it chose not to pursue Option 1, which was recommended by its own engineer and unopposed by INRC. Additionally, INRC contends that Option 1 is less risky from an engineering and operating perspective than Option 2, (id. Ex. B (V.S. Schierloh) at

³ The Board disagrees with JDD’s contention that its filing is not a surreply. While the Board’s regulations do not permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will deny INRC’s motion to strike and accept JDD’s August 18 submission and INRC’s response thereto into the record.

13 (further noting that JDD's engineer had concluded that other viable options exist); INRC Mot. 5), which JDD likewise does not dispute or otherwise address. The failure to address these allegations is troubling in light of the concerns raised by INRC regarding Option 2.

Additionally, there appear to be several significant state law issues embedded in the parties' filings, which would not be appropriate for the Board to determine. These disputes appear to include issues under state law pertaining to the natural flow of water, the free flow of water, the location of the proposed project, and the cause(s) of flooding allegedly experienced on the road beneath INRC's overpass. (See, e.g., Pet. 5-6, 8; *id.* Ex. B (Iowa Code provisions pertinent to parties' disputes); *id.* Ex. C at 5 (¶¶ 24-28), 10 (¶ 65), Ex. D at 1-4, Ex. E at 1-2, & Ex. F at 1-2 (pleadings and briefing in pending state court proceeding); INRC Reply to Pet., Ex. B (V.S. Schierloh) at 4-5, 8; JDD Reply 3, 5 & Ex. M (V.S. Rode) at 3, Aug. 18, 2020.) Based on the record presented to the Board, these issues remain to be decided by the state courts. (See Pet., Ex. G (order on summary judgment motions, Jan. 3, 2020) at 4 (denying parties' motions for summary judgment on the underlying merits); Ex. L (Rule 1.904 Ruling, Apr. 3, 2020) at 2 (stating that both parties' motions as to the underlying merits remain denied).)

To the extent the state court suggests that a Board preemption determination on JDD's proposal is needed, (see Pet., Ex. L at 2), that is not the case; it is well-settled that courts have concurrent jurisdiction to decide preemption issues under 49 U.S.C. § 10501(b). See, e.g., *City of Sammamish, Wash.—Pet. for Declaratory Order*, FD 36161, slip op. at 4 (STB served Mar. 29, 2018). Moreover, JDD is mistaken in suggesting that a Board decision finding no preemption would suffice to allow it to proceed with the installation of the culvert. (See Pet. 11.) The court must decide whether the drainage remediation plan chosen by JDD is authorized under Iowa law, and in doing so, the court can address any preemption issues that remain, after those state law questions are resolved, based on applicable Board and court precedent.⁴ The state court, in its orders, cited various court precedent involving preemption under § 10501(b). To the extent it is helpful, the Board refers the parties and the court to guidance the Board has provided in the past. See *Ingredion, Inc.—Pet. for Declaratory Order*, FD 36014, slip op. at 3-5 (STB served Sept. 30, 2016); *Wichita Terminal Ass'n—Pet. for Declaratory Order*, FD 35765, slip op. at 5-7 (STB served June 23, 2015).

In these circumstances, for the reasons discussed above, including the many unresolved issues outside the scope of this proceeding, the Board in its discretion will deny JDD's petition and decline to issue a declaratory order.⁵

It is ordered:

1. INRC's motion to strike is denied.

⁴ The Board notes that the dispute between the parties may ultimately be resolved on purely state law grounds. See, e.g., *City of Sammamish*, FD 36161, slip op. at 4.

⁵ Parties are reminded that the Board's Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

2. JDD's August 18, 2020 response and INRC's September 8, 2020 response thereto are accepted into the record.

3. The petition for declaratory order is denied.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.