

SERVICE DATE - DECEMBER 8, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36104

THE CITY OF OZARK, ARK.—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision denies a petition filed by the City of Ozark, Ark. requesting reconsideration of the Board’s July 28, 2017 decision, which found the reinstallation of an at-grade crossing preempted under 49 U.S.C. § 10501(b).

Decided: December 7, 2017

On August 21, 2017, the City of Ozark, Ark. (the City), filed a petition with the Board requesting reconsideration of the Board’s July 28, 2017 decision (July 2017 Decision), in which the Board found that the reinstallation of an at-grade crossing is preempted under 49 U.S.C. § 10501(b). For the reasons discussed below, the Board will consider the City’s filing to be a petition to reopen and will deny it.

BACKGROUND

This dispute concerns the City’s effort to compel reinstallation of an at-grade crossing in Ozark, Ark., over railroad tracks owned by Union Pacific Railroad Company (UP) at the same location where a crossing was removed in February 2001. (City Pet. ¶¶ 1, 3, Feb. 13, 2017.) According to the City, UP closed the crossing at that time in violation of state law. (Id. at ¶ 3.) In 2014, the City initiated a court action seeking to require UP to reinstall the crossing so that it could develop land that can be accessed only by traveling across UP’s tracks at the location of the original crossing. (Id. at ¶¶ 1, 36.) The United States District Court for the Western District of Arkansas granted judgment in the City’s favor on December 10, 2015, ruling that the former crossing was a public, at-grade crossing that was not properly closed according to Arkansas law and that “preemption is not at issue because the [c]rossing was not closed legally to begin with.” City of Ozark, Ark. v. Union Pac. R.R., 149 F. Supp. 3d 1107, 1116, 1120 (W.D. Ark. 2015), rev’d, 843 F.3d 1167 (8th Cir. 2016).

UP appealed the ruling to the United States Court of Appeals for the Eighth Circuit, which reversed. City of Ozark, 843 F.3d at 1170. The Eighth Circuit “emphatically disagree[d]”

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

with the district court, finding that the focus of preemption under § 10501(b) is on whether the state law remedy “will unreasonably interfere with rail operations as they are conducted today or are likely to be conducted in the future,” and not whether the crossing “was closed in violation of state law more than fifteen years ago.” *Id.* at 1172. The court also noted that UP had presented “concrete evidence that reopening this specific [c]rossing would impede rail operations or pose undue safety risks.” *Id.* at 1173 (internal quotation marks and citation omitted). The Eighth Circuit suggested that, on the record before it, requiring reinstallation of the crossing appeared to be preempted but invited “the district court to defer entry of a final judicial determination whether the City’s claims are preempted if the City requests an opportunity to petition the [Board] for a declaratory order resolving the issue of its exclusive jurisdiction.” *Id.*² At the City’s request, the district court granted leave for the City to file such a petition with the Board.

On February 13, 2017, the City filed a petition for declaratory order requesting that the Board find that reinstallation of the crossing is not preempted by 49 U.S.C. § 10501(b). Specifically, the City argued that the crossing would not interfere with railroad operations or create undue safety risks because a crossing previously existed at the same location for approximately 85 years until it was, according to the City, removed illegally under state law. (City Pet. ¶ 66, Feb. 13, 2017.)

On March 6, 2017, UP filed a reply, in which it argued that reinstallation of the crossing is preempted because it would unreasonably interfere with UP’s rail operations. Specifically, UP claimed that reinstalling the crossing would (i) prevent UP from fully utilizing the current storage track at that location; (ii) reduce rail line capacity on the Van Buren subdivision by 44 to 118%; (iii) cause loss of approximately 625 feet or 16% of siding storage capacity; (iv) prevent local train meets at this location, forcing a reduction in line capacity; and (v) increase the number of switching operations because cars would have to be set out on different sides of the crossing. (UP Reply 8, Mar. 6, 2017.) UP also argued the reinstallation of the crossing would create undue safety risks to UP employees and persons using the crossing, as well as increase the risk of derailment. (*Id.* at 8-9.)

