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December 21, 2016

BY E-FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-001

Re: *The Illinois State Toll Highway Authority – Petition for Declaratory Order*, STB
Docket FD 36075, Motion for Leave and Surreply to Limited Reply Statement of
the Soo Line Railroad Company d/b/a Canadian Pacific

Dear Ms. Brown:

The Illinois State Toll Highway Authority (the “Tollway”) respectfully submits this letter as a motion for leave and surreply to the Limited Reply Statement of the Soo Line Railroad Company d/b/a Canadian Pacific (“CP”), filed on December 9, 2016.

MOTION FOR LEAVE

Good cause exists for accepting the Tollway’s filing. Rather than submitting a substantive reply to the Tollway’s Petition for a Declaratory Order within the time specified by 49 CFR § 1104.13(a), CP submitted a “Limited Reply” asking the Surface Transportation Board (“Board” or “STB”) to dramatically enlarge the scope of this proceeding, grant CP permission to conduct four months of discovery, and extend the time for it to file a substantive reply statement. The Board should not be deprived of the material information contained herein responding to the affirmative requests contained in CP’s Limited Reply. Therefore, the Tollway respectfully asks the Board to accept and consider this surreply. *See, e.g., Michigan Air-Line Ry. Co. – Abandonment Exemption – in Oakland Cnty., Mich.*, AB 1053 (Sub-No. 1X) (STB served May 18, 2011) at 1 (surreply accepted where it “addresses allegations first asserted in reply, and because it establishes a more complete record”).

NEW RELIEF SOUGHT BY CP IN ITS LIMITED REPLY

On November 23, 2016, the Tollway filed its Petition for Declaratory Order and its request for expedited consideration. The Tollway is seeking a declaration that its eminent domain authority to condemn easements across CP property for the purpose of constructing standard highway bridges is not preempted under the Interstate Commerce Commission Termination Act (“ICCTA”). CP did not reply within the twenty day period allowed by 49 CFR § 1104.13(a). Instead, it submitted a “Limited Reply” containing three requests: (1) that the Board enlarge the scope of this proceeding to include other potential future elements of the Tollway’s entire Elgin O’Hare Western Access Project, a multibillion dollar highway improvement project (the

“EOWA”) of which the bridges are only one part; (2) allow CP four months to conduct discovery; and, (3) grant CP additional time to file a substantive reply statement, until thirty days after the completion of discovery or February 23, 2017 in the absence of discovery. Each of these requests, if granted by the Board, would severely prejudice the Tollway.

1. The Tollway’s Construction of the Western Access Interchange Does Not Involve Any Aspect of CP’s Bensenville Yard.

CP argues that if the Tollway constructs its Western Access Interchange it will be “on a collision course” with CP’s Bensenville Yard. (Limited Reply, p. 4.) Therefore, CP argues, the Board should evaluate whether crossing Bensenville Yard would unreasonably interfere with railroad operations before it decides whether preemption applies to the Western Access Interchange, a separate, preliminary phase of the EOWA project that has independent utility. CP’s contention suffers from several fatal flaws. First, this exact argument has already been rejected by the United States District Court for the Northern District of Illinois in *Soo Line Railroad Company, d/b/a Canadian Pacific v. The Illinois State Toll Highway Authority*, Case No. 15-cv-10328 (CP’s “Federal Lawsuit”). Second, construction of a highway crossing at Bensenville Yard is not “inevitable,” as CP claims, and the Tollway stipulated in its Petition that it will file another future petition if it decides to pursue that stage of the overall EOWA. Third, the Western Access Interchange is the lynchpin of the entire EOWA project, as it allows traffic to and from the west to flow north and south on a new highway at the edge of the airport, and opens up the western side of O’Hare Airport. These improvements are essential whether or not the southern traffic eventually crosses under the Bensenville Yard or merely merges onto an existing state highway north of the Yard.

