

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
December 16, 2022
Part of
Public Record

BOROUGH OF DUMONT

v.

CSX TRANSPORTATION, INC.;
ABC CORPORATIONS; AND XYZ
INDIVIDUALS

Docket No. NOR 42174

CSX TRANSPORTATION, INC.'S MOTION TO DISMISS

The “Complaint for Property Damages” (“STB Complaint”) filed by the Borough of Dumont (the “Borough”) does not identify any alleged violation of the ICC Termination Act of 1995, as amended (“ICCTA”), 49 U.S.C. § 10101 *et seq.*, or state any cause of action within the Board’s jurisdiction. Instead, the STB Complaint simply parallels the state law claims that the Borough has separately alleged in a lawsuit it filed in New Jersey state court relating to damage to a sewer pipe (“State Court Complaint”).¹ Indeed, the Borough expressly pled in that State Court Complaint that “the U.S. Surface Transportation Board (“STB” or “Board”) does not have jurisdiction over this State law action involving property damages.”² CSX Transportation, Inc. agrees.³ The Borough’s STB Complaint does not state a

¹ The State Court Complaint is attached as Exhibit A. The State Court Complaint has been removed to the United States District Court for the District of New Jersey.

² Exhibit A at 8.

³ Although the Board lacks jurisdiction to grant the Borough’s requested state law relief, the Board retains concurrent jurisdiction with the federal court to decide any defenses brought by CSXT asserting that the Borough’s claims constitute preempted “regulation of rail transportation” under 49 U.S.C. § 10501(b). *See*

claim upon which the Board can grant relief, and it should be dismissed pursuant to 49 U.S.C. § 11701(b).⁴

BACKGROUND

According to the STB Complaint, the Borough maintains a sewer pipe in the vicinity of a CSXT rail line pursuant to an easement agreement between the Borough and CSXT.⁵ The Borough alleges that CSXT performed “boring and excavation” work between December 8, 2020 and January 26, 2021, which damaged and obstructed the Borough’s sewer pipe.⁶ On September 26, 2022, the Borough filed a civil complaint against CSXT in the Superior Court of New Jersey seeking monetary damages (the previously mentioned State Court Complaint).⁷ On

14500 Ltd. LLC—Pet. for Decl. Ord., Docket No. FD 35788 (STB served June 5, 2014), slip op. at 2–3 (explaining that “both the Board and courts have concurrent jurisdiction to determine preemption” and agreeing with a district court’s ICCTA preemption determination). CSXT reserves the right to assert any appropriate preemption defenses in the federal court proceedings, and reserves the option to file a petition for declaratory order before the Board if it appears in the future that the Board’s views on any potential ICCTA preemption issues may be helpful.

⁴ The STB Complaint states that it was filed pursuant to 49 C.F.R. § 1130.2. Part 1130 provides informal complaint processes, targeted to rate and overcharge matters, and requires the pleading of, for example, “commodities, the rate applied, and the date on which the charges were paid.” 49 C.F.R. § 1130.2(b)(4). The Borough plainly did not comply with those requirements. But even if it had cited 49 C.F.R. Part 1111 as the basis of its complaint, that would not cure the fundamental legal flaw here: the STB Complaint does not identify any violation of the Board’s governing statute, or otherwise state any cause of action within the Board’s jurisdiction.

⁵ STB Compl. ¶¶ 8–11. The allegations in the STB Complaint and State Court Complaint are essentially identical.

⁶ *Id.* ¶¶ 16–24.

⁷ See *Borough of Dumont v. CSX Transp., Inc., et al.*, No. BER-L-005236-22 (N.J. Super. Ct.).

