

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CITY OF SILOAM SPRINGS, ARKANSAS,
A Municipal Corporation

PLAINTIFF

v. Civil No. 12-5140

KANSAS CITY SOUTHERN RAILWAY COMPANY

DEFENDANT

O R D E R

Now on this 10th day of September, 2012, come on for consideration Plaintiff's Motion to Remand (document #10), and defendant's Motion To Dismiss (document #12), and from said motions, and the responses thereto, the Court finds and orders as follows:

1. In this condemnation action, the City of Siloam Springs, Arkansas ("City") seeks to exercise its power of eminent domain to acquire a permanent trail easement over land running underneath a railroad bridge owned by the Kansas City Southern Railway Company ("KCSR").

2. The City originally filed this action in the Circuit Court of Benton County, Arkansas on June 8, 2012.¹ It was removed to this Court by KCSR on July 6, 2012. The City now seeks to remand the matter to state court, insisting that federal jurisdiction is lacking over this state law condemnation action.

¹This is the second condemnation action pertaining to the recreational trail easement which is the subject of the instant action. The City's previous action, City of Siloam Springs v. Kansas City Southern Transport Co., by the Kansas City Southern Railway Company, Civil No. 11-5233 (W.D. Ark. 2012), was dismissed for lack of subject matter jurisdiction by this Court on February 14, 2012.

3. KCSR, however, argues that the matter is preempted by federal law and therefore moves to dismiss for lack of subject-matter jurisdiction, pursuant to **F.R.C.P. 12(b)(1)**. It contends that jurisdiction to determine the issue lies with the Surface Transportation Board ("STB") under **49 U.S.C. § 10501(b)**, which grants the STB exclusive jurisdiction over "the construction, acquisition, operation, 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."

4. The City responds that **§ 10501(b)** is not as sweeping as claimed by KCSR, in that state laws -- such as those providing for eminent domain -- are only preempted where their application would "prevent or unreasonably interfere with railroad operations," citing **Maumee & W.R.R. Corp. and RMW Ventures, LLC - Petition for Declaratory Order**, 2004 WL 395835 (S.T.B., March 2, 2004).

5. The statute in question, **§ 10501(b)(1)**, provides that

[t]he jurisdiction of the Board over -- (1) transportation by rail carriers, and the remedies provided in this part with respect to . . . facilities of such carriers; and (2) the . . . operation . . . of . . . facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. 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.

6. The STB has explained the reach of **§ 10501** preemption as

follows:

Section 10501(b) . . . shields railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would unreasonably interfere with or discriminate against rail operations. . . . But state or local authorities may take action when it only incidentally affects railroad property. See, e.g., N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-54 (34d Cir. 2007) (\$ 10501(b) preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. . . .")

Allegheny Valley Railroad Company -- Petition For Declaratory Order, 2011 WL 1546589 (S.T.B., April 21, 2011).

7. "The preemptive effect of a federal statute is a question of law," and "[t]he party asserting federal preemption has the burden of persuasion." Elam v. Kansas City Southern Ry. Co., 635 F.3d 796, 802 (5th Cir. 2011) (holding that § 10501 only completely preempts claims attempting to "manage or govern a railroad's decisions in the economic realm").

In cases involving state laws of eminent domain, particularly those involving non-exclusive easements for routine at-grade crossings, courts have held that § 10501(b) does not preempt such laws unless the easement would "impede rail operations or pose undue safety risks." New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 333 (5th Cir. 2008), citing cases, including City of Lincoln v. Surface Transportation Board, 414 F.3d 858, 863 (8th Cir. 2005).

In light of the foregoing authorities, the Court believes that preemption applies in this case if the easement sought by the City "would unreasonably interfere with" KCSR rail operations, but not required if it "only incidentally affects" KCSR railroad property.

8. In support of its Motion To Dismiss, KCSR offers the Amended Affidavit of Allen Pepper² ("Pepper") and the Declaration Under Penalty of Perjury of Srikanth Honnur ("Honnur").

