

January 17, 2023

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Via E-File onlyMs. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001**ENTERED**
Office of Proceedings
January 17, 2023
Part of
Public RecordRe: Finance Docket No. 36261, Ballard Terminal Railroad Company, L.L.C. –
Petition for Declaratory Order

Dear Ms. Brown:

We represent the City of Seattle (“City”) in the above-referenced proceeding. On December 27, 2022, petitioner Ballard Terminal Railroad Company (“BTRC”) filed herein a Notice in the form of a letter asking the Board to dismiss without prejudice its Petition for Declaratory Order filed in STB Finance Docket No. 36261. Pursuant to the City’s letter dated December 28, 2022, the City respectfully submits this Reply to BTRC’s Notice.¹

As discussed below, the City respectfully requests that the Board provide guidance regarding the existing precedent and reach of the Board’s jurisdiction under 49 U.S.C. § 10501(b). The Washington State courts incorrectly identified the issues raised before those courts and subsequently issued decisions that will impact the Board’s jurisdiction, at least in the State of Washington, and that will interfere with the timely construction of rail-related projects in that State. However, this Board was not a party to the litigation in Washington State courts and, therefore, is not bound by the Washington State courts’ decisions. A decision from the Board that clarifies the Board’s views on its jurisdiction is entitled to “considerable weight and due deference”² and will provide important guidance not only to the parties here, but also to other railroads, government entities, and other parties in Washington State, in addition to any Washington State court that hereafter may be confronted with the same issues.

¹ We sought an extension to file this Reply until January 16, 2023, overlooking the fact that January 16, 2023 was a federal holiday. We are, therefore, filing this Reply on the first business day after the federal holiday, which of course is generally allowed under the Board’s Rules of Practice.

² *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 548 (6th Cir. 2002).

Procedural Background

In 2018, BTRC filed its Petition for Declaratory Order with the Board, seeking an order prohibiting the City from relocating or reconfiguring approximately a half-mile of its existing track to accommodate the City’s recreational trail project. Of critical importance, the Petition only raised claims alleging that the City’s action was preempted on an as-applied basis, alleging that the City’s action would “create unsafe conditions,” and “unduly interfere with railroad operations.” Petition at 4, 35-36. The Petition did not allege that the City’s action was categorically preempted.

The City’s January 2019 Reply to the Petition noted that the Petition implicated contractual issues relating to the parties’ operating agreement. Accordingly, the Board held this proceeding in abeyance to allow the Washington State courts to first address the parties’ contractual dispute. In addition to addressing the contractual issues, however, the King County Superior Court also unexpectedly ruled that the City’s track-relocation project was categorically preempted under 49 U.S.C. §§ 10501(b) and 10901 of the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), even though BTRC’s Petition had not raised issues of categorical preemption, and even though the factual disputes relating to BTRC’s as-applied preemption claims had not been addressed either in the Washington State courts or by this Board.

The Washington State Courts’ Rulings on Categorical Preemption

The Washington State courts concluded that track relocation activities are categorically preempted under the ICCTA, based on an overly broad and inexperienced interpretation of the Board’s jurisdiction over “construction” under 49 U.S.C. § 10501(b). The courts concluded that because track relocation activities concern the “physical construction of tracks or other rail facilities,” the activity is preempted under 49 U.S.C. § 10501(b).³ The courts further ruled that categorical preemption applied, even though the BTRC voluntarily agreed to a franchise agreement with the City after extensive months-long negotiations about the City’s proposed trail project, which resulted in terms that unambiguously reserved the City’s right to relocate BTRC’s tracks to accommodate its trail project.⁴

The Washington Court of Appeals’ decision in this case is a published decision with binding effect within Washington state.⁵ The decision merits the Board’s review and input because its effects are broad. Because the Court of Appeals applied a categorical preemption analysis, not an as-applied analysis, affected governments in the State of Washington will no longer have any rights to require the relocation of even an inch of track, no matter how important the project may be to the public, or how inconsequential the impacts to the railroad, even where,

³ King County Superior Court, No. 19-2-01794-5 SEA, Order Granting Defendant’s Motion for Partial Summary Judgment: Re Preemption, at 4 (June 25, 2020) (a copy of this Order was filed with the parties’ Second Joint Status Report filed herein on June 29, 2020); *see also City of Seattle v. Ballard Terminal R.R. Co., L.L.C.*, 22 Wn. App. 2d 61, 71, 509 P.3d 844, review denied *sub nom. Seattle v. Ballard Terminal R.R. Co. L.L.C.*, 200 Wn.2d 1008, 518 P.3d 209 (2022).

⁴ *City of Seattle*, 22 Wn. App. 2d at 65-66, 71-72.

⁵ *Matter of Marriage of Snider & Stroud*, 6 Wn. App. 2d 310, 315, 430 P.3d 726 (2018).

as here, the local government owns the underlying real estate and the railroad has agreed with the local government to relocate the track. The decision also erodes the “strong presumption” against preemption under the ICCTA for areas of law traditionally reserved to the states,⁶ opening the door for challengers to argue that other rights and regulations are categorically preempted in other contexts. Finally, the decision directly implicates the Board by expanding the scope of matters that may be deemed subject to the Board’s exclusive jurisdiction and regulation.

