

RENDERED: OCTOBER 19, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001601-MR

THE RAILWAY EXPOSITION COMPANY

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 05-CI-01346

CSX TRANSPORTATION, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \*\* \*\* \*

BEFORE: HOWARD, JUDGE; GUIDUGLI AND KNOPF, SENIOR JUDGES.<sup>1</sup>

KNOPF, SENIOR JUDGE: The single issue in this appeal is whether the trial judge erred in summarily dismissing the Railway Exposition Company's (REC) complaint on the basis that its cause of action is preempted by federal legislation placing jurisdiction over such disputes in the Surface Transportation Board (STB). Because our review of the substantial body of federal caselaw in this area convinces us that dismissal was premature, we reverse the judgment and remand the case for further proceedings.

<sup>1</sup> Senior Judges Daniel T. Guidugli and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

There is no substantial dispute as to the facts. REC and appellee CSX Transportation (CSX) entered into a sidetrack agreement in 1988. Under the terms of that agreement, CSX was required to maintain the portion of the sidetrack that it owned, including the switch, and was also obligated to use the sidetrack in a manner that would not materially affect its use by REC. In May, 2002, a derailment extensively damaged the switch and surrounding property. CSX subsequently removed the damaged switch and refused to replace it despite repeated requests by REC representatives that it do so.

The sidetrack agreement specifically provided that after the expiration of five (5) years from the date of execution, either party could terminate the agreement by giving sixty (60) days written notice. The agreement also permitted CSX to terminate the agreement, suspend operations and/or disconnect the sidetrack by giving thirty (30) days notice to REC.

It appears that the parties engaged in negotiations concerning re-installation of the switch, but CSX eventually notified REC that the switch would not be replaced. REC thereafter filed the instant action in Kenton Circuit Court on May 13, 2005. CSX moved to dismiss REC's complaint for lack of jurisdiction, arguing that the suit essentially alleged the abandonment of the switch, a matter over which the STB has exclusive jurisdiction. By order entered May 15, 2006, the trial court granted CSX's motion on the basis of its review of the pleadings and the briefs filed by the parties. REC then filed a motion to reconsider, requesting an opportunity to be heard orally because it

had not been granted oral argument on the initial motion to dismiss. After conducting a hearing on the motion to reconsider, the trial court denied REC's motion stating:

The court finds that the complaint alleges a cause of action based upon Defendant CSX's abandonment of switches and sidetracks. The Surface Transportation Board, pursuant to 49 U.S.C. Section 10501(b) has jurisdiction over disputes concerning abandonment of switches and sidetracks.

This appeal followed.

We commence our discussion by reference to the clear language of 49 U.S.C. §10501(b):

**(b) The jurisdiction of the Board over--**

**(1)** transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and **(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks,** or facilities, even if the tracks are located, or intended to be located, entirely in one State, **is exclusive.** Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. [Emphasis added.]

Despite the seemingly plain language of this statute, REC argues that the trial court's decision is erroneous because its claims against CSX sound in contract and the STB has no jurisdiction over contract claims.

In *Maynard v. CSX, Inc.*, 360 F. Supp.2d 836, 839-40 (E.D.Ky. 2004), the Court set out the following background as to the history and purpose of the federal preemption legislation:

“Congress and the courts long have recognized a need to regulate railroad operations at the federal level.” *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029 (9th Cir.1998). Further, “Congress' authority under the Commerce Clause to regulate the railroads is well established.” *Id.* (citations omitted). In that regard, Congress enacted in 1995 the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”). In enacting the ICCTA, Congress sought to deregulate the railroad industry. Recognizing that the over regulation of the surface transportation industries had led to financial problems for the rail industry, Congress intended for the ICCTA to significantly reduce state and local regulation of railroads. See S.Rep. No. 176, 104th Cong. 1st Sess. 3 (1995). In furtherance of this intended purpose, the jurisdictional section of the ICCTA grants the Surface Transportation Board (“STB”) exclusive jurisdiction over nearly all matters of rail regulation.

