

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF GIRARD, OHIO)

Appellant,)

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

Vs.)

YOUNGSTOWN BELT
RAILROAD CO., ET AL.)

Appellees)

Supreme Court Case No. 2011-1850

Court of Appeals Case No. TR 00079

FILED
NOV 30 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RESPONSE OF DEFENDANT APPELLEE YOUNGSTOWN BELT
RAILROAD TO PLAINTIFF APPELLANT CITY OF GIRARD'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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

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

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

ATTORNEYS FOR APPELLEE

Total Waste Logistics, Girard, LLC

177 West 83rd Street – Suite 5N
New York, NY 10024
Telephone: (212) 687-2643
hornick@zebrafund.com
APPELLEE PRO SE

Dennis Watkins (0009949)

Trumbull County Prosecutor
Administration Bldg., 4th Floor
160 High Street
Warren, Ohio 44481-1092
Telephone: (330) 675-2426
Facsimile: (330) 675-2431

ATTORNEY FOR TRUMBULL COUNTY

RECEIVED
NOV 30 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
I. EXPLANATION AS TO WHY THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR IS IT A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
II. STATEMENT OF THE CASE AND FACTS	5
III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	9
A. Law and Argument Contrary to Appellant’s Proposition of Law Number One	9
B. Law and Argument Contrary to Appellant’s Proposition of Law Number Two.....	11
CONCLUSION	15
CERTIFICATE OF SERVICE.....	15,16

I. EXPLANATION AS TO WHY THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR IS IT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

The issue in this case is whether Appellant City of Girard's ("Girard") exercise of municipal eminent domain over railroad property owned by Appellee Youngstown Belt Railroad ("YBRR") is preempted under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, *et seq.* It is undisputed that the ICCTA contains an extremely broad preemption provision which expressly grants exclusive jurisdiction over railroads and railroad property to the Surface Transportation Board ("STB"), and prohibits state laws and remedies. 49 U.S.C. § 10501(b). The courts below both held that the ICCTA's broad preemption provision precluded Girard's state eminent domain action, and that jurisdiction over Girard's claim lies with the STB. Because Girard's right to exercise eminent domain over railroad property hinges on the scope and interpretation of the ICCTA's preemption clause, it is a federal statute, not a constitutional question, which is at issue.

Girard's argument that this case is of public or great general interest is also flawed. While Girard argues that this Court urgently needs to provide clarity and guidance to Ohio courts and public agencies regarding issues of federal preemption, the public agency – namely, the STB – charged by Congress with jurisdiction over railroads and railroad property has already provided clear guidance on the legal issues in this case in its numerous decisions on point. Further guidance has been provided by the voluminous federal court decisions interpreting and applying the ICCTA's preemption provision. The brief filed by YBRR with the Court of Appeals cited some 30 STB and federal court decisions. The brief filed by Girard cited a comparable number. There is already adequate case law issued by the STB and federal courts on the federal preemption and eminent domain issues involved in this case.

Having state courts set standards on questions involving federal preemption under the ICCTA is not only unnecessary but inappropriate. It invades federal jurisdiction and invites chaos into an already complicated legal issue. It is important that federal courts and the STB have uniform rules to apply to issues of federal preemption and eminent domain over railroad property. Having each state court draft its own set of standards and rules for determining when state eminent domain action over railroad property is preempted under the ICCTA is not only expressly preempted by the ICCTA, but will only lead to more confusion and uncertainty in matters involving interstate commerce and rail transportation where uniform rules and standards must apply. This is precisely why Congress expressly left jurisdiction over matters involving railroads and rail property to the STB. There is not only no urgent need for this Court to review this matter and attempt to set forth its own standards or interpretation of the ICCTA's preemption clause, but there is good reason for this Court to avoid this area of federal concern.

Indeed, it is well settled that under the principle of primary jurisdiction, Ohio state courts should defer to federal agencies in matters that are even arguably preempted by federal law. As noted by this Court in the context of federal labor law, “[w]hen an activity ‘is arguably within the compass of § 7 or § 8 of the [NLRA], the state’s jurisdiction is displaced.’ ” *Ohio State Building & Construction Trades Council v. Cuyahoga County Board of Commissioners* (2002), 98 Ohio St. 3d 214, 224, quoting *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, 239-240, 79 S.Ct. 773. In *Garmon*, the Supreme Court noted that “[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.” *Garmon*, 359 U.S. at 242-243. Consequently, any conduct which is even arguably subject to NLRA is preempted. *J.A. Croson Company v J.A. Guy, Inc.* (1998), 81 Ohio St. 3d 346, 352-53.

