

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36770

TOWNSHIP OF PILESGROVE, N.J.—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board partially grants a petition for declaratory order concerning certain activities performed on and around a rail line in Salem City, N.J. This decision finds that some of the activities and structures attempting to be regulated by the local townships are related to the transportation of property by a rail carrier and therefore fall within the Board’s jurisdiction.

Decided: October 14, 2026

On May 1, 2024, the Township of Pilesgrove, N.J. (Pilesgrove), filed a petition for declaratory order requesting that the Board determine whether certain activities conducted by a rail carrier, SMS Rail Service, Inc. (SMS), are within the Board’s exclusive jurisdiction and therefore not subject to state or local regulation under the preemption clause of the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. § 10501(b). On June 10, 2024, the Township of Mannington, N.J. (Mannington), which shares a municipal boundary with Pilesgrove, filed a petition to intervene.² Like Pilesgrove, Mannington requests a determination from the Board on whether certain SMS activities within its borders fall under the Board’s exclusive jurisdiction and thus cannot be regulated by states or localities under ICCTA. In response to the petitions, SMS asserts that its activities conducted within the Townships all qualify as “transportation” and “as part of the interstate rail network” under 49 U.S.C. §§ 10501(a)(2) and 10102(9) and are therefore within the Board’s exclusive jurisdiction and cannot be regulated by the Townships.

As discussed in this decision, ICCTA does not preempt the Townships’ regulation of activities or structures that exist *only* to facilitate SMS’s purely intrastate passenger rail excursion service, over which the Board has no jurisdiction, consistent with longstanding precedent. ICCTA does, however, preempt state and local regulation of activities and structures that facilitate SMS’s provision of Board-licensed freight rail service, regardless of whether that service crosses state lines, even where those facilities and structures *also* support SMS’s passenger excursion service. Additionally, the Board finds that the record does not contain sufficient information to determine definitively whether some of the activities discussed by the

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).

² Pilesgrove and Mannington are collectively referred to as the Townships.

parties fall within the Board’s jurisdiction, but this decision provides general guidance concerning those identified activities.

BACKGROUND

SMS is a Class III common carrier that operates rail lines in New Jersey, New York, and Pennsylvania. (SMS Reply to Pets. 3, 5 n.7.) The rail line at issue is called the Salem County Railroad, also known as the Salem Branch. It is comprised of approximately 19.4 miles of track between milepost 11.0 in Swedesboro, N.J., and milepost 28.4 in Salem City, N.J., including a 1.2-mile spur known as the Glass House Branch. The Salem Branch runs through both of the Townships and is owned by Salem County, N.J., which has leased it to SMS since 2021. (SMS Reply to Pets. 6.) SMS obtained Board authority in 2022 to lease and operate the Salem Branch in SMS Rail Service—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).

Activities in Pilesgrove.

In 2023, SMS began operating various “fun rides” and tours for the general public along the Salem Branch under the name Woodstown Central Railroad (WCR). (Pilesgrove Pet. 3; SMS Reply to Pets. 8.) According to Pilesgrove, these are intrastate passenger excursion services provided for a fee and are solely for entertainment purposes. (Pilesgrove Pet. 3.) SMS states that these “seasonal excursions” run every other Saturday/Sunday from Easter weekend to September, every weekend in October, every other weekend in November, and on weekends from Thanksgiving to Christmas. (SMS Reply to Pets. 8 n.12.)

Around the same time the passenger excursion service started, SMS placed structures on the portion of the Salem Branch located within Pilesgrove, including two pre-fabricated sheds and an engine house. (Pilesgrove Pet. 3; SMS Reply to Pets. 15.) According to SMS, one shed is used as a crew office, ticket booth, and gift shop, and the second shed is used as a storage location for the gift shop, station supplies, and track materials. (SMS Reply to Pets. 15.) SMS states that the engine house is used as a locomotive storage and maintenance facility, and includes a pit, along with housing parts and tools to maintain SMS’s locomotive fleet. (*Id.*) Pilesgrove states that SMS did not apply for or receive any permits for the construction of these structures. (Pilesgrove Pet. 3.) In response, SMS asserts that it does not need a permit because the construction and use of these structures constitute “transportation” within the Board’s exclusive jurisdiction. (SMS Reply to Pets. 11.) SMS also claims that it sent plans and invitations to Pilesgrove to inspect the structures, in accordance with what SMS states was legally required. (*Id.* at 16.)

In October 2023, Pilesgrove issued a notice of violation against SMS notifying the carrier that it needed to submit a use variance and site plan regarding its non-freight railroad operations, per Pilesgrove’s land use ordinance. (Pilesgrove Pet. 3 & Ex. C.) According to Pilesgrove, SMS responded by informing Pilesgrove that SMS’s freight operations provide a sufficient nexus to interstate commerce and thus all local zoning and land use regulations were preempted by federal law. (Pilesgrove Pet. 3 & Ex. D.) Pilesgrove later withdrew its initial violation notice and

acknowledged that federal preemption bars it from requiring a rail carrier to seek a permit—though Pilesgrove noted that it could still enforce fire, health, plumbing, safety, and construction regulations. (Pilesgrove Pet. 4 & Ex. H.)

According to Pilesgrove, on or about December 6, 2023, a Pilesgrove employee conducted an inspection of the SMS property and wrote that he observed a large assembly space tent used for customers. (Pilesgrove Pet. 3 & Ex. B.) An SMS employee on the property stated he was advised that it was unknown if the structure’s construction was permitted. (*Id.*) On or about December 11, 2023, Pilesgrove issued a new notice and order of penalty to SMS in connection to the “installation of out building without zoning and/or construction permits.” (Pilesgrove Pet., Ex. F.)

Pilesgrove states that in December 2023, SMS submitted a minor site plan application in connection to property in Pilesgrove on Block 74, Lot 1, requesting a use variance along with bulk variance to permit the construction of structures for a portion of the property proposed to be used as a reception area for rail bike tours and a use variance for the operation of a rail bike tour facility, along with accessory structures and a use variance for multiple principle uses on property within Pilesgrove known as Block 73, Lot 1. (Pilesgrove Pet. 3.)

Activities in Mannington.

According to Mannington, on March 30, 2024, a Mannington employee inspected the portion of SMS’s property located in Mannington and observed changes that had been made by SMS. These observations included trees and vegetation having been cleared and woodchips spread widely across the property; construction of a wooden platform and steps near the railroad tracks; construction of a large storage shed; installation of a handwashing station, trash receptacles, four portable toilets, several picnic tables, two firepits and benches, decorations and signage related to the Easter holiday, and sections of 8-foot fencing material; and installation of additional sections of wye track, some within a few feet of a single-family home on an adjoining property. (Mannington Pet., Exs. A & B, Letter 1-3, April 10, 2024.)

