

IRRC

Original 2404

From: Beren, Daniel [berende@bipc.com]
Sent: Tuesday, November 16, 2004 10:25 AM
To: IRRC
Subject: Letter re PUC order No. 57234

November 16, 2004

VIA ELECTRONIC MAIL

Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
Harristown 2, 14th Floor
333 Market Street
Harrisburg, PA 17101

Re: Public Utility Commission Order No. 57-234

Dear Mr. Nyce:

On behalf of Norfolk Southern Corporation, CSX Transportation, Inc. and other interstate railroads, we believe that a portion of Public Utility Commission ("PUC") Order No. 57-234, which requires Pennsylvania utilities to develop security plans and adhere to certain reporting requirements, raises significant preemption concerns inasmuch as it applies to interstate railroads subject to the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"). We have raised these issues directly with the PUC, as you can see by attached correspondence dated November 10, 2004 and have subsequently had a conference call with the PUC staff to discuss this matter and potential solutions to address these preemption issues.

In light of the concerns raised in the attached correspondence and our suggested solutions to address those concerns contained below and in the attached proposed Memorandum of Understanding ("MOU"), we request the Independent Regulatory Review Commission ("IRRC") provide the PUC more time to consider our suggestions to resolve this dispute. Fortunately the Regulatory Review Act ("RRA") provides an opportunity for the PUC or IRRC to toll the time for IRRC's and the PUC's legislative oversight committee's review of the PUC final-form regulation in order to allow time for the PUC to consider revisions to the regulation. See attached letter dated November 12, 2004 from me to Bohdan R. Pankiw.

We have proposed two potential solutions. The first, as discussed on our conference call with the PUC staff, is an MOU that would preserve any legal preemption remedies for both the PUC and the interstate railroads. While admittedly that is not the "cleanest" approach to resolving this problem, such an agreement, if approved by the PUC, would satisfy our concerns with the applicability of this final-form regulation.

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Alternatively, and perhaps more effective, is the following amendment to the final-form regulation that clarifies that the security planning regulations are not applicable to interstate railroads subject to FRSA and HMTA. Our proposed amendment to the final-form regulations is as follows:

101.7 Applicability

This chapter does not apply to interstate freight railroads regulated by the Federal Railroad Safety Act and the Hazardous Materials Transportation Act if, within 60 days following the effective date of this chapter, the railroads submit a certification to the PUC that the railroads are in compliance with the security plan requirements to those statutes.

We understand the urgency from the PUC's perspective for the Independent Regulatory Review Commission to approve the PUC's final-form regulation in a timely manner. Fortunately, the RRA contemplates exactly this type of situation - where concerns are identified later in the regulatory process and, instead of requiring the proposing agency to withdraw the regulation entirely and begin the process from scratch, the agency is provided an opportunity to remedy those concerns. In light of the IRRC's scheduled meeting on November 30, 2004, IRRC can toll the regulation until Friday, November 19, 2004 without jeopardizing the PUC's ability to obtain approval later this month. We believe that such an extension will provide ample opportunity for the PUC to consider our proposed solution to the preemption issues raised in our correspondence and discussions.

Very truly yours,

Daniel E. Beren

DEB/jag
Attachments

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11/16/2004

MEMORANDUM

To: Commissioner Glen Thomas
Public Utility Commission

From: Dan Beren

Date: November 10, 2004

Re: PUC Order No. 57-234

On behalf of Buchanan Ingersoll's client, Norfolk Southern, Kirkpatrick Lockhart's client, CSX, and other Class One railroads, we are seeking relief from that portion of the PUC's order that pertains to Class One railroads involved in interstate commerce. Because we recognize that the PUC wishes to have this Order enacted quickly, we would request that the PUC and the IRRC consider tolling the hearing on Thursday, November 18, 2004, to accommodate what the Class One railroads consider to be a major problem. This major problem is that once Class One railroads consent to state jurisdiction that would open the door to all other states to compel Class One railroads to adopt different rules in different states -- a nightmare.

