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Sandra Dearden, President

September 17, 2008

The Honorable Charles D. Nottingham
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

RE: STB Ex Parte No. 677, Common Carrier Obligation of Railroads

Dear Chairman Nottingham:

In our various filings in the above-referenced proceeding, we urged the Board to reassert the common carrier obligation of Class I railroads to maintain spur track connections for their shippers. We pointed to numerous instances in which the Class I's have been unilaterally abandoning spur tracks in order to evade their common carrier obligations to serve particular shippers. Indeed, Mr. Chairman, you specifically focused on this issue during the course of my oral presentation.

I thought you might be interested in reviewing the attached recent decision in the case of Port City Properties vs. Union Pacific. As you will note, this case is yet another example of a Class I railroad's successful effort to abandon service to a shipper by cutting off access to a spur track. The Appellate Court noted that the shipper had failed to timely raise the railroad's common carrier service obligation and, as such, the Court concluded that issue was waived for purposes of this case.

In my view, this case further exemplifies the need for this Board to express its view with respect to the railroads' obligations to maintain spur track connections as a part of their common carrier service obligations. This Board has been justifiably focused on providing avenues of rate relief for both small and large shippers through various rate guideline proceedings. However, these various avenues of rate relief will be effectively rendered moot if carriers can continue to pick and choose the shippers they will serve by the unilateral expedient of eliminating spur track access.

Very truly yours,

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C

Port City Properties v Union Pacific R. Co
C.A. 10 (Okla.), 2008.

United States Court of Appeals, Tenth Circuit.
PORT CITY PROPERTIES, an Oklahoma corporation d/b/a Hodges Warehouse; Alpine Properties, LLC, an Oklahoma limited liability company,
Plaintiffs-Appellants,

v

UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant-Appellee.
No. 06-5187.

March 10, 2008.

Background: Warehouse brought state tort and breach of contract claims against railroad that had ceased service on spur or industrial track through industrial park. The United States District Court for the Northern District of Oklahoma, H. Payne, J., dismissed state tort claims and denied preliminary injunction. Warehouse appealed.

Holdings: The Court of Appeals, Seymour, Circuit Judge, held that:

- (1) Interstate Commerce Commission Termination Act (ICCTA) completely preempted state tort claims;
- (2) railroad was not required to seek authorization from Surface Transportation Board (STB) to cease service on spur or industrial track;
- (3) warehouse would not likely suffer irreparable harm in absence of preliminary relief enjoining cessation of service, and
- (4) warehouse had no substantial likelihood of success on merits of its breach of contract claim.

Affirmed.

West Headnotes

[1] Federal Courts 170B ◀241

170B Federal Courts

170BIII Federal Question Jurisdiction

170BIII(D) Pleading

170Bk241 k. Allegations in Pleadings in General. Most Cited Cases

Railroads 320 ◀82(6)

320 Railroads

320V Right of Way and Other Interests in Land

320k82 Abandonment and Forfeiture of Land or Rights

320k82(6) k. Remedies of Parties or Persons Interested. Most Cited Cases

Railroads 320 ◀221

320 Railroads

320X Operation

320X(A) Duty to Operate

320k221 k. Injuries from Failure to Operate Road. Most Cited Cases

States 360 ◀18.21

360 States

360I Political Status and Relations

360I(B) Federal Supremacy, Preemption

360k18.21 k. Carriers; Railroads. Most Cited Cases

Interstate Commerce Commission Termination Act (ICCTA) completely preempted warehouse's state tort claims against railroad for ceasing rail service over spur or industrial track. 49 U.S.C.A. §§ 10501(b)(2), 10906

[2] Railroads 320 ◀9(1)

320 Railroads

320I Control and Regulation in General

320k9 Supervision by Public Officers

320k9(1) k. In General. Most Cited Cases

Factors determining whether section of track is extension of regular railroad line subject to jurisdiction of Surface Transportation Board (STB), as opposed to a spur or industrial track, include whether

railroad maintains train schedule or regular service over track, furnishes express, passenger, or mail service, maintains buildings, loading platforms, or an agent, and completes bills of lading; in addition, other relevant factors include whether track is used for anything other than industrial delivery, length of track, whether it services only a single customer, and whether customer requested the service. 49 U.S.C.A. § 10906.

