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Via E-filing

August 27, 2020

ENTERED
Office of Proceedings
August 27, 2020
Part of
Public Record

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 36420, Commuter Rail Division of the Regional Transportation Authority, d/b/a METRA

Dear Ms. Brown:

In its August 6, 2020, decision holding the referenced matter in abeyance, the Board directed the parties to promptly notify the Board of any decision by the district court that was considering Metra's motion to dismiss (or stay) a case involving the same issues and refer the issues to the Board under the doctrine of primary jurisdiction.

This letter is to notify the Board that on August 27, 2020, the district court issued an order denying Metra's motion. Counsel for Union Pacific has coordinated with counsel for Metra in providing this notice. A copy of the court's decision is attached for the Board's convenience.

Thank you for your assistance.

Sincerely,

/s/ Michael L. Rosenthal

Michael L. Rosenthal
Counsel for Union Pacific Railroad Company

cc: Parties of Record

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNION PACIFIC RAILROAD CO.,	)	
	)	
Plaintiff,	)	Case No. 19-cv-7957
	)	
v.	)	Judge Jorge L. Alonso
	)	
THE REGIONAL TRANSPORTATION AUTHORITY AND ITS COMMUTER RAIL DIVISION, d/b/a METRA,	)	
	)	
Defendant.	)	

ORDER

Defendant's motion to dismiss [26] is denied. Plaintiff's motion [55] to file notice of related filings is granted. Defendant's motion [56] to file oversized reply is granted. Plaintiff's motion [59] to file notice of decision is granted. This case is set for status hearing on September 8, 2020 at 9:30 a.m.

STATEMENT

Plaintiff Union Pacific Railroad Company ("Union Pacific") filed suit against Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra ("Metra"). In its complaint, Union Pacific seeks a declaration that it does not have common-carrier obligations under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").

In its complaint, Union Pacific alleges (and the Court takes the allegations as true for purposes of this motion) that it owns three train lines—the North Line to Kenosha, Wisconsin; the Northwest Line to McHenry, Illinois; and the West Line to Elburn, Illinois—running from Ogilvie train station in Chicago. Defendant Metra owns the commuter passenger trains that run on those three lines.

In or about January 2010, Union Pacific and Metra entered a Purchase of Service Agreement ("PSA") under which Union Pacific agreed to operate Metra's commuter trains on the three lines Union Pacific owns. In exchange, Union Pacific receives compensation from Metra, as well as indemnification for certain liabilities. The services Union Pacific provides include hiring and training staff and engineers; maintaining the tracks, rights of ways, stations and platforms; selling tickets and collecting fares; and administrative services. In December 2015, Union Pacific and Metra extended the agreement until December 31, 2019. The parties later extended the PSA through February 29, 2020.

Union Pacific alleges that it and Metra have attempted to negotiate a PSA for the future but have not reached an agreement. Both seem to agree that commuter rail service should continue. One issue standing in the way of agreement on a new PSA is that the parties disagree about whether Union Pacific has any legal obligation to continue providing the services it currently provides. Union Pacific "intends to exit the business of operating commuter rail trains," (Complt. ¶ 4), which is to say that Union Pacific wants Metra to operate its own commuter trains. Metra, on the other hand, "has contended that, if the PSA were to expire without the parties reaching a new agreement for the continued provision of commuter rail service on Union Pacific's lines, Union Pacific would be subject to a 'common carrier' legal duty that would require Union Pacific to continue operating Metra's commuter trains after expiration." (Complt. ¶ 6). Because of the dispute, Union Pacific filed this declaratory-judgment action seeking a declaration that it has no common-carrier obligations to provide commuter rail service under the ICCTA.

Metra filed a motion to dismiss (or stay) in which it asks the Court to refer the question to the Surface Transportation Board under the doctrine of primary jurisdiction. While that motion was being briefed, Metra asked the Surface Transportation Board ("STB") for a declaration that Union Pacific has common-carrier obligations to provide commuter passenger service on the three lines. [Docket 55-1]. Metra's request to the STB appears to be in response to a letter Union Pacific sent to it. [Docket 56-2]. In the letter, Union Pacific told Metra that it intends to cease providing certain services, including legal services, by August 31, 2020. Union Pacific, in turn, asked the STB to hold its proceeding in abeyance on account of this case.

On August 5, 2020, the Surface Transportation Board issued an order holding its proceeding in abeyance. It said, among other things:

> UP's motion to hold the proceeding in abeyance will be granted. Metra does not dispute that the federal district court has concurrent jurisdiction to resolve the common carrier question, and litigation on the same question Metra has now raised has been pending in district court for over seven months.

[Docket 59-1 at 3].

With that background in mind, the Court turns to the motion to dismiss, in which Metra asks the Court to refer the common-carrier question to the STB on the basis of primary jurisdiction. "The doctrine of primary jurisdiction is not, despite its name, jurisdictional. Indeed, it presupposes that the court . . . has jurisdiction over the case." *Baltimore & Ohio Chi. Terminal RR Co. v. Wisconsin Central, Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) (internal citations omitted). Primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). When that happens, a court can refer the issue to an agency, although "referral" is not a precise description. Rather, the court stays the case to give the litigant a chance to ask the agency for an answer. *Reiter*, 507 U.S. at 268 n. 3.

