

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35960

PETITION OF UNION PACIFIC RAILROAD COMPANY FOR DECLARATORY ORDER

Digest:¹ Union Pacific Railroad Company (UP) requests an order that the contract rescission claims being litigated by SFPP, L.P., under California state law are preempted by 49 U.S.C. § 10501(b). In this decision, the Board denies UP's petition for declaratory order but provides guidance on the question of preemption for the courts and the parties.

Decided: September 28, 2016

Union Pacific Railroad Company (UP) filed a petition for declaratory order seeking a determination that a complaint filed in SFPP, L.P. v. Union Pacific Railroad, Case No. BC 584518 (State Complaint), by SFPP, LP (SFPP), in the Superior Court in Los Angeles County, California, is preempted under 49 U.S.C. § 10501(b). In the State Complaint, SFPP asks the court to rescind in its entirety a 1994 easement agreement (1994 Agreement)² where UP purportedly granted SFPP, a pipeline owner, subsurface pipeline easements under the railroad's right-of-way and to find, among other things, that SFPP has no obligations to perform under that agreement.³ SFPP filed its complaint after the California Court of Appeal ruled in 2014 in a separate proceeding that UP did not have a sufficient property interest in its right-of-way to grant easements to SFPP or collect rent. (See SFPP Nov. 13 Reply 1.)

UP states that the 1994 Agreement provides that SFPP would relocate a pipeline when the railroad deems it necessary for rail transportation, and that the railroad could reclaim the property if SFPP ceased operations of a pipeline or was in breach. UP is concerned that, if SFPP succeeds with its State Complaint, these protections would be dissolved and hence undermine UP's ability to operate its rail lines and to improve its capacity. As such, UP claims that there is

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² As discussed later in this decision, the 1994 Agreement embodies a longstanding arrangement between the railroad and the pipeline that began in the mid-1950s.

³ SFPP's complaint also includes actions for restitution, unjust enrichment, and damages. See UP Pet., Ex. 5 at 2.

a compelling need for the Board to declare that § 10501(b) forbids this alleged use of state law to burden rail transportation.

As explained below, a rescission of the 1994 Agreement, in and of itself, would not unreasonably interfere with rail transportation. Therefore, the Board will deny UP's petition. The Board notes that the California courts appear to have determined that, based on 19th century congressional acts bestowing easements and granting land, a post-rescission UP would retain sufficient property interests in the rights-of-way for railroad purposes. Accordingly, it appears that UP would still be able to require SFPP to relocate its pipeline to accommodate future expansion of rail operations, regardless of the validity of the 1994 Agreement. However, if other state actions unreasonably interfere with rail transportation (e.g., render UP unable to conduct its rail operations), then those actions would be preempted. The Board will provide further guidance on the preemption issue for the parties and the courts.

BACKGROUND

In the mid-1950s, one of UP's predecessors, Southern Pacific,⁴ created a pipeline affiliate, Southern Pacific Pipelines, Inc. (SPPL). Southern Pacific, believing it had sufficient property interests, and SPPL then agreed on terms that would allow SPPL pipelines to be installed on or underneath railroad rights-of-way in Oregon, California, Nevada, New Mexico, Texas, and Arizona. These terms were set forth in two master agreements executed in 1955 and 1956, respectively. SPPL agreed that the pipeline would be operated and maintained so as not to interfere with or endanger railroad property or operations. (See UP Pet., Ex. A of Ex. 6 at 3; Ex. A of Ex. 7 at 3.) It further agreed, if the railroad were to deem it necessary, to relocate the pipeline at SPPL's own expense. (See id.) The railroad maintained the ability to terminate the agreement and reacquire the property in the event of a breach. (See UP Pet., Ex. A of Ex. 6 at 6; Ex. A of Ex. 7 at 6.) Pursuant to this arrangement, the parties reached subsequent agreements as to specific easements, and SPPL and its successors installed hundreds of miles of pipelines on Southern Pacific's right-of-way through the six states between 1955 and the early 1990s. The pipelines carry refined petroleum products.

Toward the end of this period, joint control of the pipeline and the railroad ended.⁵ In April 1994, Southern Pacific and the pipeline company, by then known as SFPP, entered into the 1994 Agreement, which consolidated into one agreement governance of all of the individual existing documented pipeline easement agreements and some previously granted but undocumented easements. (See UP Pet., V.S. Love 11.) The 1994 Agreement contains the same essential protections contained in the master agreements from the 1950s. In 1996, UP merged

⁴ For ease of reference, "Southern Pacific" is used to refer to the holding company and railroad collectively, as the record indicates that the corporate structure and names of the legal entities involved have changed several times.