The Mannington inspector also observed an excursion train transporting customers in passenger cars and passengers disembarking in a decorated area. (Mannington Pet., Exs. A & B, Letter 3, April 10, 2024.) The inspector further observed that during debarkation, the train utilized the wye track to move in reverse. (*Id.*) According to the inspector, while the train was completing this maneuver, its engine came within a few feet of the exterior wall of a residential house on the adjoining property, before proceeding back to the main track where it picked up passengers and returned to the direction from which it came. (*Id.*) Additionally, the Mannington inspector identified an online advertisement for the excursion train activities. (Mannington Pet., Exs. A & B.) Mannington subsequently issued notices to SMS and WCR that their activities and improvements violated certain township zoning and land use ordinances and brought a municipal court complaint against SMS. (Mannington Pet. 5, 7, Exs. C & D.)

Procedural History. On May 1, 2024, Pilesgrove filed its petition for declaratory order seeking a determination on whether the Board maintains jurisdiction over SMS’s activities, and to what extent that jurisdiction preempts local regulations under 49 U.S.C. § 10501(b).

(Piles Grove Pet. 2.) Piles Grove argues that SMS's activities are not within the Board's exclusive jurisdiction to the extent that their primary purpose is to facilitate excursion train rides, not rail freight service. (*Id.* at 5.) Alternatively, if preemption applies, Piles Grove asserts that it should apply only as to SMS's freight activities, which Piles Grove argues are entirely different and separate from its fun/entertainment rail services. (*Id.* at 5-6.) Piles Grove cites Napa Valley Wine Train, Inc.—Petition for Declaratory Order, 7 I.C.C. 2d 954, 960-965 (1991) (Napa Valley Wine Train) and Magner O'Hara Scenic Railway Operation—in the State of Michigan, FD 29161 (ICC served May 12, 1981), *aff'd sub nom., Magner O'Hara Scenic Railway v. I.C.C.*, 692 F.2d 441 (6th Cir. 1982) (Magner), in support of its assertion that the Board does not have jurisdiction over intrastate leisure rides. (Piles Grove Pet. 6.)

On June 10, 2024, Mannington petitioned the Board for leave to intervene. (Mannington Pet. 1.) Mannington requests the Board issue a declaratory order confirming that SMS's activities within Mannington are subject to New Jersey Municipal Land Use Law. (*Id.* at 1-2.) Mannington specifically notes that the northwestern portion of the wye near Route 45 is close to a residential property and thus requires a permit, use variance, and site plan approvals. (*Id.* at 2-3.) Mannington argues that SMS's excursion operations are conducted entirely within the state of New Jersey and are not integrally related to the nation's interstate passenger rail system for preemption purposes. (*Id.* at 4.) Mannington further contends that any freight operations on SMS's rail line through Mannington that might be interstate in nature are not sufficient to bring SMS's wholly intrastate passenger rail service, or its excursion operations, within STB jurisdiction. (*Id.* at 4-5.) Mannington states that, if SMS's activities are not subject to the Board's exclusive jurisdiction, they fall within Mannington's land use authority, and Mannington will require SMS to obtain a use variance and site plan approval. (*Id.* at 2.)

The Board instituted a declaratory proceeding and granted Mannington's petition to intervene on September 13, 2024, and adopted a procedural schedule on October 24, 2024. Pursuant to that schedule, Piles Grove and Mannington filed supplemental evidence and argument on November 7, 2024, and November 8, 2024, respectively.

In its supplement, Piles Grove asserts that SMS began construction on the engine house in October 2024. (Piles Grove Suppl. 2.) Piles Grove states that while SMS represented that the building will be a locomotive maintenance shop and storage facility, Piles Grove believes it will be used to store equipment used exclusively for passenger excursion trains. (*Id.*) Additionally, Piles Grove states that SMS requested that Piles Grove provide approval to the Atlantic City Electric Company (ACE) for connection to the electrical grid and advise ACE that the property is exempt from regulation under federal law. (*Id.* at 3.) Because Piles Grove maintains that SMS's activities and structures are not entitled to federal preemption, it has so declined to give such approval. (*Id.*) Piles Grove then explains the subsequent enforcement actions it has taken against SMS. (*Id.* at 3-4.)

Mannington's supplement restates its position and asserts that its regulation of SMS's intrastate passenger service would have no effect on SMS's ability to provide interstate freight service. (Mannington Suppl. 25.) Mannington also details the results of other inspections of SMS's property that it conducted after it filed its petition to intervene. (*Id.* at 8-9.)

On December 16, 2024, SMS submitted a reply to the Townships’ petitions and supplements. SMS states that it is working to grow freight traffic on the Salem Branch and that, since 2021-22, freight service has increased from zero to 148 freight train miles in 2023, and to 548 freight train miles as of October 2024. (SMS Reply to Pets. 7-8 & Ex. C, V.S. Pfeiffer.) SMS notes that it has moved traffic for South Jersey Farmers Exchange, Toys for Tots (as a goodwill gesture), and Environmental Rail Solutions (ERS) (for which SMS rebuilds intermodal boxes and stores them until called for service by the customer). (SMS Reply to Pets. 8.) SMS further states that it anticipated additional lumber traffic in 2025, as well as future freight business from a nearby industrial park. (*Id.* at 3-4.) According to SMS, passenger excursions are not its primary objective for the Salem Branch but have cast a “positive light” on the “previously inutile rail line.” (*Id.* at 8.)

SMS asserts that, because all of SMS’s property and facilities on and along the Salem Branch are related to its rail operations and thus are related to the movement of passengers or property by rail, the activities fall under ICCTA’s definition of “transportation” under § 10102(9). (SMS Reply to Pets. 11, 38, 40, Ex. C.) SMS argues that under Denver & Rio Grande Railway Historical Foundation Denver & Rio Grande Railroad—Petition for Declaratory Order, FD 35496 (Denver & Rio Grande Railway) (STB served Mar. 24, 2015), the Board’s jurisdiction extends to rail carriers operating intrastate passenger excursion services, even if they earn the bulk of their revenue from those services, as long as they are performing more than “minimal” freight operation in interstate commerce. (*Id.* at 10, 14 n.15.)

SMS notes that, as of the date of its reply, it is still without an electrical connection, which is necessary to power the two sheds and the engine house located on its Pilesgrove property. (*Id.* at 27.) SMS also states that it has invited Pilesgrove to inspect the engine house and has provided certified engineering drawings, but Pilesgrove has not inspected the engine house and, instead, has issued stop-work orders and fines. (*Id.* at 27-30.)

On December 16, 2024, Sierra Northern Railway (SNR), a Class III rail carrier, and Mendocino Railway (MRY), a wholly owned subsidiary of SNR, filed amicus curiae briefs in support of SMS. MRY states that its interest in the proceeding is due to the “historical disregard local municipalities have shown for national interests when regulating rail carriers,” (MRY Br. 5), while SNR states that its interest is based on “a need to maintain a unified regulatory framework prioritizing national rail interests.” (SNR Br. 5). SNR and MRY argue that their ability to conduct freight and excursion operations without local interference and regulations is pivotal to their success, and that the Board has jurisdiction over excursion operations that are provided by freight common carriers. For reasons discussed below, SNR’s and MRY’s briefs will be accepted into the record.