November 17, 2022, the Borough filed the STB Complaint “to preserve its rights and provide a filing within the STB’s 2-year statute of limitations.”⁸ Like the State Court Complaint, the STB Complaint asserts violations of the New Jersey Underground Facility Protection Act and makes claims under state common law seeking monetary compensation for the damage to its sewer pipe allegedly caused by CSXT’s actions.⁹ On December 2, 2022, CSXT removed the state court action to federal court, and litigation will proceed in that forum.¹⁰

ARGUMENT

The Borough purports to invoke 49 U.S.C. § 11704(b) as the basis for the Board’s jurisdiction in this proceeding, but it is well settled that § 11704(b) is not an independent basis for Board jurisdiction.¹¹ Rather, a complainant must allege a particular violation of Title 49 Subtitle IV Part A. The statutory text makes this clear. Section 11704(b) provides that a rail carrier subject to the Board’s jurisdiction “is liable for damages sustained by a person as a result of an act or omission of that carrier *in violation of this part*.”¹² A person may file a complaint with the Board “about a *violation of this part* by a rail carrier” pursuant to 49

⁸ STB Compl. ¶ 6.

⁹ *See id.* ¶¶ 25–51.

¹⁰ *See Borough of Dumont v. CSX Transp., Inc.*, No. 2:22-cv-6982 (D.N.J.).

¹¹ STB Compl. ¶ 6.

¹² 49 U.S.C. § 11704(b) (emphasis added).

U.S.C. § 11701(b).¹³ Also under that section, the Board “may dismiss a complaint it determines does not state reasonable grounds for investigation and action.”¹⁴

Courts have interpreted this plain language to mean that a viable cause of action under § 11704 must assert a “violation of this part,” that is, “a direct statutory violation of the ICCTA itself.”¹⁵ “Section 11704 does not stand on its own, but must be coupled with a deprivation or violation of rights, duties, or obligations established by statute in the ICCTA or by regulations issued pursuant to the ICCTA.”¹⁶

In this case, even when “[v]iewing the allegations . . . in the light most favorable to the plaintiff,” the Borough’s STB Complaint asserts no violations by CSXT of any provision of ICCTA or a related Board regulation.¹⁷ Instead, the STB Complaint alleges violations of a New Jersey state statute and state common law claims. None of these allegations present an actionable claim before the agency. Indeed, the Borough expressly pled in the STB Complaint that its filing of this Complaint “does not constitute an admission that the STB is the appropriate venue for the instant action” and admitted that the Board “does not have jurisdiction over

¹³ 49 U.S.C. § 11701(b) (emphasis added).

¹⁴ *Id.*

¹⁵ *Rymes Heating Oils, Inc. v. Springfield Terminal Ry.*, 358 F.3d 82, 89 (1st Cir. 2004).

¹⁶ *Griffioen v. Cedar Rapids & Iowa City Ry.*, 785 F.3d 1182, 1191 (8th Cir. 2015).

¹⁷ *See Alonzo Benton v. CSX Transp., Inc.*, Docket No. NOR 42166 (STB served Jan. 17, 2020), slip op. at 2 (citations omitted).

safety-related matters, as is the case in this instant action.”¹⁸ And in the State Court Complaint, it pled that “the U.S. Surface Transportation Board (“STB”) does not have jurisdiction over this State law action involving property damages.”¹⁹

The Borough’s STB Complaint therefore articulates “no actionable claim before the agency and no basis for the Board to investigate or act upon [the] complaint,” and it should be dismissed.²⁰ The mere invocation of § 11704(b) is insufficient to establish the Board’s jurisdiction.

The Board’s dismissal of the STB Complaint should be with prejudice. There is no basis to think that the Borough could replead its STB Complaint in a way that would cure its fundamental failure to state a claim under ICCTA. Because ICCTA “does not provide any rights or remedies related to . . . or otherwise address such state law property issues,”²¹ nor does it provide any remedies under state tort law, there is no likelihood that an amended complaint could state a claim under ICCTA.²²

¹⁸ STB Compl. ¶ 7.

¹⁹ Ex. A at 8.

²⁰ See *Benton*, Docket No. NOR 42166, slip op. at 2.

²¹ *14500*, Docket No. FD 35788, slip op. at 6.

²² See *Union Pac. R.R.—Pet. for Decl. Ord.*, Docket No. FD 35504 (STB served Dec. 12, 2011), slip op. at 4 (explaining that “a Board ruling on the reasonableness of [indemnity] provisions” under state tort law “would amount to merely an advisory opinion”); see also *Elam v. Kansas City S. Ry.*, 635 F.3d 796, 812 (5th Cir. 2011) (explaining that “it would be futile to refer [a] negligence per se claim to the STB” because a claim for damages associated with a railroad blocking a road crossing did not violate any provision of ICCTA or any Board regulation).