The doctrine of primary jurisdiction has also been applied by courts in Ohio in other areas as well. In *Pacific Chemical Products Company v. Teletronics Services, Inc.*, 29 Ohio App. 3d 45(8th App. Dist. 1985), the court upheld the trial court's dismissal of a complaint alleging that the defendant telephone companies breached implied warranties of marketability and fitness for a particular purpose. In upholding the dismissal, the court of appeals concluded that under the doctrine of primary jurisdiction, the action against defendant Allnet fell within exclusive jurisdiction of the Federal Communications Commission. The court stressed that the Federal Communication Act of 1934, which sets forth a comprehensive scheme of federal law governing charges, practices, duties and liabilities of interstate telecommunication carriers "would surely be thwarted if the Federal Communications Commission, the primary enforcement agency under the act, is vulnerable to contradictions and inconsistent adjudications in the courts of the fifty states." *Pacific Chemical*, 29 Ohio App. 3d 45, 49, quoting *In re Long Distance Telecommunications Litigation* (E.D. Mich. 1984) 598 F. Supp. 951, 954.

The issues in this case fall within the primary jurisdiction of the STB. YBRR is a rail carrier subject to the jurisdiction of the STB. 49 U.S.C. §10101, *et seq.* The STB is the administrative agency charged with expert skill and knowledge of the interstate transportation industry, including rail carriers. *F.P. Corp. v. Ken Way Transp., Inc.*, 821 F. Supp. 1032, 1036 (E.D. Pa. 1993) (referring to the Interstate Commerce Commission, the STB's predecessor). Courts developed the doctrine of primary jurisdiction to avoid conflicts between the courts and administrative agencies charged with particular regulatory duties. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63 (1956). Primary jurisdiction comes into play when judicial enforcement of a claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body. *Id.* In general, a

court should defer to an administrative agency when the matter involves technical or policy considerations that are beyond the court's ordinary competence and are within the agency's particular field of expertise, or where there is the possibility of contradictory rulings from the agency and the court. *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 220 (3d Cir. 1974).

Regarding the primary jurisdiction of the STB, it has been held that “ ‘[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].’ ” *Rymes Heating Oils, Inc. v. Springfield Terminal R. Co.*, 358 F.3d 82, 90-91 (1st Cir. 2004), quoting *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579 (1996) (bracketed language in original). Courts have noted that “[a]s the agency authorized by Congress to administer the Termination Act, the Transportation Board is ‘uniquely qualified to determine whether state law...should be preempted’ by the termination act.” *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005), quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1584 (N.D. Ga. 1996).

As found by the courts below, the issues in this case fall within the STB's particular field of expertise and require uniform determinations. Girard claims that its taking will not interfere with rail transportation, but this is precisely the type of factual and legal inquiry that is best determined by the administrative agency (namely, the STB) who has the knowledge, expertise, and authority to make this determination. Having these types of cases decided by the STB further ensures uniform standards, protocol, practices, and policies in matters involving rail carriers and interstate rail transportation. The STB not only possesses expertise regarding the standards, practices, and requirements of rail carriers, but has been given responsibility for

protecting rail carriers from unreasonable, arbitrary and/or inconsistent local regulations or decisions that interfere with interstate commerce. Thus, the STB was not only vested by Congress with exclusive jurisdiction over Girard's eminent domain action, but, under the doctrine of primary jurisdiction, it is best suited to determine the issues in this case and whether Girard's requested relief would impair or impede rail transportation under the ICCTA.

In summary, this case involves neither a constitutional question nor a matter of great public concern. Rather, it involves state action against a railroad, and the interpretation and application of a federal statute (the ICCTA). Congress has given the STB exclusive jurisdiction over matters involving railroads and rail property. The STB therefore has exclusive jurisdiction over this case. The STB is also the appropriate entity to hear this case under the principles of primary jurisdiction established by both this Court and the U.S. Supreme Court. For all of these reasons, this Court should decline to hear Girard's appeal.