CP’s Federal Lawsuit already addresses ICCTA preemption as it applies to the Bensenville Yard. Its complaint was dismissed by the Federal Court as premature based on the facts that the Tollway has not taken any of the legally prerequisite steps toward condemnation and that the Tollway’s plans for crossing Bensenville Yard “continue to evolve.” The Court wrote, “Because the Court cannot determine the extent to which railroad transportation would be prevented or unduly interfered with by a hypothetical condemnation of land the Authority wishes to acquire, any adjudication of this dispute would amount to an advisory opinion.” Ex. A, p. 8.

Even though CP’s complaint was limited to the Bensenville Yard, CP tried to use the Tollway’s work on the Western Access Interchange to prove it is inevitable the Tollway will eventually seek to cross Bensenville Yard, and urged the Court to determine whether preemption applied. The federal court rejected this contention too:

Canadian Pacific now seeks reconsideration. It contends that after the Court dismissed the case, two new developments ripened Canadian Pacific’s claims. First, Canadian Pacific discovered engineering plans that it says illustrate that the Authority fully intends to seize at least a portion of the Bensenville Yard. Second, the Authority initiated eminent domain proceedings to take property a short distance northwest of the Yard [*i.e.*, the Western Access Interchange]. Canadian Pacific’s argument is that taking this property – in addition to developing engineering plans and purchasing property adjacent to the Yard – boxes the

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Authority into its plan to direct the EOWA project through Bensenville Yard....As the Authority made clear both in its written response to Canadian Pacific's motion to reconsider and during oral argument before the Court, these developments do not establish that the Authority intends to exercise its eminent domain power. They do not compel the conclusion that condemnation is imminent or that the Authority has decided to go that route. Ex. B, p. 3-4.

In other words, the federal court determined it is not necessary to analyze whether preemption applies to Bensenville Yard simply because the Tollway is moving forward with the Western Access Interchange. CP has appealed this ruling to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals will therefore determine, at CP's request, whether the preemption analysis regarding Bensenville Yard should be conducted now or wait until the Tollway actually determines it wishes to cross under the Yard. If the Court of Appeals decides the issue should be analyzed now, it will remand the case to the District Court, which will determine whether preemption applies to Bensenville Yard.

In contrast, the Tollway's Petition here has nothing to do with Bensenville Yard. It merely seeks a declaration that condemnation for the purpose of constructing the Western Access Interchange is not preempted. The Western Access Interchange is a separate part of the overall project that is independently vital to the transportation needs of the metropolitan Chicago area. CP's request that this project be placed on hold while the Board considers a future, hypothetical stage of the overall project – a stage that is already under consideration in a federal lawsuit filed by CP – is a transparent attempt to block the entire project simply because one phase might affect its Yard at some point in the future.

As explained in the Tollway's Petition, CP is also wrong as a factual matter. Construction of the Western Access Interchange does not make a Bensenville Yard crossing either imminent or inevitable. The EOWA project has been segmented for planning and construction purposes into ten phases. (Petition, p. 14.) The Western Access Interchange is part of Phase 4, with work scheduled to be completed in 2019. (Petition, p. 15.) Work on Phases 9 and 10, which relate to Bensenville Yard, is not even contemplated until 2020 at the earliest. (Petition, p. 16-17.) The Tollway freely admits it aspires to extend the southern leg of its new Tollway underneath the western edge of Bensenville Yard. However, the current plan is for the new tollway to terminate north of Bensenville Yard, at IL Route 19, Irving Park Road. (Petition, p. 17.) As the Tollway explained in its Petition, the Bensenville Yard crossing may ultimately prove economically or politically unworkable. However, if the Tollway decides to pursue this phase of the EOWA project, the issue of preemption will be timely addressed either in CP's Federal Lawsuit or by this Board in response to a future petition.

If CP's request to expand these proceedings to include Bensenville Yard is granted, the impact on the entire EOWA project could be severe. Currently, the Tollway has only conceptual plans for the Bensenville Yard crossing. It will take Tollway engineers at least twelve months to develop type, size and location designs that would be sufficient for the Board to analyze the potential impact on the Yard. In the meantime, the Tollway would not be able to proceed with the Western Access Interchange, now deep into construction, and which has independent utility and is essential to modernization of O'Hare Airport. If this phase of the EOWA is put on hold while

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the parties and the Board wait to analyze Bensenville Yard, the entire project will be shut down. This is totally unnecessary and publicly damaging.

