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Office of Proceedings
February 17, 2016
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Public Record

February 17, 2016

Daniel R. Elliott III, Chairman
 Deb Miller, Vice Chairman
 Ann D. Begeman, Member
 Surface Transportation Board
 395 E St SW
 Washington DC 20423

Re: STB Docket No. 35960: *Union Pacific Railroad Co. – Petition for Declaratory Order*

Dear Chairman Elliott, Vice-Chairman Miller, and Member Begeman:

On behalf of Union Pacific Railroad Company, I write to inform you of a recent development in the California state litigation that is the subject of the above-referenced Petition for Declaratory Order. This controversy surrounds a state action seeking to rescind a contract that permits a pipeline to run under hundreds of miles of Union Pacific right of way, while allowing the pipeline to remain in place without being subject to provisions that were negotiated to protect the railroad’s right-of-way. In the Petition, Union Pacific asks the Board to declare this rescission action preempted by the ICC Termination Act.

In the attached February 9, 2016 decision, the state court stayed the rescission action to seek the STB’s guidance on the preemption issue. The court observed that the STB is “uniquely qualified to evaluate what impact removal of the right-of-way protections would have on the railroad,” and it concluded that “[c]onsidering the unique issues posed by the preemption question in this case and the STB’s expertise, its preemption decision will likely be of great assistance to the court.” *SFPP, L.P. v. Union Pac. R.R. Co.*, at 5, Case No. BC584518 (Cal. Super. Ct. Feb. 9, 2016). The court understood that referring the matter to the STB could delay the state case. But “[w]aiting for a determination by the STB in a key Armageddon-like action is not unreasonable given the history of litigation regarding the AREA and its tortuous travel through time.” *Id.*

Best regards,

/s/ Raymond A. Atkins

Attachment
 cc: Service List

Attachment

Finance Docket No. 35960

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPARTMENT 73
RAFAEL A. ONGKEKO

FILED
Superior Court of California
County of Los Angeles

FEB 09 2016

Sheri A. Carter, Executive Officer/Clerk
By [Signature] Deputy
M.V. Carrino

SFPP LP,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant

Case No.: BC584518

RULING RE: DEFENDANT'S MOTION TO
STAY PROCEEDINGS; DEFENDANT'S
DEMURRER TO COMPLAINT

RULING:

Grant requests for judicial notice, limited to the existence of the documents, but not the truth of the matters asserted therein, unless such document is a court order or judgment.

GRANT Motion to Stay Proceedings. Demurrer is off-calendar in light of ruling.

The court sets a status conference date in four months, on June 8, 2016, at 8:30 a.m. in Department 73.

Discussion (Please note: Unfortunately, the court's tentative ruling website, which is the source of this version, is not able to show certain formatting contained in the original, such as the court's use of footnotes, boldface, italics, or the underscoring of case citations. A hard copy will be available for review in court before the hearing.)

Motion to Stay Proceedings

After SFPP filed its action in this case, moving party and defendant Union Pacific (UP) filed a petition before the federal Surface Transportation Board, asking STB to "declare that [this action] is an attempt to regulate rail transportation and is therefore preempted by ICCTA because it would have the effect of foreclosing or unduly restricting Union Pacific's ability to conduct its rail operations and would otherwise unreasonably burden interstate commerce." (UP RJN filed 9/25/15, Ex. A, p. 33)

On September 25, 2015, UP filed a motion to stay the proceedings pending a decision on its petition to the STB. On November 17, 2015, Plaintiff SFPP filed an opposition. On November 23, 2015, Union Pacific filed a reply. On December 16, 2015, SFPP filed a supplemental paper.

Primary Jurisdiction Doctrine

RULING RE: DEFENDANT'S MOTION TO STAY PROCEEDINGS; DEFENDANT'S DEMURRER TO COMPLAINT - 1

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UP argues that the court should stay this case under the primary jurisdiction doctrine in order to allow the STB the opportunity to rule on the issue of ICCTA preemption. UP contends that SFPP's claims are preempted by the ICCTA, which states "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).) UP argues that the STB is the appropriate forum to determine whether SFPP's state law claims are preempted, noting that the ICCTA states the STB is the federal agency charged with "ensur[ing] the development and continuation of a sound rail transportation system." (49 U.S.C. § 10101(4).) In its petition to the STB, UP argues that SFPP seeks to rescind the AREA, keep its pipeline structures beneath the railroad indefinitely, and extinguish UP's control over certain parts of the rail corridor. UP argues that these claims concern construction and operation of railroad facilities, which fall directly within the STB's regulatory authority. SFPP opposes the stay, arguing it would be inefficient and would impose unreasonable delay and also that the primary jurisdiction doctrine does not apply to this case because there is no need for the specialized expertise of the STB.

