TRAINRIDERS/ NORTHEAST

CHANGING THE WAY THE NORTHEAST TRAVELS

BOX 4869 PORTLAND, MAINE 04112
(207) 879-7245 (TRY-RAIL)

TESTIMONY OF

F. BRUCE SLEEPER, ESQUIRE
LEGAL COUNSEL TO TRAINRIDERS NORTHEAST

BEFORE THE JOINT STANDING COMMITTEE ON TRANSPORTATION

IN OPPOSITION TO
L.D. 439

"AN ACT TO PROHIBIT EXCESSIVE IDLING OF PASSENGER TRAINS"

MARCH 26, 2015

Senator Collins, Representative McLean, and Members of the Joint Standing Committee on Transportation, thank you for the opportunity to testify this morning. My name is F. Bruce Sleeper, and I am volunteer legal counsel for TrainRiders/Northeast. As many of you may know, Trainriders is a grass roots citizens' organization with hundreds of members from Maine, New England and elsewhere. Since 1989, Trainriders has been educating public officials and the public at large about the benefits of passenger rail service in Maine and throughout the Northeast. Trainriders has worked, and continues to work, closely with the Northern New England Passenger Rail Authority Rail Authority (NNEPRA), Amtrak, MDOT and others to ensure that these benefits are communicated to all. Trainriders also operates a host program both on board the Downeaster service between Portland and Boston, as well as at several of the station stops along the way. Trainriders was the driving force behind the initiation of the Downeaster service and continues to strongly support it to this day.

L.D. 439 proposes to prohibit a passenger train engine from idling when stopped for more than 30 minutes. In an attempt to recognize that sometimes such idling is necessary, the bill proposes to allow it when the engine is being repaired or serviced so long as the operation of the train engine is necessary for proper repair, and also allows idling where the engine is engaged in the delivery or acceptance of merchandise or a passenger for which engine-assisted power is necessary and another means of power is unavailable. Even with these exceptions, which in language and concept actually create more problems than they solve, the practical, financial, and legal difficulties with this bill are numerous and insurmountable.

No one likes to see an idling locomotive. Not only is an idling locomotive not traveling to earn revenues, it is costing money by using fuel, and results in noise, vibration, and fumes. There are times, however, when this is unavoidable. For example, train locomotives cannot properly operate unless fluids in their engines are maintained at a proper temperature. Additionally, a running locomotive provides power for the locomotive and its attached rail cars. Particularly in the colder months, this is essential in Maine. Furthermore, locomotive idling may be necessary, among other things, to maintain pressure in air brakes for the train set and to charge the locomotive's battery. True, there are ways to reduce idling for these purposes, most of which require hooking up the locomotive to a generator of some type, an alternative which may only work if the locomotive is set up to accept such power and there is money to purchase and install the generators, and which, in many instances, does not eliminate the need for idling but only requires that it occur at a lower level of engine usage. The bill's exception for engine repair and servicing would not include this normal and necessary operation of locomotives, making this bill a vehicle for possible elimination of passenger rail service in Maine.[1]

I am sure that there are others here who can tell you far more than I can about operational issues related to idling locomotives. As an attorney, however, I can tell you about the limits which federal preemption places upon a State's ability to regulate locomotive idling. In 1887, Congress created the Interstate Commerce Commission (the "ICC) largely to control railroads in the United States. Under the terms of the Interstate Commerce Act (the "ICCA"), the ICC was given broad authority to regulate rail transportation. In 1980, the ICCA was amended to give states the power to regulate intrastate rail rates, rules or practices. See Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., 215 F.3d 195, 204, n. 7 (1st Cir. 2000). Effective in 1996, Congress again amended the ICCA in the ICC Termination Act (the "ICCTA") replacing the ICC with the Surface Transportation Board (the "STB") and removing the 1980 amendments to grant the STB sole jurisdiction over rail functions and proceedings. It made this jurisdictional grant in 49 U.S.C. § 10501, which provides that the STB has jurisdiction 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 . . . is exclusive.

[1] This will change for the Downeaster with the construction of an indoor layover facility which will permit locomotives to shut down for most of the time that they are inside the facility. Even there, however, upon startup, the locomotives will idle inside for about 20 minutes while they undergo testing each day. Additionally, the facility will only be used by Downeaster trains, and not by passenger engines for the Maine Eastern Railroad or other passenger rail operators.

This statute then goes on to say that "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."

This is an extremely broad grant of power which the courts and the STB itself have concluded prevents state or local regulation of railroad operations in almost all instances. See Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., 297 F. Supp.2d 326, 332 (D.Me. 2003) ("[s]tate statutes and local ordinances often do not survive [a] . . . preemption challenge"); Grafton & Upton Railroad Company--Petition For Declaratory Order, STB Docket No. FD 35779 (January 22, 2014) at 10-11, 2014 STB LEXIS 12 ("The Interstate Commerce Act is 'among the most pervasive and comprehensive of federal regulatory schemes.'"; STB jurisdiction over "transportation by rail carriers" is "exclusive") (copy attached). This includes state and local environmental directives. See City of Auburn v. U.S., 154 F.3d 1025, 1031 (9th Cir. 1998) (this statute preempts state and local environmental review laws); Railroad Ventures, Inc. v. STB, 299 F.3d 523, 563 (6th Cir. 2002) (state statutes permitting townships to regulate land use preempted by this statute); Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 236 F. Supp.3d 989, 1007, 1008-1010 (D.S.D. 2002), modified and vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004) (state laws requiring governor to consider environmental impact of railroad taking property by eminent domain preempted by this statute).

Several cases have held that state and local law cannot regulate the emission of fumes from railroad operations. In the case of Pace v. CSX Transp., Inc., 613 F.3d 1066 (11th Cir. 2010), the court held that a state law nuisance claim against a railroad for increased noise and smoke caused by a new rail siding was preempted. Other cases have reached the same result. See, e.g., Ridgefield Park v. N.Y. Susquehanna & W. Ry. Corp., 163 N.J. 446, 462, 750 A.2d 57, 67 (2000); Middlesex County Health Dep't v. Conrail, Corp., 2008 U.S. Dist. LEXIS 106362 (D.N.J. 2008). Even more directly, in the case of Association of American Railroads v. South Coast Air Quality Management District, Case No. CV 06-01416-JFW, 2007 U.S. Dist. LEXIS 65685, aff'd. 622 F.3d 1094 (9th Cir. 2010), the United States District Court for the Central District of California determined that the ICCTA preempted regulations of the South Coast Air Quality Management District that would have required railroads to report idling of locomotives and to limit idling to 30 minutes or less in certain circumstances in order to reduce locomotive emissions. The court struck down these regulations stating that because they "directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable."