The Board should initiate a proceeding to address the Tollway's Petition and evaluate whether five standard highway bridges across CP mainline would unreasonably interfere with railroad operations. The issue whether this necessarily requires an examination of Bensenville Yard is already pending before a federal court of appeals, so there is no need to expand the scope of these proceedings. Given the extreme prejudice the Tollway would suffer if the proceedings are expanded, CP's request should be denied.

2. CP Does Not Require Any Discovery to Reply to the Tollway's Petition.

CP also requests 120 days to conduct discovery. In support, CP preliminarily identifies two areas in addition to the Bensenville Yard crossing it hopes to explore: whether alternative routes for the tollways exist; and, whether the Tollway's estimates of traffic on the CP mainlines are accurate. CP's claims to need discovery into these areas are disingenuous.

As explained in the Tollway's Petition, the Federal Highway Administration, the Illinois Department of Transportation, and the Tollway have been analyzing and studying the EOWA project since at least 2007. (*See*, Petition, p. 5-14.) Multiple alternative routes were considered in the course of preparing the Phase I and Phase II Environmental Impact Statements but were rejected for a variety of economic, environmental, and logistical reasons. CP was fully aware of, and consulted during the development of, these plans. In addition, the Phase I and II EISs are publicly available. CP's claim to need discovery to determine whether alternative routes exist is specious.

CP's request to conduct discovery of the Tollway's expert consultant, R.L. Banks & Associates is equally unsupportable. R.L. Banks attempted to analyze the impact on CP traffic during construction of the Western Access Interchange. R.L. Banks was forced to estimate CP traffic on the basis of video observation because CP does not make the information publicly available. CP certainly possesses information regarding its own operations sufficient to confirm or disprove R.L. Bank's conclusions. CP's request for discovery in this area appears designed merely to delay these proceedings.

Finally, CP asks for time to conduct discovery into the status of the Tollway's plans regarding Bensenville Yard. This discovery would only be necessary if the Board expands the scope of the proceedings, which it should not do. In addition, CP's request would surely lead to a protracted and contentious proceeding because the Tollway would also need to conduct discovery into CP's Bensenville Yard operations and future plans if this becomes part of the proceedings. 120 days, as requested by CP, would probably be insufficient to complete a thorough investigation and develop additional expert analysis. Given the Tollway's need for swift resolution of its right to construct the Western Access Interchange, this area of discovery would be more appropriate during a future proceeding, if necessary, in the event the Tollway determines it wishes to cross Bensenville Yard.

3. CP Should Submit a Substantive Reply so the Board May Expedite This Proceeding.

Finally, CP falsely accuses the Tollway of proposing a schedule designed for an advantage. The Tollway's proposed expedited schedule did no such thing – it is reasonable and guided by CP's eleventh hour about-face that has jeopardized completion of the Western Access Interchange, an ongoing multi-billion dollar infrastructure project now at the doorstep of O'Hare's western boundary. Pursuant to 49 CFR § 1104.13(a), CP was allowed 20 days to submit a reply, which is exactly what the Tollway proposed. The proposed Public Comment period is longer than required to allow consideration of CP's reply as well as the original Petition.

CP has already made a grab for extended time by submitting an atypical "Limited Reply." In addition, CP seeks an additional two and one-half months, even in the absence of discovery, to submit a reply. The Tollway has no objection to a reasonable extension, particularly during the holidays. CP should be ordered to submit its reply by January 31, 2017.

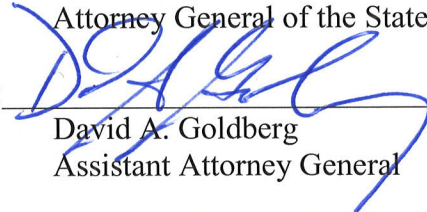
Respectfully Submitted,

The Illinois State Toll Highway Authority

By: Lisa Madigan

Attorney General of the State of Illinois

By:


David A. Goldberg

Assistant Attorney General

General Counsel

DAG/cjm
Encl.