(a) Pepper states that, in his capacity as U.S. Director of Public Safety for KCSR, he has considered the City's proposal for a "recreational trail under a bridge on the KCSR mainline in Siloam Springs," and specifically avers the following:

- * that the bridge is a 172' ballast deck timber bridge built in 1918;

- * that approximately twenty trains cross it each day;

- * that the trains that cross the bridge travel between 25 to 40 miles per hour;

- * that trail users would be exposed to hazards associated with rail transportation;

- * that although the use of corrugated roofing material may provide some protection from the danger of small objects, the roof would provide little protection from large, heavy objects; and,

²The Amended Affidavit of Allen Pepper was substituted in place of the Affidavit of Allen Pepper as Exhibit 1 to KCSR's Motion to Dismiss following this Court's text only order granting KCSR's Unopposed Motion to Substitute Amended Affidavit with Brief Incorporated (document #20).

* that constructing the proposed corrugated roof would interfere with KCSR's ability to operate the bridge, specifically KCSR's ability to inspect and maintain the bridge and its supporting structures.

(b) Further, Honnur, in his capacity as a bridge engineer and the KCSR Track and Bridge Construction Director, states:

* that "at some point in the future, this bridge will be replaced with a new bridge;"

* that destruction of the trail and proposed corrugated metal roofing will be required when the bridge is replaced or repaired;

* that KCSR will need the proposed location of the recreational trail for the construction and maintenance or improvements to its railway lines in the future;

* that KCSR may need to reinforce and repair the bridge prior to replacement through the installation of intermediate support bents; and, the installation of intermediate support bents would require removal of the proposed roofing structure;

* that the construction of the trail and proposed roofing structure could cause delays in repair response time; which could, in turn, potentially cause a collapse in the bridge; and

* that construction of the trail could interfere with water flow of an adjacent waterway and the potential need of KCSR

to widen the channel of that waterway to increase the capacity of the channel.

9. The City presents the Affidavit testimony of Randy Atkinson, who serves as the City's Public Works Director. Atkinson states, in pertinent part, that -- based on studies -- underpass rail crossings, such as the one proposed by the recreational trail, are far safer than at-grade crossings for pedestrians and bicyclists.

10. Based upon the submissions, it would appear to the Court that the proposed trail easement contemplates structural modifications to a railroad bridge -- which is unquestionably a "facility" of KCSR. In the Court's view, those structural modifications -- and the potential implications those structural modifications have on KCSR's ability to inspect and maintain the bridge -- constitute more than an "incidental effect" on the operation of the railroad.

Further, the proposed trail easement would allow pedestrians and bicyclists to cross under the track while trains are passing by overhead. Despite the proposed roofing structure, the Court believes that arrangement would still present the risks that some sort of debris -- from passing trains or from the bridge itself -- might fall and strike the trail users. Such risks expose not only the trail users, but also the railroad.

11. The City argues that at-grade crossings are considered

more dangerous than underpass crossings which, of course, may well be true. However, the issue before the Court is whether this proposed crossing will "impede rail operations or pose undue safety risks" -- not whether this proposed form of crossing will pose less of a safety risk than some other form.

12. In light of the foregoing, the Court concludes that the case falls within the ambit of 49 U.S.C. § 10501(b) -- thus preempting state law and placing exclusive jurisdiction of the matter with the Surface Transportation Board per that statute. It further concludes that, in these circumstances, the motion to remand should be denied and this case should be dismissed because the Court lacks subject matter jurisdiction.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand (document #10) is denied.

IT IS FURTHER ORDERED that defendant's Motion To Dismiss (document #12) is granted, and this matter is dismissed without prejudice.

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CITY OF NORTH LITTLE ROCK,
ARKANSAS

PLAINTIFF

v.

No. 4:10CV01689 JLH

UNION PACIFIC RAILROAD COMPANY;
and ARKANSAS MIDLAND RAILROAD
COMPANY, INC.

DEFENDANTS

OPINION AND ORDER

The City of North Little Rock, Arkansas, commenced this action in the Circuit Court of Pulaski County, Arkansas, seeking to acquire an easement on railroad property for a pedestrian and bicycle trail through the power of eminent domain. The defendants removed the action to this Court pursuant to 28 U.S.C. § 1441. Subsequently, Arkansas Midland Railroad Company filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. 12(b)(1) arguing that the Interstate Commerce Commission Termination Act of 1995 vests exclusive jurisdiction over the action in the Surface Transportation Board, preempts Arkansas law, and divests both state and federal courts of jurisdiction. Union Pacific Railroad Company filed a motion to dismiss pursuant to Fed. R. Civ. 12(b)(6) making the same arguments as Midland and adding that North Little Rock's proposed taking violates the Dormant Commerce Clause of the United States Constitution and Section 22 of Article 2 of the Arkansas Constitution. Both defendants have incorporated each other's arguments into their own motions.