⁵ A detailed history of the separation of the pipeline and railroad is described in the UP Petition at 10-11.

with Southern Pacific⁶ and became the successor-in-interest to all of Southern Pacific's rights in the 1994 Agreement.

The 1994 Agreement provides that, at the outset and every 10 years thereafter, UP can seek a rent increase from SFPP, and that, if the parties cannot agree on the amount, they would stipulate to an order for judicial relief. UP commenced the initial rental proceeding in 1994, and the second in 2004, both in California state court. As part of this second state proceeding, SFPP questioned whether the railroad had sufficient evidence of ownership of the land underlying the railroad's rights-of-way to charge rent. The trial court found that the railroad had sufficient property interests to permit it to collect and set rent. SFPP appealed, and the California Court of Appeal reversed the trial court, in part, in Union Pacific Railroad v. Santa Fe Pacific Pipeline (COA Decision), 231 Cal. App. 4th 134 (2014).⁷

In its COA Decision, the California Court of Appeal noted that the railroad had acquired rights to the property in question through pre-1871 congressional acts and an 1875 congressional act, but not sufficient rights to collect rent from SFPP or its predecessors. See id. at 160-78. The Court of Appeal further explained that the pre-1871 congressional acts required the railroad to use the rights-of-way for railroad purposes. The court found that the railroad's lease of the subsurface underlying its rights-of-way to generate revenue for itself was not a railroad purpose. See id. at 165-70. As to the 1875 act, the Court of Appeal explained that Congress only granted the railroad an easement that was limited to what was necessary to support the railroad itself. See id. at 160-65. The Court of Appeal explained, however, that the railroad might have acquired additional rights through other means. See id. at 178. The court therefore remanded the case for a determination of UP's ownership interests and, if it was determined that UP did have such interests, a decision as to the rent due for the portions of the right-of-way where UP had sufficient interests to grant a pipeline easement to SFPP.⁸ The Court of Appeal did not rule on the validity of the 1994 Agreement. In response to the COA Decision, UP filed a petition for rehearing in the California Court of Appeal and a petition for review in the California Supreme Court, both of which were denied. (See SFPP Nov. 13 Reply 6.)

Against this backdrop, SFPP filed the State Complaint in Los Angeles Superior Court on June 8, 2015. In its complaint, SFPP argues that "it cannot in equity be bound by an agreement requiring it to pay rent and relocation expenses to Union Pacific for more than 1,200 miles of easements on property that Union Pacific does not own, i.e., property that is not 'property of [the] Railroad.'" (UP Pet., Ex. 5 at 6.) As such, SFPP asks the court to rescind the 1994 Agreement in its entirety and to award restitution for all rent and relocation expenses previously paid under the agreement. It also asks the court to declare that the 1994 Agreement is invalid and that SFPP has no obligations under it.

⁶ See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233 (1996).

⁷ The COA Decision provides a full background of the rental proceedings at pages 152-156. See also SFPP Nov. 13 Reply 5-6.

⁸ The case is currently pending before the Los Angeles Superior Court.

On September 24, 2015, UP filed with the Board its petition for declaratory order. It asks that the Board declare that § 10501(b) preempts SFPP's causes of action to rescind the 1994 Agreement. UP notes that the 1994 Agreement permits the railroad to request that the pipeline relocate if the railroad deems it necessary. UP fears that, without this provision, the pipeline would not relocate when requested and hence the railroad would not be able to increase its capacity to meet shipper demand. As such, UP claims that SFPP's court action, if successful, would remove the relocation provision and therefore regulate and interfere with rail transportation.

UP states that it has previously had several disputes with SFPP about relocating, and that the relocation provision in the 1994 Agreement has played an important role in allowing those relocations to proceed. (See UP Pet., V.S. Hovanec 8-9.) According to UP, SFPP recently filed a lawsuit seeking to resist relocation of its pipeline to accommodate a double-track project on the Alhambra Subdivision in Los Angeles County that is needed to eliminate a bottleneck currently slowing eastbound traffic from the Ports of Los Angeles and Long Beach. See SFPP, L.P. v. Union Pac. R.R., Cal Super. Ct., City of Los Angeles Cent. Dist., Case No. BC 573396 (Compl. filed Feb. 28, 2015). UP also suggests that SFPP has been hesitant to make way for a new industrial lead project known as Casa Grande. (See UP Pet., V.S. Hovanec 9-10.) UP further claims that SFPP's effort to have a state court void the 1994 Agreement, if successful, would deprive UP of its contractual right to eject SFPP and reclaim the operating property if SFPP breaches the 1994 Agreement or abandons the pipeline.⁹