FD 36075

**The Illinois State Toll Highway Authority's Motion for Leave and
Surreply to Limited Reply Statement of the Soo Line Railroad
Company d/b/a Canadian Pacific**

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SOO LINE RAILROAD COMPANY,

Plaintiff,

VS.

Case No. 15 C 10328

**ILLINOIS STATE TOLL
HIGHWAY AUTHORITY,**

Defendant.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiff Soo Line Railroad Company, doing business under the name of its parent company, Canadian Pacific Railway Company, has sued the Illinois State Toll Highway Authority (Authority). Canadian Pacific seeks preliminary and permanent injunctions prohibiting the Authority from condemning Canadian Pacific's right of way, property, and rail facilities located in Bensenville, Illinois. It contends that the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101, preempts the Illinois Toll Highway Act and the Illinois Eminent Domain Act insofar as they permit the Authority to condemn Canadian Pacific's property. Canadian Pacific also requests a declaratory judgment, pursuant to 42 U.S.C. § 1983, to the effect that any action the Authority might take to condemn or otherwise take possession of the Bensenville property is a violation of Canadian Pacific's constitutional rights. The Authority has moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). For the reasons stated below, the Court grants the Authority's

motion.

Background

For present purposes, the Court accepts as true the allegations contained in Canadian Pacific's complaint. *See Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003). The Court may also properly consider "documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

Canadian Pacific is a rail carrier that operates a rail transportation network from Vancouver, British Columbia, to gateway terminals in Chicago, Toronto, Montreal, and Albany, New York. It provides rail and intermodal transportation to destinations throughout North America, including connections to ports and other rail carriers. Like other rail carriers of its size, Canadian Pacific has been classified as a Class I rail carrier by the Surface Transportation Board of the United States Department of Transportation. Because Chicago is a crucial hub for the North American rail network, Canadian Pacific and six of the other seven Class I rail carriers meet regularly at the Greater Chicago Terminal, where they interchange as much as a quarter of all of the nation's rail volume every day.

Canadian Pacific's only Chicago-area switching terminal is located at the company's rail facility in Bensenville, Illinois. Canadian Pacific's Bensenville Yard spans approximately 320 acres and consists of roughly 74 miles of rail capacity spread over 119 tracks in six separate rail operation yards used for switching and intermodal traffic. The Yard also contains repair facilities, administrative buildings, a control tower, and a

turntable and tracks, which are used to reposition locomotives. On average, the Yard handles over 2,200 freight rail cars per day. According to Canadian Pacific, a significant amount of its business depends upon its continued use of the Bensenville Yard.

In 2010, the State of Illinois established an advisory council to explore the possibility of expanding the Elgin-O'Hare Expressway to connect it with Interstate-294. In June 2011, the advisory council recommended going ahead with the project, at which point the Authority started exploring options for the proposed project, which it titled the Elgin O'Hare Western Access (EOWA) project. In various proposals and plan maps that the Authority has generated over the last four-and-a-half years, it has consistently indicated that its plan would include a right of way running through the Bensenville Yard where Canadian Pacific's tracks and locomotive turntable are currently located. In its most recent proposed plans, the Authority has indicated that the project will require it to use roughly thirty-six acres of land contained in the Bensenville Yard property.

The wheels began to turn on the EOWA project a few years ago, and construction is already underway on various portions of the project. In April 2015, the Authority sent Canadian Pacific a letter captioned "Notice to Owner – Appraisal." See Def.'s Ex. 1, dkt. no. 17-1, at 2. In that letter, the Authority notified Canadian Pacific that Bensenville Yard was located "within the project area" for EOWA; Canadian Pacific's property "may be needed for construction of the EOWA improvements"; and the Authority would be sending a professional real estate appraiser to determine the property's fair market value. *Id.*

In July 2015, the Authority filed a petition with the Illinois Commerce Commission seeking approval to modify grade crossings owned by Canadian Pacific in another area

outside of the Bensenville Yard. During a hearing related to that petition in early August 2015, a representative of the Authority testified that EOWA would pass through the Bensenville Yard.