As a follow-up to the South Coast Air Quality Management District case, the EPA filed a petition asking the STB to determine whether the rules at issue in that case would be preempted by § 10501. The STB declined to make that particular determination because the parties had raised arguments under not only § 10501, but also under other federal laws dealing with issues outside of the STB's purview. See United States Environmental Protection Agency – Petition for Declaratory Order, STB Docket No. FD 35803 (December 30, 2014) at 1, 5-6, 2014 STB LEXIS 12 (copy attached). It did,

however, provide general guidance as to whether such rules would be preempted if the proceeding was otherwise properly before it. See STB Docket No. FD 35803 (December 30, 2014) at 6-10. The STB concluded that the proposed rules would probably be preempted, at least in part because they would expose a railroad to a patchwork of regulations throughout the country, directly interfering with both the purpose of § 10501 and rail operations. See STB Docket No. FD 35803 (December 30, 2014) at 8-9. Perhaps significantly, in support of this conclusion, the STB noted that two states had enacted idling laws, and that other states, including Maine, had considered them. It also stated that the rules would "likely affect the railroads' ability to conduct their operations, as it appears to decide for the railroads what constitutes necessary idling and also to influence the railroads' choice of equipment and how to configure that equipment." STB Docket No. FD 35803 (December 30, 2014) at 9.

Local and state governments are not completely without power to regulate railroads. For example, the courts and the STB have held that state and local regulations may be enforceable if they do not interfere with interstate rail operations, or are an exercise of police powers to protect public health and safety. However, as noted in the South Coast Air Quality Management District decision, the regulations falling within these categories are ones which are generally applicable to all businesses, not just railroads, such as electrical or building code requirements. As noted in that decision as well, local and state governments may take action to enforce other federal laws against a railroad, but only where the federal law itself provides for such enforcement by that local or state entity.

Finally, the courts have generally held that a state or local regulation cannot be allowed where it requires a railroad to make substantial capital improvements, since the contrary result would permit local regulation of the economics choices made by that railroad, something that Congress clearly wanted to be handled at the federal level. See CSX Transportation, Inc. v. City of Plymouth, 92 F. Supp.2d 643, 659 (E.D. Mich. 2000), aff'd. 283 F.3d 812 (6th Cir. 2002).

Given the above, it is clear that, while the Legislature may enact this bill, the resulting statute will be unenforceable.

We appreciate this opportunity to express our views, and, as always, we are available to assist this committee with passenger rail issues.

43910
EB

SERVICE DATE – SEPTEMBER 19, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35752

GRAFTON & UPTON RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] This decision finds that federal law preempts state and local preclearance regulations and other requirements that would prohibit or unreasonably interfere with the Grafton & Upton Railroad Company's construction and operation of a liquefied petroleum gas transload facility in Grafton, Mass.

Decided: September 17, 2014

On July 24, 2013, Grafton & Upton Railroad Company (G&U) filed a petition seeking a declaratory order to clarify that a liquefied petroleum gas (propane) transload facility it plans to construct and operate on a five-acre parcel adjacent to its existing rail yard in Grafton, Mass., constitutes transportation by rail carrier and, therefore, is shielded from most state and local laws (including zoning laws) by 49 U.S.C. § 10501(b).[2] In reply, the Town of Grafton (the Town or Grafton) asked the Board to institute a declaratory order proceeding.[3] G&U then filed a petition

[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).

[2] The Board previously determined that G&U's construction and operation of a new rail yard and storage tracks on the parcel (as opposed to the transload facility that is the subject of this proceeding) was entitled to § 10501(b) preemption. See Grafton & Upton R.R.—Pet. for Declaratory Order (Grafton I), FD 35779 (STB served Jan. 27, 2014).

[3] The American Short Line and Regional Railroad Association filed a letter in support of the petition for declaratory order on August 12, 2013, and the Commonwealth of Massachusetts Department of Fire Services (DFS) filed a letter in support of the institution of a declaratory order proceeding on August 23, 2013. See Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779 (STB served Mar. 28, 2014) (corrected decision clarifying DFS' position). Also on August 23, 2013, the Massachusetts Department of Environmental Protection (DEP) filed a reply, asking the Board to deny G&U's petition for declaratory order insofar as it pertains to DEP. In the petition, G&U states that "DEP issued a unilateral administrative order determining that G&U failed to apply for permits in order to perform site work at the yard and prohibiting further work" and that DEP might contend that "G&U must obtain certain state and local permits prior to construction and operation of the transloading facility." Pet. for Declaratory Order at 3,

(continued . . .)

for leave to file a supplement to its declaratory order petition (along with the supplement), and the Town filed a reply in opposition. In the interest of a complete record, the supplement and reply will be accepted into the record.

The Board, in a decision served on January 27, 2014, instituted this declaratory order proceeding. At that time, the Board determined that the record was not clear as to whether G&U itself would finance, own, and operate the proposed transload facility, and the Board therefore directed G&U to submit additional information. See Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 2 (STB served Jan. 27, 2014). G&U submitted additional information on February 28, 2014, the Town filed a reply on March 20, 2014, and G&U filed a motion for leave to file a reply (as well as the reply) on April 1, 2014.[4] After examining the record in this case, including the information submitted in response to the January 2014 decision, we find that G&U's activities at its planned transload facility would be part of G&U's rail transportation operations. Therefore state and local permitting and preclearance requirements, including zoning requirements, are preempted with regard to the construction and operation of the facility pursuant to 49 U.S.C. § 10501(b).

BACKGROUND

G&U owns and operates a rail line (the Line), extending 16.5 miles between its connection with a CSX Transportation, Inc. (CSXT) line in North Grafton and another CSXT line in Milford, Mass. The parcel at issue is located in North Grafton immediately adjacent to G&U's Line and existing rail yard. G&U states that it intends to construct a transload facility on the parcel and use it to transfer propane received by tank car in North Grafton first to storage tanks and then to trucks for delivery to propane dealers across New England. Pending the completion of the transload facility construction project, G&U intends to use portable equipment to transload the propane.

