

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CSX TRANSPORTATION, INC., a)	
Virginia corporation,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 03-756-KAJ
)	
STATE OF DELAWARE, DEPARTMENT)	
OF TRANSPORTATION and CITY OF)	
WILMINGTON,)	
)	
Defendants.)	

MEMORANDUM OPINION

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December 12, 2003

JORDAN, District Judge

I. Introduction

Presently before the court is a motion (Docket Item [“D.I.”] 25; the “Motion”) filed by the defendants, Delaware Department of Transportation (“DelDOT”) and the City of Wilmington, seeking to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

The Complaint filed by plaintiff CSX Transportation, Inc. (“CSX”) challenges the statutory authority of DelDOT to cause CSX to repair, reconstruct, or replace certain railroad bridges in accordance with the provisions of 2 *Del. C.* § 1804.¹ (D.I. 20 at ¶¶ 19-31.) CSX seeks a declaratory judgment that, due to federal preemption, DelDOT lacks legal authority to cause CSX to repair, reconstruct, or replace certain railroad bridges and that, in any event, CSX has no legal obligation to repair, reconstruct or replace the bridges. (*Id.* at ¶¶ 1-2, p. 7-8.)

¹That statute provides, in pertinent part that:

[DelDOT] shall have exclusive power ... to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be abolished upon such reasonable terms and conditions as shall be prescribed by [DelDOT]. [DelDOT] may order the work of construction, relocation, alteration, protection or abolition of any crossing aforesaid to be performed in whole or in part by any public carrier or municipal corporation or county concerned or by the [DelDOT], or, in the case of any crossing on private land, by the owner thereof....

2 *Del. C.* § 1804(c).

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1331. For the reasons set forth herein, the Motion is granted.

II. Standard of Review

In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. *See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." *Id.* The moving party has the burden of persuasion. *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991).

III. Background

CSX is a common carrier engaged in the business of transporting goods in interstate commerce by rail. (D.I. 20 at ¶ 14.) It owns railroad tracks that run through Delaware, including tracks within the city of Wilmington, and on a daily basis it operates freight trains over the tracks that run through the city of Wilmington. (*Id.* at ¶¶ 14-15.) In a letter dated July 7, 2003, DelDOT notified CSX that it would conduct a public hearing on July 31, 2003 to assess CSX's liabilities for repairs to three bridges, namely the Newport Road bridge over the CSX railroad tracks in New Castle County, Delaware (DelDOT bridge #1-651), the 6th Street bridge over the CSX railroad tracks in Wilmington, Delaware (DelDOT bridge #1-609B), and the 9th Street bridge over the CSX

railroad tracks in Wilmington, Delaware (DeIDOT bridge #1-609D), and to assess CSX's liability for removal of another bridge, the 7th Street bridge over the CSX railroad tracks in Wilmington, Delaware (DeIDOT bridge #1-609C). (*Id.* at Ex. A.) DeIDOT alleges that all four of the bridges are owned by CSX.² (*Id.*) In the July 7, 2003 letter, DeIDOT claimed that it was forced to close three of the bridges in December 2002 due to their deteriorated condition, and that the fourth bridge (#1-609D) was then restricted to vehicular traffic not exceeding three tons. (*Id.*) DeIDOT stated that CSX's "consistent disregard for its responsibilities to inspect, maintain, and upgrade these bridges" has endangered the traveling public, resulted in traffic detours that have prolonged emergency response time for fire, ambulance, and police personnel, and caused incalculable public convenience. (*Id.*)

DeIDOT also offered two options for resolution of the impasse. (*Id.*) Under the first option, CSX would fund the design, inspection, and reconstruction of three bridges to the appropriate standards, and would further fund removal of the fourth bridge. (*Id.*) DeIDOT would accept ownership of the bridges, as well as responsibility for all future inspection and maintenance. (*Id.*) Under the second option, CSX would contribute to restoring three bridges, using modern design parameters and construction materials, and would fully fund removal of the fourth bridge. (*Id.*) DeIDOT would contribute sufficient funds to increase the load bearing strength of each of the three repaired bridges, to comply with modern standards. (*Id.*) CSX would retain ownership of the

²CSX does not claim that it owns the four bridges in dispute. (D.I. 20 at ¶¶ 6-13.) However, it does not state that it does not own the bridges and also states that its predecessors-in-interest constructed the bridges. (*Id.*)

bridges and would continue to be responsible for future inspections and maintenance.
(*Id.*)

On July 24, 2003, CSX filed a Complaint (D.I. 1) seeking injunctive relief and a declaratory judgment that the scheduled hearing violated its procedural due process rights under the Constitution, that DelDOT is without authority as a matter of law to cause CSX to repair, reconstruct, or replace the bridges, and that CSX has no obligation to repair, reconstruct, or replace them. (*Id.* at ¶¶ 1-4, p. 11-12.) CSX filed a motion for preliminary injunction on July 25, 2003 (D.I. 4), but after a teleconference with Chief Judge Sue L. Robinson on July 28, 2003, DelDOT canceled the hearing (D.I. 12) and CSX withdrew its motion for preliminary injunction (D.I. 14). CSX filed an amended complaint on August 21, 2003 (D.I. 20), dropping the procedural due process argument. However, CSX maintains that DelDOT lacks authority to cause CSX to repair, reconstruct, or replace the bridges, and that CSX has no obligation to repair, reconstruct, or replace them. (*Id.* at ¶¶ 1-2, p. 7-8.)

CSX states that the United States Congress has established a Federal-Aid Highway Program for the inspection, repair, rebuilding, and replacement of railway-highway crossings and separations, including bridges, at the combined expense of federal, state, and local government because, as a matter of public policy, such maintenance should be a public function rather than a private railroad function. (*Id.* at ¶ 20.) Moreover, CSX claims that, pursuant to authority granted by Congress, the Federal Highway Administration (“FHA”), has determined that since the reconstruction, repair, maintenance, or replacement of existing grade separations, including bridges,

“are of no ascertainable net benefit to railroads,” railroads should not be required to share the costs of these projects absent a contractual obligation, and CSX does not have such an obligation. (*Id.* at ¶¶ 22-23.) As a result, CSX argues, DeIDOT is preempted from imposing an obligation on it to fund the improvement, repair, or replacement of highway bridges at issue because DeIDOT allegedly participates in the Federal-Aid Highway Program.³ (D.I. 20 at ¶¶ 28-29).

DeIDOT disputes that it is preempted by federal law from enforcing 2 *Del. C.* § 1804(c). DeIDOT claims that under its constitutionally reserved police powers, it has the authority “to regulate the public safety at railroad-highway grade crossings and to allocate to the railroads the costs of constructing, maintaining, and improving such crossings,” as well as the “improvements necessitated by changing community needs.” (D.I. 26 at 6.) DeIDOT argues that its police powers are not superseded by the Federal-Aid Highway Program because, as an exercise of congressional power under the Spending Clause, participation in the program is optional, and a state does not subject itself to federal preemption until it agrees to federal funding. (*Id.* at 6-9.) Since CSX has not alleged that DeIDOT has taken federal funds for the repair, reconstruction, and replacement of the bridges involved in this case, DeIDOT argues that it is not preempted by federal law from enforcing 2 *Del. C.* § 1804(c). (*See id.*; D.I. 20 at ¶ 29.)

³CSX alleges in its Complaint that Delaware participates in this program (D.I. 20 at ¶ 28), but later argues that additional discovery is needed to determine whether DeIDOT or the State of Delaware has “used the various federal funding mechanisms for *any* bridge projects in the state involving highway bridges crossing over rail lines” (emphasis in the original). (D.I. 29 at 3.) However, consistent with the standard for a motion for judgment on the pleadings, the court will accept CSX’s allegations as true.

IV. Discussion

The question of when federal law preempts state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2, is fundamentally one of congressional intent. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Preemption occurs in three circumstances: when Congress uses explicit statutory language to express its intent (express preemption); when state law attempts to regulate conduct in an area Congress intended the federal government to occupy exclusively (implied preemption); and when state law actually conflicts with federal law (conflict preemption). *Stehny v. Perry*, 101 F.3d 925, 938 (3d Cir. 1996) (citing *English*, 496 U.S. at 79).

In support of its claims that DelDOT is preempted from ordering it to modify, repair, and remove the railroad bridges, CSX claims that one purpose of the Federal-Aid Highway Act of 1944, P.L. 78-521 (the “Act”), was to relieve railroads of the burden of rehabilitating or replacing railway-highway crossings, including bridges. (D.I. 29 at 7.) CSX cites Section 5(a) of the Act (revised and recodified by the Federal-Aid Highway Act of 1958, Pub. L. 85-767), which states:

[T]he entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with [the Act]....

23 U.S.C. § 130(a). (See D.I. 20 at ¶ 21; D.I. 29 at 7.) CSX also cites 23 U.S.C. § 144.

(See D.I. 20 at ¶ 21.) Subsection (d) of that statute reads:

Whenever any State or States make application to the Secretary for assistance in replacing or rehabilitating a

highway bridge which the priority system established under subsection (b) and (c) or this section shows to be eligible, the Secretary may approve Federal participation in replacing such bridge with a comparable facility or in rehabilitating such bridge....

While these sections may suggest that “Congress was fully aware of the general purpose of the Act to relieve railroads of the burden of paying for the improvement of crossings,” *CSX Transportation, Inc. v. Mayor & City Council of Baltimore City, Maryland*, 759 F. Supp. 281, 284 (D. Md. 1991) (D.I. 29 at 7-8), DelDOT argues that they do not preempt enforcement of 2 *Del. C.* § 1804(c). DelDOT points out, without opposition, that states have the traditional police power reserved by the Constitution to regulate the public safety at railroad-highway grade crossings and to allocate to the railroads the costs of constructing, maintaining, and improving such crossings. (D.I. 26 at 6.) See *Atchison, T. & S.F. Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346, 355 (1953). DelDOT further asserts, without opposition, that participation in the Federal-Aid Highway Program is optional, and therefore not preemptive of state law because the Act is an exercise of Congressional authority under the Spending Clause, and “preemptive legislation enacted under the spending power presents states with a clear choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid the necessity of abiding by those requirements).” (D.I. 26 at 8-9, quoting *O’Brien v. Mass. Bay Transp. Auth.*, 162 F.3d 40, 42 (1st Cir. 1998)).

Whether the Federal-Aid Highway program was enacted by Congress under the spending power or some other authority, the permissive language of 23 U.S.C. § 130(a)

and 23 U.S.C. § 144(d) indicates that participation in the Federal-Aid Highway Program is optional, not mandatory. Courts addressing the preemptive effect of the Federal-Aid Highway Program have thus noted that “participation in the program is at the state’s option.” *Suislaw Concrete Constr. Co. v. State of Wash., Dep’t of Transp.*, 784 F.2d 952, 953 (9th Cir. 1986). As previously noted, *supra* at 6, in order for federal law to preempt state law there must be express preemption, implied preemption, or conflict preemption. *Stehny*, 101 F.3d at 938. When Congress allows the states to choose whether to apply for and accept federal funding under the Federal-Aid Highway Program, it cannot be said that Congress has intended to completely preempt state decision-making, including decisions of the sort authorized by 2 *Del. C.* § 1804.

As additional support to its preemption argument, CSX states that FHA regulations provide that “State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.” 23 C.F.R. § 646.210(a). (See D.I. 20 at ¶ 22; D.I. 29 at 9.) CSX argues that this regulation preempts all state aid projects involving hazards at railroad crossings. (D.I. 29 at 9.) CSX believes that 23 C.F.R. § 646.210(b)(2) supports its claim for declaratory relief because under that regulation, “[p]rojects for the reconstruction of existing grade separations are deemed to be generally of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.” (See D.I. 29 at 9.)

However, contrary to CSX's assertions, 23 C.F.R. § 646.210(a) does not preempt all state aid projects that involve hazards at railroad crossings. Rather, it ties preemption to specific federal-aid projects. "[The] language [of 23 C.F.R. § 646.210(a)] could not be more clear. It means, very simply, that once a state or local government agrees to the federal funding of a railroad crossing construction or reconstruction project, it cannot seek to impose the cost of that project upon the railroad." *CSX Transp.*, 759 F. Supp. at 284. In other words, a state does not subject itself to federal preemption until it applies for and accepts federal funding for the specific project in question. The interpretation of 23 C.F.R. § 646.210 in *CSX Transportation*, in addition to the interpretation of that regulation in *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 557 A.2d 832 (Pa. Commw. Ct. 1989) (stating that 23 C.F.R. § 646.210 "explicitly expresses the federal government's intent to preempt a state law allowing allocation of costs to a railroad in a federal aid project"), is consistent with the permissive language of 23 U.S.C. §§ 130(a) and 144(d), which gives the states the option to participate in the Federal-Aid Highway program.⁴ Because the express language of 23 U.S.C. §§ 130 and 144 gives states the option to participate in the Federal-Aid Highway Program, and the express language of 23 C.F.R. § 646.210(a) ties

⁴The Delaware Legislature, in setting limitations with respect to DelDOT's discretion in cases of federally funded projects, has specifically acknowledged the effect of accepting federal funds on a specific project: "[W]hen [DelDOT] or other governmental authority maintaining any public highway determines to use federal aid moneys in the construction, relocation, alteration, protection or abolition of any crossing aforesaid, then [DelDOT] shall take this into account in allocating costs." 2 *Del. C.* § 1804(c).

preemption to federal aid projects, these statutes and regulations do not indicate the requisite congressional intent for the total preemption claimed by CSX.

CSX seeks to avoid the choice states have to accept or reject federal assistance on a project-by-project basis. It argues that although the State of Delaware has refused to classify the repair and replacement of the bridges in this case as a federal aid project, since Delaware participates in the Federal Highway Bridge Replacement and Rehabilitation Program, 23 C.F.R. § 650.405, on other projects in the state, it is required to participate in the program for the repair of these bridges. (D.I. 20 at ¶ 29; D.I. 29 at 10.)⁵ The only authority CSX provides for this argument is the previously cited opinion in *CSX Transportation, Inc. v. Mayor & City Council of Baltimore City, Maryland*, 759 F. Supp. 281, 284 (D. Md. 1991). According to CSX, the court in that case held that “efforts on the part of the City of Baltimore to impose the entire cost of reconstruction on [CSX] were preempted by federal law.” (D.I. 29 at 12.) However, CSX misreads the opinion. The court’s holding in *CSX Transportation* was that federal law preempted a state law that would void an agreement between a railroad and the State of Maryland. *Id.* at 284. Nothing in the case stands for the proposition that by way of participation in the Federal Highway Bridge Replacement and Rehabilitation Program for any project, a state has obligated itself to participate in that federal program for all such projects. If

⁵CSX asserts that the Federal Highway Bridge Replacement and Rehabilitation Program is a need-based program for the replacement or rehabilitation of highway bridges on all public roads that requires the Secretary of the United States Department of Transportation to assign a sufficiency rating for every bridge, which is to be used as a basis for establishing eligibility and priority for replacement or rehabilitation of bridges. (D.I. 29 at 10.)

that “in for a penny in for a pound” logic were applied, the choice presented to state and local governments⁶ would become largely illusory.

V. Conclusion

For the reasons set forth above, defendants Motion is granted without prejudice.⁷

An appropriate order will issue.

⁶CSX has not specifically addressed the point, but presumably its position is that the state’s election to accept federal funds for a bridge repair in Seaford, Delaware eliminates any voice the City of Wilmington might have in choosing whether a bridge repair in Wilmington should be pursued with or without federal funds.

⁷CSX has asked for “a declaratory judgment that [CSX] has no obligation to repair, reconstruct or replace the Newport Road bridge (DelDOT Bridge #1-651), the 6th Street bridge (Del.DOT Bridge #1-609B), the 7th Street bridge (DelDOT #1-609C), and the 9th Street bridge (DelDOT [bridge] #1-609D)[.]” It may be that under some theory not articulated in the complaint or briefing that CSX is entitled to such a declaration. This opinion is not intended to foreclose such relief upon a proper pleading and record.

