51770 SERVICE DATE – NOVEMBER 15, 2023
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36696

GRAFTON AND UPTON RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board issues a declaratory order finding that the use of eminent domain by the Town of Hopedale, Mass., to take property on which Grafton and Upton Railroad Company plans to construct a transloading facility and related rail facilities, as well as an order by the Hopedale Conservation Commission requiring a permit to construct those facilities, are preempted.

Decided: November 14, 2023

On April 14, 2023, Grafton and Upton Railroad (GURR), a Class III rail carrier, filed a petition for declaratory order requesting that the Board find that certain actions by the Town of Hopedale, Mass., (the Town) are preempted under 49 U.S.C. § 10501(b). Specifically, GURR asks the Board to find that preemption applies to: (1) the Town's attempt to take by eminent domain approximately 130 acres of GURR's property located at 364 West Street in Hopedale where GURR is currently developing a transload facility and related facilities (the Property)[2]; and (2) the enforcement by the Hopedale Conservation Commission (the Commission) of an order that would prohibit GURR from constructing facilities on the Property without preclearance from the Commission (the Enforcement Order). (GURR Pet. 1.) For the reasons explained below, the Board finds that the Town's actions are preempted and will grant GURR's petition for declaratory order.

BACKGROUND

GURR owns and operates a 16.5-mile rail line that bisects the Property and runs in a north-south direction between a connection with CSX in North Grafton, Mass., and Milford, Mass. (GURR Pet. 4.) According to GURR, it acquired the Property in 2020-2021 specifically to expand its rail operations to meet current customer demand and expected growth. Grafton & Upton R.R. v. Town of Hopedale, Case No. 4:22-cv-40080-ADB, slip op. at 1-2 (D. Mass. Apr. 3, 2023).

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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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] GURR acquired a total of 198 acres of property located at 364 West Street to construct its transload facility and related facilities. (GURR Pet. 1-2.) The Town seeks to take approximately 130 acres of this property. (Id. at 2.)

GURR notes that its petition is before the Board as a result of an order from the United States District Court for the District of Massachusetts (District Court). (GURR Pet. 3.) GURR states that it sought an injunction from the District Court after the Town authorized the use of eminent domain to take the Property and the Commission issued the Enforcement Order, which occurred on July 11, 2020, and July 14, 2020 respectively. (Id. at 2, 7, 14, 16.) As GURR explains, the District Court granted an injunction[3] and ordered GURR "to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Commission's Enforcement Order."[4] (Id. at 3 (quoting Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op. at 27).) GURR seeks a finding from the Board that 49 U.S.C. § 10501(b) preempts the use of eminent domain by the Town and the Enforcement Order of the Commission on the grounds that they unreasonably interfere with rail transportation. (GURR Pet. 2.)

GURR states that it anticipates steady growth in demand for its rail services and has received inquiries from customers that require transloading services that will potentially involve GURR handling an additional 1,000 rail cars annually. (Id. at 4-5.) In addition, GURR claims that the track and other facilities to be built on the Property will be controlled and operated by GURR and will be used for transloading and other rail transportation purposes. (GURR Pet. 5.) Specifically, GURR states that, when completed, the facilities on the Property will be used for transloading, temporary storage, services related to transloading or temporary storage, and additional rail activities necessary to support rail operations, such as repairs to rail-related equipment and the construction and operation of switching tracks, storage tracks, and yard tracks to relieve congestion and facilitate service. (Id.)

According to GURR, it has already taken significant steps in the development of the Property. GURR states that it has created a site plan, obtained private financing,[5] made arrangements with customers for use of the facilities, and begun construction, including clearing and grading the land. (GURR Pet. 11 n.6, Ex. 1, V.S. Delli Priscoli at ¶¶ 19-21.) GURR claims that it has spent over $1 million on developing the Property and has coordinated with governmental entities concerning environmental compliance issues, including the U.S. Army

[3] The injunction prohibits the Town from recording any notice of taking of any portion of the 198 acres of GURR's property at 364 West Street and from taking any action to enforce the Enforcement Order during the pendency of the Board's proceeding. Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op. at 27.

