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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35949

PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR EXPEDITED DECLARATORY ORDER

Digest:[1] The Board finds that the State of Delaware's statute establishing restrictions on locomotive idling is preempted by federal law.

Decided: February 22, 2016

In this decision, the Board finds that the restrictions on locomotive idling enacted by the State of Delaware (Delaware), set forth in Del. Code Ann. tit. 21, § 8501-8508 (2015), are federally preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act, as broadened in the ICC Termination Act of 1995 (ICCTA).

BACKGROUND

On August 4, 2015, Norfolk Southern Railway Company (NSR) filed a petition for declaratory order, requesting that the Board find a bill passed by the Delaware General Assembly on June 20, 2015, is preempted by § 10501(b). Senate Bill 135 (SB 135) prohibits "non-essential idling of locomotives between 8 p.m. and 7 a.m., as such non-essential idling degrades the quality of [Delaware citizens'] life, property, and environment." Del. Code Ann. tit. 21, § 8501. SB 135 sets forth the circumstances under which a railroad is permitted to idle its locomotives:

> Idling is non-essential if it is not a result of one or more of the following circumstances:
>
> (1) Traffic conditions.
> (2) The direction of a law-enforcement officer.
> (3) The operation of defrosting, heating, or cooling equipment to ensure the health or safety of the driver or passenger.
> (4) The operation of the primary propulsion engine for essential work-related mechanical or electrical operations other than propulsion.

[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).

(5) Required maintenance, servicing, repairing, diagnostics, or inspections.

Id. § 8503. SB 135 also provides that "[a]ny law-enforcement officer in whose jurisdiction the locomotive . . . is located" may enforce the provision and subjects railroads to financial penalties if found to be in violation of the law. Id. §§ 8504, 8505. The bill was signed into law on August 14, 2015.

NSR argues that SB 135 specifically prohibits rail transportation as defined in the Interstate Commerce Act and has the effect of managing and interfering with rail operations. NSR further asserts that both federal courts and the Board have concluded that state law restrictions on "unnecessary idling" are preempted by § 10501(b). (NSR Pet. 10-14 (citing Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV06-01416-JFW (PLAx), 2007 WL 2439499 (C.D. Cal. Apr. 30, 2007), aff'd, Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (S. Coast Air), 622 F.3d 1094 (9th Cir. 2010); and U.S. EPA—Pet. for Declaratory Order, FD 35803 (STB served Dec. 30, 2014)).)

In a reply filed October 23, 2015,[2] Delaware argues that SB 135 is precisely tailored so as not to interfere with "essential railroad activities" and therefore does not manage or govern rail transportation. (Delaware Reply 5.) Delaware argues that its law is distinguishable from the rules considered in Ass'n of Am. R.R., S. Coast Air, and U.S. EPA, claiming that SB 135 has been precisely aimed at activities that are not necessary to the railroad's operations. Id.

On October 23, 2015, the Association of American Railroads (AAR) filed a comment in support of NSR's petition. AAR asserts that the Board need not assess the impact of SB 135 on rail operations because SB 135 directly regulates rail operations and is therefore categorically preempted. Also on October 23, 2015, CSX Transportation, Inc. (CSXT), submitted a comment in support of NSR's petition, urging the Board to "speak strongly and clearly to the rising threat of disjointed regulation of interstate transportation." (CSXT Comment 2.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321,[3] the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). We find that a controversy exists here concerning whether SB 135 is preempted by federal law.

[2] By decision served August 24, 2015, the Board granted Delaware's motion to extend the time to reply to NSR's petition, to which NSR consented.

[3] The Surface Transportation Board Reauthorization Act of 2015, Public Law No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

Consequently, we will grant this request for a declaratory order and resolve the matter on the record before us.

The Interstate Commerce Act gives the Board broad and exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a)(1). The statute defines rail transportation expansively to encompass any locomotive, property, facility, structure, or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Section 10501(b) 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." The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce. See U.S. EPA, slip op. at 7; Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995) (noting the need for "uniformity" of federal standards for railroads and the risk of "balkanization" from state and local regulation). As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

Section 10501(b) categorically preempts state or local laws and legal processes that would regulate rail transportation directly or that could be used to deny a railroad's ability to conduct rail operations. See Wichita Terminal Ass'n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). Courts and the Board have found that state or local actions that "have the effect of managing or governing," and not merely incidentally affecting, rail transportation are expressly or categorically preempted under § 10501(b). Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc) ("[L]aws that have the effect of managing or governing rail transportation will be expressly preempted."); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); CSX Transp., Inc.—Pet. for Declaratory Order (CSXT Declaratory Order), FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the "exclusive federal regulation of railroads" are categorically preempted).

The Board has found two broad categories of state and local actions to be categorically preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. City of Auburn, 154 F.3d at 1030-31 (environmental and land use permitting categorically preempted); Green Mountain R.R. v. Vermont, 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by § 10501(b)). Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-11328); and railroad rates and service (see 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124). Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts state law claims); see also

Friberg v. Kan. City S. Ry., 267 F.3d 439 (5th Cir. 2001) (state statute imposing operating limitations on a railroad expressly preempted).

