

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 11-1850

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

MERIT BRIEF OF APPELLANT CITY OF GIRARD, OHIO

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STATEMENT OF FACTS

A. PROCEDURAL POSTURE

Appellant, The City of Girard, Ohio (“Girard”), filed an action on November 15, 2006 pursuant to O.R.C. §719.01 and §719.02 to appropriate 41.4993 acres of vacant land located in the City of Girard and owned by Appellee Youngstown Belt Railway Co. (“YBR”). (T.d. 1) Girard seeks 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.

As a defense YBR answered that Girard’s eminent domain proceedings are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”) 49 U.S.C. §10101, etc. and sought summary judgment on that ground. (T.d. 11) Total Waste Logistics of Girard LLC (“TWL”) intervened in the case and alleged that it had entered into agreement with YBR for the sale and purchase of the land being appropriated by Girard and made a pending application for necessary permits to use the property for a construction and demolition debris disposal facility. (T.d. 59)

YBR filed a motion for summary judgment on April 8, 2008. (T.d. 36) Girard filed its memorandum contra YBR’s motion for summary judgment on June 30, 2009. (T.d. 66) Girard filed its motion for summary judgment on June 30, 2009, (T.d. 67) which was answered by YBR on August 21, 2009. (T.d. 70) Both parties filed replies to each other’s contra memorandums on motions for summary judgment.

The trial court on May 13, 2010 ordered the parties to apply to the Surface Transportation Board (“STB”) for a determination as to whether it chose to “exercise its right of preemption”

and in the meantime stayed the case on its docket. (T.d. 80) Girard appealed the trial court's determination (CA-1) and the Appellate Court remanded the case back to the trial court as a non-appealable order and instructed 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." (T.d. 86; CA-26, pg 6)

The Appellate Court stated:

"We are nonplussed by the trial court's irresolution as the trial court evidently was by the issues it was asked, but failed, to rule upon." (CA-26, pg. 6)

The Appellate Court stated:

"The subject matter jurisdiction 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." (CA-26, pg. 5-6)

The trial court upon remand by the Court of Appeals rendered a nine page opinion and judgment entry. It sustained YBR's motion for summary judgment and overruled Girard's summary judgment motion finding that "the ICCTA acts to preempt Ohio's appropriation statute, thereby committing jurisdiction to the STB." (Appendix 31 – Pg. 39)

The Appellate Court then proceeded with Girard's appeal and on September 19, 2011 rendered its twenty-six-page opinion and judgment with dissenting opinion. (CA-37) The majority of the Court determined and explained in a footnote on page 21 of its opinion as follows:

"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." (Appendix 4 – Pg. 18)

The minority of the Court in its dissent opined that:

"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." (Appendix 4 – Pg. 29)

This case is now before this Supreme Court on its merits on appeal from the opinion and decision of the Eleventh District Court of Appeals.

B. STATEMENT OF THE CASE

Girard filed an eminent domain proceeding to appropriate approximately 42-acres of land in the City of Girard from YBR. The appropriated site in question is shaped like a banana or crescent with rail lines or tracks on the outermost east and west sides of the parcel with the Mahoning River running along the west part of the western track. In preparing the legal description of the 41.4993 acres of land being appropriated by Girard, the City's engineer, J. Robert Lyden, purposely avoided encroaching on the right-of-way of the Conrail railroad line on the western side of the appropriated real estate and also excluded a 100' wide right-of-way on the eastern side of the appropriated parcel. By doing so it not only excluded the existing Ohio Central line (now Youngstown Belt Railway) but also provided space for another potential track for future use in the event YBR wished to expand their rail line with another set of parallel tracks or use the space along the existing tracks as a staging area for use in assembling materials that may be used for railway repairs. (T.d. 67-Exhibit 1)

Engineer Lyden acknowledged that, upon his several physical inspections of the area that is contained within the 41.4993 acres being appropriated, and an examination of aerial photos for the precise area taken, which were photographed in the years 1999, 2000, 2005, and 2006, there is no evidence that the area being taken by Girard has been utilized for any purpose except paths created by all terrain vehicles. (T.d. 67-Exhibits 1, 2A-2D)

YBR's predecessor, Ohio Central Railroad Inc., entered into two separate contracts with Total Waste Logistics of Girard LLC "(TWL)") for the fee simple sale of the real estate for use as a construction and demolition debris disposal facility. The first contract is dated July 15, 2004 consisting of one page and the second contract is dated April 11, 2005 and consists of twenty-four pages.

Although both contracts appear to be for the same 55-acres of land located along YBR's track in Trumbull County, primarily in the City of Girard, neither contract contains a precise legal description. On Schedule II of the contract dated April 11, 2005 it is captioned "Description of Ohio Central Property (see annexed)" but no legal description is attached. (T.d. 67-Exhibits 3-4)

Both contracts contain clauses to the effect that, "Seller is expected to be able to purchase additional adjacent land from the CSX railroad, and this additional land shall be offered to the purchaser (TWL) at cost." (T.d. 67-Exhibit 3-4) There is no evidence indicating that there is yet a closing that perfected the sale of the real estate to TWL.