SFPP replied in opposition to UP's petition on November 13, 2015. It asserts that UP has failed to demonstrate a ripe controversy here. It claims that a controversy would only exist if UP were to plan an expansion project, if relocation were required, and if SFPP were to refuse to relocate its pipeline. SFPP further claims that it has always agreed to relocate and that there is no reason to believe that it would refuse to relocate in the future. In response to UP's reference to prior litigation concerning relocation, SFPP argues that those matters dealt with standards and costs related to relocation, rather than an outright refusal to relocate. As for the Alhambra project, SFPP notes that the parties are in settlement talks. (See SFPP Nov. 13 Reply 8.)

SFPP argues that even if the Board were to consider the request for declaratory order now, it should nonetheless deny UP's petition. SFPP asserts that the State Complaint seeks only

⁹ Comments supporting UP's petition were filed by Hub Group, the Alameda Corridor-East Construction Authority, the Port of Long Beach, and the Port of Los Angeles, generally, raising concerns that interference with UP's rail operations could undermine various expansion projects that would rely on UP service. The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) also submitted filings supporting UP's petition. AAR asserts that permitting SFPP's state law complaint to go forward could undermine expansion nationally by exposing railroads to a patchwork of state suits. ASLRRA echoes these concerns and argues that allowing SFPP's complaint to proceed could lead to states managing various rights-of-way and to findings that agreements pertaining to rail operations and safety are unenforceable.

to rescind a contract and recover restitution, and that the pipeline is not seeking a court order to regulate UP's activities or acquire portions of the right-of-way to the exclusion of UP. The State Complaint is a contract matter, according to SFPP, and the Board has generally left matters involving contracts and contract interpretation to state courts. SFPP also claims that, if the Board were to find the State Complaint preempted, SFPP would have no way of terminating the invalid 1994 Agreement. SFPP adds that the Board should be wary of allowing UP to use the Board's auspices to initiate a proceeding that would enable UP to impinge upon the operations of another common carrier under the jurisdiction of another federal agency (the Federal Energy Regulatory Commission).

On November 23, 2015, UP submitted a letter responding to SFPP's November 13, 2015 filing, seeking to "correct" the record. Among other things, UP claims that the order sought through its petition is not speculative based on SFPP's assertion in its State Complaint that it cannot be forced by UP to relocate a pipeline if the property does not belong to the railroad. UP further notes that SFPP itself stated that "[f]rom 2001 to 2005, SFPP never complied, or agreed to comply" with UP's request to relocate as part of the Beaumont Hill project. UP also claims that Board action on the State Complaint would not require contract interpretation.

SFPP responded by letter dated December 14, 2015, challenging UP's response on procedural grounds and denying the railroad's assertions. SFPP claims that it is not alleging that it need not relocate its pipeline if the 1994 Agreement is rescinded. Instead, SFPP claims that its position in the State Complaint is that SFPP need not relocate under the specific terms of the 1994 Agreement because the agreement is invalid. SFPP further argues that its State Complaint is only at the pleadings stage, and that rescission of the 1994 Agreement is only one possible outcome.

On February 17, 2016, UP notified the Board that the Los Angeles Superior Court issued a February 9, 2016 decision staying SFPP's state court action to allow the parties to seek Board guidance on the preemption issue. The court's decision notes that, under preemption principles, the issue is whether SFPP's state court action would unreasonably interfere with interstate transportation, but acknowledges that the Board does not have exclusive jurisdiction over the specific claims before the court, which include rescission of contract and unjust enrichment. Nevertheless, the court asserts that Board expertise would be helpful given the scope of the parties' dispute and the potentially speculative nature of the interference with rail transportation. SFPP filed a response to UP's letter on March 8, 2016, emphasizing that the court's stay order itself acknowledged that the interference with UP's operations is potentially speculative at this time.

PROCEDURAL MATTERS

In its November 23, 2015 letter, UP argues that it limited itself to arguments and evidence the Board would find necessary to complete the record. SFPP argues that UP's letter is a surreply that is not permitted by the Board's regulations, citing 49 C.F.R. § 1104.13(c). The Board concludes that both UP's letter and SFPP's response are needed to complete the record in this complicated proceeding and therefore accepts both filings into the record. For the same reasons, the Board also accepts UP's February 17, 2016 filing and SFPP's March 8, 2016 reply.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321¹⁰ to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp., Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). For the reasons explained below, we will deny UP’s request for a declaratory order.

