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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35915

TRI-CITY RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board finds that the condemnation and acquisition by Kennewick, Wash., and Richland, Wash., of a portion of a railroad right-of-way for an at-grade crossing that would bisect both a line of railroad and a railroad siding is preempted under 49 U.S.C. § 10501(b).

Decided: September 12, 2016

On March 19, 2015, Tri-City Railroad Company, LLC (TCRY), filed a petition for declaratory order requesting that the Board find that the efforts of Kennewick, Wash., and Richland, Wash. (together the Cities), to condemn and acquire a portion of a railroad right-of-way for an at-grade street crossing are preempted by 49 U.S.C. § 10501(b). TCRY claims that the proposed at-grade crossing would unreasonably interfere with its current and future railroad operations. In response, the Cities argue that their condemnation action is not preempted because this dispute involves a routine crossing that would not impede railroad operations or pose undue safety risks.

For the reasons discussed below, the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with TCRY's present and future railroad operations on one of the tracks at issue and that, therefore, condemnation of the railroad right-of-way to permit construction of an at-grade crossing at that location pursuant to state law is preempted under § 10501(b).

BACKGROUND

Course of Proceedings. TCRY filed its petition on March 19, 2015, and the Cities filed their notice of intent to participate on March 20, 2015. Subsequently, on April 7, 2015, TCRY filed an affidavit to notify the Board that the city councils for both Kennewick and Richland had scheduled separate hearings to consider and vote upon the proposed condemnation ordinance. In a decision served on May 21, 2015, the Board instituted a proceeding and set a procedural schedule. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2 (STB served May

[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).

21, 2015). The Cities filed their reply to TRCY's petition on June 15, 2015, and TCRY filed a rebuttal on June 24, 2015.

On June 30, 2015, the Cities requested leave to file a reply to TCRY's rebuttal. The Board granted that request and allowed TCRY to rebut the Cities' additional filing. Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 2-3 (STB served Aug. 31, 2015). In addition to allowing the supplemental filings, the Board noted that the record in this docket would close on September 30, 2015. Id. at 3. The Cities filed their supplemental reply on September 15, 2015, and TCRY filed its supplemental rebuttal on September 30, 2015.

On June 17, 2016, the Cities submitted a June 16, 2016, decision by the Washington State Court of Appeals concerning an appeal of a Washington State Utilities and Transportation Commission (UTC) decision referenced by the parties in their earlier pleadings. On the same day, TCRY filed a letter in opposition noting that the Cities' pleading was filed after the closing of the record in this docket. (TCRY Letter 1, June 17, 2016.)

On June 27, 2016, TCRY filed a letter requesting that the Board expedite its decision. On June 29, 2016, the Cities filed a response in opposition to TCRY's characterization of the issues before the Board in its June 27, 2016, letter.

On July 25, 2016, the Cities submitted two decisions issued by the Washington State Court of Appeals concerning proceedings referenced by the parties in their previous pleadings.

While the record in this docket closed on September 30, 2015, the Board will accept these additional pleadings in the interest of a more complete record.[2]

The Controversy at Issue. TCRY is a Class III railroad with its headquarters and principal place of business in Benton County, Wash. (TCRY Pet. 4.) TCRY states that it operates as a handling carrier over, and serves as the dispatching carrier on, approximately 16 miles of track (the "line" or "mainline") and that its primary rail yard is located in Richland.[3] (Id. at 4-5, 7.) The line is owned by the Port of Benton, and TCRY conducts its rail operations pursuant to a written lease agreement. (TCRY Pet. 4.) TCRY states that it moves carloads for its own customers and operates as the handling carrier for UP. (Id. at 4-5.) BNSF Railway (BNSF) also operates on the line. (Id. at 5.)

[2] The Board is also accepting the letter submitted on July 26, 2016, by Senator Maria Cantwell requesting an expeditious review of TCRY's petition. TCRY has moved to strike the letter on the grounds that it was not served on all parties and that it could violate the ex parte contact prohibitions of 49 C.F.R. § 1102.2. But here the Board followed its longstanding practice of posting Congressional letters on our website. Therefore, the motion to strike is denied.