Finally, in September 2015, the Authority served Canadian Pacific with a letter captioned "Notice of Intent to Acquire with Railyard Modifications," in which the Authority indicated its continued interest in purchasing or otherwise acquiring a portion of the Bensenville Yard. Pl.'s Ex. F, dkt. no. 1-6, at 1. The Authority noted that it had "undertaken an extensive effort to address the current and future rail yard plans noted by the Canadian Pacific Railroad," and had accordingly "refashion[ed] some of the parcels after modifying [its] roadway design to ensure that only the land essential for the construction will be purchased." *Id.* In the letter, the Authority also stated that it wanted to meet with Canadian Pacific "to share [its] updated EOWA design plans, including the scaled back real estate take, and also to present [its] purchase offer." *Id.* Canadian Pacific insists that no portion of the Bensenville Yard is, or has ever been, for sale.

Canadian Pacific sued the Authority in November 2015. In its complaint, Canadian Pacific claims that the Authority intends to exercise the eminent domain power it was given under the Illinois Toll Highway Act, 605 ILCS 10/1, and the Illinois Eminent Domain Act, 735 ILCS 30/1-1-1, to circumvent Canadian Pacific's refusal to sell its property. As a regulated Class I rail carrier, Canadian Pacific contends that to the extent these laws authorize the Authority to take the property by eminent domain, they are preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101. Canadian Pacific seeks a declaratory judgment to that effect. It also seeks a declaratory judgment that such exercise of eminent domain "would constitute

an impermissible deprivation of Plaintiff's rights under the United States Constitution, Art. I § 8, in violation [of] 28 U.S.C. § 1983." Compl., dkt. no. 1, at 10. Lastly, Canadian Pacific requests an injunction prohibiting the Authority "from taking any further action seeking to condemn Plaintiff's right of way, property and rail facilities." *Id.* at 11. The Authority has moved to dismiss Canadian Pacific's complaint on the ground that there is no justiciable dispute between the parties.

Discussion

The ICCTA confers upon the Surface Transportation Board exclusive jurisdiction over the regulation of railroad transportation. See 49 U.S.C. § 10501(b). Railroad "transportation," according to the statute, includes railroad property, facilities, and equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). As the Seventh Circuit has observed, "Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011). Preemption under the ICCTA can be categorical or "as applied." *Id.* at 679. When a plaintiff mounts an "as applied" preemption challenge under the ICCTA, a court must determine "whether the condemnation of railroad property 'would prevent or unduly interfere' with railroad transportation." *Id.* at 680 (quoting *Norfolk S. Ry. Co.—Petition for Declaratory Order*, STB Finance Dkt. No. 35196, 2010 WL 691256, at *3 (S.T.B. Feb. 26, 2010)).

The Authority does not dispute that the ICCTA may preempt certain exercises of state-conferred authority to condemn property. But it seeks dismissal of Canadian

Pacific's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that no ripe justiciable dispute currently exists between the parties. Ripeness is a justiciability doctrine "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (internal quotation marks omitted) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57, n.18 (1993)). Ripeness "is peculiarly a question of timing," a doctrine that forbids plaintiffs from asserting injuries that "may depend on so many future events that a judicial opinion would be advice about remote contingencies." *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 538 (7th Cir. 2006) (internal citations and quotation marks omitted). "[W]hen it implicates the possibility of this Court issuing an advisory opinion," ripeness "is a question of subject matter jurisdiction under the case-or-controversy requirement." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008).

