



ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, D.C. 20024

Timothy J. Strafford
Associate General Counsel

ENTERED
Office of Proceedings
February 23, 2017
Part of
Public Record

Phone: (202) 639-2506
Fax: (202) 639-2868
E-mail: tstrafford@aar.org

February 23, 2017

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: FD 36075, *The Illinois State Toll Highway Authority – Petition for Declaratory Order*

Dear Ms. Brown:

Pursuant to the decision served on January 17, 2017, the Association of American Railroads hereby files the attached reply in the above docketed proceeding.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36075

THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY
– PETITION FOR DECLARATORY ORDER

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

On November 23, 2016, the Illinois State Toll Highway Authority (“Tollway”) filed a petition for declaratory order (“Tollway Petition”) seeking a finding by the Surface Transportation Board (“Board” or “STB”) that state condemnation of certain active rail property owned and operated by Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) would not be preempted by Section 10501(b) of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (“ICCTA”). CP filed a limited reply in opposition to the Tollway Petition (“CP Limited Reply”) on December 9, 2016, contending that the Board should allow sufficient time to fully consider the ramifications of the Tollway’s whole project, including impacts to CP’s Bensenville Yard. Pursuant to the Board’s decision served in this proceeding on January 17, 2017, seeking public comment on the entire project, the Association of American Railroads (“AAR”) hereby replies in opposition to the Tollway Petition and in support of CP.

The AAR and its member railroads have a strong interest in the proper application of Section 10501(b) to ensure the uniform, national regulation of the railroad industry in the United States and to prevent a patchwork of local and state regulation from impeding railroad

operations. As detailed more fully below, the plans of the Tollway cannot be squared with federal law because they would impede interstate commerce by depriving CP of critical rail properties and unreasonably burdening the railroad operations of CP. But even more critically, the disruption of the operation of the active railroad property in CP's Bensenville Yard would degrade the national flow of freight and passenger traffic through the crucial rail hub of Chicago.

Nowhere is the necessity of coherent, federal regulation more evident than the greater Chicago Terminal, of which CP's Bensenville Yard is a part. Six of the seven Class I freight railroads operate and interchange traffic in Chicago for movements beyond and throughout the national rail network. Approximately 500 freight trains operate per day in the city, representing a third of all rail freight traffic in the United States and 60% of intermodal traffic. *See Report of the Amtrak Chicago Blue Ribbon Panel*, (Oct. 1, 2015) available at <https://www.amtrak.com/ccurl/873/180/Chicago-Gateway-Amtrak-Blue-Ribbon-Panel-Final-Report.pdf>. In addition, 56 Amtrak passenger trains originate or terminate each day in Chicago, and Metra operates more than 700 commuter trains on 11 routes, the majority of which are on tracks owned by freight railroads. *Id.*

The federal courts and the STB have consistently recognized that condemnation of active railroad operating property by a state body like the Tollway is regulation that is preempted by ICCTA. *See, e.g., Union Pac. R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 679-80 (7th Cir. 2011). As described more fully in the filings of CP, the Tollway's plans would have both temporary, but significant, impacts to CP's existing rail operations during construction both of the cross-over of CP's property and through CP's Bensenville Yard, and permanent impacts to CP's ability to utilize its limited property in the busy and critical Chicago terminal now and in the future. Rail operating property cannot be replaced once it is taken, especially in densely-

populated, urban areas such as Chicago. The Tollway's use of eminent domain authority would unreasonably burden interstate commerce by impermissibly interfering with railroad operations in Chicago and beyond. Consistent with precedent, the Tollway's plans would be preempted by ICCTA.

Comments

I. The Board's Broad and Exclusive Jurisdiction Over Railroad Operations and Activities Preempts State Regulation

Congress's assertion of federal authority over the railroad industry has historically been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989); see *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999). And as the federal framework has evolved away from direct economic regulation of railroads in favor of reliance on market forces, Congress broadened the scope of federal preemption in 1995 by enacting 49 U.S.C. § 10501(b) in its current form.

