

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 REPLY BRIEF OF APPELLANT CITY OF GIRARD, OHIO

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Appellant's Reply to Appellee's Proposition of Law No. 1:

Under The ICCTA's Broad Preemption Clause, Any State And Local Regulations That Unreasonably Interfere With Railroad Lines And/Or Railroad Operations Are Preempted.

Appellant's Reply to Appellee's Proposition of Law No. 3:

Any Eminent Domain Proceeding Is Preempted By ICCTA If It Unreasonably Interferes With Current Or Future Rail Operations.

Appellant agrees that Appellee's Propositions of Law Nos. 1 and 3 are correct to state that "if" there is an "unreasonable interference" with current or future rail transportation by State or local regulations or eminent domain proceedings then preemption applies. The key in applying the propositions requires a determination as to what constitutes an "unreasonable interference."

In the case at bar the Appellee's action in signing a binding contract to sell all 55-acres of its property called "Mosier Yard" including its own rail lines and right-of-way to Total Waste Logistics ("TWL") to be used as a land fill constitutes an admission by the railroad that the land is no longer needed for rail operations. To say otherwise is a contradiction.

How can the Appellee posit that it needs the property for present and future operations when it was willing to sell the real estate in fee simple without retaining any property interest in the real estate? If the sale is completed TWL will have full control over the entire land including the rail lines. It is disingenuous for the Appellee to maintain the position that it needs the property for staging, expansion, etc., when in fact it did not reserve such property interests, including its own rail lines, in a contract to sell the property in fee simple for a non-related rail use.

Appellant City of Girard's appropriation of 41.4993 acres of the 55-acres owned by the railroad, which reserves to Youngstown Belt Railway Co. ("YBR") its rail lines and an additional 100 parallel feet beside the railroad right-of-way for expansion and staging, is not an

“unreasonable interference” with railroad lines or railroad operations considering the railroad’s pledge and willingness to sell all of its interest in its holdings to be used as a landfill.

In *City of Creede, Co. – Pet. For Dec. Order, STB Finance Docket No. 34376, 2005 STB Lexis 486, (STB May 3, 2005)* cited by Appellee the STB clearly stated:

“Conversely, state and local laws are not preempted where the activity is not ‘transportation’ or it is not offered by a ‘rail carrier.’ For example, if the property were being used for a restaurant or hotel or some other non-transportation purposes, then there would be no preemption under section 10501(b) and the City’s zoning ordinance would apply. Similarly, even if the property is being used for transportation purposes, the activity must be performed by a duly authorized rail carrier. E.G. Florida East Coast; Hi Tech Trans; Town of Milford. The center of this dispute – whether an activity is ‘transportation’ offered by a ‘rail carrier’ is often a fact specific determination.”

The pledged use of the property for a landfill is a similar non-transportation use such as a restaurant or hotel for which preemption would not apply. The Appellee attempts to side step the requirement to apply the applicable law on the fact specific case analysis. Instead it applies recited principles of law from cases where the facts actually do require preemption.

In addition Appellee attempts in footnote 2 page 7 and footnote 1 page 3 of its merit brief to infuse alleged facts regarding the status of TWL’s permit application and the status of V&M Star Steel Company’s project as having a bearing on the case to be decided by this Supreme Court. These facts are not in the record and cannot be considered in the Court’s resolution of the case.

It is well settled as a matter of law that an appellate court may not consider materials, evidence, or matters outside the record and it is improper for the Appellee to suggest or submit such material for consideration in order to attempt to influence the Court’s decision otherwise. *Squire v. Geer, 117 Ohio St.3d 506, 2008-Ohio-1432; In re Estate of Southard, 192 Ohio App.3d*

590, 2011-Ohio-836; *Belardo v. Belardo*, 187 Ohio App.3d 9, 2010-Ohio-1758; *Colley v. Colley*, 2009-Ohio-6776; *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730; *McAuley v. Smith*, (1998), 82 Ohio St.3d 393, 1998-Ohio-402.

Furthermore, the sales contract for the 55-acres that is part of the record does not preclude the use of the land by the buyer, TWL, for other non-transportation purposes in place of or in addition to a landfill. There is no evidence to indicate that the parties have canceled the sales contract for the 55-acres to TWL.

Appellant's Reply to Appellee's Proposition of Law No. 2:

Appellant Girard's eminent domain proceeding is [not] "per se" preempted by ICCTA.