CONCLUSION

The Board should dismiss the Borough's Complaint for failure to state a claim under the ICCTA upon which the relief sought can be granted and close this proceeding.

Respectfully submitted,

/s/ Matthew J. Warren

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Dated: December 16, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2022, a copy of the foregoing Motion to Dismiss was served by email on the following counsel of record:

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Exhibit A

State Court Complaint

***Borough of Dumont v. CSX Transp., Inc.,
No. 2:22-cv-6982 (D.N.J.)***

(As filed in federal court upon removal.)

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BOROUGH OF DUMONT,

Plaintiff,

v.

CSX TRANSPORTATION, INC.; ABC
CORPORATIONS 1-10; and XYZ
INDIVIDUALS 1-10,

Defendant(s).

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY: LAW DIVISION
DOCKET NO.: BER-L-

CIVIL ACTION

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff the Borough of Dumont (the “Borough”), by its undersigned attorneys, for its Complaint against CSX Transportation (“CSX”), and fictitious entities and individuals not yet identified by the Borough, alleges and says as follows:

NATURE OF THE ACTION

The Borough brings this action for money damages against defendant CSX, and fictitious entities and individuals not yet identified by the Borough, for the negligent destruction of and trespass into the Borough’s sewer line. The Borough’s sewer line was located in an easement at CSX’s property containing train tracks traversing the Borough in or around Columbia Avenue. CSX (and other entities/individuals not yet identified) destroyed the Borough’s sewer line while negligently performing boring work and excavation on CSX’s property. The Borough seeks relief in the form of compensatory and consequential damages against defendants due to the loss and replacement of the

Borough's sewer line, as well as the Borough's emergency work to address the damages.

PARTIES

1. Plaintiff, the Borough of Dumont, having a place of business at 50 Washington Ave., Borough of Dumont, County of Bergen, State of New Jersey, is a duly organized body politic of the State of New Jersey 07628 (the "Borough").

2. Defendant CSX Transportation, Inc., is a corporation with a principal place of business at 500 Water Street, Jacksonville, Florida 32202 c/o The Corporation Trust Company 820 Bear Tavern Road, West Trenton, New Jersey 08628 ("CSX"). CSX is a rail carrier providing railroad transportation of goods for compensation.

3. Defendant ABC Corporations 1-10 are fictitious entities which have not yet been identified by the Borough but which are liable for the Borough's losses. These ABC Corporations may be New Jersey corporate or business entities.

4. Defendant XYZ Individuals 1-10 are fictitious individuals who have not yet been identified by the Borough but who are liable for the Borough's loss. These XYZ Individuals may be domiciled in New Jersey.

JURISDICTION AND VENUE

5. Pursuant to R. 4:3-1(a)(5), the Superior Court of New Jersey, Law Division, Bergen County Vicinage has jurisdiction as this matter is for compensatory and consequential damages, and venue over this Complaint in Bergen County is appropriate because the actions giving rise to this complaint occurred within the Borough of Dumont, a municipality within Bergen County.

FACTS COMMON TO ALL COUNTS

6. CSX is the owner of property at or near the intersection of Columbia and Cortland Avenues, in the Borough of Dumont, New Jersey, which is identified as CSX mile post QR-12.45

(the “Property”).

7. The Property contains CSX’s railroad tracks, a railroad crossing, several fixtures, and upon information and belief, real and personal aboveground and underground property and conduits.

8. On or about August 10, 1925, CSX’s predecessor provided the Borough an easement on the Property to construct and maintain one eight inch (8”) cast iron sewer pipe encased in concrete (the “Sewer Pipe”). See **Exhibit A**.

9. The Borough constructed the Sewer Pipe in accordance with the 1925 easement agreement with CSX’s predecessor, and the Sewer Pipe was used by the Borough to provide essential sewerage services to its residents from the years 1925 to 2021.

10. On or about December 8, 2020, CSX made a request for a utility mark-out pursuant to the New Jersey One Call System, established by the New Jersey Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq.

