

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BOROUGH OF DUMONT

v.

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

Docket No. NOR 42174

**CSX TRANSPORTATION, INC.'S REPLY TO THE BOROUGH OF
DUMONT'S CROSSMOTION TO HOLD THIS DOCKET IN ABEYANCE**

The Borough of Dumont (the “Borough”) in its “Crossmotion To Hold This Docket In Abeyance” (the “Borough Crossmotion”) agrees with CSX Transportation, Inc. (“CSXT”) that the Surface Transportation Board (“Board”) “lacks subject matter jurisdiction for the instant claims for monetary damages.”¹ This admission is sufficient for the Board to rule on and dismiss the “Complaint for Property Damages” (“STB Complaint”) with prejudice and deny the Borough’s abeyance request as moot.² The arguments in the Borough Crossmotion do not warrant a

¹ Borough Crossmotion, *Borough of Dumont v. CSX, Transp., Inc., et al.*, Docket No. NOR 42174 (filed Jan. 4, 2023), at 1.

² The Borough combined the Borough Crossmotion for abeyance with its reply to CSXT’s Motion to Dismiss. CSXT has endeavored to confine its arguments herein to the issues raised in the Borough Crossmotion for abeyance, but to the extent the Board deems any arguments in this filing to be an impermissible “reply to reply,” 49 C.F.R. § 1104.13(c), CSXT respectfully requests the Board accept those arguments “in the interest of a more complete record, and because the proceeding will not be further delayed by the filings.” *See Consol. Rail Corp.—Abandonment Exemption-in Hudson County, NJ*, Docket No. AB 167 (Sub-No. 1189X) (STB served July 1, 2016), slip op. at 4, n.7.

different result. While it is true that the federal court case may implicate preemption under the ICC Termination Act of 1995 (“ICCTA”), the federal court is capable of resolving any preemption issues or referring them to the Board. Denial of the Borough Crossmotion does not affect the Board’s ability to deal with any preemption questions that may be brought to its attention in a future proceeding (e.g., if the federal court were to refer a preemption issue to the Board). There are no grounds for abeyance, and the Board should rule on CSXT’s Motion to Dismiss and dismiss the STB Complaint.

ARGUMENT

CSXT and the Borough agree that the Board has no jurisdiction over the claims alleged in the STB Complaint. The Borough Crossmotion concedes that “the Board lacks subject matter jurisdiction as the Borough’s claims are strictly for money damages” under state law.³ And the Borough Crossmotion identifies no violation of the ICCTA that would confer statutory jurisdiction on the Board. Therefore, abeyance is not the appropriate outcome here. Dismissal is.

Nevertheless, the Borough contends that abeyance is necessary on the theory that dismissal of its state-law claims for monetary damages could affect the Board’s ability to rule on a defense of ICCTA preemption in the federal court litigation.⁴ This is not so. In the first place, the fact that the Borough’s federal court case may implicate a defense of ICCTA preemption does not create an affirmative cause of

³ Borough Crossmotion at 3.

⁴ *See id.* at 3–4.

action before the Board.⁵ Contrary to the Borough’s suggestion, claims for monetary damages can be preempted where they impermissibly interfere with rail transportation,⁶ just as claims for equitable relief may be preempted. But a litigation opponent’s preemption defense is not itself an affirmative claim for monetary or equitable relief under the ICCTA. Moreover, ICCTA preemption defenses do not require Board intervention: “issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board *or the courts in the first instance*, as both the Board and courts have concurrent jurisdiction to determine preemption.”⁷

In any event, ruling on and dismissing with prejudice the Borough’s STB Complaint for monetary damages would not preclude the Board from later considering a question of ICCTA preemption raised in the federal court proceeding. Federal and state courts may refer cases to the Board to determine whether specific claims are preempted by the ICCTA.⁸ A party may also file on its own initiative a

⁵ CSXT notes that it filed an answer in federal court to the Borough’s State Court Complaint on January 13, 2023, which included ICCTA preemption as one of 27 separate defenses to the Borough’s claims. *See Borough of Dumont v. CSX Transp., Inc.*, No. 2:22-cv-6982 (D.N.J.), ECF No. 14 at 13.

⁶ *See Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012) (observing that “state ‘regulation can be . . . effectively exerted through an award of damages,’ and ‘[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy’” (modifications in original) (citation omitted)).

⁷ *14500 Ltd. LLC—Pet. for Decl. Ord.*, Docket No. FD 35788 (STB served June 5, 2014), slip op. at 2 (emphasis added).