Section 10501 provides that:

The jurisdiction of the Board over –

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part 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). “Transportation” is defined expansively by the statute to include any “locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, or equipment related to the movement of passengers and property by rail” and any related services. 49 U.S.C. § 10102(9). Thus, Section 10501(b) makes the STB’s “jurisdiction” over *all* rail transportation facilities “exclusive.” 49 U.S.C. §10501(b).

The sweeping language of ICCTA has been given broad effect by the courts. “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. Georgia Pub. Service Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). ICCTA preemption is not limited to economic regulation, and it applies without regard to whether the STB actively regulates the railroad operations or activity involved. *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005).

II. Condemnation of Property in Active Rail Use Is State Regulation that Is Preempted by ICCTA.

A long line of court and Board precedent holds that state law actions that deprive railroads of the use of property needed for rail transportation is preempted by ICCTA. ICCTA may categorically preempt state and local action affecting rail transportation, or may preempt that action “as applied.” *U.S. EPA—Pet. for Declaratory Order*, FD 35803 (STB served Dec. 30, 2014). State and local laws or regulations are categorically preempted if they impose requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. *See, e.g., Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). *See also City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998), *cert. denied* 527 U.S. 1022 (1999) (finding preemption of local environmental review of rail line acquisition and operation, though city claimed environmental review was a local police power). The Board has stated that the agency’s broad and exclusive jurisdiction over railroad operations and activities

prevents the application of state law claims that would take rail property for another, conflicting use and has suggested that such action would be categorically preempted. *14500 Limited LLC – Petition for Declaratory Order*, FD 35788, slip op. at 4 (STB served June 5, 2014). As such, the Tollway’s plan to permanently deprive CP of portions of its active rail property in the Bensenville Yard, and portions of its mainline right of way, would be categorically preempted by ICCTA.

Other aspects of the Tollway’s plans would be preempted “as applied.” Even if a state or local rule or regulation is not categorically preempted by ICCTA, it may be preempted “as applied” if the law or regulation has the effect of unreasonably burdening or interfering with rail transportation. *See NY Susquehanna & W Ry. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007) (federal law preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation”). The STB’s jurisdiction over railroad transportation prevents the application of state laws that would unreasonably burden or interfere with rail operations, including condemnation to take property used for rail transportation for another conflicting use. *Union Pac. R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 679-80 (7th Cir. 2011); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005).

It is well settled that condemnation of property in active use for rail transportation amounts to the significant interference with rail operations which warrants preemption. *See, e.g., Wisconsin Central v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D. Wis. 2000) (a condemnation intended to “relocate” a passing track was preempted). The federal courts have made clear that condemnation of active railroad property is preempted. For example, where condemnation would prevent a railroad from using tracks for its own operations and require it to use non-

standard procedures to maintain its right of way, it is preempted. *Union Pacific*, 647 F.3d at 682. In *Buffalo S. R.R. Inc. v. Village of Croton-on-Hudson*, the district court held an attempt to condemn an industrial rail yard containing track was preempted. 434 F.Supp.2d 241 (S.D.N.Y. 2006). In *City of Lincoln v. Surface Trans. Bd.*, an attempt to condemn a five-block-long, 20-foot-wide section of railroad right of way was preempted, with the Eighth Circuit affirming the Board's denial of a city's request to allow a taking of actively used railroad property as "extraordinary." 414 F.3d 858 (8th Cir. 2005). In *Soo Line R.R. Co. v. City of St. Paul*, the district court granted summary judgment, finding that ICCTA preempted a plan to take a 24-foot-wide strip for a pedestrian bike path. 827 F.Supp.2d 1017 (D. Minn. 2010). And in *City of N. Little Rock, Arkansas v. Union Pac. R.R. Co.*, efforts to condemn railroad right of way for an easement were preempted. 808 F.Supp.2d 1102 (E.D. Ark. 2011).