On July 28, 2017, the Board issued a decision finding that the reinstallation of an at-grade crossing at the proposed location would indeed unreasonably interfere with UP’s present and future rail operations and cause undue safety risks. In support of its conclusion, the Board noted that the proposed crossing would (1) cross four of UP’s tracks, including a mainline track, a long side track used as a storage track and for train meets, and two side tracks UP uses to set out cars; (2) restrict UP’s use of the side tracks, causing trains and equipment that otherwise would have been cleared onto the side tracks to block the mainline and create train delays and inefficiencies in UP’s rail operations; and (3) result in additional brake safety inspections due to increased switching of railcars, which could result in delays in train operations of up to 90 minutes. July 2017 Decision, FD 36104, slip op. at 5. The Board also found that the record demonstrated that the crossing would pose safety risks to both UP employees and members of the public who

² The Board and the courts have concurrent jurisdiction to determine questions of federal preemption under 49 U.S.C. § 10501(b), applying existing court and Board precedent. E.g., 14500 Ltd. LLC—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).

traverse the crossing. Id. Thus, the Board held that reinstallation of the crossing at the proposed location was preempted under § 10501(b). Id. at 6.

On August 21, 2017, the City filed a petition for reconsideration of the July 2017 Decision. UP replied to the City's petition on September 11, 2017.

DISCUSSION AND CONCLUSIONS

The City filed its petition for reconsideration pursuant to 49 C.F.R. § 1115.3, which requires that such petitions be filed within 20 days of the Board's service of its decision. 49 C.F.R. § 1115.3(e). Here, the Board served its decision on July 28, 2017, and the City filed its petition for reconsideration 24 days later, on August 21, 2017. Therefore, because the City filed its petition outside the 20-day reconsideration period under § 1115.3, the Board will consider the City's petition for reconsideration to be a petition to reopen, which may be filed at any time, under 49 C.F.R. § 1115.4. See, e.g., Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X) et al., slip op. at 1 n.2, 3 (STB served Aug. 21, 2017); Pyco Indus., Inc.—Feeder Line Appl.—Lines of S. Plains Switching, Ltd., FD 34890 et al., slip op. at 7 n.16 (STB served Aug. 31, 2007).

A petition to reopen will be granted only if it presents material error, new evidence, or substantially changed circumstances in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017). If a party has demonstrated no material error, new evidence, or changed circumstances that “would mandate a different result,” then the Board will not reopen. Id. (quoting Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003)).

Here, the City bases its petition on material error. Specifically, the City argues that the Board materially erred by failing to address (1) that UP “illegally removed the [c]rossing,” (City Pet. ¶ 4, Aug. 21, 2017); (2) “whether the procedure [for vacating or abandoning a public street, alleyway, and easement] under Arkansas [s]tate law is binding on UP or any other railroad in Arkansas,” (id. at ¶¶ 4-5); and (3) “what federal law or basis allows UP to disregard Arkansas’ established procedure for closing a public crossing,” (id. at ¶ 7). Additionally, the City argues that the Board failed to address a conflict between UP’s expert witness, who found safety issues and unreasonable interference with the reinstallation of the public crossing, and the City’s safety expert, who found no safety issues or unreasonable interference with UP’s railroad operations. (Id. at ¶ 6).

On reply, UP argues that the City’s petition should be denied because it “merely recycles the same evidence and legal arguments that were considered and rejected by the Eighth Circuit and the Board.” (UP Reply 1, Sept. 11, 2017.) According to UP, the City’s argument that the Board must now consider the circumstances of the closure is contrary to the Eighth Circuit’s decision and runs afoul of the law-of-the-case doctrine, which provides that a party may not attempt to revisit an earlier court finding by making the same argument that was unsuccessful in

court. (*Id.* at 2-3.) Additionally, UP argues that the petition fails to substantiate any claim of material error. (*Id.* at 1, 4-5.)