⁸ *See, e.g., id.* at 1; *Norfolk S. Ry. & the Ala. Great S. R.R.—Pet. for Decl. Ord.*, Docket No. FD 35196 (STB served Mar. 26, 2010), slip op. at 2; *see also* 28 U.S.C. § 1336(b) (describing a federal district court’s authority to “refer[] a question or

petition for declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, seeking an order from the Board “to terminate a controversy or remove uncertainty” on matters of ICCTA preemption.⁹ If such a petition were filed in the future at the behest of the court or a party, the Board would have discretion to entertain it.¹⁰

The Borough also argues that abeyance is appropriate in this proceeding to prevent irreparable harm under 49 U.S.C. § 1321(b)(4).¹¹ To start, Section 1321 is not an independent source of authority that creates Board jurisdiction.¹² Rather, it enumerates the Board’s powers in implementing and enforcing the ICCTA’s provisions, which are the source of the Board’s statutory jurisdiction.¹³ If the Board agrees with the parties that it has no jurisdiction over the Borough’s claims, then

issue to the Surface Transportation Board for determination” while retaining the authority to “enforce, enjoin, set aside, or suspend, in whole or in part, any order of the Surface Transportation Board arising out of such referral”).

⁹ *Pet. of Norfolk S. Ry. for Expedited Decl. Ord.*, Docket No. FD 35949 (STB served Feb. 25, 2016), slip op. at 2.

¹⁰ *Id.* The Borough’s STB Complaint plainly does not present any particular preemption questions for the Board to address.

¹¹ Borough Crossmotion at 4–6.

¹² See, e.g., *Alonzo Benton v. CSX Transp., Inc.*, Docket No. NOR 42166 (STB served Jan. 17, 2020), at 3 n.6 (dismissing complaint for failure to allege a violation of ICCTA and noting that, to the extent the complainant may have referred to § 1321, that “would also be unavailing”); *Parrish & Heimbecker, Inc.—Pet. for Decl. Ord.*, Docket No. NOR 42031 (STB served Jan. 27, 1999) (In deciding to institute a proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 (now § 1321), the Board explained that the matter was “referred by a federal court and otherwise appears to be within our primary jurisdiction.”).

¹³ *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 34 (Fed. Cl. 2012) (“49 U.S.C. § 721 [now § 1321] sets forth the general administrative powers of the Surface Transportation Board.”).

the Board likewise lacks jurisdiction to issue a stay or abeyance with respect to those claims.

Moreover, the Borough has not met the Board's requirements for a stay or abeyance.¹⁴ The party seeking such relief must show that "(1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed by a stay, and (4) the public interest supports the granting of the stay."¹⁵

None of these factors are met here. The Borough cannot prevail on the merits of its claims before the Board, because the Board lacks statutory jurisdiction to award monetary damages under state law.¹⁶ And no irreparable harm will flow from dismissal of the Borough's STB Complaint, because such a dismissal has no impact on the Board's future ability to entertain any hypothetical referrals from federal court or petitions for declaratory order. And it is not in the public interest

¹⁴ The Borough cites to *Ballard Terminal Railroad Company, LLC—Petition for Declaratory Order*, Docket No. FD 36261 (STB served June 27, 2019), where the Board considered whether an order for abeyance would promote efficiency and cause fundamental unfairness to a party. In *Ballard*, however, there was no question that the proceeding—in which a declaratory order was sought pertaining to preemption of construction activities affecting a rail line—was within the Board's jurisdiction. Here, there is no basis to even consider these factors given the lack of jurisdiction.

¹⁵ *Total Petrochemicals & Ref., USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121 (STB served Jan. 2, 2014), slip op. at 2 (citations omitted).

¹⁶ Whether the Borough's claims in civil court are meritorious or not is irrelevant to this question. The "action sought to be enjoined" is dismissal of the STB Complaint—and the parties agree that the Board lacks jurisdiction over the Borough's claims for money damages.

for the Board to permit a proceeding over which it lacks jurisdiction to languish indefinitely on its docket.

In sum, the Board should rule on CSXT's Motion to Dismiss the Borough's STB Complaint with prejudice, and in so doing deny the Borough's request to hold this proceeding in abeyance as moot. The Board took a similar approach in *Benton*. In that proceeding, the Board dismissed Benton's complaint for failing to allege a violation of the ICCTA.¹⁷ The Board then denied Benton's request for a stay as moot despite Benton's argument that dismissal would leave him with no available remedy.¹⁸ The Board observed that CSXT had not "advanced a preemption argument in its filings before the Board" and "the issue of preemption had not been referred to the Board by the federal district court."¹⁹ The same outcome is warranted here.

CONCLUSION

The Board should deny the Borough's Crossmotion for abeyance as moot because the Borough's STB Complaint warrants dismissal with prejudice for failure to state a claim under the ICCTA.²⁰

¹⁷ *Benton*, Docket No. NOR 42166, slip op. at 3.

¹⁸ *Id.* at 2–3.

¹⁹ *Id.* at 3 n.4.

²⁰ The Borough requested oral argument in the caption of its Crossmotion. CSXT does not believe that oral argument is necessary here given that the parties agree the Board lacks statutory jurisdiction over the Borough's claims, which is dispositive of all other issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2023, a copy of the foregoing Reply to the Borough of Dumont's Crossmotion to Hold This Docket In Abeyance was served by email on the following counsel of record:

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