In December 2012, G&U notified the Town that four 80,000 gallon propane storage tanks were about to be delivered to its rail yard to be used in connection with the construction of the transload facility. Citing its municipal zoning and permitting ordinances, the Town issued a cease and desist order requiring G&U to halt construction and filed a complaint in the Superior Court for Worcester County, Mass. (Superior Court), arguing that construction of the transload facility would violate the Town's zoning laws. The state court case was removed by G&U to the United States District Court for the District of Massachusetts (District Court), which determined that it lacked jurisdiction. The District Court remanded the case back to the Superior Court

---

(. . . continued)

20. In its reply, DEP advises that it has entered into a settlement agreement with G&U regarding claims involving the Massachusetts Wetlands Protection Act, and asserts that this renders moot G&U's request that the Board declare DEP's administrative order preempted. Given the parties' settlement agreement, it is unnecessary to address whether DEP's original administrative order would be preempted under § 10501(b).

[4] G&U's motion for leave to file a reply was not opposed and will be granted in the interest of a more complete record.

without addressing any preemption issues. The Superior Court subsequently entered two orders on June 12, 2013, which: (1) enjoined the delivery of the storage tanks, (2) directed G&U to comply with the Town's cease and desist order, (3) stayed court proceedings pending a determination by the Board concerning whether 49 U.S.C. § 10501(b) preempts the Town's application of its permitting and preclearance requirements to the facility, and (4) directed G&U to file a petition for declaratory order with the Board on the preemption issue.

In its petition, G&U describes the history of its acquisition of the parcel and its plans for the transload facility. G&U states that it bought the parcel in January 2012 following discussions with consultants, CSXT, and propane dealers in the New England area, and initially retained LPG Ventures, Inc. (LPG) (a firm specializing in propane transload facilities) to design and build the facility. To complete construction, estimated at $5 million, G&U planned to invest $1.8 million of its own funds and to raise capital for the remainder of the cost.

G&U further states that in October 2012 it entered into agreements with four companies for the financing, construction, and operation of the transload facility: Spicer Plus, Inc. (Spicer),[5] and three other companies formed and equally owned by Spicer and NGL Supply Terminals Co. (NGL), a Canadian propane supplier and wholesaler. The three other companies were: All American Transloading, LLC, which was to perform the transloading as a subcontractor; GRT Financing, LLC (GRT), which was to purchase the storage tanks and other equipment and lease them to G&U; and Patriot Gas Supply, LLC, which would guarantee the delivery of a certain volume of rail cars containing propane.[6]

Following the Superior Court's order directing G&U to comply with the Town's cease and desist order, G&U states that it decided to build and operate the transload facility by itself. G&U states that it terminated its arrangements with the Propane Companies by issuing notices of termination on July 15, 2013. G&U then entered into new agreements on August 14, 2013, that included: (1) an Equipment Purchase Agreement Assignment of Contracts & Termination Agreement, between G&U and the Propane Companies, which, among other things, transferred title to the propane storage tanks and other equipment from GRT to G&U in a bill of sale; (2) a nonrecourse equipment note from G&U to GRT, financing the sale of the storage tanks and other equipment; and (3) a security agreement by G&U, giving GRT a first security interest in the storage tanks and other equipment. Three contracts relating to the construction of the transload facility, including a contract between GRT and LPG, were assigned to G&U.[7]

---

[5] Spicer, a Connecticut propane dealer, does business as Spicer Advanced Gas Inc.

[6] Spicer and the three other companies it formed with NGL are collectively referred to as "the Propane Companies."

[7] Copies of the four notices of termination, as well as the new agreements and contracts, were appended to the supplement to the petition for a declaratory order that G&U filed on September 9, 2013.

G&U also submitted verified statements from Jon Delli Priscoli (G&U's owner, president, and chief executive officer) and Lawrence Chesler (president of Spicer), both of whom attest to the termination of all of the previous agreements.[8] According to G&U, these statements conclusively demonstrate that the Propane Companies no longer have any role in the financing, construction, and operation of the facility.

The Town contends that G&U's new plans to finance, construct, and operate the transload facility on its own are neither credible nor feasible. The Town questions whether G&U will actually own and operate the transload facility, asserting that the agreements with the Propane Companies were canceled only after G&U realized during the District Court proceedings that state and local permitting and preclearance requirements likely would not be found to be preempted for the facility based on the rail carrier's original plans with the Propane Companies. The Town also points to the fact that G&U's executives suggested in their District Court testimony that participation by the Propane Companies was necessary for the construction and operation of the facility. The Town further takes issue with G&U's statements that it has the financial ability to build, and the knowledge and experience to operate, the facility.

In response, G&U asserts that it will in fact be the owner and operator of the transload facility, that it has the financial ability to complete the project on its own, and that it can and will hire the people with the necessary expertise to properly operate the facility.

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.[9] We have received evidence and argument on the reach of federal preemption in connection with the proposed facility. The parties do not dispute that the actions of the Town constitute local permitting and preclearance actions that are generally preempted with regard to facilities under the Board's jurisdiction. The parties, however, disagree as to whether the proposed transload facility would be part of G&U's transportation by rail carrier entitled to federal preemption, or rather a third-party transload operation run by non-railroads that may be regulated by states and localities. In

---

[8] Priscoli's verified statement was submitted with G&U's petition for a declaratory order. Chesler's verified statement was submitted with G&U's February 28, 2014 filing. In his verified statement at 9, Priscoli states as follows:

> As a result of the Termination Agreements, G&U has eliminated any participation or role of the Propane Companies in the construction or operation of the transload facility. The equipment lease is not in effect, and the financing to be provided by one of the subsidiaries of the Propane Companies will not be provided. The subcontract pursuant to which an affiliate of the Propane Companies would have operated the facility on behalf of G&U has been terminated, and the transportation contract providing for minimum volumes has also been voided.

[9] See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

addition, DFS requests that we clarify that G&U's construction, maintenance, and operation of the transload facility is subject to Massachusetts' fire safety code[10] and relevant provisions of Massachusetts' aboveground storage tank construction codes.[11] We issue this declaratory order to provide guidance to the parties.

Preemption. The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a). Section 10501(b), as modified by Congress in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that, where the Board has jurisdiction over transportation by rail carriers, which includes the carriers' facilities,[12] that jurisdiction is "exclusive" and state and local laws are generally preempted. The Board and the courts have found that federal preemption shields railroad operations that are subject to the Board's jurisdiction from local zoning and permitting laws, and laws that have the effect of managing or governing rail transportation.[13] To qualify for federal preemption under § 10501(b), the activities at issue must constitute "transportation," and must be performed by, or under the auspices of, a "rail carrier."[14]

Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. See City of Alexandria, Va.—Pet. for Declaratory Order (City of Alexandria), FD 35157, slip op. at 2 (STB served Feb. 17, 2009). In determining whether transloading activities (i.e., the transfer of material to or from rail at a transloading facility) come within the Board's jurisdiction or are part of an independent business, the Board and the courts have considered factors including, but not limited to: (1) whether the rail carrier holds itself out as providing transloading service; (2) whether the rail carrier is contractually liable for damage to the shipment during loading or unloading; (3) whether the rail carrier owns the transloading facility; (4) whether any third party that performs the physical transloading receives compensation from the rail carrier or the shipper; (5) the degree of control

---

[10] 527 CMR 1.00, et seq.