We have discussed this procedure with the IRRC and we believe that by utilizing the above process we can solve the problem of the Class One railroads' need for relief, together with the PUC's need for a timely resolution. Both could be accomplished by tolling this order prior to the hearing on November 18. This would give the PUC time to make what we believe to be the necessary changes and the PUC could return the same to the IRRC so that it could be acted on at the meeting scheduled for November 30.

I recognize that you are the expert on tolling. I believe that if you can explore with your colleagues, and either the House or Senate Committees, a request that this matter be tolled in order to solve the above-mentioned problem and return it to the IRRC in time for the November 30 meeting, we could have a win-win situation.

November 12, 2004

Mr. Bohdan R. Pankiw
Chief Counsel
Pennsylvania Public Utility Commission

Via E-Mail and Facsimile

Re: Public Utility Security Planning and Readiness Rulemaking -- Comments of CSX Transportation, Inc., Norfolk Southern Railway Company, Canadian National Railway Company, Canadian Pacific Railway, and Consolidated Rail Corporation.

Dear Mr. Pankiw:

The five above railroad companies which are jointly commenting in this proceeding represent the preponderance of the freight rail operations in the Commonwealth of Pennsylvania. They respectfully ask the Pennsylvania Public Utility Commission ("PUC") to suspend and amend its regulations governing security plans for "public utilities" to exclude freight rail carriers from the application of those regulations.

There are sound legal and public policy reasons why the freight rail industry should not be swept up with the more traditional "public utilities" in this rulemaking.

- Federal law preempts state and local regulation of railroad safety and security. The Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA") mandate a federal uniform system governing railroad safety and security regulation rather than varying state-by-state regulation. (The pertinent statutory excerpts are attached.)
- The Railroad Industry has been in the forefront of private sector response to the heightened security threats the nation faces. The railroads have acted responsibly and aggressively in adopting their own security plans in consultation and conformance with the Association of American Railroads ("AAR"), the US Department of Transportation ("DOT"), the Department of Homeland Security/Transportation Security Administration ("TSA") and other federal law enforcement agencies. Preemption issues aside, the railroads submit that state regulation is not needed to force them to

act, as appropriate action has already been taken by the railroads with respect to the four areas of noted concern in the PUC regulations: physical security, cyber security, emergency response and business continuity.

The application to the railroads may be unintended.

The Railroads are raising this issue here, for the first time, because they simply were unaware of the PUC Proposed Regulations. Although the PUC's Final Rulemaking Notice on Docket No. L-00040166 indicates that copies of the proposed rules were served on the "true" utility companies through their trade associations, nothing appears to have been sent to any of the railroads. Publication in the State Bulletin did not clearly bring the matter to the actual attention of anyone in the rail industry, and PUC did not contact the railroads, to our knowledge when no rail industry comments were received. It is not even clear that the PUC affirmatively and consciously sought in the proposed regulations to regulate rail security plans. Indeed, the failure to serve copies on the rail industry, the absence of any rail-specific requirements in the proposed regulations, and the fact that PUC did not contact the rail industry suggests strongly that the railroads may have been unintentionally swept up in the regulatory reach through the mere technicality of a definition.

The inclusion of the railroads within the reach of the regulations is a consequence of the definition of "public utility" in a century-old section of the PA Statutes, 66 PA C.S.A. Section 102. The railroads are unaware of any affirmative analysis, consideration or desire of the PUC to regulate an area that is vested in the exclusive legal province of the federal government.

Federal law preempts application of the regulations to the freight railroads.

The Federal Railroad Safety Act provides for national uniformity of regulation relating to rail safety and security to the extent practicable, and expressly preempts state activity once the subject matter of security has been regulated by either the Secretary of Transportation or the Secretary of Homeland Security. 49 U.S.C. Section 20106. The preemptive umbrella of FRSA also extends to any rail safety/security matter regulated by the Secretary of Transportation, including matters prescribed under the HMTA. In this case, the preemption provision of HMTA at 49 U.S.C. Section 5125 also preempts state jurisdiction over railroad security plans. The DOT and DHS have without question occupied the field of freight railroad security.

The DOT has extensively regulated the subject matter of railroad security plans. The DOT first addressed rail security in its February 2002 Advisory Notice on Enhancing the Security of Hazardous Materials in Transportation at 67 F. Reg. 6963. This was followed by the DOT's adoption of security plan regulations in March 2003. See 49 C.F.R. Section 172 Subpart I, which was

promulgated at 68 F. Reg. 14509 -14521 (March 25, 2003). These regulations were issued in consultation with the TSA. In its evaluation of the DOT regulations TSA concluded that further security regulation is not required in the rail industry:

TSA evaluated the measures currently required under DOT hazmat and rail regulations [including DOT's HM-232 rulemaking], the nature of rail operations, and the security enhancements completed by railroads, and has determined that, for the present, they adequately address the security concerns of which it is aware. See the attached Notice, "Hazardous Materials: Transportation of Explosives by Rail," 68 F. Reg. 34,374 (June 9, 2003).

DOT and TSA continue to evaluate the need for further federal regulation to enhance rail transportation security. These two federal agencies agree that any further regulation must be based on a "comprehensive, risk-based approach" that is "narrowly tailored to suit the industry and the threat." Supra.

Case law on preemption under FRSA and HMTA is legion. In particular reference should be made to **CSX Transportation v. PUCO**, 901 F. 2d 497 (6th Cir. 1990), **cert. denied** 498 U.S.1066 (1991).

It is important for the PUC to consider that freight rail operations are interstate in nature. Many aspects of security planning affect the carriers' operations in every state in which they operate. For example, CSX and NS operate in twenty-three and twenty-two states, respectively, as well as the District of Columbia. The potential for different security plan requirements in every state creates the potential for conflict, confusion and – ultimately -- an actual reduction in security in the name of "compliance." Such burdens on interstate commerce have long been held contrary to the Commerce Clause of the US Constitution (Art I Section 8), and those principles are embodied in both FRSA and HMTA by virtue of statutory preemption to avoid subjecting railroad carriers to piecemeal regulation by the various states and localities.

There is no need for the Commonwealth to regulate freight railroads' security plans due to the industry's security measures.

In considering our request, the IRRRC should understand that the railroads are not attempting to avoid developing security plans. Those plans already exist. Indeed, the Rail Industry was one of the very first in the private sector to react to the events of September 11, 2001, by adopting comprehensive, threat-based security plans. Even before Governor Ridge had been asked to join the White House staff to lead the nation's anti-terrorist efforts, Secretary of Health and Human Services Tommy Thompson had this to say about the rail industry's efforts:

“The anti-terrorist measures that the railway industry has taken, establishing a Rail Freight Industry Crisis Center and working with the military ...have added and will continue to add to the safety of our citizens, the delivery of vital goods and the ability of our men and women in uniform to carry our battle to the enemy.”

Within a week of September 11, the railroad industry had created five task forces to address security in the new environment. With the help of experts in counter terrorism – most of them former national intelligence agency experts – the railroad industry developed a comprehensive threat-based plan. That plan has been reviewed with federal authorities in great detail at levels ranging from subject matter experts on the agencies’ staffs to the very highest levels.

Through the AAR, the Rail Industry operates a Rail Alert Network (“RAN”) and a Surface Transportation Information Sharing Analysis Center (“ISAC”). Both networks operate 24/7. The RAN creates a network for sharing rail-developed intelligence among the carriers, and the ISAC is the channel between the Rail Industry and the national intelligence agencies. AAR and the railroads regularly confer and cooperate with the federal security, law enforcement and intelligence agencies. In like manner, the railroad industry is willing to discuss its security plans with appropriate Commonwealth regulatory, homeland security, and law enforcement authorities in a joint meeting with the DOT and the TSA as long as an appropriate confidentiality agreement is reached among the parties. The railroads consider their security plans to constitute both critical infrastructure information and security sensitive information that cannot be made public for obvious reasons.

1.1.Conclusion

We respectfully submit that applying the PUC regulations to the Railroads is unnecessary, preempted by federal law, and may even be inadvertent. The Railroads request the PUC to suspend and amend the regulations so as not to apply them to freight railroads subject to the Federal Railroad Safety Act and the Hazardous Materials Transportation Act.

Respectfully submitted,

**Theodore Kalick
Canadian National Railway Company**

**William Tuttle
Canadian Pacific Railway**

**Jonathan Broder
Consolidated Rail Corporation**

**Paul Hitchcock
CSX Transportation, Inc.**

**A. Gayle Jordan
Norfolk Southern Railway Company**

CC:

Kim Joyce, Esq.

**Daniel Beren, Esq.
Peter Gleason, Esq.**

ATTACHMENT

FRSA § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

- (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866, and amended Pub.L. 107-296, Title XVII, § 1710(c), Nov. 25, 2002, 116 Stat. 2319.)

FRSA § 20103. General authority

(a) Regulations and orders – The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970. When prescribing a security regulation or issuing a security order that affects the safety of railroad operations, the Secretary of Homeland Security shall consult with the Secretary.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 863, and amended Pub.L. 103-440, Title II, § 217, Nov. 2, 1994, 108 Stat. 4624; Pub.L. 107-296, Title XVII, § 1710(b), Nov. 25, 2002, 116 Stat.)

HMTA § 5125. Preemption

a) General. Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if –

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter [49 USCS § 5101 et seq.], a regulation prescribed under this chapter [49 USCS 5101 et seq.], or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter [49 USCS § 5101 et seq.], a regulation prescribed under this chapter [49 USCS § 5101 et seq.], or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(As amended November 25, 2002, P.L. 107-296, Title XVII, § 1711(b), 116 Stat. 2320.)

HMTA § 5103. General regulatory authority

...

(b) Regulations for safe transportation. (1) The Secretary shall prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. The regulations –

(A) [Unchanged]

(B) shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate.

(C) Consultation. When prescribing a security regulation or issuing a security order that affects the safety of the transportation of hazardous material, the Secretary of Homeland Security shall consult with the Secretary.

(2) [Unchanged]

(As amended Nov. 25, 2002, P.L. 107-296, Title XVII, § 1711(a), 116 Stat. 2319)

MEMORANDUM OF UNDERSTANDING

The Pennsylvania Public Review Commission has recently issued a final rulemaking order on Public Utility Security Planning and Readiness, Docket No. L-00040166 ("the Regulation"). On its face, the Regulation is applicable to interstate railroads. It is the position of the railroads that application of the Regulation to interstate railroads is preempted by federal law, including but not limited to the Federal Railroad Safety Act 49 USC Sec.20101, the Hazardous Materials Transportation Act 49 USC Sec. 5101, and the Interstate Commerce Commission Termination Act 49 USC Sec. 10101. It is the position of the PA PUC staff that the Regulation is not preempted.

The railroads have adopted security plans in consultation with the Federal security, law enforcement and intelligence agencies and in conformance with Federal requirements. The railroads represent that these plans meet or exceed all applicable requirements under Federal law. The PA PUC regards security plans that are consistent with Federal requirements as satisfactory compliance with the Regulation. The Commission staff has nonetheless indicated a desire that the individual railroads or railroad systems confirm to the Commission that they have security plans prepared and implemented in accordance with federal law, order, regulation and/or directive.

Neither the PA PUC staff nor the railroads desire to litigate the issue of federal preemption at a time when there is no substantive disagreement between the parties. All parties desire to preserve their respective legal positions vis a vis Federal preemption, *vel non*, of the Regulation.

The parties therefore agree:

Each interstate railroad may represent by letter to the Commission that its security plans meet or exceed all applicable requirements under Federal law. The Commission staff agrees to deem those railroads to be in compliance with the state requirements. Any efforts by the Commission to review an interstate railroad's security plans will be done in conjunction with representatives of the U.S. Secretary of Transportation and/or the Secretary of Homeland Security. Any information disclosed by the railroads in the course of such a review must be kept strictly confidential and otherwise treated by the Commission in accordance with requirements of the US Department of Transportation/Federal Railroad Administration and/or the US Department of Homeland Security/Transportation Security Administration. The Commission agrees that submission of such confirmation by the railroads shall not be deemed to be a waiver of any statutory preemption defense that the railroads may have regarding the requirements of the Regulation. The Railroads agree that the agreement by the PA PUC staff to this Memorandum of Understanding shall not be deemed a waiver of any legal position of the PA PUC. All parties preserve their respective legal rights and positions.