The American Short Line and Regional Railroad Association (ASLRRA) and the California Short Line Railroad Association (CSLRA), of which SNR and MRY are members, also submitted comments supporting the positions of SNR and MRY. ASLRRA argues that Pilesgrove and Mannington ignore language in Magner, which states 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. (ASLRRA

Comment 8 (citing Magner, 692 F.2d 441 (6th Cir. 1982)).) The Board will consider ASLRRRA's and CSLRA's comments which, like the filings from SNR and MRY, will be accepted into the record. All four parties are collectively referred to as Commenters.

On January 14, 2025, SMS filed a response to the submissions of other interested persons, agreeing with arguments made by the Commenters, including that "bifurcation" of regulation of freight and excursion operations is unworkable, that "minimal freight" in interstate commerce is the standard that should be used to determine if the Board has jurisdiction over the carrier, and that SMS meets that standard. (SMS Reply to Commenters 3-5.) SMS also argues that there are policy reasons for the Board to find preemption exists, including the need to preserve short line rail operations. (Id. at 3-5.) SMS adds that the electrical supply to SMS's properties remains blocked and that stop work orders from the towns have been placed on its sheds and engine house. (Id. at 6.)

In accordance with the procedural schedule, Mannington and Pilesgrove both filed rebuttal statements to SMS's reply to the Commenters. The Townships argue that SMS has not provided evidence of freight transportation activities that are a part of the interstate rail network, as none of the traffic mentioned by SMS moves between New Jersey and other states. (Pilesgrove Rebuttal 5-6; Mannington Rebuttal 4-5.) Pilesgrove and Mannington argue that claims of "anticipated opportunities" for freight traffic contain no evidence of a pending future agreement. (Pilesgrove Rebuttal 6-7; Mannington Rebuttal 5-6.) And additionally, Mannington questions whether a Class III carrier's "fabrication or refabrication of a third-party non-carrier's intermodal boxes" is "transportation." (Mannington Rebuttal 6 n. 1.)

Pilesgrove argues that SMS misinterprets the Board's decision in Denver & Rio Grande Railway. (Pilesgrove Rebuttal 8-11.) Pilesgrove argues the Board did not hold that non-preempted operations become entitled to preemption if conducted by a carrier that also conducts preempted operations. (Id.) The Townships both argue that the concept of "bifurcation" of the Board's regulation between interstate freight service and intrastate passenger service is statutorily mandated by ICCTA. (Pilesgrove Rebuttal 12-13; Mannington Rebuttal 11.) They claim that if Congress had intended for preemption to extend to non-interstate operations in this manner, it would have included the terms "nexus" or "integration" when it amended 49 U.S.C. § 10501. (Pilesgrove Rebuttal 13; Mannington Rebuttal 15.) The Townships also argue that none of the cases cited by SMS support the notion of "bundled" preemption (i.e., SMS's notion that preemption of freight operations extends to intrastate passenger operations). (Pilesgrove Rebuttal 13-14; Mannington Rebuttal 14-15.) The Townships argue any shared use of these buildings or the other structures and facilities for operations and activities relating to SMS's non-preempted intrastate passenger excursions should be prohibited unless approved by the Townships. (Pilesgrove Rebuttal 17-19; Mannington Rebuttal 28-33.)

SMS filed a motion for leave to file a surreply (with the surreply attached), stating the surreply should be accepted in light of new and recent developments, to correct inaccuracies stated by the other parties in the record, and in the interest of a more complete record. (SMS Mot. for Leave to File Surreply 2, 8.) Pilesgrove and Mannington filed replies to SMS's surreply.

PRELIMINARY MATTER

SMS's motion for leave to file a surreply will be granted in part and denied in part. The surreply mostly repeats or expands upon arguments SMS raised in its reply, which is not permitted. However, the surreply is properly responsive to an assertion that was raised for the first time by Mannington in its rebuttal, specifically, that another SMS facility (a refabrication shop) may also be in violation of Mannington's zoning and site plan regulations. (SMS Surreply 4-5 (citing Mannington Rebuttal 6 n.1.).)³ Accordingly, SMS's surreply will be accepted into the record, but only to the extent that it addresses whether local regulation of its refabrication shop (known as Building 90) would be preempted. Mannington's reply to the surreply will also be accepted into the record, subject to the same limitation, so that the Board can consider information related to Building 90 that Mannington developed after learning about the facility from SMS's reply.⁴ However, the Board will strike Pilesgrove's reply to SMS's surreply from the record.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. 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). To eliminate the controversy between the parties, the Board will resolve some threshold legal issues regarding the scope of federal preemption under 49 U.S.C. § 10501 and then address which activities constitute “transportation” that facilitates SMS's freight rail service and are thus subject to federal preemption, to the extent that such fact-specific questions can be answered on the current record.

Threshold Legal Issues.

Preemption applies despite SMS's contract with Salem County. Pilesgrove notes that under the operating agreement between Salem County and SMS, SMS agreed to comply with “all laws and ordinances and notices, orders, rules, regulations and requirements of all federal, state, and municipal governments and appropriate departments, commissions, boards and officers thereof.” (Pilesgrove Pet. 2-3, Ex. A.) Pilesgrove argues that, because of this agreement, SMS

³ According to Mannington, it first learned of the existence of the refabrication facility from SMS's reply brief. (Mannington Rebuttal 6 n.1.)

⁴ Although replies to replies were often accepted in the past, in March 2025 the Board announced that it would more strictly enforce its rule at 49 C.F.R. § 1104.13(c) prohibiting them to promote the orderly and efficient administration of cases. See Sunflower State Indus. Ry.—Pet. for Declaratory Ord., FD 36714 (Sub-No. 1), slip op. at 2 n.3 (STB served Mar. 28, 2025). Among other things, the Board noted that information provided in a reply to a reply often could have been included in an initial filing, *id.*, and indeed here, SMS could have provided the additional data related to verified statements that it presented in its initial reply. Nonetheless, even if SMS's rebuttal were accepted into the record in its entirety, it would not change the conclusions reached in today's decision.

cannot claim preemption consistent with the Board’s decision in Township of Woodbridge v. Consolidated Rail Corp., NOR 42053 (Township of Woodbridge) (STB served Dec. 1, 2000). (Piles Grove Supplement 6-7.)