[3] TCRY states that it has additional operating rights on approximately 37 miles of Department of Energy-owned track and operates on 8 miles of Union Pacific Railroad (UP) track in order to facilitate interchange with UP at Kennewick. (TCRY Pet. 6.)

According to TCRY, the Cities are attempting to use Washington State law to condemn and acquire a right-of-way for a public street which would bisect TRCY's tracks. TCRY explains that the crossing, at the location being proposed, would cross both TCRY's mainline and a 1900-foot parallel track with switches at both ends, which, according to TCRY, "is the only siding on this stretch of tracks between TCRY's yard in the north, and the UP and BNSF yards in the south." (Id. at 6-7.) TCRY has exclusive use of the parallel track. (Id. at 6.)

TCRY states in its petition that the proposed crossing would unreasonably interfere with current and future railroad transportation. (Id. at 24-25, 27, 41-43.) Specifically, TCRY argues that the proposed crossing would compromise the railroad's ability to use the parallel track for passing and staging operations, eliminate railcar storage and staging in the vicinity of the southern switch, limit its switching operations generally, and reduce its ability to use the parallel track for over-capacity storage that will be needed in light of expected volume increases. (Id. at 1, 24, 41-43.) In particular, TCRY states that because multiple carriers use the mainline, it is critical from an operational standpoint that it have unfettered access to the parallel track in order to set out or hold a train while another train uses the mainline. (TCRY Pet. 7, 41.) Moreover, TCRY states that it needs the parallel track for storing rail cars when the main TCRY yard reaches capacity, and it uses the switches on both ends on a daily basis. (Id. at 7.)

TCRY states that it lacks any alternative facility or location at which the rail activities performed on the parallel track could take place. (TCRY Pet. 24-25, 41-43; TCRY Rebuttal at 4, 27, 33.) Moreover, it presents evidence that it expects an increase in rail traffic, and as a result, is exploring expanding the length of the parallel track to 10,000 feet to accommodate unit trains on both the mainline and parallel tracks. (TCRY Pet. 7-8.) As for the mainline, it argues that the portion of the line that this crossing would bisect is one of the only locations where a unit train can be stopped to wait for operations to clear along the track or for other safety reasons. (Id. at 7.)

TCRY states that it handled 2,247 carloads (or two 9-car trains per day) in 2013, and that it handled 2,626 carloads (or two 10-car trains per day) in 2014. (Id. at 6.) TCRY expected its 2015 numbers to rise to 4,175 carloads, or two 16-car trains per day. (Id.) In addition, TCRY states that need for its service should continue to grow because the Preferred Freezer Plant, the largest frozen food plant in the world, was scheduled to begin operations in 2015. (Id. at 8.) TCRY also notes that the City of Richland has approved a development plan to construct a rail loop in the Horn Rapids Industrial Park and has entered an agreement with ConAgra Foods to develop an automated cold storage warehouse in the Horn Rapids area. (Id. at 16.)

In their reply to TCRY's petition, the Cities state that the proposed at-grade crossing is part of a regionally important project that extends a public street, Center Parkway, between the cities of Kennewick and Richland. (Cities Reply 1, 15.) The Cities note that they have received

state and federal funds for the project and that the proposed at-grade crossing received unanimous approval from the UTC.[4] (Id. at 1-2, 15, 17-19.)

The Cities assert that the use of the trackage at issue for rail transportation would not be compromised by the Cities' grade crossing project.[5] (Id. at 1.) They cite a field study that they conducted, which they claim shows no instance in which TCRY had actually used the full 1900-foot parallel track for its current operations. (Id. at 8-11.) The Cities also contend that TCRY's primary use of the parallel track is for the storage of rail cars, which would not require the blocking of the crossing. (Id. at 33.) The Cities acknowledge the new rail loop in the Horn Rapids Industrial Park and the new Preferred Freezer Plant in the area, but nevertheless claim that TCRY's carload projections are speculative and too high. (Id. at 8-11.)

The Cities argue that regardless of increased track usage, a crossing at the proposed location would not impact railroad operations because TCRY will continue to have right-of-way access over the crossing. (Cities Reply 32.) They also claim that any concerns of undue safety risks are unfounded because gates would prevent vehicular access when a train occupies the track within the limits of the crossing. (Id. at 11, 31-33.)