II. STATEMENT OF THE CASE AND FACTS

A. Procedural History

On November 15, 2006, Girard filed this action to appropriate 41.4993 acres of railroad property (the "Property") owned by YBRR. In its Answer, YBRR asserted, *inter alia*, that the action was preempted under 49 U.S.C. § 10501(b).¹ On April 8, 2008, YBRR filed a motion for summary judgment asking the trial court to dismiss Girard's action on federal preemption grounds. On June 30, 2009, Girard filed a cross motion for summary judgment on the issue of preemption. Following a hearing, the trial court issued a judgment which referred the issue of

¹ YBRR also asserts that the alleged intended use of the Property by Girard is pretextual and that Girard's real purpose in appropriating the Property is to prevent its use as a rail-serviced landfill, but this issue is not before the Court in this appeal.

jurisdiction to the STB, the federal agency expressly charged under the ICCTA with jurisdiction of all matter relating to rail transportation. Girard appealed.

On April 19, 2011, the Trumbull County Court of Appeals issued an interlocutory order finding that the trial court's judgment was not a final and appealable order because it did not adjudicate the issue of preemption. It remanded the case 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." In response, the trial court issued a second judgment entry specifically finding that Girard's appropriation action is preempted by the ICCTA. The court granted summary judgment to Defendant YBRR and denied Girard's Motion for Summary Judgment.

On September 19, 2010, the Court of Appeals issued its decision affirming the judgment of the trial court. The Court held that Girard's action is preempted because Girard's appropriation, if permitted, "could have the ultimate effect of unreasonable interfering with rail transportation and those activities integrally related to transportation contrary to the jurisdictional provisions of 49 U.S.C. 10501(b)." The Court of Appeals held that Girard's action was preempted by the ICCTA, and "therefore the matter must be committed to the exclusive jurisdiction of the STB." The Court of Appeals expressly indicated in its decision that Girard could still seek relief with the STB. Girard has now filed this discretionary appeal to this Court.

B. Statement of Facts.

The Property occupies most of what is known as the "Mosier Yard." The Mosier Yard consists of approximately 55 acres of land in a crescent shape with active track along its westerly curve. YBRR acquired the Mosier Yard from Consolidated Rail Corporation in 1997. The Mosier Yard has been railroad property for over a century.

YBRR purchased the Property from Conrail to facilitate expansion of its rail operations. YBRR uses the main rail line that runs along the westerly curve of the Mosier Yard as a through route the movement of freight and for staging, switching, and parking rail cars. In addition to YBRR's daily use of the main line, YBRR uses three or four acres of the Property for staging and storage of railroad ties, rail, aggregate, and other miscellaneous hardware, including railroad spikes, tie plates, joint parts, and nuts and bolts used for track construction and maintenance projects. The Property is the only property owned by YBRR west of Youngstown which can be used for staging and storing materials. The next closest facility is the Mahoning Valley Railway yard east of Youngstown. Many of YBRR's annual construction and maintenance projects are in the Brier Hill area of Youngstown, and YBRR's facilities at Brier Hill are too congested to permit staging of materials there. Each spring, YBRR determines the construction and maintenance projects to be undertaken for the year. YBRR bulldozes areas of the Property that are needed for staging and storage. YBRR then orders railroad ties and other related supplies and has them delivered by truck directly to the Property. As new ties are installed, the old ties are then stored at the Property until they can be disposed.

In addition to storage of materials used in track maintenance, YBRR also uses the Property for other construction projects. For example, in 2007, YBRR used the Property to store materials in connection with the replacement of the deck of a bridge over the Mahoning River. YBRR has also used the cleared center of the Property to deposit waste ballast and other materials when YBRR replaces railroad crossings.

Located contiguous to YBRR's existing rail lines and the interchanges to interstate rail lines, the Property also provides YBRR with the opportunity to develop the Property for industrial, transloading, and/or warehousing purposes to be serviced by rail. YBRR's intent with

respect to the Property is to reconnect the rail line on the Mosier Yard to the main rail line and to develop the Property for industrial, transloading and/or warehousing purposes to be serviced by rail.

Pursuant to its plans for the Property, In July of 2004, YBRR entered into a contingent Purchase Agreement with Total Waste Logistics Girard, LLC (hereinafter "TWL") for development of the Property as a construction and demolition debris (hereinafter "CDD") landfill that YBRR would service by rail. TWL would first need to secure a permit to construct a CDD landfill on the Property. Upon approval of the permit, TWL would then purchase the Property, develop the landfill, and then grant easements to YBRR for an active main line, staging track, and additional moveable side track on the Property that YBRR would use to transport CDD material to the landfill. YBRR and TWL intended for TWL to enter into contracts with entities on the east coast of the United States for disposal of CDD materials. The CDD materials would be loaded into railcars and transported by Class I rail carriers, most notably CSX and Norfolk Southern, to interchanges in Youngstown. At the interchanges, YBRR would pick up the railcars and transport the loaded cars to the CDD facility. After the railcars were unloaded at the facility, YBRR would take the empty cars back to the interchanges where they would be transferred to Class I rail carriers for transporting back east. It was anticipated that YBRR would earn over \$1,000,000 per year servicing the landfill. The income would enable YBRR to pay down its debts and reinvest in its infrastructure to increase its rail operations in the area.

