

June 23, 2003

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 34354, *Emergency Petition of Maumee & Western Railroad Corporation and RMW Ventures, LLC for Declaratory Order – Condemnation of Main Line Tracks by the City of Napoleon, Ohio*

Dear Secretary Williams:

Enclosed please find an original and ten (10) copies of the "Opposition to Motion for Procedural Order" respectfully submitted by the City of Napoleon in the above-referenced docket.

Also enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My office telephone number is (202) 331-8800.

Sincerely,



Jeffrey O. Moreno
Michael H. Higgins

*Attorneys for
The City of Napoleon*

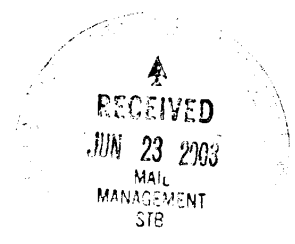
ENTERED
Office of Proceedings

JUN 27 2003

Part of
Public Record

208153

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB FINANCE DOCKET NO. 34354

**EMERGENCY PETITION OF MAUMEE & WESTERN
RAILROAD CORPORATION AND RMW VENTURES, LLC FOR DECLARATORY
ORDER – CONDEMNATION OF MAIN LINE TRACKS BY
THE CITY OF NAPOLEON, OHIO**

**THE CITY OF NAPOLEON’S
OPPOSITION TO MOTION FOR PROCEDURAL ORDER**

**ENTERED
Office of Proceedings
JUN 27 2003**

Comes now, the City of Napoleon (“Napoleon”), pursuant to 49 C.F.R. § 1104.13, and, through its undersigned counsel, submits its Opposition to the Motion for Procedural Order (the “Motion”) filed by Maumee & Western Railroad Corporation (“M&W”) and RMW Ventures, LLC (“RMW”) (collectively “Movants”) on June 9, 2003. The Board should deny and dismiss the Motion because it is both superfluous and improper. In support of its Opposition, Napoleon states:

1. The Motion is superfluous because it asks the Board to do something that it would ordinarily do in the event that it decides to institute a full declaratory proceeding in response to Movants’ petition filed on May 6, 2003. If, on the other hand, the Board declines to institute a full declaratory proceeding, then there is no need for a procedural schedule. Either way, the motion serves no purpose.

2. The content of the Motion reveals an ulterior motive: it is a poorly disguised, and an entirely impermissible, reply to a reply. For this reason alone, the Board should reject it. 49 C.F.R. § 1104.13(c).

3. In any event, Movants’ illicit sur-reply arguments are unavailing. The bald statement that “Congress has preempted the power of state courts to make [] regulatory

determinations with respect to railroad facilities and operations” is overbroad and simply untrue. Congress expressly reserved traditional state police powers from ICCTA preemption.¹ Thus, the states can, and do, order railroads to erect and maintain fencing, crossings, bridges, etc., as required for public welfare.² Movants’ general citations to the contrary are at best unpersuasive. In fact, the second citation³ undermines Movants’ arguments that states have no regulatory authority whatsoever and that railroads should be immunized from crossing expenditures. In that decision, the Board ordered Norfolk Southern to install certain crossing warning and safety devices “at its sole cost” and “subject to the approval of the Pennsylvania PUC.” If Petitioners are correct that states have no authority over crossings and that costs pose a serious threat to rail operations, the Board’s approval conditions are puzzling.⁴

4. Movant’s removal of Napoleon’s eminent domain action from the Common Pleas Court for Henry County, Ohio to federal district court provides no support for the Board to institute a declaratory proceeding. Under the “well-pleaded complaint rule,” remand to state court is a virtual certainty, given Movants’ entirely defective assertion of federal question jurisdiction based solely on their federal preemption defense. Beneficial Nat’l Bank v. Anderson, 539 U.S. ___, 123 S. Ct. 2058, 2062 (2003); Metropolitan Life Ins. v. Taylor, 481 U.S. 58, 63 (1987); Strong v. Teletronics Pacing Sys., 78 F.3d 256, 259 (6th Cir. 1996). When the lawsuit returns to state court, Movants will have the opportunity to present their preemption

¹ Under ICCTA’s jurisdictional provision, “[s]tates retain the police powers reserved by the Constitution,” despite comprehensive economic regulation and deregulation. H. Rep. No. 104-311 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808; See also H. Conf. Rep. No. 104-22 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 852 (ICCTA preemption does not relate to state laws that “generally do not collide with the scheme of economic regulation (and deregulation) of rail transportation.”)

² See Wheeling & Lake Erie Ry. v. Pennsylvania Pub. Utilities Comm., 778 A.2d 785, 791 (Pa. Comwlth. Ct. 2001) (“[W]e conclude that the PUC’s authority under the Code to regulate the safety of the subject bridge and allocate the costs of its reconstruction has not been preempted, either explicitly or implicitly by the ICC Termination Act.”); Oklahoma v. Burlington Northern and Santa Fe Ry., 24 P.3d 368, 371 (Okla. Civ. App. 2000) (upholding Oklahoma Corporation Commission order requiring BNSF to fence 3/10 mile portion of right-of-way).

³ STB Finance Docket No. 33928, Norfolk Southern Corp. and Norfolk Southern Ry.—Construction and Operation—In Indiana County, PA, 2003 STB Lexis 280 at *27 (served May 16, 2003).

⁴ Movants do not explain their first citation to the Board’s decision authorizing the CSX/NS/Conrail transaction. That the Board has imposed crossing safety measures on applicants pursuant to its authority to approve rail mergers does not support the argument that the Board should institute a declaratory proceeding, here, or that the Ohio court cannot act.

defense and will be subject to the protections of Ohio condemnation law that make STB involvement unnecessary.

WHEREFORE, the City of Napoleon, respectfully asks the Board to deny the Motion for Procedural Order requested by Movants and to dismiss their Emergency Petition for Declaratory Order.

Respectfully submitted,

The City of Napoleon

By its representatives,



Jeffrey O. Moreno
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

*Attorneys for
The City of Napoleon*

June 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 23rd day of June, 2003, a copy of the foregoing
The City of Napoleon's Opposition to Motion for Procedural Order by first-class mail, postage
prepaid, at the address set forth below:

Richard R. Wilson, Esq.
Richard R. Wilson, P.C.
Attorney at Law
127 Lexington Avenue, Suite 100
Altoona, PA 16601



Jeffrey O. Moreno