In determining whether an issue is within an agency's so-called primary jurisdiction, "[n]o fixed formula exists," but the Supreme Court has recognized "two factors" that cut in favor

of "referring" an issue to an agency. *United States v. Western Pacific RR Co.*, 352 U.S. 59, 64 (1956). Thus, where a case "rais[es] issues of fact not within the conventional experience of judges" or "requir[es] the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Western Pacific*, 352 U.S. at 64.

In *Western Pacific*, three railroads sued the United States for not paying the tariff for incendiary bombs when it shipped bomb components. The Supreme Court concluded that the issue was within the primary jurisdiction of the Interstate Commerce Commission, which had set the tariff for incendiary bombs (and, at the time, set all tariffs), to decide whether the other materials fell within the tariff. It explained:

> [T]here were obviously commercial reasons why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore follows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves an intimate knowledge of these very reasons themselves. Whether steel casings filled with napalm gel are incendiary bombs is, in this context, more than simply a question of reading the tariff language or applying abstract 'rules' of construction. For the basic issue is how far the reasons justifying a high rate for the carriage of extra-hazardous objects were applicable to the instant shipment.

Western Pacific, 352 U.S. at 66-67. Thus, the Supreme Court concluded that the question of the appropriate tariff for the goods shipped was for the ICC. *Id.* at 70.

Here, Metra has not convinced the Court that this case presents a fact-intensive issue requiring an agency's understanding of a complex industry. This case does not, for example, ask the Court to adjudicate the *extent* of Union Pacific's common-carrier obligations. By statute, a rail carrier must provide transportation on reasonable request. 49 U.S.C. § 11101(a). Questions of reasonableness are generally within the primary jurisdiction of the STB. *See Baltimore & Ohio*, 154 F.3d at 410-11 ("The central issue that the doctrine confides to the agency is the reasonableness of the terms in the tariff."); *see also Chlorine Institute, Inc. v. Soo Line RR*, 792 F.3d 903, 912 (8th Cir. 2015) ("Determining whether a request is reasonable is a complex, fact-intensive inquiry that requires knowledge and consideration of the industry at issue. The task is usually best left to the STB—the agency most experienced in evaluating the particular circumstances of each case. And in other cases where the central issue was reasonableness, this Court and others have applied the doctrine of primary jurisdiction to defer claims to the STB.") (internal citations omitted); *Pejepscot Industrial Park, Inc. v. Maine Central RR Co.*, 215 F.3d 195, 205 (1st Cir. 2000) ("STB's expertise is clearly involved in the question of whether [a party's] actions constitute unlawful refusal to 'provide service on reasonable request.'").

Likewise, Metra has not convinced the Court that the case involves an issue that is within the agency's discretion. Metra has not, for example, shown this is a case requiring interpretation of an ambiguous term in a regulation. *See, e.g., In re: Starnet, Inc.*, 355 F.3d 634, 636-39 (7th Cir. 2004) (after explaining the multiple potential meanings of the word "location" in the statute and regulations, the Seventh Circuit referred the question of its meaning to the FCC). Nor has

Metra cited any statutory provision under which Congress has delegated the issue in this case to the STB.

Rather, this case seems to present an issue of statutory interpretation: whether Union Pacific does or does not have common-carrier obligations to provide commuter passenger service under the ICCTA. Considering such legal issues is what this Court and its sister courts do every day, which is why it would not be appropriate to refer such an issue to an agency. *See Louisville & Nashville RR Co. v. F.W. Cook Brewing Co.*, 223 U.S. 70, 84 (1912) ("[T]he result must not turn upon any administrative question or questions of fact within the scope of the power of the Commission, but upon validity of the legislation which controlled the action of the carrier. That is a question of general law, for a judicial tribunal[.]"); *see also Baltimore & Ohio*, 154 F.3d at 410-11 ("This is an issue of law rather than a matter within the special expertise of the STB, and therefore it did not have to be referred to the agency."); *cf. Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-6 (1976) ("The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of those standards."). This Court also suspects the STB would not have held its matter in abeyance if it believed the issue was within its primary jurisdiction. Still, the STB possesses significant industry knowledge and is welcome to submit an amicus brief on the merits. *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 132 (7th Cir. 1991) (reversing referral to EPA based on primary jurisdiction and noting, "If the district court believed that it needed specific information from the EPA to decide this case, it could have asked the EPA to file an *amicus* brief.").

Although the Court's opinion could change if briefing on the merits discloses an issue obviously within the primary jurisdiction of the STB, the Court declines to stay this case on the basis of primary jurisdiction at this time. Defendant's motion to dismiss is denied.

SO ORDERED.

ENTERED: August 27, 2020

JORGE L. ALONSO
United States District Judge