[3] Federal Courts 170B ⇨34

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction, Determination and Waiver

170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases
Burden of establishing subject matter jurisdiction is on the party asserting jurisdiction.

[4] Railroads 320 ⇨9(1)

320 Railroads

320I Control and Regulation in General

320k9 Supervision by Public Officers

320k9(1) k. In General. Most Cited Cases
Track built into industrial park to service businesses there was spur or "industrial track," as opposed to extension of regular line subject to Surface Transportation Board (STB) jurisdiction. 49 U.S.C.A. § 10906.

[5] Railroads 320 ⇨82(1)

320 Railroads

320V Right of Way and Other Interests in Land

320k82 Abandonment and Forfeiture of Land or Rights

320k82(1) k. In General. Most Cited Cases
Railroad was not required to request authorization from Surface Transportation Board (STB) to abandon spur or industrial track in industrial park 49 U.S.C.A. § 10903(a)(1)(A)

[6] Injunction 212 ⇨138.31

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138 30 Property, Conveyances and Encumbrances

212k138 31 k. In General. Most Cited Cases

Warehouse would not likely suffer irreparable harm from loss of business in absence of preliminary relief enjoining railroad from ceasing to provide service over spur or industrial track in industrial park.

[7] Injunction 212 ⇨138.6

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138 6 k. Nature and Extent of Injury; Irreparable Injury. Most Cited Cases
Economic loss usually does not, in and of itself, constitute irreparable harm, so as to satisfy requirement for preliminary injunctive relief.

[8] Injunction 212 ⇨138.37

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138 37 k. In General. Most Cited Cases

Warehouse seeking preliminary injunction prohibiting railroad from ceasing service over spur or industrial track had no substantial likelihood of success on merits of its claim that abandonment would breach contract for rail service.

*1187 Kenneth L. Brune of Brune Law Firm, Tulsa,

OK, for Plaintiffs-Appellants.

Christopher D. Wolek (Tom L. Armstrong, Robert D. Hart, and Laura L. Eakens with him on the brief) of Gibbs Armstrong Borochoff Mullican & Hart, P.C., Tulsa, OK, for Defendants-Appellees.

Before KELLY, SEYMOUR, and MURPHY, Circuit Judges.

SEYMOUR, Circuit Judge.

Port City Properties, Inc. d/b/a Hodges Warehouse and Alpine Properties, LLC (collectively "Hodges") appeal the district court's denial of their request for a preliminary injunction against Union Pacific Railroad Company ("Union Pacific"). We affirm.

I

Hodges owns and operates a commercial public warehouse in an industrial park located in Tulsa, Oklahoma. An industrial rail track is routed through the park with rail service provided to Hodges' warehouse via an additional private track owned by Hodges. After Union Pacific determined the industrial rail track servicing the warehouse was no longer safe, it ceased rail service thereon. Hodges brought this action against Union Pacific, alleging breach of contract, tortious interference with business relations, and defamation. In pursuing those claims, Hodges moved for a preliminary injunction to enjoin Union Pacific from ceasing rail operations servicing his warehouse and from informing others that Hodges could not receive shipments by rail. Hodges also moved for an order directing Union Pacific to maintain and operate the line.

The matter was referred to a magistrate judge who held an evidentiary hearing on the motion for preliminary injunction. The judge issued a Report and Recommendation determining that all of Hodges' claims, except for the breach of contract claim, were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.* The judge also recommended that the district court deny Hodges' motion for preliminary

injunction based on the breach of contract claim. The district court adopted the Report and Recommendation and affirmed.

*1188 II

We review the district court's determination on jurisdiction *de novo*. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1241 (10th Cir. 2001). We review the district court's denial of a preliminary injunction for abuse of discretion. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001).

A. Jurisdiction

Section 10501(b) of the ICCTA broadly grants jurisdiction to the Surface Transportation Board ("STB") 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." 49 U.S.C. § 10501(b)(2). This broad jurisdictional grant is coupled with an express preemption clause mandating that "[e]xcept 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). As a consequence, jurisdiction over "spur, industrial, team, switching or side tracks, or facilities" rests solely with the STB. 49 U.S.C. § 10501(b)(2); *see also United Transp. Union III - Legis. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999). In 49 U.S.C. § 10906, however, Congress provided that entities may construct, transfer or operate spur or industrial tracks without STB approval. Hodges contends § 10906's withdrawal of authority from the STB creates a jurisdictional void, thereby permitting jurisdiction over state causes of action related to such tracks.