Township of Woodbridge does not apply here. That case stands for the proposition that, in appropriate circumstances, carriers can be held to valid and otherwise enforceable agreements into which they voluntarily enter, and that preemption may not shield them from application of the conditions of such agreements, on the basis that voluntary commitments are presumed to reflect “the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce.” Twp. of Woodbridge, NOR 42053, slip op. at 5. In that case, a dispute between a town and a railroad over excessive noise from locomotive idling was filed in federal court; the parties entered into an agreement to resolve the dispute; the parties submitted the settlement agreement to the federal court and had it memorialized (including specific hours when idling would be curtailed); and then the railroad “expressly reaffirmed and renewed the original agreement” after the railroad was acquired by entering a consent order that clarified the terms of the settlement. Id. at 2, 5. The Board also noted that the railroad there had “not shown that enforcement of its commitments would unreasonably interfere with the railroad’s operations.” Id. at 5. Township of Woodbridge is therefore readily distinguishable for several reasons. Piles Grove and Mannington are not parties to the agreement at issue, and the language of the agreement is ambiguous at best. In the absence of contrary evidence from the other party to the agreement—Salem County, the owner and lessor of the Salem Branch—the Board believes the pertinent language is neither definitive nor specific enough for it to represent SMS’s “own determination and admission” that the regulation contemplated by Piles Grove and Mannington would not unreasonably burden interstate commerce.⁵ SMS’s broad agreement to comply with applicable laws and regulations is not a sufficient basis to conclude that SMS agreed to abide by local regulations that would not be applicable because they are preempted by federal law.

SMS’s freight transportation on the Salem Branch is “part of the interstate rail network.” According to the Townships, while SMS has presented evidence that it uses the Salem Branch to provide freight rail service, SMS has failed to show that it provides freight service that crosses state lines. From this, the Townships argue that the Board lacks jurisdiction over even SMS’s *freight* activities on the Salem Branch. (Piles Grove Rebuttal 5-8; Mannington Rebuttal 4-7.)

Purely intrastate rail transportation is within the Board’s jurisdiction if it occurs “as part of the interstate rail network.” 49 U.S.C. § 10501(a)(2); see, e.g., Great Redwood Trail Agency—Adverse Aban.—Mendocino Ry. in Mendocino Cnty., Cal., AB 1305 (Sub. No. 1) (STB served Feb. 19, 2026) (“49 U.S.C. § 10501(a)(2) is clear that the Board has jurisdiction over shipments between a ‘State and a place in the same . . . State as part of the interstate rail

⁵ Although the Board “[g]enerally” does not engage in state-law contract interpretation, the Board sometimes must “examine the arrangements between the parties” in the course of applying federal law. Central Illinois R.R. Co.—Operations Exemption—Rail Line of the City of Peoria & the Village of Peoria Heights, Peoria Cnty., IL, FD 34518, slip op. 6 (STB served Feb. 23, 2005); see id. at 5-6.

network.’ . . . [T]he fact that MRY’s current and future rail shipments might consist only of movements to and from points within the same state does not mean those shipments are not subject to the Board’s jurisdiction.”); DesertXpress Enters., LLC—Pet. for Declaratory Ord., FD 34914 (DesertXpress), slip op. at 9 (STB served May 7, 2010). The Board has interpreted the interstate rail network “broadly to include (but not be limited to), facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce.”⁶ See DesertXpress, FD 34914, slip op. at 11. Thus, a rail line is “part of the interstate rail network” if it connects to a network of rail lines that themselves cross state borders. And the Salem Branch undisputedly connects to a line owned by Conrail, an interstate carrier. (See SMS Reply to Pets. 5.) Indeed, the Board has already found that SMS needed Board authority to operate the line because it is within the Board’s jurisdiction. See SMS Rail Serv., Inc.—Change in Operator Exemption Including Acquis. by Lease—Salem Branch Line in Salem & Gloucester Cntys., N.J., FD 36529 (STB served July 15, 2022); see also Nw. Pac. R.R.—Pet. for Declaratory Ord., No. FD 35977, slip op. at 2 n.3 (STB served Apr. 22, 2016) (“There is no question that the Line is subject to the Board’s jurisdiction, as the Board specifically authorized NWPCO to conduct common carrier freight operations on the Line, finding that it is part of the interstate rail network.”). Thus, SMS freight operations on the Salem Branch are subject to Board jurisdiction, even if those freight operations move only between points in New Jersey.

SMS’s passenger service on the Salem Branch is not “part of the interstate rail network.” Although SMS’s freight service on the Salem Branch is within the Board’s jurisdiction, its passenger service is not. That is because, under longstanding agency precedent not challenged here, purely intrastate passenger-rail service generally is not “part of the interstate rail network,” 49 U.S.C. § 10501(b)(a)(2); see, e.g., Denver & Rio Grande Ry., FD 35496, slip op. at 10; All Aboard Fla.—Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla., FD 35680 (STB served Dec. 21, 2012), unless the service is part of a broader interstate movement (such as via a through-ticketing arrangement with another carrier), see, e.g., Tex. Cent. R.R. & Infra., Inc.—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex., FD 36025, slip op. at 7-8 (STB served July 16, 2020). Here, SMS does not claim, and there is no evidence to indicate, that the passenger excursion trains being operated by SMS are part of a broader interstate movement.

SMS argues that the Board’s general principle regarding intrastate passenger service does not apply here because SMS uses the Salem Branch for both passenger- and freight-rail service. SMS relies on language in Denver & Rio Grande Railway stating that the Board’s jurisdiction “extend[s] to rail carriers operating intrastate passenger excursion service, even if they earn the bulk of their revenue from that service, as long as they are performing more than ‘minimal’ freight operation in interstate commerce.” Denver & Rio Grande Railway, slip op. at 7. According to SMS, this language means that any rail carrier that conducts at least “minimal” freight service necessarily brings any intrastate passenger services that it provides on the same line within ICCTA’s preemptive scope, even if that passenger service standing alone would not be entitled to preemption. (SMS Reply to Pets. 10-14.)

⁶ The Board has interpreted “as part of the interstate rail network” more narrowly for passenger rail, as discussed below.

That is not correct. The cited passage explains that, when a carrier provides both intrastate passenger service and “more than ‘minimal’” freight service, the *freight service* and the carrier providing it still falls under exclusive Board jurisdiction (notwithstanding that the passenger service also exists). The passage cannot be read to say that the Board would also have exclusive jurisdiction over the purely intrastate passenger service. Such a statement would have been inconsistent with Board cases holding that the agency does not have jurisdiction over purely intrastate passenger movements, see All Aboard Fla., FD 35680, slip op. at 4; Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp. & Fla. Dep’t of Transp., FD 33472, slip op. at 3 (STB served Mar. 5, 1998), and there is no indication that the Board in Denver & Rio Grande Railway intended to overrule that principle. SMS points to no decision in which the Board has found purely intrastate passenger-rail service to be within its jurisdiction in the absence of through-ticketing or a similar arrangement. And nothing in the Board’s cases suggests that that principle ceases to apply when the carrier also transports freight. See, e.g., Napa Valley Wine Train.