The Authority argues that this dispute is not ripe because the injuries Canadian Pacific anticipates sustaining are indefinite, remote, and not certain to accrue. First, the Authority notes that Canadian Pacific has not contended that the ICCTA categorically preempts Illinois's Toll Highway Act or Eminent Domain Act. Because Canadian Pacific has mounted only an "as applied" challenge, the Court can find preemption only to the extent the particular authority exercised under these laws in fact interferes with interstate rail operations. The Authority says that because it has taken none of the steps necessary to commence a condemnation action, the Court can have no way of knowing whether its actions will cause such interference.

Canadian Pacific, for its part, agrees that the ICCTA leaves room for states to

regulate and otherwise impact the ways Surface Transportation Board-regulated railway entities make use of their properties—in other words, Canadian Pacific indeed does not claim the ICCTA categorically preempts either of the Illinois statutes at issue. But Canadian Pacific argues that actual interference is imminent and certain. It points out that each and every proposed plan the Authority has come up with envisions purchasing or condemning more than thirty-five acres of land contained within the Bensenville Yard, even though Canadian Pacific has repeatedly told the Authority that the land is not for sale. Canadian Pacific also cites the fact that construction is well underway elsewhere, making this "an immediate problem for the Tollway itself as it must either convince the Court that its present plan does not somehow interfere with railroad operations, or it must figure out how it is going to build the south leg of the new toll road." Pl.'s Mem., dkt. no. 19, at 10.

In *Rock Energy Cooperative v. Village of Rockton*, 614 F.3d 745 (7th Cir. 2010), the Seventh Circuit confronted a substantially similar case. There, a local government ordinance conferred upon the Village of Rockton authority to acquire assets for local utilities by purchase or condemnation. *Id.* at 746. The Village threatened condemnation in letters to the owners of these assets, but it did not commence condemnation proceedings. *Id.* at 747. It did, however, file suit in state court to enforce an agreement in which the plaintiff had agreed to "explore the feasibility of [the Village's] acquiring the local utility assets" from the plaintiff. *Id.* at 746. Although the Seventh Circuit acknowledged that "it is typically no bar to ripeness if the government has only threatened enforcement, rather than actually brought a lawsuit," *id.* at 748, it nonetheless concluded that "the chance of future eminent-domain proceedings in [that]

case [was] too remote to support the [plaintiff's] claim." *Id.* at 749.

The same is true in this case. As the Authority points out, it has taken none of the steps that state law would require it to take were it in fact prepared to commence eminent-domain proceedings. Even in the most recent letter from the Authority to Canadian Pacific, the Authority did not indicate that it had commenced any action to condemn Canadian Pacific's property, nor did it suggest that it intended to do so soon. Rather, the Authority reiterated that it was interested in engaging in additional discussions with Canadian Pacific about the possible purchase of the land. Canadian Pacific contends that it has repeatedly and unequivocally told the Authority that its land is not for sale and that these refusals to deal distinguish this case from *Rock Energy*, in which the plaintiff had indicated some interest in negotiating with the locality. But Canadian Pacific's refusal to negotiate a purchase price does not render the potentiality of eventual condemnation proceedings imminent, nor does Canadian Pacific's belief that speedy judicial resolution is in the best interest of the Authority and its EOWA project.

The Authority's plans for the EOWA project continue to evolve, and it appears to still be interested in purchasing some portion of the Bensenville Yard from Canadian Pacific. Because the Court cannot determine the extent to which railroad transportation would be prevented or unduly interfered with by a hypothetical condemnation of the land the Authority wishes to acquire, any adjudication of this dispute would amount to an advisory opinion. This, the Constitution does not permit. See U.S. Const. Art. III § 1.

Conclusion

For the foregoing reasons, the Court grants defendant's motion to dismiss [dkt.

no. 13] and directs the Clerk to enter judgment dismissing the case for lack of subject matter jurisdiction.

A handwritten signature in black ink, appearing to read "Matthew Kennelly", is written over a horizontal line.

MATTHEW F. KENNELLY
United States District Judge

Date: March 29, 2016

FD 36075

**The Illinois State Toll Highway Authority's Motion for Leave and
Surreply to Limited Reply Statement of the Soo Line Railroad
Company d/b/a Canadian Pacific**

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SOO LINE RAILROAD COMPANY,

Plaintiff,

VS.