[11] M.G.L. Ch. 148, § 37; 502 CMR 5.00, et seq.

[12] The statute defines "transportation" expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9).

[13] See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 643 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010); Grafton I; New England Transrail, LLC—Construction, Acq. & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797 (STB served July 10, 2007) (addressing the scope of §10501(b) preemption).

[14] See Hi Tech Trans LLC—Pet. for Declaratory Order—Newark, N.J. (Hi Tech), FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003). A rail carrier is a "person providing common carrier railroad transportation for compensation . . . ." 49 U.S.C. § 10102(5).

retained by the rail carrier over the third party; and (6) other terms of the contract between the rail carrier and the third party.[15]

Here, the Town focuses chiefly on the degree of control retained by G&U and the terms of the former contracts between G&U and the Propane Companies. The Town advances a number of arguments as to why the transload facility would not be part of G&U's rail transportation, but fails to demonstrate that, under the current proposal, an entity other than G&U will be financing, constructing, and/or controlling operations at the facility. The Town points out that G&U's original proposal delegated control of the facility to the Propane Companies. While G&U does not dispute this point, it does provide evidence that those arrangements have been terminated and that G&U now plans to construct and control the facility and the activities to be conducted there, and buttresses this evidence with verified statements from the principals involved. The Town does not dispute the legality of the termination agreements and the new contracts submitted by G&U. Rather, the Town alleges that there must be an undisclosed vehicle that subverts the proffered agreements and maintains control of the facility in the hands of the Propane Companies. To support this allegation, the Town cites Priscoli's testimony in the District Court, which describes the benefits of the previous agreements. However, the Town's unsupported allegation is insufficient to support the declaration it seeks. G&U had the right to revise its initial plans by terminating its agreements with the Propane Companies and assuming control over the proposed facility and any transload operations conducted there.

The Town's argument, that G&U restructured its plans for financing, constructing, and operating the facility to qualify for preemption of the Town's permitting and preclearance requirements, may be correct. But parties are free to structure their transactions to meet their needs, and the Board generally examines proposals as they currently exist when determining whether they are part of rail transportation.

---

[15] Compare Green Mountain, 404 F.3d at 640, 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier found to be part of rail transportation); City of Alexandria (ethanol transloading service conducted by third party was an integral part of the railroad's operations and therefore qualified for federal preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967), and Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 290-95 (1992) (when the service in question is part of the total rail common carrier service that is publicly offered, the agent providing it for the offering rail carrier is deemed to hold itself out to the public) with Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the rail carrier, but the transloading services were not being offered as part of common carrier services offered to the public); Hi Tech, slip op. at 7 (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057, slip op. at 5 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services directly to customers).

The Town argues that NGL did not sign a termination agreement and therefore may still be involved in activities related to the facility. G&U explains, however, that NGL was not a party to the original agreements. Rather, NGL was a co-owner with Spicer in three of the companies that signed the agreements. Because NGL never cosigned the original agreements, there is no reason it should have signed any of the termination agreements. The Town also thinks it suspicious that NGL, "one of the biggest propane companies in the country . . . would agree to terminate its involvement and abandon its investments of time and money in the facility."[16] However, the Town has not presented any evidence to suggest that NGL may still be involved in the project.

The Town also challenges the ability of the rail carrier and its owner, Mr. Priscoli, to finance the project. The financial structure underlying a facility can be relevant to determining whether the facility is controlled and operated by a rail carrier or its agent, and therefore is entitled to federal preemption, or whether the facility instead is a third-party independent business fully subject to state and local regulation. Here, however, G&U has provided evidence that the rail carrier and its owner intend to finance the project. Moreover, the Town provides no evidence that another entity will in fact finance the facility's construction.

In contrast, there is substantial evidence in the record demonstrating that Priscoli has sufficient assets to finance the project as it is currently planned. Priscoli's verified statement demonstrates that he has sufficient assets. In addition, the record contains evidence that the sale of propane in New England is expected to be profitable and that the demand for propane is both significant and increasing. Furthermore, G&U has submitted evidence rebutting the Town's claims that Priscoli's assets are too heavily encumbered to complete the project.[17]

The Town further argues that the proposed facility would be the largest of its kind in Massachusetts but asserts that G&U has no knowledge of, or experience in, handling propane or dealing with the regulations of the Pipeline and Hazardous Materials Safety Administration of

---

[16] Grafton March 20, 2014 Reply at 4-5.

[17] For example, in response to a claim by the Town that G&U is obligated on a $6 million mortgage in favor of First Colony Development Co. (First Colony), G&U argues that Priscoli owns First Colony, and so the mortgage should not be considered debt to an outside party. As to three properties the Town claims are over-leveraged, G&U contends that the Town's analysis is based on incomplete and inaccurate public information, which the Town either misunderstood or misinterpreted. According to G&U, the property on Crowley Drive is appraised by the bank holding the mortgage "at a value substantially in excess of the assessed value for property tax purposes and of the amounts advanced pursuant to the construction loan [and that this does not include] the additional 19.74 acres of commercially zoned land on Crowley Drive that Mr. Delli Priscoli owns in a different entity." G&U April 1, 2014 Reply at 2-3. With regard to the properties on Brigham Street, G&U claims that "a nationally recognized real estate brokerage firm [recognized that] the equity in [these properties] is substantial [and] generates substantial cash flow over and above the amount needed to service the debt." Id. at 3. G&U adds that traditional commercial financing should be available once the transload facility begins to generate the anticipated income stream.

the United States Department of Transportation, and that Priscoli admitted as much in his testimony before the District Court. G&U, however, adequately responds that it can and will hire the people with the necessary expertise to properly operate the facility on its own.

In short, the evidence of record now before the Board demonstrates that G&U's current plans call for the transloading facility to be an integral part of its operations as a rail carrier. Therefore, operation of the facility will constitute "transportation by rail carrier" within the meaning of the statute, and as such it comes within the Board's jurisdiction and qualifies for federal preemption under § 10501(b). See, e.g., City of Alexandria, slip op. at 5.