[4] GURR attached a copy of the District Court's decision at Exhibit 2. The District Court found that GURR had met its burden for the issuance of a preliminary injunction, including demonstrating that GURR is likely to succeed on the merits of its claims that the taking of the Property and the Enforcement Order are preempted. Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op. at 20-27.

[5] GURR states that it has secured private financing to undertake the initial site improvements for the use of the Property for rail purposes and has pending private financing for the full development of roads, rail, and other infrastructure. (GURR Pet. 11 n.6, Ex. 1, V.S. Delli Priscoli at ¶ 19.)

Corps of Engineers and the Massachusetts Department of Environmental Protection. (Id. at Ex. 1, V.S. Delli Priscoli at ¶ 21.) According to GURR, it intends to open the rail facilities on the Property by the summer of 2024. (Id. at 5-6.)

GURR claims that, for purposes of § 10501(b), it is clearly a "rail carrier" and that the transloading, temporary storage, and other operations to be performed on the Property constitute "transportation." (Id. at 10-11.) Accordingly, GURR argues that a taking of the Property would be preempted because it would prevent GURR from conducting its planned rail transportation activities on the Property. (Id. at 11-13.) GURR further asserts that, under Board and court precedent, state or local laws that impose permitting or preclearance requirements as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are categorically preempted. (Id. at 14-15.) GURR argues that the Enforcement Order is a preempted preclearance and permitting requirement because that order asserts that GURR acted without a permit or prior notification, seeks to stop GURR's construction of rail facilities, and would require GURR to reverse the development work that it has already completed.[6] (Id. at 16-17.)

On May 11, 2023, the Town filed a reply to GURR's petition. The Town recounts the long and complicated history of litigation regarding ownership of the Property and states that ongoing litigation in state court could result in a finding that GURR did not lawfully acquire the Property.[7] (Town Reply 3-9, May 11, 2023.) According to the Town, GURR acquired the Property in a manner that deprived the Town of a statutory right of first refusal under Massachusetts General Laws Chapter 61. (Id. at 1.) The Town argues that because GURR could be stripped of its ownership of the Property, thereby rendering GURR's petition moot, Board precedent requires that this proceeding be dismissed or held in abeyance until litigation regarding the state law property issues is resolved. (Id. at 19-20.)

The Town further argues that if the Board does address the merits in this proceeding, it must hold that preemption does not apply. According to the Town, a taking of railroad property is not categorically preempted. (Town Reply 21, May 11, 2023.) Rather, the Town asserts that preemption only applies to a taking where it would unreasonably interfere with rail transportation. (Id.) The Town claims that the taking will not interfere with GURR's current rail operations because it applies only to land used for future expansions of operations, and not to any land currently in use by GURR for railroad purposes or transloading. (Id. at 21-22.)

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[6] On April 24, 2023, the American Short Line and Regional Railroad Association filed comments in support of GURR's petition.

[7] On May 16, 2023, GURR filed a motion to strike statements regarding the "state law property dispute" from the Town's reply. GURR argued that the statements should be stricken from the record because an April 28, 2023 Board order granting an extension of time for the Town to file its reply stated that the Board does not view the state law property dispute between the Town and GURR as relevant to this proceeding. (GURR Mot. 4.) The Board finds that no party would be prejudiced by accepting these statements into the record. Accordingly, in the interest of a more complete record, the Board will deny GURR's motion to strike. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

With respect to future operations, the Town argues that GURR's plans for its transloading facilities and related development should not be considered in any preemption analysis because they are not likely to come to fruition. (Id. at 22-23.) According to the Town, GURR's planned facilities cannot be built as proposed because the grade of the land is too steep and GURR devised its plans as a litigation strategy or to improperly invoke Board jurisdiction purposes unrelated to rail transportation. (Id. at 23-24.) In addition, the Town further states that GURR's senior leadership is involved in litigation that has effectively crippled the company such that GURR cannot execute its plan. (Id. at 24-25.)

The Town further argues that even if GURR shows that it can and will construct the facilities as planned, preemption would not apply because GURR has not shown that transloading operations (which the Town seems to refer to as "offload[ing] and stor[age of commodities] near a train") will be "integrally related" to railroad operations. (Id. at 27-28.) The Town does not present any arguments defending the Enforcement Order. (See generally id.)

On July 18, 2023, the Town filed a motion to supplement the record with an Affidavit of Jon Delli Priscoli, the owner and president of GURR, dated June 2, 2023 (June 2nd Aff.), that was submitted to the Superior Court of Massachusetts, Suffolk County on July 10, 2023, in Milanoski v. Delli Priscoli, C.A. No. 2384CV00071-BLS2.[8] The Town notes that Mr. Delli Priscoli states in the June 2nd Aff. that GURR's site plan dated August 1, 2022, "was not workable since slope issues make track installation impractical." According to the Town, this statement is an admission by GURR that it is "impossible for GURR to use the property for the purported transload facility" and that GURR therefore does not have a bona fide plan to build a transloading facility on the Property. (Town Mot. 1-2, July 18, 2023.) On August 4, 2023, GURR filed a reply to the Town's motion, supported by a verified statement from GURR's engineer and a more recent verified statement from Mr. Delli Priscoli, dated August 2, 2023. According to GURR, it still plans to build a transloading facility on the Property, and the statement from the June 2nd Aff. reflects Mr. Delli Priscoli's determination that the August 1, 2022 plan is not financially practical at this time compared to a new, lower-cost plan that it has developed. (Id. at Ex. 3, Second V.S. Delli Priscoli at ¶ 18.) GURR's revised plan, which is dated April 14, 2023, and revised as of July 27, 2023, is provided as an attachment to its reply. On August 25, 2023, the Town filed a reply to GURR's reply and a motion for leave to file a reply to a reply.[9] The Town argues that the fact that GURR only provided its new plan when it needed to respond to the Town's most recent filing, along with GURR's statement that the plan is subject to further change, call into question whether GURR has a workable, legitimate plan to use the Property for rail purposes. (Town Reply 2, Aug. 25, 2023.) The Town also asserts that GURR's reply relies on an incorrect legal standard "to invoke preemption that is based on little more than railroad ownership of property and a statement of intent to develop that property for railroad use." (Id. at 4.)

[8] A copy of the affidavit is provided as Exhibit 1 of the Town's motion.

[9] Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept the Town's August 25, 2023 reply in the interest of a complete record. See City of Alexandria, FD 35157, slip op. at 2 (allowing a reply to a reply "[i]n the interest of compiling a full record").

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has broad discretion to issue a declaratory order to terminate a controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). The Town argues that the Board should refrain from issuing an order. As the Town's reply notes, there has been extensive state court litigation, which remains ongoing, regarding GURR's acquisition of the Property and whether that acquisition deprived the Town of a statutory right of first refusal under Massachusetts General Laws Chapter 61. (Town Reply 1, 3-9, May 11, 2023.) The Town argues that if it prevails in this litigation, GURR will not own the Property and GURR's preemption argument will be moot. (Id. at 19.) According to the Town, Board precedent dictates that it dismiss this proceeding or hold it in abeyance until the state law property issues have been resolved. (Id.) The Board disagrees.

In certain of the preemption cases identified by the Town in support of its argument that the preemption question is premature, the Board noted that the state courts, which have concurrent jurisdiction, could resolve the state property law issues as well as the preemption questions, rather than referring the preemption questions back to the Board. See Grafton & Upton R.R. Co.—Pet. for Declaratory Ord., FD 36518, slip op. at 3 n.4 (STB served Nov. 3, 2021) (noting that "the state court may decide to address all of the issues together [including the preemption question] itself"); City of Milwaukie—Pet. for Declaratory Ord., FD 35625, slip op. at 5 (STB served Mar. 25, 2013) ("[I]t would also be appropriate for the state or municipal court to resolve the parties' preemption dispute . . . ."). Here, the District Court determined that it had jurisdiction over the preemption claims. Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op at 5-12. Nonetheless, the District Court ordered GURR to file a petition for declaratory order with the Board "for the purpose of the [Board] issuing a declaratory order regarding the Town's proposed taking and the Conservation Commission's Enforcement Order." Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op at 27. Thus, the Board interprets the District Court's order as referring the preemption questions to the Board for resolution.

The Town cites certain cases in which, it argues, the Board would not address a petition for declaratory order where the resolution of an ongoing state property law dispute could have informed or mooted the proceeding before the Board. (Id. at 15-19.) The Town also claims that "the Board cannot meaningfully apply its preemption analysis until the Massachusetts courts have resolved the underlying state law property issues." (Id. at 20.) The cases the Town cites, however, are distinguishable from the present case. In some cases, the Board was being asked to resolve a state law question, which is a matter for the state courts.[10] In others, the Board needed to make a determination it could not make without resolution of the underlying state law issues that would clarify the dispute for the Board.[11] Specifically, in the primary cases relied upon by

[10] E.g., Allegheny Valley R.R. Co.—Pet. for Declaratory Ord.—William Fiore, FD 35388, slip op. at 4 (STB served Apr. 25, 2011) (declining to address state property law dispute).

[11] E.g., V&S Ry., LLC—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 7 (STB served July 12, 2012) (determination of state law property rights would "inform the Board's determination" or question presented to the Board).

the Town, the Board's resolution of the issues presented to it in those cases was "contingent upon the interpretation of an easement"[12] or encompassed regulatory determinations (for example, whether track was mainline or ancillary, as opposed to a preemption question) that would vary in scope depending on a state law matter.[13] By contrast, what the Board is deciding here is whether the Town can presently use eminent domain or the Enforcement Order to prevent GURR's development of property to which it holds title, or whether such regulatory action is preempted. The Board need not know the ultimate outcome of the state court litigation to make that determination.

The Town and the Commission—of their own accord—set into motion the events that have necessitated the Board's involvement while the state property litigation remains ongoing. As the Town states, "[w]hile litigation in the Superior Court and the Land Court was proceeding," the Town "considered its options" and decided "to exercise its power of eminent domain to acquire [the Property]." (Town Reply 9, May 11, 2023.) In tandem, the Commission issued the Enforcement Order. (GURR Pet. 7.) In other words, the Town and Commission did not wait until the state property litigation resolved before taking action. As a result, the District Court entered a preliminary injunction and referred the matter to the Board for resolution notwithstanding the state court litigation. And the Town has not presented the Board with any compelling reason why the Board should not likewise move forward. Moreover, if the Board were to hold this proceeding in abeyance until the conclusion of the state court proceedings, GURR would be unable to develop the Property for an indeterminate period of time, which the District Court held would cause GURR irreparable harm and is a hardship and public interest factor that weighs in GURR's favor. Grafton & Upton R.R., Case No. 4:22-cv-40080-ADB, slip op at 23-24, 26.[14] For these reasons, the Board will move forward now and exercise its discretion to issue a declaratory order in this case as requested by the District Court.

The Board's jurisdiction over "transportation by rail carriers" is "exclusive," and "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." 49 U.S.C. § 10501(b). 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)). Preemption under 49 U.S.C. § 10501(b) applies to "transportation by rail carrier" and "transportation" covers "a . . .

[12] Grafton & Upton R.R. Co.—Pet. for Declaratory Ord., FD 36518, slip op. at 2 (STB served Nov. 3, 2021).

[13] Allied Industrial Development Corporation—Pet. for Declaratory Ord., FD 35477, slip op. at 6 (STB served Sept. 17, 2015).

[14] The District Court's referral and that court's findings as to irreparable harm and likelihood of success on the merits distinguish this case from City of Milwaukie—Petition for Declaratory Order, FD 35625, slip op. at 3-5 (STB served Mar. 25, 2013) with respect to the Board's decision to issue a declaratory order. However, if the courts ultimately determine that the railroad does not have a state law property interest in the land, preemption may not shield the railroad from available state law remedies. See id., slip op. at 4-5 & n.14.

facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," as well as "services related to that movement." 49 U.S.C. § 10102(9).

Both the Board and the courts have found that the Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws, including condemnation of unused railroad property, if those laws would have the effect of foreclosing, or unduly restricting, present or future transportation by rail carrier. See City of Ozark v. Union Pac. R.R., 843 F.3d 1167 (8th Cir. 2016) (order requiring railroad to restore crossing closed in violation of state law preempted if restoration will unduly interfere with present or future rail operations); Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675, 681-82 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way not in use by the railroad preempted because it would interfere with current and potential future rail operations); City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 862 (8th Cir. 2005) (affirming Board's determination that taking would unduly interfere with present and future railroad operations); Tri–City R.R.—Pet. for Declaratory Order, FD 35915, slip op at 7-8 (STB served Sept. 14, 2016) (state law condemnation and acquisition by two cities for an at-grade crossing at location that would unreasonably interfere with a railroad's present and future operations preempted); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196, slip op. at 4-5 (STB served Mar. 1, 2010) (condemnation action to take property on which the railroad was not actively operating preempted when proposed condemnation would unreasonably interfere with railroad's future plans). Additionally, state law preclearance or permitting requirements that could be used to deny or unreasonably delay a rail carrier's ability to conduct rail operations typically are categorically preempted, without requiring a factual analysis of their effect on transportation. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) (holding that state land use statute requiring preconstruction permits was preempted as applied to railroad transload facility); City of Auburn, 154 F.3d at 1030-31 (affirming the Board's finding that ICCTA preempted a local environmental permitting requirement); Soo Line R.R.—Pet. for Declaratory Order, FD 35850 (STB served Dec. 22, 2014) (holding that environmental and wetlands review and permitting requirements were categorically preempted); Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 5 (STB served Jan. 27, 2014) (holding that ICCTA "prevent[s the town] from imposing environmental and land use regulations and permitting requirements that could be used to deny or unreasonably delay the rail carrier's ability to use its property for railroad operations"). In this case, both the taking of the Property and enforcement of the Enforcement Order are preempted, as explained further below.

The Town argues that a taking of railroad property is not preempted if a railroad's claimed future use of that property is unlikely to come to fruition.[15] In support of this proposition, the Town cites a decision by the Supreme Court of Ohio, Girard v. Youngstown Belt Ry., 134 Ohio St. 3d 79 (2012). That state court case is easily distinguishable from the present case. In Girard, as in the current case, a local government sought to take railroad property via eminent domain. The railroad in Girard argued that the proposed taking was preempted because

[15] As noted above, the Town also argues that the taking will not interfere with GURR's current rail operations. However, GURR's petition focuses on interference with its planned future use of the Property and the Board therefore need not determine if the taking would interfere with GURR's current rail operations.

it might use the property for future expansion and development to accommodate the growing demand for rail service in the area. Girard, 134 Ohio St. 3d at 91. However, the court found that this claimed potential development was too speculative to establish that the property would be used for rail transportation in the future. It noted that not only was the land vacant, but also that the railroad "ha[d] done nothing in terms of development from its purchase of the land in 1997 up to the present day [in 2012, 15 years later]," had no concrete plans for the development of the property, and had already entered into a contract to sell the property to another party for activity that did not constitute transportation by rail carrier. Id. at 90-92. The court went on to hold that it can be appropriate in determining if a taking is preempted to consider a railroad's future intentions for its property despite a lack of concrete plans, but only where the land at issue contains an existing rail line or right-of-way. Girard, 134 Ohio St. 3d at 91. The Town relies on this language in claiming that GURR's plans for the Property cannot support a finding of preemption because GURR's plans are not concrete, and it is not seeking to take GURR's existing infrastructure. (Town Reply 26, May 11, 2023.)

The Board need not decide whether to endorse the court's analysis in Girard because, here, GURR recently purchased the Property, has detailed plans for the Property, and has taken numerous concrete steps to execute its plans. First, GURR acquired adjoining properties in 2020 and 2021 specifically "to support its rail operations to meet current customer needs and expected growth" and developed detailed plans for a transload facility, which it seeks to complete by the summer of 2024. (GURR Pet. 5-6, Ex. 3, Affidavit Milanoski at ¶ 9, Ex. 1 V.S. Delli Priscoli at ¶¶ 10, 20.) Subsequently, GURR acquired private funding for the project, made arrangements with customers for the use of the facility, and began work on the project, which has cost it over $1 million to date. (Id. at 11 n.6, Ex. 1, V.S. Delli Priscoli at ¶¶ 19, 21.) In contrast to these concrete steps taken by GURR, the railroad in Girard kept the property vacant for 15 years, claimed it might use certain property to accommodate future demand for rail service, and appeared to contradict this claim by entering into an agreement to sell the property to another party for purposes unrelated to rail transportation.

The Town also argues that GURR's plans are unlikely to come to fruition because the planned facilities cannot be built due to topography issues. (Town Reply 23, May 11, 2023.) However, GURR has since revised its plans and now intends to build a smaller and less expensive facility that largely avoids having to remediate the topography issues. (GURR Reply 6.) In addition, the Board is not persuaded by the Town's claim that Mr. Delli Priscoli's statement that GURR's August 1, 2022 plan "is not workable since slope issues make track installation impractical" demonstrates that GURR has no bona fide, workable plan for building a transloading facility.[16] As explained in Mr. Delli Priscoli's more recent verified statement regarding his comments, the August 1, 2022 plan was developed at a time when Mr. Delli Priscoli had resigned as president of the company and was not involved in its day-to-day operations. (Town Mot. Ex. 3, Second V.S. Delli Priscoli at ¶¶ 4-8.) In January 2023, Mr. Delli Priscoli returned to his role as president and reviewed the August 1, 2022 plan. (Id. at Ex. 3, Second V.S. Delli Priscoli at ¶ 10.) He states that he became concerned about the cost of remediating the slope issues and concluded that although the facility could be built according to

[16] In the absence of any objection from GURR, the Town's motion to supplement the record will be granted.

the August 1, 2022 plan, the large scale of the plan may not be necessary or cost-effective at this time given current economic conditions. (Id.) He then worked with engineers to develop a scaled down plan that could be expanded in the future if warranted by demand growth. (Id. at Ex. 3, Second V.S. Delli Priscoli at ¶¶ 13, 18.) According to Mr. Delli Priscoli, his statement from the June 2nd Aff. was meant to reflect his business judgment that the expense of dealing with the slope issue made the August 1, 2022 plan impractical at this time compared to a scaled down version of the plan. (Id. at Ex. 3, Second V.S. Delli Priscoli at ¶ 18.) Mr. Delli Priscoli states that GURR's intention to develop the Property as a transloading facility has never wavered and "continues to be an important component of GURR's future rail operations." (Id. at Ex. 3, Second V.S. Delli Priscoli at para. 12, 20.) In short, Mr. Delli Priscoli's statement from the June 2nd Aff. indicates that, in his judgment, the August 1, 2022 plan is not currently workable from a financial perspective and that a revised plan was therefore preferable. Contrary to the Town's argument, it does not demonstrate that GURR currently lacks a bona fide, workable plan for constructing a transloading facility.

The Town argues that GURR's disclosure of its changed plans only after the Town alerted the Board to Mr. Delli Priscoli's Superior Court affidavit, and GURR's statement that its new plan is potentially subject to further change, call into question whether GURR's plan is bona fide and workable. (Town Reply 2, Aug. 25, 2023.) According to the Town, under Board and court precedent, GURR has to show that it has a "credible, implementable plan" to use the Property for rail purposes and cannot rely merely on a stated intent to do so or on speculative, conceptual plans. (Id. at 7.) However, "the Board can consider the railway's future plans . . . and make its own evaluation of how likely it is that the plans will come to fruition." City of Lincoln v. STB, 414 F.3d 858, 862 (8th Cir. 2005). While GURR should have informed the Board sooner of its change in plans, the Board credits GURR's statements that Mr. Delli Priscoli, upon returning to his role as president of GURR, revised the plans approved by his predecessors—based on his business judgment and current economic conditions—and maintains GURR's intent to develop a transloading facility. Moreover, GURR has done substantially more than merely state its intent to construct a transloading facility or produce conceptual plans. The Board is persuaded that GURR's actions in purchasing a large plot of land, retaining an engineering firm to develop plans for a transloading facility, obtaining private financing, making arrangements with customers for use of the facilities, and spending over $1 million on developing the Property so far, sufficiently demonstrate its intent to construct rail transportation facilities on the Property.

