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SERVICE DATE - AUGUST 12, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34425

CITY OF LINCOLN—PETITION FOR DECLARATORY ORDER

Decided: August 11, 2004

On November 12, 2003, the city of Lincoln, NE (Lincoln), filed with the Board and served on Lincoln Lumber Company (LLC) a petition for a declaratory order. Lincoln requests that we determine that its acquisition of a 20-foot-wide strip of right-of-way of LLC's rail line between 19th Street and 24th Street in Lincoln (the line) would not constitute either an acquisition for which Board approval would be required under 49 U.S.C. 10901 or an abandonment or discontinuance of operations for which prior Board approval would be required under 49 U.S.C. 10903; and that Lincoln's acquisition of such a strip of LLC's right-of-way under state eminent domain law would not be federally preempted under 49 U.S.C. 10501(b). Arkansas-Oklahoma Railroad, Inc. (AOK), a Class III rail carrier, and LLC filed replies to Lincoln's petition. We will grant the petition in order to resolve the parties' dispute.

BACKGROUND

LLC is a Class III rail carrier; it acquired the line from the Union Pacific Railroad Company in 2000 by means of the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904. The line connects with a rail line owned by the Omaha, Lincoln & Beatrice Railway Company, which provides rail service over the line pursuant to an operating agreement with LLC. According to LLC, it receives shipments of lumber and building materials on a regular and increasing basis.

Lincoln wishes to acquire a 20-foot-wide strip of the right-of-way for a 5-block distance for construction and operation of a pedestrian and bicycle commuter trail and for storm drainage system improvements. Lincoln states that it has previously acquired other portions of the rail corridor to which the line in question is connected for trail use, but that it requires the strip at issue here to complete the trail. Lincoln alleges that neither project (trail or storm sewer) would interfere with the continued rail use of the line, and indicates that it intends to acquire the strip by means of a state law eminent domain proceeding if LLC refuses to cooperate in this endeavor.

LLC states that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way. Although it originally was agreeable to a trail on the northern edge of the right-of-way between 19th and 22nd Streets and between 23rd and 24th Streets, LLC now

opposes construction of the trail on any of its right-of-way. LLC argues that condemnation of rail right-of-way is federally preempted under 49 U.S.C. 10501(b) as state regulation of rail transportation, and that it needs the full width of its right-of-way for rail operations.

AOK asserts that taking of railroad property under state eminent domain law constitutes regulation by a state that is preempted; and that the construction of a trail along 20 feet of LLC's right-of-way would present a safety hazard and expose LLC to increased liability, putting its financial health at risk.

#### PRELIMINARY MATTERS

By decision served on December 8, 2003, a proceeding was instituted and a procedural schedule was established. Lincoln initiated discovery under our rules. LLC filed a copy of its discovery responses with us, and Lincoln moved to strike them. Under 49 CFR 1114.21(f), discovery materials "shall be served on other counsel and parties, but shall not be filed with the Board" unless we order otherwise. Accordingly, Lincoln's motion to strike LLC's discovery responses will be granted.

Lincoln late-filed its rebuttal to AOK's and LLC's replies. LLC moved to strike Lincoln's rebuttal because it was filed after the January 8, 2004 due date, was served on LLC by a different method and class of service than was used in serving the Board, and was not received by LLC (through the mail) until January 29, 2004. Lincoln replied, and submitted evidence that its filing was timely delivered to a private express delivery service pursuant to 49 CFR 1104.6 and accordingly is in substantial compliance with the service requirements of 49 CFR 1104.12. LLC filed letters on February 5 and 11, 2004, further arguing that we should strike Lincoln's rebuttal. Lincoln moved to strike both letters. In the interest of a more complete record, and because LLC has not shown that it was prejudiced as a result of Lincoln's method of service, LLC's motion to strike Lincoln's rebuttal will be denied, as will Lincoln's motion to strike LLC's two letters.