Even where categorical preemption does not apply, state and local actions may be preempted "as applied"—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co., 593 F.3d at 414; see also N.Y. Susquehanna & W. Ry., 500 F.3d at 252. The Board analyzes the facts and circumstances of the case to determine whether the action is preempted as applied. E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012).

Section 10501(b) preemption applies without regard to whether or not the Board actively regulates the railroad operations or activity involved. See Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (state law claims related to side track preempted); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (state law claims preempted even though Board does not actively regulate spur and side track); Friberg, 267 F.3d at 443 (state statute restricting a train from blocking an intersection preempted, even though the Board typically does not actively regulate such operations). Section 10501(b), therefore, does not allow for state and local regulation of activities that are part of rail transportation. CSXT Declaratory Order, slip op. at 7.

While § 10501(b) is broad and far-reaching, there are, of course, limits. For example, localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce or the Board's regulatory programs. See Green Mountain R.R., 404 F.3d at 643; N.Y. Susquehanna & W. Ry., 500 F.3d at 252-54; CSXT Declaratory Order, slip op. at 4-5.

We find that SB 135 is categorically preempted because it has the effect of directly managing and governing the operation of locomotives that are essential parts of rail transportation. As NSR explains, "the decision to and practice of idling locomotives is critical to the day-to-day operation of [NSR]." (NSR Pet. 3.) A railroad may idle its locomotives for a variety of reasons, including maintaining the air line to ensure the proper functioning of the braking system, preventing damage to the train when temperatures drop or are projected to drop below 35 degrees Fahrenheit, or addressing unforeseen circumstances such as train crew shortages or scarce rail capacity. (NSR Pet., Ex. A, V.S. Baron K. Emery 2-4.) SB 135 clearly pertains to activity that is part of "transportation by rail carriers," and therefore activity that is subject to the Board's exclusive jurisdiction under § 10501(b).

Delaware tries to argue that the law does not constitute management of rail operations because "SB 135 has been precisely tailored not to interfere with essential railroad activities" and aims to limit only activities "not necessary to the railroad's operations." (Delaware Reply 5.) But by enacting SB 135, Delaware has purported to determine for the railroad which rail operations are essential and which are not. See S. Coast Air, 622 F.3d at 1097 (regulations addressing unnecessary idling that applied exclusively and directly to railroad activity are preempted by §10501(b)). In particular, an instance of idling that the state deems "non-essential" may in fact be important from an operational standpoint. By substituting its judgment for that of the railroads, the state is directly managing rail operations for NSR and other railroads. See U.S.

EPA, slip op. at 9 (rules targeting unnecessary idling decide for railroads what constitutes unnecessary idling and would likely affect a railroad's ability to conduct operations, and thus would likely be preempted, even if rules address activity that "has no transportation purpose"). Thus, SB 135 directly conflicts with the Board's exclusive jurisdiction over rail operations and is categorically preempted by § 10501(b). See CSXT Declaratory Order, slip op. at 5.

Even if the Board were to find that SB 135 is not categorically preempted, it would nonetheless be preempted on an "as applied" basis because the law has the effect of unreasonably burdening and interfering with rail transportation. Delaware asserts that by narrowly tailoring SB 135 to protect residents during nighttime hours from the effects of nonessential idling, the law avoids any "unreasonable restraint" on NSR to conduct its rail operations. (Delaware Reply 2.) However, SB 135 leaves it to the discretion of local police officers to determine whether an idling locomotive is in violation of the law, thus subjecting a railroad in violation to a fine ranging from $5,000 to $20,000. Allowing local officials to make such judgments on operational necessity, which could result in financial penalties, is necessarily burdensome on railroads and unreasonably interferes with the daily management and operational decisions made by railroads. (See NSR Pet., Ex. A, V.S. Baron K. Emery 2-4.)

Moreover, SB 135 would unreasonably interfere with rail transportation due to the potential patchwork of regulations that could result in a railroad's being subject to several different and possibly conflicting state and local regulations as it crosses state lines. See Ass'n of Am. Railroads, 2007 WL 2439499, at *8 (finding rules targeting unnecessary idling to be "exactly the type of local regulation Congress intended to preempt by enacting the ICCTA in order to prevent a 'patchwork' of such local regulation from interfering with interstate commerce"); U.S. EPA, slip op. at 8 (STB served Dec. 30, 2014). Delaware argues that SB 135 is a state law that will be applied uniformly in all communities. (Delaware Reply 5.) However, allowing enactment of anti-idling requirements at the state (rather than local) level could still lead to a burdensome patchwork of regulations across the rail network (albeit in somewhat larger "patches" than if they were enacted at the local level). Individual state or local laws, such as SB 135, that regulate locomotive operations would interfere with a railroad's ability to uniformly operate its rail lines, thus contravening Congress's purpose in enacting § 10501(b). See Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd --- F.3d ---, 2015 WL 9465907 (8th Cir. Dec. 28, 2015); see also U.S. EPA, slip op. at 9 (citing CSX Transp., Inc. v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005) ("Such a variety of localized regulations would likely have a 'practical and cumulative' impact on rail operations on the national rail network.").

For these reasons, we find that SB 135 is preempted by § 10501(b). Accordingly, we will grant NSR's petition for declaratory order to the extent discussed above.

It is ordered:

1. NSR's petition for declaratory order is granted to the extent discussed above.

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, Commissioner Begeman.