The Interstate Commerce Act, as amended by the ICC Termination Act of 1995, 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).¹¹ The purpose of this express federal preemption is to prevent a patchwork of local and state regulations from unreasonably interfering with interstate commerce. See Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff’d 812 F.3d 1141 (8th Cir. 2015).

Section 10501(b) thus shields railroad operations that are subject to the Board’s jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served Mar. 1, 2010) (city condemnation action preempted when it would interfere with present and future rail operations). But § 10501(b) does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not have the effect of regulating rail transportation or unreasonably interfere with interstate commerce. See E. Ala. Ry.—Pet. for Declaratory Order, FD 35539 (STB served June 6, 2012) (condemnation action to install two underground pipelines is not preempted because no unreasonable interference with rail operations would result).

Although the Board has explained that questions of property law generally are more appropriately decided by courts,¹² suits concerning property rights can result in a finding that an

¹⁰ 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.

¹¹ The statute defines “transportation” expansively to encompass a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include “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).

¹² See V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); Allegheny Valley R.R.—Pet. for

(continued . . .)

action is preempted if it would unreasonably interfere with interstate commerce. For example, in Jie Ao—Petition for Declaratory Order, FD 35539 (STB served June 6, 2012), an adverse possession claim regarding rail-banked property was preempted because such a seizure of railroad property could interfere with possible future reactivation and rail use. See also 14500 Ltd.—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014). On the other hand, in JGB Properties—Petition for Declaratory Order, FD 35817 (STB served May 21, 2015), state court findings concerning easements and other state property law matters were found not to be preempted by § 10501(b) because they did not unreasonably interfere with rail transportation.

The Board has also explained that disputes over the interpretation of private contracts typically involve questions of state contract law that are more appropriately decided by state courts. See, e.g., Gen. Ry. Corp.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007); Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, FD 33905, et al., slip op. at 6 (STB served Oct. 22, 2001). Indeed, the Board has previously held that preemption under § 10501(b) does not apply to voluntary agreements reached between a railroad and another party. Twp. of Woodbridge. v. Consol. Rail Corp. (Woodbridge I), NOR 42053, slip op. at 4-5 (STB served Dec. 1, 2000) (finding no preemption for agreement whereby rail carrier agreed to curtail idling of locomotives and switching of cars behind a residential street during certain hours). However, as discussed below, the Board and the courts have also held that there may be situations where the application or interpretation of a contract may be preempted because it unreasonably interferes with interstate commerce. See Twp. of Woodbridge. v. Consol. Rail Corp. (Woodbridge II), NOR 42053, slip op. at 3 (STB served Mar. 23, 2001) (explaining that rail carrier was not barred from arguing that certain interpretation of a voluntary agreement unreasonably interfered with interstate commerce); see also Blanchard Sec. Co. v. Rahway Valley R.R., 191 Fed. App'x 98, 100 (3d Cir. 2006) (unpublished) (distinguishing Woodbridge I and finding state law contract claims preempted).

Here, UP asks the Board to hold that if the California state court rescinds the 1994 Agreement, that rescission decision would be preempted under § 10501(b). In particular, UP argues that rescinding the contract would constitute “regulation,” and that the regulation would unreasonably burden interstate rail transportation. (See, e.g., Pet. 21-22; see also AAR, ASLRRA comments raising concerns about the patchwork of regulation that could result from rescission of the contract.)

On the issue of whether preemption applies because rescission of the contract would constitute “regulation” of a rail carrier, the Board and the courts have found certain state actions that force a rail carrier to accept an involuntary use of its property by another party within the interstate rail network to constitute “regulation.”¹³ But in PCS Phosphate Co. v. Norfolk

(. . . continued)

Declaratory Order—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court).

¹³ E.g., Union Pac. R.R. v. Chi. Transit Auth. (CTA), 647 F.3d 675, 681-82 (7th Cir. 2011) (holding that local condemnation of railroad property previously leased to the locality

(continued . . .)

Southern Corp., 559 F.3d 212 (4th Cir. 2009), a railroad argued that, although it entered into a private contract that required it to relocate its line under certain circumstances, litigation to enforce that contract was preempted under § 10501(b). The court, however, found there was no “regulation” of rail transportation, and therefore, no preemption of the lawsuit to enforce the contract.