LLC moves for leave to file a surrebuttal on the ground that it has not had an opportunity to reply to the statement in Lincoln's rebuttal that Lincoln would accept a condition that would require that the trail be located on the northernmost 20 feet of LLC's right-of-way. Lincoln states that it had agreed to limit the trail to the northernmost 20 feet of the right-of-way in correspondence to us and served on LLC as early as November 21, 2003. Under 49 CFR 1104.13(c), replies to replies are not permitted. LLC was aware of, and had the opportunity to discuss, Lincoln's willingness to limit the trail to the northernmost 20 feet of LLC's right-of-way. Therefore, LLC's motion for leave to file a surrebuttal will be denied.

## DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, we have discretion to issue a declaratory order to terminate a controversy or remove uncertainty. 5 U.S.C. 554(e). See also 49 U.S.C. 721. For the reasons discussed below, we will grant Lincoln's request for a declaratory order and will resolve the controversy here. We find that Lincoln's proposed taking of a 20-foot-wide strip of LLC's rail right-of-way under state eminent domain law would be federally preempted.

Under 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), the jurisdiction of the Board over transportation by rail carriers and the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt other remedies provided under Federal or state law. See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn); Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5. This preemption is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations. See CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); see also City of Auburn, 154 F.3d at 1030; Joint Petition for Decl. Order–Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) at 8. Courts have held that condemnation can be a form of regulation, and that using state eminent domain law to condemn railroad property or facilities that are necessary for railroad transportation “is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9).” See Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1013 (W.D. Wisc. 2000). Therefore, under 49 U.S.C. 10501(b) and relevant precedent, we must consider whether a proposed taking would prevent or unduly interfere with railroad operations and interstate commerce. If the taking would cause such undue interference, then it is federally preempted.

Citing Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984), Lincoln points out that the United States Supreme Court has allowed state law eminent domain remedies against railroad property. However, in that case, the right-of-way at issue had already been lawfully abandoned and thus was no longer part of the national rail system. In this case, the right-of-way is not abandoned. LLC currently conducts rail operations using the right-of-way pursuant to authority granted by this agency, and has stated its intent to continue and possibly expand such operations. Lincoln's attempt to acquire the northernmost 20 feet of LLC's right-of-way by means of eminent domain would therefore be federally preempted.

To support its position that the taking it wishes to implement would not be preempted, Lincoln primarily relies on State of Texas, Department of Transportation–Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX, Finance Docket No. 32589 (ICC served Feb. 7, 1995) (State of Texas) and Sacramento Regional Transit District–Petition For Declaratory Order Regarding Carrier Status, STB Finance Docket No.

33796 (STB served July 5, 2000) (Sacramento Regional Transit District). In State of Texas, the Board's predecessor, the Interstate Commerce Commission, issued a declaratory order declining to assert jurisdiction and thereby allowing the state to exercise eminent domain over a rail right-of-way to provide for highway construction. In Sacramento Regional Transit District, we held that a local government entity's acquisition of excess rail right-of-way for the purpose of providing commuter passenger service did not require our approval or make it a carrier subject to our jurisdiction.

Both of these cases are distinguishable from the situation at hand. In State of Texas, the state provided funding to relocate the rail right-of-way being taken and did not actually take any property until the relocation was completed. This case, on the other hand, involves a narrowing, not a relocation, of rail right-of-way. Instead of being no better or worse off than it was before the taking, as the railroad in State of Texas was, LLC would be left with less than it previously had, and less than it states it requires in connection with its rail operations, if the northernmost 20 feet of its right-of-way were taken from it. Sacramento Regional Transit District is also inapposite. In that case, the acquisition of rail right-of-way by a local government entity (the Transit District) was voluntary; the owner of the right-of-way in question, Union Pacific Railroad Company, agreed that the portion of right-of-way the Transit District was acquiring was surplus, voluntarily sold it to the Transit District, and retained enough of its right-of-way to fully conduct all needed common carrier operations. Here, in contrast, LLC claims it needs the full width of its right-of-way for railroad operations. Therefore, neither State of Texas nor Sacramento Regional Transit District is on point.