Jurisdictional test where freight and intrastate passenger rail overlap. The foregoing conclusions, however, do not resolve the central question posed by this case: how the Board’s jurisdictional test applies to rail facilities and services that could relate to both freight rail transportation, which the Board regulates, and purely intrastate passenger excursion services, which the Board does not.

A framework exists for determining whether particular rail facilities and services are within the Board’s jurisdiction. In Del Grosso—Petition for Declaratory Order (Del Grosso), FD 35652 (STB served July 31, 2017), the Board considered whether certain activities at a transloading facility constituted “transportation.” The U.S. Court of Appeals for the First Circuit instructed that the answer turns on “whether the activities . . . facilitated the physical movement of ‘passengers or property’” by rail, Del Grosso v. STB, 804 F.3d 110, 119 (1st Cir. 2015) (quoting the definition of “transportation” in 49 U.S.C. § 10102(9)), “or w[ere] done solely for another, unrelated purpose,” id. at 120.

Adapting that test to the present circumstances, the Board’s jurisdictional determination here will examine whether the structures or activities at issue are “transportation” that “facilitate[]” the movement of jurisdictional rail traffic (e.g., facilitate freight rail), or whether those structures or activities exist “solely for another, unrelated purpose” (e.g., exist solely for an intrastate excursion service). Del Grosso, FD 35652, slip op. at 7 (STB served July 31, 2017). As a general rule, so long as the structures or activities in question facilitate the movement of freight traffic, they will be found to be subject to the Board’s jurisdiction—even if that same structure or activity also furthers (or even *predominantly* furthers) non-jurisdictional passenger service. See, e.g., N. San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Ord., FD 34111, slip op. at 6-7 (STB served Aug. 21, 2002) (finding a city’s permitting requirement for construction of a passing track was preempted despite objectors’ assertion that it would primarily benefit commuter service).

The Commenters raise the policy concern that, when short line freight carriers also provide excursion services, their freight and passenger rail operations are often so “integrated”

that for localities to regulate the excursion service at all would unreasonably burden the freight-service. MRY articulates this argument as follows:

There is simply no way to bifurcate their railcar transportation services from the other railroad services they offer using the same trackage, the same facilities, the same equipment, and the same personnel, especially when the revenues from all of their various rail services underwrite their continued provision of freight rail service and the trackage and facilities used to provide that service. Allowing a local municipality to impose its own chosen regulations on a Class III Freight Carrier's railroad facilities, maintenance operations, operating requirements, locomotives and other railroad equipment, safety requirements, and employee regulations simply because the rail carrier is also using the same property, equipment, and employees to provide [nonjurisdictional] commuter passenger or excursion rail services would wreak havoc with the rail carrier's ability to fulfill its common carrier obligations.

(MRY Comment 12; see also SNR Br. 15; ASLRRRA Comment 10; CSLRA Comment 3.) Toward that same end, SMS argues that "[i]t is indisputable that, SMS's seasonal passenger excursions notwithstanding, SMS, the [Salem] Branch and all the structures and track about which the Townships complain are used in common with SMS's interstate freight operations." (SMS Reply to Commenters 3.)

The Del Grosso test adequately addresses this concern. For example, where the jurisdictional and non-jurisdictional services "us[e] the same trackage, the same facilities, [and] the same equipment," it will clearly be the case that those tracks, facilities, and equipment "facilitate" the jurisdictional service and thus are within Board jurisdiction. A locality will not be able to regulate track that is used for freight rail service simply because the track is also used for intrastate passenger rail. The Del Grosso test excludes only those activities and facilities that are unrelated to the provision of jurisdictional service, which are an appropriate subject of state and local regulation.

To the extent that the Commenters mean to argue that state and local regulation of intrastate excursion service "unreasonably burdens" freight transportation by depriving carriers of revenue, however, the Board rejects that argument. Such a policy would effectively allow rail carriers to undertake any revenue-generating activity free from all state and local regulation, whether or not the activity qualifies as "transportation . . . as part of the interstate rail network." 49 U.S.C. § 10501(a)(2). The Board's preemption analysis must distinguish between rail services that meet those definitions and rail services that do not. The adapted Del Grosso test is the proper means for doing so.

Whether each disputed activity or facility constitutes freight-rail transportation.

The remaining issue is how the adapted Del Grosso test applies to the various disputed activities and facilities at the Salem Branch—that is, whether each activity or facility falls within the statutory definition of rail "transportation" in 49 U.S.C. § 10102(9) and whether that transportation "facilitates" freight rail service (rather than just SMS's purely intrastate passenger

rail service). In establishing the Board’s jurisdiction, Congress defines the term “transportation” broadly to include: (1) “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” 49 U.S.C. § 10102(9)(A); and (2) services “related to” that movement, including “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers or property,” 49 U.S.C. § 10102(9)(B). Whether a particular activity constitutes transportation by rail carrier under § 10501(b) is a case-by-case, fact-specific determination. Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015). The Board, in making its jurisdictional determination, will focus on whether the activities “facilitate[] [the freight activity] or [were] done solely for another, unrelated purpose [i.e., passenger rail].” Del Grosso—Pet. for Declaratory Ord., FD 35652 (Del Grosso), slip op. at 4 (STB served July 31, 2017).

Under 49 U.S.C. § 10501(b), state or local statutes or regulations are preempted categorically if they have the effect of managing or governing rail transportation. See, e.g., Delaware v. STB, 859 F.3d 16, 19 (D.C. Cir. 2017). The Board has recognized two broad types of state regulation that are categorically preempted. The first category includes permitting or preclearance requirements such as building permits, land use regulations, and zoning ordinances that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized. The second category of preempted state regulation includes attempts to intrude into matters that are regulated by the Board. E.g., CSX Transp.—Pet. for Declaratory Ord., FD 35832, slip op. at 4 (STB served July 31, 2015).

If the local or state law is not categorically preempted, the Board will conduct an as-applied preemption analysis—that is, preemption applies if the regulation would have the effect of unreasonably burdening or interfering with, or discriminating against, rail transportation, which involves a fact-specific determination. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc); Borough of Riverdale—Pet. for Declaratory Ord., FD 35299, slip op. at 2 (STB served Aug. 5, 2010); Joint Pet. for Declaratory Ord.—Bos. & Me. Corp., 5 S.T.B. 500, 509 (2001). Whether preemption applies to any potential state or local regulation of SMS’s excursion service will also 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. Tenth Ave. Neighbors—Pet. for Declaratory Ord., FD 36654, slip op. at 4 (STB served May 9, 2024).

The Passenger Excursion Service. Mannington indicates that it seeks to enforce local zoning and land use regulations in a manner that would dictate when and how SMS operates its passenger excursion trains.⁷ Mannington notes, in particular, that:

[I]f SMS applies to the Mannington Township Planning Board for use variance and site plan approval for its excursion-related customer entertainment and recreation activities at the Mannington Property, the Planning Board might have concerns

⁷ Pilesgrove clearly seeks to regulate development and use of SMS’s structures, but it is not clear from its filing whether it also wishes to regulate SMS’s actual operation of its passenger excursion trains.

about the frequency and durations of the excursion train movements along the tracks within the Mannington Property; the times of day during which the movements occur; and whatever noise or other disturbances might attend such movements.