As for whether rescission of the contract would amount to unreasonable interference with rail transportation, there is precedent that a state court decision applying contract law could unreasonably interfere with rail transportation. Specifically, it is possible that contract remedies could force an involuntary use of railroad property within the interstate rail network, which could be preempted depending on the facts presented. See PCS Phosphate, 559 F.3d at 221-22 (finding no unreasonable interference and thus denying preemption on that basis as well); see also Woodbridge II, NOR 42053, slip op. at 3.

However, that does not appear to be what will occur in this case. UP claims that preemption must apply because a rescission decision would “proclaim that the pipeline may under state law remain at its present location indefinitely” (Pet. 21)—i.e., that SFPP is free to maintain its pipeline in that location without UP’s consent. (Pet. 22 (comparing such a decision to the condemnation action preempted in CTA.) But there is no indication in the record that a decision by the state court to rescind the 1994 Agreement would affirmatively grant any right to SFPP to “remain at its present location indefinitely” without UP’s consent. SFPP itself acknowledges that, even if it succeeds in state court and obtains a decision rescinding the contract, it would not “secure a right to use property at all.” (See SFPP Reply 22, Nov. 13, 2015.) Rather, a rescission decision would apply ordinary contract remedies to *remove* an agreement between the parties. (See Pet. 27 (the requested state court action “would remove the contractual provisions.”)) By removing the parties’ contractual agreement, the parties would be left with whatever pre-existing property rights they already have under federal and state law. As the California Court of Appeal explained, the pre-1871 land grants gave the railroad the right to “use the subsurface underlying [the rights-of-way] for things that support the construction and operation of their railroad – i.e., for railroad purposes.” 231 Cal. App. 4th at 170. The Court of Appeal also found that the easements granted under the 1875 act likewise allow the railroad to use the subsurface “to support the construction and operation of the railroad (i.e., for railroad purposes).” Id. at 163.¹⁴ UP’s right to use the rights-of-way for railroad purposes would

(. . . continued)

amounted to regulation because the property use would be the result of compulsory government action rather than a private agreement); Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765 (STB served June 23, 2015) (state court orders forcing a railroad to accept a crossing at a certain location would unreasonably burden interstate commerce, but a court-ordered crossing at another location might not have such effects, in which case it would not be preempted).

¹⁴ As part of the Alhambra litigation, UP claimed before a California federal court that it possesses sufficient property interests to require SFPP to relocate. See SFPP Nov. 13 Reply 8 & Ex. 2. That matter was remanded to state court. See id., Ex. 1. As noted above, however, the parties are currently in settlement talks.

presumably include the right to force relocation of other parties located in the right-of-way, to the extent it is necessary for railroad operations. Therefore, UP appears to retain sufficient property interests in the surface and subsurface of the rights-of-way at issue to require SFPP to relocate its pipeline to accommodate future expansion of rail operations.

A state court decision that did grant SFPP a right to remain at its present location permanently without UP's consent could constitute unreasonable interference with rail transportation, depending on the facts presented. *See, e.g., Wichita Terminal Ass'n*, FD 35765, slip op. at 7-11 (analyzing, based on the facts presented regarding a particular location, whether a state court decision forcing involuntary use of railroad property within the interstate rail network would unreasonably interfere with rail transportation).¹⁵ But UP has not shown that the rescission of the 1994 Agreement sought by SFPP would lead to such a result.

AAR's and ASLRRA's concerns about a patchwork of regulation stemming from various future suits do not lead us to find that the contract rescission claims being litigated here are federally preempted. As discussed above, the Board typically leaves contract and property matters to courts. The Port of Los Angeles and the Port of Long Beach are concerned about their inability to fully implement expansion projects without the certainty that UP would be available to provide rail service. As we note above, however, state court precedent appears to indicate that UP would be able to require SFPP to relocate its pipeline to accommodate future expansion of rail operations, regardless of the validity of the 1994 Agreement.

For the reasons discussed above, UP's petition for a declaratory order will be denied.

It is ordered:

1. The filings submitted on November 23, 2015, December 14, 2015, February 17, 2016, and March 6, 2016, are accepted into the record.
2. UP's petition for declaratory order is denied.
3. This decision is effective on its service date.

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

¹⁵ State action can also constitute "regulation" when it would force a rail carrier off of property that it uses for transportation, or when it would remove assets from the interstate rail network. *See, e.g., 14500 Ltd.*, FD 35788, slip op. at 4-5 (finding claims of adverse possession and prescriptive easement preempted); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD 35468 (STB served Apr. 21, 2015) (attempt to evict a railroad from property used as part of the interstate rail network). The record does not suggest that a decision rescinding the 1994 Agreement would have either of these effects.