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ENTERED
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Via Electronic Filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Finance Docket No. 36809, *Northeast Louisiana Multimodal District-Petition for Declaratory Order – Former Line of Railroad Between MP 498.44 and MP 501.15 in Madison Parishes, Louisiana*

Dear Ms. Brown:

Accompanying this letter for filing is the Petition for Declaratory Order filed by the Northeast Louisiana Multimodal District (“NELMD”), which is a political subdivision of the State of Louisiana as defined in Article VI, Section 44 of the Constitution of Louisiana. Given its status as a state government entity, NELMD hereby requests a waiver of the filing fee pursuant to 49 C.F.R § 1002.2(e)(1).

Michael F. McBride, Esq., Van Ness Feldman, LLP, 2000 Pennsylvania Ave. N.W., Suite 6000, Washington, D.C. 20006 will serve as co-counsel for NELMD in this proceeding. If you have any questions, please give me a call at 202-210-4761.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter

Cc: Counsel for Delta Southern
John M. Scheib scheib@gentrylocke.com
FILED

August 22, 2024

SURFACE

TRANSPORTATION BOARD

FEE RECEIVED
August 22, 2024
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36809

Northeast Louisiana Multimodal District – Petition for Declaratory
Order – Former Line of Railroad Between MP 498.44 and MP 501.15
in Madison Parish, Louisiana

Northeast Louisiana Multimodal District (“NELMD”¹, or “the District”)) a political subdivision of the State of Louisiana, respectfully petitions the Surface Transportation Board (“STB” or “Board”) to issue, pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, a declaration that the track segment of the former Vidalia Branch Line between Milepost (“MP”) 498.44 and MP 501.15 that is at issue herein and is owned by Delta Southern Railroad, Inc. (“DSRR”) was authorized for abandonment, and was in fact abandoned (as DSRR admitted in FD 36447), and, therefore, is no longer subject to the STB’s jurisdiction.

Background: Abandonment of the Vidalia Branch Line

On January 8, 1988, Missouri Pacific Railroad (“MoPac”) filed an application with the Interstate Commerce Commission

¹ Prior to December 21, 2023, NELMD was known as the Northeast Louisiana Railroad Development District.

(“ICC”) “seeking a certificate of public convenience and authority permitting abandonment and discontinuance of operations over the Lake Providence [and] Vidalia Branches located in the states of Arkansas and Louisiana.” The case was docketed as AB-3 (Sub-No. 72), *Missouri Pacific Railroad Company - Abandonment - In Desha and Chicot Counties, ARK, and East Carroll, Madison, Tensas and Concordia Parishes, LA*.

On July 11, 1988, by notice (53 Fed. Reg. 26,122) provided to the general public, the ICC found that the public convenience and necessity authorized the abandonment of the rail line between MP 408.9 near McGehee in Desha County, AR, and MP 651.6 near Vidalia in Concordia Parish, LA and that a certificate of abandonment would issue, unless a valid offer of financial assistance (“OFA”) was filed. Subsequently, the Lake Providence Port Commission (“LPPC”) filed an OFA for the segment of the line between MP 408.9 and MP 498.4, which the ICC approved.

Shortly thereafter, the National Railroad Equipment Company (“NREC”) filed an OFA seeking to acquire both the Lake Providence Branch Line between MP 408.9 and MP 494.4, and the Vidalia Branch Line between MP 498.4 and MP 501.1. After the ICC

initially rejected NREC's OFA, NREC dropped its effort to acquire ICC authority to obtain the right to own and operate the Vidalia Branch Line. After the ICC approved NREC's amended offer to acquire the Lake Providence Branch Line, LPPC agreed to step aside.

The ICC, on August 24, 1988, after finding "the time for filing offers of financial assistance has expired without a *bona fide* offer for a 73.2 -mile portion of the line between milepost 498.4 at Tallulah, LA and milepost 651.6 near Vidalia," determined that the present and future public convenience and necessity authorized MoPac to abandon the rail line between MP 498.4 in Tallulah and MP 651.66 and discontinue rail service. In other words, the abandoned track was determined to no longer be a critical component of the national rail system.

As the ICC further explained in June of 1989 in *Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co.*, 5 I.C.C.2d 542, 544 n.6 (1989), "abandonment of the Tallulah-Vidalia segment was consummated" in 1988 when "[n]o party submitted an offer under § 10905 for the Tallulah-Vidalia segment." Hence, there is no dispute

regarding the abandonment of the entire Vidalia Line south of MP 498.4 (later clarified to be more accurately stated as MP 498.44)².

A subsequent ICC decision in Docket No. AB 3 (Sub-No. 72), served October 13, 1988, authorized Delta Southern Railroad Company (“DSSR”), a newly formed subsidiary of NREC, to acquire and operate the segment between McGehee (MP 408.9 and Tallulah (MP 498.4) pursuant to 49 U.S.C. § 10905, which DSRC did.

The ICC, however, did not authorize DSRC to acquire or operate the segment of the line between MP 498.4 in Tallulah and MP 651.66 near Vidalia. Instead, following the close of the ICC proceeding, DSRC’s owner negotiated a sale of this segment of the abandoned line by MoPac with full knowledge that DSRC had not been authorized by the ICC to own or to hold out to provide common carrier rail service to the public over any segment of the line between MP 498.4 and MP 651.66.

² FD 33802, *Delta Southern Railroad, Inc. – Acquisition and Exemption – Delta Southern Railroad Company* (served Sept. 1, 2023).

Summary of Reasons Prompting NELMD's Request For Declaratory Order.

When it enacted the Interstate Commerce Commission Act of 1995 ("ICCTA"), Congress broadened federal preemption by making the Board's jurisdiction "exclusive" for all rail transportation and rail facilities that are part of the national rail network-including so-called "ancillary" tracks that are located only in one state. Congress, however, **did not** preempt state laws that involve expropriation of real property and tracks that have been lawfully removed from the national rail network by decisions of the ICC or the STB. In this regard, Congress made no effort to modify or overturn the Supreme Court's decision in *Hayfield N. R.R. Co., Inc. v. Chicago and N.W. Transp. Co.*, 467 U.S. 622 (1984), that had affirmed the ICC's position that its jurisdiction did not include the power to regulate the sale of the real property on which the abandoned track was located. As the Supreme Court explained (*id.* at 633-34):

The proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction is strongly buttressed by the Commission's own interpretation of its regulatory authority. According to the Commission, "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved

jurisdiction. Questions of title to, and disposition of, the property are matters subject to State law.” (Citations omitted).

Based on multiple decisions issued by the STB following enactment of ICCTA, there is nothing to suggest that the STB has chosen to take a different approach.

NELMD is a political subdivision of the State of Louisiana as defined in Article VI, Section 44 of the Constitution of Louisiana. The District has all of the rights, powers, privileges and duties granted to and imposed on railroad development districts under the provisions of LA R.S. 33:140.71 through 33:140.79. The primary purpose for the creation of the District is to promote and encourage development of rail service between the parishes of East Carroll, Madison, Tensas, and Concordia, to stimulate the economy among those Parishes through renewed commerce and industry, and for the utilization and development of natural and human resources by providing job opportunities in and among the Parishes. Pursuant to its statutory authority, NELMD is seeking to expropriate 2.7 miles of right-of way and tracks between MP 498.44 near Tallulah, Louisiana and MP 501.15 that were abandoned by MoPac and removed from the national rail network.

Subsequent to the abandonment of the Vidalia Branch Line, neither DSRC nor DSRR ever sought to resurrect the 2.7-mile as part of the rational rail network by seeking authority from either the ICC or the STB to *acquire and operate* over any segment of the abandoned line between MP 498.44 and MP 651.6. Indeed, this was confirmed by the Board in its recent decision in *Delta Southern Railroad, Inc.-Acquisition and Exemption-Delta Southern Railroad Company*, FD 33802, slip op. at 2-3 (Sept. 1, 2023) (although DSRC acquired the real estate between MP 498.44 and MP 651, which DSRR later purchased from DSRC, “the southern terminus of the line over which DSR acquired ownership and operating authority is located at milepost 498.44 at Tallulah”).

State and Federal Court Proceedings

On November 22, 2023, NELMD’s predecessor, NLRDD, filed a Petition for Expropriation with the Sixth Judicial District Court in Madison Parish, Louisiana seeking to acquire certain right of way to construct an active rail line to connect and work between ports along the Mississippi River from East Carroll Parish to Concordia Parish, part of which will contain lands subject to expropriation. As was explained, “[i]ncluded with the right of way required for said

project is certain property believed to be owned by the defendant, Delta Southern Railroad, Inc. and required for a permanent servitude comprised of 2.7 miles of track from milepost 498.44 to milepost 501.15 consisting of a fifty (50) foot wide Right of Way, being twenty-five (25) feet on each side of the centerline of the railroad.”³ By decision dated November 28, 2023, the Judge of the Sixth Judicial District Court issued the Order of Expropriation and Ordered DSRR to vacate the property.⁴

Despite the fact that the entire Vidalia Branch line was eliminated from the national rail network in 1988, DSRR removed the case to the United States District Court for the Western District of Louisiana, Monroe Division (“District Court”) on the alleged grounds that the District’s expropriation action is completely preempted. DSRR, which holds no authority from the STB to provide for-hire transportation service south of MP 498.44 in Tallulah, LA, which obviously includes the subject track segment that is located between MP 498.44 and 501.15, claims that the

³ See Exhibit 1.

⁴ See Exhibit 2.

track segment is so-called “ancillary” track.⁵ In taking this position, it has argued before the District Court that when it enacted ICCTA, “Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks.”⁶ DSRR then dropped a footnote that assumes, without any support, claims that:

This fact alone renders the District’s citation to *Hayfield N. R.R. Co, Inc. v. Chicago and N. W. Transp. Co.*, 467 U.S. 622 (1984) obsolete. Plaintiff’s Brief at 6. Plaintiff’s citations to other cases decided before the current statutory scheme was adopted are equally unavailing. See Plaintiff’s Brief at 5 (citing *Colorado v. U.S.*, 271 U.S. 153 (1926)).⁷

Thereafter, at p. 21 of 23, DSRR also argues that “the District rests its argument almost entirely on a 1926 and a 1984 case, that

⁵ It is noted that the term “ancillary” is not mentioned or defined at any point in the Interstate Commerce Act. The statute refers to “spur, industrial, team, switching or sidetrack” as “except[ed]” track, that is, that such tracks are excepted from the requirement that a railroad seek a certificate under 49 U.S.C. § 10901 for such track. 49 U.S.C. § 10906. Nevertheless, as the Board knows, the STB’s “exclusive” jurisdiction includes “the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or sidetrack.” 49 U.S.C. § 10501(b)(2).