[1] To the contrary, § 10906 has been interpreted to preclude *all* regulation of industrial or spur tracks.

"When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management." *Cities of Auburn and Kent*, 2 S.T.B. 330, 1997 WL 362017 at *7 (1997); see also Report on ICCTA, H.R. Rep. No. 104-422, 104th Cong., 1st Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, pp. 850, 1995 U.S.C.A.N. 850 (explaining that § 10501(b)(2) was added "[i]n light of the exclusive Federal authority over auxiliary tracks and facilities ..."). In short, read together, § 10501 and § 10906 completely preempt Hodges' state law tort claims with respect to spur or industrial tracks. See, e.g., *PCI Transp. v. Fort Worth & Western R.R.*, 418 F.3d 535, 545 (5th Cir.2005) (ICCTA completely preempts non-contractual claims), *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir.2001) (ICCTA preempts claims of negligence and negligence per se with respect to railroad's alleged road blockages); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F.Supp.2d 326, 334 (D.Me.2003) (state law claims preempted by ICCTA); *South Dakota ex rel. South Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F.Supp.2d 919, 934-35 (D.S.D.2003) (state law claims for punitive damages and tortious interference preempted by ICCTA); *Guckenberg v. Wis. Cent. Ltd.*, 178 F.Supp.2d 954, 958 (E.D.Wis.2001) (state law nuisance claim preempted with respect to railway traffic issue), *Rushing v. Kan. City S. Ry. Co.*, 194 F.Supp.2d 493, 500-01 (S.D.Miss.2001) (ICCTA preempts state law nuisance and negligence claims intended to interfere with railroad's operation of switchyard).

[2] In an attempt to avoid this result, Hodges seems to argue the track at issue was not a spur or industrial track, but rather a regular railroad line subject to § 1189 STB jurisdiction. Factors used to determine whether a section of track is an extension of a regular railroad line, as opposed to a "spur" or "industrial" track, include whether the railroad

maintains a train schedule or regular service over the track, furnishes express, passenger, or mail service; maintains buildings, loading platforms, or an agent along the trackage; and who completes the bills of lading. See *Chicago, M. & St. P. & P.R. Co. v. Chicago & E.I.R. Co.*, 198 F.2d 8, 12 (7th Cir.1952). It is also relevant whether the track has been or is to be used for anything other than industrial delivery, see *La. & Ark. Ry. Co. v. Mo. Pac. R.R. Co.*, 288 F.Supp. 320, 323 (D.C.La.1968), the length of the track, whether the track serves only a single customer, and whether the customer requested the carrier to provide service. See *Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 612 (3d Cir.1991).

[3][4] The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. See *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir.1974). Hodges presented no evidence that the track was a main line within the meaning of the cases cited above. The only evidence that the track was something other than a spur or industrial track was the testimony of Hodges' owner, Dennis Kriz, who referred to it as a "lead track," a term we do not find in the statute. The evidence in the record establishes that the Katy Industrial Park was created in 1956. The Missouri-Kansas-Texas Railroad Company (the predecessor to Union Pacific) extended railroad tracks into the industrial park to service businesses located there. In 1966, the railroad contracted with Hodges to extend its "spur track" to connect with a "spur track" Hodges agreed to build on its property. *Apl't App.* at 218 (1966 Agreement). In 1999, when part of Union Pacific's "industrial lead track" in the Katy Industrial Park needed rehabilitation, Hodges agreed to pay \$62,000 to Union Pacific for the materials and work necessary for the railroad to repair the line. *Id.* at 196 (1999 Agreement). These documents reference the track at issue here and support the district court's conclusion that the track was an industrial or spur track.

[5] Hodges also argues against preemption on the

grounds that Union Pacific was required to obtain prior permission from the STB for abandonment of its service to the track pursuant to 49 U.S.C. § 10903(a)(1)(A) (rail carrier must file application with STB if it intends to "abandon any part of its railroad lines"). As discussed previously, the STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines. That authority is left entirely to railroad management who may contract services as they see fit. As a result, there was no requirement that Union Pacific request authorization for abandonment from the STB.

