

ENTERED
Office of Proceedings
May 19, 2016
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

INGREDION INCORPORATED –
PETITION FOR DECLARATORY ORDER

)
)
)
)
)
)
STB Finance Docket No. 36014

REPLY IN OPPOSITION TO
COULAS VIKING PARTNERS'
MOTION TO DENY INGREDION'S PETITION, OR,
IN THE ALTERNATIVE, STAY PROCEEDINGS

Rodney Perry
BRYAN CAVE LLP
161 N. Clark Street, Suite 4300
Chicago, Illinois 60601
Phone: (312) 602-5000
Fax: (312) 698-7560

Karyn A. Booth
David E. Benz
THOMPSON HINE LLP
1919 M Street N.W., Suite 700
Washington, D.C. 20036
Phone: (202) 331-8800
Fax: (202) 331-8330

Attorneys for Ingedion Incorporated

May 19, 2016

Illinois court to resolve the underlying dispute by “enjoining” the use of the disputed rail line by The Belt Railway Company of Chicago (“BRC”), and requiring BRC to “remove...all railway ties and any equipment belonging to Belt Railway.”¹ If these actions are ordered by the court, they would impermissibly intrude into the Board’s exclusive jurisdiction over railroad operations and rail line abandonments, as described in 49 U.S.C. §§ 10501(b) and 10903.²

The court complaint also includes a claim for “ejectment” against BRC, meaning that Coulas Viking is asking the court to order BRC “to surrender possession” of the disputed property and, as a result, discontinue rail operations to Ingredion’s facility that is served by the rail line at issue.³ Under Illinois law, the object of an action for ejectment “is to obtain possession of land.”⁴ Obviously, if a Board-licensed rail carrier is ordered to surrender its rail line to a non-railroad, rail operations are jeopardized and the Board’s exclusive jurisdiction is invaded.⁵ Coulas Viking is also seeking a court determination that BRC “does not have any legal right...to use the Viking Property on which the Spur Line is built,”⁶ thereby implicating the Board’s exclusive jurisdiction over licensing of rail operations. See 49 U.S.C. §§ 10901 and 10903.

In addition to mischaracterizing its own complaint, Coulas Viking wrongly asserted that Ingredion’s Petition would require the Board to step into the shoes of the court and decide the

¹ Motion, Exhibit 1 (Complaint) at ¶ 1 and “Wherefore” section following ¶ 46.

² See, e.g., Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981) (the agency has “exclusive” and “plenary” control over abandonments). See also Petition at p. 9-14 and 16-17.

³ Motion, Exhibit 1 (Complaint) at ¶¶ 47-53 and “Wherefore” section following ¶ 53.

⁴ Dagit v. Childerson, 63 N.E.2d 706, 707 (Ill. 1945). See also Bulatovic v. Dobritchianin, 625 N.E.2d 26, 32 (Ill. App. Ct. 1993).

⁵ See, e.g., Union Pacific Railroad Company v. Chicago Transit Authority, 647 F.3d 675, 681 (7th Cir. 2011) (finding state law action preempted “because it would have a significant impact on railroad transportation...by unreasonably interfering with existing transportation”).

⁶ Motion, Exhibit 1 (Complaint) at “Wherefore” section following ¶ 40.

state law easement claims. Specifically, Coulas Viking asserted that Ingredion is “try[ing] to convince the Board that it has jurisdiction over Viking Partners’ state law claims.”⁷ Similarly, Coulas Viking contended that if Ingredion’s Petition is granted, “it means only that this Board will replace a court...[and] will...have to resolve the state law property dispute.”⁸ These assertions are plainly inconsistent with the Petition filed by Ingredion which requested a declaratory order from the Board that:

1. BRC rail operations occur pursuant to Board authorization or are otherwise under exclusive Board jurisdiction, and only the Board can authorize cessation of such operations;
2. No court has legal authority to enjoin or prevent such BRC rail service, or otherwise issue any decision causing unreasonable interference with BRC rail service to Ingredion; and
3. Relief sought by Coulas Viking in the cited lawsuit is preempted to the extent it would intrude into matters under exclusive Board jurisdiction or unreasonably interfere with BRC rail service to Ingredion.

Petition at 1-2. The first item is merely a description of BRC’s status as a Board-regulated railroad⁹, as well as a statement of the Board’s exclusive jurisdiction over rail operations, as set forth in 49 U.S.C. § 10501(b) and numerous court decisions such as CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573, 1583 (N.D. Ga. 1996) (“the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations”) (citation omitted). The second item is a necessary corollary of the first, and it has voluminous support in Board and court decisions

⁷ Motion at 12.

⁸ Id. at 7.