⁶ *Defendant Delta Southern Railroad, Inc.’s Memorandum in Opposition to Motion to Remand and in Support of its Motion to Dismiss*, at p. 15 of 23 (attached hereto as Exhibit 3).

⁷ *Id.* at n.8.

were decided by the U.S. Supreme Court *before* ICCTA, in 1995, completely preempted state regulation of 10906 track.”⁸ It is NELMD’s position that nothing in ICCTA overturned the multiple Supreme Court’s decisions which support its position that it has the right to acquire the real property that, after it was abandoned some 36 years ago, was never authorized thereafter by the ICC or the STB to be used to provide for-hire rail transportation service. Moreover, NELMD believes that the Board has not modified its position that this matter is controlled by the Supreme Court’s decision in *Hayfield N. R.R. Co., Inc. v. Chicago and N.W. Transp. Co.*

In its Sur-Reply in Opposition to Motion to Remand and in Support of its Motion to Dismiss, DSRR quotes from the letter written by DSRR’s former counsel, dated September 2, 2022, in which he disclosed that “DSRR also owns roughly 1.5 miles of ancillary track located south of the KCSR main line connection at milepost 498.44.”⁹ However, DSRR’s current counsels failed to mention prior counsel’s candid admission in the next sentence of

⁸ *Id.* at p. 21 of 23.

⁹ Exhibit 4 at p. 3.

the same footnote that the track is “non-regulated track” by which DSRR obviously meant “abandoned.”

The Board is also requested to consider that DSRR in that same letter also failed to mention that the segment of track that is at issue herein is physically separated from DSRR’s authorized track by CPKC’s Meridian Speedway. Hence, this isolated segment of track does not fit within the definition of any of the “excepted” tracks that are named in either §§ 10501(b)(2) or 10906. Of course, tracks mentioned in 49 U.S.C. §§ 10501(b)(2) and 10906 are subject to the STB’s “exclusive” jurisdiction unless abandoned (as is the case here), as DSRR admitted (at 2 n.2) in its September 2, 2022 letter filed with the Board in FD 36447.

Unfortunately, as is reflected by the recommendations of the Magistrate Judge,¹⁰ DSRR has wholly confused the issues in the United States District Court by suggesting that the track in question is “ancillary” and that as a result, decisions of the Supreme Court of the United States, and decisions of the Board that have relied upon the Supreme Court’s decisions for the past 40

¹⁰ See Exhibit 5.

years, which includes the 29 years following the enactment of ICCTA, must be disregarded.

When the Board established the southern terminus of DSRR's at MP 498.44 it obviously relied on DSRR's representations. The same is true of the Lake Providence Port Commission. Accordingly, DSRR is estopped from arguing that the southern terminus of the Lake Providence Line is anything other than MP 498.44.

Plainly, the comment in note 7 of the Magistrate Judge's Report and Recommendations in the District Court that, "[i]f the STB were to determine it does not have jurisdiction over this controversy, the matter may return to this Court" indicates that the District Court had doubts about DSRR's positions. The same is suggested by the further comment in n. 7 that "review of STB decisions is directed to the court of appeals, not the district courts. *See* 28 U.S.C. §§ 2321, 2342."

On June 10, 2024, the District Court issued a Judgment in the case "finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended

therein is warranted”.¹¹ The District Court denied NELMD’s Motion to Remand. In addition, the Court *sua sponte* found that “it lacks subject matter jurisdiction over the instant suit.” After denying DSRR’s Motion to Dismiss to the extent it moved under Federal Rule of Civil Procedure 12(b)(6), it granted DSRR’s Motion to the extent it sought dismissal. Therefore, it dismissed the suit without prejudice. By taking this approach, the District Court left it to the Board to decide whether the segment of track that is at issue is a “non-regulated” segment of track over which it has no jurisdiction.

Given the foregoing, this matter presents an issue that should be decided by the Board. It is NELMD’s position that MoPac’s abandonment unquestionably deprived the ICC and the Board of jurisdiction of the segment of the line between MP 498.44 and MP 501.1. In addition to *Hayfield N.R.R.*, see also, *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005) (citing *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990) (“Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the [ICC]

¹¹ See, *Exhibit 6*.

is empowered to impose conditions on abandonments . . . as a general proposition [the] ICC jurisdiction terminates” (citations omitted).

As noted above, because the ICC in June of 1989, confirmed that the abandonment of Vidalia Branch Line between MP 498.4 (later clarified to be MP 498.44) and MP 651.6 was consummated in 1988 when DSRC’s owner withdrew its OFA to acquire the Vidalia Branch Line, DSRC could *not have acquired any operating authority* from the ICC to operate over any part of the Vidalia Branch Line. Therefore, DSRC would have had to apply to the ICC for authority to perform for hire rail service over that track.

Because it failed to seek such authority, DSRC could not have transferred any authority to operate the segment of the track between MP 498.44 in Tallulah and MP 651.66 near Vidalia to DSRR in 1999. In order to hold out to provide common carrier rail service to the public, DSRR would have had to obtain operating authority from the Board, which it has never done.

While DSRR now claims that the 2.7 miles of track that NELMD is seeking to expropriate pursuant to Louisiana Law is “ancillary track,” whatever it may mean by that term (as noted

supra, “ancillary” is not a statutory term), the fact is that the segment of the track that is at issue is *not physically connected with DSRR’s track that extends from MP 498.44 to MP 471.0.*

Moreover, any operations that DSRR may be performing on those tracks without obtaining operating authority from the Board are not vital for-hire operations that are needed to satisfy DSRR’s rail common carrier obligations.¹² Hence, the track the ICC removed from the national rail system in 1988 that NELMD seeks to acquire through its expropriation authority in accordance with LA RS. 33:140.73 *et seq.* is not at this time a “critical components of the national rail system.”

NELMD respectfully submits that it is essential that the Board decide that the so-called “ancillary track” at issue herein is not part of the national rail network, so that NELMD can complete its expropriation of the track segment at issue herein. Moreover, because the track is not part of the national rail network, what remains of the abandoned Vidalia Branch Line is not subject to the Board’s exclusive jurisdiction under U.S.D. § 10501(b)(2) because it

¹² On information and belief, DSRR uses the track south of MP 498.44 for storage of railcars.

was abandoned by MoPac and is “non-regulated,” as DSRR admitted in FD 36447.

Conclusion

The Board should institute a declaratory proceeding, in response to the determination of the United States District Court for the Western District of Louisiana, Monroe Division, that it is unsure whether the Board retains jurisdiction over the Line at issue. On the merits, the Board should conclude that the Line was authorized for abandonment in 1988, and consummation of the abandonment occurred in 1989, as determined by the ICC. Therefore, the Board should declare that the track segment at issue herein, which is not physically connected to DSRR’s Line of track between MP 498.44 and MP 471.0, is not subject to the Board’s regulatory jurisdiction and, therefore, NELMD’s efforts to expropriate the track segment at issue herein are not preempted.

Respectfully submitted,

Richard H. Streeter

Michael F. McBride

/s/ Richard H. Streeter

/s/ Michael F. McBride

Richard H. Streeter
Law Office Richard H. Streeter
5255 Partridge Lane, N.W.
Washington, D.C. 20016

Michael F. McBride
Van Ness Feldman, LLP
2000 Pennsylvania Ave., N.W.
Suite 6000
Washington, D.C. 20006

Certificate of Service

I, Richard H. Streeter, do hereby certify that, on August 22, 2024, a true copy of the foregoing Petition for Declaratory and all Exhibits attached thereto were served on John M. Scheib, Esq., Counsel for Delta Southern Railroad, Inc., (the owning railroad), via email at scheib@gentrylocke.com.

F.D. No. 36809

Exhibit No. 1

NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT

VS. NO. *23-211*

DELTA SOUTHERN RAILROAD, INC.

FILED: *November 27, 2023*

STATE OF LOUISIANA

PARISH OF MADISON

SIXTH JUDICIAL DISTRICT

By CLERK: *[Signature]*

PETITION FOR EXPROPRIATION

THE PETITION OF the Northeast Louisiana Railroad Development District ("NLRDD"),
a district created and organized under the laws of the State of Louisiana, respectfully represents that:

1.

Made defendant herein is Delta Southern Railroad, Inc., a company domiciled in East Baton
Rouge Parish, represented herein by its registered agent, Corporation Service Company.

2.

The "NLRDD" proposes to construct an active rail line to connect and work between ports
from East Carroll Parish to Concordia Parish, part of which will contain lands subject to this
expropriation.

3.

The construction of the aforementioned rail line will be greatly conducive to the public
interest, as stated in the public necessity certification attached hereto as Exhibit "A".

4.

Included with the right of way required for said project is certain property believed to be
owned by the defendant, Delta Southern Railroad, Inc. and required for a permanent servitude
comprised of 2.7 miles of track from milepost 498.44 to milepost 501.15 consisting of a fifty (50) foot
wide Right of Way, being twenty-five (25) feet on each side of the centerline of the railroad.

5.

In order to construct the project in a manner and mode conducive to the public interest,
convenience, safety and commerce, NLRDD must acquire a permanent servitude on the property of
defendant, Delta Southern Railroad, Inc. described as 2.7 miles of track from milepost 498.44 to
milepost 501.15 consisting of a fifty (50) foot wide Right of Way, being twenty-five (25) feet on each
side of the centerline of the railroad, and the appropriation process does not appear to be available to
the NLRDD. Therefore, it is necessary for petitioner to expropriate a permanent servitude on the
above described property in accordance with La. R. S. 33:140.73 et seq.

A TRUE COPY ATTEST

[Signature]
By CLERK OF COURT MADISON PARISH

6.

