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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC
PETITION FOR DECLARATORY ORDER

STATE OF WISCONSIN'S REQUEST FOR LEAVE TO FILE REPLY AND REPLY
TO PETITIONER'S REPLY TO STATE OF WISCONSIN'S MOTION TO
LIFT ABEYANCE

Josh Kaul
Attorney General
17 West Main Street
Madison, Wisconsin 53707

Zachary B. Corrigan
Assistant Attorney General
17 West Main Street
Madison, Wisconsin 53707
(608) 266-1677
CorriganZB@doj.state.wi.us

Attorneys for State of Wisconsin

On December 9, 2024, the Respondent State of Wisconsin (State) filed a Motion to Lift Abeyance in the above-docketed matter, indicating that the settlement negotiations had reached a seeming impasse but further stating that the Petition for Declaratory Order (Petition) should still be denied as premature. On December 27, 2024, Petitioner filed a Reply to the State's Motion to Lift Abeyance (Petitioner's Reply) to address the State's contention that the Petition is premature. The State files the following Reply in response to the Petitioner's Reply to address and correct certain statements and arguments made in Petitioner's Reply and requests that the Board accept the Reply in the interest of a complete record.

Petitioner's Reply makes two main arguments for why the Board should not dismiss the Petition or hold it in abeyance as premature. Neither has any merits.

I. The Petition Should be Dismissed Regardless of Whether a State Action Is Presently Pending.

Petitioner claims that Board should not dismiss its the Petition or hold it in abeyance for the resolution of state court proceedings because the Board "typically" denies those requests if the state court proceeding "is initiated after a petition for relief is filed at the [Board]." (Pet'r's Reply to State Wisconsin's Mot. to Lift Abeyance and State Wisconsin's Reply to Pet. Declaratory Order and Request Leave File Reply to Reply to Pet. Declaratory Order (Pet'r's Reply to Reply) 6.)

Petitioner cites no support for this so-called "abeyance principal," except *Metro. Council—Pet. for Declaratory Order (Metro. Council)* , FD 36178, slip op. at 4 (served May 22, 2018).) (Pet'r's Reply to Reply 6, 8.) It completely ignores the Board's decision in *City of Milwaukee—Pet. Declaratory Order*, cited in the State's Reply to the

Petition, where the Board had indeed declined to issue a declaratory order, even though no state proceeding had been filed at the time. Docket No. FD 35625, 2013 WL 1221975, at *2 (served Mar. 25, 2021).

Further, the *Metro. Council* decision upon which Petitioner solely relies is totally inapposite. Nothing in that decision indicates that the Board will typically deny requests to dismiss or hold in abeyance if a Petition is filed before a state court action. Instead, there the Board granted a petition for a declaratory order after the respondent removed its opposition and signaled as much by voluntarily dismissing a federal court case it had filed on the same day as its petition. *Id.* at 4 & n.7. In the present matter, in contrast, the State remains opposed to the Petition and maintains that state court is the better venue to determine the bevy of factual disputes and matters of state law.

As detailed in the State's Reply to the Petition, the State did not file its actions in state court prior to Petitioner's filing of the Petition because it believed the parties were in productive settlement negotiations, and it was thus quite surprised by the Petition. (Reply State Wisconsin (State's Reply) 17.) There is no basis for Petitioner's suggestions that the State's good-faith efforts to first engage in settlement discussions before filing a state court action somehow make the matter more ripe for a Board decision. And, even if this were true, now that the negotiations are at a seeming impasse, there is no reason that the Board could not temporarily deny the State's motion to lift the current stay until the State files its state court actions, at

which time the Board could dismiss or enter a long-term stay until a state court resolves the disputes.

In short, there is no reason that the Board cannot deny the Petition as premature simply because there are no state actions presently pending.

II. The Petition Should Be Dismissed for Further Factual Development by a State Court.

Petitioner's second argument is that the Board should not dismiss this case because "no predicate issues of state law or fact need be resolved for the [Board] to consider the Petition." (Pet'r's Reply to Reply 8.) This is wrong because there are, as detailed below, a substantial number of relevant disputed facts and matters of state law, contrary to Petitioner's blithe assertions that the "relevant facts in this proceeding are . . . not in dispute." (Pet'r's Reply to Reply 2.) The Board has denied petitions for declaratory orders in precisely the same situations, enabling the state court or Board to make its preemption determination after further factual development.