The Washington State courts’ interpretation is inconsistent with long-standing precedent from the United States Supreme Court, the federal Courts of Appeals, and the STB and its predecessor entity, which have consistently construed the STB’s jurisdiction over “construction” under section 10501 (and its predecessor statutes) by reference to section 10901. Section 10901 clarifies that the Board has jurisdiction over actions to “construct an *extension* to any . . . railroad line[]” or to “construct an *additional* railroad line.” (Emphases added.). These authorities establish that the STB has exclusive jurisdiction over “construction” of rail line extensions or additions extending into new markets but does not require a Section 10901 certificate for all other construction activities, including minor relocations of rail facilities.

The United States Supreme Court first explored the extent of exclusive federal jurisdiction over “construction” in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 277–78 (1926), when it held that Congress’s concern and intent to regulate railroad “construction” only applied “where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier.”⁷ Accordingly, only construction of extensions into new markets were subject to the Interstate Commerce Commission’s jurisdiction.⁸ The STB has subsequently cited to and applied the *Texas & Pacific* test to determine whether railroad construction projects fall within its purview.⁹ Accordingly, the STB has consistently concluded that preemption does not apply to a wide range of “construction” activities.¹⁰

⁶ *Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wash.2d 697, 702, 836 P.2d 823 (1992); *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010).

⁷ *Id.* at 277–78.

⁸ *Id.* See also *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331, 345 (1924) (concluding that “mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination” would not fall within the jurisdiction of the ICC; *Detroit/Wayne Cnty. Port Auth. v. ICC*, 59 F.3d 1314, 1316–17 (D.C. Cir. 1995) (applying *Texas & Pacific* and affirming the ICC’s conclusion that it lacked jurisdiction over relocation of existing facilities within an existing market).

⁹ *Union Pac. Railroad Co.—Pet. for Declaratory Order—Rehab. Of Mo.-Kan.-Tex. Railroad between Jude & Ogden Junction*, Tex. 3 S.T.B. 646, 1998 WL 525587 at *4 (STB Aug. 19, 1998) (concluding that the Board did not have jurisdiction over a railroad’s addition of a 16.7-mile mainline that did not extend into new markets); see also *Valley Feed Co. v. Greater Shenandoah Valley Dev. Co. d/b/a Shenandoah Valley R.R. Co.*, STB 41068, 1998 WL 857071, at *7 (STB Nov. 30, 1998) (applying *Texas & Pacific* and concluding that construction activities were non-jurisdictional); *CSX Transp., Inc.—Pet. for Declaratory Order*, No. FD 33388 (Sub-No. 101), 2008 WL 3971091, at *5 (STB Aug. 26, 2008) (declining to preempt or regulate construction of multi-building complex over and adjacent to rail line).

¹⁰ *Id.* See also *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (concluding that preemption did not apply to property owner’s action to enjoin a railroad from removing railroad

Construing section 10501 by reference to section 10901 is also consistent with the ICCTA's statutory scheme. 49 U.S.C. § 10501 generally establishes the STB's exclusive jurisdiction over matters such as rates, classifications, rules, practices, and the acquisition, abandonment, or discontinuance of facilities. The subsequent sections, including section 10901, specifically define the scope of the STB's jurisdiction over these activities.¹¹ Specific statutes prevail over general statutes.¹² Accordingly, the STB's jurisdiction over "construction" under section 10501 should be construed by reference to section 10901's specific terms, which for almost a century have been consistently interpreted by the United States Supreme Court, U.S. Courts of Appeals, the STB (and its predecessor the ICC) to provide the STB with jurisdiction over the construction of extensions or additions to railroad lines, but not over the relocation of existing tracks (which is the subject of BTRC's Petition, pending herein, and so was also the subject of the litigation in the Washington State courts, discussed herein).

Conclusion

We respectfully request that the Board retain jurisdiction for the limited purpose of providing its views and guidance on the applicability of categorical preemption to track-relocation activities. The Board was not a party to the litigation below before the Washington State courts referred to herein, and, therefore, is not bound by the decisions of those courts. Thus, the Board is free to address the jurisdictional issue and should conclude that it is important that it do so to provide valuable independent guidance to railroads and other parties in projects and other railroad-related matters that arise in Washington State.

We thank the Board for its time and consideration. Please do not hesitate to contact the undersigned if there are any questions.

Respectfully submitted,



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Parties of Record via email only:

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crossings); *Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, No. FD 35424, 2011 WL 2356468 at *3 (STB June 13, 2011) (concluding that the Board did not need to exercise jurisdiction over relocation of existing tracks).

¹¹ For example, 49 U.S.C. Chapter 107 involves the STB's jurisdiction over rates, classifications, rules, and practices. 49 U.S.C. §§ 11321 to 11328 involve the STB's jurisdiction over mergers and acquisition of carriers or facilities. 49 U.S.C. §§ 10903 to 10905 involve the STB's jurisdiction over the abandonment or discontinuance of rail lines.

¹² *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957).