The expropriation of the permanent servitude on the property described above shall include but not be limited to including the permanent right to construct and maintain an active railroad that petitioner, its successors and assigns, deems appropriate, and the permanent right of ingress and egress, so as to inspect, repair, improve, alter, and maintain the same and including, further, the permanent right to use all or any part of the surface of the above described property for any purpose connected with railroad construction. No additional payment shall be due the owners for the future work performed on or the future taking, use, damage, or destruction of the same lands or improvements over which the permanent servitude is taken and for which any compensation has been paid for railroad improvement purposes.

7.

The just compensation to which the defendant, Delta Southern Railroad, Inc. is entitled, being the fair market value for a fifty (50) foot wide permanent servitude on the above described property, has been appraised by two certified appraisers, the higher appraisal being the sum of \$271,700.00, as shown by the written reports of appraisal of the appraisers marked Exhibit "B", annexed hereto and made a part hereof.

8.

Petitioner is entitled to expropriate the permanent servitude on the above described property, in a manner authorized by La. R.S. 33:140.73. A certified copy of the resolution adopted by the NLRDD on November 6, 2023, with the concurrence of a quorum declaring that the expropriation is necessary or useful for railroad development to enhance the property and improve commerce throughout the region. See Exhibit "C".

WHEREFORE, PETITIONER PRAYS that an order issue herein directing petitioner to deposit in the registry of this court the sum of \$271,700.00 for payment to the person or persons entitled thereto, and declaring that a permanent servitude has been taken for any purpose connected with railroad construction.

PETITIONER FURTHER PRAYS that said order direct the defendants to surrender to petitioner possession of said property.



**BRYANT HAMMETT
& ASSOCIATES, LLC**
CIVIL ENGINEERING & LAND SURVEYING

BRYANT O. HAMMETT, JR., P.E./P.L.S.
C. KEITH CAPDEPON, JR., P.E.
HUGH "BUD" MCCURDY, III, P.L.S.

CERTIFICATE OF EXPROPRIATION

Delta Southern Railroad, Inc., owns approximately 2.7 miles of track from milepost 498.44 (near Tallulah) to milepost 501.15 (near Afton). The track consists of a ROW fifty (50) feet wide, being twenty-five (25) feet on each side of the centerline of the railroad. The line is composed of a light weight eighty-five (85) pound rail section with a small tie plate. Most of the lines have either no track or poor tie conditions and the subgrade is poor.

The Northeast Louisiana Railroad Development District is in the process of expanding their infrastructure further South to connect both the Tensas Port in St. Joseph and the Port of Vidalia with the Port of Lake Providence. This will enhance commerce within the region, with the ability to access rail from any of the three port locations.

I hereby certify that the Northeast Louisiana Railroad Development District needs the above railroad located in Madison and Tensas Parish, Louisiana, for the development of their property and interests, by supporting commerce in the area.



C. Keith Capdepon, Jr., P.E.
Civil Engineer, Reg. No. 22157



FD No. 36809

Exhibit No. 2

NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT

VS. NO. 23-211

DELTA SOUTHERN RAILROAD, INC.

STATE OF LOUISIANA

PARISH OF MADISON

SIXTH JUDICIAL DISTRICT

FILED: November 22, 2023

by CLERK: Shirley Trudovec

RECEIPT

CLERK OF COURT
TO
NORTHEAST LOUISIANA
RAILROAD DEVELOPMENT DISTRICT

STATE OF LOUISIANA
PARISH OF MADISON

BE IT KNOWN that on the 24th day of November, 2023, before me,
Shirley Trudovec, Notary Public in and for the Parish of Madison, State of Louisiana, duly
commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned,
personally came and appeared Marion Hopkins, a resident of the Parish of Madison, State of Louisiana,
and Clerk of the Sixth Judicial District Court for the State of Louisiana, in and for the Parish of
Madison.

The appearer declared that in the above captioned suit No. 23-211 of the docket of said
Court, the Northeast Louisiana Railroad Development District seeks the expropriation of a permanent
servitude on the property described below, as described in the petition, in accordance with law, and
subject to any existing oil or gas reservation or to any existing oil or gas lease, for the project set forth
in the petition, said property being described as follows, to-wit:

**A fifty (50) foot wide Right of Way over 2.7 miles of unusable railroad from
milepost 498.44 to milepost 501.15, in Madison Parish, Louisiana.**

The appearer further declared that in accordance with an order of the court signed herein, the
Northeast Louisiana Railroad Development District has this day paid into the registry of said Court the
sum of \$271,700.00 in cash, lawful current money of the United States of America, by delivering said
sum to the said Clerk of Court and said appearer further acknowledges receipt of said sum and declares
that the Northeast Louisiana Railroad Development District has placed same in the registry of said
court.

THUS DONE, READ AND PASSED at my office in the City of Tallulah, Parish of Madison,
State of Louisiana, in the presence of Summer Hodges and Stacy Smith,
competent witnesses, who have hereunto signed their names with the appearer and me, said Notary, the
day, month and year first above written at 10:45 o'clock 6 .m.

WITNESSES:

MADISON PARISH CLERK OF COURT

Summer Hodges

By: Marcia Hopkins

Stacy Smith

[Signature]
Notary Public

Madison Parish Recording Page

Marion Hopkins
Clerk of Court
100 North Cedar St
Tallulah, LA 71282
(318) 574-0655

First VENDOR

NORTHEAST LOUISIANA RAILROAD DEVELOPMENT DISTRICT ET AL

First VENDEE

THE PUBLIC

Index Type : CONVEYANCE

Inst Number : 146569

Type of Document : RECEIP

Book : 365 Page : 108

Recording Pages : 9

Recorded Information

I hereby certify that the attached document was filed for registry and recorded in the Clerk of Court's office for Madison Parish, Louisiana.

Marion Hopkins
Marion Hopkins, Clerk of Court

On (Recorded Date) : 11/29/2023

At (Recorded Time) : 3:52:04PM



Doc ID - 001857100009

CLERK OF COURT
MARION HOPKINS
Parish of Madison

I certify that this is a true copy of the attached
document that was filed for registry and
Recorded 11/29/2023 at 3:52:04
Recorded in Book 365 Page 108
File Number 146569.

Stacy Smith
Deputy Clerk



NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT

VS. NO. 23-211

DELTA SOUTHERN RAILROAD, INC.

STATE OF LOUISIANA

PARISH OF MADISON

SIXTH JUDICIAL DISTRICT

FILED: November 22, 2023

by CLERK: Shirley J. Guevara

ORDER OF EXPROPRIATION

THE PETITION, exhibits and the premises considered:

IT IS HEREBY ORDERED that the Northeast Louisiana Railroad Development District deposit in the registry of this court, for the use and benefit of the person or persons entitled thereto, the sum of \$271,700.00.

IT IS HEREBY FURTHER ORDERED that a permanent servitude over lands described in paragraph 4 of the petition on the property described below is expropriated and taken as a permanent servitude for public purpose of improving commerce within the region, said property being described as follows, to-wit:

A fifty (50) foot wide right-of-way over 2.7 miles of unusable railroad from milepost 498.44 to milepost 501.15, in Madison Parish, Louisiana.

IT IS HEREBY FURTHER ORDERED that the defendant, Delta Southern Railroad, Inc. vacate the above described property and surrender possession thereof unto the plaintiff, Northeast Louisiana Railroad Development District.

Tallulah, Louisiana, this 28th day of November,
2023.

Angela C. Clark
JUDGE
SIXTH JUDICIAL DISTRICT COURT

A TRUE COPY ATTEST
Shirley J. Guevara
CLERK OF COURT MADISON PARISH

FD No. 36089

Exhibit No. 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORTHEAST LOUISIANA RAILROAD DEVELOPMENT DISTRICT	CIVIL ACTION
Plaintiff	CASE NO: 3:23-cv-1783
versus	JUDGE: Terry A. Doughy
DELTA SOUTHERN RAILROAD, INC.	MAG.: Kayla D. McClusky
Defendant	JURY TRIAL

**DEFENDANT DELTA SOUTHERN RAILROAD, INC.'S
MEMORANDUM IN OPPOSITION TO MOTION TO REMAND
AND IN SUPPORT OF ITS MOTION TO DISMISS**

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INTRODUCTION

The Northeast Louisiana Railroad Development District (“District” or “Plaintiff”) is attempting to seize by expropriation railroad tracks that are owned by Delta Southern Railroad, Inc. (“DSRR”) and that are subject to the jurisdiction of the United States Surface Transportation Board (“STB”). Pet. for Expropriation ¶ 2, ECF No. 1-1 at 5. DSRR’s tracks, even though abandoned as mainline rail tracks, are still used for rail transportation, including for storage of rail cars in support of DSRR’s rail transportation along the track immediately North of the property the District seeks to seize. Indeed, under Section 10906 of Title 49, DSRR’s tracks are considered auxiliary tracks (spur, industrial, team, switching, or side tracks) often referred to as “10906 track.”¹ The STB has “exclusive” jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks”—exactly the kind of railroad property targeted for acquisition by the District’s expropriation action. 49 U.S.C. § 10501(b)(2). Because the STB has exclusive jurisdiction over the subject matter of the District’s expropriation action, that raises a federal question over which this Court has jurisdiction—making remand improper. *Id.* (“remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law”); *see PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 544-45 (5th Cir. 2005) (upholding removal pursuant to 49 U.S.C. § 10501(b), citing complete preemption doctrine).²

The District’s premise for seeking to remand this action to state court rests on a faulty understanding of the STB and its jurisdiction—erroneously concluding that a prior abandonment proceeding permits open season for state-seizure of railroad property. *See* Pl.’s Br. in Supp. of

¹ “10906” refers to 49 U.S.C. § 10906.

² *See also B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 1252 (E.D. Wash. 2012) (finding federal question jurisdiction under ICCTA preemption and granting motion to dismiss); *14500 Ltd. v. CSX Transp., Inc.*, 2013 LEXIS 39806 (N.D. Ohio 2013).