Chief among such cases is *CSX Transp., Inc.—Pet. Declaratory Order (CSX)*, 2016 WL 787578 (served Feb. 29, 2016). Like in *CSX*, "the facts have not been fully developed" in the present case, as the parties have not yet engaged in discovery or trial, making "the state court . . . an appropriate forum to engage in such fact-finding." 2016 WL 787578, at *5.

Petitioner attempts to distinguish *CSX*, stating that "[i]t is the design of the structural repair to the rail bridge with which the State takes issue—not any waste or debris from the railroad (there are no such allegations here, nor could there be)."

(Pet'r's Reply to Reply 7–8.) But this conclusory statement merely serves to highlight the deep factual and legal disputes between the State and Petitioner in this matter. Just like in *CSX*, these need to be resolved to “enable the Board or a court to determine whether the state or local action falls within a category subject to categorical preemption, or is subject to as applied preemption, or is not subject to preemption at all.” *CSX*, 2016 WL 787578 at *4.

The following are several examples of such disputes, falling into four categories.

First, just like in *CSX*, the State disputes that after-the-fact Chapter 30 permits and enforcement actions are preempted by the ICCTA because they seek to remedy harms caused by the improper design, construction, and maintenance of the rail line, like in *Thomas Tubbs, et al.*, No. FD 35792, 2014 WL 5508153, at *1 (served Oct. 31, 2014), *aff'd*, *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015). *CSX*, 2016 WL 787578, at *4. Rather, the State contends that they are like the state claims in *Emerson v. Kansas City S. Ry. Co.*, which were not preempted because no provision of the ICCTA gives the Board the “authority to dictate how the Railroad should dispose of detritus or maintain drainage ditch vegetation.” 503 F.3d 1126, 1132 (10th Cir. 2007).

The State seeks only to regulate the harm that Petitioner's placement of the grout mats on the riverbed caused to the public's use and enjoyment of this public trust resource. It does not seek to regulate the “design of the grout mats,” contrary to Petitioner's contentions, as this is outside of the State's Chapter 30 authority. Indeed,

the fact that Petitioner correctly indicates that the State does not generally challenge the use of grout mats as an “important functional engineering structure” actually underscores how the State only seeks to regulate the grout mats’ placement and resulting harm, rather than their design. (*Contra* Pet’r’s Reply to Reply 10.)

Here the Petitioner’s placement of the cementitious grout mats on the Menomonee riverbed, even if done deliberately (as Petitioner concedes), is in essence pollution that has concretized the riverbed, substantially increased water velocities and the river’s flooding potential, and impeded fish passage. The criteria that the Department of Natural Resources (DNR) uses to evaluate whether to grant or conditionally grant a Chapter 30 permit—such as whether the activity will reduce the flood flow capacity of the river or will be detrimental to the public interest because it will harm wildlife habitat, prevent recreational activities, or pollute the water (*see* State’s Reply 25 (discussing the criteria under Wis. Stat. § 30.12(3m)(c)1.–3.))—are only, at best, incidentally related to the Board’s authority over rail transportation.

The ICCTA has no provisions dictating how railroads place structures or materials off their property and onto state public trust property. Such activities are thus like the depositing of detritus in drainage ditches that was the target of the state’s claims in *Emerson*. As such, these are the types of activities that courts and the Board have repeatedly held are not categorically preempted under the ICCTA.

Second, this case has several unique factual disputes that were not present in *CSX*—making it an even better candidate for dismissal than that case was. The State strongly disputes the contention that Petitioner’s placement of grout mats was

“within the existing railroad right of way” (Pet’r’s Reply to Reply 14), which Petitioner asserts without any support, rather than on the riverbed that the State holds in trust for the public. (*See* State’s Reply 4.) The State also disputes Petitioner’s claims that the State “insists its Chapter 30 pre-construction permit is not actually a pre-construction requirement, even though [the State] is threatening enforcement actions based on [Petitioner]’s failure to obtain a permit.” (Pet’r’s Reply to Reply 5.) In reality, Chapter 30 allows for issuance of permits after construction. And the State’s draft complaint alleges that Petitioner only has violated Chapter 30 for “deposit[ing] or caus[ing] grout mats to be deposited upon the bed of the Menomonee River without a Chapter 30 Permit.” (Rittmeyer V.S. Ex. 17 ¶ 59.) The violation runs from the time when Petitioner “[c]onstruct[ed] or place[d] any structure or deposits any material in navigable waters.” (*Id.* ¶ 61.) The State alleges no separate violation for the company’s failure to obtain a pre-construction permit, independent from its placement of the grout mats in the navigable waters. These factual disputes alone demonstrate that the preemption analysis could benefit from further factual development.