YBR, through its President William A. Strawn II, admits that Mosier Yard includes approximately 55-acres of real property, shaped as a crescent, which includes its present rail system. President Strawn also alleges that it uses three to four acres of the property for storage within the 55-acres for track construction projects, which he roughly circled within the 55-acre

plot. However, this three to four acres appears in the same 41.993 acres being appropriated by Girard and the 55-acre parcel that is being sold to TWL for dumping construction and demolition debris. (T.d. 66 Strawn Affidavit) There are no reservations of any interest in the contract of sale to TWL for any staging area. (T.d. 67 Exhibits 3 and 4)

Appellant's Exhibit 5 is a copy of TWL's "Facility Design Plan" that shows the southern most part of the property for use as a proposed basin. (T.d. 67-Exhibit 5) This is also the exact same area where YBR's President marked the area for use as a staging area on Appellant's Exhibit 6A (Appellee's Exhibit C) for staging railroad construction materials. (T.d. 67-Exhibit 6A) TWL plans to use the same identical area for its basin. Exhibit 6B shows the location of TWL's claimed proposed basin and YBR's claimed use for a staging area in juxtaposition to each other proving that both claim a use for the exact same area that is included in a sale to TWL with no reservations by YBR. (T.d. 67-Exhibit 6B)

The affidavit of Guy Fragle, Director of Operations for TWL, attached to YBR's memorandum in support of its motion for summary judgment, admits in ¶8 of his affidavit that TWL was purchasing the Mosier Yard. (T.d. 36) In ¶5 of his affidavit he admits Mosier Yard includes approximately 55-acres shaped in a crescent and that Mosier Yard was depicted in YBR's Exhibit B, which is the same exhibit testified to by YBR's President as being the 55-acres sold to TWL, and is also the same 55-acres on which President Strawn drew a circle claiming that the area of three to four acres within the circle depicted on Appellant's Exhibit 6A (Appellee's Exhibit C) was used from time to time as a staging area for track construction projects. (T.d. 67-Exhibit 6A and Exhibit C)

At the deposition of YBR's Chief Engineering Officer, John Dulac, was asked the question at page 37 of his deposition:

“Q. Okay, now if you could answer my question. My question is that if there’s been a contract for the sale of 55 acres of this property to Waste Logistics and there’s no reservation in the sales contract for the storage of materials by the railroad, where are they going to store their staging materials if they sell that 55 acres fee simple to Waste Logistics?”

The answer to that is I don’t know.” (T.d. 67-Exhibit 7 pg. 37)

In response to interrogatories and production of documents submitted to YBR, its President admitted that as to the alleged three or four acres used for a staging area there was no official railroad map showing this area. YBR does not keep records of its construction and maintenance projects to explain the necessity of the staging and storing area. YBR did not keep an inventory, a list of materials, requisition sheets, work sheets, materials list, or other evidence to prove it ever used the area circled on Appellant’s Exhibit 6A (Appellee’s Exhibit C) for storage or staging at that particular area. YBR could not indicate when was the last date that the area circled on Appellant’s Exhibit 6A (Appellee’s Exhibit C) by President Strawn was used to store materials for an annual track construction project. Neither did he have names and addresses of any employees or contractors that were involved in the alleged staging area since the time of purchase. (T.d. 67-Exhibit 8)

YBR’s Chief Engineering Officer John Dulac admitted that the railroad didn’t necessarily have to use the staging area, depicted in the circle drawn by President Strawn, where the topography changes were at 10’. It could use as a storage area that portion of the railroad right-of-way along the existing tracks excluded from Girard’s appropriation description that is four or five times the width of the railroad track. (T.d. 67-Exhibit 7 pgs. 33-34)

ARGUMENT

Proposition of Law No. 1:

The Interstate Commerce Commission Termination Act (“ICCTA”) 49 U.S.C. §10501, et seq. does not encompass complete preemption of all state law. Preemption under the Act is a factual issue that is determined on a case-by-case and fact specific determination.

Proposition of Law No. 2:

The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation but permits the application of state or local laws that have no effect or that may have a more remote or incidental effect on rail transportation.

The United States Surface Transportation Board (“STB”) decided the following in the case of *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ* decided August 14, 2003 in (S.T.B. Finance Docket No. 34192 (Sub No. 1) cited in 2003 WL 21952136:

“Whether a particular activity constitutes transportation by rail carrier under Section 10501(b) is a case by case and fact specific determination.”

This case-by-case approach to the consideration of matters involving the ICCTA, which is adopted by the Surface Transportation Board, is elaborated upon in the recent case of *Shupp v. Reading Blue Mountain & Northern Railroad Company*, 2012 WL 398811 (M.D. Pa.). The United States District Court of Pennsylvania opined that:

“The adoption of a case-by-case, ‘as applied’ analysis presents a logical conundrum in application of the ‘complete preemption’ doctrine in that an area of law cannot be ‘completely’ preempted when complete preemption can be found to be present or absent based on an individualized, case-by-case analysis. When a court recognizes that a broad policy of ‘complete preemption’ does not exist with regard to a particular area of law, such as the ICCTA, RSIA or FRSA, then no amount of factual analysis, in particular circumstances, should be able to create complete preemption...Complete preemption does not arise in some circumstances while retreating when the facts of a particular case arguably support a finding of ‘ordinary preemption’ having to engage in an ‘as-applied’ analysis is inherently antithetical to the concept of complete preemption.”