(Mannington Rebuttal 37.)

As discussed above, the Board's jurisdiction does not extend to purely intrastate passenger rail service. Accordingly, Mannington (and Pilesgrove) may enforce any state or local regulations that are related solely to SMS's passenger operations, i.e., if those regulations do not impact SMS's freight rail service (beyond the mere reduction of passenger-service revenues). Cf. City of Creede—Pet. for Declaratory Ord., FD 34376, slip op. at 7 (STB served May 3, 2005) (“[I]f the property were being used for a restaurant or hotel or some other non-transportation purposes, then there would be no preemption under section 10501(b) and the City's zoning ordinance would apply.”). Thus, for example, a zoning rule that prohibited the operation of passenger trains—while not restricting SMS's actions, facilities, or equipment in any way with respect to freight service—would likely not be preempted. It does not appear on this record that SMS's operation of intrastate passenger trains “facilitates” freight rail service in the relevant sense.

Electrical Codes and Other Police Powers. SMS states that for more than a year Pilesgrove has blocked the electrical service required for each of the structures on the Salem Branch. (SMS Reply to Pets. 15, Ex. C.) Rail carriers are not exempted from complying with electrical codes or other non-rail safety codes, so long as those state and local laws are not applied in a discriminatory manner against a rail carrier. See Borough of Riverdale—Pet. for Declaratory Ord.—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001) (“[N]on-discriminatory enforcement of other types of state and local requirements, such as building and electrical codes, generally would not be preempted.”); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d. Cir. 2005). If SMS has complied with Pilesgrove's standard regulatory processes, then a directive from Pilesgrove prohibiting electrical connections may unreasonably interfere with freight transportation, such that it would be preempted. See CSX Transp.—Pet. for Declaratory Ord., FD 34662, slip op. at 5 (STB served May 3, 2005) (finding that state and local action must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce). However, the Board finds that there is not sufficient information in the record to make a factual determination as to whether the Townships are enforcing the electrical codes against SMS in a discriminatory manner.

Rehabilitation and Maintenance of the Wye Track. SMS's wye track is located in Mannington on a parcel of land designated Block 67, Lot 14.01. (SMS Reply to Pets. 2.) According to Mannington, its inspection of the wye track showed that the wye track “had been installed at the property as a turnout or turnaround facility to re-direct trains, with a portion of the wye being located within a few feet of a single-family home on an adjoining property.” (Mannington Pet. 5 & Ex. I.) Mannington states that its inspector also observed the wye track being used to turn around locomotive and passenger cars. (Mannington Pet. 6 & Ex. I.) According to Mannington, New Jersey's Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-

10, requires all site plan and variance applications to be reviewed and decided during a public hearing. (Mannington Pet. 19-20.) Mannington argues that “SMS’s use of the tracks at the property, including the wye, for [passenger] excursions is *not* preempted by ICCTA, and is thus subject to all Mannington Township land use regulations.” (*Id.* at 25.)

According to SMS, the wye track has existed and been part of the Salem Branch for more than a century and was “upgraded by SMS with funds from the New Jersey Department of Transportation Rail Freight Assistance Program, as well as Salem County’s and SMS’s own funds.” (SMS Reply to Pets. 16.) According to SMS, the wye track is used both for its freight operations (including for transloading) as well as for its intrastate passenger excursion service. Specifically, “the wye serves as a storage location for freight cars, a turnaround for the seasonal passenger excursion trains, and is also used as a location to transload freight, to date containers from rail cars.” (*Id.*)

Whether state and local land use regulations would be preempted under § 10501(b) as to a transloading facility depends on whether the facility’s transloading services are part of or integrally related to “transportation by rail carrier.” Norfolk S. Ry. v. City of Alexandria, 608 F.3d at 159 n.11; Norfolk S. Ry. v. City of Alexandria, No. 1:08-cv-618 at 22 (E.D. Va. Apr. 15, 2009). The Board’s jurisdiction extends to rail-related activities that take place at transload facilities if the activities are offered by a rail carrier, either directly or through its agent, or if a rail carrier exerts control over a third-party’s operations. Town of Smithtown—Pet. for Declaratory Ord., FD 36575 (Sub-No. 1), slip op. at 4 (STB served Feb. 23, 2024); see also Grafton & Upton R.R.—Pet. for Declaratory Ord., FD 36696, slip op. at 10 (STB served Nov. 15, 2023). Although SMS does not provide many specifics regarding the transloading process occurring on the wye track, it appears from the record that SMS—a rail carrier—is itself performing the transloading. (*See* SMS Reply to Pets. 23.) If so, the transloading would therefore be performed as part of the freight rail service. *See New England Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass.*, FD 34797, slip op. at 2 (July 10, 2007) (“‘[T]ransportation’ is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage.”).

Here, Mannington seeks to impose what is essentially a pre-clearance requirement on the use and development of the wye track. As noted above, preclearance requirements are categorically preempted if they apply to facilities that facilitate freight rail service, even if the same facilities are also used for passenger excursions. Accordingly, if SMS is indeed performing the transloading itself, if the transloading otherwise qualifies as freight-rail “transportation,” or if SMS is using the wye track for its freight service in other ways, then Mannington’s efforts to regulate SMS’s construction, freight-related operation, and maintenance of the wye track are preempted. *See Tubbs—Pet. for Declaratory Ord.*, FD 35792, slip op. at 5 (STB served Oct. 31, 2014) (finding that “state and local regulation of actions based on the railroad’s design, construction, and maintenance standards for railroad track are preempted under § 10501(b)”),

aff’d, 812 F.3d 1141 (8th Cir. 2015).⁸ The fact that SMS may also be using the wye track to conduct passenger excursions does not change the Board’s finding that preemption may apply.

Prefabricated Sheds in Pilesgrove. SMS states that there are two prefabricated sheds on the portion of its property located in Pilesgrove, with “the main shed serving as a crew office, ticket office, and gift shop, and the second, smaller shed serving as a storage location for gift shop and station supplies, as well as basic track materials such as spikes, bolts, switch brooms.” (SMS Reply to Pets. 15 (footnote omitted).) It further states that the sheds serve as offices and storage for both freight and excursion purposes. (*Id.* at 33.) SMS’s witness states that “[t]he main shed on Lot 1 contains the bulletin board, where the requisite General Order, Bulletin Order, On-Track Safety Sheets, etc. are posted,” and “where track inspection reports are completed and filed.” (*Id.*, Ex. C, V.S. Pfeiffer 3.) According to SMS, Pilesgrove’s attorney advised SMS during a phone call on October 1, 2024, that Pilesgrove’s permitting process must be followed. (*Id.* at 26.) SMS further states that Pilesgrove has refused to provide the necessary confirmation to ACE so that the sheds can be connected to the electrical grid. (*Id.*) In its rebuttal, Pilesgrove states that “it remains Pilesgrove’s position that SMS is not entitled to federal preemption and would, therefore, have to comply with Pilesgrove’s local land use procedures in having the electrical connection implemented.” (Pilesgrove Rebuttal 17.)