Appellee cites at pages 8, 9, and 10 of its brief and relies heavily on the case of *Union Pacific Railroad Company v. Chicago Transit Authority*, N.D. Ill. Case No. 07-CV-229, 2009 WL 448897 (N.D.Ill. Feb. 23, 2009) in support of its position that an eminent domain proceeding is "per se" preempted. That case, however, was appealed and the U.S. District Court of Appeals on April 28, 2010 rejected the "per se" preemption theory. *Union Pacific Railroad Co. v. Chicago Transit Authority*, 647 F.3d 675, 2010 WL 5808265 (C.A. 7) The Appeals Court remanded the case back to the District Court stating the lower court should undertake an "as applied" analysis suggesting that the STB and the courts have consistently required the railroad to show that the proposed condemnation will unreasonably interfere with rail operations. The Appellate Court held that the District Court erroneously held that any State condemnation of railroad property is categorically pre-empted.

The Appellate Court in *Union Pacific* wrote a lengthy opinion well worth perusing in which it said that "the U.S. Supreme Court recognized long ago that the State's eminent domain power is an 'attribute of sovereignty' that 'extends to all property within the jurisdiction of the

state' (including 'lands already devoted to railway use') and is 'essential to the life of the state'." Citing *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924); *Accord Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974).

The Appellate Court in *Union Pacific, supra*, reviewed the history of 49 U.S.C. §10501(b) and recited overwhelming authority to show that the Courts do not accept the "per se" preemption theory and instead embrace the "as applied" approach with the touchstone being whether the state action will prevent or unreasonably interfere with rail operations.

The lower Appellate Court, in the case at bar, at footnote 2 page 21 of its majority opinion noted that Girard's proposed taking would not deny YBR the ability to conduct its operations even though it "might" affect rail transportation and the taking would not directly regulate matters committed to the STB. In spite of such finding the Eleventh District Court majority affirmed the trial court's decision that Girard's appropriation was preempted and that it should be sent to the STB for determination. This conflicts with the majority's footnote findings.

Furthermore, the finding by the Appellate majority that the taking would not directly regulate matters committed to the STB and would not deny YBR the ability to conduct its operations required the Court to retain jurisdiction rather than sending the case to the STB for determination on issues that the Court had already determined and for which it had jurisdiction to decide.

Appellant's Reply to Appellee's Proposition of Law No. 4:

Appellant Girard Does Not Agree That Girard's Appropriation Action Fails The "As Applied" Analysis As It Will Prevent Or Interfere With Both Current And Future Rail Transportation On The Property And Is Therefore Clearly Preempted.

Appellee cites various legal authorities to prove instances where the courts have determined an unreasonable interference with railroad lines. The facts of these cases are dissimilar to the case at bar.

In *Green Mountain R.R. Corp. v. Vermont*, (2005), 404 F.3d 638 the railroad proposed to build facilities on its own property some of which were within a 100' strip along its tracks to unload bulk goods. In this case the facility was to be built on railroad property and operated by the railroad as part of its rail services. In the case at bar, TWL will build the facility on its own property and operate the landfill independently of the railroad.

Buffalo S. R.R., Inc. v. Village of Croton-on-the-Hudson (2006), 434 F.Supp.2d 241 was a case where the property involved 1,600' of spur track, off-loading facility, storage facilities, roads, and parking used by the railroad for transloading. The Court ruled that the City's appropriation did not take just a portion of the property but was also taking the facilities necessary for use by the railroad for transloading the contents of railcars onto trucks and vice versa.

In the case at bar Girard is not interfering with any of YBR's use of its property for railroad transportation. It is only appropriating 41.4993 acres of the 55 acres that is being sold to TWL that will be used solely as a dumping ground for construction and demolition debris by TWL.

In *Canadian National Ry. Co. v. City of Rockwood*, 2005 WL 1349077, 3 (E.D. Mich.) the District Court granted preemption where the railroad transported debris by rail onto trucks that

hauled it to a nearby facility for disposal. The Court distinguished the case from the CFNR, Florida East, and Hi-Tech cases, cited supra, stating that in those cases Hi-Tech's activities were not an integral part of the railroad's provision of transportation by rail carrier. The Court maintained that the railroad (CFNR) exercised control over the site, which would differentiate the cases from those cases where the businesses, which leased the land from the railroad, were customers of the railroad who wished to locate their distribution centers as close to delivery as possible.