Fire safety and aboveground storage tank construction. The Town argues that G&U submitted to the State Fire Marshall's Office a Fire Safety Analysis (FSA) that: (1) contained a conceptual drawing that was several months out of date, (2) significantly overstated the number of available first responders, (3) relied on safety measures not included in the FSA, and (4) referenced a different version of the National Fire Protection Association Standard 58 Liquefied Petroleum Gas Code than the one Massachusetts uses. DFS requests that we clarify that, even if G&U is not required to apply for a construction permit under Massachusetts' aboveground storage tank construction codes, G&U's construction, maintenance, and operation of the transload facility is nevertheless subject to Massachusetts' fire safety code and relevant other provisions of the aboveground storage tank construction codes. These codes require, among other things, the production of documents, including plans, drawings, and test results, and provide for the inspection of the tank construction.

Massachusetts' aboveground storage tank construction permit requirement is categorically preempted by § 10501(b) with respect to the facility at issue here, as it constitutes a permitting or preclearance requirement. See, e.g., Green Mountain, 404 F.3d at 643. That does not mean, however, that all state and local regulations affecting rail carriers are preempted with respect to the facility in question. State and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect public health and safety as long as their actions do not discriminate against rail carriers or unreasonably burden interstate commerce. Id. Thus, the Board has stated that it is reasonable for states and localities to request that rail carriers: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. See Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500, 511 (2001). State and local electrical, plumbing, and fire codes typically have been found to be applicable even when preemption applies. See Green Mountain, 404 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).

Thus, states and towns may exercise their traditional police powers over the development of rail facilities like the one at issue here to the extent that the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." See Green Mountain, 404 F.3d at 643. Accordingly, unless applied in a discriminatory manner, id., provisions of the Massachusetts fire safety code and the above-ground storage tank construction codes that fit within the local police power exception to federal preemption, as described above, would be applicable to this project, notwithstanding our finding that the facility will constitute transportation by rail carrier entitled to federal preemption under § 10501(b).

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

It is ordered:

1. G&U's request for leave to file a supplement to the petition for declaratory order is granted and the supplement is accepted into the record.

2. G&U's motion for leave to file a reply is granted and the reply is accepted into the record.

3. The petition for declaratory order is granted to the extent discussed above.

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

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

44003
EB

SERVICE DATE – DECEMBER 30, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35803

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY—PETITION FOR DECLARATORY ORDER

Digest:[1] The issue in this proceeding is whether certain proposed rules regarding railroad locomotive idling in the South Coast Air Basin of California would be preempted by 49 U.S.C. § 10501(b) if the United States Environmental Protection Agency were to approve the rules as part of California's air quality management plan under the Clean Air Act. Given the many unresolved issues outside the scope of this proceeding, the Board declines to issue a declaratory order at this time, but provides guidance on the preemption issue and explains that the proposed rules at issue may be preempted by § 10501(b).

Decided: December 29, 2014

On January 24, 2014, the United States Environmental Protection Agency, Region IX (EPA) filed a petition for declaratory order requesting that the Board institute a proceeding to consider whether two rules (the Rules) concerning railroad locomotive idling proposed by the South Coast Air Quality Management District (District) would be preempted by 49 U.S.C. § 10501(b), if EPA were to incorporate the Rules into the California State Implementation Plan (SIP) under the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq. EPA has not expressed a position to the Board as to whether the Rules, if adopted, would be preempted under § 10501(b).

For the reasons discussed below, we conclude that issuing such an order would be premature, and, accordingly, we will deny the petition for declaratory order. However, we will provide guidance on the preemption issue and explain that, based on the information that has been submitted to the Board, the Rules may be preempted by § 10501(b) if EPA were to incorporate the Rules into California's SIP.

---

[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).

BACKGROUND

On February 26, 2014, the Board instituted a proceeding to consider the issue presented by EPA. U.S. Envtl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 1-2 (STB served Feb. 26, 2014). The Board invited interested parties to file new or supplemental comments by March 28, 2014, and replies to those comments by April 14, 2014. Comments were filed by EPA, the District, the California Air Resources Board (CARB), the Commonwealth of Massachusetts Department of Environmental Protection (MassDEP), the Association of American Railroads (AAR), BNSF Railway Company (BNSF), and the Union Pacific Railroad Company (UP). East Yard Communities for Environmental Justice (EYCEJ), the Center for Community Action & Environmental Justice, the National Resources Defense Council, and Sierra Club (collectively, Environmental Advocates) filed joint comments. Replies to the comments were filed by the United States Department of Transportation (USDOT) and the Federal Railroad Administration (FRA), the District, CARB, MassDEP, AAR, BNSF, and UP.[2] On April 18, 2014, the District filed a reply to the USDOT/FRA reply comments.[3] In addition, letters supporting the Rules were filed by United States Representatives Tony Cardenas, Alan Lowenthal, and Henry A. Waxman; Miguel A. Pulido, the Mayor of the City of Santa Ana, California and District Governing Board member;[4] and Chairman William A. Burke of the District Governing Board.

The District and its development of the Rules. The District is one of 35 regional air quality management districts created by the California Legislature.[5] The District's responsibility is to monitor the air quality within its borders and ensure that it meets federal standards.[6]

Under the CAA, state and local governments have primary responsibility to meet National Ambient Air Quality Standards (NAAQS).[7] This is achieved through the development of a State Integration Plan or SIP. A SIP is a state's "primary tool for demonstrating the State will meet federal air quality standards."[8] In California, the air quality management districts sponsor rules designed to address air quality issues for SIP inclusion.[9] The SIP is then submitted

---

[2] Prior to the Board's decision instituting a proceeding, many of these parties filed replies to EPA's petition. In addition, Norfolk Southern Railway Company (NS) filed a reply. We will refer to AAR, BNSF, NS, and UP collectively as the Railroad Parties.

[3] Although this filing was outside the procedural schedule for this proceeding, we will accept the filing in order to establish a more complete record and because no party will be prejudiced.

[4] The letter was submitted on Mr. Pulido's behalf by the District.

[5] District Reply 2-3.

[6] Id.

[7] Id. at 3.

[8] CARB Reply 5.

[9] Id. at 6; District Reply 3.

to CARB, which assesses whether to include the rules proposed by the districts in the SIP. Once CARB has finalized which rules to include, the SIP is submitted to EPA (in this case, Region IX) for final approval. Courts have stated that EPA's approval of a rule into a SIP gives the rule "the force and effect of federal law." E.g., Safe Air for Everyone v. EPA, 488 F.3d 1088, 1097 (9th Cir. 2007).