The Board will deny the City's petition. The City continues to base its preemption arguments on whether the crossing was legally removed 16 years ago. Both the Eighth Circuit and the Board rejected the notion that preemption hinges on whether the crossing was closed in violation of state law.³ City of Ozark, 843 F.3d at 1172; July 2017 Decision, FD 36104, slip op. at 5. Rather, as noted by the Eighth Circuit and the Board, whether an action is preempted under the Board's "as-applied" analysis⁴ turns on whether the action would unreasonably burden or interfere with rail transportation *at present or in the future*.⁵ As a result, the district court's previous factual findings concerning state law are not relevant to the Board's inquiry.

The Board applied the appropriate standard in the July 2017 Decision. Specifically, following a review of the evidence presented by both parties, the Board found that reinstallation of a crossing at the proposed location would unreasonably interfere with UP's present and future operations given changes made to the track and UP's operations over that track since the crossing was removed 16 years ago. July 2017 Decision, FD 36104, slip op. at 5-6. The Board noted that UP added 600 feet of siding, which allowed UP to begin using the location for train meets, storage of maintenance of way equipment, and storage of work trains. *Id.* at 5 (citing City Pet. Ex. G-7 Doc. 43 at 19, Feb. 13, 2017). The Board further noted that installing a crossing at the proposed location would restrict UP's use of the side tracks, causing trains and equipment that otherwise would have been cleared onto the side tracks to block the mainline and create train delays and inefficiencies in UP's rail operations. *Id.* For these reasons, the Board found that, even though a crossing existed in the same location at one time, reinstallation of a crossing at the same location now would unreasonably interfere with UP's present and future operations.

³ The City's petition ignores that the Eighth Circuit reversed the district court on precisely this issue and does not even mention the Eighth Circuit's decision. The petition devotes considerable space to summarizing factual determinations by the district court, (City Pet. ¶¶ 8-23), but these determinations did not survive the circuit court's reversal, as the Eighth Circuit held that the facts addressed by the district court were not relevant to the standard for determining preemption. City of Ozark, 843 F.3d at 1172.

⁴ The Board explained its two types of preemption analysis under § 10501(b)—categorical and as applied—in the July 2017 Decision, FD 36104, slip op. at 3-4.

⁵ See City of Ozark, 843 F.3d at 1172; July 2017 Decision, FD 36104, slip op. at 3-4. See also Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (Jan. 6, 2010); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 7-8 (STB served Sept. 14, 2016) (finding preemption applied where an at-grade crossing would unreasonably interfere with the petitioner's present and future railroad operations); City of Lincoln—Pet. for Declaratory Order, FD 34425, slip op. at 4 (STB served Aug. 12, 2004), *aff'd sub nom.* City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (considering a railroad's future plans to determine whether a city's proposed condemnation of railroad right-of-way was preempted).

Additionally, the City's claim that the Board committed material error by failing to address a conflict between UP's and the City's expert witnesses is without merit. The Board considered the evidence presented by both parties and found the evidence submitted by UP more persuasive. In support of its conclusions, the Board detailed the evidence it found most persuasive on the question of unreasonable interference with railroad operations, including that the proposed crossing would now cross four of UP's tracks and that the increased switching of railcars required at the crossing would result in additional brake safety inspections, which could delay train operations up to 90 minutes. See July 2017 Decision, FD 36104, slip op. at 5. Moreover, as UP noted, "[t]he City's expert regarding crossings, crossing safety and railroad operations admitted he is not an expert in any of these areas." (UP Reply 10, Mar. 6, 2017 (citing City Pet. Ex. L Doc. 65 at 3-6).)

For these reasons, the Board finds that the City has failed to demonstrate any material error by the Board and has presented no grounds that would materially alter the Board's prior decision.

It is ordered:

1. The City's petition to reopen is denied.
2. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller. Board Member Miller concurred with a separate expression.

BOARD MEMBER MILLER, concurring:

Although my rationale for the July 2017 Decision would have been slightly different than that of the majority, given that the City has presented no basis for finding that the majority's rationale of the July 2017 Decision contained material error,¹ I support this decision.

¹ The City claims—incorrectly—that my conclusions regarding the facts were erroneous. (City Pet. ¶ 28, Aug. 21, 2017). Regardless, this claim is immaterial, as my view of those facts was not part of the basis for majority's rationale in the July 2017 Decision.