

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35956

READING, BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Digest:¹ In this decision, the Board finds that application of the competitive bidding requirement of the Pennsylvania Municipal Authorities Act to contract for the operation of railroad lines by state-chartered municipally owned rail carriers is not preempted by federal law. The Board also provides guidance on the question of preemption of another provision of the Pennsylvania Municipal Authorities Act that places limitations on competition between municipal authorities and privately owned businesses.

Decided: June 3, 2016

By petition filed September 11, 2015, Reading, Blue Mountain & Northern Railroad Company (RBMN) requests that the Board issue a declaratory order under 49 U.S.C. § 721 (now recodified as 49 U.S.C. § 1321)² and 5 U.S.C. § 554(e) finding that two provisions of the Pennsylvania Municipal Authorities Act (Municipal Authorities Act) are not preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act, as broadened by the ICC Termination Act of 1995 (ICCTA), with regard to the operations of two rail carriers owned by Pennsylvania municipal authorities. The two provisions are:

(1) 53 Pa. C.S.A. § 5607(b)(2) (“Section 5607(b)(2)”), which states that “none of the powers granted by [the Municipal Authorities Act] shall be exercised in the construction, financing, improvement, maintenance, extension or operation of any project or projects or providing financing for insurance reserves which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes;” and,

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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Surface Transportation Board Reauthorization Act of 2015, Public Law No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

(2) 53 Pa. C.S.A. § 5614(a) (“Section 5614(a)”), which requires Pennsylvania municipal authorities to competitively bid projects for the “construction, reconstruction, repair or work of any nature” above a base amount.

On October 2, 2015, the Pennsylvania Northeast Regional Railroad Authority (“PNRRA”) and the SEDA-COG Joint Rail Authority (“SEDA-COG”) (collectively “the Authorities”) replied, arguing that the two state law provisions are federally preempted because the relief and remedies RBMN seeks, if granted by the Pennsylvania state courts, would unreasonably interfere with their rail operations.

As discussed below, we will grant RBMN’s petition with respect to the competitive bidding requirement of Section 5614(a). We conclude that the application of the state law competitive bidding requirement would not unduly interfere with rail transportation. Therefore, Section 5614(a) would not be federally preempted if the state court determines that the provision applies to the underlying dispute. Our decision denies RBMN’s petition with respect to Section 5607(b)(2), because the record before us suggests that the foreclosure of competition between federally licensed rail carriers that RBMN claims is required by that provision could be preempted by federal law as an undue interference with rail transportation, depending on the circumstances. We provide general guidance on the scope of federal preemption that can be used by the state courts in addressing that preemption question. While our decision assumes for purposes of the declaratory order that Sections 5607(b)(2) and 5614(a) apply to the underlying dispute, whether that is in fact the case is a matter for the Pennsylvania state courts to decide.

BACKGROUND

RBMN, a Class III railroad operating in northeastern Pennsylvania, states that it competes for rail traffic with rail lines owned by the Authorities. PNRRA, an authority formed under the Municipal Authorities Act and other Pennsylvania state laws, is a rail common carrier that owns approximately 100 miles of rail lines within four Pennsylvania counties. (Joint Reply 7.) PNRRA’s rail lines are currently operated by the Delaware-Lackawanna Railroad Co., Inc., a Class III rail carrier. (Pet. 3.) SEDA-COG, a joint authority also formed under the Municipal Authorities Act and other Pennsylvania state laws, is a rail common carrier that owns approximately 200 miles of rail lines within eight Pennsylvania counties. (Joint Reply 9.) SEDA-COG’s rail lines are currently operated by North Shore Railroad Company, a Class III carrier, and its affiliated carriers. (See Pet. 6.)