The District has not attained the NAAQS for certain pollutants and attributes part of the reason to the significant freight rail traffic and associated facilities concentrated within its borders.[10] Accordingly, in 2006, the District developed the two Rules at issue here: Rule 3501, which requires railroads to keep records of trains that idle 30 minutes or more ("the recordkeeping rule"), and Rule 3502, which limits idling of *unattended* locomotives to 30 minutes under certain circumstances ("the idling limitation rule").[11] However, if a locomotive is equipped with an anti-idling device set at 15 minutes or less, its operator is not required to record information related to idling events of 30 minutes or more.[12] Similarly, a locomotive is in compliance with the idling limitation rule if the locomotive is equipped with an anti-idling device set at 15 minutes or less.[13] The District states that when it developed the Rules, it planned to enforce them as local regulations, and did not seek inclusion of the Rules as part of the SIP.[14] It expresses concerns about its ability to meet NAAQS without implementation of the Rules.[15]

AAR litigation. Following the District's development and attempted implementation of the Rules at the local level, AAR, BNSF, and UP filed a complaint against the District in the United States District Court, Central District of California, alleging that, inter alia, the Rules were preempted by § 10501(b) and requesting injunctive relief. Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (AAR 2007), No. CV 06-01416-JFW(PLAx) (C.D. Cal. Apr. 23, 2007). The District Court held that the Rules were preempted by § 10501(b) because they were an attempt by the District, a local governmental entity, to directly regulate rail operations and therefore were "exactly the type of local regulation Congress intended to preempt [with the enactment of § 10501(b)] to prevent a 'patchwork' of such local regulation from interfering with interstate commerce." Id. The District Court also concluded that the District did not have authority under California law to "regulate air contaminants from locomotives, and therefore was not acting under the CAA when it adopted the Rules." Id. The District Court entered a permanent injunction enjoining implementation or enforcement of the Rules.[16]

---

[10] District Reply 3, 7-8.

[11] The exhibits to EPA's petition include the complete text of the Rules.

[12] Rule 3501(k)(1).

[13] Rule 3502(d). An anti-idling device shuts a locomotive engine down after it has idled for a set time period.

[14] District Reply 5.

[15] Id. at 7-8.

[16] UP Reply 14.

The Ninth Circuit Court of Appeals affirmed AAR 2007 on the basis that § 10501(b) preempted the Rules. Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (AAR 2010), 622 F.3d 1094 (9th Cir. 2010). The court reasoned that the Rules were preempted because they "apply exclusively and directly to railroad activity [and] . . . . have the effect of managing or governing rail transportation." Id. at 1098 (internal quotation marks omitted). The court noted, however, that if EPA were to approve the Rules into the California SIP, they would have "the force and effect of federal law." Id. The court cited a previous Board decision suggesting that §10501(b) may not preempt rules in a SIP that is approved by EPA because such rules could possibly be harmonized with §10501(b). AAR 2010, 622 F.3d at 1098 (citing Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500 (2001)). The court declined to consider the District Court's alternative holding that the District did not have authority to adopt the Rules under California law; rather, it "assumed without deciding" that the Rules were validly promulgated. AAR 2010, 622 F.3d at 1096 n.1.

On November 2, 2011, the District submitted the Rules to CARB for consideration of inclusion in the state's SIP.[17] CARB submitted the District's Rules to EPA on August 30, 2012.[18] EPA's petition to the Board followed on January 24, 2014.

The parties' arguments in this proceeding. The District, CARB, MassDEP, and Environmental Advocates ask the Board to find that the Rules, if incorporated into California's SIP, would not be preempted by § 10501(b). The District argues that when presented with a preemption issue involving § 10501(b) and another federal law, the Board must "strive to harmonize the two laws," citing AAR 2010, 622 F.3d at 1098, and Board decisions such as Cities of Auburn & Kent, Washington—Petition for Declaratory Order—Burlington Northern Railroad—Stampede Pass Line, 2 S.T.B. 330, 337 (1997), which state that § 10501(b) typically does not preempt federal environmental laws, including those implemented or enforced by state and local authorities.[19] The District also argues that the Rules are not burdensome and do not discriminate against the railroads.[20] Finally, the District claims that adoption of the Rules will not lead to a patchwork of local regulations.[21]

CARB also asserts that § 10501(b) does not preempt the Rules and that AAR 2010 requires the Board to harmonize the Rules with § 10501(b).[22] In addition, CARB explains that SIP rules have an important role in giving localities the regulatory flexibility to achieve compliance with the NAAQS.[23] Regarding concerns over the impact of the Rules on uniformity

---

[17] District Reply 6.

[18] Id. at 7.

[19] Id. at 13-16.

[20] District Comments 38-41, 48.

[21] E.g., id. at 44-47.

[22] CARB Comments 2-3.

[23] Id. at 6-8.

of regulation, CARB argues that the local, state, and EPA processes of SIP development and approval would address national uniformity issues, and that EPA can require revisions to SIP proposals to ensure harmonization with § 10501(b).[24]

Environmental Advocates express concerns about the health impacts of locomotive emissions from rail yards on District residents [25] and claim that these health impacts disproportionately affect lower-income, minority residents.[26]

AAR, BNSF, NS, and UP assert that a number of issues prevent EPA from allowing incorporation of the Rules into the California SIP.[27] They also argue that, even if EPA approves the Rules, § 10501(b) would preempt them. Specifically, they argue that the Board should find that the Rules would be categorically preempted due to their effect on uniformity of regulation.[28] The Railroad Parties contest CARB's claim that EPA's review process would avoid this problem, arguing that EPA is not charged with maintaining uniformity across air quality control regions and inherently over interstate commerce.[29] The Railroad Parties also argue that a fact-based examination of the effects of the Rules would demonstrate interference with railroad operations and thus support a finding of preemption.[30]

USDOT/FRA ask the Board to consider potential operational and safety impacts of the Rules, some of which relate to possible conflicts with FRA regulations.[31] However, USDOT/FRA do not express an opinion on whether the Rules would be preempted by § 10501(b).[32]

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. Where appropriate, the Board may also provide guidance to assist other government agencies and courts. See Mid-America Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599, slip op. at 3 (STB served June 6, 2005). As discussed below, we conclude that because the parties have

---

[24] Id. at 9.

[25] Environmental Advocates Comments 3-4.

[26] EYCEJ Reply 1-2.