11. On December 8, 2020, the Borough conducted a utility mark-out pursuant to CSX’s New Jersey One Call request, and appropriately marked the Sewer Line in safety green as required pursuant to N.J.S.A. 48:2-80 (hereinafter the “Mark-Out”).

12. CSX’s request for a utility mark-out pursuant to the New Jersey One Call System represented that the “Start Date/Time” of its work was to be “12/14/20 AT 6:30” with an “Expiration Date” of “02/12/21.”

13. Upon information and belief, CSX failed to initiate the performance of its work in a timely manner under the New Jersey Underground Facility Protection Act.

14. On or about January 26, 2021, CSX was performing work at the Property, which included boring activities and related underground excavation.

15. Between December 8, 2021, the date of the Borough's Mark-Out, and January 26, 2021, CSX wholly failed to protect, preserve, or maintain the Borough's Mark-Out, and failed to issue new notification as required pursuant to N.J.S.A. 48:2-82.

16. On or about January 26, 2021, the Borough's Department of Public Works was informed of a sewer blockage near the Property, and upon further inspection, discovered that the Sewer Pipe was clogged and blocked by dirt and mud. The Borough undertook emergency efforts to clear the blockage from the Sewer Pipe.

17. Following the Sewer Pipe's blockage, the Borough undertook emergency efforts to inspect the Sewer Pipe with a camera to locate any cracks or penetrations. Such cracks or penetrations could have undermined the Sewer Pipe, caused sewage flooding, created a sinkhole in the train tracks, and caused a major catastrophic train derailment in and around the Borough.

18. On or about January 29, 2021, the Borough was able to run a camera into the Sewer Pipe and observed substantial amounts of dirt, stone, and debris in the Sewer Line. The camera became blocked by a wall of debris in the Sewer Line at the location of CSX's boring holes.

19. Furthermore, the Borough identified a newly installed 4" conduit installed by CSX at a depth of 9.8 feet, intersecting with the bottom of the Sewer Pipe.

20. CSX refused to permit the Borough to commence emergency repair to the Sewer Pipe unless the Borough entered into an amended agreement.

21. The Borough entered into an Amended Agreement, dated February 9, 2021, whereby the parties agreed that the Borough would abandon and replace the existing Sewer Pipe at the Property to address the blocked sewer line. See Exhibit B.

22. The Sewer Pipe became damaged and obstructed because of CSX's negligent boring and excavation activities, which directly caused the Borough's damages due to the loss and

replacement of the Borough's Sewer Pipe, as well as the Borough's emergency work to address the damages.

COUNT ONE

**NEGLIGENCE *PER SE* PURSUANT TO THE NEW JERSEY UNDERGROUND
FACILITY PROTECTION ACT, N.J.S.A. 48:2-73 et seq.**

23. The Borough incorporates paragraphs 1 through 22 as if fully set forth herein.

24. With respect to the work performed by CSX at the Property, CSX was an "excavator" as that term is defined under the New Jersey Underground Facility Protection Act (the "Act"), N.J.S.A. 48:2-75.

25. With respect to Mark-Out, the Borough was an "Operator" as that term is defined under the Act, N.J.S.A. 48:2-75.

26. The Sewer Pipe was an "Underground facility" as that term is defined under the Act, N.J.S.A. 48:2-75.

27. The Sewer Pipe was "Damaged" as that term is defined under the Act, N.J.S.A. 48:2-75.

28. Pursuant to the Act and the applicable regulations, an excavator must protect and preserve the marking, staking, or other designation of an underground facility until the marking, staking, or other designation is no longer necessary for safe excavation or demolition. N.J.S.A. 48:2-82(d)(4).

29. Pursuant to the Act and the applicable regulations, an excavation must commence within 10 business days after providing notice for the notice to remain valid for 45 business days from the initial notification. However, the notice remains valid "providing that the excavator maintains any mark out that is made by an operator in accordance" with the Act. N.J.S.A. 48:2-82(d)(4) & (f).

30. Upon information and belief, CSX failed to timely commence its excavation pursuant to the Act and the applicable regulations.

31. CSX failed to protect and preserve the Borough's Mark-Out, and failed to provide any new notification for the work CSX performed on January 26, 2021. N.J.S.A. 48:2-82.