State Court Litigation. RBMN has filed separate lawsuits in Pennsylvania state court against PNRRA and SEDA-COG claiming that both Authorities are violating Section 5607(b)(2) by directly competing with RBMN. In particular, RBMN’s state court complaints allege that the Authorities compete directly against RBMN in three respects: obtaining state grant funding, attracting customers to their rail lines, and pricing offered to their rail customers. (See, e.g., Ex. E at 4-5, 14; Ex. H at 4, 9; Ex. K at 3-5.) RBMN’s lawsuit also alleges that the Authorities are violating Section 5614(a) by entering into agreements with other rail carriers to operate the Authorities’ rail lines without obtaining competitive bids for these contracts in an open process. Accordingly, RBMN is asking the Pennsylvania courts to void these operating agreements under state law and to have PNRRA and SEDA-COG divest some or all of their rail lines or sell the

rights to freight traffic on its lines that allegedly compete directly with RBMN. PNRRA and SEDA-COG have responded in state court that neither Section 5607(b)(2) nor Section 5614(a) applies to their operations. Alternatively, they have claimed that application of Sections 5607(b)(2) and 5614(a) to them is preempted under 49 U.S.C. § 10501(b).

This Declaratory Order Proceeding. In its petition for a declaratory order, RBMN asserts that 49 U.S.C. § 10501(b) does not preempt the application of Sections 5607(b)(2) and 5614(a) under the circumstances presented here and that, therefore, its state law claims alleging violations of those statutes can proceed in state court. (See Pet. 7, 8 n.5, 10.) RBMN contends that § 10501(b) preemption does not apply to the selection of a rail freight operator by a municipal authority, or how that may or may not be done, including whether the selection is subject to any competitive bidding requirement. (Pet. 11.) RBMN also asserts that § 10501(b) does not allow the Board to override what RBMN views as the state's statutory prohibition on municipal authorities directly competing with private businesses. (Pet. 11-12.) According to RBMN, the relief it seeks in state court does not infringe upon the Board's exclusive jurisdiction to authorize the acquisition and operation of rail lines. (Pet. 12.) Specifically, RBMN acknowledges that, while this relief could involve the Authorities' divestiture of their rail lines, the current operators would be permitted to continue operating until the Board issued discontinuance authority and that a new operator would also need Board authority. (Pet. 12-13.) Thus, RBMN requests that the Board declare that the application of the Municipal Authorities Act to the instant dispute pending in state court is not federally preempted.

The Authorities argue that the application of Sections 5607(b)(2) and 5614(a) here is preempted under § 10501(b), because compliance with those state law provisions would foreclose their ability to conduct all or part of their operations, would prevent them from proceeding with activities expressly authorized by the Board, would encroach upon matters directly regulated by the Board, and would otherwise have the effect of preventing or unreasonably interfering with rail transportation. (See Joint Reply 14-18.) The Authorities maintain that some of the activities that RBMN seeks to prohibit the Authorities from performing, such as assisting their operators in obtaining customers and securing grants, are essential responsibilities of rail carriers. (Joint Reply 14 n.25.) The Authorities also argue that a remedy that RBMN seeks – divestiture of property that is used for railroad activities – is preempted, even though RBMN has acknowledged that any acquirer of rail property following divestiture would seek Board authority for the acquisition. (Joint Reply 15.)

The Authorities argue that application of the competitive bidding requirement of Section 5614(a) is preempted by § 10501(b) for similar reasons. (See Joint Reply 19–23.) The Authorities contend that subjecting their operating agreements to public bidding would have the effect of governing or managing rail transportation or unreasonably interfering with railroad operations, because the application of the public bidding requirements would dictate how and when the Authorities may contract for the provision of common carrier rail freight service on their rail lines, and with whom the Authorities may contract and at what price. (Joint Reply 20.)

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. Based on the record before us here, we will grant RBMN’s petition in part, finding that Section 5614(a) would not be preempted by 49 U.S.C. § 10501(b), assuming for purposes of the declaratory order that the Pennsylvania state courts determine that Section 5614(a) requires PNRRA or SEDA-COG to competitively bid their contracts to operate their rail lines. For the reasons discussed below, we will deny RBMN’s petition for a declaratory order finding that Section 5607(b)(2) would not be preempted by § 10501(b), but will provide general guidance as to the circumstances under which that provision could be preempted under relevant Board and court precedent, should the Pennsylvania state courts find that Section 5607(b)(2) applies to limit competition between RBMN and PNRRA or SEDA-COG.

