

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35393

PROVIDENCE AND WORCESTER RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER—GARDNER BRANCH

Digest:¹ This decision opens a proceeding to determine whether a Massachusetts law prevents P&W from removing National Grid's power line from its right-of-way without the consent of the Massachusetts Department of Public Utilities, or whether federal law permits the transmission line to be removed without such consent. This decision also directs the parties to attend a meeting with Board staff to seek to resolve this controversy.

Decided: May 23, 2011

Providence and Worcester Railroad Company (P&W) on July 20, 2010, filed a petition asking the Board to issue a declaratory order to resolve a controversy between it and New England Power Company d/b/a National Grid (National Grid) with respect to P&W's Gardner Branch, a 26.1-mile line extending between Worcester and Gardner, Mass. As discussed below, a declaratory order proceeding will be instituted to resolve the controversy.

BACKGROUND

P&W seeks to construct a second track (the Second Track) on a section of the Gardner Branch right-of-way between Worcester (MP 0.0) and Barber's Crossing, Mass. (MP 2.9) (the Corridor). National Grid occupies a portion of the Corridor with an electric transmission line, pursuant to a Pole and Wire Agreement (Agreement) that National Grid and Boston and Maine Corporation (B&M), the previous owner of the Gardner Branch, entered into in 1966. According to P&W, the construction of the Second Track along the Corridor will require full use of the right-of-way. Based on engineering studies and plans prepared in anticipation of the proposed construction of the Second Track, P&W claims that it is physically impossible to build the Second Track while National Grid occupies a portion of the right-of-way. National Grid, in a

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 in Decisions, EP 696 (STB served Sept. 2, 2010).

reply filed on August 30, 2010, responded to P&W's assertions and indicated that it supports the institution of a declaratory order proceeding.²

According to P&W, the proposed Second Track is needed because: (1) CSX Transportation, Inc. (CSXT) will be consolidating its traffic interchange at Barber's Crossing as a result of a transaction between Pan Am Railways, Inc. and Norfolk Southern Railway Company;³ (2) the Commonwealth of Massachusetts acquired CSXT's Boston and Albany line in 2010 to use for passenger service, which may result in additional freight traffic moving over the Corridor; and (3) the Massachusetts Bay Transit Authority has approved the State's plan to purchase a section of rail line to permit it to expand commuter rail service between Worcester and Boston through Ayer, Mass., which may also result in additional traffic moving over the Corridor.⁴

The Agreement that allows National Grid to occupy a portion of P&W's right-of-way contains a termination provision.⁵ Either party can terminate by giving the other party a 30-day written notice of termination. Within 10 days after termination is effected, the Agreement provides that National Grid "shall remove all its poles, wires or other materials" from the right-of-way, and restore the right-of-way to its original condition. In addition, the Agreement grants P&W the right both to remove and dispose of the transmission lines and to repair the premises as nearly as possible to its preexisting condition at National Grid's expense if National Grid fails to do so within 10 days of termination. See Petition, Exhibit 1 at 2.

According to P&W, it formally asked National Grid to relocate the transmission line in March 2009 but did not terminate the Agreement, thereby giving National Grid time to plan for relocating the transmission line. Thereafter, the parties engaged in lengthy and continuing negotiations, and during that time P&W offered to discuss alternative resolutions to the problem, including allowing National Grid to remain on the P&W right-of-way if National Grid would subsidize the acquisition of additional land to construct the Second Track. P&W says that when those negotiations failed, it served National Grid with a notice of termination on March 3, 2010,

² National Grid filed a motion for a modified procedural schedule and a motion to hold the proceeding in abeyance. P&W opposes both of those motions. Those motions will be addressed in a later decision. National Grid also filed a motion for a protective order, which is the subject of a separate decision being issued today.

³ See Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC, FD 35147, slip op. at 11-12 (STB served Mar. 10, 2009) (CSXT interchanges traffic at 3 locations: Rotterdam Junction, Springfield, and Barber's Crossing, Mass.)

⁴ Mass. Dep't of Transp.—Acquis. Exemption.—Certain Assets of CSX Transp. Inc., FD 35312 (STB served May 3, 2010).

⁵ Although the Agreement refers to B&M, P&W's predecessor in interest, for ease we will refer to P&W as the party to the Agreement in this decision.

giving National Grid 60 days (30 days more than required under the Agreement) to remove the transmission line from P&W's right-of-way.⁶

The parties dispute whether federal or state law applies to this controversy. National Grid claims that the use of the P&W right-of-way for the transmission of electricity is governed by Massachusetts state law and that it cannot be required to remove the transmission line from P&W's right-of-way without the consent of the Massachusetts Department of Public Utilities (MassDPU) under Massachusetts General Laws c. 164, §73.⁷ P&W asserts that the Board has exclusive jurisdiction over P&W's use of the right-of-way, that P&W has the right to the exclusive use of the right-of-way, and that regulation of its use of the right-of-way under state law by the MassDPU is preempted under 49 U.S.C. § 10501(b).

National Grid denies that the Massachusetts law impedes P&W's ability to operate the Gardner Branch. Specifically, National Grid contends that P&W has not demonstrated that the one mile of transmission line at issue must be removed before the proposed Second Track can be constructed, and otherwise claims that a number of obstructions along the right-of-way would prevent the proposed construction. According to National Grid, there is no case law addressing the federal preemption of a state law such as the one at issue here, which gives the MassDPU the authority to decide what is "best for the public interest and convenience" and "does not on its face directly regulate rail operations." Reply at 11. Additionally, National Grid contends that a preemption finding would conflict with both the Energy Policy Act of 2005, Pub. L. No. 109-58 (16 U.S.C. § 824n *et seq.*), under which the reliability of the bulk power system is a federal concern, and the jurisdiction of the Federal Energy Regulatory Commission (FERC).