The sale of the property to TWL removes YBR from any control or management of the property being appropriated and thus it is not an integral part of its rail transportation system but serves TWL strictly as its customer.

The facts in *Coastal Distribution LLC v. Town of Babylon*, 2006 WL 270252, are vague because the District Court in its preliminary remarks stated, "For purposes of this review, familiarity with the facts of the case is presumed." No factual pattern was set forth but there are references in the case that it involves the railroad's proposed construction of a shed.

The District Court found that the railroad by agreement with the user of the facility had control of the facility operation. In the case at bar, YBR, upon the sale of the property, has no control over TWL's operations. Total Waste is merely a customer or deliverer.

Columbiana Port Authority v. Boardman Twp. Park District (2001), 154 F.Supp.2d 1165 was a case where the Township of Boardman's right of appropriation of the property was challenged by the railroad on the grounds that it had acquired a valid right-of-way approved by the Surface Board of Transportation and that the Township was taking its rights in a rail line. The Court ruled that the determination of the Surface Board of Transportation could not be attacked on the grounds of *res judicata* and the statute of limitations. The facts of this case are completely

different than the case at bar. Girard is not challenging a Surface Transportation Board ruling nor is it taking any property used for rail transportation.

The case of *CSX Transportation, Inc. v. Georgia Public Service Com'n* (1996), 944 F.Supp. 1573 is about an attempt by the State of Georgia to regulate an intra-state railroad. Again the facts are so dissimilar it does not merit citing in support of YBR's position. It involves a rail line that is clearly within the statutory definition for preemption because it clearly involves the rail tracks itself.

In *Grafton & Upton Ry. Co. v. Town of Milford*, (D.Mass. Feb 27, 2004), 337 F.Supp.2d 233 the GU railroad wanted to develop a Milford Yard to increase its ability to interchange its rail activities with CSX railroad. GU engaged BRT, a terminal railroad company, which means BRT operates a railroad over a short distance for a singular purpose such as movement of freight within an industrial complex or for a single industrial entity. BRT agreed to reinstall an old switch to mesh or intersect GU's track with CSX's track so that CSX could transfer steel shipments via railcars to GU's account at Milford Yard. It was agreed that GU's employees would operate a locomotive leased from BRT between CSX connection and the Milford Yard where BRT employees would transfer the steel to trucks and transport it to customers. The *Town of Milford* attempted to enforce its zoning laws. The Court stayed the proceedings to allow the Surface Transportation Board to consider the matter in full. The case does not indicate what the outcome was before the Surface Transportation Board.

The *Soo Line R.R. v. City of Minneapolis*, (D. Minn. 1998), 38 F. Supp. 2d 1096 case entailed a dispute between the railroad and the City of Minneapolis. The railroad wanted to demolish five buildings at its Shoreham Yard. This yard was being operated as a major "intermodal" yard and distribution hub in the upper Midwest. The Court used the term

“intermodal” to describe the movement of a commodity by multiple modes of transportation. This can be accomplished by either the transfer of trailers and shipping containers between railcars, trucks, and ships, or by the transfer of the commodities themselves between cars, trucks, and ships. This typically requires a “bulk transfer facility,” which required the five buildings to be demolished.

The City of Minneapolis refused to issue demolition permits claiming the buildings may have historic value requiring study. The Court maintained that preemption applied since the yard was to be operated as an “intermodal” yard and distribution hub. It is to be noted that this yard and hub were being operated by the rail carrier itself and the Court noted that its business directly involved the movement of rail goods through the “intermodal” facility. This is hardly the case where YBR is merely delivering the construction and demolition debris to TWL for dumping at the site that Girard wishes to appropriate by eminent domain and within which YBR will have no control or management.

Finally, YBR and the trial court cited the case of *Wisconsin Central Ltd. v. City of Marshfield*, (2000), 160 F.Supp.2d 1009, 1013, in this case the City of Marshfield attempted to take by eminent domain a 14,475’ passing track from the railroad. The Court found that the passing track was an integral component in the operation of the railroad’s single-track line because it enables multiple trains to use one main track by allowing trains on the same track heading in opposite directions to pass each other.

It is no surprise that the *Wisconsin* Court would consider the passing track important to rail transportation and thus maintain that the railway activity would preempt its taking by the City in eminent domain proceedings. Again these facts are completely different because the land being taken by Girard would be used by TWL as a dumping ground, and it would not be used by

YBR for rail transportation, nor would the construction and demolition debris facility be managed or controlled by YBR.