On rebuttal, TCRY provides additional evidence to document its need for all of its rail infrastructure to perform its current and potential future operations. TCRY states that it has begun serving as the rail services manager for the Preferred Freezer Plant, responsible for the management and dispatch of all railroads providing services to the plant. (TCRY Rebuttal 24.) TCRY states that UP sent TCRY 142 empty rail cars for storage in June 2015, prior to the opening of the Preferred Freezer Plant in July 2015, and that after this shipment, additional rail cars arrived, which resulted in both its yard and nearby industrial lead being over capacity. (Id. at 24-25.) TRCY also states that prior to the opening of the Preferred Freezer Plant, it staged several hundred refrigerated cars in its rail yard. (Id. at 25.)

TCRY further claims that if the crossing is built, it would have to comply with Kennewick Municipal Code (KMC) § 11.80.090, a local ordinance governing grade crossings, and that doing so would result in a loss in capacity to use the parallel track. (TCRY Pet. 23-24.) That ordinance provides, in relevant part, that trains must be left clear of road crossing signal

[4] The UTC did not address § 10501(b) preemption. Following the second UTC decision issued on June 24, 2014, TCRY filed an action in Washington state court that raised preemption claims. (TCRY Pet. 21.) Subsequently, the state court proceeding was "voluntarily dismissed, without prejudice, by TCRY" so that TCRY could seek a Board determination on whether the proposed condemnation objected to by the railroad to permit this crossing is preempted under federal law. (Id. at 23.)

[5] The Cities' pleadings refer to the Board as having jurisdiction over crossings. In fact, the Board has exclusive jurisdiction over "transportation" by "rail carriers," see 49 U.S.C. § 10501(b), and therefore, federal law preempts any state action, including a condemnation action for a crossing, that would unreasonably interfere with rail transportation under the Board's jurisdiction.

circuits and that, when it can be avoided (1) cars or engines must not be left standing nearer than 250 feet from a road crossing and (2) public crossings must not be blocked for more than five minutes. (Id. at 24.)

TCRY also argues that in addition to the KMC, the General Code of Operating Rules (GCOR) — which is a set of operating and safety rules used by most western railroads[6] — requires that railroads should avoid (1) leaving cars, engines, or equipment standing closer than 250 feet from road crossings when there is an adjacent track and (2) blocking public crossings for more than 10 minutes. (TCRY Rebuttal 4.) TCRY claims that, given the provisions of the KMC and the GCOR and the configuration of the track, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks. (TCRY Rebuttal 30.)

The Cities respond that KMC § 11.80.090 and the GCOR are not mandatory and therefore would not reduce the railroad's capacity to conduct current and future rail operations. (Cities Supplemental Reply 11-14.) The Cities argue that, in fact, these two provisions support the Cities' position that the crossing does not interfere with railroad operations, stating that "the plain language of the provisions establish that TCRY has the flexibility to maintain its railway operations on the 1900-foot siding when the siding is needed for railway operations." (Id. at 12.) The Cities also note that BNSF and UP, which operate over TCRY's mainline, have not opposed the location of the proposed crossing.[7] (Cities Supplemental Reply 7-8.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. We find it appropriate to issue a declaratory order addressing the grade crossing controversy here. As discussed below, we conclude that the proposed at-grade crossing bisecting TCRY's mainline and parallel tracks would unreasonably interfere with TCRY's current and future railroad operations on the parallel track, and therefore any state or local regulation requiring a crossing at the proposed location is preempted under § 10501(b).

The Interstate Commerce Act is "among the most pervasive and comprehensive federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Board's jurisdiction over "transportation by rail carriers" is "exclusive," and "the

[6] According to the Federal Railroad Administration, at present, most Class I railroads in the U.S. use one of two "standard" rulebooks: the Northeast Operating Rules Advisory Committee (NORAC) rulebook or the GCOR. Conrail, Amtrak, and several commuter and short line railroads in the northeastern United States use the NORAC rulebook. The GCOR is used by every Class I railroad west of the Mississippi River, most of the Class II railroads, and numerous shortline railroads. See FRA report "Compliance with Railroad Operating Rules and Corporate Culture Influences," Oct. 1999, at 2.