The Interstate Commerce Act, as amended by ICCTA, provides that the Board’s jurisdiction over “transportation by rail carriers” is “exclusive” and that “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). The statute defines “transportation” expansively to encompass 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). Moreover, § 10102(6) defines “railroad” broadly to include “a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard [or] ground, used or necessary for transportation.” The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce. See Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765, slip op. at 5-6 (STB served June 23, 2015). Therefore, the Board and the courts look to whether a challenged action would directly conflict with exclusive federal regulation of railroads, or whether it would prevent or unduly interfere with railroad operations and interstate commerce, and if it would, the challenged action is preempted. Id.

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances, are categorically, or *per se*, preempted. City of Auburn v. STB, 154 F.3d 1025, 1029–31 (9th Cir. 1998). Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board’s authorization of those facilities and operations. Id. at 1031; CSX Transp.—Pet. for Declaratory Order, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005). State and local actions also may be preempted “as applied”—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R. (Franks), 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (laws that have the effect of unreasonably burdening or interfering with rail transportation preempted); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts “state laws that may

reasonably be said to have the effect of managing or governing rail transportation while permitting the continued application of laws having a more remote or incidental effect on rail transportation”).

While § 10501(b) preemption is broad, it does not encompass all matters that may have some effect on railroads. See Fla. E. Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (local zoning ordinance not preempted with respect to property that a railroad leased for non-rail related storage, because application of the zoning ordinance would not “impede the interstate functioning of the railroad industry” under the circumstances presented). Thus, contract and property law disputes involving railroads generally are resolved by state courts applying state law. See JGB Props., LLC–Pet. for Declaratory Order, FD 35817, slip op. at 5-7 (STB served May 22, 2015); Lackawanna Cty. R.R. Auth.–Acquis. Exemption–F&L Realty, Inc., FD 33905, slip op. at 6 (STB served Oct. 19, 2001). The right to proceed under state property or contract law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks, 593 F.3d at 414 (rejecting railroad’s preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Friberg v. Kan. City S. R.R., 267 F.3d 439, 443 (5th Cir. 2001) (“Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad . . .” such as restrictions on “train length, speed or scheduling.”) and Jie Ao & Xin Zhou–Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (loss of railroad land under state adverse possession laws would limit the capacity of the line of railroad should it be needed for potential future active rail service).

Therefore, the issue in this case is whether Section 5607(b)(2) and Section 5614(a) intrude into matters that are directly regulated by the Board, or unduly burden or interfere with the rail transportation provided by PNRRA and SEDA-COG, assuming these provisions apply to the operation of their rail lines. We will first discuss Section 5614(a) and then turn to Section 5607(b)(2).

Section 5614(a). We agree with RBMN that, if the Pennsylvania state courts interpret Section 5614(a) to require PNRRA and SEDA-COG to select the operators of their rail lines through an open competitive bidding process, that requirement would not be preempted by § 10501(b). The state law provision does not attempt to regulate matters that are directly regulated by the Board, such as railroad rates, services, construction, or abandonments. Although the Board licenses carriers to operate rail lines, it does not regulate the process by which a rail line owner selects a prospective operator for its line. Nor does the record here suggest that a requirement for competitive bidding in connection with municipal authorities’ activities would unduly burden or interfere with a rail carrier’s transportation. The Authorities argue that having to comply with this requirement will dictate how they may contract for the provision of common carrier service. Although the Authorities are correct, the requirement does not rise to the level of an undue burden or interference with rail transportation. Although the provision might limit which carriers the Authorities can select to perform operations, nothing in the record here indicates that the provision serves as an outright prohibition on selecting an operator which can then provide rail transportation, or a limitation on service that the selected operator can provide. Thus, based on the information before us, § 10501(b) does not prevent Pennsylvania from applying this state law, which requires municipal authorities to competitively

bid various categories of contracts. As noted, whether Section 5614(a) applies to the contracts that PNRRA and SEDA-COG have entered into for management and operation of their rail lines is a matter to be determined by the state courts.

Section 5607(b)(2). RBMN's claim that the application of Section 5607(b)(2) is not federally preempted is more complicated, given the language of the state law provision and the nature of RBMN's claims regarding the activities of PNRRA and SEDA-COG that purportedly conflict with the state statute. If the Board were to find that Section 5607(b)(2) is not preempted, it would leave intact the provision that, in RBMN's view, prohibits the Authorities from competing for business with RBMN. Thus, the issue here is whether such a restriction on competition between RBMN and the Authorities, if it exists under Pennsylvania law, conflicts with the Board's jurisdiction.