[27] E.g., AAR Reply 19-23; BNSF Reply 20-26; AAR Comments 18-20 (arguing inter alia that the CAA would not permit approval of the Rules into the California SIP and that the Rules would not accomplish CAA objectives).

[28] E.g., BNSF Reply 15-20.

[29] BNSF Reply to Comments 21-23.

[30] E.g., UP Reply 22-29.

[31] USDOT/FRA Reply to Comments 2-4.

[32] Id. at 2 n.1.

raised many issues outside the Board's purview that control whether or not EPA can even incorporate the Rules into California's SIP, it would be premature for us to issue a declaratory order. However, we will provide guidance on the nature and extent of § 10501(b) preemption to assist parties in any future proceedings and explain that, based on the current record, the Rules would likely be preempted if EPA were to incorporate the Rules into California's SIP.

A declaratory order at this time would be premature. EPA has asked the Board to consider a specific issue: whether the Rules would be preempted by § 10501(b) ***if*** they were approved into the California SIP under the CAA.[33] However, the Railroad Parties argue that EPA cannot properly approve the Rules into the California SIP in the first place, for a number of reasons. For example, they claim that the CAA requires states to show that federal or state law does not prohibit a proposed SIP rule,[34] and that here, the District cannot make this showing. The Railroad Parties point to the fact that the District Court found the Rules to be unlawful under California state law in AAR 2007.[35] In addition, the Railroad Parties argue that the Rules are prohibited by the CAA itself because, under that law, states cannot create "any standard or requirement relating to the control of emissions" from new locomotives.[36] The Railroad Parties acknowledge that states can bypass this CAA prohibition by obtaining a waiver from EPA to regulate locomotives (at least those not considered new), but point out that California has not sought such a waiver.[37] The parties that support the Rules disagree with the arguments made by the Railroad Parties and question the relevance of such arguments to this proceeding.[38]

We will not address the merits of the arguments regarding EPA's ability or inability to approve the Rules into the SIP because these questions are not within the purview of the Board. However, it appears that these issues would indeed need to be addressed before EPA could approve inclusion of these Rules in California's SIP. We therefore conclude that a declaratory order deciding preemption under § 10501(b) would be premature given these outstanding questions. However, we will provide the following guidance summarizing the relevant court and agency case law on the nature and extent of § 10501(b) preemption and how it might apply to the incorporation of the Rules into the California SIP. If EPA subsequently does approve the Rules as part of the California SIP, the preemption issue will then be ripe for review and any party may petition the Board for a formal preemption determination.

Preemption under § 10501(b). The Interstate Commerce Act is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The preemption provision of the Act, as broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, expressly

---

[33] EPA Comments 1-2.

[34] AAR Reply 19-22 (citing 42 U.S.C. § 7410(a)(2)(E)(i)); UP Reply 15 & n.47.

[35] E.g., BNSF Reply 20-26.

[36] AAR Reply 22-23 (citing 42 U.S.C. § 7543(a), (e)).

[37] Id. at 22.

[38] E.g., District Comments 12-19, 24-27.

provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." § 10501(b). The statute defines "transportation" expansively to encompass "a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services relating to that movement." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides 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." Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See 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), reprinted in 1995 U.S.C.C.A.N. 793, 808 ("[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.").

The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b). Compare e.g., Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1339 (11th Cir. 2001) (declining to find preemption of city's zoning ordinance for railroad-owned facility that was not used in rail transportation because application of the ordinance would not "burden [the railroad] with the patchwork of regulation that motivated the passage of [§ 10501(b)]") with Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010) (finding that application of state antitrust laws to rail transportation would "subject [shipments] to fluctuating rules as they crossed state lines" and therefore "directly interfere" with the purpose of § 10501(b).") and CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 11 (STB served March 14, 2005), recons. denied (STB served May 3, 2005) (finding local regulation regarding routes for rail transportation of hazardous materials through the District of Columbia preempted because such regulation would interfere with interstate commerce and lead to piecemeal regulation, subverting the purpose of § 10501(b)).

When examining state or local action affecting rail transportation, preemption under § 10501(b) may be categorical or "as applied." Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 4-5 (STB served Jan. 27, 2014). Categorically preempted actions are preempted "regardless of the context or rationale for the action." CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3 (STB served May 3, 2005). The Board and the courts have found that § 10501(b) categorically prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

Other state or local actions may be preempted "as applied"—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (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"); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), recons. denied 5 S.T.B. 1041 (2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999).

The Board has stated that federal environmental statutes such as the CAA, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads. E.g., Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 6. The Board also has acknowledged state and local agencies' role in enforcement of federal environmental statutes and has stated that § 10501(b) is not generally intended to interfere with that role. Ayer, 5 S.T.B. at 508. However, actions taken and regulations enacted under federal environmental statutes or other federal statutes may directly conflict with the purposes and regulatory scheme under the Interstate Commerce Act. When such a conflict occurs, the Board or a court must determine whether the two federal statutes and their applicable regulatory schemes can be harmonized. AAR, 622 F.3d at 1097-98; Ayer, 5 S.T.B. at 509 n.28 (two federal statutes should be harmonized unless there is a "positive repugnancy" or "irreconcilable conflict" between them). As explained below, if EPA were to approve the Rules as part of California's SIP, it appears, based on the current record, that the Rules likely would be preempted by § 10501(b) even under the harmonization standard.

The Rules likely cannot be harmonized with the purposes of §10501(b). If EPA were to approve the Rules as part of California's SIP, it is likely that the Rules would be preempted because of the potential patchwork of regulations that could result, contravening Congress's purpose in enacting § 10501(b). If the Rules were adopted into the California SIP, locomotives would be subject "to fluctuating rules as they cross[] state lines" (and as they cross air quality regions), and the Rules would therefore likely "directly interfere" with the purpose of § 10501(b). See Fayus Enters., 602 F.3d at 452. Moreover, it is not only the impact of the District's rules that we must consider, but the fact that other states and local districts throughout the country could follow suit and adopt their own emission rules. The District claims that it is unlikely that approval of the Rules into the California SIP would lead to similar proposed rules in other states, but the record appears to indicate otherwise. According to AAR, more than 100 nonattainment districts are spread across more than 40 states.[39] Massachusetts and Rhode Island have previously enacted idling rules,[40] and Maine, Michigan, and New Hampshire have

[39] AAR Comments 5.