⁹ See Petition at 7.

regarding the scope of preemption.¹⁰ The third item is simply application of the first two items to Coulas Viking's pending lawsuit. Any relief sought by Coulas Viking is preempted "to the extent" it would intrude into the Board's exclusive jurisdiction or unreasonably interfere with BRC rail service. It should not be a surprise that preemption bars Coulas Viking's efforts to enjoin rail service, eject BRC from its rail line, or otherwise unreasonably interfere with BRC rail service.¹¹ Thus, none of the three requested orders require the Board to decide matters of state law, and Coulas Viking can point to no part of the Petition where such a request was made.

It is also significant that BRC has joined Ingredion in complete support of its Petition. As a Board-licensed rail carrier, BRC's long-standing operations over the rail line in service to Ingredion's corn processing facility cannot be enjoined without Board authorization, based on the Board's exclusive jurisdiction over such rail service.¹² Yet, Coulas Viking is improperly and unlawfully attempting an end-run around the Board's exclusive jurisdiction based on the relief it is seeking in the court proceedings.

B. Development of a Factual Record is Not Necessary for the Board to Decide the Preemption Issue.

In an unsuccessful attempt to buttress its Motion, Coulas Viking asserts that the Board should deny Ingredion's Petition because a "factual record...will be needed to assess what, if any, impact" the lawsuit will have "on *Belt's* railway operations."¹³ There is no need for factual

¹⁰ See, e.g., Wichita Terminal Association, BNSF Railway Company & Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 35765, slip op. at 6 (served June 23, 2015) ("It is well settled that the provisions of § 10501(b) preempt...legal processes...that could be used to deny a railroad's ability to conduct rail operations.").

¹¹ See, e.g., Jie Ao and Xin Zhou – Petition for Declaratory Order, STB Docket No. 35539, slip op. at 4 (served June 6, 2012) (preemption bars "state property law claims brought by non-government entities, where such claims would have the effect of interfering with railroad operations") (citation omitted).

¹² See 49 U.S.C. § 10501(b).

¹³ Motion at 16 (emphasis original).

investigation for the Board to determine that a court may not order relief that prevents or interferes with existing rail operations. In this case, the specific requests by Coulas Viking for the court to enjoin operations over the rail line and order the removal of the tracks and equipment – on their face – establish the wrongful interference with BRC’s rail service to Ingredion.

Where the facts and law are clear, the Board often responds to petitions for declaratory order without instituting a proceeding; in such cases, the Board simply issues a substantive statement on the question(s) raised in the relevant petition.¹⁴ Ingredion’s position has always been, and still is, that the opening of a Board proceeding is not required here because the issues raised in the Petition are clear and straight-forward,¹⁵ and because Ingredion has only sought a declaratory order from the Board regarding the extent to which preemption bars the specific requests for relief sought by Coulas Viking in the court proceeding.¹⁶ Given the nature of the relief requested by Coulas Viking, there is simply no need for the Board to engage in a factual investigation. In other words, if the court were to grant the relief sought by Coulas Viking, obvious interference with rail operations would occur.

C. A Stay is Not Warranted.

Coulas Viking’s proposal that the Board take a “wait-and-see” attitude toward the pending lawsuit is unwise at best.¹⁷ Given the extreme nature of the relief sought by Coulas Viking, waiting until after a court decision is rendered would be too late to prevent the serious

¹⁴ See, e.g., Brazos River Bottom Alliance – Petition for Declaratory Order, STB Docket No. 35781, slip op. at 4 (served Feb. 19, 2014) (answering the question raised without instituting a declaratory order proceeding because “no legal uncertainty” exists).

¹⁵ Petition at 17 (“Given that the law on this issue is clear, there is no need to institute a formal proceeding; instead, the Board should simply provide guidance to the courts on the preemption question raised herein.”) (citation omitted).

¹⁶ In the court proceeding, Ingredion is similarly arguing that the easement issue is also a purely legal question that does not require development of a factual record prior to a court decision.

¹⁷ See, e.g., Motion at 3 (“The Board should deny Ingredion’s Petition, or otherwise stay the proceedings unless and until the ICCTA is directly impacted in a future court ruling.”).

and nearly immediate harms that would be experienced by Ingredion from a cessation in BRC rail operations.¹⁸ Therefore, the Board should deny Coulas Viking's request for a stay of the Board's consideration of the Petition. Coulas Viking has made no effort to show that its request for a stay meets the customary four-part test utilized by the Board,¹⁹ and a stay is unwarranted given that the relief requested in the lawsuit strikes at the heart of the Board's exclusive jurisdiction and overall mission. Ingredion sought input from the Board by filing the Petition due to the serious implications and harm to Ingredion that are presented by the relief sought in the complaint; the Board is the best forum for consideration of the issues raised in the Petition because of the Board's exclusive jurisdiction over rail operations and the Board's statutory duty to promote and protect the national rail system.²⁰

D. The Board Should Reject the Remaining Arguments in the Motion.

Coulas Viking raises a series of other arguments against the Petition but none of them have merit or justify a denial of the Petition. For example, there is no contradiction between the Petition and Ingredion's removal of the state law action to federal court on March 24th.²¹ In fact, Ingredion's actions are entirely consistent. Ingredion removed the state lawsuit to the U.S. District Court pursuant to federal question jurisdiction due to the complete preemption doctrine. Specifically, Ingredion advised the District Court that the relief sought by Coulas Viking in state court includes measures that are completely preempted by the Interstate Commerce Commission Termination Act because, among other things, they would unreasonably interfere with rail

¹⁸ See Petition at 5-7.