While it appears that the sheds are being used mainly for activities related to the intrastate passenger excursion service, SMS indicates they are also being used for functions relating to freight rail, including serving as a crew office and storage area for track supplies. To the extent that use of the sheds facilitates interstate freight rail, they are within the Board’s jurisdiction and local permitting of their construction and placement is categorically preempted.

Engine House. According to SMS, the engine house is used as “a locomotive storage and maintenance facility and includes a pit, over which FRA-required 92-day inspections will be performed,” as well as “tools, machinery, lube oils, and other such parts and equipment necessary to maintain SMS’s locomotive fleet on the Salem Branch.” (SMS Reply to Pets. 15.) SMS states that in October 2024, Pilesgrove issued various stop-work orders and violation notices relating to the engine house, including one requiring SMS to pay fines of approximately \$7,500 per week. (*Id.* at 28-30.) SMS also notes that its ability to connect the engine house to the electrical grid (like the sheds) has been blocked by Pilesgrove’s refusal to provide authorization to ACE. (*Id.* at 27.) Pilesgrove argues that SMS must comply with the state and local ordinances because “SMS has provided no proof of interstate commerce which would support the Board’s jurisdiction over the rail line.” (Pilesgrove Rebuttal 18.)

As discussed above, the Board rejects Pilesgrove’s argument that SMS is not engaged in interstate commerce and therefore not subject to the Board’s jurisdiction. SMS is a Board-licensed rail carrier offering and providing common carrier freight rail service. In addition, it appears from the record that SMS is using the engine house to facilitate its freight rail service,

⁸ For example, although Mannington states that it observed SMS using the wye track to turn around its passenger excursion trains (Mannington Pet. 2-3), it is not clear from the record whether SMS also uses the wye track to turn around freight trains. If so, that would be another basis for finding that Mannington’s efforts to regulate the wye track are preempted.

even if the facility also supports its passenger excursion service. Thus, “Pilesgrove’s zoning and site plan review requirements” (Pilesgrove Rebuttal 21) are categorically preempted as they pertain to the construction and operation of the engine house.⁹

Prefabricated Shed in Mannington. During an inspection by a Mannington employee on March 30, 2024, the employee observed that SMS had installed a large storage shed on the property. (Mannington Pet., Exs. A & B, Letter 2, April 10, 2024.) SMS argues that the prefabricated shed simply replaced an old tool shed that was dilapidated and was creating a safety hazard for employees and trespassers. (SMS Reply to Pets. 40.) Mannington claims, however, that despite “containing some tools and supplies that might be used in connection with SMS’s freight operations, the new shed is also utilized as a concession stand in connection with SMS’s passenger excursion operation.” (Mannington Rebuttal 28-29.) Mannington’s employee also stated that the only item inside the shed was a ladder. (*Id.* at 29.) Mannington concedes that the shed could be used by SMS’s freight employees for freight-related operations but asserts that it could not be used by SMS’s excursion employees or passengers unless such excursion-related use is approved by Mannington. (*Id.* at 32.)

It is not clear from the record whether the shed is being used for activities related to freight transportation or if it is being used exclusively for other purposes. Therefore, the Board will again simply note that to the extent the shed facilitates freight operations on the wye track, any regulation requiring “municipal land use approval” (Mannington Rebuttal 32) of the shed’s construction is categorically preempted, even if the shed is also used to support passenger service. However, local regulation of any concession or other activity that may be taking place in the shed is not preempted to the extent that the activity relates solely to SMS’s passenger service.

Building 90 – Repair Shop. SMS mentions in its reply that it owns a repair shop along the Salem Branch that it uses to rebuild intermodal boxes for ERS. (SMS Reply to Pets. 8.) SMS states that the boxes are rebuilt and then flatcars with empty, rebuilt boxes are stored until called for service by ERS. (*Id.*) In its rebuttal, Mannington claims that it first became aware of this facility from SMS’s reply and that the facility may be subject to Mannington’s zoning and site planning regulations, and that Mannington will investigate. (Mannington Rebuttal 6 n.1.) SMS clarifies in its surreply that it repairs and restores the ERS containers in a building (called Building 90) that it rents from another company called Mannington Mills, Inc. (Mannington Mills) in Salem. (SMS Mot. for Leave to File Surreply 2-3.) According to SMS, Mannington has been in contact with Mannington Mills regarding alleged violations of local permitting, variance, and other land use regulations by SMS in Building 90. (*Id.* at 5.) SMS argues that its “rail container repair and refurbishment operations, services, and facilities in Building 90” are subject to federal jurisdiction for the same reasons that its other facilities are. (SMS Surreply 5.)

⁹ According to SMS, one of the bases for the orders and notices is its alleged failure to provide Pilesgrove with construction plans, but SMS claims it has in fact provided construction plans. (SMS Reply to Pets. 30-32.) Whether SMS has been properly cited for failure to provide construction plans is a factual question beyond the Board’s purview.

In its reply to SMS's surreply, Mannington states that it conducted an inspection of Building 90 on March 18, 2025. (Mannington Reply to SMS Surreply 7.) Based on the inspection, Mannington learned that the actual work on the intermodal containers at Building 90 is performed by TB Enterprises (TBE), a company that SMS has contracted to repair, weld, paint, and otherwise refurbish the intermodal containers; that although the refurbishing is done inside the building, containers are stored in a staging area of approximately 1,500 square feet outside Building 90; and that ERS is currently the only SMS customer for whom SMS and TBE perform intermodal container repair and refurbishing services. (*Id.* at 7-8.) Thus, Mannington argues that SMS's activities at Building 90 do not fall under the definition of "transportation" set forth in 49 U.S.C. § 10102(9) and are therefore not protected by preemption. (*Id.* at 9.)