Mot. to Remand at 2, ECF No. 9-1 (“Plaintiff’s Brief”). But the process by which a track is abandoned for mainline purposes does not automatically eliminate STB jurisdiction over such tracks. While it limits the STB’s regulatory authority, when, as here the railroad continues to use the tracks as 10906 track, that track remains within the STB’s exclusive jurisdiction, pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”), which is a statute Plaintiff omits. The ICCTA provides for the explicit expansion of STB jurisdiction to such track. The District’s attempts to make hay from the subsequent owner’s operation of the line without seeking regulatory authority fail because no such authority was required under Section 10906.

For the reasons set forth more fully below, the District’s expropriation action is completely preempted and properly subject to removal to federal court. DSRR therefore respectfully requests that the Court deny the District’s motion to remand. The Court should retain jurisdiction over this matter and grant DSRR’s motion to dismiss, pursuant to Rule 12(b)(6).

FACTS

A. The Property the District Seeks to Seize is Actively Used for Rail Transportation.

The District seeks to seize a 2.7 mile long rail track that its expert admits “consists of a ROW fifty (50) feet wide, being twenty-five (25) feet on each side of the centerline of the railroad” (“Track Segment”). Pet. for Expropriation Ex. A, ECF No. 1-1 at 12. The District’s expert further admits that “[t]he line is composed of a light weight eighty-five (85) pound rail section with small tie plate.” *Id.*

The Track Segment is owned and operated by DSRR, a rail carrier subject to the jurisdiction of the STB.³ The Track Segment is part of what was a much larger rail line, portions

³ See *Patriot Rail Co, LLC, et al.—Control Exemption—Delta Southern R.R., Inc.*, FD 36642 (STB served Dec. 20, 2022) (“Patriot Rail”).

of which have been formally abandoned with sections of that part remaining in use for rail purposes and other portions being sold. The other part—known as the Lake Providence Branch—is owned and operated by DSRR for common carrier rail service today and is subject to both the STB’s jurisdiction and authority.⁴

The beginning of the Track Segment is located at the terminal point (at Tallulah, Louisiana) of the Lake Providence Branch. The Lake Providence Branch runs North from milepost 498.44. Decl. of Rob Thrall (“Thrall Declaration”) at Ex. A. DSRR’s operations on the Lake Providence Branch (North of milepost 498.44) remain subject to the STB’s jurisdiction and regulatory authority, which is why Patriot Rail was required to file for authority with the STB to acquire DSRR and the Lake Providence Branch (along with another line known as the Sterlington Branch). Patriot Rail received that authority on December 23, 2022. *See Patriot Rail Co. LLC, et al.—Control Exemption—Delta Southern R.R.*, FD No. 36642, 2022 STB LEXIS 314 (STB served Dec. 23, 2022). The Track Segment runs South from milepost 498.44 and remains subject to the STB’s jurisdiction, but not the STB’s authority, as 10906 track. Accordingly, Patriot Rail was not required to file authority to acquire it.

It is undisputed that the Track Segment was subject to abandonment proceedings before the Interstate Commerce Commission (“ICC”), which is the predecessor agency to the STB,

⁴ On December 31, 1987, Missouri Pacific Railroad Company filed a notice of intent to abandon the line, followed 30 days later by an abandonment application in *Missouri Pac. R.R. Co.—Abandonment—In Desha and Chicot Counties, AR, and East Carroll, Madison, Tensas, and Concordia Parishes, LA*, Docket No. AB-3 (Sub-No 72) (1988). Abandonment authority was granted July 11, 1988. The Track was not removed and has been used in rail service since. A subsequent decision, served October 13, 1988, authorized DSRR to acquire and operate the segment between McGehee and Tallulah pursuant to 49 U.S.C. § 10905. *Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co.*, FD 31246, 1989 ICC LEXIS 151 (1989). For simplicity, we use the term “active” to mean a rail line subject to the common carrier obligation and both the STB’s jurisdiction and authority. “10906 track” is subject to the STB’s jurisdiction, but not its authority.

through which its abandonment as a mainline track was approved. It appears that National Railway Equipment Company (“NREC”) acquired a portion of the line that included the Track Segment, but did not file for authority from the ICC and instead used it as 10906 track. When NREC transferred its rights to DSRR, DSRR also continued to use the Track Segment to support rail services as 10906 track to support common carrier rail operations, with such use continuing today.

DSRR uses the Track Segment to stage and store rail equipment. *See* Thrall Declaration at ¶¶ 13-17 and Exs. A, B, C. The rail operations on the Track Segment are incidental to the receipt of shipments by the carrier. *Id.* at ¶ 13. The physical characteristics of the Track Segment include that the track is a short segment, and it does not invade another railroad’s territory. *Id.* at ¶ 7. Additionally, there is not regularly scheduled service over the Track Segment, and it is not used to serve a specific customer’s facility. *Id.* at ¶¶ 8, 9. However, DSRR has continued to use the Track Segment as 10906 track for rail transportation purposes. *Id.* at ¶ 13. In particular, DSRR has stored railcars on the track in recent years, as also shown by the District’s own expert, and, indeed, there are railcars on the Track Segment even today. *Id.* at ¶¶ 14, 15 and Exs. A, B, C. The District concedes DSRR has been using the property for rail purposes. Plaintiff’s Brief at 6. *See also* ECF No. 1-1 at 16 (noting District’s desire “for the continued use, and operation of the rail line”) (emphasis added).

B. The Regulatory Background

The STB is the successor to the ICC, and is a federal agency with jurisdiction over railroads created by the ICCTA. Several provisions of its statute are relevant to this Court’s jurisdiction over the District’s expropriation action.

1. The Statutory Scheme under ICCTA Limits STB Authority over 10906 Tracks; However, it Maintains Federal Jurisdiction over Them.

Unlike railroad tracks that are actively used for common carrier service and subject to both the STB's jurisdiction and authority, 10906 track is within the STB's jurisdiction but *not* within the STB's regulatory authority.

Through ICCTA, Congress wrested from the states jurisdiction over 10906 track and put it exclusively within federal jurisdiction, at the STB.⁵ See *PCI Transp. Inc.*, 418 F.3d at 544 (ICCTA changes included ““extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction”” under prior law) (quoting ICCTA House Report). Congress explicitly granted exclusive *jurisdiction* to the STB for 10906 tracks. See e.g., *Baylands Development, Inc.—Pet. for Declaratory Order*, FD No. 36660 at n.8 (STB served Sept. 18, 2023); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD No. 35468 (STB served April 21, 2015). Section 10501(b) of Title 49 grants to the STB exclusive jurisdiction 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, facilities of such carriers; and
- (2) the construction, 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

49 U.S.C. 10501(b). ICCTA further provides that: “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).

⁵ Use of 10906 track was never subject to federal licensure. Prior to ICCTA, it was state-regulated. After ICCTA, it was exclusively within the federal domain under § 10501(b), though as excepted from STB authority in 49 U.S.C. § 10906. Thus, the abandonment of a rail line, both before ICCTA at the ICC and after ICCTA at the STB, did not then and does not now define the regulatory status of 10906 track.

Although Congress granted exclusive federal jurisdiction over 10906 tracks, it also strictly limited the STB's authority to control rail carriers' use of 10906 track.⁶ Section 10906 of Title 49 limits the STB's authority over 10906 track. It provides, in pertinent part, that the STB "does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." 49 U.S.C. § 10906. Thus, these tracks are referred to as 10906 track, and regulatory authority is not required to own, operate, contract or sell such tracks. While it is not without controversy, Congress has never acted to change what is known in the industry as a "regulatory gap" for 10906 track in which the STB has exclusive jurisdiction but lacks authority over such tracks.⁷

2. Abandonment Proceedings as Related to Industrial or Spur Track.

Under ICCTA, as with prior law under the Interstate Commerce Act, there is a process for a rail carrier to seek abandonment of its rail lines to remove them from the STB's regulatory authority. *See* 49 U.S.C. §§ 10903 through 10905. Under that process, rail carriers can seek permission to abandon all or portions of their common carrier rail line. With ICCTA, Congress expanded the STB's authority to offer opportunities to use or for others to purchase abandoned common carrier rail lines for rail transportation purposes. *See* 49 U.S.C. § 10905. Congress also

⁶ *See e.g., Baylands Development, Inc.—Pet. for Declaratory Order*, FD No. 36660 at n.8 (STB served Sept. 18 2023); *Pinelawn Cemetery—Pet. for Declaratory Order*, FD No. 35468 (STB served April 21, 2015); *Allied Industrial Dev. Corp.—Pet. for Declaratory Order*, FD No. 35477, 2015 STB LEXIS 310 (STB served Sept. 17, 2015).

⁷ *The New York City Econ. Dev. Corp.—Pet. for Declaratory Order*, FD No. 34429, 2004 STB LEXIS 434 at *27 (STB served July 15, 2004) (Mulvey, dissenting) ("I recognize that the gap in environmental oversight results from the overlay of 49 U.S.C. 10501(b) and 10906: reservation of spur track to the Board's exclusive jurisdiction while simultaneously excepting it from the Board's licensing authority. I believe that this gap, and its real-world impacts, are an unfortunate result of the ICC Termination Act that Congress may want to reconsider in light of the potentially serious consequences of a determination that particular track is a spur"). Congress has not.

permitted additional rail use of abandoned rail through 10906. *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress’s adoption of Section 10906 “encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked”).

LEGAL STANDARD

“A defendant sued in state court may remove the suit to federal court so long as the federal tribunal would have had original jurisdiction over the action.” *Grace Ranch, LLC v. BP Am. Prod. Co.*, 989 F.3d 301, 307 (5th Cir. 2021) (citing 28 U.S.C. § 1441(a)); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A complaint that appears to raise only state-law claims presents a federal question where “a federal statute wholly displaces the state-law cause of action through complete preemption.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003). A complaint “purporting to rest on state law can be recharacterized as one ‘arising under’ federal law if the law governing the complaint is exclusively federal.” *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009).