If the sale of the Mosier Yard to TWL did not close for any reason, YBRR would use the Property for other railroad purposes, such as expanding YBRR's facilities. YBRR is experiencing significant congestion at its existing facilities due to increased business activity

along the YBRR's main line. Additional track on the Mosier Yard will be needed regardless of whether the CDD landfill comes to fruition.

Girard has actively opposed TWL's efforts to obtain a CDD landfill permit. Girard retained Bennett & Williams Environmental Consultants, Inc. to assist the Girard Health Department in reviewing TWL's permanent application. On multiple occasions, Bennett & Williams declared TWL's landfill application to be incomplete based on various technicalities. Girard also has argued to the Ohio EPA that new more restrictive regulations should be applied to TWL's proposed CDD landfill.

In addition to opposing TWL's CDD permit, on April 24, 2006, Girard City Council passed a resolution declaring Girard's intent to appropriate the Property. T.d. 1. The resolution declared the intent to appropriate 41.4993 out of the 55 acres comprising the Mosier Yard. *Id.*

III. LAW AND ARGUMENT CONTRARY TO GIRARD'S PROPOSITIONS OF LAW

A. Law and Argument Contrary to Proposition of Law Number One

In proposition of law number one, Girard posits that, under *Western Pac., supra*, a state court of common pleas has jurisdiction to determine whether an action by a municipality to take railroad property is preempted under the ICCTA except in those cases where (a) there are issues of transportation policy which require consideration by the STB in the interest of a uniform and expert administration of the railroad industry, (b) where expertise is required, or (c) where an STB determination would materially aid the court. What Girard overlooks, however, is that the Supreme Court further stated in *Western Pac.* that "no fixed formula exists for applying the doctrine of primary jurisdiction." Girard essentially wants this Court to establish a "fixed formula" for when eminent domain cases should go to the STB notwithstanding the Supreme

Court's admonition in *Western Pac.* that fixed formulas for the doctrine of primary jurisdiction in railroad cases are inappropriate.

Moreover, Girard completely overlooks the fact that, under 49 U.S.C. 10510(b), the STB has exclusive jurisdiction over matters involving railroads and rail property. Girard's action to take 41 acres of YBRR's property clearly falls within the exclusive jurisdiction of the STB under 49 U.S.C. 10501(b). Both lower courts correctly concluded that Girard's eminent domain fell within the exclusive jurisdiction of the STB.

It should also be noted that adoption of Girard's proposition of law number one would not change the outcome in this case. Under Girard's proposition of law, a state court should refer an eminent domain action over railroad property to the STB when, *inter alia*, "the STB determination would materially aid the court." As noted by the STB in *Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right of Way for a Storm Sewer* (2007-Westlaw-2299735 [STB]), it is not unusual for courts to refer issues to the STB, including issues involving preemption, where the agency determination "would materially aid the court." *Western Pac.* at 64. In this case, both lower courts essentially found that this case should go to the STB. The trial initially referred the case to the STB, and the Court of Appeals expressly stated that Girard could still seek relief with the STB.

The principle of primary jurisdiction, discussed *supra*, also dictates the referral of this case to the STB. As noted above, conduct which is even arguably preempted under federal law should first go to the appropriate federal agency. *Croson* at 352-53. In this case, Girard's attempted taking of 41 acres of railroad property for its own use is at the very least arguably preempted (see discussion below) and therefore appropriate for review by the STB.

B. Argument Contrary to Girard's Proposition of Law Number Two

In proposition of law number 2, Girard contends that its taking would not unreasonably interfere with railroad operations and is therefore not preempted. It is well settled, however, that an action by a city to acquire railroad property through eminent domain is considered an extreme form of state law regulation that is preempted by the ICCTA. As recently observed that the federal district court for the Northern District of Illinois, “[n]early every judicial or STB opinion to have considered the question has concluded that the use of eminent domain is a preempted form of state regulation.” *Union Pacific Railroad Company v. Chicago Transit Authority*, number 07-cv-229, 2009 WL 448897(N.D. Ill. February 23, 2009), *aff’d*, 2011 U.S. App. Lexis 15290 (7th Cir. July 25, 2011).

Because it is so clear that taking railroad property by eminent domain is contrary to the ICCTA’s preemption clause, some federal courts have held that eminent domain proceedings to acquire railroad property are *per se* preempted. *Union Pacific, supra*. Other federal courts and the STB conduct an “as applied” analysis, asking whether the condemnation of railroad property would interfere with rail transportation. Under this view, “routine” takings for “non-conflicting uses,” such as for an at grade road or sewer crossing, are permitted. See, e.g., *Franks Investment Company vs. Union Pac. R.R.*, 593 F. 3d 404 (5th Cir. 2010).

The scope of the taking sought by Girard, however, distinguishes this case from those relied on by Girard and makes it clear that this action is preempted. Girard does not seek a “routine” easement for a non-conflicting use such as a storm sewer. Rather, it seeks to acquire outright title to some 41 acres of railroad property. The scope and nature of Girard’s taking puts this case squarely into the preemption provisions of 49 U.S.C. §10501(b).

A comparison of the appropriations sought in the cases relied on by Girard to Girard's own attempted appropriation is instructive. In *Lincoln Lumber Company, supra*, Lincoln Lumber Company ("LLC") owned and operated a short line railroad over right-of-way in the City of Lincoln. The city instituted condemnation proceedings to acquire a 20 foot wide, longitudinal strip of the railroad's right of way for use as a recreational trail. The STB, however, ruled against the city, finding that the proposed state law condemnation was preempted. On appeal, the federal Eighth Circuit agreed with the STB, holding that the taking of the property for recreational use was preempted. *City of Lincoln v. STB*, 414 F. 3d 858 (8th Cir. 2005).

Subsequently, the city of Lincoln instituted a proceeding in state court to condemn the same right of way for a storm sewer. LLC responded by filing a petition with the STB to obtain a declaratory order that this taking was also preempted. This time, the STB refused to issue the order. The STB found that there was no "blanket rule" prohibiting any condemnation action against railroad property and that "routine, non-conflicting uses, such as nonexclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc. are not preempted so long as they would not impede rail operations..." *Lincoln Lumber Company*, at *2.

The eminent domain proceeding instituted by the City of Lincoln in *Lincoln Lumber Company* is clearly far different than the eminent domain proceeding instituted by Girard. In *Lincoln Lumber Company*, the city condemned a 20 foot wide strip of railroad property for a storm sewer. The STB found that the storm sewer would not interfere with the railroad's rail operations, and that, given the nature of the taking, the court could make this determination. In this case, Girard seeks to condemn 41 *acres* of land owned by YBRR. Girard wants title to most of the Property that comprises YBRR's Mosier Yard. The outright taking of 41 acres of railroad property clearly does not fall within the narrow category of non-preempted taking. Indeed, in its

earlier *Lincoln Lumber* decision, the STB found that the City of Lincoln's attempt to take even the twenty foot wide strip of property for recreational use was preempted, a decision upheld by the federal eighth circuit. There is no doubt, therefore, that under the standards set forth by the STB and the courts in the *Lincoln Lumber Company* cases, Girard's eminent domain proceeding to take 41 acres of YBRR's property for recreational use is clearly preempted.

The only case Girard can cite as supporting the right of a city to acquire anything more than a *de minimis* interest in railroad property for a non-conflicting use such as a grade crossing or storm sewer is *District of Columbia v. 109,205.5 Square Feet of Land*, 2005-WL-975745 9 D.D.C. This case is quite distinguishable, however. In *District of Columbia*, plaintiff filed an eminent domain action in the District of Columbia's Superior Court to appropriate land for a hike and bike trail. The District of Columbia sought to acquire a narrow easement over defendant's property for use as a hike and bike trail. The proposed easement in that case involved 109,205 square feet of land. Defendant CSX removed the case to federal court on the basis of federal question jurisdiction. The federal court remanded the case to state court on the grounds that the federal court was without removal jurisdiction. In remanding the case to state court, the federal court in *District of Columbia* noted a split of authority among the courts regarding the broadness of preemption under the ICCTA. *District of Columbia*, at *3. The court decided that not all state condemnation proceedings were preempted and that preemption instead depended on the scope of the condemnation. The court found that the District of Columbia's eminent domain proceeding to obtain an easement for a bicycle and pedestrian trail was not preempted because the easement "would not interfere with railroad operations."

As observed by the federal court in *Union Pacific, supra*, 2009 U.S. Dist. Lexis 13526 at fn. 7, *District of Columbia* represents a minority view. In fact, it appears to be the *only* case

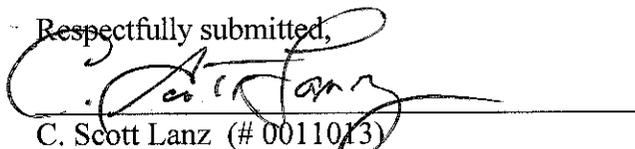
where a court held that the taking of railroad property for recreational use was not preempted. Other courts have refused to permit the taking of railroad property for recreational use. *City of Lincoln, supra*; *Soo Line Railroad Company v. City of Saint Paul*, No. 09-2311, 2010 U.S. Dist. Lexis 59971 (D.C. Minn. June 17, 2010); *City of North Little Rock, Ark v. Union Pacific Railroad Company*, No. 4:10 Cv 01689, 2011 U.S. Dist. Lexis 43571 (E.D. Ark. Apr. 21, 2011). In each of these cases, the courts held that actions initiated for the taking of even small easements for recreational use were preempted.

Moreover, as noted by the trial court, *District of Columbia* is also readily distinguishable from the case here based on the scope of the taking. The District of Columbia sought to acquire a narrow *easement* over defendant's property for use as a hike and bike trail. The proposed easement in that case involved 109,205 square feet of land. In the case at bar, Girard seeks to take *title* to most of YBRR's Mosier Yard (over 41 of the 55 total acres), or some 1.8 *million* square feet of land), leaving YBRR with only a narrow strip along one edge of the Property. In other words, Girard does not seek to acquire just an easement over a limited portion of the Property for use as a hike and bike trail as did the District of Columbia; it wants title to almost all of YBRR's property, leaving YBRR with just a narrow strip. Girard's taking of the 41 acres will not only interfere with YBRR's railroad operations, it will outright prevent YBRR's use of the Property because it would no longer even be owned by YBRR. The scope of the taking brings this action squarely within the express provisions of the ICCTA preemption clause, 49 U.S.C. 10501(b).

IV. CONCLUSION

Girard's attempt to take YBRR's railroad property by eminent domain does not involve a constitutional question nor a matter of great public concern. It involves the interpretation and application of a federal statute that preempts the action taken by Girard. Congress has given the STB exclusive jurisdiction over matters involving railroads and rail property. The STB therefore has exclusive jurisdiction over this case. The STB is also the appropriate entity to hear this case under the principles of primary jurisdiction established by both this Court and the U.S. Supreme Court. For all of these reasons, this Court should decline to hear Girard's appeal.

Respectfully submitted,



C. Scott Lanz (# 0011013)

Thomas J. Lipka (# 0067310)

Counsel for Defendants/Appellees

MANCHESTER, BENNETT, POWERS &
ULLMAN

A Legal Professional Association

The Commerce Building, Atrium Level Two

Youngstown, Ohio 44503

Telephone: 330-743-1171

Email: tlipka@mbpu.com

Email: slanz@mbpu.com

CERTIFICATE OF SERVICE

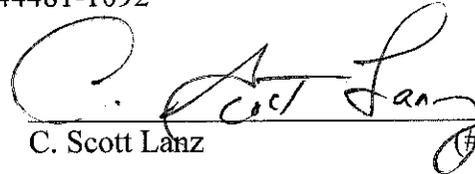
I hereby certify that a copy of the foregoing was sent by regular U.S. mail, postage prepaid this 29 day of November, 2011 to the following:

Frank R. Bodor, Esq.
157 Porter Street, NE
Warren, Ohio 44483
Counsel for City of Girard

Mark M. Standohar, Esq.
Girard City Law Director
100 W. Main Street
Girard, Ohio 44420
Counsel for City of Girard

Total Waste Logistics Girard, LLC
177 West 83rd Street, Suite 5N
New York, New York 10024
Appellant Pro Se

Dennis Watkins
Trumbull County Prosecutor
Administration Bldg., 4th Floor
160 High Street NE
Warren, Ohio 44481-1092


C. Scott Lanz (#0011013)