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SERVICE DATE – DECEMBER 12, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35701

NORFOLK SOUTHERN RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

Decided: December 12, 2012

Norfolk Southern Railway Company (NS) filed a petition for a declaratory order on November 28, 2012, pertaining to 18 inverse condemnation lawsuits filed in the Circuit Court of Roanoke County, Va., against NS and Appalachian Power Company (APCO). In its petition, NS requests that the Board find that under 49 U.S.C. § 10501(b), the claims of nuisance and inverse condemnation asserted against NS in those suits are preempted by federal law. For the reasons discussed below, a declaratory order proceeding will be instituted to consider the issues raised in the petition.

BACKGROUND

According to the petition, between 1890 and 1900, NS constructed and began operation on a rail line in Roanoke County, Va., which has been an active line since that time. The plaintiffs in the state lawsuits are homeowners who live in a neighborhood near the NS line. According to NS, operations on its rail line predate the development of the neighborhood. APCO's property is adjacent to the rail line and lies between plaintiffs' properties and NS's rail line.

The petition alleges that, beginning in 2009, APCO began removing trees and erecting electrical transmission towers and lines on its land. Thereafter, plaintiffs filed their state court lawsuits against NS and APCO alleging, in part, that, since APCO removed the trees that had insulated their property from the effects of NS's rail operations, the dust (including coal dust), dirt, smoke, vibrations, and noise from the operation of NS's trains have damaged their property and diminished its value. Plaintiffs' court complaints claim that the operation of NS's rail line now constitutes a nuisance and that NS has violated Article I, section 11 of the Constitution of Virginia, which provides that private property shall not be taken or damaged for public use without just compensation to the property owner. NS does not dispute that its operation of the rail line constitutes a public use, but does contend that plaintiffs' claims are preempted by 49 U.S.C. § 10501(b).

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, vests in the Board broad jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). The preemption provision in the Board’s governing statute states that “the remedies provided under [49 U.S.C. § 10101-11908] 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). NS argues, and asks the Board to declare, that the claims asserted against it in the state lawsuits are preempted under this provision.

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of pleadings. This will ensure that the record is complete on the issue of whether the remedies sought by plaintiffs are preempted by § 10501(b).¹

The Board will consider this matter under the modified procedure rules at 49 C.F.R. pt. 1112. NS’s detailed petition will serve as its opening statement. Replies will be due 20 days from the date of service of this decision. NS’s rebuttal will be due 27 days from the service date of this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted.
2. Replies to NS’s petition are due by January 2, 2013.
3. NS’s rebuttal statement is due by January 9, 2013.

¹ In its petition, NS seeks leave to conduct “any appropriate discovery.” The Board, however, generally does not order discovery in declaratory order proceedings involving largely legal issues, see Md. Transit Admin.—Pet. for Declaratory Order, Docket No. FD 34975, slip op. at 8 (STB served Sept. 19, 2008), and NS does not explain, nor is it apparent, why discovery is needed here. For those reasons, and given NS’s request for expedited review, the procedural schedule adopted here does not include a period for discovery.

4. A copy of this decision will be served upon the parties and counsel listed in the certificate of service appended to NS's petition as well as upon:

Hon. Clifford R. Weckstein, Chief Judge
Roanoke County Circuit Court
P. O. Box 1126
305 E. Main Street
Salem, VA 24153-1126

5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.