“The ‘as-applied’ analysis is appropriate when trying to determine whether ordinary preemption applies to particular facts in an ICCTA matter; however, when exceptions to preemption such as routine at-grade crossings and utility easements are recognized by a variety of district and circuit courts, as well as by the STB, it is difficult, if not impossible, to reconcile such exceptions with a “complete **preemption**” policy that, by definition, displaces all conflicting state and common laws. [Emphasis Added]

Various circuit courts have determined that the ICCTA preemption provision is narrowly tailored to displace only ‘regulation’, namely, those state laws that may reasonably be said to manage or govern rail transportation while permitting the continued application of laws having a more remote or incidental effect on rail transportation. *Trejo v. Union Pacific Railroad Company* (2011) U.S. Dist. Court of Ark., 2011 WL 309614; *Frank Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 408-13 (5th Cir. 2010); *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001); *PGS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009); *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

This principle was adopted by the U.S. Sixth District Court of Appeals in *Adrian & Blissfield R.R. Co. v. City of Blissfield*, (2008) 550 F.3d 533,539.

The Court stated:

“...the ICCTA preempts 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.”

In *Allied Industrial Development Corporation v. Ohio Central Railroad, Inc.*, 2010 WL 987156 (N.D. Ohio) the U.S. District Court applied the principle set forth by the Sixth District Court of Appeals and remanded a case back to the Mahoning County Court of Common Pleas on the grounds that the case did not arise under the ICCTA.

The STB's own interpretation of the ICCTA preemption clause reinforces the limited nature of the ICCTA's complete preemptive reach. In *CSX Transp., Inc. (STB Finance Docket No. 34662)*, 2005 WL 1024490 the Board acknowledged that the statute recognizes only two categories of categorical preempted state actions:

“(1) 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,” and (2) “state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisition, and other forms of consolidation; and railroad rates and service.”

The STB has not only recognized, the principal that ICCTA cases must be heard on a case-by-case basis but has also used the “as applied” analysis to determine whether the handling and processing of construction and demolition debris qualifies for Federal preemption under 49 U.S.C. 10501(b).

In the case of *Town of Babylon and Pineview Cemetery – Petition for Declaratory Order* 2008 WL 4377804 (S.T.B.) the S.T.B. determined that a railroad's activities that authorized a transload facility for construction and demolition debris on cemetery property did not qualify for Federal preemption. The STB concluded that because Coastal was the only party that operated the transloading facility and responsible for it and because the railroad assumed no liability or responsibility for Coastal's transloading activities the railroad's involvement with Coastal's transloading operations was insufficient to make Coastal's activities an integral part of rail transportation.

The U.S. Court of Appeals (2d Circuit) most recently in *New York & Atlantic Railway Co. v. The Surface Transportation Board* (2011), 635 F.3d 66 upheld the decision of the STB

that a transload facility operated by Coastal in the railroad's Farmdale yard did not fall within the STB's exclusive jurisdiction.

The Court agreed with the STB 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. The federal court of appeals decided the waste facility did not involve "transportation by rail carrier." The railroad's involvement was essentially limited to transporting cars to and from the facility. This is precisely the same set of facts in the case at bar.

In *Growers Marketing Co. v. Pete Marquette Ry.*, (1941) 248 I.C.C. 215 and *C.F.N.R. Operating Co. v. City of American Canyon* 282 F.Supp.2d 1114 both the Interstate Commerce Commission and the federal court ruled that the business that leased land from the railroads for their distribution centers were not involved in transportation per se. They were ruled to be customers of the common carrier the same as Total Waste Logistics would be a customer of YBR in the case at bar.

Likewise, in *Hi Tech Trans, LLC v. New Jersey*, (2004) 382 F.3d 295 the federal court ruled that the solid waste facility did not involve "transportation by rail carrier" as would fall under the jurisdiction of the STB. This case is exactly on point with the case at bar.

Another case directly in point is *J.P. Rail, Inc. v. New Jersey Pinelands Com'n.*, (2005) 404 F. Supp.2d 636. In *J.P.* the railroad, lessee of a site, sought to enjoin the commission under the ICCTA from interfering with the proposed construction of a solid-waste transfer facility on its leased site. The District Court of New Jersey denied the injunction on the grounds that the planned facility was outside ICCTA's grant of exclusive jurisdiction to the Surface Transportation Board. The preemption was denied on the basis that it involved transportation

“to” a rail carrier rather than “by” rail carrier. The Court held that the proposed facility did not involve “transportation by a rail carrier,” which would put it in the realm of preemption under U.S.C. §10101. The court said the statute clearly reads, “transportation by rail carriers” and not “to rail carriers.”

Also the STB, in *Town of Milford, MA – Petition for Declaratory Order (STB Finance Docket No. 34444) 2004 WL 1802301 (S.T.B.)*, ruled that preemption did not apply to the railroad where BRT, that is not a rail carrier, proposed to build and operate a transloading and strut fabricating facility.