The property in question contains a 100 foot wide railroad right-of-way located on "certain lands lying southeast of East Washington Avenue and Vance Street in North Little Rock, Pulaski

County, Arkansas" owned by Union Pacific. Midland leases this property and operates a railroad line. According to the complaint, the City seeks:

A 30 foot wide right-of-way for a bike path/walking trail on lands owned by Union Pacific Railroad and leased to the Arkansas Midland Railroad, said lands lying in Section 6, Township 1 North, Range 11 West, and Section 31, Township 2 North, Range 11 West, and Spanish Grant #2431, all lying in the City of North Little Rock, Pulaski County, Arkansas, said easement centerline being more particularly described as follows:

Commencing at a point which is the intersection of the centerline of Baucum Pike (Hwy. #165) and the centerline of the Union Pacific Railroad property; thence N 67°30'00" West 21.0 feet; thence S 22° 30' 00" West 45.0 feet to the point of beginning, said point being 15 feet South of the Southerly right-of-way line of said Baucum Pike; thence N 67°30'00" West on a line that is 15 feet South of and parallel with said Southerly right-of-way of said Baucum Pike, a distance of 183.14 feet to the point of curvature of a 1,493.76 foot radius curve to the left; thence along said curve to the left, a chord bearing and distance of S 83°57'31" West 130.12 feet to the point of tangency; thence S 80°44'16" West and on a line that is 15 feet South of the North right-of-way of said Union Pacific Railroad Property, a distance of 3122.00 feet; thence N 68°59'44" West 90.00 feet; thence S 73°39'18" West 245.15 feet to the end of this easement, containing 59,113.15 square feet or 1.36 acres, more or less.

Midland is a short-line rail carrier operating on small, branch lines. It retrieves loaded railroad cars from shippers and delivers them to interstate carriers, such as Union Pacific, for transportation to destinations in other states. Midland has a two mile track, the Ashgrove lead, running through the property with the center of the track located 50 feet from the boundary of the property. The proposed easement cuts across the Ashgrove lead adjacent to Baucum Pike. It then runs alongside the track between the boundary of the railroads' property and the Ashgrove lead.

An additional track, the team track, separates from the Ashgrove lead and runs parallel with it. The team track is primarily used to park overflow railcars and for transloading, that is, moving product from railcars to trucks and vice versa. The center of the team track is 17 feet 7 inches from the center of the Ashgrove lead. A freight car on the team track normally extends another 5.5 feet

from the center of the team track. With a train upon it, the team track extends about 23 feet from the Ashgrove lead. Thus, there are only about 27 feet between the team track and the boundary of the railroads' property. The proposed 30 foot wide easement overlaps with the team track. Charles Laggan, vice president and general manager of Midland, testified that granting the easement would render the team track unusable.

Part of the railroad property at issue is adjacent to East Washington Avenue. Midland uses a portion of this area as a transloading facility. Trucks drive onto the railroads' property from East Washington Avenue to load cargo onto and to unload cargo from railroad cars located on the team track. The evidence established that the transloading operations use most or all of the railroads' property between the team track and Washington Avenue in this area. The proposed easement encroaches upon this area.

Midland operates a switch stand where the Ashgrove lead and the team track join. The switch stand extends beyond the tracks onto the property that would be taken by the proposed easement.

Should a derailment occur on the team track or the Ashgrove lead, the railroad would likely need to bring large equipment onto the proposed easement. In response to evidence that the City might build a fence to separate the bicycle trail from the railroad track, Laggan testified any fence would interfere with Midland's ability to bring in the large equipment needed in the rerailing process. Even the trail itself could constitute an obstacle because the necessary equipment would likely damage the trail. Laggan testified that the railroad switch itself is a high-risk area for derailments. Laggan also testified that the construction of a trail on the proposed easement would

severely impact Midland's ability to conduct transloading and switching operations and to deal with derailments.