The Town's theory as to why GURR has expended substantial resources on purchasing and developing the Property and on litigation despite, according to the Town, "having no real plan" for a transloading facility, is that GURR is seeking to create the false appearance that it intends to use the Property for railroad purpose to improperly invoke federal preemption and then use the Property for purposes unrelated to rail transportation. (Town Reply 8-9, Aug. 25, 2023; Town Reply 24, May 11, 2023.) However, if GURR does develop the Property for purposes unrelated to rail transportation, all of GURR's actions and expenditures would likely have been for naught, because regulation of that development would likely not be preempted. E.g., Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1332 (11th Cir. 2001) (holding that application of municipal ordinances to noncarrier operating on land leased from railroad was not preempted); see also Franks Inv. Co. v. Union Pacific R.R., 593 F.3d 404, 414

(5th Cir. 2010) (state law actions preempted as applied only if "they have the effect of unreasonably burdening or interfering with rail transportation"). In addition, the taking of the Property via eminent domain would likely not be preempted if it is developed for purposes unrelated to rail transportation. The record does not support a finding that GURR has expended such considerable time and resources as a subterfuge so that it can develop the property for purposes unrelated to rail transportation.

The Town also argues that GURR's plans are unlikely to come to fruition because of an ongoing dispute among senior GURR management that has crippled the company. (Town Reply 25, May 11, 2023.) However, GURR supported its petition with a Verified Statement from Mr. Delli Priscoli—which is dated after the date of the hearing that the Town relied on to make this argument[17]—affirming that GURR expects to open the facility (perhaps as soon as next year). (GURR Pet. Ex. 1, V.S. Delli Priscoli at ¶ 22.) Even if this dispute is currently preventing GURR from making progress on the development of the Property, that does not establish that the project has been scrapped or that it is unlikely to come to fruition.

The Town further claims that preemption will not apply to the proposed activities because they are not "integrally related" to rail transportation, but rather are "just . . . some activity that economically benefits from being near a railroad." (Town Reply 27, May 11, 2023.) The argument is not persuasive. Transloading is part of "transportation by rail carrier," 49 U.S.C. § 10501(b)(1), and subject to the Board's exclusive jurisdiction, when performed or operated by, or under the auspices of, a rail carrier. Green Mountain R.R. Corp., 404 F.3d at 642; see also New York & Atl. Ry. Co. v. Surface Transp. Bd., 635 F.3d 66, 72 (2d Cir. 2011) (citing Town of Babylon and Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057, slip op. at 5 (STB served Sept. 26, 2008)). GURR's plans are clearly part of "transportation by rail carrier," given that GURR—a rail carrier—plans to engage in transloading and associated temporary storage. Such activity is not merely "activity that economically benefits from being near a railroad." Rather, the loading, unloading, and temporary storage activities that comprise transloading indisputably facilitate the movement of property by rail and thus are part of "transportation."[18] Del Grosso v. STB, 804 F.3d 110, 118 (1st Cir. 2015) (stating that the fact that transloading activities involving loading and unloading materials from rail cars and temporary storage of materials constitute "transportation" is an "indisputable point"); see also N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 249 (3rd Cir. 2007) (transloading falls within the definition of "transportation"). The other activities to be conducted by GURR on the

[17] The Verified Statement is dated April 13, 2023. (GURR Pet. Ex. 1, V.S. Delli Priscoli at 8.) The hearing relied upon as evidence by the Town occurred on April 6, 2023. (Town Reply Ex. 6, May 11, 2023.)