The party seeking to invoke federal jurisdiction bears the burden of showing it exists. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996). Because federal courts are courts of limited jurisdiction, the removal statute is subject to strict construction, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810 (1986), and “doubt about the propriety of removal must be resolved in favor of remand.” *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007). However, even within the rubric of strict construction, “federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

A claim arises under federal law if the allegations in the plaintiffs’ complaint establish that “federal law creates the cause of action asserted” or that the plaintiffs’ right to relief necessarily

depends upon the resolution of a substantial question of federal law. *Gunn v. Minton*, 568 U.S. 251, 257 (2013). Under the doctrine of complete pre-emption, once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) Complete preemption arises when the federal statute “so forcibly and completely displace[s] state law that the plaintiff’s cause of action is either wholly federal or nothing at all.” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331 (5th Cir. 2008) (internal quotations omitted).

Under the complete preemption doctrine, “[w]hen a plaintiff has asserted a cause of action under state law that has been judicially declared to be completely preempted by federal law, that claim—no matter how it may have been set out in the complaint or characterized by the plaintiff—is necessarily federal.” 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722.1 (4th ed. 2019). When Congress has completely occupied a field, “federal law does not merely preempt a state law to some degree; rather, it substitutes a federal cause of action for the state cause of action, thereby manifesting Congress’s intent to permit removal.” *Id.* at § 3722.2. If a plaintiff alleges only state law claims in an area where Congress has “occupied the field,” the court will “recharacterize the plaintiff’s cause of action as a federal claim for relief, making removal proper on the basis of federal-question jurisdiction.” *Id.*

Substantial jurisprudence regarding the ICCTA establishes that this is such a case, and was properly removed to federal court.

ARGUMENT

I. Removal Is Proper Because ICCTA Completely Preempts the District's Expropriation Action.

ICCTA completely preempts state law for the matters ICCTA places within the STB's exclusive jurisdiction, pursuant to 49 U.S.C. § 10501(b). This complete preemption includes actions under state law to take railroad property in ways that prevent the railroad from operating, such that those actions present only federal questions that are removable to federal court. *See PCI Transp.*, 418 F.3d at 544 (“the plain language of § 10501 supports our conclusion that Congress intended actions regarding [the matters in § 10501] to be governed exclusively by ICCTA”). The Fifth Circuit has also held that “it is beyond peradventure that” regulation of a rail carrier’s “side tracks”—among the types of 10906 track listed in § 10501(b)—“is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise.” *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) (finding Texas anti-blocking statute could not establish liability for negligent operation of side tracks because § 10501(b) expressly preempts such laws).

As this Court has explained, and as relevant here, ICCTA “establishes that the [STB] has exclusive jurisdiction” over (1) ““transportation by rail carriers”” and (2) over “acquisition”” of ““spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely”” within one state. *Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, 2018 U.S. Dist. LEXIS 61928, at *14-*15 (W.D. La. 2018) (Doughty, J.) (quoting 49 U.S.C. § 10501(b)). Here, the preemption question is quite plain to answer: the District seeks to expropriate a portion of DSRR’s 10906 track in violation of Section 10501(b). ICCTA facially, expressly, and completely preempts the District’s expropriation action, which establishes federal removal jurisdiction. It also requires dismissal of this action.

A. ICCTA Expressly Preempts the Acquisition of the Track Segment Because It Is 10906 Track.

As 10906 track, the Track Segment is subject to the STB's exclusive jurisdiction under Section 10501(b)(2). Congress was absolutely clear—in language that the Fifth Circuit described as putting the preemption issue “beyond peradventure”—that, among other regulated activities related to “spur, industrial, team, switching, or side tracks,” the “acquisition” of such tracks is exclusively within the STB's jurisdiction. *Friberg*, 267 F.3d at 443; 49 U.S.C. § 10501(b)(2). It is undisputed that the District's expropriation action seeks to *acquire* DSRR's Track Segment.

As the STB has explained, “[i]n enacting ICCTA, Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks.”⁸ *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition, and Operation—In Wilmington and Woburn, MA*, FD No. 34797, 2007 STB LEXIS 391 at *26-27 (STB served July 10, 2007); *see also Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003) (holding that the fact that track at issue was 10906 track did not take them outside the jurisdiction of the STB for purposes of federal subject matter jurisdiction analysis).

The Fifth Circuit has also embraced this history in which ICCTA placed 10906 track *within* federal jurisdiction, removing it from prior state regulatory control. *See PCI Transp.*, 418 F.3d at 544. State laws and regulations effecting a taking of such tracks are therefore also preempted. “The § 10906 exception states that the [STB] ‘does not have authority’ over ‘construction,

⁸ This fact alone renders the District's citation to *Hayfield N. R.R. Co., Inc v. Chicago and N. W. Transp. Co.*, 467 U.S. 622 (1984) obsolete. Plaintiff's Brief at 6. Plaintiff's citations to other cases decided before the current statutory scheme was adopted are equally unavailing. *See* Plaintiff's Brief at 5 (citing *Colorado v. U.S.*, 271 U.S. 153 (1926)). Plaintiff notes in footnote 2 that ICCTA was passed, but does not discuss the statutory scheme that it created.

acquisition, operation, abandonment, or discontinuance of spur ... track,' but this does not mean that the [STB] lacks jurisdiction over such transactions. That would flatly contradict the unambiguous statutory language providing that the Board has 'exclusive' jurisdiction over the 'construction, acquisition, operation, abandonment or discontinuance' of spur track." *United Transp. Union—Illinois Legis. Bd. v. STB*, 183 F.3d 606, 612 (7th Cir. 1999).

Here, the Track Segment that the District seeks to seize is 10906 track. The terms "spur, industrial, team, switching, or side tracks" (collectively also known as "auxiliary" track) are not defined in the statute. *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996). Moreover, there is no single test for determining whether a particular track segment is a "line of railroad," or is instead simply a spur or other 10906 track. *New York City Econ. Dev. Corp.—Pet. for Declaratory Order*, FD 34429, 2004 STB LEXIS 434 at *12-13 (STB served July 15, 2004) ("NYCEDC"). The agency and the courts look primarily at the use of a track (the "use test"), and at a track's physical characteristics (the "physical characteristics test"), in making the determination of whether it should be categorized as a common carrier line of railroad, or as 10906 track.⁹ *Id.* at *14 (citing *Battaglia Distributing Co., Inc. v. Burlington Northern R.R. Co.*, FD 32058, slip op. at 3 (STB served June 27, 1997)).

The Track Segment is unquestionably 10906 track under both tests. With respect to the use test, tracks that are found to be auxiliary track are typically used for loading, unloading, storage, or switching operations that are incidental to the movement of trains. *Id.* at *14-15 (citing *Nicholson v. ICC*, 711 F.2d 364, 367-68 (D.C. Cir. 1983); *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966)). As DSRR's supporting declaration makes clear, that is precisely what the Track Segment is used for—it is storing rail cars there at this moment, was storing rail

⁹ Because it was abandoned, it is not a common carrier line of railroad.

cars in March 2023 when the District's expert took pictures, and was storing railcars whenever Googlemaps last updated. *See* Thrall Declaration at ¶¶ 14, 15, 20 and Exs. A, B, C.

As for the physical characteristics test, there is no single criterion, but the Track Segment has all the elements of 10906 track. Specific indicia that have been found relevant in making the determination of whether a track is a line of railroad or is instead 10906 track. They include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track, etc. *NYCEDC* at *15-16 (citing *ParkSierra Corp.—Lease & Operation Exemption—Southern Pacific Transp. Co.*, FD 34126, slip op. at 5 (STB served Dec. 26, 2001); *Grand Trunk Western R.R.—Pet. for Declaratory Order—Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI*, FD 33601, slip op. at 2 (STB served July 30, 1998); *Chicago SouthShore & South Bend Railroad—Pet. for Declaratory Order—Status of Track at Hammond, IN*, FD 33522, slip op. at 6 (STB served Dec. 17, 1998)).

Here, the primary use of the track has been for staging and storing rail equipment¹⁰ and is incidental to the receipt of shipments by the carrier. Thrall Declaration at ¶ 13. The physical characteristics include that the track is a short segment; it does not invade another railroad's territory, there is not regularly scheduled service over the Track; and it is not used to serve a customer. Thrall Declaration at ¶¶ 7, 8, 9. To top it off, the District concedes the Track Segment is used for rail purposes. Plaintiff's Brief at 6; *see also* ECF No. 1-1 at 16.

¹⁰ *See Allied Industr. Dev. Corp.*, 2015 STB LEXIS 310 at *12 (staging and storage of railroad equipment found to be industrial track).

In the Fifth Circuit, “trackage . . . used in the loading, reloading, storage and switching of [rail] cars incidental to the receipt of shipments by the carrier or their delivery to the consignee . . . is ‘spur, industrial, team, switching or side tracks’” under section 10906. *Railway Labor Executives Ass’n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988) (quoting *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966)). In *Spencer*, the court explained that “[i]f, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is ‘spur, industrial, team, switching or side tracks.’”¹¹ 366 F.2d at 166. The Track Segment is squarely 10906 track under these precedents too. See Thrall Declaration at ¶¶ 13, 14, 15.

Accordingly, the District’s attempted acquisition of the Track Segment is expressly within the exclusive jurisdiction of the STB—and thus, completely preempted.

B. ICCTA Expressly Preempts the District’s Expropriation Action Because It Targets Transportation by DSRR, a Rail Carrier Under ICCTA.

The Track Segment is also subject to the STB’s exclusive jurisdiction because it is used for rail transportation by a rail carrier. The key elements to Section 10501(b)(1) are whether there is “transportation” and that it is by a “rail carrier.” The term “transportation” is broadly defined to include: 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 . . . services related to that movement including receipt, delivery, elevation, transfer in transit, refrigeration, icing,

¹¹ The court determined that the agency would not have jurisdiction if the track were “spur or industrial” track. 366 F.2d at 166. Since that decision, ICCTA placed such tracks under the STB’s jurisdiction. See, e.g. *PCI Transp.*, 418 F.3d at 544; *Fox v. STB*, 379 Fed. Appx 767, 770-772 (10th Cir. 2010).

ventilation, storage, handling, and interchange of passengers and property. *See* 49 U.S.C. § 10102(9)(A) and (B). Courts have recognized that Congress intended to give the STB extensive authority in this area. *City of Lincoln v. STB*, 414 F.3d 858, 861 (8th Cir. 2005) (citing *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (reviewing the history of railway preemption, text of the ICCTA, and court decisions to reject the argument that preemption is limited only to economic regulation)).