According to National Grid, the removal and relocation of the transmission line would require substantial coordination of electrical operations throughout Massachusetts to assure the stability of the electric grid. The immediate removal of the transmission line, National Grid asserts, could have a serious negative impact on the reliability of electric service to Worcester and the entire New England region, putting National Grid at risk of violating FERC-approved reliability standards and subjecting it to potentially large financial penalties.

P&W says it has continued to discuss possible resolutions with National Grid but that National Grid has threatened to institute proceedings at the MassDPU to prevent P&W from forcing the removal of the transmission line either through judicial proceedings or the self-help measures contained in the Agreement. P&W fears that if a proceeding were to be instituted before the MassDPU, its plans to expand needed operations along the Corridor could be delayed

⁶ Because the March 3, 2010, termination notice erroneously referred to a different licensing agreement for a parallel transmission line, P&W states that in an abundance of caution, it sent another notice of termination referencing the Agreement on May 25, 2010, which was received by National Grid on May 26, 2010, and that the Agreement's termination became effective no later than June 25, 2010.

⁷ The MassDPU on August 27, 2010, filed a notice of intent to participate in the proceeding.

indefinitely and it would be caught up in expensive and time-consuming legal proceedings regarding the right to use its own right-of-way for railroad purposes.

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board’s subject matter jurisdiction. We have broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate here to institute a declaratory order proceeding to provide clarification on the question presented: whether and to what extent federal law preempts M.G.L. c. 164, § 73, or its application in this case.

In 49 U.S.C. § 10501(a), Congress has given the Board jurisdiction over “transportation by rail carrier.” As modified by the ICC Termination Act of 1995,⁸ 49 U.S.C. § 10501(b) expressly provides that where the Board has such jurisdiction, that jurisdiction is “exclusive,” and therefore, certain state and local laws—including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation—are generally preempted.⁹

The purpose of the federal preemption is to prevent a patchwork of state and local law and regulation from unreasonably interfering with interstate commerce. Thus, when the Board has jurisdiction under 49 U.S.C. § 10501(a), two broad categories of state regulation are generally categorically preempted under 49 U.S.C. § 10501(b): (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the Board has authorized; and (2) attempts to address rail transportation matters that are regulated by the Board. Other state requirements may also be preempted if, as applied, they would unreasonably burden or interfere with transportation by the rail carrier. See Borough of Riverdale—Petition for Declaratory Order, FD 35299, slip op. at 2 (STB served Aug. 5, 2010). In addition, a state law or requirement may be preempted where it directly targets or discriminates against rail transportation.¹⁰ Preemption under § 10501(b) is broad. But it is not unlimited.¹¹

⁸ Pub. L. No. 104-88, 109 Stat. 803 (1995).

⁹ For an explanation of the scope of federal preemption under 49 U.S.C. § 10501(b) see, e.g., N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain R.R. v. Vt., 404 F.3d 638, 642 (2d Cir. 2005); City of Lincoln—Petition for Declaratory Order, FD 34425 (STB served Aug. 12, 2004), aff’d City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005).

¹⁰ See, e.g., Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1098 (9th Cir. 2010) (local regulations applying “exclusively and directly to railroad activity” preempted); N.Y. Susquehanna, 500 F.3d at 253; Burlington N. & Santa Fe Ry. v. Dep’t of

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Typically, the Board makes its decision on a written record, compiled, as is the record before us, through petitions, replies, and other pleadings. But in some cases, the nature of the issues in dispute causes the Board to proceed in a different manner. For example, in Ohio Valley Railroad—Petition to Restore Switch Connection and Other Relief, FD 34608, U S Rail Corp.—Construction and Operation Exemption—Brookhaven Rail Terminal, FD 35141, and Montreal, Maine & Atlantic Railway, Ltd.—Discontinuance of Service and Abandonment—in Aroostock & Penobscot Counties, Me., AB-1043 (Sub-No. 1), the Board convened a meeting of the parties under its auspices, led by Board staff, to discuss the issues raised by those cases and the range of possible solutions that might be employed to resolve them. We are convening such a meeting in this proceeding.

The Board believes that a meeting between P&W and National Grid, facilitated by Board staff, could be beneficial. This case presents important issues concerning the scope of federal preemption under § 10501(b). In these circumstances, the Board believes it is in everyone's best interest to explore any and all options that may help to resolve this dispute. Therefore, the parties will be contacted by Board staff to establish an acceptable meeting date within the next 2 weeks.¹² The meeting will be treated as confidential and Board staff who participate in this meeting will not participate in any decision-making process or discuss the case with anyone who is participating in that process.

We will not order discovery at this time. However, in order to permit the fullest possible discussion of the issues at the meeting and to facilitate the sharing of information, we are, by separate decision, issuing an appropriate protective order.

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

It is ordered:

1. A declaratory order proceeding is instituted.
2. A meeting of representatives of P&W, National Grid, and Board staff will be convened at the Board's headquarters at 395 E Street S.W., Washington, DC.

(continued . . .)

Transp., 206 P.3d 261, 264 (Or. Ct. App. 2009) (state law expressly targeting railroad operations preempted).

¹¹ See, e.g., N.Y. Susquehanna, 500 F.3d at 255-56 (remanding to district court for determination of which state regulations were preempted as applied, and which were not); Green Mountain, 404 F.3d at 643 (noting local electrical, plumbing, and fire codes not preempted).

¹² MassDPU will also be contacted to see if wishes to attend the meeting that will be held at the Board.

3. This decision is effective on its service date.

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