Case No. 15 C 10328

**ILLINOIS STATE TOLL
HIGHWAY AUTHORITY,**

Defendant.

ORDER

Plaintiff Soo Line Railroad Company, doing business under the name of its parent company, Canadian Pacific Railway Company, has sued the Illinois State Toll Highway Authority (Authority). Canadian Pacific alleges that the Authority has begun accepting bids on projects, developing engineering plans, and breaking ground on construction of the Elgin-O'Hare Western Access (EOWA) project, by which the Authority hopes to connect the Elgin-O'Hare Expressway with Interstate 294. Because Canadian Pacific fears that the Authority intends to effectuate a taking of its property to complete the project, it seeks preliminary and permanent injunctions prohibiting the Authority from condemning Canadian Pacific's right of way, property, and rail facilities located in Bensenville, Illinois. It contends that the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101, preempts the Illinois Toll Highway Act and the Illinois Eminent Domain Act insofar as they permit the Authority to condemn Canadian Pacific's property. Canadian Pacific also requests a declaratory judgment, pursuant to 42 U.S.C. § 1983, to the effect that any action the Authority might take to

condemn or otherwise take possession of the Bensenville property is a violation of Canadian Pacific's constitutional rights.

The Authority moved to dismiss for lack of subject matter jurisdiction on ripeness grounds. It argued that no justiciable case or controversy existed between the parties because the Authority had not taken steps toward initiating a condemnation proceeding. In fact, it said, it had not even finalized its construction plans and still hoped to negotiate the purchase of at least a portion of Canadian Pacific's property. The Authority also argued that the dispute was not ripe because it was not yet possible to determine whether the potential eventual condemnation of certain portions of Canadian Pacific's property would "prevent or unduly interfere with railroad transportation" and thereby be preempted. *Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011) (internal quotation marks omitted). The Authority explained that at present, it remained possible that by carefully designing plans, guaranteeing land swaps, and compensating Canadian Pacific to help it move any displaced tracks or turntables, no disruption would be caused.

In response, Canadian Pacific argued that under *Rock Energy Cooperative v. Village of Rockton*, 614 F.3d 745, 748 (7th Cir. 2010), "it is typically no bar to ripeness if the government has only threatened enforcement, rather than actually brought a lawsuit." It contended that unlike the municipality in *Rock Energy Cooperative*, the Authority was well on its way to condemning Canadian Pacific's property. The threat was real and immediate, it said, for two reasons. First, Canadian Pacific had already told the Authority repeatedly and consistently that its property was not for sale, yet the Authority continued to indicate in its plans that it would be building through the

Bensenville Yard. Second, the Authority had spent large sums of money and broken ground on construction in other locations leading to the Yard, making it inevitable that the Authority would soon need Canadian Pacific's property. As for the Authority's second argument, Canadian Pacific contended that it made no difference whether the full impact of an eventual condemnation could yet be determined, because courts have consistently found *any* condemnation of Surface Transportation Board-regulated railways' active rail property to be preempted.

The Court never reached the Authority's second argument because it agreed with its first. In its decision granting the Authority's motion to dismiss, the Court observed that the Authority had "taken none of the steps that state law would require it to take were it in fact prepared to commence eminent-domain proceedings" and that the Authority continued to represent to Canadian Pacific that it remained interested in negotiating the purchase of Canadian Pacific's property. *Soo Line R.R. Co. v. Ill. State Toll Highway Auth.*, No. 15 C 10328, 2016 WL 1215372, at *4 (N.D. Ill. Mar. 29, 2016). Although Canadian Pacific had no intention of selling its property, the Court noted that it remained possible that the Authority might eventually make an offer that Canadian Pacific would accept. The Court also accepted the Authority's representations that despite its expenditures of time, money, and resources on other portions of the project, it remained possible that the EOWA project would not cross Bensenville Yard. The Court granted the Authority's motion.