Here, the Track Segment is both a property and a facility used by DSRR (a rail carrier) to move property by rail and is encompassed by the term “transportation.” *See DesertXpress Enterprises, LLC—Pet. for Declaratory Order*, FD No. 34914, 2007 STB LEXIS 343 at *9-10 (STB served July 27, 2007). Indeed, the District admits as much in acknowledging DSRR’s “subsequent use of the track to perform any rail operations over the track, including the storage of railcars.” Plaintiff’s Brief at 6. The “storage” of railcars is expressly included within the definition of transportation. 49 U.S.C. § 10102(9)(B). Rail rights-of-way and track are also clearly covered by Section 10501(b)(1) and are subject to the STB’s exclusive jurisdiction even when located “entirely in one state.” 49 U.S.C. § 10501(a)(2)(A).

C. Courts Have Found that Condemnation Proceedings Targeting Railroad Property Is Completely Preempted by ICCTA.

The District is clear that it seeks to seize the Track Segment that is used for rail purposes and take it entirely away from DSRR. Attempts to take completely railroad track and property have repeatedly been found to be per se preempted by Section 10501(b). “Both the Board and the courts have found that the Board’s broad and exclusive jurisdiction over railroad transportation prevents the application of state laws, including condemnation of unused railroad property, if those laws would have the effect of foreclosing, or unduly restricting, present or future transportation by rail carrier.” *Grafton & Upton R.R.—Pet. for Declaratory Order*, FD No. 36696, 2023 STB

LEXIS 207 at *7 (STB served Nov. 15, 2023) (citing *City of Ozark v. Union Pac. R.R.*, 843 F.3d 1167 (8th Cir. 2016) (order requiring railroad to restore crossing closed in violation of state law preempted if restoration will unduly interfere with present or future rail operations); *Skidmore v. Norfolk S. Ry. Co.*, 1F.4th 206 (4th Cir. 2021) (holding ICCTA’s complete preemption of quiet title claim seeking to take railroad property from it results in federal court jurisdiction); *Union Pac. R.R. v. Chicago Transit Auth.*, 647 F.3d 675, 681-82 (7th Cir. 2011) (finding a proposed state condemnation establishing a perpetual easement over railroad right-of-way not in use by the railroad preempted because it would interfere with current and potential future rail operations); *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (affirming Board’s determination that taking would unduly interfere with present and future railroad operations); *Tri-City R.R.—Pet. for Declaratory Order*, FD 35915, slip op at 7-8 (STB served Sept. 14, 2016) (state law condemnation and acquisition by two cities for an at-grade crossing at location that would unreasonably interfere with a railroad’s present and future operations preempted); *Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35196, slip op. at 4-5 (STB served Mar. 1, 2010) (condemnation action to take property on which the railroad was not actively operating preempted when proposed condemnation would unreasonably interfere with railroad’s future plans); *Matter of Metro. Transp. Auth.*, 32 A.D.3d 943 (N.Y. App. Div. 2006); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W. Dist. Wisc. 2000) (holding that “condemnation is regulation” and omitting references to the as-applied framework). The Track Segment here that the District seeks to take entirely is not unused railroad property; it is track that has long been, and is now, used to provide railroad services—making this a straightforward case of federal preemption. Thrall Declaration at ¶¶ 12-18.

II. ICCTA's Federal Preemption Applies Even Though the Track Segment Was Abandoned as a Rail Line in 1988 and Part of It Was Sold.

The District's primary retort is to argue that the prior abandonment of the Track Segment puts it outside of the STB's jurisdiction. Plaintiff's Brief at 5-6. But that is a red herring and is wrong because Congress intentionally sought to encourage the continued use of abandoned tracks by adopting Section 10906. *See Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988) (noting that Congress's adoption of 49 U.S.C. § 10906 "encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked"). Neither the NREC nor any subsequent user, including DSRR, was required to seek any approval or authority from the ICC or the STB to use the Track as 10906 track. The Track Segment sits squarely within the STB's jurisdiction but outside its authority—in the regulatory gap described above—without the requirement to obtain STB approval for using the 10906 track. Therefore, the prior abandonment says nothing, whatsoever, about the regulatory status of the Track Segment.

Similarly, DSRR's sale of some property is also irrelevant. Again, abandonment removed the entire abandoned line from the STB's authority. DSRR (and NREC before it) could chose to continue to use the entire line or any segment thereof as 10906 track. Or, it could sell off part or all of it. And, it could take all those actions without STB authority pursuant to 10906. That DSRR chose to sell off parts while operating the Track Segment is meaningless.

That the Track Segment was previously abandoned and that a different segment was sold is irrelevant to the Track Segment's longstanding use or the STB's exclusive jurisdiction over it. Indeed, the District rests its argument almost entirely on a 1926 and a 1984 case, that were decided by the U.S. Supreme Court *before* ICCTA, in 1995, completely preempted state regulation of 10906 track. *See* Plaintiff's Brief at 5-6. Those cases are therefore of no consequence. When track is abandoned, a railroad has several options with respect to this track, including continuing

to utilize it as non-mainline track, *e.g.*, as industry, spur, team, switching, or side track (10906 track); or physically removing or selling the track. *See Glosemeyer*, 685 F. Supp. at 1117. The continued use of the Track Segment for railroad transportation and as 10906 track, after formal abandonment as 10906 track, makes the track subject to the STB's jurisdiction. *Fox v. STB*, 379 Fed. Appx 767, 770-772 (10th Cir. 2010).

CONCLUSION

For the foregoing reasons, DSRR respectfully requests that the Court deny the District's remand motion because ICCTA completely preempts the District's attempt to expropriate entirely the Track Segment, which is 10906 Track, from DSRR such that DSRR could not provide rail transportation services over the Track Segment. Because complete preemption establishes both the Court's removal jurisdiction *and* that there is no expropriation cause of action available to the District with respect to the Track Segment, DSRR also requests that the Court additionally grant its motion to dismiss under Rule 12(b)(6).

Respectfully submitted,

/s/ Leila A. D'Aquin

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FD No. 36809

Exhibit No. 4

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

NORTHEAST LOUISIANA RAILROAD DEVELOPMENT DISTRICT Plaintiff versus DELTA SOUTHERN RAILROAD, INC. Defendant	CIVIL ACTION CASE NO: 3:23-cv-1783 JUDGE: Terry A. Doughty MAG.: Kayla D. McClusky JURY TRIAL
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**DEFENDANT DELTA SOUTHERN RAILROAD, INC.'S
SUR-REPLY IN OPPOSITION TO MOTION TO REMAND
AND IN SUPPORT OF ITS MOTION TO DISMISS**

Plaintiff NLRDD's "Reply to Opposition to Motion to Remand" ("Reply") does nothing to advance its position or rebut Delta Southern Railroad, Inc.'s ("DSRR") argument that NLRDD's expropriation action is completely preempted by federal law and thus this Court has subject matter jurisdiction. NLRDD does not contest in any way the evidence submitted by DSRR (which included photographs from NLRDD's own appraiser) showing that the Track Segment NLRDD seeks to seize has been and is actively used by DSRR as ancillary track in support of its rail operations.¹ Accordingly, the use of the State of Louisiana's expropriation statute to seize DSRR's rail line is preempted by 49 U.S.C. § 10501 because the track at issue is 10906 Track² that is

¹ Unless otherwise indicated, defined terms are the same as in DSRR's Memorandum in Opposition to Motion to Remand and in Support of Its Motion to Dismiss ("Opp.") (Dkt. 13), or in the Reply.

² DSRR's tracks are considered auxiliary or ancillary tracks (spur, industrial, team, switching, or side tracks) often referred to as "10906 Track." *See* Opp. at 1.

subject to the exclusive jurisdiction of the Surface Transportation Board (“STB”) -- even though 49 U.S.C. § 10906 took authority away from the STB and the States over that rail line.

The repeated recitation by Plaintiff that it cannot find where the Interstate Commerce Commission (“ICC”) or the STB authorized DSRR to operate over the Track Segment and real property (Reply at 1 & 3) should surprise no one. The very nature of 10906 Track, as a matter of rail regulatory law, is that no authority is required for railroad operations over 10906 Track – not from MoPac (Reply at 2) and not from the ICC or the STB. But, in part to prevent exactly the kind of State takeover of 10906 Track that NLRDD is pursuing, exclusive *federal* jurisdiction by the STB still attaches to 10906 Track, pursuant to Section 10501.

Plaintiff’s argument would render Section 10906 a nullity. Plaintiff contends that “because the ICC’s authorization had brought the ICC’s jurisdiction over that segment of the line to an end, any post-abandonment *acquisition* of the real property and the abandoned track by NREC or its new subsidiary DSRC would have required the filing of a new application as the ICC’s jurisdiction was terminated when the line was abandoned.” Reply at 3. But Section 10906 specifically says that is not the case. Under that Section, any property – former main line, common carrier track or new property – can be used as 10906 Track without any application to or authorization from the STB. Even if track has been abandoned, it can be reestablished as 10906 Track without the involvement of the STB, or its predecessor the Interstate Commerce Commission. *See The Great Walton R.R. Co. – Petition for Dec. Order*, No. AB 1241 9 Sub-No 1), 2020 STB LEXIS 356 at *19-20 (STB served June 23, 2020) (observing that as long as the railroad can establish a property interest in the land, the railroad “would be free to reconstruct the § 10906 runaround track regardless of whether it had previously been removed from the interstate rail system” through abandonment) (“*Great Walton*”).

The new information related to DSRR's notice of exemption in 1999 that Plaintiff attempts to introduce in the Reply also is of no avail. Reply at 4-6. DSRR was only required to obtain STB authority for main line track and not for 10906 Track, which is in fact what it did. Plaintiff even acknowledges that in seeking the authority required for the main line track, DSRR disclosed (although it was not required to do so) to the STB that it owned 10906 Track as well – “* As explained in Note 2, DSR[R] also owns roughly 1.5 miles of ancillary track located south of the KCSR main line connection at milepost 498.44.” Reply at 5 (emphasis added). “Ancillary track” is synonymous with “10906 Track”.³ See *Great Walton*, at *2.