In sum, Congress granted exclusive jurisdiction to the STB over the construction, operation, and abandonment of spur or industrial lines, thereby precluding state regulation. Congress then specifically withdrew regulation of such lines from the STB, leaving their management solely to the respective railroads.

B. Preliminary Injunctive Relief Based on Breach of Contract

To obtain a preliminary injunction based on a contract, Hodges was required to meet the test established in this circuit:

It is well established that in order to obtain a preliminary injunction, the moving party must establish four factors: (1) it will suffer irreparable harm if the injunction is not granted, (2) its threatened injury outweighs the harm caused to the opposing party as a result of the injunction, (3) the injunction is not adverse to the public interest, and (4) it "1190 has a substantial likelihood of success on the merits of the case. In examining these factors, courts have consistently noted that because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.

Domimon Video Satellite, Inc. v Echostar Satellite Corp., 356 F.3d 1256, 1260 (10th Cir 2004) (citations and internal quotations omitted) "Likewise, because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Id.* (quotations and citations omitted).

[6][7] A showing of irreparable harm requires that the injury "be both certain and great, .. and that it must not be merely serious or substantial." *Prattis Band*, 253 F.3d at 1250 (internal citation and quotations omitted). The district court determined that Hodges failed to show irreparable harm. Having reviewed the record, we agree.^{FN1} Mr. Kriz testified that the rail cargo he receives is a "small part of [his] business." *Apl't App.* at 133. Further, he noted that loss of rail service was "not going to put [him] out of business, but it definitely [was] costing [him] money." *Id.* at 136. Mr. Kriz also admitted that Union Pacific made alternative arrangements for delivery of Hodges products and paid for them to be unloaded at another location a mile away. As the district court explained, Hodges' loss of business can be compensated in money damages. Economic loss "usually does not, in and of itself, constitute irreparable harm." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir 2003) (citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 2948.1, at 152-53 (2d. ed.1995)) Hodges has offered no evidence demonstrating the type of loss that satisfies the element of irreparable harm.

FN1 Hodges asserts the district court abused its discretion by limiting the scope of evidence it would consider in making its determination on Hodges' right to injunctive relief. But Hodges did not raise this issue in his objection to the Report and Recommendation and it was therefore waived. See *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir.1996) ("[A] party's objections to the

magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.").

[8] In addition, the district court held that Hodges failed to show a likelihood of success on the merits because it offered no evidence of a contract requiring Union Pacific to provide rail service to it. Hodges contends on appeal that the district court erroneously relied on the 1966 Agreement between the parties in making this determination. Hodges claims this is not the contract requiring "rail service between Union Pacific and Hodges." *Aplt. Br.* at 21. However, the 1999 Agreement, the document Hodges apparently relies on, was specifically referenced by the court. As the court concluded, while the 1999 Agreement "may support a subjective expectation of continued rail service for some period of time after October 1, 1999, nothing within the [1999] Agreement obligates [Union Pacific] to provide continued rail service to [Hodges'] warehouse for any period of time." *Aplt.App.* at 77. In fact, that agreement provided for termination upon ten days' notice. There is no contract for rail service by Union Pacific to Hodges' warehouse. Accordingly, Hodges cannot show a likelihood of success on the merits.^{FN2} See **1191PCI Transp., Inc.*, 418 F.3d at 545 (plaintiff cannot show likelihood of success on contractual claim without evidence of contract).

FN2 In his argument on likelihood of success, Hodges also contends Union Pacific is a common carrier and is thereby required to provide rail service to Hodges' warehouse. Hodges did not specifically raise the issue of common carrier status in his objection to the Report and Recommendation, and the issue is therefore waived. See *One Parcel of Real Property*, 73 F.3d at 1060.

Without a showing of either of these two key preliminary injunction factors, Hodges cannot succeed on its contention that the district court abused its

discretion when it determined Hodges was not entitled to a preliminary injunction. The district court also correctly held that Hodges' state law tort claims were completely preempted by the relevant provisions of the ICCTA.

We AFFIRM.

C.A.10 (Okla.), 2008.
Port City Properties v. Union Pacific R. Co.
518 F.3d 1186

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