The primary jurisdiction doctrine " 'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' " (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390, quoting United States v. Western Pac. R. Co. (1956) 352 U.S. 59, 63-64 [italics in original omitted].) The doctrine applies to cases that may be addressed by a court, but would be better addressed by an administrative body. (Cundiff v. GTE California Inc. (2002) 101 Cal.App.4th 1395, 1413; Wise v. Pacific Gas & Electric Co. (1999) 77 Cal.App.4th 287, 295-96.) The doctrine allows a court to take advantage of administrative expertise and helps ensure uniform application of regulatory laws. (Farmers Ins. Exchange, supra, 2 Cal.4th at 391.) Thus, applying the primary jurisdiction doctrine is appropriate where there is a "paramount need for specialized agency fact-finding expertise" (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 398), but not when it only "concern[s] issues of statutory interpretation appropriate for judicial resolution" (Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc. (2000) 83 Cal.App.4th 139, 142-143). In determining whether to apply the doctrine, the court "will also consider whether applying the doctrine presents an inadequate remedy to litigants, such as whether there would be an unreasonable expense and delay." (Cundiff, supra, 101 Cal.App.4th at 1412.) "[I]n the absence of legislation clearly addressing whether a court may exercise discretion under the primary jurisdiction doctrine, a court may exercise such discretion and may decline to hear a suit until the administrative process has been invoked and completed." (Farmers, 2 Cal.4th 383.)

Administrative Expertise

UP argues that the STB is the appropriate forum to determine whether SFPP's state law claims are preempted because of its expertise regarding the development and continuation of a sound rail transportation system." (49 U.S.C. § 10101(4).) UP further argues that these claims concern construction and operation of railroad facilities, which fall directly within the STB's regulatory authority. Determining preemption typically involves legal questions of statutory interpretation

and legislative intent. (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371.) Here, UP contends that SFPP's state law claims are preempted by section 10501(b) of the ICCTA, which gives the STB exclusive jurisdiction over "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 "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 USC §10501(b).)

A determination of whether STB's exclusive jurisdiction preempts SFPP's state law claims requires a fact-specific inquiry into whether the claims would prevent or unreasonably interfere with railroad transportation. (See *Franks Inv. Co. v. Union Pac. R.R.* (5th Cir. 2010) 593 F.3d 404, 414 (en banc).)

Specifically, SFPP seeks to rescind the AREA, which includes right-of-way protections for the railroad, while continuing to use the existing pipelines. UP contends that SFPP's use of the pipelines without the right-of-way protections is a matter that falls under ICCTA's exclusive jurisdiction. In *Adrian & Blissfield R. Co. v. Village of Blissfield*, the Sixth Circuit Court of Appeals explained that a state claim that is not facially preempted by the ICCTA may be preempted as applied. (*Adrian & Blissfield R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 540.) The "as applied" preemption analysis "requires a factual assessment of whether the state action would have the effect of preventing or unreasonably interfering with railroad transportation." (*Id.*) Indeed, the parties' numerous conflicts between pipeline use and railway operations have been resolved by reference to the right-of-way protections in the AREA. (See Motion, Ex. A ("Petition for Declaratory Order"), pp. 26-28.)

Here, whether SFPP's use of the pipelines without the right-of-way protections would interfere with Union Pacific's rail operations requires a factual inquiry into the nature the protections, how they impact SFPP's pipelines and how use of the pipelines without the protections will impact rail operations. This is not, as SFPP contends, simply a matter of statutory interpretation.

However, this does not necessarily mean that the question of preemption raised by this action cannot be resolved by the court. SFPP points to a number of cases where the STB itself found that the factual preemption issue was one the courts could resolve. In *Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for Declaratory Order* (2004) 2004 WL 395835, the petitioner sought to determine whether a condemnation proceeding to acquire an easement for a road and subsurface utilities crossing a main line right-of-way was preempted by section 10501(b). The STB characterized the issue as a generalized question of whether an eminent domain action would impermissibly interfere with railroad operations. (*Id.* *2.) This type of generalized question was well-suited for resolution by the courts. (*Id.*) Similarly, *Lincoln Lumber Company—Petition for Declaratory Order—Condemnation of Railroad Right-of-Way for a Storm Sewer* (2007) 2007 WL 2299735, *3, involved a question of whether government condemnation of a lumber company's rail right-of-way for a storm sewer was preempted by section 10501(b). The STB ruled that this type of preemption, involving a common use of the rail right-of-way, should be decided by the court. (*Id.*) Finally, in *Jie Ao and Xin Zhouf—Petition for*

Declaratory Order (2012) 2012 WL 2047726, *1, 8, a determination of whether a prescriptive easement claim within the national rail network was preempted was also a matter that could be handled by the state courts.