Finally, the cases cited by Plaintiff in Reply are inapposite to the issue here of 10906 Track being within the exclusive jurisdiction of the STB. For instance, NLRDD relies in its Reply on *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228 (5th Cir. 2005) (“*Baros*”), but that case does not support Plaintiff. In fact, the holding in *Baros* was that the STB had exclusive jurisdiction (*Baros*, at 235), and then dealt with issues not present here like the effect of the National Trail Act.⁴ *Baros*, at 235-236. Other cases cited by Plaintiff are equally unavailing. *Hayfield N. R.R. Co. v. Chi. N. W. Transp. Co.*, 467 U.S. 622 (1984) was decided before Congress made clear that states had no jurisdiction over 10906 Track and put such track exclusively within Federal jurisdiction, at the STB. See *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 544 (5th Cir. 2005) (ICCTA changes included ““extending exclusive Federal jurisdiction to matters relating to spur,

³ Track remains 10906 Track until the STB removes its jurisdiction after it is demonstrated that “that the [ancillary track] is no longer needed for the interstate rail system.” *Great Walton* at *21 (citing *Pinelawn Cemetery--Petition for Declaratory Order*, FD No. 35468, 2015 STB LEXIS 126 at *30 (STB served April 21, 2015) and *NewVista Property Holdings, LLC--Pet. for Declaratory Order*, FD 36040, 2017 STB LEXIS 43 at *2 (STB served Mar. 17, 2017)).

⁴ The remaining cases also implicate the National Trails Act or the Historic Preservation Act, which have nothing to do with the issues presented here and do not involve the taking of property actively used to support rail transportation.

industrial, team, switching or side tracks formerly reserved for State jurisdiction” under prior law) (quoting ICCTA House Report).

In short, NLRDD's sole argument on Reply appears to be that DSRR did not receive authorization—after MoPac's prior abandonment—to operate the Track Segment as 10906 Track.

That misses the mark.

The track at issue has long been and is actively used by DSRR to provide ancillary rail transportation services, as 10906 Track. As such, the Track Segment is “spur, industrial, team, switching, or side tracks,” the “acquisition” of which is within the “exclusive” jurisdiction of the STB. 49 U.S.C. § 10501(b)(2). No authorization – from MoPac, the ICC, or the STB – is required to operate 10906 Track, yet 10906 Track expressly and explicitly remains within exclusively federal jurisdiction.

For the foregoing reasons and as stated in DSRR's Opposition, the Court should deny NLRDD's Motion to Remand and grant DSRR's Motion to Dismiss.

Respectfully submitted,

/s/Leila A. D'Aquin

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading has been delivered to all counsel of record on **March 15, 2024**, by ECF filing, by hand delivery, by telephonic facsimile transmission, or by depositing a copy of same in the United States Mail, first class postage prepaid, at their last known addresses of record.

/s/ Leila A. D'Aquin

FD No. 36809

Exhibit No. 5

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIV. ACTION NO. 3:23-01783

VERSUS

JUDGE TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD INC

MAG. JUDGE KAYLA D. MCCLUSKY

REPORT & RECOMMENDATION

Before the undersigned Magistrate Judge, on reference from the District Court, is a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendant Delta Southern Railroad Inc. [doc. #5] and a motion to remand filed by Plaintiff Northeast Louisiana Railroad Development District. [doc. #9]. The motions are opposed. [docs. #12, 14].

For reasons assigned below, it is recommended that the motion to remand be DENIED, the motion to dismiss be GRANTED IN PART and DENIED IN PART, and the suit be DISMISSED WITHOUT PREJUDICE.

Background

Plaintiff Northeast Louisiana Railroad Development District (“the Development District”) filed the instant petition for expropriation against Defendant Delta Southern Railroad Inc. (“Delta Southern”) on November 22, 2023, in the Sixth Judicial District, Madison Parish, Louisiana. Petition for Expropriation [doc. #1-1, pp. 5-7]. Delta Southern removed the action to this Court on December 21, 2023. Notice of Removal [doc. #1]. The Development District seeks to expropriate 2.7 miles of track to facilitate construction of a rail line between East Carroll Parish and Concordia Parish. Petition for Expropriation [doc. #1-1, p. 5].

Delta Southern owns 2.7 miles of track between milepost 498.4 near Tallulah, Louisiana, and milepost 501.1 near Vidalia, Louisiana (“the Track Segment.”). *Id.* (specifying the mileposts as 498.44 and 501.15). The history of the Track Segment relevant to this proceeding dates back to June 29, 1988, when Missouri Pacific Railroad (“MPR”) petitioned the Interstate Commerce Commission (“the ICC”) to abandon the rail line located between milepost 408.9 near McGehee, Arkansas, and milepost 651.6 near Vidalia, Louisiana. Memo in Support of M/Remand [doc. #9-1, p. 3]. The ICC subsequently authorized National Railway Equipment Company (“NREC”) to acquire portions of that track from milepost 408.9 to milepost 498.4 in Tallulah, Louisiana, from MPR. *Id.* NREC later acquired the remaining track – from milepost 498.4 to milepost 651.6 – from MPR. *Id.* On September 30, 1988, the ICC authorized NREC to operate south of milepost 408.9 and north of milepost 498.4. *Id.* Through a series of transactions, ownership and operating rights of the track south of milepost 408.9 and north of milepost 498.4 now rests with Delta Southern. *Id.* at pp. 3-4. Portions of the line south of milepost 498.4 have been sold by Delta Southern, but the company retains ownership of other segments south of that milepost, including the Track Segment. *Id.* at p. 4; Memo in Support of M/Remand [doc. #9-1, p. 3]. Delta Southern has never received operating authority from the Surface Transportation Board (“STB”)¹ concerning any of the line south of milepost 498.4. Memo in Support of M/Remand [doc. #9-1, p. 3].

The Development District now seeks to construct an active rail line between East Carroll Parish and Concordia Parish. Petition for Expropriation [doc. #1-1, p. 5]. The Track Segment is

¹ The STB is the successor agency of the ICC, which was abolished by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). 49 U.S.C. § 10101 *et seq.*

included in the right of way the Development District has determined necessary for completion of this proposed line. *Id.*

On December 29, 2023, Delta Southern filed its motion to dismiss. M/Dismiss [doc. #5]. The Development District filed its motion to remand on January 19, 2024. M/Remand [doc. #9]. Ten days later, on January 29, 2024, the Development District filed its opposition to the motion to dismiss, Opposition to M/Dismiss [doc. #12], to which Delta Southern responded on February 5, 2024. Reply to Opposition to M/Dismiss [doc. #13]. On February 23, 2024, Delta Southern filed its opposition to the motion to remand. Opposition to M/Remand [doc. #14]. The Development District replied on March 13, 2024. Reply to Opposition to M/Remand [doc. #19]. Shortly thereafter, on March 15, 2024, Delta Southern filed a further brief opposing remand and supporting dismissal. Sur-Reply to M/Dismiss and M/Remand [doc. # 20].

Briefing is complete. Accordingly, this matter is ripe.

Analysis

I. Legal Standard

a. Remand to State Court

Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) (citation omitted). As there is a presumption against federal jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“It is to be presumed that a cause lies outside this limited jurisdiction . . .”), the removal statute is to be construed “strictly against removal and for remand.” *Hicks v. Martinrea Automotive Structures, Inc.*, 12 F.4th 511, 514-15 (5th Cir. 2021). The party invoking federal jurisdiction bears the burden of proving the suit lies within the court’s limited jurisdiction. *Howery*, 243 F.3d at 916.

A complaint that seemingly pleads only state-law claims presents a federal question if “a federal statute wholly displaces the state-law cause of action through complete preemption.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009) (“[An action] purporting to rest on state law can be recharacterized as one ‘arising under’ federal law if the law governing the complaint is exclusively federal.”). Federal law may preempt an entire area of law if federal statutes “so forcibly and completely displace state law that [a] cause of action is either wholly federal or [non-existent].” *New Orleans & Gulf Coast Ry. Co. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 544-45 (5th Cir. 2005).

b. *Federal Rule of Civil Procedure 12(b)(6)*

The Federal Rules of Civil Procedure sanction dismissal where the plaintiff fails “to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). To withstand a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

II. **Motion to Remand**

The motion to remand raises questions about this court’s jurisdiction over the instant action. *See generally* Memo in Support of M/Remand [doc. #9-1]. It is thus appropriate to resolve the motion to remand before analyzing the motion to dismiss.

Under the ICCTA, the STB’s jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,” even if they are located entirely in one state, “is exclusive.” 49 U.S.C. § 10501(b)(2). This means that the ICCTA completely preempts state law concerning matters enumerated in § 10501(b)(2). Section 10906 of the ICCTA provides that the STB “does not have authority . . .

over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” *Id.* at § 10906. Sections 10501(b)(2) and 10906 taken together create a regulatory gap whereby the STB may have *jurisdiction* over a track but lack regulatory *authority* over it. Indeed, the Fifth Circuit has found that “[a]lthough railroad side tracks are under the exclusive jurisdiction of the STB, rail carriers do not need prior STB approval to construct and operate those tracks.” *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (citing 49 U.S.C. § 10906). Decisions of other circuits confirm that the STB retains jurisdiction over track excepted under § 10906 (“Excepted Track”), *see, e.g., New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011) (indicating § 10501(b)(2) confers jurisdiction over “ancillary activities” that were previously excluded from STB licensing requirements); *United Transp. Union-III. Legis. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (“The § 10906 no-authority language means no *authority*, not no *jurisdiction*.”), as do the Board’s own decisions. *See, e.g., Baylands Dev., Inc. – Petition for Dec. Order*, No. FD 36660, 2023 WL 6121079, at *3 n.8 (S.T.B. Sept. 18, 2013) (“Board precedent makes clear that [§ 10906] track is within the Board’s jurisdiction under 49 U.S.C. § 10501(b).”); *Pinelawn Cemetery – Petition for Dec. Order*, No. FD 35468, 2015 WL 1813674, at *1 (S.T.B. Apr. 20, 2015) (“[Section] 10906 track, while excepted from licensing, is subject to the Board’s general jurisdiction under 49 U.S.C. § 10501(b)(2).”). However, the STB’s jurisdiction over a line terminates when a rail carrier abandons the line. *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005) (citing *Preseault v. I.C.C.*, 494 U.S. 1, 5 n.3 (1990) (“Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the [ICC] is empowered to impose conditions on

abandonments . . . as a general proposition [the] ICC jurisdiction terminates.” (citations omitted))).

