Any formal written determination from the Board on whether BNSF's construction of an intermodal facility in Wittman is preempted would have to be obtained via a declaratory order proceeding. We are able to provide informal, non-binding guidance on the Board's preemption case law generally but cannot weigh in on how the Board might decide this specific preemption issue.

Preemption

Many laws established by state and local governments do not apply to railroads – they are preempted by federal laws that address the same subject matter. The relevant statute gives the Board "exclusive" jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(b). What constitutes "transportation" is defined broadly, and includes any property, facility, structure, or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9)(A). What constitutes a "railroad" is also defined broadly, including "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). As a result, state and local laws generally cannot be used to regulate rail transportation. The purpose of § 10501 is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce.

There are two types of preemption: categorical and as applied.

Categorical preemption is when a state or local regulation is wholly or "per se" preempted due to the nature of the regulation. There are two types of state or local regulation that are categorically preempted: permitting or preclearance requirements that could be used to deny a rail carrier the right to construct facilities, conduct operations, or proceed with activities the Board has authorized; and matters directly regulated by the Board, like railroad rates, services, construction authority, and abandonments or discontinuances of service. As a result, a city or a state cannot, for example, require a railroad to obtain a license from them to build new track or railroad-related infrastructure or allow a railroad to discontinue service.

As applied preemption, sometimes also referred to as implied preemption, is when state or local actions are preempted only if they would unreasonably burden or interfere with rail transportation. This is a fact-specific determination based on the nature of the action and the effect on rail transportation. For example, eminent domain laws established by a state or local government generally cannot be used by a non-railroad to condemn or take over railroad rights-of-way where the Board has not authorized abandonment, because condemnation of railroad property could force a railroad to cease or alter its operations.

Both the Surface Transportation Board and courts can rule on preemption-related questions, and there is no single test that defines when preemption applies. Whether a particular activity is considered part of "transportation by rail carrier" is a case-by-case,

fact-specific determination. In many cases, it is not clear if a state or local law is preempted. In these instances, the Board or a court will look at a range of factors including: (1) the extent to which the enforcement of the local ordinance will impact railroad operations; (2) whether the law directly targets or discriminates against rail transportation; and (3) if train movements or other core railroad operations are conducted on property that is subject to the law in question. On the other hand, a law may impose a monetary cost on a railroad and not be preempted. For example, laws requiring railroads to pay for improvements to public sidewalks on their property, build fencing along their lines, or incur other expenses have been found permissible. See Adrian & Blissfield RR. Co. v. Village of Blissfield, 550 F.3d 533 (6th Cir. 2008) (PDF attached).

When there is a question as to the applicability of Board jurisdiction (for construction authority, for example) or federal preemption, parties often bring a petition for declaratory order to the Board to decide the issue.

For your reference, here are three Board decisions on petitions for declaratory order on the question of preemption – the first two finding preemption applied, and the third finding preemption did not apply:

1. Soo Line Railroad—Petition for Declaratory Order, STB Docket No. FD 35850 (STB served Dec. 23, 2014). In this decision the Board found that federal law preempts state and local permitting and preclearance requirements and other state and local laws that would prohibit or unreasonably interfere with a track extension project in a rail yard owned and operated by Canadian Pacific Railway.
2. Grafton & Upton Railroad—Petition for Declaratory Order, STB Docket No. FD 35752 (STB served Sept. 19, 2014). In this decision the Board found that federal law preempts state and local preclearance regulations and other requirements that would prohibit or unreasonably interfere with the Grafton & Upton Railroad Company's construction and operation of a liquified petroleum gas transload facility. Here the Board found that the railroad's transloading activities would be part of their rail operations, and thus preemption applied.
3. Grafton & Upton Railroad—Petition for Declaratory Order, STB Docket No. FD 36464 (STB served Dec. 18, 2024). In this decision the Board denied a petition filed by Grafton & Upton Railroad Company seeking a determination that federal law preempts efforts by the Town of Hopedale, Mass., to pursue remedies under state and local law related to Grafton & Upton's acquisition of control and use of certain real property in Hopedale. Instead, the Board concluded that Hopedale's efforts were not preempted and therefore denied the petition for a declaratory order.

Declaratory Orders

As general information on the declaratory order process, filing a petition for declaratory order (the initial filing in such a case) costs $1400 and can be filed via our e-filing portal here. More information on filing procedures generally is available here. Here is a link to the docket listing for Docket FD 35850 mentioned above, a fairly simple declaratory order case

on preemption – this was initially filed in July 2014, and a decision was issued by the Board in December 2014. In contrast, here is a link to the docket listing for Docket FD 35752 mentioned above, a case about preemption with more interested parties and more filings – this one was initially filed in July 2013, and a final decision was issued by the Board in October 2014. In terms of process, when a petition like this is filed, the Board's regulations at 49 C.F.R. 1104.13 provide 20 days for replies to the petition. From there, the process can vary based on the complexity of the case, as you can see by comparing the two dockets linked above. There is not a regulatory or statutory deadline for the Board to issue a decision in a declaratory order proceeding, so the timing of a decision can vary, although the Board generally seeks to resolve matters before it as expeditiously as possible.

The Board's authority to issue declaratory orders is discretionary and is used to "eliminate controversy or remove uncertainty." In deciding a petition for declaratory order, the Board may grant the petition and provide guidance to clarify the issue (as in the Soo Line and 2014 Grafton & Upton cases above), or the Board may deny the petition, either because it finds against the petitioner (as in the 2024 Grafton & Upton case above) or because it finds there is no controversy to resolve. When the Board denies a petition for declaratory order it sometimes provides some guidance on the issue (here is one such case), but the Board can also simply deny the petition and say there is no uncertainty (here is an example).

Construction

With regard to construction authority, which is touched on in Vice Chair Lesko's letter, prior Board authorization is necessary to construct and operate new rail lines that are part of the interstate rail network.

There are three general types of railroad track:

1. Railroad lines that are part of the interstate rail network, which require a Board license as well as an appropriate environmental review under the National Environmental Policy Act (NEPA) and the Board's environmental rules;
2. Track known as "ancillary track," such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906 (or an environmental review under NEPA), but is subject to the Board's jurisdiction under 49 U.S.C. 10501(b) such that most state and local regulation of such track is preempted; and
3. Track called "private" track, which is not part of the interstate rail network or subject to the Board's jurisdiction because the track is not intended to serve the general public.

Here are two cases in which the Board has discussed the different types of track and railroad projects:

1. Tri-City Railroad Company—Petition for Declaratory Order, STB Docket No. FD 36037 (STB served June 1, 2017). This case discusses railroad track serving an industrial park.
2. Brazos River Bottom Alliance—Petition for Declaratory Order, STB Docket No. 35781 (STB served Feb. 19, 2014). This case discusses the construction of a rail yard and track within that yard.

Generally speaking, where a railroad engages in a rail-related construction project that does not involve the addition of new rail lines that are part of the interstate rail network, preemption may apply as discussed above, but prior Board authorization is not required.