A case by case factual analysis of YBR's citations proves that the preemption in those cases were merited because it could be proven that the facility being challenged was necessary for rail transportation and the facility was owned or managed by the railroad rather than a customer.

In the case at bar we are dealing with 41.4993 acres of land appropriated by eminent domain out of a 55-acre tract that:

1. Had no railroad tracks or permanent railroad fixtures on it;
2. Allegedly only three or four acres of the land have been purportedly used in the past as a staging area for railroad purposes. But YBR's Chief Engineer admits he did not know where it would stage operations if the land were transferred to the landfill company. But he also admitted that it could stage its operations on the 100' of extra residue area next to its tracts that is not being taken by Girard and purposely left to the railroad;
3. The railroad was unable to produce any pictures or records of its construction or maintenance projects to explain the necessity of the staging and storage area it professes to need;
4. The railroad did not keep an inventory, a list of materials, requisition sheets, work sheets, or other evidence to prove it ever used the three or four acre area on Appellant's Exhibit 6A (Appellee's Exhibit C) for storage or staging;
5. The railroad could produce no names and addresses of any employees or contractors that were involved in the alleged staging area since the time of purchase of the property;

6. Physical inspection of the 41.4993 acres by Girard's Engineer showed no physical evidence of any area in the 41.4993 acres that was used for storage;

7. Annual aerial photos showed no sign of any staging areas on the property;

8. The area, hand drawn by YBR's President to indicate a staging area, of three or four acres is the exact same area that TWL's "Facility Design Plan" shows as being a proposed basin for the landfill;

9. The railroad has no official maps showing a staging area;

10. No documents or plans of any kind were introduced to show any future use of the land involved in the eminent domain proceeding;

11. There is no evidence that the 41.4993 acres has ever been used for railroad purposes except for the purported three or four acres claimed for staging materials.

12. The entire 55-acres, that includes the railroad tracks, is under sales contract with TWL to be sold and used as a commercial demolition dumpsite.

The evidence clearly shows that the appropriation of land by Appellant has no effect or at most a remote or incidental effect on rail transportation and it does not manage or govern rail transportation involving the ICCTA therefore there is a presumption against preemption of Ohio eminent domain laws that is traditionally reserved to State government. This presumption required YBR to present evidence and bear the burden of proof for the land acquired by Girard for public purposes. See *Eastern Alabama Railway LLC – Petition for Declaratory Order (March 8, 2012) Docket No. FD 35583, 2012 WL 758259 (STB)(Condemnation for Underground Sewer Lines and Waterlines were deemed not federally preempted)*.

Of course in every case where land is being appropriated it is expected that the railroad will assert that it needs the land for present or future use as in this case where the president of the

railroad, Strawn, quickly circled in pencil on a map a three or four acre area claimed for staging. But there was no other proof to verify such need especially where the same area was being sold in fee simple for a dump and no tangible evidence was introduced to show how the land would be used in the present or future even if the contract of sale of the entire 55-acres was not consummated.

Appellee emphasizes the size of the taking of land by Girard. This is not the criteria to determine whether or not the eminent domain proceedings are preempted. In *Union Pacific Railroad Co. v. Chicago Transit Authority*, 647 F.3d 675, 2010 WL 5808265 (C.A. 7) the Court stated when undertaking the “as applied” analysis, the STB and the courts have consistently required the railroad to show that the proposed condemnation will unreasonably interfere with rail operations.

Certainly a small amount of land taken could conceivably unreasonably interfere with rail transportation whereas a large tract of land taken may have little or no affect on rail transportation. Such is the case in the taking that is now before this court. The touchstone in applying the “as applied analysis” is not the size of the appropriation or how the City wishes to use the property. Instead it is whether it unreasonably affects rail transportation. Appellant, for the reasons advanced in its merit brief, posits that the taking does not unreasonably interfere with railroad transportation.

YBR, after the appropriation of land, will have in tact all of the rail lines it had before the appropriation plus a 100’ tract of vacant land parallel to its tracks. In fact it will have fourteen more acres of land plus its rail system by virtue of the appropriation of the 41.4993 acres of land by Girard than it would have in its sale of all 55-acres of land, including its rail lines, to TWL for a landfill site.