The Development District asserts that the ICC authorized abandonment of the Track Segment, and neither it nor the STB have been asked to reauthorize interstate transportation on that segment. Memo in Support of M/Remand [doc. #9-1, p. 2]. The Development District further argues that, on this basis, the STB lacks jurisdiction over the Track Segment. *Id.* According to the Development District, because the federal regulator lack jurisdiction over the Track Segment, there is no federal question to grant this Court jurisdiction over the matter. *Id.*

Delta Southern admits that the Track Segment has previously been abandoned. Opposition to M/Remand [doc. #14, p. 16 n.9] (“Because [the Track Segment] was abandoned, it is not a common carrier line of railroad.”). This would seemingly place the track outside the jurisdiction of the STB. However, Delta Southern argues that the Track Segment has been used as Excepted Track subsequent to its abandonment, thus subjecting it to the STB’s jurisdiction, but not its authority. *Id.* at pp. 8-11, 15-18. Section 10906 certainly does not foreclose once-abandoned track coming back into use as Excepted Track without STB approval. *See* 49 U.S.C. § 10906; *see also Pinelawn Cemetery*, 2015 WL 1813674, at *1 (describing § 10906 track as exempt from STB licensing, but subject to STB jurisdiction). Consequently, there exists a federal question as to whether the STB has jurisdiction over the instant matter.

Whether the STB has jurisdiction over the Track Segment turns on whether the segment is Excepted Track. In the Fifth Circuit, track “used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments” is considered Excepted Track. *See Ry. Lab. Execs. Ass’n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988) (citing *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 166 (5th Cir. 1966)), *vacated on different grounds* 492

U.S. 901 (1989).² The Development District admits that the Track Segment “is primarily, if not always, used to store railcars.” Reply to Opposition to M/Remand [doc. #19, p. 6]. Delta Southern agrees. See Declaration of R. Thrall [doc. #14-1, p.3] (“The primary use of the [Track Segment] has been for staging and storing rail equipment necessary to the movement of rail shipments.”). Thus, under the test endorsed by the Fifth Circuit, the Track Segment appears to be excepted under § 10906 as it is used for storage and staging of cars incidental to the receipt of shipments. Another related test utilized by the STB yields the same conclusion.^{3,4} For the limited purpose of determining jurisdiction, the undersigned finds that the Track Segment is Excepted Track, placing this controversy in the exclusive jurisdiction of the STB.

Accordingly, it is RECOMMENDED that the Development District’s motion to remand be denied.

² Note that *Ry. Lab. Exec.* and *Spencer* were decided before the current statutory scheme governing the STB came into effect. Consequently, those cases indicate that spur, industrial, team, switching, and side track lay outside the ICC’s jurisdiction. See *Spencer*, 366 F.2d at 166. The ICCTA enacted § 10906 to bring such track under STB jurisdiction as described *supra*.

³ Indicia found relevant in determining whether a track is Excepted Track include the length of the track; how many shippers will be served; whether the track is stub-ended; whether the track is built to invade another railroad’s territory; whether the shipper is located at the end of the track; whether there is regularly scheduled service on the track; and who owns and maintains the track. *New York City Econ. Dev. Corp. – Petition for Dec. Order*, No. FD 34429, 2004 WL 1585810, at *6 (S.T.B. July 15, 2004). The Track Segment is “a short segment,” does not invade the territory of another railroad, does not host scheduled, maintained or regular service, does not serve a specific customer’s facilities, and does not host overhead or through traffic. Declaration of R. Thrall [doc. #14-1, p. 2].

⁴ It is also worth noting that the test of abandonment utilized by other circuits and the STB indicate that the Track Segment may not be abandoned. Under this test, when determining whether a line has been abandoned, “the focus is on the carrier’s intent.” *Fox v. Surface Transp. Bd.*, 379 F.App’x 767, 772 (10th Cir. 2010) (citing *Birt v. Surface Transp. Bd.*, 90 F.3d 580, 585 (D.C. Cir. 1996)). “[S]everal concrete actions . . . may indicate an intent to abandon: cessation of operations, cancellations of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way.” *Id.*

III. Motion to Dismiss

As this case presents a federal question, the undersigned now turns to the motion to dismiss. Delta Southern has moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). M/Dismiss [doc. #5].

Delta Southern presents several arguments in support of its motion. First, it asserts that the procedure used by the Development District to expropriate the Track Segment is deficient under Louisiana law. Memo in Support of M/Dismiss [doc. #5-1, pp. 3-6] (arguing the Development District is not empowered to affect a “quick-take” under Louisiana law and did not comply with pre-suit requirements of Louisiana Revised Statutes Title 19). However, as established *supra*, federal law preempts state law with regards to the Track Segment. It is thus inappropriate analyze these state law arguments or to recommend dismissal because of them.

Delta Southern also contends that the ICCTA’s complete preemption of jurisdiction over the Track Segment is an independent basis for dismissal. Reply to Opposition to M/Dismiss [doc. #13, pp. 2, 4]; Opposition to M/Remand [doc. #14, p. 14]. The undersigned agrees that the ICCTA’s grant of exclusive jurisdiction to the STB over acquisition of Excepted Track places this controversy outside this Court’s jurisdiction. The Fifth Circuit has endorsed dismissal of cases where the STB has exclusive jurisdiction over the matter. *See, e.g., Baros*, 400 F.3d at 235 (holding district court finding that STB retained exclusive and plenary jurisdiction over track properly led to conclusion that the court lacked jurisdiction over claims concerning that track).⁵

⁵ “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). “Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Clark v. Tarrant*

Resolution of the Development District's attempt to acquire the Track Segment is within the STB's jurisdiction and must thus be resolved through that entity's processes.⁶

While Delta Southern predicates its motion on the Development District's putative failure to state a claim, it has nonetheless presented arguments that sound in the key of Federal Rule of Civil Procedure 12(b)(1). *See* Reply to Opposition to M/Dismiss [doc. #13, p. 4] ("ICCTA preemption also means dismissal of the expropriation action is appropriate, [and is] a separate and independent basis to dismiss the case."); Opposition to M/Remand [doc. #14, p. 14] ("ICCTA facially, expressly, and completely preempts the [Development District's] expropriation action, which establishes federal removal jurisdiction. It also requires dismissal of this action."). Furthermore, this Court has an ongoing obligation to ensure that it possess subject matter jurisdiction and may raise the issue *sua sponte* at any time. FED. R. CIV. P. 12(h)(3); *Louisiana Sportsmen All. v. Vilsack*, 583 F.App'x 379, 380 (5th Cir. 2014). While it would be improper to grant Delta Southern's motion to dismiss on the basis that the Development District has failed to state a claim, dismissal is appropriate on grounds that this court lacks subject matter jurisdiction over the controversy.

Accordingly, it is RECOMMENDED that Delta Southern's motion to dismiss be denied to the extent it Defendant moves under Rule 12(b)(6), the Court *sua sponte* find it lacks subject

County, 798 F.2d 736, 741 (5th Cir. 1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

⁶ While not entirely relevant at the moment, review of STB decisions is directed to the court of appeals, not the district courts. *See* 28 U.S.C. §§ 2321, 2342.

matter jurisdiction, and the motion to dismiss be granted in part to the extent it seeks dismissal of the suit.⁷

Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that Plaintiff Northeast Louisiana Railroad Development District's motion to remand [doc. #9] be **DENIED**.

IT IS FURTHER RECOMMENDED that the Court *sua sponte* find it lacks subject matter jurisdiction over the instant suit.

IT IS FURTHER RECOMMENDED that Defendant Delta Southern Railroad Inc.'s motion to dismiss [doc. #5] be **DENIED IN PART** to the extent it moves under Federal Rule of Civil Procedure 12(b)(6), **GRANTED IN PART** to the extent it seeks dismissal, and the suit be **DISMISSED WITHOUT PREJUDICE**.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and FED. R. CIV. P. 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS

⁷ If the STB were to determine it does not have jurisdiction over this controversy, the matter may return to this Court to be disposed of in an appropriate manner.

**REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL
BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM
ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS
AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.**

In Chambers, at Monroe, Louisiana, on this 24th day of May, 2024.



KAYLA DYE MCCLUSKY
UNITED STATES MAGISTRATE JUDGE

FD No. 36809

Exhibit No. 6

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**NORTHEAST LOUISIANA RAILROAD
DEVELOPMENT DISTRICT**

CIV. ACTION NO. 3:23-01783

VERSUS

JUDGE TERRY A. DOUGHTY

DELTA SOUTHERN RAILROAD INC

MAG. JUDGE KAYLA D. MCCLUSKY

JUDGMENT

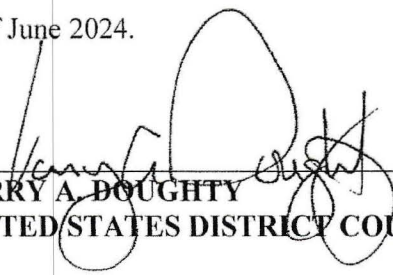
The Report and Recommendation of the Magistrate Judge [Doc. No. 23] having been considered, together with the Objection [Doc. No. 24] filed by Plaintiff, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS ORDERED that Plaintiff Northeast Louisiana Railroad Development District's Motion to Remand [Doc. No. 9] is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court *sua sponte* has found that it lacks subject matter jurisdiction over the instant suit.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Delta Southern Railroad Inc.'s Motion to Dismiss [Doc. No. 5] is **DENIED IN PART** to the extent it moves under Federal Rule of Civil Procedure 12(b)(6), and **GRANTED IN PART** to the extent it seeks dismissal. Therefore, this suit is **DISMISSED WITHOUT PREJUDICE**.

MONROE, LOUISIANA this 10th day of June 2024.



TERRY A. DOUGHTY
UNITED STATES DISTRICT COURT