The STB also determined in *New England Transrail LLC, dba Wilmington & Woburn Terminal Railway 2007 WL 1989841 (STB)*, that the handling of construction and demolition debris does not fall within the realm of federal rail preemption. In that case the STB on page 1 found as follows:

“In this decision we find that, under its proposal New England Transrail, LLC dba Wilmington & Woburn Terminal Railway (NET or petitioner) would, if authorized, become a rail carrier subject to the Board’s jurisdiction. However we find that some of its planned activities related to the handling of construction and demolition debris (C&D) would extend beyond the scope of rail transportation and therefore would not come within the Federal preemption from most state and local laws provided in 49 U.S.C. 10501(b).” [Emphasis Added]

Proposition of Law No. 3:

Where a state or local law does not manage or govern rail transportation involving the Interstate Commerce Commission Termination Act (“ICCTA”) and has no effect on rail transportation, or which may have a remote or incidental effect on rail transportation, there is a presumption against preemption in those areas of law traditionally reserved to the States.

The U.S. Supreme Court recognizes a presumption against preemption as set forth in *Medtronic Inc. v. Lohr*, 518 U.S. 470 at 485:

“...because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has “legislated... in a field which the States have traditionally occupied,” *Rice v. Santa Fe Elevator Corp.*, (1947) 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” [ibid.; *Hillsborough Cty.*, 471 U.S., at 715-716, 105 S.Ct., at 2376; cf. *Fort Halifax Packing Co., v. Coyne*, (1987) 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L.Ed.2d 1. Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law, see *Cipollone*, 505 U.S. 504, at 545-546, 112 S.Ct. 2608, at 2632-2633 (SCALIA., J., concurring in judgment in part and dissenting in part), we used a “presumption against the pre-emption of state police power regulations” to support a narrow interpretation of such an express command in *Cipollone, Id.*, at 518, 523, 112 S.Ct. 2608, at 2618, 2621...”

The presumption against preemption is concisely set forth in a most recent Fifth Circuit U.S. Court of Appeals January 2010 case entitled *Franks Investment Company LLC v. Union Pacific Railroad Co.* 593 F.3d 404, *Fed. Carr. Cas. P* 84,641 (5th 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.

The Appellate Court at pages 406-407 of its decision summed up the basic standard of review for the existence and application of the presumption against preemption as follows:

“The statutory provisions at the center of this dispute are in the Interstate Commerce Commission Termination Act (“ICCTA”) Pub.L. 104-88, 109 Stat. 803. In one of its sections, the jurisdiction of the Surface Transportation Board (“STB”) is defined and the preemptive effect of the statute is declared.

The jurisdiction of the 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 *407 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).

We will explore this language at length. First, we review some basics.

[1] The preemptive effect of a federal statute is a question of law that we review de novo. *Friberg v. Kansas City Southern Railway Co.*, 267 F.3d 439, 442 (5th Cir.2001).

[2][3][4] In determining the existence and reach of preemption, Congress's purpose is “the ultimate touchstone” to use. *Medtronic, Inc. v. Lohr*, (1996) 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (quoting *Retail Clerks v. Schermerhorn*, (1963) 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179). Congress can show its purpose in one of two ways. First, it may “indicate pre-emptive intent through a statute's express language.” *Altria Group, Inc. v. Good*, (2008) --- U.S. ----, 129 S.Ct. 538, 543, 172 L.Ed.2d 398. However, even when there is an express preemption clause in a statute, “the question of the substance and scope of Congress' displacement of state law still remains.” *Id.* Second, Congress may impliedly preempt state law “if the scope of the 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.*; see *Friberg*, 267 F.3d at 442.

[5][6] There is also a presumption that the “historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group*, 129 S.Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The presumption is relevant even when there is an express pre-emption clause. That is because “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’ ” *Id.* (quoting *Bates v. Dow Agrosciences LLC*, (2005) 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687). Thus, the presumption operates both to prevent and to limit preemption.

This court has explained that the presumption against preemption is applicable to “areas of law traditionally reserved to the states, like police powers and property law” *Davis v. Davis*, 170 F.3d 475, 481 (5th Cir.1999) (en banc). More recently and topically, we discussed the presumption against preemption in another railroad crossing case. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir.2008). We found the no-preemption presumption to apply “with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing.” *Id.* at 334.”

In the *Franks Investment* case the Appellate Court dealt with the issue of whether the preemption provision of the federal statute preempted a state law possessory action filed by a landowner to preserve a long-existing crossing over railroad tracks. The Court, after explaining the presumption against preemption, stated it was not necessary to invoke the principle in that particular case.

The Court concluded that closing a railroad crossing does not relate to the movement of passengers or property. It stated at page 409 that “the appropriate questions are: what does the state seek to regulate and does the proposed regulation burden rail transportation?”

In a Harvard Law Review article entitled *New Evidence on Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 Harvard L. Rev. 1604, the author at page 1607 remarks:

“...And while scholars may debate the extent to which the Court actually applies a presumption against preemption there is no question that the Court invokes the doctrine religiously...” Citing *Medtronic*, 518 U.S. 485; *Hillsborough County v. Automated Med. Labs, Inc.*, (1985) 471 U.S. 707, 715-716; *Rice* 331 US at 230.”

Proposition of Law No. 4:

Where a State public agency, having the authority to appropriate property by eminent domain, appropriates railroad property for a public use a Common Pleas Court has jurisdiction to decide the factual issue of preemption under the ICCTA where the appropriation does not have the effect of managing or governing rail transportation and the appropriation has no effect or has a remote or incidental effect on rail transportation.