The Board has previously held that repair of rail equipment by a rail carrier on rail-owned property falls within the definition of "transportation" and is therefore subject to the Board's exclusive jurisdiction. Grafton & Upton R.R.—Pet. for Declaratory Ord. (Grafton & Upton), FD 36696, slip op. at 10-11 (STB served Nov. 15, 2023) ("[t]hese activities . . . constitute 'transportation' because they involve facilities, instrumentalities, and equipment related to the movement of property (tracks and rail equipment) and services related to that movement (repairs and operation of tracks and rail equipment)"). It is undisputed that the intermodal boxes are "equipment" related to the movement of property by rail within the definition of "transportation" at 49 U.S.C. § 10102(9). And, as the Board found in Grafton & Upton, repair of such equipment under the auspices of a rail carrier (here, SMS) is a "service[] related to that movement." 49 U.S.C. § 10102(9). Moreover, such services are conducted as "part of the interstate rail network," 49 U.S.C. § 10501(a)(2)(A), occurring as they do within a building that is ancillary to SMS's licensed main line track. Accordingly, SMS's movement of intermodal boxes to and from Building 90, and its repair of that equipment, constitute "transportation" under 49 U.S.C. § 10102(9), and state and local permitting of the repair activity is categorically preempted under 49 U.S.C. § 10501."¹⁰

Mannington's counterarguments are not persuasive. Mannington argues that the repairs being performed by SMS are not "integral" to its freight service and therefore do not fall under the definition of "transportation." (Mannington Reply to SMS Surreply 11-12.) It contends that, because SMS does not use the intermodal boxes *itself* to transport freight, the repair operations at Building 90 are not "'part of SMS's ability to provide' its transportation service." (*Id.* at 12 (citing Borough of Riverdale—Pet. for Declaratory Ord., FD 33466 (Sept. 10, 1999).) Borough of Riverdale, however, involved the manufacturing of corn syrup, which is plainly not a "service[] related to the movement" of freight, regardless of whether the manufacturing is performed under the auspices of a rail carrier. And by contrast, SMS's repair of intermodal

¹⁰ The fact that SMS has contracted with another company, TBE, to perform the actual repairs does not change the Board's preemption finding. City of Alexandria—Pet. for Declaratory Ord., FD 35157, slip op. at 5 (STB served Feb. 17, 2019) ("[f]ederal preemption can apply to a service that is provided to a rail carrier through an agent or a contractor. . . . the service need only be provided under the auspices of the rail carrier as part of rail transportation.") Mannington has not argued that TBE is a separate, independent entity outside the control of SMS. If TBE is not acting on behalf of SMS, however, preemption likely would not apply.

boxes (i.e., a “vessel” in which freight is transported on the interstate rail network) is a service related to the movement of freight. Thus, SMS’s repair activity in Building 90 does not otherwise need to be shown to be “integrally related” to SMS’s provision of freight service because it independently is such a service.

Mannington also argues that the fact that SMS is conducting “end-destination” repairs at Building 90, rather than making spot repairs for cars that are in transit, means that the repairs are not sufficiently related to SMS’s freight rail service to constitute “transportation.” (*Id.* at 13-14.) The Board notes that in *Del Grosso*, it held that “[s]ervices ‘related to’ rail transportation, within the meaning of § 10102(9)(B), must be provided either during rail transit or reasonably contemporaneously with the rail movement.” *Del Grosso*, FD 35652, slip op. at 10. There Mannington does not argue that the repairs to the intermodal boxes are far removed from, or otherwise not reasonably contemporaneous with, their movement to Building 90.

Additionally, Mannington argues that preemption of local land use regulations of railcar repair facilities is not necessary to avoid “a patchwork of regulation from unreasonably interfering with interstate commerce,” given the local nature of SMS’s operations on the Salem Branch. But ICCTA preemption protects all freight “transportation” that is conducted as part of the interstate rail network, even if local.

Lastly, Mannington argues that “repairs” are not included in the § 10102(9)(B) definitional list of “services related to” the movement of passengers or property by rail. But the fact that the list of services does not expressly include “repairs” is not significant because the word “including” indicates that the list is not meant to be exhaustive. *See Del Grosso*, FD 35652, slip op. at 9 (finding that “bagging, palletizing, and shrink-wrapping,” activities not specifically listed in § 10102(9), were subject to the Board’s exclusive jurisdiction in that case); *Del Grosso v. STB*, 898 F.3d 139, 142 (1st Cir. 2018) (“[T]he use of the word ‘include’ indicates the list is illustrative rather than comprehensive.”).

Tents for public gatherings, fire pits, picnic tables, portable toilets, the hand-washing station, trash receptacles, decorations, games, and signage. Mannington states that when its employee inspected the SMS property located within Mannington on March 30, 2024, and again on October 12, 2024, he observed firepits, picnic tables, corn-hole gameboards, and other facilities, though on a later inspection on November 3, 2024, the picnic tables and fire pit had been removed. (Mannington Suppl. 7-8; Mannington Rebuttal 28.) SMS asserts that the firepit, picnic tables, and other facilities along the wye track are used by both passengers and SMS employees “working on rail transportation of freight” and should thus not be subject to state or local regulation. (SMS Reply to Pets. 40.)

Although SMS has argued these facilities are all used by employees who provide freight rail service, certain of these facilities and activities (the firepits, picnic tables, decorations, games, etc.) do not appear to facilitate the movement of freight. *See Del Grosso*, FD 35652, slip op. at 4; *see also Emerson v. Kan. City S. Ry.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (“[The] definition of ‘transportation’ does not encompass everything touching on railroads.”). As noted

above, to the extent the facilities or activities relate solely to SMS's provision of passenger excursion service, their regulation is not preempted.¹¹

Conclusion.

As explained above, the Board concludes that SMS provides freight rail service within the Board's jurisdiction over the Salem Branch; that the intrastate passenger rail service and attendant operations provided/conducted by SMS is not within the Board's jurisdiction; and that ICCTA does not preempt the Townships' regulation of SMS's facilities and activities to the extent that those facilities and activities relate solely to SMS's intrastate passenger rail service. Accordingly, the Board will partially grant Pilesgrove's and Mannington's petitions for declaratory order but finds that some SMS activities are within the Board's exclusive jurisdiction. As explained above, Pilesgrove's and Mannington's efforts to subject those activities to their land use, zoning, and permitting regulations are categorically preempted. For other SMS activities and facilities, the Board does not have sufficient information to comprehensively issue a holding, so instead has provided general guidance to assist the parties in resolving these disputes.

It is ordered:

1. SMS's motion for leave to file a surreply is partially granted, subject to the limitation discussed above. SMS's surreply and Mannington's reply to the surreply will be accepted into the record, subject to the limitation discussed above. Pilesgrove's reply to SMS's surreply is stricken from the record as an impermissible reply to a reply.
2. The Board partially grants Pilesgrove's and Mannington's petitions for declaratory order as discussed above.
3. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Kloster, and Schultz.

¹¹ Pilesgrove and Mannington both (1) assert that there has been some indication by SMS that it will pursue a rail bike project in Pilesgrove and (2) argue that local regulation of such activity is not preempted. (Pilesgrove Rebuttal 2-3; Mannington Rebuttal 34.) SMS argues that the question of whether preemption exists for the rail bikes is not ripe for review because SMS is not currently pursuing plans for this line of business, though SMS states that it reserves the right to raise this issue with the Board at an appropriate time after further consideration and/or discussion with Pilesgrove. (SMS Reply to Pets. 23.) Given that there does not appear to be a live controversy on this issue since SMS is not currently pursuing this line of business, the Board declines to address this issue.