The ICCTA states:

The jurisdiction of the Board 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, and facilities of such carriers; and

(2) the construction, acquisition, operation, 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,

is exclusive. 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). The term "transportation" has been defined broadly in the ICCTA to include:

(A) 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

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

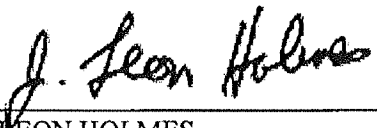
49 U.S.C. § 10102(9). Courts have said that " '[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations' than the language contained in Section 10501(b)." *Union Pac. R.R. Co. v. Chi. Transit Auth.*, No. 07CV229, 2009 WL 448897, *5 (N.D. Ill. Feb. 23, 2009) (citing *CSX Transp. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga.1996)). *See also City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998); *Soo Line R. Co. v. City of St. Paul*, 2010 WL 2540695, *3 (D. Minn. June 17, 2010); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *City of*

Creede, CO-Pet. for Declaratory Order, STB Finance Docket No. 34376, 2005 WL 1024483, *4 (S.T.B. May 3, 2005).

The evidence demonstrates that the proposed easement could interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and could interfere with efforts to address derailments. Whether to allow the taking is a decision that, on these facts, involves the regulation of rail transportation. Congress has vested exclusive jurisdiction over the regulation of rail transportation in the Surface Transportation Board.

Therefore, the defendants' motions to dismiss are GRANTED. Documents #4 and #9. This action is dismissed without prejudice.

IT IS SO ORDERED this 21st day of April, 2011.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, a municipal corporation)

Plaintiff,)

vs.)

UNION PACIFIC RAILROAD COMPANY,)
ARKANSAS STATE HIGHWAY)
COMMISSION, as Governing Body of the)
ARKANSAS STATE HIGHWAY AND)
TRANSPORTATION DEPARTMENT,)

CIVIL ACTION NO: 2:14-cv-02196-TLB

Defendants.

AFFIDAVIT OF STEPHEN KIFER

Comes Stephen Kifer, upon oath, and after being duly sworn, states as follows:

1. My name is Stephen "Steve" Earl Kifer. I was in the railroad industry for thirty-six years, hiring out with the Missouri Pacific Railroad Company in 1973 and staying on with the Union Pacific Railroad Company ("Union Pacific") after the companies merged. I became Manager of Operating Practices in 1987 and continued in that position until 2005, when I became Manager of Train Operations. I retired in 2009 from Union Pacific as a Manager of Train Operations. My responsibilities included train operations for Union Pacific's service in and through the City of Ozark. I was located in Van Buren, Arkansas.
2. During my time as Manager of Operating Practices in 2000 and 2001, I received numerous calls from an Ozark resident complaining about the only crossing in Ozark. Ultimately, Union Pacific removed the crossing.

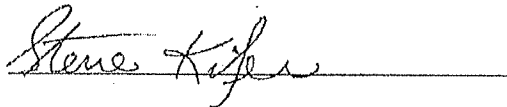
3. I have personal knowledge of the use of the facilities in Ozark before and after the removal of the crossing. The removal of the crossing resulted in a gain of approximately 600 feet to the Ozark siding. As a result, Union Pacific increased the use of the siding and used it in different ways. For example, the ability to place trains in the siding was increased by approximately 12 cars. Union Pacific was then able to use the siding for train meets involving the local trains. As background, a "local" is a train that services a local industry. Union Pacific began using the siding for train meets by placing the local trains in the siding, which freed up the main line for interstate trains.

4. Union Pacific was also able to increase the amount of maintenance of way equipment (equipment used to maintain the tracks and facilities) it stored in the siding. Thus, maintenance of way crews could avoid tying up the main line and other sidings with equipment, allowing trains to run on the main line more efficiently.

5. In addition, Union Pacific was able to store work trains (smaller trains that carry rock, ties, rails and the like that are used for maintaining the tracks) in the siding, which again freed up the main line and other sidings, resulting in more efficient operations.

6. With the increased footage after the removal of the crossing, Union Pacific changed its operations and began using the siding in ways that were not previously available, as outlined above.

Further, Affiant sayith not.

A handwritten signature in cursive script, appearing to read "Steve Kifer", is written over a horizontal line.

Steve Kifer

ACKNOWLEDGEMENT

STATE OF ARKANSAS)

)ss.

COUNTY OF Crawford

On this day personally appeared before me, the undersigned Notary Public within and for the County and State aforesaid, duly qualified, commissioned, and acting _____, to me well known as the AFFIANT, in the foregoing AFFIDAVIT and stated that he had executed the same for the purposes therein mentioned and set forth.

IN WITNESS WHEREOF, I set my hand and official seal as such Notary Public on this 5th day of December, 2014.

Jon-Erik Ian Garrido

Notary Public

My Commission Expires: 7/10/2024

(SEAL)