[7] TRCY responds that BNSF and UP have not intervened because they were able to reach separate agreements with the Cities to access the Horn Rapids Industrial Park. (TCRY Rebuttal 2-3.)

remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). The Board's governing statute defines "transportation" expansively to encompass not only railroad operations over the Nation's rail network but also a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include "a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard, [or] ground used or necessary for transportation." 49 U.S.C. § 10102(6). The purpose of § 10501(b) is to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd 812 F.3d 1141 (8th Cir. 2015); U.S. Envtl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); 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). As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress' 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)).

It is well settled that the provisions of § 10501(b) preempt permitting or other 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 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."); CSX Transp., Inc.—Pet. for 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 preempted). Federal preemption applies without regard to whether the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

The Board has stated that "routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks." Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9. 2012) (finding that an easement across a railroad's property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad's preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (finding state property law ownership

claims preempted where such claims would directly affect the amount and type of maintenance that could be performed on a railroad right-of-way and limit the capacity of the line of railroad should it be needed for potential future active rail service); see also Maumee & W. R.R., FD 34354, slip op. at 2 (noting that preemption may shield a railroad from state eminent domain laws where the effect of those laws is an unreasonable interference with railroad operations).

The Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property used for rail transportation for another, conflicting use that would unreasonably burden or interfere with rail use, present or future. Wichita Terminal Ass'n, FD 35965, slip op. at 5 (finding that a state court order forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce because it would have the effect of managing or governing property that is part of the national rail network, but that a court-ordered crossing at another location might not have such effects, in which case it would not be preempted); see also Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way preempted by § 10501(b) even if the city's proposed use of the property would have been coextensive with a prior lease); City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005) (finding a city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Norfolk S. Ry—Pet. for Declaratory Order, FD 35196 (STB served March 1, 2010) (finding a condemnation action to take property on which the railroad was not actively operating trains preempted when proposed condemnation would unreasonably interfere with railroad's future plans); 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (finding claims of adverse possession and prescriptive easement preempted); Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (finding an attempt to evict a railroad from property used as part of the interstate rail network preempted).

The Board engages in a fact-specific analysis to consider whether a proposed condemnation action would prevent or unduly interfere with railroad operations and interstate commerce. See Franks Inv. Co., 593 F.3d at 414; Wichita Terminal Ass'n, FD 35965, slip op. at 6. In conducting this analysis, the Board considers both the railroad's current and future plans. City of Lincoln, 414 F.3d at 862 (railroad's future plans can be considered because "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses."); Norfolk S. Ry., FD 35196 (finding preemption based on anticipated impact a condemnation action would have on railroad's future plans for the property).

Here TCRY asks the Board to find that state law condemnation of the right-of-way at the location of the proposed crossing is preempted by federal law. The Cities argue that takings of railroad right-of-way in circumstances such as these are not unusual or controversial and that the Board should not interfere with what they view as a routine crossing that has local support and, in their opinion, would not impinge on TCRY's operations.

The Board's decision here hinges on whether the Cities' attempt to condemn TCRY's property to create an at-grade road crossing would unreasonably interfere with and burden rail

transportation by limiting TRCY's capacity to conduct its current and future operations on the parallel track.

The Board finds that TCRY has demonstrated that the proposed at-grade crossing, which would bisect the mainline and parallel tracks, would unreasonably interfere with and burden both current and future rail transportation on the parallel track. Therefore, state law condemnation of the right-of-way for a crossing at that location is federally preempted.