In light of the strong national policy in favor of competition in the railroad industry, 49 U.S.C. § 10101(1), (5), and the different types of competition that could occur between privately held and publicly owned rail carriers licensed by the Board to provide common carrier freight rail service, we are denying RBMN's petition with respect to Section 5607(b)(2). We leave the preemption question to the Pennsylvania courts because, on this record, we cannot definitively conclude whether the application of the non-compete provision of Section 5607(b)(2) to the Authorities' operations would be preempted by § 10501(b). In particular, it is unclear whether the Authorities have engaged in actions that would be subject to Section 5607(b)(2) and what the effects of that provision would be. Such a determination requires findings of fact, as well as interpretation of state law, that should be left to the state courts. Accordingly, the Board will not issue a decision regarding whether or not Section 5607(b)(2) is preempted. We will, however, provide general guidance as to the circumstances under which Section 5607(b)(2) could potentially be preempted by § 10501(b).³

As noted, RBMN's state court complaints allege that the Authorities compete directly against RBMN in three respects: obtaining state grant funding, attracting customers to their rail lines, and pricing offered to their rail customers. (See, e.g., Ex. E at 4-5, 14; Ex. H at 4, 9; Ex. K at 3-5.) Competition between privately owned and municipally owned rail carriers for Pennsylvania state grants does not involve matters that are directly regulated by the Board or otherwise unreasonably burden or interfere with rail transportation. Nothing in Title 49, Subtitle IV part A precludes a state from deciding how to allocate grant funds for the improvement of rail transportation in the state. Therefore, if the Pennsylvania state courts find that Section 5607(b)(2) prevents the Authorities from obtaining state grants for rail transportation improvements or support in competition with "existing enterprises serving substantially the same purposes," that would not be an undue burden on rail transportation. See Franks, 593 F.3d at 414 (addressing preemption due to burden on rail transportation).

³ See CSX Transp., Inc. — Pet. For Declaratory Order, FD 35832 (STB served Feb. 29, 2016) (leaving factual determinations underlying preemption claim to the state court, but issuing guidance on applicability of preemption).

It is possible, however, that if the state courts read Section 5607(b)(2) to restrict the Authorities from competing with RBMN for customers, competing on price, or constructing track and ancillary rail facilities needed to improve service to customers, that application of the provision could be preempted under § 10501(b). As noted above, the Board has exclusive jurisdiction over “transportation by rail carriers” and the remedies provided under Title 49, Subtitle IV part A with respect to, among other things, rail carriers’ rates, practices, and services. 49 U.S.C. § 10501(b)(1); see also 49 U.S.C. § 10704 (establishing the remedy before the Board for claims of unreasonable rates or practices by a rail carrier). Moreover, it is national rail transportation policy to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail. 49 U.S.C. § 10101(1). To the extent that the state courts find that RBMN is invoking Section 5607(b)(2) as a means of preventing the Authorities from competing for business or offering rates more attractive to shippers than those offered by RBMN, application of Section 5607(b)(2) could infringe on the Board’s exclusive jurisdiction over rail rates and could unduly burden interstate commerce. That is not to say that the Authorities would be required to provide rates that are lower than those offered by competitors, as railroads are free to set their own rates (with the exception of rates prescribed by the Board following a complaint and adjudication, 49 U.S.C. § 10704(a)(1)). Rather, our guidance here relates to a situation where a state restricts the Authorities’ *ability* to offer competitive rates.

As rail carriers, the Authorities also have a common carrier obligation to provide service to the public on reasonable request. 49 U.S.C. § 11101(a). Section 5607(b)(2) could infringe upon the Authorities’ federally mandated common carrier obligation if the Pennsylvania state courts interpret that provision as preventing the Authorities from providing common carrier freight rail service to any shipper that makes a reasonable request for service. See, e.g., Cent. Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059, 1063 (1996) (“As a threshold matter, railroads are required, under their common carrier obligation, to establish rates and routes to move a shipper's traffic from origin to destination, 49 U.S.C. 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742.”); Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162, 1168 (6th Cir. 1979) (common carrier obligation is not dependent on railroads’ “holding out”); Decatur Cty. Comm’rs v. STB, 308 F.3d 710, 715 (7th Cir. 2002) (under the common carrier obligation, “[a] railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable.”).