Third, there are disputed predicate issues of State law in this case. Petitioner is wrong when it says that “State property law rights are not at issue, and the State has conceded that the railroad may place structures in the waterway to protect the bridge abutments.” (Pet’r’s Reply to Reply 14.) Under Chapter 30, the State must ascertain whether a particular structure encroaches on a particular navigable waterway in a way that undermines the public’s particular use and enjoyment of such

waterway. The State can then deny permits or issue them with conditions to conform to Wis. Stat. § 30.12(3m)(c)1.–3. and avoid conflicting uses. That the State does not flatly prohibit the placement of many structures on public trust resources—whether to protect bridge abutments or for other private purposes—supports its contention that its Chapter 30 enforcement authority should not be found categorically preempted. This is because whether the placement of a structure in a navigable waterway amounts to a violation of Chapter 30 is dependent on the encroachment and conflicting uses. This makes it akin to other state property actions, such as those for ejectment and trespass—where, *e.g.*, it is no defense that the trespasser had permission to be on the property at a different time, for a different purpose, or a different area.¹ With such property disputes, courts, particularly the Seventh Circuit, have refused to apply a categorical approach because they “necessarily var[y] with the facts of the case and the specific property.” *Union Pac. R.R. Co., v. Chicago Transit Auth.*, 647 F.3d 675, 679–80 (7th Cir. 2011).

Fourth, the State disputes that Petitioner has met its fact-intensive burden of showing that the Chapter 30 permit and enforcement case are as-applied preempted because they prevent or unreasonably burden railroad operations. For example, contrary to Petitioner’s assertions that the State is demanding that the company employ rip rap as its “preferred method” to armor parts of the bridge (*see* Pet’r’s Reply to Reply 3), the State merely contends that Petitioner has not shown that the permanent placement of all three grout mats is the only alternative to achieve

¹ *See* Restatement (Second) of Torts §§ 168–71 (1965).

Petitioner's stated purposes, and why other alternatives would not equally serve the same purposes, such as excavating the channel to use rip-rap, lowering the elevation of grout mats, or removing parts of the mats. (See State's Reply 32.) Such considerations are particularly important given DNR's determination that the grout mats are presently having serious negative impacts on the environment.² The State also contends that Petitioner has not met its burden of showing that the State's demands for it to consider alternatives to obtain a Chapter 30 permit serves to prevent or unreasonably burden railroad operations, given that the Petitioner has continued its activities on the bridge, unabated since the dispute began.

Given all these unresolved issues, the Board should dismiss the Petition so that the Board or state court can determine the preemption issues based on a more fully developed factual record.

² Resolving these issues will also enable the Board or state court to assess whether Petitioner has met its burden of demonstrating that the State's demands that the railroad obtain a Water Quality Certification adhering to the Chapter 30 public interest criteria and its related enforcement action are preempted under the ICCTA because they unduly restrict the railroad from conducting its operations or burdened interstate commerce. (See State's Reply 21–42.)

Dated this 16th day of January, 2025.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Zachary B. Corrigan

ZACHARY B. CORRIGAN
Assistant Attorney General
State Bar # 1116596

Attorneys for Plaintiff the State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1677
(608) 294-2907 (Fax)
corriganzb@doj.state.wi.us

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2025, a copy of the foregoing was served via e-mail upon the following:

Charles W. Webster
Senior Counsel
CPKC
11306 Franklin Ave
Franklin Park, IL 60131
(630) 860-4161
Charles.Webster@cpkcr.com

Michelle Sullivan
Legal Counsel – US
CPKC
120 S. Sixth Street #800
Minneapolis, MN 55402
(612) 594-4738
Michelle.Sullivan@cpkcr.com

David F. Rifkind
STINSON LLP
1775 Pennsylvania Avenue NW, Suite
800
Washington, DC 20006
(202) 785-9100
David.Rifkind@stinson.com

Andrew Davis
Joshua Poertner
STINSON LLP
50 South Sixth Street, Suite 2600
Minneapolis, MN 55402
(612) 335-1466
Andrew.Davis@stinson.com
Joshua.Poertner@stinson.com

Amber L. McDonald
Association of American Railroads
425 3rd Street SW
Suite 1000
Washington, DC 20024
United States
(202)639-2507
amcdonald@aar.org

/s/ Zachary B. Corrigan
ZACHARY B. CORRIGAN
Assistant Attorney General
State Bar #1116596