With respect to current operations, the record makes clear that installation of a crossing at the proposed location would make as much as 600 feet of the 1900-foot long parallel track unusable for TCRY's switching, storage, and interchange operations. The parallel track is the only location along the 16-mile line where these essential railroad operations can be performed. TCRY, as the dispatcher for the entire length of the mainline (including UP and BNSF traffic), has demonstrated that a loss of useable parallel track would impinge on TCRY's ability to conduct its current operations. For example, TCRY explains that the current configuration of the 1900-foot track, with switches at both ends, allows TCRY to spot and store cars for various lengths of time at one end of the track while using the other end for moving and holding trains. (TCRY Rebuttal 26-28.) However, the location of the proposed crossing would require TCRY to relocate switching operations from the southern switch to the northern switch for interchange with UP at Kennewick. (TCRY Rebuttal, V.S. Foster Peterson 15.) TCRY's experts have stated that this would be an inefficient way to operate. (Id.) Accordingly, federal preemption applies. See Wichita Terminal Ass'n, FD 35965, slip op. at 9 (finding a crossing is federally preempted because it would unreasonably burden or interfere with the interchange of railcars).

The Cities take issue with TCRY's June 24, 2015 rebuttal testimony from TCRY's President and CEO, Randolph Peterson. They note that Mr. Peterson's statement that the proposed crossing would "drastically interfere with [TCRY's] railroad operations" is inconsistent with prior statements before the UTC in 2013 that there would be no operational interference. (Cities Supplemental Reply 9-11.) We recognize that Mr. Peterson's testimony on rebuttal could be viewed as inconsistent with prior statements made before the UTC in 2013. However, the statements to the UTC were made several years ago and do not reflect the subsequent increase in carloads handled that has taken place since 2013, or the existence of the Preferred Freezer Plant or the new rail loop. Thus, notwithstanding this testimony, the weight of the evidence demonstrates that the proposed crossing bisecting the mainline and parallel tracks would unreasonably interfere with TCRY's current and planned future operations.

TCRY has established a need for full access to the parallel track for its future operations. See City of Lincoln, 414 F.3d at 862; Norfolk S. Ry., FD 35196, slip op. at 3-4; Jie Ao & Xin Zhou, FD 35539, slip op. at 6 (finding plans for the future use of a railroad right-of-way, which were less concrete than TCRY's, an acceptable basis on which to find preemption). It is undisputed that the new Preferred Freezer Plant has begun operating and that a rail loop to support this facility has been, or soon will be, constructed in the Horn Rapids Industrial Park (located on the northern end of TCRY's line). While the parties differ on whether TCRY currently uses the entire length of the 1900-foot parallel track and how much additional rail traffic there will actually be, there is no doubt that an increase in rail capacity (i.e., the rail loop) and an additional large customer (i.e., the Preferred Freezer Plant) are likely to lead to an

increase in traffic on TCRY's line and the number of cars that will need to be staged, stored, and interchanged on the parallel track. TCRY's evidence demonstrates that unrestricted use of the entire length of the parallel track will be needed to handle the future expected influx of rail cars from new customers and to stage, pause, or hold manifest trains approaching the rail loop. (See TCRY Pet. 7, 24, 41-43; TCRY Rebuttal 26-28.) TRCY has limited capacity and system infrastructure. As TCRY notes, it received a large influx of cars in preparation for the opening of the Preferred Freezer Plant commencing operations, and this influx caused its yard and the parallel track to reach capacity. (TCRY Rebuttal 23.) While TCRY states that it has begun to explore its options for extending the parallel track (which itself suggests that the railroad cannot do with less than the entire length of the parallel track), it is unclear from the record that TCRY actually would be able to do so under the terms of its lease with the Port of Benton. In these circumstances, TCRY has shown that it needs the ability to continue full, unimpeded use of the entire parallel track to carry out its current and future operations and that losing any part of the parallel track would leave insufficient room for these operations.

The Cities also suggest that federal preemption does not apply here because the mainline and parallel tracks that the crossing would bisect are owned by the Port of Benton, and TCRY operates over the tracks pursuant to a lease. (Cities Reply 1, 41-42.) It is common, however, for railroads to hold various types of property interests in the land that constitutes their right-of-way. See, e.g., Cayuga Cty. Indus. Dev. Agency—Acquis. Exemption—Finger Lakes Ry., FD 36011 et al. (STB served July 14, 2016) (acquisitions and subleases). The Cities have proffered no evidence showing that TRCY lacks the property interest it needs to perform its current and future rail operations. As the Board explained in Norfolk S. Ry., FD 35196, slip op. at 6, the Board has jurisdiction over rail transportation regardless of whether the property on which that transportation is being conducted is owned, leased, or held in easement by the operating railroad. See also § 10102(9) (defining transportation expansively to encompass facilities of any kind related to the movement of property by rail "regardless of ownership or an agreement concerning use").