[40] Id. at 6-7, 7 n.8. While Massachusetts and Rhode Island have enacted idling rules, no party has asked this agency to consider whether § 10501(b) preempts those regulations.

considered such laws.[41] Approval of the Rules here would likely signal to other localities that they also could propose their own rules on locomotive operations to meet localized concerns through the SIP process, thereby leading to the lack of uniformity of regulation that Congress intended to preclude in §10501(b). Such a variety of localized regulations would likely have a "practical and cumulative impact" on rail operations on the national rail network. See CSX Transp., Inc. v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005).

We disagree, at least based on the record here, with the District's claim that adoption of the Rules would not interfere with rail operations.[42] The District argues that Rule 3501 is merely a record-keeping requirement and thus does not impede the flow of transportation. However, Rule 3501 would potentially create a patchwork of localized, operational recordkeeping requirements that would likely affect railroad operations. More than 100 nonattainment districts exist, and if the District's recordkeeping rule were implemented, other nonattainment districts across the country could, and likely would, implement their own, unique recordkeeping requirements.

The District claims that Rule 3502 addresses unnecessary idling that has no transportation purpose. Here too though, adoption of Rule 3502 would likely affect the railroads' ability to conduct their operations, as it appears to decide for the railroads what constitutes unnecessary idling and also to influence the railroads' choice of equipment and how to configure that equipment. Allowing potentially 100 different localities to adopt their own idling rules also would likely disrupt uniformity in rail operations by opening the door to varying regulatory operational and/or equipment requirements for locomotives across the country.[43] Moreover, as discussed below, USDOT/FRA raise concerns regarding operational inefficiencies, safety, and delays that may result from implementation of the Rules.[44]

The District argues that any concerns over differing, localized regulations on locomotive emissions could be addressed through the state/local process of developing California SIP rules and EPA's review process for approving new SIP rules.[45] However, no party describes in the record here the EPA or the state/local process for developing and approving proposed SIP rules in enough detail to allow us to fully assess these arguments. In particular, it is unclear whether

---

[41] BNSF Reply to Comments, V.S. Ratledge 13-14.

[42] District Reply 40.

[43] CARB is incorrect when it suggests that AAR 2010, 622 F.3d at 1098, essentially requires us to conclude that the Rules can be harmonized with § 10501(b) and therefore are not preempted. AAR 2010 merely notes that § 10501(b) "generally does not preempt" the implementation of federal environmental rules. 622 F.3d at 1098. AAR 2010 does not mandate a method for conducting a harmonization analysis nor does it determine whether the particular rules at issue in this proceeding could be harmonized with the Interstate Commerce Act preemption provision. See id.

[44] USDOT/FRA Reply to Comments 2-4.

[45] District Reply 27; MassDEP Comments 9; CARB Comments 9.

EPA must, or would even be permitted to, consider the potential effects on interstate commerce when deciding whether to incorporate particular state and local provisions into a SIP under the CAA, and could thereby take steps to avoid creating a unworkable array of regulations.

It is unlikely we would be persuaded by the District's argument that the railroads could achieve regulatory compliance with differing emissions rules by developing systems that allow for variability in idling. The District points to the fact that railroads have systems for compliance with local speed restrictions and quiet zones where horn blowing is restricted, and argues that they could also develop systems to comply with differing local rules on locomotive idling.[46] But these are not apt comparisons. Quiet zones are simply marked by signs, and speeds are given in timetables that crews can easily follow.[47] Requiring railroad employees to comply with idling and recordkeeping rules for each jurisdiction, in contrast, would likely result in an unworkable variety of regulations.

We do not suggest that every existing federal regulation that may affect railroad operations is preempted by § 10501(b). However, based on the current record, it appears that allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation. For this reason, based on the current record, we find that the Rules likely would be preempted by §10501(b).

The Rules may conflict with other federal statutes. The record here also suggests that adoption of the Rules into the California SIP could conflict with obligations imposed under other federal laws. While interpretation of statutes other than the Interstate Commerce Act is beyond our purview, it appears that adoption of the Rules may interfere with EPA's own regulations on locomotive emissions enacted pursuant to the CAA. While EPA's national rule regarding locomotive emissions allows anti-idling devices to be set at 30 minutes or less, 40 C.F.R. § 1033.115(g)(1), the District's proposed rules would require devices to be set to 15 minutes or less. Rule 3501(d)(3), (e)(2); Rule 3502(d). But because railroads cannot easily reset the devices as trains cross into different jurisdictions,[48] and railroads regularly interchange locomotives and operate other railroads' locomotives,[49] they would effectively need to comply with the District's requirement of a 15-minute anti-idling device setting across their networks, not just within the District. As a result, the 15-minute setting for idling devices could result in national application of a more restrictive idling standard than currently exists under EPA's own

[46] District Comments 46-47.

[47] See BNSF Reply to Comments, V.S. Ratledge 16.

[48] See BNSF Reply to Comments, V.S. Ratledge 7.

[49] As discussed supra, we are unpersuaded by the District's claim that the railroads can adopt systems that will allow them to set the level of idling to match the requirements for that jurisdiction.

nationwide rule regarding locomotive idling.[50] Moreover, each time EPA adopts a different or more restrictive standard proposed by a state or locality, it could force the railroads to alter their locomotive operations nationally in response, creating a continually changing standard. We do not believe that Congress intended such a result. See § 10501(b); H.R. Rep. No. 104-311, at 95-96.

Furthermore, FRA, the agency with primary responsibility over railroad safety, raises concerns in the USDOT/FRA comments that there are inconsistencies between the Rules and FRA regulations, which could detract from the safe and efficient operation of the national rail network.[51] Specifically, USDOT/FRA suggest that, if adopted into the SIP, the Rules could impact the way certain FRA-required safety tests are conducted, compromise air brake systems, and lead to system-wide railroad delays.[52]

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

It is ordered:

1. EPA's petition for declaratory order is denied, as discussed above.

2. This decision is effective on its service date.

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

---

[50] UP Reply, V.S. Iden 4 (note map showing extensive path of UP locomotive over 60-day period).

[51] The District argues that USDOT/FRA's opinion was developed in response to a solicitation by AAR and does not reflect a complete understanding of the Rules and the state and local process under the CAA. District Comments 40-41. Before the comments were filed, however, USDOT/FRA had the opportunity to review the relevant materials up to the March 28, 2014 filings in this proceeding, and continued to express concerns about inconsistencies between the Rules and FRA regulations. See USDOT/FRA Reply to Comments 2-4; District Comments, Official Notice Tab 5; id. at Official Notice Tab 6.

[52] USDOT/FRA Reply to Comments 2-4. In particular, FRA notes that it might take more than the 30 minutes a train is allowed to idle for a train crew to conduct safety critical tests and inspections.