Moreover, the Board has consistently held condemnation of property used for rail transportation to be preempted. See, e.g., *Wichita Terminal Ass'n—Pet. for Declaratory Order*, FD 35765, slip op. at 5 (STB served June 23, 2015) (finding that a state court order forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce because it would have the effect of managing or governing property that is part of the national rail network); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (finding an attempt to evict a railroad from property used as part of the interstate rail network preempted); *Tri-City Railroad—Pet. for Declaratory Order*, FD 35915 (STB served Sept. 14, 2016) (finding condemnation of 600 feet of track would render it unusable for spotting and switching rail cars and therefore would unreasonably interfere with and burden both current and future rail transportation).

The analysis of whether a proposed condemnation action would prevent or unduly interfere with railroad operations and interstate commerce includes both the railroad's current and future plans. *Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35196 (STB served March 1, 2010) (finding a condemnation action to take property on which the railroad was not actively operating was preempted when proposed condemnation would unreasonably interfere with railroad's future plan); *Wichita Terminal Ass'n—Pet. for Declaratory Order*, FD 35765, slip op. at 6 (STB served June 23, 2015).

In considering the Tollway Petition, the Board must not only consider the impacts of the Tollway's plans to CP's operations, but also the current and future implications of the loss of active rail property in the heart of the Chicago Terminal. As the Board well knows, operational problems on one railroad in the Chicago area will impact other railroads in Chicago and beyond. The Board has characterized Chicago as "the most important hub in the rail network." *Reciprocal Switching*, EP 711 (Sub-No. 1), slip op. at 17 (STB served July 27, 2016). The Board has also recently recognized the "longstanding importance of Chicago as a hub in national rail operations" and has judged that congestion in Chicago during the harsh winter of 2013-14 had widespread impacts on rail service in the Upper Midwest and nationwide. *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 6 (STB served Dec. 30, 2014). The Bensenville Yard is one of the Chicago rail yards that the Board has deemed significant enough to require permanent weekly reporting of data. *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 22-23 (STB served Nov. 30, 2016).

Here, as detailed by CP in this proceeding, the Tollway has made plain its intention to acquire portions of CP's critical yard infrastructure as well as its mainline right of way. The Tollway's plans call for disrupting CP's mainline activity on more than 6 acres of active rail

property for at least 5 years during construction of the proposed cross-over and permanently limiting CP's ability of adding capacity on that property. *See* CP Limited Reply at 2, 5 (filed December 9, 2016). Ultimately, the Tollway would build a major expressway through Bensenville Yard, permanently taking over 36 acres of the yard's already limited capacity. *Id.* at 5. Such actions necessarily would limit and interfere with CP's ability to conduct rail operations. The burdens on railroad operations and interstate commerce are increased exponentially in this case by the fact that the Chicago area has a unique importance to the United States rail network.

Conclusion

Collectively, the case law of the Board and the federal courts stands for the proposition that the Board's continuing jurisdiction over transportation by rail carriers preempts state actions that have the effect of unreasonably burdening interstate commerce by impeding railroad operations. In this proceeding, CP has shown that the Tollway's use of state eminent domain authority would unduly interfere with rail transportation. As such, the Board should deny the Tollway Petition and unequivocally state that the Tollway's plans would be preempted by ICCTA.

Respectfully submitted,



Kathryn D. Kirmayer
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2506

*Counsel for the Association of
American Railroads*

February 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be delivered by U.S. Mail,
postage prepaid, to the following counsel of record:

William M. Barnes
69 West Washington Street
Suite 2100
Chicago, IL 60602

David A. Goldberg
Robert T. Lane
The Illinois State Toll Highway Authority
2700 Ogden Avenue
Downers Grove, IL 60515

Christopher S. Perry
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

David F. Rifkind
Stinson Leonard Street
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006



Kathleen M. Birch

February 23, 2017