Similarly, whether or not the parallel track is considered "siding" track, as the Cities argue (Cities Reply at 12-13), federal preemption would still apply. Under 49 U.S.C. § 10906, side track is excepted from Board licensing, but is still within the Board's jurisdiction. Id. The Board and the courts have consistently found that because the Board's jurisdiction over transportation is "exclusive," § 10501(b) preempts state law remedies without regard to whether or not the Board actively regulates activities on the particular track involved. See Pace, 613 F.3d at 1068-69 (finding state law claims related to side track preempted); Port City Props., 518 F.3d at 1188 (finding state law claims preempted even though the Board does not actively regulate spur and side track). Here TCRY has shown that the parallel track is used to support rail operations subject to the Board's jurisdiction, §§ 10102(6), 10102(9), and that the proposed crossing would unduly interfere with TCRY's ability to perform its current and future operations on that track. Accordingly, federal preemption applies.

The Cities fail to show that TCRY erred in relying on the GCOR provisions providing that cars generally should not be spotted less than 250 feet from each side of the crossing. TCRY claims that, given these provisions, the proposed crossing would render unusable as much as 600 feet of the mainline and parallel tracks, given the configuration of the track. (TCRY

Rebuttal 30.). The record here shows that TCRY has adopted the GCOR. (See TCRY Pet., V.S. Peterson 12.) Despite the Cities' contention that the GCOR provisions are not mandatory for TCRY, the provisions of the GCOR represent industry best practices. Thus, as TCRY states, failure to establish operating rules consistent with the GCOR standards could open the railroad to potential liability it would not otherwise face. (TCRY Supplemental Rebuttal at 12-13.) In any event, federal preemption would apply here without regard to whether TCRY's operations on the parallel track comply with the GCOR standards. The courts and the Board have found that even minimal loss of railroad right-of-way is too much where, as here, the railroad objects and shows that full use of the property (e.g., the parallel track) is needed in connection with its current and future rail transportation plans. See City of Lincoln, 414 F.3d at 861 (involving loss of 20-foot longitudinal strip at the edge of a railroad's right-of-way); Norfolk S. Ry., FD 35196, slip op. at 4 ("it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses"). Having found persuasive TCRY's argument that compliance with the GCOR limits its use of the parallel track, the Board need not address the parties' arguments regarding the effect of § 11.80.090 of the KMC on railroad operations.

For the reasons discussed above, we find that the efforts of the Cities to condemn and acquire a right-of-way for an at-grade crossing at the proposed location, bisecting both the parallel and main tracks, are preempted by § 10501(b).

It is ordered:

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

2. TCRY's motion to strike Senator Cantwell's letter is denied.

3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

I agree that today's decision reaches the correct legal outcome, though unfortunately, I do not think it is the best possible outcome. I would have preferred that the Board require the parties to engage in mediation to determine if there was a solution that would have been mutually acceptable to both sides.

The Cities have a significant interest in building a road that will connect the two cities. The project is identified as an essential capital improvement in the Cities' Comprehensive Plan and in the Regional Transportation Plan and, if completed, would promote important public benefits, such as reducing traffic congestion, increasing access by emergency responders, and promoting economic development. The Cities have also expended a significant amount of resources in planning. The record shows that it involved years of work, including extensive

hearings and review. The project has also received federal and state funding, and appears to be supported by all state, regional, and local planning and transportation agencies.