32. CSX's failure to preserve the Borough's Mark-Out and to provide additional notice is *prima facie* evidence that the Borough's damages were caused by CSX's negligence. N.J.S.A. 48:2-89.

33. As a result of CSX's failure to comply with the Act, the Borough was damaged due to the loss of the Sewer Pipe.

34. Pursuant to the Act, an excavator that damages an underground facility in violation of the Act is liable for all costs, labor, parts, equipment, and personnel downtime, incurred by the operator. N.J.S.A. 48:2-80.

COUNT TWO

COMMON LAW NEGLIGENCE & NEGLIGENCE RES IPSA LOQUITUR

35. The Borough incorporates paragraphs 1 through 34 as if fully set forth herein.

36. CSX owed the Borough a duty of care while performing boring and excavation work at the Property on and around the Sewer Pipe.

37. CSX's actions and inactions breached the duty of care it owed to the Borough, including the negligent planning, performance, and supervision of employees and agents, in conducting boring and excavation activities which compromised the integrity of the Sewer Pipe.

38. CSX's breach of duty was the direct and proximate cause of the damages to the Sewer Pipe.

39. The Borough's damaged sewer line caused an emergency due to overflowing

sewerage.

40. The events and instrumentalities which caused the Borough's damages were within CSX's direction and control.

41. The events and circumstances complained of would not have occurred but for a lack of due care by CSX, and such negligence by CSX is presumed.

COUNT THREE

TRESPASS

42. The Borough incorporates paragraphs 1 through 41 as if fully set forth herein.

43. CSX's boring activities caused the unauthorized entry of dirt, debris, and materials from its Property into the Borough's Sewer Pipe.

44. As a result of CSX's unauthorized entry, the Borough was damaged.

COUNT FOUR

STRICT LIABILITY

45. The Borough incorporates paragraphs 1 through 44 as if fully set forth herein.

46. CSX's construction activities created the existence of a high degree of risk of harm to the Borough's property.

47. CSX's construction activities involved a high likelihood that resulting harm to the Borough's property would be great.

48. CSX's construction activities are not a matter of common usage.

49. CSX's construction activities were inappropriate to the place where it was carried on.

50. CSX's construction activities involved dangerous attributes which greatly outweighed the value to the community.

DEMAND FOR RELIEF

Pursuant to the above counts, the Borough demands relief as follows:

- (a) Compensatory, incidental, and consequential damages;
- (b) All additional damages available pursuant to the New Jersey Underground Facility Protection Act (the “Act”), N.J.S.A. 48:2-75 et seq.;
- (c) Market value of destroyed property; replacement cost of destroyed property; repair costs, loss of use damages;
- (d) Punitive damages;
- (e) Prejudgment interest;
- (f) Post judgment interest, including those as noted in the emergency bonds used to pay for the repairs of damage done;
- (g) Attorneys’ fees and costs; and
- (h) Such other relief as the court deems equitable and just.

DESIGNATION OF TRIAL COUNSEL

Marc E. Leibman, Esq., and Rafael Corbalan, Esq., are hereby designated as trial counsel.

R. 4:5-1 CERTIFICATION

Pursuant to 42 U.S.C. § 20106(b), the U.S. Surface Transportation Board (“STB”) does not have jurisdiction over this State law action involving property damages. Furthermore, this State law action strictly involves a claim of money damages.

In order to preserve the Borough’s rights, the Borough anticipates filing a complaint with the STB to recover damages as the applicable statute of limitations for claims with the STB is within 2 years after the claim accrues. However, such a filing with the STB is not an admission by the Borough that the STB is the appropriate venue for the instant action, as it is not. The

undersigned members of the bar assert that all the Borough's claims are properly within the jurisdiction of the Superior Court of New Jersey, Bergen Vicinage, and there should be no other action pending in any court or arbitration proceeding. Other than the complaint before the STB to preserve the Borough's rights, the Borough does not contemplate any other action or arbitration proceeding.

CHIESA, SHAHINIAN & GIANTOMASI, P.C.
Attorneys for the Borough

Marc E. Leibman /s/
BY: _____
Marc E. Leibman, Esq.

Dated: September 28, 2022