SFPP's reliance on these cases is not persuasive. The factual inquiries posed by these cases are not analogous to the inquiry that is required in the instant action. The above cases sought to determine preemption in very narrow circumstances. While it is within the expertise of the courts to determine whether a particular easement or right-of-way would unreasonably burden or interfere with rail transportation, this dispute does not simply involve a single instance of competing rights between the parties. Indeed, no case cited by either party is directly analogous to the unusual circumstances presented by this dispute, which has spanned decades and given rise to a multitude of litigation.

For example, UP points to *Pinelawn Cemetery v. Coastal Distribution, LLC*, where a cemetery landlord brought an action to evict a tenant railroad from the cemetery property. (*Pinelawn Cemetery v. Coastal Distribution, LLC* (N.Y. App. Div. 2010) 74 A.D.3d 938, 939, 941.) The New York court held that the ICCTA gave the STB exclusive jurisdiction over the issues of abandonment or discontinuance of rail service raised by the case. The court determined that a stay of the state claims was necessary pending a determination by the STB. (*Id.* at 941.) Unlike the instant action, *Pinelawn* involved undisputed exclusive jurisdiction by the STB over the cemetery's abandonment claims. Here, there is no exclusive jurisdiction by the STB over claims for rescission of contract or unjust enrichment.

UP also relies on *Farmers Insurance Exchange*, where the People filed suit against various insurers alleging violations of the Insurance Code and the Business and Professions Code for Farmers' refusal to offer a "Good Driver Discount policy" to all eligible applicants. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 381-382.) The court applied the primary jurisdiction doctrine, finding that there was a "paramount need for specialized agency review" because questions involving insurance rates posed issues for which specialized agency fact-finding was needed, such as analysis of an individual's eligibility for a specific insurance provision. (*Id.* at 397-399, 401.) Resolution of these questions also turned on interpretation of complex regulations promulgated by the Insurance Commissioner, such that his agency was uniquely suited to answer those questions.

This action involves neither exclusive STB jurisdiction, nor the application of complex regulations to numerous individuals. It does, however, raise complicated factual questions regarding the impact of right-of-way protections for hundreds of miles of railroad, beneath which run extensive subsurface pipelines. Determining whether allowing SFPP unfettered access to the railroad right-of-way amounts to an unreasonable burden or interference with the rail system is best determined at the STB level not only because of the scope of the dispute, but because of its somewhat speculative nature that is better-suited within the STB's expertise. In other preemption cases, the nature of the dispute between the parties was already known. For example, *Maumee & Western Railroad Corporation and RMW Ventures, LLC* sought to resolve how an easement for a road and subsurface utilities affects a main line right-of-way. Similarly, *Lincoln Lumber Company* involved condemnation of a single right-of-way. Here, it will be necessary to

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hypothesize about the many possible burdens to the rail network from SFPP's pipelines before determining whether those burdens, real or not, are unreasonable. This requires an understanding of the interplay between the rail and pipeline networks, not only as they currently exist, but also as they intend to develop given all the competing considerations. Given the STB's expertise in the development and continuation of a sound rail transportation system, it is uniquely qualified to evaluate what impact removal of the right-of-way protections would have on the railroad.

Unreasonable Delay

SFPP also argues that staying this action while the STB decides the issue of preemption will cause unreasonable delay because there is no deadline by which the STB must issue a decision and there is no guarantee that it will issue a decision. While it is true that the court has an obligation to eliminate delay in its cases, that does not require it to ignore a proper basis for a stay. Additionally, while this action was filed less than a year ago, the dispute over the parties' relationship under the AREA has been subject to ongoing litigation since 2004 and multiple cases have been spawned and continue to await resolution. Waiting for a determination by the STB in a key Armageddon-like action is not unreasonable given the history of litigation regarding the AREA and its tortuous travel through time.

SFPP also argues that the STB's preemption decision will not be binding on this court, which will have to make its own preemption determination. Perhaps. The cases to which UP cites in reply are inapposite as they do not involve a decision about federal preemption under the ICCTA. However, this does not mean that allowing the STB to rule on the preemption issue will cause an unreasonable delay in the case. While the STB's preemption decision may not be binding on the court, it is "free to adopt the STB's preemption test to the extent [the court] find[s] it to be reasonable and a persuasive interpretation of the relevant considerations." (Franks Inv. Co. LLC v. Union Pacific R. Co. (2010) 593 F.3d 404, 414 (citing Wyeth v. Levine (2009) 555 U.S. 555).) Considering the unique issues posed by the preemption question in this case and the STB's expertise, its preemption decision will likely be of great assistance to the court.

Union Pacific's Motion to Stay Proceedings is GRANTED.

Demurrer to complaint

In light of the court's stay of these proceedings, defendant's demurrer to the complaint is taken off-calendar pending lifting of the stay.

Defendant is to give notice.

Dated: February 9, 2016



RAFAEL A. ONGKEKO
JUDGE OF THE SUPERIOR COURT