In the recent cases involving the handling of construction and demolition debris both the STB and the U.S. Court of Appeals have held that this activity extends beyond the scope of rail transportation and does not come within federal preemption.

The STB determined in *New England Transrail LLC, dba Wilmington & Woburn Terminal Railway*, 2007 WL 1989841 (STB) 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]

The most recent leading case, which is almost an exact pattern of the case at bar, was decided March 15, 2011 by the Second Circuit U.S. Court of Appeals in *New York & Atlantic Railway Co. v. Surface Transportation Board*, 635 F.3d 66 (2d Cir. 2011) Docket No. 10-1490-AG. That case was decided less than two months before the trial court decision. (T.d. 87) The U.S. Appellate Court agreed with the STB that a waste transfer facility was not within the exclusive jurisdiction of the STB because the facility operation was not acting as agent of the rail carrier and therefore there was no preemption for rail purposes. The rail carrier’s involvement with the waste facility was limited to transporting rail cars to and from the facility. This is also true in the case at bar. YBR will have no control of TWL’s operation upon transfer of YBR’s property to TWL.

The lower appellate court majority determined in footnote 2 on page 21 of its Opinion that Girard’s proposed taking would not deny YBR the ability to conduct its operations. It did not decide but stated it “might” affect rail transportation. It is difficult to reconcile these

statements. If the appropriation does not deny YBR's ability to conduct its rail operations then how can it affect rail transportation?

In this case rail transportation is not affected. YBR has proved, by its own action in entering into the sales contract for its entire 55-acres to a landfill company including rail lines with no reservations, that it does not need the land for present or future rail transportation. Based on specific facts and an "as applied analysis" the eminent domain condemnation in this case does not interfere with rail transportation and the dissenting opinion analysis advanced in the lower appellate court should be adopted.

Appellant's Reply to Appellee's Proposition of Law No. 5:

Appellant Disagrees With The Applicability Of Appellee's Proposition Of Law Advanced That The Supreme Court Will Not Weigh The Evidence And Overturn The Factual Conclusion Of The Trier Of Fact In Relation To An "As Applied" Preemption Determination.

In this case there is no need to overturn the factual conclusions of the appellate court. The majority of the appellate court concluded on page 21 footnote 2 of its opinion as follows:

"2. In its judgment entry, the trial court initially concluded that the current act is preempted per se because of its 'aggressive regulatory nature.' As discussed above, we do not believe that 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."
[Emphasis Added]

The appellate court concluded that the proposed taking would not deny YBR the ability to conduct its operations; that it "might" affect rail transportation and that it would not directly regulate matters committed to the STB. With this factual conclusion the majority had no basis to

affirm the trial court's determination that the cause was preempted as applied and that the matter should be referred to the STB for further determination.

The appellate court should have determined, based on its conclusions in footnote 2 page 21 of its opinion, that the State Court had jurisdiction; that there was a presumption against preemption; and that there was no preemption of Girard's eminent domain taking because, as it determined, the taking would not deny YBR the ability to conduct its operations and would not directly regulate matters committed to the STB. The correct analysis is outlined in the dissenting opinion of the appellate court.

Appellant's Reply to Appellee's Proposition of Law No. 6:

The Appellate Court Majority Acted [Did Not Act] Properly When It Suggested That Girard Commit The Matter To The STB For Further Proceedings.

As expressed by the U.S. Court of Appeals in *Union Pacific Railroad Co. vs. Chicago Transit Authority*, 647 F.3d 675 2010 WL 5808265 (C.A. 7) at page 29:

“In short, when undertaking the as applied analysis, the STB and the courts have consistently required the railroad to show that the proposed condemnation will unreasonably interfere with rail operations. This Court in the first instance, or the district court on remand, should undertake this analysis.”

The appellate court majority, in the case below, did not act properly to have the matter committed to the STB for further proceedings. Once it concluded that Girard's taking would not deny YBR's ability to conduct its railroad operations and that the taking would not directly regulate matters committed to the STB, as expressed on page 21 footnote 2 of its decision, it was required to reverse the decision of the trial court; retain jurisdiction in the State Court; and determine that federal preemption does not apply and remand the case to the trial court for further proceedings in eminent domain.

Respectfully Submitted,



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I hereby certify that a copy of the foregoing Reply Merit Brief was sent by regular U.S. mail, postage pre-paid, this 18th day of May 2012, to the following:

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