The STB has recognized that courts can and regularly do make determinations as to whether eminent domain actions interfere with railroad operations. In *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.”

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 to appropriate a bike and pedestrian trail. CSX Railroad contended that the ICCTA 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.”

The Court determined that defendants still had vehicular access to their signal equipment and concluded that the easement would not impede railroad operations.

Also, in the case of *City of Sachse, Texas v. Kansas City Southern*, (2008) 564 F.Supp.2d 649 where a city brought a State Court action against a railroad to condemn property necessary for construction of a railroad grade crossing the Court stated at page 7:

“49 U.S.C. §10501(b) (2006). The statute goes on to state that, “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.” *Id.* Despite this broad expression of policy, the courts and the STB have not found it to categorically preempt state condemnation proceedings. *Lincoln Lumber Co.*, (2007 WL 2299735 [S.T.B.]), at *2 (Aug. 13, 2007). Where, as here, the power of eminent domain is invoked to construct a mundane structure such as a railroad grade crossing, the ICCTA completely preempts state law if the project would “impede rail operations or pose undue safety risks.” *Maumee & W.R.R. Co.*, (2004 WL 395835 [S.T.B.]), at *2 (Mar. 3, 2004); *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745, No. Civ.A. 05-202 (RMU), at *3 (D.D.C. Apr. 21, 2005).” [Emphasis Added]

In that case the Court remanded the case back to the State County Court of Texas.

In *United States v. Western Pacific Railroad Co., et al.*, (1956) 352 U.S. 59; 77 S.Ct. 161 the U.S. Supreme Court 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 United States Supreme Court in *Western Pacific* at page 64 determined 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 United States District Court in the case of *Bayou DeChene Reservoir Commission v. Union Pacific Railroad Corp. Case No. 09-0429 dated June 8, 2009* is directly in point with the case at bar. In that case the Reservoir Commission filed an appropriation case in the State Court to acquire full ownership of a parcel of land owned by the railroad. The Commission contended the property was necessary to construct a road to its reservoir. The acreage appropriated was even a part of the railroad right of way.

The Railroad removed the case to the U.S. District Court on the basis of complete preemption under the ICCTA because it claimed it interfered with present and future use of railroad operating procedures and facilities. The Federal District Court rejected the argument of preemption and remanded jurisdiction back to the State District Court. The Federal Court examined the case in context with the existing case law and opined:

“While the STB does make that determination in some cases, the litany of cases just cited all involved the district court's resolution of a motion to remand by determining whether the proposed eminent domain action would interfere with rail operations and, therefore, whether removal based on complete preemption of the ICCTA was proper. *See City of Sache, 564 F.Supp.2d at 655-57* (finding that an eminent domain proceeding that had been removed from state court would not impede rail operations and, therefore, that the court did not have subject matter jurisdiction based on complete preemption of the ICCTA); *District of Columbia, 2005 WL 975745 at *3-4* (granting motion to remand case removed by railroad on the

ground of complete preemption based on finding that proposed condemnation would not unreasonably interfere with railroad operations); *City of Lincoln*, 2006 WL 1479043 at *6-9 (same); see also *Lincoln Lumber Company--Petitioner for Declaratory Order*, STB Finance Docket No. 34915, 2007 WL 2299735, *3 (Aug. 10, 2007) ("Courts can, and regularly do ... make determinations as to whether proposed eminent domain actions such as this would interfere with railroad operations."); *Maumee*, 2004 WL 395835 at *1 (noting that when federal preemption issues are raised, proposed eminent domain actions may be removed to federal court, but such courts regularly determine whether the action would interfere with rail operations). [FN6] Therefore, Defendant's contention that the STB should decide whether federal or state law should apply in this case is without merit." [Emphasis Added]

Rephrasing the question in this case, as the Court simply stated in the *Franks Investment*, case, supra:

1. What is the City of Girard attempting to appropriate from YBR?
2. Does the proposed appropriation burden rail transportation?

The facts are undisputed that YBR owns 55-acres of land upon which it has rail lines. The railroad entered into two contracts with Total Waste Logistics of Girard LLC to sell the entire 55-acres, including the land occupied by the rail lines, for a landfill for the dumping of construction materials and demolition debris. The contracts contained no reservation of any proprietary interest in the land by the railroad.

The City of Girard filed an appropriation action to take 41.4993 acres to acquire the land for the purpose of constructing and expanding its parks, playgrounds, parkways, greenery, and park expansion to river frontage and provide recreational bicycle paths that will provide linkage to the Lake Erie and Ohio River bicycle paths.

The City was very careful not to interfere with anything having to do with rail transportation. It purposely avoided encroaching on the right-of-way of the Conrail railroad line on the western side of the appropriated real estate and also excluded a 100' wide right-of-way on

the eastern side of the appropriated parcel. The take area not only excluded the existing Ohio Central line (now YBR) but also provided space for another potential parallel track for future use in the event the railroad wished to expand their rail line or use the space as a staging area for use in assembling materials or staging operations for use in railway repairs. The City, by taking 41.993 acres, left the remaining 13-acres of the property for rail use, which included all tracks.

The railroad claims its property is preempted for rail use under the ICCTA even though it entered into contract for the sale in fee simple of its entire 55-acres to a landfill company to dump construction material and debris. The contract contains no reservation to YBR for the rail lines nor did YBR reserve in the sales contract any proprietary interest in the 55-acres.

The railroad also argues that the contract is not consummated and if Total Waste Logistics of Girard does not finalize the transaction, then it needs three or four acres that it claims it used for staging materials for repair of its rail lines. This was refuted by the railroad's own Chief Engineering Officer who said he didn't know where their materials would be stored for staging after the sale of the property to Total Waste Logistics. He also admitted that the railroad could use as a storage area, if needed, that portion of the railroad right-of-way along the existing tracks that is four or five times the width of the railroad track. The trial court acknowledged that the affidavit of the President of the railroad claiming the necessity of three or four acres for a staging area was "self-serving by nature." (Appendix 31 – Pg. 35)

The trial court, instead of taking jurisdiction, attempted improperly to refer the matter to the STB to see if the STB chose "to exercise its right of preemption." (Appendix 46 – Pg. 49) Obviously the court meant to use the word "jurisdiction" instead of "preemption."

Upon appeal the Appellate Court then remanded the case back to the trial court to “specifically determine whether the ICCTA acts to preempt Ohio’s appropriation statute...thereby committing jurisdiction to the STB.” (Appendix 40 – Pg. 45)

The trial court in a nine-page opinion decided the appropriation action by Girard was preempted by the ICCTA “thereby committing jurisdiction to the STB.” Thus the court on the one hand had already decided the appropriation action was preempted but by so finding it stated that jurisdiction was then committed to the STB. (Appendix 31 – Pg. 31)

Upon appeal the majority of the Appellate Court maintained that the appropriation action was instead “impliedly preempted.” It also determined that YBR’s current uses and future plans for the property indicate that the appropriation “could” have the 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). The Appellate Court then held that the appropriation proceeding was preempted by the ICCTA but in the same sentence determined its holding was preliminary and should not be read to completely adjudicate or foreclose additional analysis by the STB on the issue. It then determined that its holding functioned to commit the matter to the STB for it to consider what remedy, if any, Girard may be entitled to. (Appendix 4 – Pg. 24)

The confusion in the lower courts is obvious. The trial court first tried to side step the issue of jurisdiction. Then, after the Appellate Court ordered the trial court to make a determination, it ruled the appropriation action was preempted by the ICCTA yet simultaneously committed jurisdiction to the STB. Query, if the Court already decided the matter was preempted then what was the reason for committing the matter to the STB?

Upon appeal the majority of the Appellate Court straddled the issue concluding the appropriation proceeding was preempted by the ICCTA. But it also said its holding was “preliminary” and should not be read to completely adjudicate or foreclose additional analysis by the STB on the issue. The majority of the Court interpreted its holding as a means “to commit the matter to the STB to consider what remedy, if any, Girard may be entitled to.” (Appendix 4 – Pg. 18)

A significant footnote to the Appellate Court’s majority opinion gives support and credence in this case to the dissenting opinion of Judge Grendell. The footnote reads as follows:

“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.*”
(Appendix 4 – Pg. 24) (Emphasis Added)

Judge Grendell’s dissent concluded that the appropriation action was not federally preempted and therefore the trial court had jurisdiction. Judge Grendell’s dissenting opinion determined the evidence supported 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.

The majority finding, set forth in its footnote, that “Girard’s proposed taking would not deny YBR the ability to conduct its operations and, even though it might effect rail transportation, the taking would not directly regulate matters committed to the STB” signifies that the finding not only supports the dissenting opinion but contradicts the majority’s own

conclusion that the matter is preempted by the ICCTA and should be committed to the STB to consider what remedy, if any, Girard may be entitled to.

Applying the simple *Franks Investment*, supra, questions to the case at bar: First, what is the City of Girard attempting to appropriate? The answer is it is appropriating 41.993 acres from a 55-acre tract, which does not involve any railroad lines of YBR. Significantly, Girard is appropriating the 41.993 acres from the 55-acre tract all of which YBR contracted to sell to a private company for a landfill. YBR reserved no interest of any kind in the real estate. Girard maintains this sale constitutes an admission and declaration against interest by YBR proving that it does not need the 41.993 acres for rail purposes.

The second question posed in the *Franks Investment* is: What or how does the proposed regulation [appropriation] burden rail transportation? The answer is that upon the sale of the property to the landfill company, there will be no burden on rail transportation. It will be land owned by a private company with YBR owning no interest in the property.

In the event the sale is not completed by the landfill company, the only alleged use of the land is three or four acres of the 41.993 acres appropriated by Girard for staging materials for railroad repair or construction. The railroad's Chief Operation Engineer admits that if the landfill company completed the sale there would not be a staging area reserved. He also admits that if the sale is not completed to the landfill there is adequate room left along the tracks, that Girard omitted from its appropriation, to stage the materials that would make up for the three or four acres that the railroad claims it needs for staging. As such the impact on rail transportation is at the very most remote or incidental to railroad transportation.

These facts fit with the majority's finding and the dissenters' opinion that Girard's proposed taking would not deny YBR's ability to conduct its operations, and they also prove that the appropriation does not burden rail transportation.

Proposition of Law No. 5:

Where railroad owned land is appropriated by a State public agency having appropriation authority under State eminent domain laws, and the railroad has contracted in writing to sell the land to a private landfill company for a landfill facility, and if the sale is not consummated, the railroad claims an incidental need for three or four acres of land for the temporary staging of railroad materials for repair of its tracks, which by admission can be adequately accommodated on the residue of the railroads real estate not taken, said eminent domain proceedings are not preempted by the ICCTA.

The facts and applicable law of this case clearly show that Girard's appropriation of 41.993 acres of a 55-acre tract of vacant land owned by the railroad does not qualify to be preempted under the ICCTA. The taking does not involve any acreage containing railroad tracks or facilities used in rail transportation.

Furthermore, the railroad, by its own actions, entered into contract to sell the entire 55-acre tract with its railroad tracks to a private landfill company to be used to dump construction and demolition debris thereby forfeiting its own right to the use of the real estate for railroad transportation. The contract has no reservations and would grant fee simple title to the land to Total Waste Logistics including its railroad tracks.

The railroad claims that it needs three or four acres of the land for staging materials or track maintenance. It attempts to establish this by the affidavit of its President, who during deposition took a pencil and drew a circle on a portion of a scaled map within the area being appropriated by Girard and stating that the circled area was used for staging of materials for track maintenance.

The penciled circle attempting to depict the three or four acres alleged to be used for a staging area is also the same identical area upon which the landfill company proposed to build a basin for its landfill. (T.d. 67 – Exhibit 6B) The railroad produced no other evidence to prove that the penciled circle was used for staging materials. The railroad did not furnish a railroad map to depict a “staging area.” Nor did it produce any records of its construction and maintenance projects to explain the necessity of a staging and storing area. The railroad did not keep an inventory, a list of materials, requisition sheets, work sheets, or other evidence to prove it ever used the area circled on Appellant’s Exhibit 6A (Appellee’s Exhibit C) for storage or staging at the particular area. Neither could it indicate the last date that the area, roughly circled on Exhibit 6A (Appellee’s Exhibit C), was ever used to store materials for an annual track construction project. Nor did it have names and addresses of any employees or contractors that were involved in the alleged staging area since the time of its original purchase. (T.d. 67 – Exhibit 8)

Even if the trial court could find that the existence of an alleged staging area was worthy of belief, based on the mere circle drawn by the railroad’s President on the scaled map, the evidence is clearly refuted by the railroad’s own Chief Engineering Officer, John Dulac. He admitted that the railroad didn’t necessarily have to use the staging area depicted in the circle drawn by President Strawn. He stated that it could use as a staging area that portion of the railroad right-of-way along the existing tracks that is four or five times the width of the railroad track. (T.d. 67 – Exhibit 7 Pg. 33-34) He further testified that if the contract for the sale of land for the landfill, were consummated, he did not know where the railroad would store its staging materials. (T.d. 67 – Exhibit 7 Pg. 37)

Aside from the railroad agent's own admissions, evidence produced by Girard's engineer, by physical inspections of the area and aerial maps for the years 1999, 2000, 2005, and 2006, showed no evidence that the area being taken by Girard had been utilized for any purpose except paths created by all terrain vehicles. (T.d. 67 – Exhibits 1, 2A-2D)

One can expect that any time railroad property is appropriated by a governmental agency a claim will be made that the land is necessary for rail transportation. In this case even if a presumption against preemption is not applied, which it should be, it is obvious that preemption should not predominate over the eminent domain laws of Ohio where it does not manage or govern rail transportation or may only have a remote or incidental effect on rail transportation.

The cases cited in this brief point the way for this Supreme Court to adopt the rule of law to be applied in ICCTA preemption cases in Ohio and to correct the apparent confusion demonstrated in the trial and appellate courts below.

In this case the lower courts were hesitant to take jurisdiction and would instead have the STB decide whether or not the ICCTA is applicable even where, as here, the Appellate Court majority recognized that the taking of the property by the City of Girard would not deny YBR the ability to conduct its railroad operations and the taking would not directly regulate matters committed to the STB.

Even the STB has acknowledged in *Lincoln Lumber*, supra, that courts can and regularly do make determinations as to whether eminent domain actions of this type would interfere with railroad operations and that the case is of the type that courts are well suited to address.

CONCLUSION

In keeping with the authority cited and the traditional balance between State and Federal powers it is incumbent upon Ohio trial courts that they do not automatically cede jurisdiction in

ICCTA cases *carte blanche* to the STB or Federal Courts where the specific facts fail to show that the State or local laws clearly affect rail transportation. Trial courts should assume jurisdiction and iron out the issues on preemption except in those cases where it is clear that the State or local powers intrude upon the ICCTA or STB jurisdiction.

In this case the dissenting opinion of the Appellate Court was correct and should be adopted. Based on the facts and precedent cited the trial court was required to assume jurisdiction, apply a presumption against preemption and conclude on the specific facts that preemption is not applicable in this case. The judgment of the appellate court should be reversed and the matter remanded with orders that the eminent domain proceeding should advance without preemption.

Respectfully Submitted,



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I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. mail, postage pre-paid, this 28th day of March 2012, to the following:

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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

NOTICE OF APPEAL OF APPELLANT CITY OF GIRARD, OHIO

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Notice of Appeal of Appellant City of Girard, Ohio

Appellant, City of Girard, Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2010 TR 00079 on September 19, 2011.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully Submitted,



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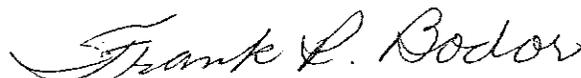
CERTIFICATE OF SERVICE

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

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SEP 19 2011

TRUMBULL COUNTY, OH
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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).

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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

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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-*9.¹

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.² 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. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, 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.

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

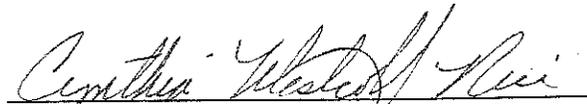
- vs -

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

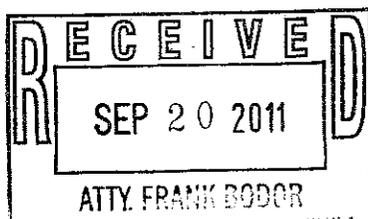
TIMOTHY P. CANNON, P.J., concurs,

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

FILED
COURT OF APPEALS

SEP 19 2011

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK



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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.¹ 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

¹ 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., ¶13.

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.



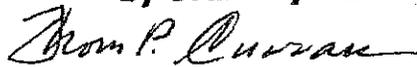
JUDGE THOMAS P CURRAN

Date: April 26, 2011

Copies to:

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

**TO THE CLERK OF COURTS: You Are Ordered to Serve
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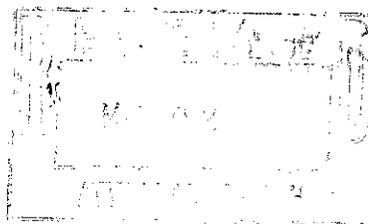


JUDGE THOMAS P CURRAN

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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

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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
TRUMBULL COUNTY, OHIO

CITY OF GIRARD, OHIO)	CASE NO. 2006-CV-2995
)	
PLAINTIFF,)	JUDGE THOMAS P. CURRAN
)	(Sitting by assignment)
vs.)	
)	
YOUNGSTOWN BELT)	
RAILWAY COMPANY, et al.,)	JUDGMENT ENTRY
)	
DEFENDANTS,)	

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.

KAREN INFANTE
CLERK OF COURT
TRUMBULL COUNTY
2010 MAY 13 PM
TRUMBULL COUNTY
CLERK OF COURTS

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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.

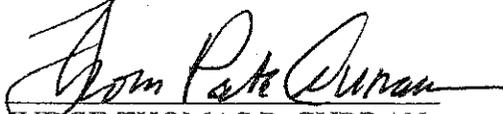
This court finds that the preemption intent of Congress regarding railroads is clear. As a result, the Court finds it may be without jurisdiction to enter a final judgment in this matter. The Court hereby ORDERS the parties to apply to the STB for a determination as to whether it chooses to exercise 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.

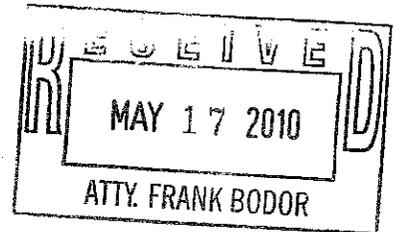
IT IS SO ORDERED.

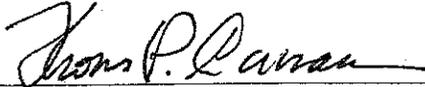
DATE May 11, 2010


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.

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SEND
COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD
OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH-
WITH BY ORDINARY MAIL.




JUDGE THOMAS P. CURRAN

5-1370

copies to:

Pros.
M. Bushey
F. Bodor
C. Lanz
M. Standohar
T. Lipka
J. Krzys
M. Rigelsky
C. Gibben
Consolidated Rail Corp
Erie Land. (2)
YO Belt Railway

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United States Statutes**Title 49. Transportation****Subtitle IV. INTERSTATE TRANSPORTATION****Part A. RAIL****Chapter 105. JURISDICTION***Current through P.L. 111-290***§ 10501. General Jurisdiction**

- (a)
- (1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is-
 - (A) only by railroad; or
 - (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.
 - (2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in-
 - (A) a State and a place in the same or another State as part of the interstate rail network;
 - (B) a State and a place in a territory or possession of the United States;
 - (C) a territory or possession of the United States and a place in another such territory or possession;
 - (D) a territory or possession of the United States and another place in the same territory or possession;
 - (E) the United States and another place in the United States through a foreign country; or
 - (F) the United States and a place in a foreign country.
- (b) The jurisdiction of the 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,

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.

- (c)
- (1) In this subsection-
- (A) the term "local governmental authority"-
- (i) has the same meaning given that term by section **5302 (a)** of this title; and
- (ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and
- (B) the term "mass transportation" means transportation services described in section **5302 (a)** of this title that are provided by rail.
- (2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over--
- (A) mass transportation provided by a local government authority; or
- (B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.
- (3)
- (A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to-
- (i) safety;
- (ii) the representation of employees for collective bargaining; and
- (iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.
- (B) The Board has jurisdiction under sections **11102** and **11103** of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.