Canadian Pacific now seeks reconsideration. It contends that after the Court dismissed the case, two new developments ripened Canadian Pacific's claims. First, Canadian Pacific discovered engineering plans that it says illustrate that the Authority

fully intends to seize at least a portion of the Bensenville Yard. Second, the Authority initiated eminent domain proceedings to take property a short distance northwest of the Yard. Canadian Pacific's argument is that taking this property—in addition to developing engineering plans and purchasing property adjacent to the Yard—boxes the Authority into its plan to direct the EOWA project through Bensenville Yard. The railroad also continues to contend that the Court's decision legally incorrect.

This dispute remains unripe. Ripeness "hinges on 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Rock Energy Coop.*, 614 F.3d at 749 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Neither of these considerations weighs in Canadian Pacific's favor. First, the constitutionality of a hypothetical condemnation proceeding to take an unspecified piece of Canadian Pacific's property is not an issue that is currently fit for judicial determination. Even if one accepts for the sake of argument that any taking of active rail property is unconstitutional interference, the Authority has not indicated that it intends to effectuate a taking of active rail property. As the Authority made clear both in its written response to Canadian Pacific's motion to reconsider and during oral argument before the Court, these developments do not establish that the Authority intends to exercise its eminent domain power. They do not compel the conclusion that condemnation is imminent or that the Authority has decided to go that route.

The Authority has not made a final purchase offer, declared its development plans final, or otherwise signaled that it will soon initiate a forced sale. Whether Canadian Pacific will or will not accept the Authority's future offers remains to be seen; the fact that the railroad says it will not accept offers that have not yet been made is of

no consequence. Moreover, even if the Court could confirm with certainty Canadian Pacific's prediction that it will never accept any offer the Authority makes, no matter how good it is, the dispute would remain unripe. The Authority has represented to the Court that although it might seek to exercise its eminent domain power if Canadian Pacific rejects its offer, it might instead make changes to the EOWA project's planned route that would avoid the need to go over, under, or through the railroad's property. It is not within the Court's constitutional authority to determine whether one of many potentialities would be unlawful were it to come to pass.

Second, Canadian Pacific has not shown that withholding judicial consideration until further developments clarify the contours of this dispute would impose hardship on the parties. The Court asked Canadian Pacific's counsel during the motion hearing whether Canadian Pacific believed that its rights would be placed at greater risk by waiting to file this suit until it could say for certain that the Authority had made a decision that it would commence eminent domain proceedings. Canadian Pacific's response was that it did not, but that it wished to define the contours of its rights now rather than waiting. The only hardship Canadian Pacific has cited is the potential hardship the Authority might experience by spending millions of dollars in taxpayer money only to later discover that it can neither purchase nor condemn Canadian Pacific's active rail property. The Authority, however, has expressly disclaimed this hardship, telling the Court that although it would like very badly to secure at least a right of way over Canadian Pacific's property, the plans it has executed to this point would be the same whether it secures one or not.

For the foregoing reasons, the Court denies plaintiff's motion to reconsider [dkt.

no. 25].

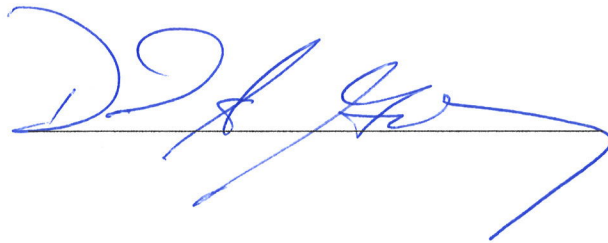

MATTHEW F. KENNELLY
United States District Judge

Date: June 12, 2016

CERTIFICATE OF SERVICE

I certify that I have this 21st day of December, 2016 served copies of **The Illinois State Toll Highway Authority's Motion for Leave and Surreply to Limited Reply Statement of the Soo Line Railroad Company d/b/a Canadian Pacific**, upon all parties of record in this proceeding, by FedEx Overnight Delivery:

David F. Rifkind
Stinson Leonard Street
1775 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006

A handwritten signature in blue ink, appearing to read 'D. F. Rifkind', is written over a horizontal line.