[18] The Town's assertions that GURR has not explained how the activities of its "prospective tenants" will be "integrally related" to rail service are misplaced. (See Town Reply 27-28, May 11, 2023.) GURR has not stated that customers or "tenants" will occupy or operate at any of the proposed facilities. Rather, GURR explains that it will operate all the facilities on the Property and that such facilities will be used to transload various commodities for customers and to engage in activities to support this transloading, such as temporary storage and equipment repair, all of which constitute "transportation by rail carrier." Thus, there is nothing for GURR to explain with respect to the potential activities of its customers.

Property are those necessary to support its rail operations, such as repairs to rail equipment and the construction and operation of switching tracks, storage tracks, yard tracks. These activities, which will be conducted by a rail carrier, constitute "transportation" because they involve facilities, instrumentalities, and equipment related to the movement of property (tracks and rail equipment) and services related to that movement (repairs and operation of tracks and rail equipment). Because the Town's attempted taking would foreclose GURR's development of the property for rail "transportation" purposes, it is preempted.

The Town cites three cases in support of its argument,[19] all of which are inapposite here. In Hi Tech Trans, FD 34192, slip op. at 4-5, the Board held that preemption did not apply to regulation governing transportation of certain materials by truck on public roads prior to arriving at a transload facility. The Board noted that "section 10501(b) preemption applies to a rail intermodal transfer facility" but held that the regulations in question were not preempted because they applied to truck transportation on public roads rather than transportation by rail carrier. Id. The current case does not involve regulation of activities unrelated to rail transportation occurring outside rail facilities but rather the regulation of GURR's planned transloading facilities and facilities necessary to support its rail operations, such as additional tracks and facilities for the repair of rail equipment. In Grafton & Upton Railroad, 417 F. Supp. 2d at 176, the activities at issue were not subject to preemption because they were not provided by a "rail carrier" or on behalf of a "rail carrier." Here, in contrast, the facilities on the Property will be operated by GURR, which is a rail carrier. In Del Grosso, 804 F.3d at 117-21, the court initially vacated and remanded the Board's decision finding that activities performed on behalf of a rail carrier at a facility that received wood pellets by rail and processed them for transloading onto trucks constituted "transportation by rail carrier" and that regulation of those activities was preempted. However, on remand, the Board provided further explanation and reached the same conclusion, reasoning that the processing facilitated transloading and involved services related to the transportation of property by rail, and that remand determination was affirmed by the same court. Del Gross v. STB, 898 F.3d 139, 145-46, 150 (1st Cir. 2018).

As noted, the Town does not defend the Enforcement Order, and makes only a few passing references to it in the context of explaining what the District Court ordered. (Town Reply 10, May 11, 2023.) The Town does not respond to GURR's argument that the Enforcement Order is categorically preempted because it is a preclearance or permitting requirement that can be used by a local government to prevent a railroad from engaging in rail construction, maintenance, or operations. The Board will nonetheless address the application of preemption with respect to the Enforcement Order.

For the reasons explained above, the Board finds that the record supports a finding that GURR is in the process of constructing facilities to be used for "transportation by rail carrier." The Board and the courts have held that state or local permitting or preclearance requirements, including environmental and land use permitting requirements, of such facilities are categorically preempted. See, e.g., Green Mountain R.R. v. Vermont, 404 F.3d at 643 (2d Cir. 2005); City of

[19] The Town cites Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ, FD 34192 (STB served Nov. 20, 2002); Grafton & Upton Railroad v. Town of Milford, 417 F. Supp. 2d 171 (D. Mass. 2006); and Del Grosso, 804 F.3d 110.

Auburn, 154 F.3d at 1030-31; Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 4 (STB served Jan. 27, 2014). Thus, the Commission's Enforcement Order, which seeks to impose environmental permitting requirements on the construction of GURR's facilities, is preempted.

It is ordered:

1. The Town's motion to supplement the record and motion for leave to file a reply to a reply are granted.

2. GURR's petition for declaratory order is granted.

3. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz