

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1850

CITY OF GIRARD, OHIO )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 YOUNGSTOWN BELT )  
 RAILWAY CO., et al. )  
 )  
 Appellees )

On Appeal from the Trumbull  
County Court of Appeals, Eleventh  
Appellate District

Court of Appeals  
Case No. 2010 TR 00079

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT CITY OF GIRARD, OHIO

**FRANK R. BODOR (0005387)**  
**(COUNSEL OF RECORD)**  
 157 Porter Street NE  
 Warren, Ohio 44483  
 Telephone: (330) 399-2233  
 Facsimile: (330) 399-5165  
[frank.bodor@gmail.com](mailto:frank.bodor@gmail.com)

and

**MARK M. STANDOHAR (0059652)**  
**Girard City Law Director**  
 100 W. Main Street  
 Girard, Ohio 44420  
 Telephone: (330) 545-6252  
 Facsimile: (330) 545-5081  
[mstandohar@neo.rr.com](mailto:mstandohar@neo.rr.com)

ATTORNEYS FOR APPELLANT

**C. Scott Lanz, Esq. (0011013)**  
**(COUNSEL OF RECORD)**  
 Thomas J. Lipka, Esq. (0067310)  
 Manchester, Bennett, Powers & Ullman  
 The Commerce Bldg., Atrium Level Two  
 201 E. Commerce Street  
 Youngstown, OH 44501-1641  
 Telephone: (330) 743-1171  
 Facsimile: (330) 743-1190  
[slanz@mbpu.com](mailto:slanz@mbpu.com)  
 ATTORNEYS FOR APPELLEE

**Total Waste Logistics Girard LLC**  
 177 West 83<sup>rd</sup> Street – Suite 5N  
 New York, NY 10024  
 Telephone: (212) 687-2643  
[hornick@zebrafund.com](mailto:hornick@zebrafund.com)  
 APPELLEE PRO SE

**Dennis Watkins (0009949)**  
**Trumbull County Prosecutor**  
 Administration Bldg., 4<sup>th</sup> Floor  
 160 High Street NE  
 Warren, Ohio 44481-1092  
 Telephone: (330) 675-2426  
 Facsimile: (330) 675-2431  
 ATTORNEY FOR TRUMBULL  
 COUNTY

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## **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case consists of two critical issues of first impression pertaining to eminent domain law involving the appropriation of railroad real estate for a public purpose by an Ohio public agency, namely a municipality.

1) Ohio Courts should have jurisdiction, in certain cases, to determine whether or not the right of Ohio public agencies to acquire property by eminent domain, pursuant to Ohio Constitution Article I §19, enabling statutes and O.R.C. Chapter 163, is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 et. seq. A corollary is that if the Ohio Courts do have jurisdiction in certain cases to determine the jurisdiction what are the indicia or the standard of review to determine the issue of jurisdiction regarding preemption.

2) The Interstate Commerce Termination Act ("ICCTA"), 49 U.S.C. §10101 does not preempt the Ohio constitutional and statutory right of an Ohio municipality, or other public agency, to acquire railroad property for public purposes where the entire property appropriated has been contracted for sale in fee simple to a private company to be used as a commercial landfill and where alternate uses claimed by the railroad does not unreasonably interfere with rail transportation.

The majority on the Court of Appeals, at page 15 of its opinion, held that Appellant Girard's appropriation proceeding to acquire land for park purposes is not categorically or expressly preempted by the federal statute. The Court, with a dissenting opinion, held at pages 20 and 21 of its opinion, that Girard's appropriation action is "impliedly preempted" and therefore the matter must be committed to the exclusive jurisdiction of the U.S. Surface Transportation Board. The Court at page 21 then stated, "Although we conclude the appropriation proceeding is

preempted by the ICCTA, our holding is preliminary and should not be read to completely adjudicate or foreclose additional analysis by the STB on the issue. Our holding therefore functions to commit the matter to the STB for it to consider what remedy, if any, Girard may be entitled to.”

The dissenting opinion of the appellate court correctly concluded that federal preemption does not apply in this case; that the trial court had proper jurisdiction; and determined that the trial court’s decision should be reversed and remanded for further proceedings in the trial court. The dissenting opinion recognized in effect the right of the State Courts under its constitution and enabling statutes to exercise primary jurisdiction to determine whether or not the taking of railroad property was or was not preempted by the federal statute under the facts of this particular case.

The case involves a substantial constitutional question as well as a case of public and general interest. It raises the question of whether or not an Ohio Court must in all instances abdicate jurisdiction to the U.S. Surface Transportation Board where an Ohio municipality or public agency exercises its constitutional and legislative right of condemnation of Ohio property owned by a railroad pursuant to Article I §19 of the Ohio Constitution and enabling Ohio Statutes. It also expresses a necessity for this Court to establish a standard of review or indicia to determine when an Ohio Court should assume jurisdiction in an eminent domain case involving railroad property.

In this case, the railroad company contracted and obligated itself to sell the appropriated property in fee simple to a private company for purposes other than a railroad use. The contract of sale was to a waste disposal company for a landfill for construction debris. Does the lower court ruling mean that the State Courts can never retain jurisdiction in cases where the land is

owned by the railroad even if the appropriation does not unreasonably interfere with railroad use, or the intended use claimed by the railroad is not supported by cogent evidence?

Ohio Courts and public agencies need a standard of review to determine when a case is required to be filed with or referred to the STB and when jurisdiction should be retained by an Ohio Court. The STB itself acknowledges that Courts can and do make such determinations as to whether or not a proposed eminent domain action interferes with railroad operations to the extent that the railroad operation preempts the condemnation.

In an STB case entitled *Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right of Way for a Storm Sewer (2007-WL-2299735 [S.T.B.])* a lumber company sought a declaratory order to determine whether a condemnation proceeding by the City to acquire portions of land in a railway right-of-way for a storm sewer pursuant to state law, was preempted. The STB denied the request holding as follows at page 3 of its decision:

“\*3 Courts can, and regularly do (sometimes with input from the Board through referral) make determinations as to whether proposed eminent domain actions such as this would interfere with railroad operations. The uses that LLC has raised concerns about here are common and of the type that the courts are well suited to address. See Maumee & Western. While the Board enjoys broad discretion to institute a declaratory order proceeding to eliminate a controversy or remove uncertainty, the particular facts of this case do not suggest that further Board involvement is needed here.” [Emphasis Added]

Likewise, in *District of Columbia v. 109,205.5 Square Feet of Land 2005-WL-975745 (D.D.C.)* the District of Columbia filed an eminent domain suit in the District’s Superior Court [comparable to an Ohio State Court] to appropriate a bike and pedestrian trail. CSX Railroad contended that the Interstate Commerce Termination Act preempted the matter and that the District’s Superior Court was without jurisdiction. The Superior Court issued an order to remove

the case to the Federal U.S. District Court but the District Court remanded it back to the D.C. Superior Court.

The Federal Court's remand back to the Superior Court was premised on "whether or not the District's intended use of the defendant's property would unreasonably interfere with railroad operations." (Pg. 3) The Court quoted *Maumee & Western Railroad Corp., 2004-WL-395835 (S.T.B.)* at page 2 stating:

..."Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations."

Unless the matter involves uniform transportation policy or intricate or complicated technical railroad matters it would seem that a State Court is fully equipped to make determinations as to whether or not an eminent domain taking, prevents or unreasonably interferes with railroad operations.

In view of the lower Appellate Court's decision, Ohio public bodies and railroads need direction as to whether all eminent domain proceedings when filed in an Ohio Court must go through a three step process of 1) filing the appropriation case in State Court; 2) then have the matter referred to the STB to determine the preemption issue and 3) if determined that there is no preemption then go back to the State Court for processing the appropriation case. Or in most instances can the State Court, that already has the case for appropriation, keep jurisdiction to decide whether or not the appropriation prevents or unreasonably interferes with railroad operations.

If the public body must always go through the three-step process without the Ohio Court having jurisdiction to determine the issue of preemption then the appropriating body and the

railroad must go to the expense of journeying to Washington to the STB to request a declaratory judgment on the issue of preemption. If it is determined that preemption does not apply, then they must go back to the State Court to proceed with the appropriation proceeding.

If the State Court has jurisdiction to decide in most cases the question of preemption then all of the issues can be decided in one proceeding saving considerable expense to all parties and conserving judicial time and resources. Referring cases to the STB for determining the issue of preemption after the appropriation case is filed with the court requires the court to stay the case while the STB and an appeals court decide the issue thus prolonging the case, which delays the right of the appropriating body to take possession to complete the public project. This can translate into added costs to the public body since the projected cost to complete the public project may increase substantially while a ruling is being made by the STB or an appellate court on the preemption issue and the case is transferred back to the State Court to process the condemnation proceeding.

The case at bar is a perfect example of such delay. The appropriation case was filed November 16, 2006 and nearly five (5) years later it has recently been ordered to be submitted to the STB. By permitting the State Court to decide the preemption issue would, in most cases, combine the process into one series of State Court proceedings including the appellate levels thus allowing for expedited decisions.

Article I §19 provides that, "Private property shall ever be held inviolate, but subservient to the public welfare." [Emphasis Added] O.R.C. §719.01(B) authorizes municipalities to appropriate property "for parks, park entrances, boulevards, market places, and children's playgrounds." Chapter 163 of the Ohio Revised Code sets forth the procedure for a public agency, such as a municipality, to acquire the land by appropriation. These statutes satisfy the

provisions of Ohio Constitution Article I §19 of private property being “subservient to the public welfare.”

The State Courts should have jurisdiction, by virtue of the Ohio Constitution, to determine what private property is “subservient to the public welfare” and the Courts have the capacity to apply the federal law in most cases unless for some reason the matter is such that it requires action to determine uniform transportation policy, agency expertise to unravel intricate facts, or an agency determination by the STB would materially aid the Court.

The U.S. Supreme Court in *United States v. Western Pac. R.Co. (1956) 352 U.S. 59, 77 pg. 161* provided the following indicia in determining whether primary jurisdiction should rest with the court or the Surface Transportation Board:

“[T]he primary jurisdiction doctrine requires initial submission to the [STB] of questions that raise issues of transportation policy which ought to be considered by the [STB] in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICCTA].” *Atlantic Coast Line, 383 U.S. at 579. 86 S.Ct. 1000* (internal quotation marks omitted). ***Specifically, three factors are relevant to whether the primary jurisdiction doctrine applies: “(1) whether the agency determination lies at the heart of the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.”*** *Pejepscot, 215 F.3d at 205* [Emphasis Added]

The Court at page 64 further held that:

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question of whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”

The above quoted indicia of the U.S. Supreme Court was cited by the Appellant Girard in its briefs. The Appellate Court did not adopt it or any other practical standard by which primary jurisdiction could give precedent guidance to litigants in the State of Ohio.

At page 7 of its opinion the appellate court merely used as the “standard of review” the recognition of the applicability of federal preemption and treated the summary judgment motion as a dismissal under Civ.R. 41(B)(4)(a) for lack of jurisdiction over the subject matter. It maintained that the sole issue before the Court was the preemption effect of the ICCTA. The appellate court’s so-called “standard of review” begs the question as to how jurisdiction is to be determined and offers no indicia to follow to determine jurisdiction. It implies that whenever the ICCTA statute is raised that the case will be committed to the STB for determination.

This is not a recognized standard of review by the federal courts or even by the STB itself, which acknowledges courts can and regularly do make determinations as to whether proposed eminent domain actions interfere with railroad operations. (*Lincoln Lumber, supra.*)

The confusion and uncertainty of policy in Ohio is registered in the trial and the appellate courts’ differing conclusions. The trial court typed the case as a categorical preemption and ordered the parties to apply to the STB for a determination as to whether or not it “chooses to exercise its right of preemption.” Later, when remanded by the appellate court the trial court ruled the STB had jurisdiction and that the appropriation case was preempted. The appellate court maintains the case to be an “implied preemption” and also committed the case to the STB. The dissenting opinion maintains that the facts dictate there is no preemption and that the Ohio Court in effect has jurisdiction to determine the issue of preemption.

This being a case of first impression, this Supreme Court is being called upon to express its policy as to whether Ohio Courts have jurisdiction and, if so, what standard will be adopted to determine its jurisdiction in an appropriation case involving a public agency and railroad property.

## STATEMENT OF THE CASE AND FACTS

Appellant, City of Girard, ("Girard") filed an appropriation case to acquire 41.5 acres of land from a 55-acre tract of land owned by Appellee Youngstown Belt Railway Co. ("YBRR") in the City of Girard, Ohio. Prior to the appropriation Total Waste Logistics Girard LLC ("TWL") entered into written contract with YBRR for the purchase in fee simple of the entire 55 acres of land to build a construction and demolition debris waste landfill.

The property is shaped like a banana or crescent with established rail lines along the elongated perimeters of the tract. None of the land to be acquired by Girard involved the area used for rail purposes. The 41.5 acres to be acquired by Girard from a 55-acre tract owned by the railroad purposely avoided encroaching on the rail right-of-way on the western side of the appropriated real estate. It also excluded an additional 100' wide right-of-way on the eastern side of the appropriated parcel that not only excluded the existing YBRR rail line but also provided space for another potential track for future use in the event the railroad wished to expand its rail line with another set of parallel tracks and use the space along the existing tracks as a staging area for use in assembling materials that may be used for railway repairs.

Girard and YBRR both filed motions for summary judgment. The trial court on May 13, 2010 determined that it may be without jurisdiction to enter a final judgment due to what it called the clear preemption intent of Congress regarding railroads. (See Appendix A) The trial court stayed the proceedings and ordered the parties to apply to the STB for a determination "as to whether it chooses to exercise its right of preemption."

Appellant Girard appealed the case to the appellate court. The Court of Appeals decided the trial court failed to decide the jurisdictional issue properly and stated in its opinion of April 19, 2011 (See Appendix B) that it did not have jurisdiction to hear the appeal and remanded the

case back to the trial court to specifically determine within ten (10) days whether the ICCTA acts to preempt Ohio's appropriation statute in this case thereby committing jurisdiction to the STB.

The trial court on April 26, 2011 sustained YBRR's motion for summary judgment and denied Girard's motion for summary judgment. It determined that Girard's appropriation action is preempted by the ICCTA thereby committing jurisdiction to the STB. (See Appendix C)

Appellant Girard then amended its appeal to include the trial court's April 26, 2011 determination. The Appellate Court in its split decision then ruled, based upon conflicting facts between the parties' motions for summary judgment regarding the railroads' necessity for the use of the land being acquired, that Girard's action to appropriate is "impliedly preempted" and committed the matter to the exclusive jurisdiction of the STB. The Court concluded that its holding was preliminary and should not be read to completely adjudicate or foreclose additional analysis by the STB on the issue. The dissenting opinion maintained that there was no interference with rail transportation and that the appropriation was not preempted by the ICCTA. (See Appendix D)

## **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:** A Court of Common Pleas has jurisdiction to determine whether or not railroad property appropriated by an Ohio public agency is preempted by the provisions of the ICCTA except in those cases:

- a) Where there are issues of transportation policy which ought to be considered by the STB in the interests of a uniform and expert administration of the regulatory scheme laid down by the ICCTA;
- b) Where STB expertise is required to unravel intricate railroad related technical facts;
- c) Where, though not determinative, the STB determination would materially aid the court.

**Proposition of Law No. 2:** An appropriation of land for a public purpose is not preempted by the ICCTA where a railroad contracted to sell land to a private landfill company in fee simple for

use as a commercial dump for demolition debris and materials with alternative claims of use by the railroad that do not unreasonably interfere with railway use.

Article I §19 of the Ohio Constitution provides that, “Private property shall ever be held inviolate, but subservient to the public welfare.” Ohio has enabling legislation, under the provisions of the Ohio Revised Code, authorizing various public bodies to appropriate private property, as for instance, O.R.C. §719.01 giving municipalities such power. O.R.C. Chapter 163 provides for the method by which such appropriations are to be made.

The Surface Transportation Board and federal courts have acknowledged and recognized that courts can and regularly do make determinations as to whether proposed eminent domain actions would interfere with or preempt railroad operations.

The STB in *Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right of Way for a Storm Sewer* (2007 WL 2299735 [S.T.B.]) acknowledged that courts can and regularly do make determinations involving preemption as to whether proposed eminent domain actions interfere with railroad operations particularly where the concerns are common and of the type that courts are well suited to address.

In *Franks Investment Company LLC v. Union Pacific Railroad Co.* 593 F.3d 404, Fed. Carr. Cas. P 84,641 (5<sup>th</sup> Cir. (La) Jan 06, 2010) (No. 08-30236). The U.S. Court of Appeals decided the case “en banc” by seventeen judges voting to remand the case for proceedings on the merits of state law claims with only three judges dissenting. In that case it upheld its previous ruling “en banc” that there is a presumption against preemption applicable to “areas of law traditionally reserved to the states, like police power and property law...” (Emphasis Added)

In the very recent case decided March 15, 2011 of *New York & Atlantic Railway Co. v. Surface Transportation Board*, 635 F.3d 66, Fed. Carr. Cas. P 84,686 (2<sup>nd</sup> Cir., Mar 15, 2011) (NO. 10-1490-AG) cited by the *New York Law Journal* the STB found that a transload facility

operated by Coastal in NYAR's Farmingdale Yard in the town of Babylon does not fall within the STB's exclusive jurisdiction. The Second District Appellate Court upheld the decision of the STB and agreed that the transloading of construction materials and demolition debris was not within the realm of rail transportation thus the STB did not have jurisdiction and federal preemption did not apply.

In other various cases federal courts and the STB have remanded preemption cases back to the lower courts to determine whether or not a railroad's intended use of the property unreasonably interfered with railroad operations requiring a finding of preemption. (*New England Transrail LLC dba Wilmington & Woburn Terminal Railway* (2007 WL 1989841 [S.T.B.]); *District of Columbia v. 109,205.5 Square Feet of Land* 2005 WL 975745 (D.D.C.); *Maumee & Western Railroad Corp.*, 2004 WL 395835 [S.T.B.]; *United States v. Western Pac. R. Co.* (1956), 352 U.S. 59; 77 pg. 161; *Bayou DeChene Reservoir Commission v. Union Pacific Railroad Corp.* Case No. 09-0429 dated June 8, 2009.)

In the case at bar the split decision of the lower court of appeals and that of the trial court displays the disparity and confusion on the question of primary jurisdiction where an Ohio public agency appropriates land owned by a railroad. The issue of jurisdiction should be clarified and Ohio trial courts should exercise jurisdiction to decide in certain cases if preemption is warranted instead of batting the issue back and forth like a ping-pong ball between the STB and Ohio courts as to who should have primary jurisdiction to decide questions of preemption.

Since the appropriation cases are required to be filed in the Ohio Common Pleas Court involving Ohio property by an Ohio public agency, the issue of jurisdiction on preemption cases should in most cases be resolved by the local courts unless 1) the matter involves certain issues which ought to be considered by the STB in the interests of a uniform and expert administration

of the regulatory scheme laid down by the ICCTA; 2) where the STB expertise is required to unravel intricate railroad technical facts related to rail transportation; 3) where the STB determination would materially and not superficially aid the court in its determination. This is the type of standard that was adopted by the U.S. Supreme Court in *United States v. Western Pac. R. Co.*, *supra*.

The dissenting opinion of the lower appellate court is more in tune with the STB and federal court rulings in preemption cases. In addition the majority court's ruling is based upon conflicting evidence regarding evidence offered by opposing motions for summary judgment.

O.R.C.P. Rule 56 provides that:

“...Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor...”

In most cases, such as the one at bar, the evidence is conflicting as to the extent of intrusion of the appropriation case on the railroads actual use and intended use of the property for rail purposes. Girard presented evidence not only of YBRR's contract to sell the property to a private corporation for a dump but also evidence to show that three or four acres of the 41.5-acres of the land being taken for alleged staging materials is not necessary for staging of railroad supplies as claimed by YBRR. Also that sufficient land was omitted from the taking to allow for staging of materials, which YBRR's own Chief Engineering Officer admitted could be utilized. In addition, any claimed proposed present or future use of the land by YBRR, other than for landfill use, was not supported by any evidence other than self-serving statements of YBRR's

witnesses that even the trial court recognized as being self-serving at page 5 of its April 26, 2011 judgment entry. (See Appendix D) The railroad produced no documentation, such as plans, corporate minutes, memos, or other material to support its claim for intended use of the property if the waste disposal company refused to consummate its contract to purchase the real estate.

Material facts regarding the issue of the use of the land by the railroad conflicted whereby reasonable minds could come to different conclusions. Accordingly, the trial and appellate court found against Girard on the conflicting evidence contained in opposing motions for summary judgment resulting in evidentiary assumptions that were in violation of O.R.C.P. Rule 56.

The conflicting facts received by the Court on dual motions for summary judgment was not a proper legal basis for a finding by the lower court that Girard's case was preempted. Neither were these conflicting facts a proper legal basis for the appellate court to rule that there was an "implied preemption" requiring the Court to commit the matter to the STB. The conflicting facts required a hearing.

The trial court and the appellate court were required by O.R.C.P. Rule 56 to overrule both motions for summary judgment, assume jurisdiction and hold a hearing at the trial court level to make a finding of facts upon which it could then base a finding that it had jurisdiction unless the evidence showed that the case was, for reasons advanced in the proposition of law, required to be submitted to the STB.

## **CONCLUSION**

The U.S. Surface Transportation Board, the U.S. Supreme Court and other appellate courts have ruled and acknowledged that courts can and regularly have jurisdiction to make

determinations as to whether proposed eminent domain actions interfere with railroad operations and whether the eminent domain action is preempted by the Federal ICCTA.

The United States Supreme Court in *U.S. v. Western Pac. R. Co.*, *supra*, set up a standard of review to determine whether primary jurisdiction in such cases rests with the Court or the STB. The lower appellate court ruled that the standard of review to be used is that of "implied preemption," which suggests that every case where preemption is claimed or argued is required to be committed to the STB.

Appellant posits that the confusion in the lower courts demonstrates that there is a compelling need for this Ohio Supreme Court to provide indicia to be uniformly applied by Ohio Courts, based upon Article I §19 of the Ohio Constitution and enabling statutes, to assume and retain primary jurisdiction in those cases involving railroad preemption with the exception of certain cases 1) where issues of transportation policy ought to be considered by the STB in the interests of a uniform and expert administration of the regulatory scheme laid down by the ICCTA; 2) where STB expertise is required to unravel intricate railway facts; and 3) where, though not determinative, the agency determination would materially aid the court.

An appropriation of property by an Ohio public agency is not preempted by the ICCTA where a railroad enters into written contract with a landfill company for the sale of its land in fee simple to be used as a dump for construction demolition debris with alternative claims of railway use that do not unreasonably interfere with railroad operations.

For the reasons submitted above, this case involves matters of public and great general interest important to numerous Ohio public agencies having the right to exercise eminent domain involving railroad property as well as the railroads that are located in nearly every community in Ohio. The case also involves a substantial constitutional question of Article I §19 of the Ohio

Constitution as to whether railroad property in certain cases must also be “subservient to the public welfare” where the appropriation does not unreasonably interfere with railroad operations and the interpretation of the provisions of the ICCTA.

Respectfully Submitted,



**FRANK R. BODOR (0005387)**  
**(COUNSEL OF RECORD)**  
157 Porter Street, NE  
Warren, Ohio 44483  
Phone: (330) 399-2233  
Facsimile: (330) 399-5165  
[frank.bodor@gmail.com](mailto:frank.bodor@gmail.com)

and



**MARK M. STANDOHAR (0059652)**  
Girard City Law Director  
100 W. Main Street  
Girard, Ohio 44420

ATTORNEYS FOR APPELLANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail, postage pre-paid, this 31st day of October 2011, to the following:

C. Scott Lanz, Esq.  
Thomas Lipka, Esq.  
Manchester, Bennett, Powers &  
Ullman Co., L.P.A.  
Atrium Level Two  
201 E. Commerce Street  
Youngstown, OH 44501-1641  
Attorneys for Appellee

Total Waste Logistics Girard LLC  
177 West 83<sup>rd</sup> Street – Suite 5N  
New York, NY 10024  
Appellee Pro Se

Dennis Watkins (0009949)  
Trumbull County Prosecutor  
Administration Bldg., 4<sup>th</sup> Floor  
160 High Street NE  
Warren, Ohio 44481-1092  
Attorney for Trumbull County



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FRANK R. BODOR (0005387)  
Attorney for Appellant

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

CITY OF GIRARD, OHIO )

PLAINTIFF, )

vs. )

YOUNGSTOWN BELT )  
RAILWAY COMPANY, et al., )

DEFENDANTS, )

CASE NO. 2006-CV-2995

JUDGE THOMAS P. CURRAN  
(Sitting by assignment)

JUDGMENT ENTRY

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This cause came to be heard on the following motions:

1. Motion for Summary Judgment filed by Defendant Youngstown Belt Railroad Company on April 8, 2008;
2. Motion for Summary Judgment filed by Plaintiff City of Girard on June 30, 2009;
3. Motion for Leave to File Addendum Instanter filed by Plaintiff City of Girard on November 13, 2009;
4. Motion to Intervene filed by Total Waste Logistics, Girard, LLC on November 5, 2008.

The Court shall first address the motion for leave to file addendum instanter filed by Girard. The Court finds the motion to be well taken and the Court has reviewed the same in preparation for the ruling on the remaining three motions. Therefore, the motion for leave to file addendum instanter is hereby granted.

2010 MAY 13 PM 1:58  
KAREN INFANTE ALLEN  
CLERK OF COURTS  
TRUMBULL COUNTY

APPENDIX

A

The Court has also reviewed the remaining motions, pleadings, exhibits, affidavits, memoranda and the relevant applicable law.

YBR filed its motion for summary judgment on April 8, 2008. YBR claims the present eminent domain action filed by Girard is expressly preempted pursuant to the Interstate Commerce Commission Termination Act (ICCTA). This position is well taken. The ICCTA, specifically 49 U.S.C.A. §10501(b), provides exclusive jurisdiction to the Surface Transportation 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\*\*\*.”

The Code further provides: “[e]xcept 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.”

“To come within the preemptive scope \*\*\*, these activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier.” *Canadian Nat. Ry. Co. v. City of Rockwood*, 2005 WL 1349077, 3 (E.D. Mich.), quoting *Hi Tech Trans., LLC, Petition for Declaratory Order*, S.T.B. Finance Docket No. 34191, at 5 (Aug. 14, 2003) (Slip Op.). Transportation is defined as: “\*\*\* a warehouse \*\*\* yard, property, facility, instrumentality, or equipment of any kind related to the movement of

passengers or property, or both, by rail.” *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639.

In this case, Girard seeks to appropriate 41.4993 acres of land owned by YBR. According to Girard, the purpose of the appropriation is: “to acquire the land for the purpose of constructing and expanding its park grounds, playgrounds, parkways, greenery and park expansion to river frontage and provide for park recreational bicycle paths that will provide linkage to the Lake Erie and Ohio River bicycle paths.”

YBR claims Girard’s eminent domain action is expressly preempted pursuant to the ICCTA. Federal law preempts state law when the preemptive intent is express, the state law is in conflict with the federal law and “\*\*\* federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’” *Green Mountain*, supra at 641. “The ‘ultimate touch-stone’ of preemption analysis is congressional intent \*\*\*.” *Id.* The ICCTA was enacted to “\*\*\* foster railroad transportation as a safe, effective, competitive, and reasonable mode of transportation.” *Canadian Nat. Ry. Co. v. City of Rockwood*, 2005 WL 1349077, 3 (E.D. Mich.).

Total Waste Logistics Girard, LLC (TWL) is a Delaware limited liability company formed for the purpose of providing construction and demolition debris landfill services in Girard, Ohio. TWL and YBR entered into a purchase agreement wherein TWL agreed to purchase the Mosier Yard from YBR for \$275,000. The parties further agreed that upon the approval of the appropriate permits, YBR would transport construction and demolition debris by rail to disposal locations in the Mosier Yard. In addition, once the landfill permit was obtained, “\*\*\* TWL was going to grant easements

to YBR for a main rail line and a switching yard,” according to the affidavit of Guy Fragle, director of operations for TWL. However, this sale and anticipated business ventures have never been consummated due to the failure of TWL to secure the proper permits.

Girard claims the preemption statute does not apply due to the pending transfer of the real estate to TWL. Following the culmination of the sale, Girard asserts the railroad will have no control or operation for railroad purposes. Therefore, TWL will retain title to the property Girard seeks in the appropriation and YBR will have no further involvement in transportation as a rail carrier.

This court finds that the preemption intent of Congress regarding railroads is clear. As a result, the Court finds it may be without jurisdiction to enter a final judgment in this matter. The Court hereby ORDERS the parties to apply to the STB for a determination as to whether it chooses to exercise its right of preemption. This case shall be stayed on the Court’s inactive docket until such determination is made or until further order of this Court. As such, the Court shall retain jurisdiction temporarily pending the outcome of the determination by the Surface Transportation Board.

The Court also recognizes that TWL filed a motion to intervene in November 2008. In light of the Court’s decision herein, the Court finds this motion is moot at this

point and will hold any decision on said motion in abeyance pending the outcome of the stay for the STB determination.

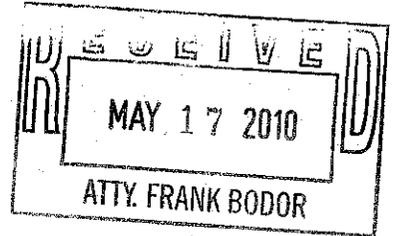
IT IS SO ORDERED.

DATE May 11, 2010

  
JUDGE THOMAS P. CURRAN  
On Assignment Article IV, Sec. 6  
Ohio Constitution

Cc: C. Scott Lanz, Esq.  
Thomas Lipka, Esq.  
Frank Bodor, Esq.  
Mark Standohar, Esq.

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JUDGE THOMAS P. CURRAN

5-1370

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M. Blushey  
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T. Lipka  
J. Krzys  
M. Rigelsky  
C. Gibbon  
Consolidated Rail Corp  
Erie Land. (2)  
YO Belt Railway

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

CITY OF GIRARD, OHIO,  
Plaintiff-Appellant,

JUDGMENT ENTRY

CASE NO. 2010-T-0079

- vs -

THE YOUNGSTOWN BELT RAILWAY  
COMPANY, et al.,  
Defendants-Appellees.

FILED  
COURT OF APPEALS

APR 19 2011

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

On November 15, 2006, appellant, the city of Girard ("Girard") filed an action to appropriate approximately 42 acres of vacant land located in the city of Girard and owned by appellee, Youngstown Belt Railway ("YBR"). Girard sought to acquire the land to create park grounds. YBR filed its answer and, in defense of the action, asserted the proceedings were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. Section 10101, et seq. ("ICCTA"). Total Waste Logistics of Girard, LLC ("TWL") subsequently intervened in the case, alleging an interest in the underlying complaint. TWL asserted it had entered into an agreement for the sale and purchase of the land in question as a landfill for construction and demolition debris. At the time of the suit, TWL had applied for, but not received, necessary permits to use the land as a disposal site.

In April of 2008, YBR filed a motion for summary judgment asserting the ICCTA preempted Ohio's appropriation statute in this case because it had the effect of burdening or interfering with railroad transportation. YBR pointed out

SCAN

APPENDIX

B

the ICCTA creates exclusive federal regulatory jurisdiction over railroads and exclusive federal remedies. Specifically, the ICCTA provides:

"The jurisdiction of the [federal Surface Transportation Board ("STB")] 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." 49 U.S.C. 10501(b).

YBR further pointed out that the regulatory scheme expansively defines "transportation" to include:

"(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

"(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property \*\*\*." 49 U.S.C. 10102(9).

Because it is a rail carrier and the underlying case involves an action to acquire land that is part of its property, YBR claimed the federal statute preempted the state action. YBR therefore concluded that the matter is within the exclusive jurisdiction of the STB.

In response, Girard moved to dismiss YBR's motion for summary judgment, asserting the Ohio Rules of Civil Procedure are inapplicable to appropriation proceedings pursuant to Civ.R. 1(C). YBR filed a memorandum in opposition to Girard's motion to dismiss, asserting its motion for summary judgment functioned to challenge the court's jurisdiction and was therefore not "clearly inapplicable" under the circumstances. On June 26, 2008, the trial court overruled Girard's motion to dismiss.

Girard subsequently filed a memorandum in opposition to YBR's motion for summary judgment as well as a motion for summary judgment of its own. In its motion, Girard argued the subject land excludes any land YBR uses or intends on using for railway purposes and does not interfere with any existing or abandoned lines. Girard observed YBR's pending sale of the land to TWL for use as a dump site underscores this point. Girard consequently concluded that the appropriation proceeding is outside the exclusive jurisdiction of the ICCTA. Therefore, as a matter of law, the Trumbull County Court of Common Pleas, not the STB, possessed jurisdiction to rule on the matter.

YBR subsequently filed its memorandum in opposition to Girard's motion. And, on May 15, 2010, after several status conferences on the issues, the trial court issued a purported "judgment" on the pending motions. The court set forth

the general background of the case and provided a brief summary of each party's position. The court then made the following "determinations":

"This court finds that the preemption intent of Congress regarding railroads is clear. As a result, the Court finds it may be without jurisdiction to enter a final judgment in this matter. The Court hereby ORDERS the parties to apply to the STB for a determination as to whether it chooses to exercise its right of preemption. This cause shall be stayed on the Court's inactive docket until such determination is made or until further order of this Court. As such, the Court shall retain jurisdiction temporarily pending the outcome of the determination by the Surface Transportation Board."

Girard filed an appeal from the above entry, after which YBR filed a motion to dismiss for want of a final, appealable order. Girard filed a memorandum in opposition to YBR's motion to which YBR subsequently replied. This court held the motion in abeyance "until such time the appeal is reviewed on the merits." A briefing schedule was set and Girard filed its merit brief, alleging the following assignment of error:

"The trial court committed prejudicial error and abused its discretion in ordering the parties to apply to the Surface Transportation Board for a determination as to 'whether it chooses to exercise its right of preemption.'"

First of all, as Girard properly points out in its merit brief, neither the STB nor the trial court may selectively choose the matters over which they possess jurisdiction. Either the STB has exclusive jurisdiction pursuant to the ICCTA or it does not; if the latter is true, the Trumbull County Court of Common Pleas may exercise subject matter jurisdiction over the appropriation case. Either way, the

analysis hinges upon whether the ICCTA preempts the underlying state appropriation proceedings, an issue of law, not administrative or judicial discretion. See, e.g., *Franks Inv. Co. LLC v. Union Pacific Railroad Co.* (C.A.5, 2010), 593 F.3d 404, 407 (“The preemptive effect of a federal statute is a question of law \*\*\*.”)

Disregarding this point, the question becomes whether the order requiring the parties to apply to the STB is final and appealable. We hold it is not.

For a judgment to be final and appealable, it is axiomatic that the entry must set forth a specific ruling upon an issue capable of judicial review. In this case, the language “ordering” the parties to apply to the STB to determine jurisdiction was used by the trial court to inappropriately dodge its responsibility of rendering a decision on a legal issue it was obligated to adjudicate; namely, whether, in the context of this case, the ICCTA preempts Ohio’s appropriation statute such that jurisdiction rests *only* with the STB. In their respective briefs, the parties thoroughly explored the issue of whether the appropriation proceeding is preempted by the ICCTA. The May 15, 2010 entry, however, does not rule upon this issue and thus cannot constitute a final appealable order.

Although the court made an observation regarding the clarity of Congress’ preemptive intent as it relates to railroad regulation, it did not specifically rule that the underlying appropriation case was preempted, either categorically or as-applied, by the ICCTA. Instead, the court initially makes the unremarkable, if not content-less, statement that “it may be without jurisdiction to enter final judgment.” The subject matter jurisdiction of the court was the only issue before the court at this stage of the proceedings. Hence, the court simply decided not to

decide the jurisdictional issue properly before it. Instead, it simply deferred its obligation to the STB.

We are as nonplussed by the trial court's irresolution as the trial court evidently was by the issues it was asked, but failed, to rule upon. Nevertheless, because the trial court did not issue a final judgment on the issue of subject matter jurisdiction, a necessary condition for a final, appealable order, we are without jurisdiction to consider the substantive merits of the preemptive effects, if any, of the ICCTA on Girard's appropriation action. See Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02.

Because the May 15, 2010 entry did not actually adjudicate the issue of preemption, the issue is not properly before this court. Given its indefinite nature, the entry is not a final, appealable order. To cure this defect, we hereby remand the matter to the trial court to specifically determine whether the ICCTA acts to preempt Ohio's appropriation statute in this case, thereby committing jurisdiction to the STB. The court shall have 10 days from the issuance of this order to enter its judgment.

IT IS SO ORDERED.

**FILED  
COURT OF APPEALS**

**APR 19 2011**

**TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK**

  
JUDGE CYNTHIA WESTCOTT RICE

FOR THE COURT

**IN THE COURT OF COMMON PLEAS  
- GENERAL DIVISION -  
TRUMBULL COUNTY, OHIO**

**CASE NUMBER: 2006 CV 02995**

**CITY OF GIRARD OHIO  
PLAINTIFF**

**VS.**

**JUDGE THOMAS P CURRAN**

**YOUNGSTOWN BELT  
RAILWAY COMPANY  
DEFENDANT**

**JUDGMENT ENTRY**

This cause came to be heard pursuant to remand from the Eleventh District Court of Appeals. Pursuant to that remand, this court has been directed to "\*\*\*\* specifically determine whether the ICCTA acts to preempt Ohio's appropriation statute, thereby committing jurisdiction to the STB." The Eleventh District Court directed this determination be made within ten days of the remand.

Therefore, as directed, the court has reviewed the motions, pleadings, exhibits, affidavits, depositions, memoranda and the relevant applicable law.<sup>1</sup> YBR presently has a motion for summary judgment pending before this court. Likewise, Girard has a motion for summary judgment pending before the court.

YBR filed its motion for summary judgment on April 8, 2008. YBR claims the present eminent domain action filed by Girard is expressly preempted pursuant to the Interstate Commerce Commission Termination Act (ICCTA). The ICCTA, specifically 49

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<sup>1</sup> The court notes for clarification purposes that in its previous judgment entry, the court granted the City of Girard leave to file its addendum brief instant. However, due to the appeal of the court's judgment entry, that addendum brief, although considered by the court, was never time-stamped as part of the court's docket. Therefore, the City of Girard filed its addendum brief on April 25, 2011, having previously been granted leave to do so according to this court's May 13, 2010, judgment entry.

U.S.C.A. §10501(b), provides exclusive jurisdiction to the Surface Transportation Board (STB) 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\*\*\*."

The Code further provides: "[e]xcept 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."

In the present case, Girard seeks to appropriate 41.4993 acres of land owned by YBR. According to Girard, the purpose of the appropriation is: "to acquire the land for the purpose of constructing and expanding its park grounds, playgrounds, parkways, greenery and park expansion to river frontage and provide for park recreational bicycle paths that will provide linkage to the Lake Erie and Ohio River bicycle paths."

The acreage Girard seeks to acquire constitutes a large portion of the Mosier Yard. YBR owns the Mosier Yard and the adjacent main tracks. The Mosier Yard consists of 55 acres of land in a crescent-like shape. There is an active railroad line along the westerly curve of the real property. YBR uses that active line \*\*\*\* as a through route and for staging, switching and parking rail cars \*\*\* (including) \*\*\* rail services to Syro Steel Industries, Valorec Steel, City Stone, and the movement of miscellaneous general freight." Affidavit of William A. Strawn, ¶11 and 12.

YBR claims Girard's eminent domain action is expressly preempted pursuant to the ICCTA. Federal law preempts state law when the preemptive intent is express, the state law is in conflict with the federal law and "\*\*\*\* federal law so thoroughly occupies a legislative field `as to make reasonable the inference that Congress left no room for the States to supplement it." *Green Mountain*, supra at 641. "The `ultimate touch-stone' of preemption analysis is congressional intent \*\*\*." Id. The ICCTA was enacted to "\*\*\*\* foster railroad transportation as a safe, effective, competitive, and reasonable mode of transportation." *Canadian Nat. Ry. Co. v. City of Rockwood*, 2005 WL 1349077, 3 (E.D. Mich.).

Girard maintains its appropriation will not interfere with the active railroad along the westerly curve. In addition, Girard has provided space for YBR to construct an additional active line to run parallel to the presently active railroad line without any interference with the appropriated property. Affidavit of J. Robert Lyden, P.E., P.S., ¶3.

Total Waste Logistics Girard, LLC (TWL) is a Delaware limited liability company formed for the purpose of providing construction and demolition debris landfill services in Girard, Ohio. TWL and YBR entered into a purchase agreement wherein TWL agreed to purchase the Mosier Yard from YBR for \$275,000. The parties further agreed that upon the approval of the appropriate permits, YBR would transport construction and demolition debris by rail to disposal locations in the Mosier Yard. In addition, once the landfill permit was obtained, "\*\*\*\* TWL was going to grant easements to YBR for a main rail line and a switching yard," according to the affidavit of Guy Fragle, director of operations for TWL. However, this sale and anticipated business ventures have never been consummated due to the failure of TWL to secure the proper permits.

Girard claims the preemption statute does not apply due to the pending transfer of the real estate to TWL. Following the culmination of the sale, Girard asserts the railroad will have no control or operation for railroad purposes. Therefore, TWL will retain title to the property Girard seeks in the appropriation and YBR will have no further involvement in transportation as a rail carrier.

The court finds the fact that the transfer has yet to occur is problematic. It is nothing more than guesswork and conjecture at this point to analyze and resolve a case of appropriation prior to an intended and assumed transfer of the real estate. It is the equivalent of putting the cart before the horse. As it stands now, the court is put in the position of analyzing "if this, then that" set of circumstances. This creates a quandary of unknowns which weighs in favor of the court resolving the jurisdictional question in favor of YBR since as of this present time they are operating as a railroad transporting goods on the property sought to be appropriated.

The anticipated sale of the Mosier Yard to TWL has yet to close. Therefore, the court must evaluate the jurisdictional question on the present facts; not futuristic intentions. As it sits today, YBR owns the Mosier Yard. The court agrees with YBR, "[n]either a potential transfer of ownership of the property, nor its future use \*\*\*, affects the federal preemption analysis." Courts are not in the business of analyzing "what if" scenarios, nor should they be engaged in such speculation.

According to William Strawn, President of YBR, YBR uses the Mosier Yard for the staging and storage of equipment, materials and supplies related to annual track maintenance and construction. There is an oval-shaped portion of approximately 3-4 acres on the southeastern tip of the Mosier Yard used by YBR for storage. According to

Strawn, YBR uses this section for "\*\*\* the staging and storage of railroad ties, rail, tie plates, joint bars and kegs of nuts and bolts related to Defendant's annual track construction projects." Strawn Affidavit at ¶13. YBR clears this area annually in preparation for this staging and storage of materials. Id. at ¶15.

John Dulac, Chief Engineering Officer of YBR, testified this oval portion is used once or twice a year on average for this type of staging work. According to Dulac, there are no other locations in the immediate vicinity to accomplish this staging and storing task for the Briar Hill area being serviced. Dulac also opined that the staging and storing area typically used constitutes almost double the 3-4 acre area previously indicated.

Lyden, the surveyor hired by Girard, disputes the alleged use of this area by YBR for staging and storing. According to Lyden, "[u]pon several physical inspections of the area that is contained within the 41.4993 acres being appropriated and an examination of aerial photos of the subject area taken in the years 1999, 2000, 2005 and 2006 there is no evidence that the area being taken by the City of Girard has been utilized for any purpose except paths created by all terrain vehicles." Lyden Affidavit at ¶4.

Although the court agrees the aerial photos provided by Girard depict a barren area of land with no evidence of any occupation or use, the court does not find these photos to be demonstrative of the area over a course of time. Specifically, the pictures are not enough evidence when weighed in contrast with Dulac's testimony of precise instances of use approximately once or twice a year. This testimony, combined with Strawn's affidavit, although each is self-serving by nature, cannot be outweighed by five aerial-view photographs capable only of capturing the landscape on one day of the five years depicted in the photos.

Therefore, the question properly before the court at this time is whether the ICCTA pre-empts an appropriation action by a municipality for land presently used by a rail carrier on at least an annual basis for staging and storing materials. The court answers this question in favor of preemption.

"To come within the preemptive scope \*\*\*, activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier." *Canadian Nat. Ry. Co. v. City of Rockwood*, 2005 WL 1349077, 3 (E.D. Mich.), quoting *Hi Tech Trans., LLC, Petition for Declaratory Order*, S.T.B. Finance Docket No. 34191, at 5 (Aug. 14, 2003) (Slip Op.). Transportation is defined as: "\*\*\*\* a warehouse \*\*\* yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639. Based on its operations to the west of the Mosier Yard, YBR is a rail carrier under the ICCTA.

Transportation under the ICCTA is defined broadly to include "\*\*\*\* a locomotive, car, vehicle, vessel, warehouse, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." *Green Mountain*, supra at \*642. This expansive definition includes transloading and storage facilities. Id.

The legislative history of the ICCTA indicates Congress did not intend to remove all police powers from the State government so far as the railroad entities were concerned. Id. at 643. "Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other

generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption." Id.

However, in the present case, the court is not faced with any such police power regulations. Instead, the court must determine whether an appropriation action is subject to the federal preemptive power under the ICCTA. Eminent domain actions such as this have been determined to be per se subject to preemption. *Union Pacific Railroad Co. v. Chicago Transit Authority*, 2009 WL 448897, \*7. "[N]early every judicial or STB opinion to have considered the question has concluded that the use of eminent domain power is a preempted form of state regulation." Id. The per se preemption applies if the regulation "\*\*\*\* by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized." Id.

By its very nature and definition, appropriation is a taking of another's land. This is the "\*\*\*\* most extreme type of control over rail transportation \*\*\*." *Wisconsin Central Ltd. v. City of Marshfield* (2000), 160 F.Supp2d 1009, 1013. Girard seeks to appropriate nearly 41.5 acres of land in the Mosier Yard. This type of appropriation constitutes a taking that is subject to federal preemption. *Buffalo S. R.R., Inc. v. Village of Croton-on-the-Hudson* (2006), 434 F. Supp.2d 241, 249.

Despite the case law that suggests an appropriation action is per se preempted by the ICCTA, Girard is correct to point out at least one case wherein an appropriation was not preempted. *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745. However, the court finds *District of Columbia* is not analogous to the underlying facts in this case. The area appropriated in *District of Columbia* was two

parcels of land for use as a pedestrian and bike trail much like Girard's intentions. However, the only interference with railroad operations in *District of Columbia* was the access to the railroads signal boxes. That court found the appropriated area would not restrict the railroad's access to the signal boxes since there were other means of access to the boxes and likewise for maintenance. In the present case, YBR uses a portion of the requested area for staging and storage. Once again, there is no other area in the near vicinity accessible for YBR to perform this work. The court notes that *District of Columbia* is not the majority view on appropriation and preemption.

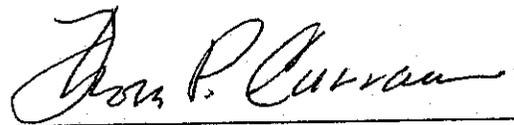
Although the court has found herein that an appropriation is preempted per se by its aggressive regulatory nature, the court's conclusion would be the same under a so-called "as applied" or factual analysis. *Union Pacific, supra*, at \*8. Pursuant to this type of factual analysis, the question becomes whether the appropriation will unreasonably interfere with the railroad's operations. *Id.* The court again answers this question in favor of a finding of an unreasonable interference.

Despite Girard's belief to the contrary, the evidence before the Court in the form of the Strawn affidavit and Dulac deposition indicates YBR consistently uses the Mosier Yard, or at least a portion thereof, on at least an annual basis for staging and storage. The appropriation sought by Girard does not accommodate this use. Although Girard has cited STB decisions and circuit court decisions wherein appropriation actions were not preempted, the court finds those are inapplicable to the case at bar because such cases involved construction and demolition debris sites. As the court has previously stated herein, if the sale to TWL had been consummated, the factual scenario would be

different and the analysis may likewise be different. However, the present facts do not involve either a working construction or demolition debris site.

Therefore, the court finds YBR's motion for summary judgment is well taken and the same is hereby granted. The appropriation action sought by Girard is preempted by law and therefore summary judgment in favor of YBR is appropriate. The Court finds the ICCTA acts to preempt Ohio's appropriation statute, thereby committing jurisdiction to the STB. Conversely, the motion for summary judgment of Girard is hereby denied.

IT IS SO ORDERED.



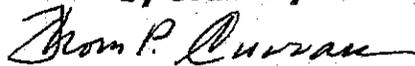
JUDGE THOMAS P CURRAN

Date: April 26, 2011

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MICHAEL J RIGELSKY JERRY R. KRZYS THOMAS J. LIPKA C. SCOTT LANZ MARTHA L BUSHEY  
JEFFREY D ADLER  
MARK M. STANDOHAR FRANK R. BODOR

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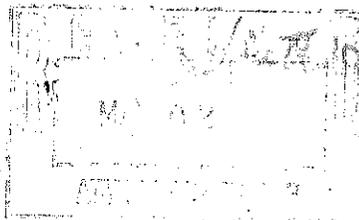


JUDGE THOMAS P CURRAN

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SEP 19 2011

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

CITY OF GIRARD, OHIO,	:	OPINION
	:	
Plaintiff-Appellant,	:	CASE NO. 2010-T-0079
	:	
- vs -	:	
	:	
THE YOUNGSTOWN BELT RAILWAY COMPANY, et al.,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 2995.

Judgment: Affirmed.

*Frank R. Bodor*, 157 Porter Street, N.E., Warren, OH 44483; *Mark M. Standohar*, City of Girard Law Director, 100 West Main Street, Girard, OH 44420 (For Plaintiff-Appellant).

*C. Scott Lanz* and *Thomas J. Lipka*, Manchester, Bennett, Powers & Ullman, L.P.A., Atrium Level Two, The Commerce Building, 201 East Commerce Street, Youngstown, OH 44503-1641 (For Defendants-Appellees, The Youngstown Belt Railway Company, Consolidated Rail Corp., and Erie Land and Improvement Co. of Pennsylvania).

*Dennis Watkins*, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Defendants-Appellees, Trumbull County Auditor and Trumbull County Treasurer).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the city of Girard ("Girard"), appeals from the judgment of the Trumbull County Court of Common Pleas granting The Youngstown Belt Railway Company, et al.'s ("YBR"), appellees herein, motion for summary judgment based upon

YBR's assertion that the trial court lacked jurisdiction to consider Girard's appropriation complaint because the action was preempted by federal law. At issue is whether the trial court erred in finding Girard's appropriation action was preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. Section 10101 et seq. For the reasons discussed herein, we affirm the judgment of the trial court.

**{¶2} Statement of Facts and Procedural Posture**

{¶3} On November 15, 2006, Girard filed an action to appropriate approximately 41.5 acres of vacant land, referred to as Mosier Yard, located in the city of Girard and owned by appellee, Youngstown Belt Railway. Girard sought to acquire the land to create public recreational and park grounds. The crescent-shaped parcel has rail lines on its outermost east and west sides, with the Mahoning River running along the west side of the western tracks and an abandoned railway situated between these western tracks and Mosier Yard. In preparing the legal description of the parcel, Girard excluded a 100-foot-wide right-of-way on the eastern side of the existing tracks. Although YBR uses "three or four acres" of the roughly 55-acre property for storage of railroad equipment and materials, the portion of the property Girard sought to appropriate appeared, at the time the complaint was filed, to be generally unutilized.

{¶4} YBR filed its answer and, in defense of the action, asserted the proceedings were preempted by the ICCTA. Total Waste Logistics of Girard, LLC ("TWL") subsequently intervened in the case alleging an interest in the underlying complaint. TWL asserted it had entered into a purchase agreement for the land in question for \$275,000. The record indicates TWL wished to obtain the property to create a landfill for construction and demolition debris. At the time of the suit, TWL had

applied for, but had not received, necessary permits to use the land as a disposal site. Once it obtained the required permits, Guy Fragle, TWL's Director of Operations, averred that TWL would grant YBR easements on the property to install additional rail so YBR could transport debris to designated sites in the landfill. According to William Strawn, YBR's president, the purchase by TWL was still pending at the time the suit was initiated and, because the permits were still pending, he could not comment on when or if the agreement would be finalized.

{¶5} In April 2008, YBR filed a motion for summary judgment asserting Girard's appropriation was expressly preempted by the ICCTA, and thus the trial court lacked jurisdiction to hear the case. YBR pointed out the ICCTA creates exclusive federal regulatory jurisdiction over railroads and exclusive federal remedies. To the extent a state law cause of action would unreasonably interfere with a rail carrier's transportation of persons or property, it is preempted by the ICCTA, and the Surface Transportation Board ("STB") is the exclusive body charged with adjudicating the matter. According to YBR, Girard's appropriation would preclude its current and future plans for rail transportation and therefore the taking would unreasonably interfere with railroad transportation in violation of the ICCTA.

{¶6} In response, Girard moved to dismiss YBR's motion for summary judgment asserting the Ohio Rules of Civil Procedure are inapplicable to appropriation proceedings pursuant to Civ.R. 1(C). YBR filed a memorandum in opposition to Girard's motion to dismiss asserting its motion for summary judgment functioned to challenge the court's jurisdiction and was therefore not "clearly inapplicable" under the circumstances. On June 26, 2008, the trial court overruled Girard's motion to dismiss.

{¶7} Girard subsequently filed a memorandum in opposition to YBR's motion for summary judgment as well as a motion for summary judgment of its own. In its motion, Girard argued the subject land does not encroach upon or interfere with any existing or abandoned lines and thus could not unreasonably interfere with railroad operations. Girard further observed YBR's pending sale of the land to TWL for use as a dump site underscored this point. Because the appropriation will have no effect on railroad transportation, Girard asserted the matter was not preempted and the Trumbull County Court of Common Pleas possessed jurisdiction to resolve the matter.

{¶8} On May 15, 2010, after several status conferences on the issues, the trial court issued an entry on the pending motions. The court set forth the general background of the case and provided a brief summary of each party's position. The court then issued a ruling, indicating "\*\*\*\* it may be without jurisdiction to enter a final judgment in this matter." Given this uncertainty, the trial court ordered "\*\*\*\* the parties to apply to the STB for a determination as to whether it chooses to exercise its right of preemption." The trial court stayed the matter on its inactive docket until the jurisdictional issue was resolved.

{¶9} Girard filed a notice of appeal from the trial court's entry, after which YBR filed a motion to dismiss for want of a final, appealable order. Girard filed a memorandum in opposition to YBR's motion to which YBR subsequently replied. This court held the motion in abeyance "until such time the appeal is reviewed on the merits." A briefing schedule was set and the parties filed their respective briefs.

{¶10} On April 19, 2011, this court issued a judgment ruling the trial court's decision was not a final, appealable order. In light of this conclusion, this court

remanded the matter to the trial court to enter a final judgment on the matter. On April 26, 2011, the trial court entered a final judgment, ruling Girard's appropriation action was both expressly and impliedly preempted by the ICCTA. As the trial court's order did not affect the issues addressed in the parties' previously filed briefs, this court treated Girard's original notice of appeal as premature and allowed the matter to go forward.

{¶11} Girard asserts two assignments of error. As Girard's assigned errors are related, we shall address them together. Girard respectively asserts:

{¶12} "[1.] The trial court committed prejudicial error and abused its discretion in finding upon remand under the facts of this case that the ICCTA acts to preempt Ohio's appropriation statute thereby committing jurisdiction to the Surface Transportation Board.

{¶13} "[2.] The trial court committed prejudicial error and abused its discretion in 1) failing to apply a presumption in favor of Girard required by law; and 2) in overruling Girard's motion for summary judgment and sustaining Youngstown Belt Railway Company's motion for summary judgment."

{¶14} On appeal, Girard argues that the ICCTA does not preempt the underlying appropriation proceeding and therefore the trial court's decision is contrary to law. Girard argues its appropriation action should be allowed to proceed in state court because the property in question does not interfere with any existing or abandoned rail lines and thus does not affect rail transportation or the movement of passengers or property. Girard points out aerial photos of the parcel from the years 1999, 2000, 2005, and 2006 demonstrate that the 41.5 acres at issue have not been "utilized for any purpose except paths created by all terrain vehicles." And, in any event, Girard

emphasizes that its appropriation will include only 41.5 of the 55 contiguous acres owned by YBR, thereby leaving YBR with 13 remaining acres, plus a 100 foot right-of-way, to store and stage its materials and equipment.

{¶15} Girard additionally emphasizes that YBR's pending sale of the entire 55-acre parcel is prima facie evidence that YBR does not need the property for rail transportation. And furthermore, YBR's purported intent to use the property, sale or no sale, for rail operations is unsupported by any specific plans. In essence, Girard argues YBR's claim for future rail use is merely a stratagem used to block Girard from acquiring the land for its stated purposes. Because the appropriation would not have the effect of regulating or burdening rail transportation, Girard maintains the state court has jurisdiction to consider the matter.

{¶16} In response, YBR contends the trial court did not err in ruling the matter was preempted because, contrary to Girard's position, the appropriation would unreasonably interfere with its current and future plans for its rail operations. According to YBR, it uses three to four random acres of the subject property annually for staging and storage of railroad materials and equipment. Further, according to YBR representatives, the sale of the land to TWL would cause YBR to construct additional track onto the property so rail cars could then transport construction debris to the landfill. These activities would generate significant revenue for YBR allowing it to reinvest in its infrastructure to increase its rail operations in the area.

{¶17} Moreover, even if TWL is unable to obtain the necessary permits to create the landfill and the sale does not go through, YBR claims it still plans to use the vacant property to expand its current rail operations by installing additional rails. YBR, through

its representatives, argues such lines will be necessary to accommodate the foreseeable increase in railway traffic in the region of Mosier Yard. Because YBR has specific plans for the property, either of which would directly involve railway transportation, it maintains Girard's appropriation action has the effect of regulating railroad operations and unreasonably interfering with railroad transportation. Pursuant to the ICCTA, YBR therefore asserts the matter is preempted and falls within the exclusive jurisdiction of the federal STB, the agency charged with ruling on causes governed by the ICCTA.

**{¶18} Standard of Review**

{¶19} Initially, we recognize the underlying judgment on appeal awarded YBR summary judgment. Because the arguments at issue are jurisdictional in nature, premised upon the applicability of federal preemption, we shall treat the trial court's judgment as a dismissal entered pursuant to Civ.R. 41(B)(4)(a). That rule permits a court to dismiss a cause, "otherwise than on the merits," for lack of jurisdiction over the subject matter. As the sole issue currently before this court is the preemptive effect of the ICCTA, we review the court's decision de novo. See *Friberg v. Kansas City S. Ry. Co.* (C.A.5, 2001), 267 F.3d 439, 442 (the preemptive effect of a federal statute is a question of law reviewed de novo).

**{¶20} Discussion and Analysis**

{¶21} In its brief, Girard initially underscores what it considers a "confusion" in the trial court's judgment entry. To wit, Girard queries: if the STB has jurisdiction over the underlying dispute, "\*\*\*\* then what gives the trial court the power to assume authority to rule on the preemption matters \*\*\*?" Although Girard formulates its position in the

form of a question, it is obviously challenging the trial court's power to rule on the preliminary issue of jurisdiction. Girard's challenge is not well-taken.

{¶22} A court possesses the authority to determine whether, as a matter of law, it has subject-matter jurisdiction over a particular case or controversy. *Swift v. Gray*, 11th Dist. No. 2007-T-0096, 2008-Ohio-2321, at ¶38. ("The existence of the court's own subject-matter jurisdiction in a particular case poses a question of law which the court has the authority and responsibility to determine.") See, also, *Internatl. Language Bank, Inc. v. Ryan*, 11th Dist. No. 2010-A-0018, 2010-Ohio-6060, at ¶28. Moreover, a general review of the cases relating to the ICCTA demonstrates that trial courts, both federal district courts and state courts of common pleas, routinely consider whether state causes of action are preempted by the statute and thereby committed to the STB's jurisdiction. Thus, the trial court's legal conclusion that the cause of action was within the jurisdiction of the STB, pursuant to the ICCTA, raises no jurisdictional red flags. With this in mind, we shall begin our analysis of Girard's arguments with a brief overview of the doctrine of preemption.

**{¶23} Preemption in General**

{¶24} The doctrine of preemption is rooted in the Supremacy Clause of Article VI of the United States Constitution and stands for the general proposition that courts implement Congress' intent for a federal law to trump, and consequently supersede, the enforceability of a state law. *Fid. Fed. S. & L. Assn. v. De La Cuesta* (1982), 458 U.S. 141, 152-153. In any case requiring a determination of whether a state-law cause of action is preempted by a federal statute, "the purpose of Congress is the ultimate touchstone." *Retail Clerks v. Schermerhorn* (1963), 375 U.S. 96, 103. Congress may show

its preemptive purpose in one of two ways. *Altria Group, Inc. v. Good* (2008), 129 S.Ct. 538, 543. First, Congress may set forth its preemptive intent through the express language of a statute. *Id.* Even when there is an express preemption clause in a federal act, however, questions may still arise regarding “the substance and scope of Congress’ displacement of state law \*\*\*.” *Id.* Second, Congress may impliedly preempt state law “if the scope of the [federal] statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.” *Id.*

{¶25} The Supreme Court of the United States has applied a presumption *against* preemption when the state legislation at issue relates to the “historic police powers of the States.” *Altria Group, Inc.*, *supra*. The Fifth Circuit Court of Appeals has explained that this presumption is applicable to “areas of law traditionally reserved to the states, like police powers and property law \*\*\*.” *Davis v. Davis* (C.A.5, 1999), 170 F.3d 475. An appropriation action does not fall under the rubric of a state’s police powers. See, e.g., *Kelo v. New London* (2005), 545 U.S. 469, 520. (“The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power.”) Moreover, we have found no case specifically holding that a state government’s constitutional power of eminent domain has been considered a matter of state property law. Nevertheless, in Ohio, state and local governments have traditionally possessed the power to take privately-owned property, for reasonable compensation, by filing an action in appropriation. We shall therefore consider the trial

court's judgment presuming ICCTA does not preempt the underlying appropriation action.

**{¶26} Express Preemption**

{¶27} "Congress and the courts long have recognized a need to regulate railroad operations at the federal level[,] and Congress' power to do so under the Commerce Clause is well-established. *Auburn v. United States* (C.A.9, 1998), 154 F.3d 1025, 1029. Thus, "[i]n enacting the ICCTA, Congress sought to deregulate and federalize many aspects of railway regulation that previously had been reserved for the states in an effort to revitalize the surface transportation industries." *Cedarapids v. Chi., Cent. & Pac. RR. Co.* (N.D.Iowa 2003), 265 F.Supp.2d 1005, 1011. To ensure the deregulation and federalization of the rail industry, the ICCTA grants exclusive jurisdiction of matters relating to rail carrier transportation regulation to the STB. The section of ICCTA conferring jurisdiction to the STB also sets forth an express preemption clause, which provides:

{¶28} "The jurisdiction of the [STB] over—

{¶29} "(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

{¶30} "(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.” Section 10501(b).

{¶31} A complete reading of Section 10501(b) demonstrates the express preemptive authority of the ICCTA is located in the last sentence under Section 10501(b)(2): If an activity attempts to regulate rail transportation by rail carriers, the remedies set forth in the ICCTA are “exclusive and preempt the remedies provided under Federal or State law.” (Emphasis added.) Section 10501(b)(2), *supra*. See, also, *Franks Invest. Co., LLC v. Union Pacific RR. Co.* (C.A.5, 2010), 593 F.3d 404, 410; *Fla. E. Coast Ry. Co. v. W. Palm Beach* (C.A.11, 2001), 266 F.3d 1324, 1331.

{¶32} In construing the preemptive scope of Section 10501(b)(2), various federal courts of appeals have held the ICCTA acts to preempt or displace *only* “regulation”; i.e., “\*\*\*\* all “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”” *Adrian & Blissfield RR. Co. v. Blissfield* (C.A.6, 2008), 550 F.3d 533, 539, quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson* (C.A.3, 2007), 500 F.3d 238, 252, quoting *Fla. E. Coast Ry. Co.*, *supra*. Accord *Franks Invest. Co., LLC*, *supra*; see, also, *PSC Phosphate Co. v. Norfolk S. Corp.* (C.A.4, 2009), 559 F.3d 212, 218. Hence, to come within the STB’s jurisdiction and consequently fall within Section 10501(b) preemption, activities must constitute the “regulation” of “transportation” and must be performed by, or under the auspices of, a “rail carrier.” *New England Transrail LLC, d/b/a/ Wilmington & Woburn Terminal Ry. – Constr., Acquisition & Operation Exemption – in Wilmington & Woburn, MA*, STB Finance Docket No. 34797, (STB served July 10, 2007), 2007 STB LEXIS 391, \*21. It

is undisputed that YBR is a rail carrier. At issue in this appeal is whether the evidence in the record demonstrates Girard's planned activities attempt to regulate transportation.

{¶33} The ICCTA expansively defines "transportation" to include:

{¶34} "(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

{¶35} "(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property \*\*\*." Section 10102(9).

{¶36} Even though the ICCTA denotes the types of activities which fall within the gamut of "transportation," "[f]or a state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations of rail transportation." *Franks Invest. Co.*, supra, at 413. The issue of whether an activity or activities constitute transportation or are integrally related to transportation under the ICCTA is "\*\*\*\* a fact-specific determination." *New England Transrail, LLC*, supra, \*24.

{¶37} With this in mind, the STB has underscored "[t]wo broad categories of state and local actions [that] have been found to be preempted regardless of the context or rationale for the action." *CSX Transp., Inc.*, STB Finance Docket No. 34662, (STB served May 3, 2005), 2005 STB LEXIS 675, \*5. The Fifth Circuit Court of Appeals has explained the first category as follows:

{¶38} "First, there are those state actions that are 'categorically preempted' by the ICCTA because such actions 'would directly conflict with exclusive federal regulation

of railroads.’ \*\*\* Regulations falling within this first category are ‘facially preempted’ or ‘categorically preempted’ and come in two types:

{¶39} “The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized \*\*\*.

{¶40} “Second, there can be no state or local regulation of matters directly regulated by the Board--such as the construction, operation, and abandonment of rail lines \*\*\*; railroad mergers, line acquisitions, and other forms of consolidation \*\*\*; and railroad rates and service.” *New Orleans & Gulf Coast Ry. Co. v. Barrois* (C.A.5, 2008), 533 F.3d 321, at 332.

{¶41} Such regulations are per se preempted because, by their very nature, they unreasonably interfere with interstate commerce and must be preempted. *Id.*; see, also, *Adrian & Blissfield RR. Co.*, *supra*, at 540. We must therefore determine whether Ohio’s appropriation statute falls within either of the foregoing categories such that it is “categorically preempted.” We hold it is not.

{¶42} We initially note, contrary to certain representations made by YBR in its brief, the use of a municipality’s eminent domain power is not subject to per se preemption under the ICCTA. See, e.g., *Dist. of Columbia v. 109,205.5 Square Feet of Land* (Apr. 25, 2005), 2005 U.S. Dist. LEXIS 7990, \*3; see, also *S.D. v. Burlington N. & Santa Fe RR. Co.*, (D.S.D., 2003), 280 F.Supp.2d 919, 931; *Fla. E. Coast RR. Co.*, *supra*, at 1330-1331. Notwithstanding Section 10501(b)’s broad preemption clause, the STB has specifically determined that state condemnation proceedings are not subject to “blanket” preemption by the ICCTA:

{¶43} “\*\*\* [N]either the court cases nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible. Rather, routine, non-conflicting uses \*\*\* are not preempted so long as they would not impede rail operations or pose undue safety risks.” *Lincoln Lumber Co. – Petition for Declaratory Order – Condemnation of RR. Right-of-Way for a Storm Sewer*, STB Finance Docket No. 34915, (STB served Aug. 13, 2007), 2007 STB LEXIS 467, \*2.

{¶44} Clearly, an appropriation or condemnation action will not always deny a rail carrier the ability to conduct its operations nor will it, in all cases, directly regulate matters committed to the STB. We recognize that courts have ruled condemnation actions that seek to appropriate actual railway or a railroad right-of-way are per se preempted by the ICCTA. See *Lincoln v. Surface Transp. Bd.* (C.A.8, 2005), 414 F.3d 858; see, also, *Union Pacific RR. Co. v. Chicago Transit Auth.* (N.D.Ill., Feb. 23, 2009), Case No. 07-CV-229, 2009 U.S. Dist. LEXIS 13526. Such cases, however, presented scenarios in which the state condemnation action fundamentally interfered with or impeded railroad operations. This case does not present such facts.

{¶45} The property under consideration, while owned by YBR, does not touch upon any currently operational or abandoned rails. And Girard does not seek to take the entire property. It proposes to appropriate 41.5 of approximately 55 acres and also reserve a 100 foot right-of-way adjacent to the active rails. Finally, we underscore the appropriation proceeding at issue sought to acquire ostensibly unused railroad property to expand public recreational grounds, not to manage or govern YBR’s operations or railroad transportation.

{¶46} We acknowledge Girard's appropriation of 41.5 acres of Mosier Yard would have an effect on railroad transportation because it represents an acquisition of railroad property used currently by a rail carrier for staging and storage. The allowances in Girard's proposal, however, demonstrate the effects of the taking would be, at least in the immediate future, "remote" and "incidental" to railroad transportation. Consequently, the appropriation proceeding would not function to regulate railroad transportation. See *Adrian & Blissfield RR. Co.*, supra; *N.Y. Susquehanna & W. Ry. Corp.*, supra; *Fla. E. Coast Ry. Co.*, supra.; *Franks Invest. Co., LLC*, supra; *PSC Phosphate Co.*, supra. Under the circumstances, we therefore hold Girard's appropriation proceeding is not categorically or expressly preempted by the federal statute.

{¶47} **Implied Preemption**

{¶48} If a state law cause of action is not expressly preempted by the ICCTA, it still may be impliedly preempted or, alternatively, preempted "as applied." See, e.g., *Adrian & Blissfield RR. Co.*, supra, at 540. Such an analysis requires a factual determination of whether the cause would have "the effect of preventing or unreasonably interfering with railroad transportation." (Emphasis added.) *New Orleans & Gulf Coast Ry. Co.*, supra, at 332, quoting *CSX Transp., Inc.*, STB Finance Docket No. 34662, supra, \*8-\*9.<sup>1</sup>

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1. We recognize that the STB's decisions regarding the preemptive effect of the ICCTA and the test it uses for determining preemption are not binding upon a judicial tribunal. *Wyeth v. Levine* (2009), 129 S.Ct. 1187, 1201. Still, the "per se" and "as applied" analyses developed by the agency for analyzing preemption vis-à-vis the ICCTA has been adopted in its entirety by the Fifth and Sixth Circuit courts of appeal. See *Franks Invest. Co., LLC*, supra, and *Adrian & Blissfield RR. Co.*, supra, respectively. We defer to these federal appellate circuits on the value and guidance of the preemption tests crafted by the agency and thus adopt the same for purposes of this analysis.

{¶49} As outlined above, YBR asserts it uses three or four acres of the 55-acre plot for staging and storing of railroad materials and equipment. According to YBR, not only would Girard's appropriation of approximately 42 acres of the parcel prevent or interfere with this use, the appropriation would undermine its future established plans for the property. Such plans include its alleged intent to install tracks to assist in dumping construction debris if the property is ultimately sold to TWL or, if it is not sold, its intent to install additional tracks on the property to expand its current rail operations. To the extent the appropriation would not allow YBR to actualize these plans, YBR maintains it would interfere with rail transportation and have the effect of regulating the railroad.

{¶50} In considering whether Girard's proposed appropriation of the property would constitute a regulation that has the effect of preventing or unreasonably interfering with rail transportation, it is necessary to consider the facts relating to YBR's past and current activities on the affected property, in addition to its future plans for the property. If Girard's appropriation would unreasonably interfere with or impede YBR's operations in relation to railroad transportation, the presumption against preemption is rebutted and the matter must be committed to the STB.

{¶51} With respect to YBR's past and current use of the property, YBR's Chief Engineering Officer, John Dulac, testified the railroad used three or four acres of the property for staging and storing railroad property. He testified such occurred annually from May to October, i.e., during YBR's construction season. There was some dispute regarding this particular use. Engineer J. Robert Lyden, retained by Girard, asserted: "[u]pon several physical inspections of the area that is contained within the 41.4993 acres being appropriated and an examination of aerial photos of the subject area taken

in the years 1999, 2000, 2005 and 2006 there is no evidence that the area being taken by the City of Girard has been utilized for any purpose except paths created by all terrain vehicles.” Despite Girard’s reliance upon these points, we do not believe Lyden’s conclusions necessarily contradict Dulac’s testimony. Simply because the photos indicate the property, as a whole, appears unutilized on certain specific dates in four separate years does not imply it was not used for storage, etc., at other times of the year. We therefore agree with the trial court that Lyden’s points “are not enough evidence [to refute YBR] when weighed in contrast with Dulac’s testimony of precise instances of use \*\*\*.”

{¶52} As already discussed above, to the extent the appropriation would include the three or four acres used for storage and the like, it would affect railroad transportation. An action that merely affects rail transportation, however, is insufficient to trigger preemption. See *Franks Invest. Co., LLC*, supra at 415. Instead, as discussed supra, for an action to be preempted “as applied,” it must “\*\*\*\* have the effect of unreasonably burdening or interfering with rail transportation.” *Id.* at 414. The issue therefore becomes whether YBR’s future plans for the property *in conjunction with* its current usage of the property meets this test. We answer this question in the affirmative.

{¶53} The evidence indicated that TWL had entered a preliminary contract to purchase “approximately 55 acres” of YBR’s property. If TWL obtained the necessary permits, the record indicates it would put a landfill on the property purchased. Although Girard asserts this purchase agreement included the entirety of the Mosier Yard property (which, in Girard’s view would preclude its use for rail transportation), William

Strawn, YBR's president, testified that the 55-acre measurement was an estimation of the acreage it would sell TWL, depending on each parties' relative business needs. Strawn elaborated:

{¶54} "We didn't ever say there was 55 acres. That's why it says 55 plus or minus with the intent being that if we only wanted to sell them 30 acres, that's all we had to sell. We knew we had track to put in there. We knew we had railroad growth coming, and so I just picked a number. I said 55 plus or minus. If we need more, you get less; if you need more, we get more in finances. \*\*\* We don't have to sell them 55 acres. We can sell them 30. If that's not big enough for their blueprint because we need it for railroad, we need it for railroad. The deal's not been done."

{¶55} With respect to the sale, Strawn further explained that, to the extent the sale is finalized and TWL creates a landfill, YBR would possess easements onto the property to construct the railway necessary to unload materials into the TWL facility. According to Strawn, the TWL landfill would require this railroad nexus because such a facility "couldn't go into business without the railroad." Guy Fragle, Director of Operations for TWL, confirmed much of Strawn's testimony in an affidavit. Fragle specifically averred that if TWL obtained a permit to construct a construction and demolition debris landfill and the purchase of Mosier Yard was finalized, TWL would grant YBR easements to construct additional track for YBR to transport materials by rail directly to disposal sites in the facility.

{¶56} To the extent YBR's and TWL's plans come to fruition, YBR's participation in transporting the debris to the landfill would fall within the definition of rail transportation as defined by the ICCTA. The STB has specifically ruled that "\*\*\*\*

intermodal transloading operations and other activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation that would come within the [STB's] jurisdiction." *New England Transrail, LLC*, supra, citing *Fla. E. Coast Ry. v. W. Palm Beach* (C.A.11, 2001), 266 F.3d 1324, 1327-1336.

{¶57} Strawn also discussed YBR's plans to make various "physical plant changes" that would incorporate the Mosier Yard property. He testified the current rail system surrounding Mosier Yard is insufficient to handle the growing interstate railroad business and indicated YBR specifically intended to develop the property as needed to accommodate this growth. Strawn testified YBR is considering constructing an additional rail line running north and south on the affected property. Although Strawn did not testify when this development would occur and did not specify where on the parcel the expansion would occur, he testified the 100 foot right-of-way offered by Girard would be inadequate for the railroad to meet its ultimate expansion goals.

{¶58} In addition to Strawn's points, Dulac testified to a current expansion in industries that use YBR's lines in the region. Because of this growth, Dulac asserted that even if the TWL transaction is never finalized, additional trackage will have to be placed on the Mosier Yard property. Dulac explained the current track would be inadequate for the anticipated growth in use and, as a result, such "capacity issues" will require YBR to use the Mosier Yard property. He testified the property could be foreseeably used as a "holding area for trains because of the congestion, which would then mean that you would have to put in additional track otherwise you would have a bottle neck."

{¶59} We acknowledge YBR's future plans for the property have not been fully established. Still, in *Lincoln*, supra, the Eighth Circuit Court of Appeals determined that, in the context of considering whether an eminent domain action is preempted under the ICCTA, it is permissible to consider and evaluate a rail carrier's future plans as well as its current uses. *Lincoln*, supra, at 862. In support, the court reasoned that "[c]ondemnation is a permanent action, and 'it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.'" Id., quoting *Midland Valley RR. Co. v. Jarvis* (C.A.8, 1928), 29 F.2d 539, 541. We consequently hold there is sufficient testimony in the record from YBR's senior officials to warrant the conclusion that the property will be used for rail transportation, as contemplated by the ICCTA, in the near future.

{¶60} Moreover, courts have acknowledged the ICCTA will preempt state law claims that stand to negatively impact the "economic realm" of railroads. *Friberg v. Kansas City S. Ry. Co.* (C.A.5, 2001), 267 F.3d 439, 443; see, also, *Fort Bend Cty. v. Burlington N. & Santa Fe Ry. Co.* (Tex.App. 2007), 237 S.W.3d 355, 360; *Elam v. Kansas City S. Ry.* (N.D.Miss. 2009), No. 1:09CV304-D-D. 2009 U.S. Dist. LEXIS 24004, \*3. The testimony relating to YBR's future railroad expansion on the Mosier Yard property would have a foreseeable effect on interstate commerce and, by implication, would impact the so-called "economic realm" of railroad transportation.

**{¶61} Conclusion**

{¶62} Given the foregoing analysis, this court holds Girard's action is impliedly preempted. YBR's current uses and future plans for the property indicate that Girard's appropriation, if granted, could have the ultimate effect of unreasonably interfering with

rail transportation and those activities integrally related to transportation contrary to the jurisdictional provisions of 49 U.S.C. 10501(b). We therefore hold the state action is impliedly preempted by the ICCTA, and therefore the matter must be committed to the exclusive jurisdiction of the STB.<sup>2</sup> Although we conclude the appropriation proceeding is preempted by the ICCTA, our holding is preliminary and should not be read to completely adjudicate or foreclose additional analysis by the STB on the issue. Our holding therefore functions to commit the matter to the STB for it to consider what remedy, if any, Girard may be entitled to.

{¶63} Girard's assignments of error are overruled and the judgment entry of the Trumbull County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶64} I respectfully dissent from the majority's conclusion that Girard is impliedly preempted by the ICCTA from seeking relief in the trial court and that this matter is committed to the exclusive jurisdiction of the STB. This matter was not federally preempted and, therefore, the trial court properly had jurisdiction.

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2. In its judgment entry, the trial court initially concluded that the current action is preempted per se due to its "aggressive regulatory nature." As discussed above, we do not believe the underlying proceedings meet the test for express, per se preemption because Girard's proposed taking would not deny YBR the ability to conduct its operations and, even though it might affect rail transportation, the taking would not directly regulate matters committed to the STB. To this extent, we do not agree with the trial court's ruling. Because the trial court also determined the cause was preempted as-applied, however, we affirm its ultimate conclusion.

{¶65} State and local regulation of railroads is permissible where it does not interfere with interstate rail operations. *District of Columbia v. 109,205.5 Square Feet of Land* (D.D.C.), No. 05-202, 2005 U.S. Dist. LEXIS 7990, at \*10; *Florida E. Coast Ry. Co. v. W. Palm Beach* (C.A.11, 2001), 266 F.3d 1324, 1330-1331. However, “state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation.” *Franks Invest. Co., LLC v. Union Pacific RR. Co.* (C.A.5, 2010), 593 F.3d 404, 414.

{¶66} It is appropriate for a trial court, and a reviewing appellate court, to make a determination as to whether an eminent domain action “would interfere with rail operations and, therefore, whether removal based on complete preemption of the ICCTA [is] proper.” *Bayou DeChene Reservoir Comm. v. Union Pacific RR. Corp.* (W.D.La.), No. 09-0429, 2009 U.S. Dist. LEXIS 48236, at \*9; *Sachse v. Kansas City S. Ry. Co.* (E.D.Tex.2008), 564 F.Supp.2d 649, 655-57 (finding that an eminent domain proceeding that had been removed from state court would not impede rail operations and, therefore, the court did not have jurisdiction based on preemption of the ICCTA). It is not required that the STB make such a determination.

{¶67} Regarding whether a state or city may take railroad land through eminent domain, several courts have found that such a taking is preempted. However, it is important to note that such cases generally involve a taking of railroad land that was explicitly and clearly being used for railroad transportation. In the current case, Girard did not exercise eminent domain over the portion of the property where the railroad tracks are located. Therefore, this case is distinguishable from those where eminent domain was used to exert control over property actually containing railroad tracks or

when eminent domain interfered with the movement of a train. See *Wisconsin Cent., Ltd. v. Marshfield* (W.D.Wis.2000), 160 F.Supp.2d 1009, 1014 (state court proceedings were preempted when the city sought to relocate a portion of railroad track); *Buffalo S. RR. Inc. v. Croton-On-Hudson* (S.D.N.Y.2000), 434 F.Supp.2d 241, 244-245 (property that the city sought to appropriate contained railroad track and loading facilities and, therefore, the matter was preempted).

{¶68} In *District of Columbia v. 109,205.5 Square Feet of Land*, the court approved taking a portion of railroad property through eminent domain. In that case, the court found that federal preemption did not exist when the city sought to acquire railroad land, via condemnation, for a pedestrian and bike trail. The court found that because the trail was set back from the active railroad line and would not interfere with railroad transportation, the case was "among those generally resolved in the state courts." 2005 U.S. Dist. LEXIS 7990, at \*13. Similarly, in the current case, Girard seeks to take property set away from the active railroad tracks.

{¶69} The majority finds that Girard's action is impliedly preempted because the taking would unreasonably interfere with YBR's railroad operations. Specifically, it holds that Girard's current uses and future plans could ultimately interfere with rail transportation. However, the facts in the record do not support this conclusion. Girard sought to take 41.5 acres of YBR's property, leaving YBR with 13.5 remaining acres. Girard did not seek to appropriate the portion of the property containing the railroad tracks and also allowed a 100 foot right-of-way located to the side of the tracks. While YBR contends that it stored railroad equipment and other items on 3 to 4 acres of its property, Girard provided evidence to the trial court, in the form of aerial pictures, that

the land in question was not being used and that no railroad storage or activity had been occurring. Even if YBR was conducting such storage, it would be left with 13.5 acres, allowing sufficient room to store these items. In addition, John Dulac, YBR's Chief Engineering Officer, admitted in his deposition that the railroad could use the portion of the right-of-way beside the railroad as its storage or staging area. Under these circumstances, YBR would be able to continue its business as it had previously, without any changes to its procedure or railroad operations. Therefore, the appropriation would not have the effect of interfering with railroad transportation, as required for the application of implied preemption.

{¶70} In addition, federal courts have noted that the party challenging eminent domain or condemnation must present evidence in support of the contention that the proceedings would interfere with railroad operations. *Bayou DeChene*, 2009 U.S. Dist. LEXIS 48236, at \*14; *Franks*, 593 F.3d at 415. The challenging party cannot make "conclusory" or "unsupported statements," but must instead demonstrate that railroad transportation will actually be prevented or that unreasonable interference would occur. *Bayou DeChene*, 2009 U.S. Dist. LEXIS 48236, at \*14. Although YBR asserts that it will be prevented from conducting its railroad operations, it cannot show that it uses the property in question for more than just the use of the railroad line and the 3-4 acres of storage, as noted above, while Girard showed that no interference would occur. See *Id.* at \*15 (where the city cited specific facts supporting its contention that condemnation would not have the effect of interfering with railroad operations, including that the land to be taken to build a road was 275 feet from the railroad itself and 75 feet from the railroad right of way and the opposing party did not show interference with railroad

operations, a motion to dismiss based on preemption was without merit); *Franks*, 593 F.3d at 415 (there must be some evidence that the alleged interference will be caused specifically by the portion of land that was taken).

{¶71} YBR also argues that it was in negotiations to sell the property to TWL, a waste management company. Such a sale was speculative, as there is no evidence that a definitive sale would occur. If such a sale did not occur, YBR would continue to make little use of the property Girard is seeking to take through eminent domain, as explained above. In addition, in the sales contract, YBR did not reserve any portion of the railroad property for staging, track right-of-way, or other railroad activities, indicating that YBR has limited activity occurring on the subject parcel of land and that no interference will occur. If such a sale were to take place, any additional transportation that resulted from the operations would likely not qualify as railroad transportation, as YBR asserts. See *New York & Atlantic Ry. Co. v. Surface Transp. Bd.* (C.A.2, 2011), 635 F.3d 66, 73 (if a railroad's involvement in transporting waste is limited to transporting cars to and from the facility and the waste company is offering its own services to customers directly, preemption does not apply); *J.P. Rail, Inc. v. New Jersey Pinelands Comm.* (D.N.J.2005), 404 F.Supp.2d 636, 650.

{¶72} Even if transportation of waste could be considered railway transportation, YBR has not shown that the existing railway, which Girard does not seek to interfere with, would be insufficient to transport such waste. Although YBR contends that it may need to expand and add another track upon sale of the property to TWL, Girard Engineer Robert Lyden also testified that the acres not appropriated provide sufficient space to build another track for potential future use. Therefore, it is not likely, even if

TWL did purchase a portion of YBR's land, that an unreasonable burden or interference with rail transportation would occur, such that implied preemption would apply.

{¶73} In this case, the evidence presented supports a finding that YBR will be able to meet its present and future railway needs after Girard's exercise of its eminent domain authority. Therefore, federal preemption does not apply. I would reverse the decision of the court below and remand this case for further proceedings.

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

CITY OF GIRARD, OHIO,

JUDGMENT ENTRY

Plaintiff-Appellant,

CASE NO. 2010-T-0079

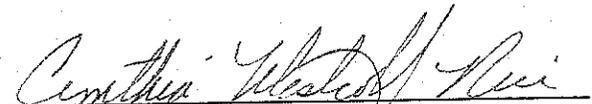
- vs -

THE YOUNGSTOWN BELT RAILWAY  
COMPANY, et al.,

Defendants-Appellees.

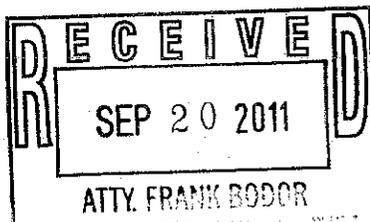
For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

  
JUDGE CYNTHIA WESTCOTT RICE

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.



FILED  
COURT OF APPEALS

SEP 19 2011

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

- APPENDIX E -