Thus, the Court makes clear that the federal legislation is intended to preclude *state regulation* of railroad operations. As to what constitutes state regulation, the *Maynard* court goes on to offer the following explanation:

As discussed in the *Guckenberg* case, a state may regulate through an award of damages under a common law claim as effectively as it may regulate by some form of preventative relief, and thus a state common law cause of action qualifies as “regulation” for purposes of section 10501(b). *Guckenberg*, 178 F.Supp.2d at 958. *See also Friberg*, 267 F.3d at 444 (ICCTA preemption clause does not permit ICCTA “to be circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions”)[.]

The question thus becomes whether the claims advanced by REC can be appropriately classified as falling within the “common law claims” proscription and/or within the express proscription over claims involving switch abandonment; or whether, as REC

suggests, its claims are garden variety contract claims over which the STB itself has shown a predilection for state-court deference.

The recent opinion in *New England Cent. R.R., Inc. v. Springfield Terminal Ry. Co.*, 415 F.Supp.2d 20 (D.Mass.,2006), offers some guidance. As noted by the Court in that case, courts have “struggled to define the scope of this preemption provision, and as this decisional authority emerges, a general line comes into focus, distinguishing purely regulatory activity, which is clearly preempted, from traditional torts.” *Id.* The *New England Central* court's analysis of the proper application of the preemption provision leads us to conclude that the dismissal of REC's claim was premature in that there appears to be no resolution of a critical inquiry: whether REC's contract claims unreasonably interfere with interstate commerce.

The court in *New England Central* reached a similar conclusion based upon the following reasoning:

Although courts have repeatedly found that common law claims are preempted where they seek to affect railroad conduct, courts have upheld common law claims against railroads that do not relate directly to railroad operations. In *Rushing*, for example, a court allowed homeowners' claims for damage to property from pooling of rainwater caused by the railroad's construction of an earthen berm. *See* 194 F.Supp.2d at 501 (allowing nuisance and negligence claims related to the earthen berm). **Contract claims have also been allowed to proceed.** As noted above, in *Pejepscot*, the district court found that breach of contract claims based on a voluntary agreement were not preempted, **provided that the agreement did not unreasonably interfere with interstate commerce.** *See* 297 F.Supp.2d at 333. In *Cedarapids*, after dismissing claims that would have forced the railroad to abandon its tracks, the district court found that the plaintiff's

request for rescission of a lease and restitution of amounts paid thereunder was not preempted, because it concerned only the lease and the parties' rights thereunder. 265 F.Supp.2d at 1015.

At this time, however, a finding that Plaintiff's state law claims are preempted is premature. Without a full record, this court cannot evaluate the nature of Plaintiff's claim and say with certainty that § 11704 provides a remedy that preempts the common law claims. *See Ayer*, 330 F.3d at 17 (noting that **the determination of whether a state law unduly restricts a railroad or interferes with interstate commerce is a "fact-bound question"**). The large majority of the cases cited above in which courts found that a claim was preempted by § 10501(b) were not decided on a motion to dismiss, but rather at some later stage, when the record before the court was more fully developed.

*Id* at 26-27 (emphasis added, footnotes and internal citations omitted).

We find this reasoning squarely on point. Without a determination whether REC's contract claims constitute an unreasonable burden on interstate commerce, we cannot properly assess the trial court's summary decision that REC's complaint is preempted by section 10501(b). We therefore remand the case to the trial court to make that determination prior to ruling on the question of preemption.

Finally, we note REC's argument that it was denied the opportunity to present oral argument on CSX's motion to dismiss, to which it alleges opposing counsel had expressly agreed and which had been endorsed by the court. We find this to be a matter peculiarly within the discretion of the trial court and are not convinced that REC suffered any deprivation of due process by the denial of the opportunity to be heard

orally. On remand, the trial court again has the authority to determine what procedure will best assist it in resolving the issues in the case.

In conclusion, the summary dismissal of REC's complaint is reversed and the case remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John S. "Brook" Brooking  
Brooking, Moeves & Halloran PLLC  
Fort Wright, Kentucky

BRIEF FOR APPELLEE:

Edward Roberts  
James F. Brockman  
Lindhorst & Dreidame  
Cincinnati, Ohio

ORAL ARGUMENT FOR APPELLANT:

John S. "Brook" Brooking  
Fort Wright, Kentucky

ORAL ARGUMENT FOR APPELLEE:

James F. Brockman  
Cincinnati, Ohio