Our decision today basically negates all of this. In my view, the Board should have exhausted all options to keep this important public project alive before reaching today's winner-take-all decision, including mediation. Mediation would have been particularly useful here. The record indicates that the Cities successfully negotiated with both UP and BNSF to obtain their consent to the proposed at-grade crossing, suggesting that a negotiated solution was not outside the realm of possibility. It also appears that the two sides, despite having been involved in years-long litigation, have never really sat down with one another to discuss a mutually-agreeable solution. In fact, the Cities state that TCRY chose not to engage in the Cities' extensive planning process for the crossing, despite being invited to participate; that TCRY submitted no comments in the planning process; and that TCRY did not attend the Washington Utilities and Transportation Commission's diagnostic meeting for the crossing. (Cities Reply 19.) The Cities also note that it was not until TRCY's rebuttal in this case that they became aware of TRCY's plans to extend the parallel track. (Cities Supplemental Reply, V.S. Rogalsky 5.) It disappoints me that TRCY did not try to work with the Cities, particularly when there might have been a way for it to protect its own interests while looking for a way to help them accomplish their goal. Perhaps had the Board required the parties to communicate, with the assistance of a Board-appointed mediator, they could have reached a solution that would have met both sides' needs.

When the Board enabled itself to force parties to engage in mediation, it stated that it "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, *wherever possible*." Assessment of Mediation & Arbitration Procedures, Docket No. EP 699, slip op. at 2 (STB served May 13, 2013) (emphasis added). However, since then, the Board has only used this power in two instances (or less than one case per year).[1] The Board needs to consider using all the tools in its toolbox, including mediation where it makes sense. This proceeding is one where it would have made sense.

This case also highlights yet again what I believe is the Board's inability to handle cases quickly under its current processes.[2] Today's decision comes nearly a year after the last significant filing in the case, which was made on Sept. 30, 2015. (Although there were recent filings, they merely provided updates in the related state proceeding – updates that would not

[1] The two proceedings in which the Board ordered the parties to mediate were Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141 and BNSF Ry.—Terminal Trackage Rights—Kansas City S., Docket No. FD 32760 (Sub-No. 46).

[2] See Petition for Rulemaking to Adopt Revised Competitive Switching, Docket EP 711, et al., (STB served July 27, 2016) (Miller comment); CSX Transp., Inc.—Acquis. of Operating Easement—Grand Trunk W. R.R., Docket No. FD 35522 (STB served June 22, 2016) (Miller comment) ("The fact that parties in even the most urgent cases must still wait months before a decision is issued demonstrates the need for the Board to reconsider our internal decision-making process.").

have been necessary had the Board ruled sooner). The proceeding had been pending for so long that one party felt compelled to write a letter to the Board expressing urgency[3] and a U.S. Senator felt it necessary to make an inquiry.[4]

As I have previously noted, I am frustrated by the Chairman's unwillingness to consider changes that I think would help improve timeliness.[5] The resistance is particularly puzzling given that Congress has already had to step in and require the agency to begin filing quarterly reports on unfinished regulatory proceedings (i.e., rulemakings), forcing the agency to create deadlines for next actions and to provide explanations if those deadlines are not met. All three Board Members have expressed a belief that this reporting requirement is having a positive impact on the pace of those proceedings.[6] If that is the case, then the Chairman should be willing to apply those same principles to our other proceedings – and we should not wait for a directive from Congress to do so.

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[3] See TRCY's June 27, 2016 letter.

[4] See Senator Maria Cantwell's July 26, 2016 letter.

[5] Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 9 (2016) (statement of Vice Chairman Deb Miller, Surf. Transp. Bd.) ("During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not."). Commissioner Begeman has also expressed frustration with the Board's pace and a desire to improve the functioning of the agency. See Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. 1-2 (2016) (statement of Commissioner Ann Begeman, Surf. Transp. Bd.).

[6] Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015 Before the Senate Comm. on Commerce, Science, & Transp., 114th Cong. (2016), video archive, at 01:47:00, available at: https://www.youtube.com/watch?v=J9Sv9Gqgpfg&feature=youtu.be&t=19m51s, testimony of Chairman Daniel Elliott, Surf. Transp. Bd. ("First of all, I would like to start off by saying that as far as the unfinished regulatory proceeding[s] reports themselves, I think they've been excellent, I think the results speak for themselves, and you've seen things coming out of the agency at a pace that didn't occur in the past. Personally, I very much appreciate that transparency and it's created, I think, some great efficiencies at the Board that didn't exist before. So, you know, all and all, I think it's been great."). See also statement of Commissioner Begeman, at 3, and statement of Vice Chairman Miller, at 3.