LLC states that it is using the full width of its right-of-way for moving freight, storing lumber, unloading railroad cars, and staging unloaded freight for further movement into shipper facilities; and it has indicated that it may rebuild a spur and construct a rail-related terminal building on a portion of the right-of-way. A trail would interfere with or prevent these activities, all of which are part of "transportation" by rail under 49 U.S.C. 10102(9).

According to LLC, the unloading of lumber and I-joists would also present a safety hazard to pedestrians and bicyclists using the proposed trail, because those articles would be directly above the trail while the forklift positioned them for unloading, and an accidental drop could be harmful or fatal to the trail users below. Furthermore, according to LLC, halfway between 19th and 20th Streets, the edge of the proposed trail would be only 7.5 feet from the main track, less than the 10-foot minimum setback between a trail and a rail line recommended by the United States Department of Transportation,<sup>1</sup> and a derailment could threaten the safety of users of the proposed trail. Also, according to LLC, the proposed trail would not leave enough room for equipment used in track maintenance and in clearing derailments to access the track.

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<sup>1</sup> See Rails-With-Trails: Lessons Learned, U.S. Dept. of Transp., Final Report dated Aug. 1, 2002 at Exec. Summ. vi.

Lincoln disputes LLC's contention that it requires the northernmost 20 feet of its right-of-way for transportation operations and argues that LLC's claims are contrived. Lincoln also argues that LLC's previous use of a portion of the right-of-way for storage belies its claim that it unloads in this area; that the photographs depicting unloading operations have been staged; and that alternative unloading methods can be used.

LLC indicated in its reply that alternative trail routes exist and described three such alternative routes. Lincoln maintains that those routes are not feasible because one is on low-income housing property which Lincoln has no legal authority to condemn and the other two are on city streets and thus would defeat Lincoln's avowed purpose of keeping pedestrians and bicyclists off the streets. Nevertheless, these are options, and there may be other options, or ways to mitigate the alternatives that LLC has identified.

Because the City of Lincoln is a government entity that represents the interests of all its citizens, its views are an important element in proceedings involving railroad property within the City's boundaries. However, we cannot simply accede to a public entity's wishes regardless of the transportation implications. See New York Cross Harbor R.R. v. STB, 374 F.3d 1177 (D.C. Cir. 2004). Based on our review of the record in this proceeding, we find that Lincoln has not adequately refuted LLC's contentions that it uses all of its right-of-way, including the northernmost 20 feet, for rail transportation purposes, and that the narrowing of the right-of-way to construct a trail would hinder or halt those legitimate transportation operations and create safety hazards. The burden is on Lincoln to justify its extraordinary request to allow a taking of actively used railroad property. We conclude, based on the record, that Lincoln has not met that burden. Lincoln has not proffered convincing evidence that LLC can satisfy its present and future rail transportation needs using less than the full width of its right-of-way, or that the proposed trail can safely be placed so near LLC's active rail line. Because Lincoln has not made such a showing, we cannot declare, as Lincoln requests, that its proposed taking will not unduly interfere with interstate commerce.

We note that LLC initially did not oppose a trail on the northern edge of the right-of-way between 19th and 22nd Streets and between 23rd and 24th Streets if Lincoln would route the trail around the right-of-way between 22nd and 23rd Streets. Perhaps the parties can now review their respective positions and renew negotiations to attempt to resolve their dispute.

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

It is ordered:

1. Lincoln's motion to strike LLC's discovery responses that were filed with the Board is granted.

2. LLC's motion to strike Lincoln's rebuttal is denied.
3. Lincoln's motion to strike LLC's February 5 and 11 letters is denied.
4. LLC's motion for leave to file a limited surrebuttal statement is denied.
5. Lincoln's petition for a declaratory order is granted and this proceeding is discontinued.
6. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary