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CITY OF BENICIA
COMMUNITY DEVELOPMENT

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36036

VALERO REFINING COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] Valero Refining Company (Valero), a noncarrier, asks the Board to issue a declaratory order finding that decisions by the City of Benicia Planning Commission denying certification of an environmental impact report and denying Valero's conditional use permit for a crude oil off-loading facility are preempted by federal law. The Board denies the petition for declaratory order, but provides guidance on the issue of preemption.

Decided: September 20, 2016

By petition filed on May 31, 2016, Valero Refining Company (Valero) seeks a declaratory order finding that the City of Benicia's Planning Commission (Planning Commission) decisions denying certification of an environmental impact report (EIR) and denying Valero's conditional use permit for a crude oil off-loading facility are preempted by 49 U.S.C. § 10501(b). (Valero Pet. 1.) Several parties filed replies both in support[2] of and in opposition[3] to Valero's petition.[4]

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[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 following parties filed replies in support of Valero's petition: Union Pacific Railroad Company; CSX Transportation, Inc. (CSXT); Canadian National Railway Company (CN); Phillips 66 Company (Phillips 66); Tesoro-Savage Petroleum Terminal, LLC, D/B/A Vancouver Energy (Vancouver Energy); Association of American Railroads (AAR); and QEP Energy.

[3] The following parties filed replies in opposition to Valero's petition: City of Benicia (Benicia); Association of Irritated Residents, Climate Solutions, Columbia Riverkeeper, Evergreen Islands, Friends of the Columbia Gorge, Friends of the Earth, Resources for Sustainable Communities, Friends of the San Juans, Spokane Riverkeeper, and Washington Environmental Council (collectively, Earthjustice); People of the State of California (California); Benicians; Safe Fuel and Energy Resources California (SAFER California); the Cities of Davis, Berkeley, and Oakland, the County of Yolo, and the Sacramento Area Council of Governments (collectively, California Local Government Agencies); and League of California Cities (League).

[4] James MacDonald also submitted two filings that appear to challenge the construction

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For the reasons discussed below, Valero's petition for a declaratory order will be denied, but the Board will provide guidance concerning other potential preemption issues.

BACKGROUND

Valero, a noncarrier, owns and operates an oil refinery in Benicia, Cal. (Valero Pet. 1.) According to Valero, 10% of gasoline consumed in California is produced in the Benicia refinery. (Id. at 8.) Valero currently receives crude oil at the refinery by marine vessel from Alaska and foreign sources, and by pipeline from producers in California, but does not receive any crude oil by rail.[5] (Id.) Valero seeks to install a crude off-loading facility because it has determined that it needs access to North American crude oil feedstock—which is economically and competitively accessible only by rail—to remain viable and competitive in the long term. (Id. at 8-9.) Valero states that the proposed off-loading facility would have the capacity to receive 50-car unit trains of crude oil twice per day (approximately 70,000 barrels per day), but that the operating capacity of the refinery would not change. (Id. at 8.)

In December 2012, Valero submitted its land use permit application for construction and operation of the off-loading facility at the Benicia refinery to the Planning Commission. The application stated that the facility would be served by Union Pacific Railroad Company (UP). (Id. at 9.) According to Valero, over the following three years, Benicia city staff and environmental consultants prepared an EIR[6] evaluating the environmental impact of the construction and operation of the off-loading facility. (Id. at 2.) Valero states that, in addition to addressing potential environmental impacts at the proposed facility location, the EIR disclosed potential environmental impacts from proposed UP rail operations between the Benicia refinery and California's borders with Oregon and Nevada. (Id. at 9.) The EIR did not include proposed mitigation for the potential environmental impacts of UP rail operations because Benicia city staff determined that such measures would be preempted by 49 U.S.C. § 10501(b). (Id. at 9-10.)

On February 11, 2016, the Planning Commission denied certification of the EIR and denied Valero's land use permit application. The Planning Commission enumerated 14 reasons for denying certification of the EIR, some of which were based on the potential effects of increased rail traffic outside of the off-loading facility location and others that addressed potential effects of the construction and operation of the off-loading facility itself. (See Valero Pet., Ex. 4 at 4-5.) Valero appealed the Planning Commission's decision to the Benicia City

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of Valero's off-loading facility under state and federal environmental law and do not address whether the Planning Commission's denials are preempted by federal law. (See MacDonald Reply, July 6, 2015; MacDonald Reply, July 8, 2016.)

[5] Valero states that the refinery does receive isobutane by rail and ships caustic, commercial coke, liquefied propane gas, and petroleum coke by rail. (Valero Pet. 8.)

[6] The EIR refers collectively to the draft EIR, the revised draft EIR, and the final EIR, all prepared by the City of Benicia, apparently to satisfy its obligations under the California Environmental Quality Act (CEQA). (Valero Pet. 9.)

Council. (Id. at 12.) The City Council voted on April 19, 2016, to defer a decision until September 20, 2016, to allow Valero to raise the issue of preemption with the Board.

Valero challenges the Planning Commission's denial of certification of the EIR and of the land use permit as impermissibly based on findings of environmental impacts related to UP's increased rail traffic. (Id. at 12.) Valero asserts that Benicia is engaged in impermissible indirect rail regulation, stating that "[t]he Planning Commission Resolution is so full of managing, governing and regulating rail transportation that it is not possible to determine with any degree of certainty what action the Planning Commission would have taken on the EIR or the permit if it had acted within the bounds of its authority." (Valero Pet. 16.) Valero maintains that the Planning Commission's refusal to certify the EIR and denial of the land use permit are federally preempted under § 10501(b) because they prevent rail transportation of crude oil to the refinery, deny Valero its right to receive rail service, and prevent UP from providing such rail service. Id.

UP, Vancouver Energy, AAR, Phillips 66, CN, CSXT, and QEP Energy support Valero's petition and ask the Board to provide guidance on the scope of permissible indirect rail regulation in these circumstances. (See, e.g., UP Reply 1.) Benicia also requests that the Board provide guidance on its ability to impose conditions on Valero that are designed to avoid or mitigate impacts related to rail operations, although it opposes the petition. (Benicia Reply 1.)

Benicia argues that, in denying certification of the EIR and approval of Valero's land use permit, it was exercising its local land use authority pursuant to CEQA. (Benicia Reply 2.) According to Benicia, its actions are not federally preempted, because Valero is a noncarrier and is not acting as an agent for a rail carrier in constructing and operating the off-loading facility. (Id. at 1-2, 7-8.) Earthjustice, California Benicians, SAFER California, California Local Government Agencies, and the League also ask the Board to find that the Planning Commission's decisions are not preempted.

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 eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See, e.g., 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, 675 (1989). Where appropriate, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue presented, as the Board will do here. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).

The Interstate Commerce Act (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 federal preemption provision contained in § 10501(b) bars the application of most state and local laws to railroad operations that are subject to the Board's jurisdiction.[7]

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[7] State or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically

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Because the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a), to be subject to the Board's jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be "transportation" and must be performed by, or under the auspices of, a "rail carrier." The statute defines "transportation" expansively to encompass any property, facility, structure or equipment of any kind 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, and handling of property. 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). Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Feb. 17, 2009); see also, N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 73-74 (2nd Cir. 2011).

The Board finds here that there is no preemption because the Planning Commission's decision does not attempt to regulate transportation by a "rail carrier." The Board's jurisdiction extends to rail-related activities that take place at transloading (or, as here, off-loading) facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations.[8] The record presented to the Board in this case, however, does not

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preempted as to any facilities that are part of transportation by rail carrier. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005). Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500, 507-08 (2001), recons. denied (STB served Oct. 5, 2001). Even where § 10501(b) preemption applies, there are limits to its scope. Overlapping federal statutes are to be harmonized, with each statute given effect to the extent possible. Moreover, states retain police powers to protect the public health and safety on railroad property so long as state and local regulation do not unreasonably interfere with interstate commerce. Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1095, 1097-98 (9th Cir. 2010); Green Mountain, 404 F.3d at 643.

[8] Compare Green Mountain, 404 F.3d at 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier qualified for preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967), City of Alexandria (ethanol transload facility operated under auspices of a rail carrier qualified for preemption), and Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 290-95 (1992) (an agent undertaking the obligations of a common carrier (i.e., performing services as part of the total rail service contracted for by a member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation), 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); High Tech Trans, LLC—Pet. for Declaratory
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demonstrate that Valero is a rail carrier or that it is performing transportation-related activities on behalf of UP or any other rail carrier at its off-loading facility.

Relying on Boston & Maine Corp.—Petition for Declaratory Order (Winchester), FD 35749 (STB served July 19, 2013), Valero argues that the Planning Commission's actions have deprived it of the right to receive common carrier rail service and are, thus, federally preempted under § 10501(b). Winchester, however, involved a local regulation that would have stopped a rail carrier from operating its existing common carrier rail service over the line in question. The Board determined that § 10501(b) preempted this regulation because it prevented the rail carrier from conducting its operations in interstate commerce. Unlike the facts in Winchester, Valero has not identified an attempt by the Planning Commission to regulate *UP's* operations. Here, Valero's challenge involves the Planning Commission's decisions regarding *Valero's* off-loading facility, and Valero is not a rail carrier, nor is it acting under the auspices of a rail carrier.

Valero also cites Norfolk Southern Railway v. City of Alexandria (Alexandria), 608 F.3d 150 (4th Cir. 2010), for the premise that a locality cannot indirectly regulate rail transportation by regulating noncarriers. Alexandria is inapposite, however, as it involved an ethanol transload facility constructed and owned by Norfolk Southern Railway Company and operated under its auspices. As noted above, Valero makes no allegation that it is a rail carrier or that it would be performing offloading under the auspices of a rail carrier at the facility at issue here.

Instead, the facts here are more analogous to the Board's decision in SEA-3, Inc.—Petition for Declaratory Order (SEA-3), FD 35853 (STB served Mar. 17, 2015). In that case, SEA-3—a noncarrier seeking to expand an offload facility served by a single rail carrier—claimed that the expansion of its facility was necessary for it to receive cost-effective propane. SEA-3, slip op. at 2. Portsmouth, a nearby city, sought to stop construction of the expanded facility, and SEA-3 claimed that Portsmouth opposed the project because it wanted to block the rail traffic that would travel through the city. Id. SEA-3 filed a petition with the Board arguing that any attempt by a locality or state to direct rail traffic or impose preclearance requirements on an offload facility is federally preempted. Id. The Board in SEA-3 found that the local government's participation in zoning litigation over the expansion of SEA-3's facility was not preempted and did not reflect undue interference with transportation by rail carriers. Id., slip op. at 6-7. The Board stated that if the locality "were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with [the railroad's] common carrier operations, those actions would be preempted under § 10501(b)." Id. at 7 (citing Winchester).

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Order—Newark, N.J., FD 34192 (Sub-No. 1), slip op. at 7 (STB served Aug. 14, 2003) (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).

Although Valero argues that the facts in this case are distinguishable from SEA-3, its arguments are not persuasive. As discussed above, Valero has not demonstrated that the Planning Commission's decisions unreasonably interfere with UP's common carrier operations. Accordingly, this situation, like the situation in SEA-3, does not reflect undue interference with "transportation by rail carriers" within the Board's jurisdiction under § 10501(b).

Benicia also seeks Board guidance on: (1) whether § 10501(b) preempts Benicia from imposing mitigation measures or conditions of approval of the use permit that would directly regulate the activities of UP; and (2) whether Benicia could impose mitigation measures or conditions of approval on Valero to alleviate indirect impacts related to the project that are caused by the activities of UP in delivering crude oil by rail. (Benicia Reply 16.) As an initial matter, any attempt to regulate UP's rail operations on its lines would be categorically preempted. CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005). Otherwise, state and local regulation is permissible where it does not unreasonably interfere with rail transportation. Ass'n of Am. R.R.s, 622 F.3d at 1097; Alexandria, 608 F.3d at 158, 160. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not discriminate against rail carriers or unreasonably burden interstate commerce. See Ass'n of Am. R.R.s, 622 F.3d at 1097; Green Mountain, 404 F.3d at 643. For example, local electrical, plumbing, and fire codes are generally applicable. Green Mountain, 643 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); see also Ass'n of Am. R.R.s, 622 F.3d at 1079-98. If the offloading facility were eventually to be constructed but the EIR or the land use permit, or both, included mitigation conditions unreasonably interfering with UP's future operations to the facility, any attempt to enforce such mitigation measures would be preempted by § 10501(b).

It is ordered:

1. Valero's petition for declaratory order is denied, and this proceeding is discontinued.

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

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

Commissioner Begeman, concurring:

I concur only in the Board's decision that the City of Benicia's Planning Commission certification and permit denials are not preempted by 49 U.S.C. § 10501(b).