The Board and the courts have concurrent jurisdiction to determine questions of federal preemption under 49 U.S.C. § 10501(b), applying existing court and Board precedent. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8. In this case, the preemption issues presented regarding Section 5607(b)(2) are already pending in state court, and that court is familiar with and has the necessary expertise to interpret the reach of that state law provision. Therefore, we believe the Pennsylvania court system is the appropriate place to determine the extent to which § 10501(b) preemption applies to the application of Section 5607(b)(2) in the circumstances at issue here, based on the relevant Board and court precedent discussed above.

Lastly, regardless of how the state court rules on RBMN’s claims, any state law remedy that infringes upon the Board’s exclusive jurisdiction to regulate rail transportation is preempted

by § 10501(b) and may only be effectuated upon obtaining the requisite Board authority. Thus, for example, the divestiture that RBMN seeks in state court, if granted, could not take place without the Board's approval of the abandonment of the lines owned by the Authorities or their transfer to a private owner. See Robey—Pet. for Declaratory Order—Levin, FD 33420, slip op. at 3 n.5 (STB served June 17, 1998).

For these reasons, the declaratory relief sought by RBMN is granted in part and denied in part as discussed above.

It is ordered:

1. RBMN's petition for declaratory order is granted in part and denied in part, as discussed above, and this proceeding is terminated.
2. This decision is effective on its service date.
3. RBMN is directed to file a copy of this decision with the court in each of the pending state court proceedings:

Reading Blue Mountain & Northern Railroad v. Pennsylvania Northeast Regional Rail Authority and Board of Pennsylvania Northeast Regional Rail Authority, Case No. 13-06796, Court of Common Pleas to Lackawanna County, Pennsylvania; and

Reading Blue Mountain & Northern Railroad v. SEDA-COG Joint Rail Authority and Board of SEDA-COG Joint Rail Authority, Case No. CV-15-1201, Court of Common Pleas Northumberland County, Pennsylvania.

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

COMMISSIONER BEGEMAN, dissenting:

The preemption questions raised in the Reading, Blue Mountain & Northern Railroad Company (RBMN) petition for declaratory order are already pending in the Pennsylvania state courts and that is the appropriate place for them to be settled.¹ While the majority's decision recognizes our precedent in denying RBMN's petition with respect to 53 Pa.C.S.A. Section 5607(b)(2) ("We leave the preemption question to the Pennsylvania courts ..."), the

¹ Questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts. See, e.g., Brookhaven Rail Terminal—Pet. for Declaratory Order, FD 35819, slip op. at 4 (STB served Aug. 28, 2014); 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005).

majority fails to apply that reasoning in granting RBMN's petition with respect to the competitive bidding requirement of 53 Pa.C.S.A. Section 5614(a). I believe that is a mistake, particularly since the application of the state law competitive bidding requirements is a pending question for the courts to resolve, as the majority acknowledges. The Pennsylvania Courts have not indicated that the Board should address these preemption issues to facilitate their proceedings, nor have the Courts referred these issues to the Board. With the Board struggling to meet its docket obligations and timely implement STB Reauthorization Act directives, the majority's inconsistent, piecemeal decision is an unnecessary use of agency time and resources.

There are other reasons the Board should have exercised its discretion and rejected RBMN's petition from the start. In my view, we should not even entertain a carrier's blatant attempt to use Board authority to remove a competitor from the rail network. And, while the Pennsylvania Northeast Regional Railroad Authority and the SEDA-COG Joint Rail Authority are here in response to the RBMN petition, state or local government-chartered railroads should not ask the Board to get them out of their own governing laws. See Cal. High-Speed Rail Auth.—Pet. for Declaratory Order, FD 35861 (STB served Dec. 12, 2014) (Begeman dissenting).

Given the Board's considerable docket, its obligations under the STB Reauthorization Act, and the implications of preempting state and local carriers from their own laws, the Board should have adhered to its precedent and left these pending matters before the courts. I dissent.