¹⁹ See, e.g., Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, STB Docket No. 35412, slip op. at 2 (served Oct. 6, 2010).

²⁰ See, e.g., New York Cross Harbor Railroad v. STB, 374 F.3d 1177, 1187 (D.C. Cir. 2004) (the Board has a “statutory duty to preserve and promote continued rail service”) (quotation omitted).

²¹ See Motion at 3 (alleging that Ingredion “contradicted itself”).

service.²² Although both the courts and the Board can decide issues of preemption,²³ Ingression filed the Petition because the Board is “uniquely qualified” to evaluate the preemption question in this case, given that it so directly implicates both the Board’s exclusive jurisdiction over rail operations and the Board’s statutory duty to protect and preserve the national rail system.²⁴ In other words, whether Coulas Viking’s complaint intrudes upon the Board’s exclusive jurisdiction over rail operations is a federal question that triggers jurisdiction for the U.S. District Court, but the Board is the best forum for consideration of the preemption question. By filing its Petition, Ingression is not asking the Board to “take over” the entire lawsuit and decide all claims included in the court complaint. Instead, Ingression is asking the Board to issue an order explaining the extent to which relief sought by Coulas Viking is preempted and, thereby, ensure that the rail operations of a Board-licensed rail carrier, BRC, are shielded from the interference so plainly sought in the complaint. To the extent preemption does not bar relief sought by Coulas Viking, a court can adjudicate the state law easement-related claims, relying on the Board’s guidance as to the scope of preemption.

The Board should likewise reject Coulas Viking’s contention that preemption does not apply because an interference with BRC rail operations would affect only a “short length of track” and “would not affect Belt’s rail services as a whole.”²⁵ Coulas Viking’s unusual theory,

²² See, e.g., Petition, Exhibit 8 (Notice of Removal) at ¶¶ 10-17.

²³ See, e.g., 14500 Limited, LLC – Petition for Declaratory Order, STB Docket No. 35788, slip op. at 2 (served June 5, 2014). In the U.S. District Court, Ingression moved for dismissal of the Coulas Viking complaint or, in the alternative, a stay of the court proceeding pending the Board’s ruling on the Petition. See Ingression’s correspondence to the Board (filed March 28, 2016).

²⁴ Green Mountain Railroad Corporation v. Vermont, 404 F.3d 638, 642 (2nd Cir. 2005) (“As the agency authorized by Congress to administer the [Interstate Commerce Commission] Termination Act, the [Surface] Transportation Board is uniquely qualified to determine whether state law...should be preempted.”) (quotation and citation omitted).

²⁵ Motion at 13-15.

based as it is on the length of track affected, would apparently mean that a state court in Illinois could grant an injunction request regarding 150 miles of Union Pacific Railroad (“UP”) track simply because such an injunction would affect only a small part, less than 0.3%, of UP’s track mileage in its overall rail system.²⁶ Obviously, epic problems would result from Coulas Viking’s novel and extremely narrow interpretation of preemption. The Board should reject this interpretation as contrary to the governing statutes and precedent.²⁷

Coulas Viking contends that BRC is unconcerned and “ambivalen[t]” about the threat to its operations from the relief sought in the complaint. See Motion at 14. This is plainly not true. BRC has joined this proceeding before the Board, expressed its unqualified support for the position put forth by Ingredion in the Petition,²⁸ and clearly stated that Coulas Viking is “not entitled” to the relief it seeks due to the impact on rail operations.²⁹

Finally, Coulas Viking expends several pages contending that Ingredion had no standing to bring its Petition before the Board. See Motion at 6-9. This effort is futile, however, and the Board can easily dismiss Coulas Viking’s contentions. Coulas Viking ignores the simple fact that BRC is a Board-licensed rail carrier that has provided rail operations over the track at issue for approximately 100 years.³⁰ One of the main purposes of the Board is to preserve and protect

²⁶ See Union Pacific Corporation: 2015 Investor Fact Book, page 4 (Apr. 26, 2016) (stating that UP had 51,439 track miles on December 31, 2015); Motion at 14 (stating that the BRC track serving Ingredion is less than 0.3% of BRC’s total rail operations by track length).

$(51,439) \times (0.003) = 154.3$.

²⁷ See, e.g., 49 U.S.C. § 10501(b). Cf. Joseph R. Fox – Petition for Declaratory Order, STB Docket No. 35161, slip op. at 3 (served May 18, 2009) (advance authorization from the Board is required for a railroad to “permanently close and discontinue service over” a rail line).

²⁸ See, e.g., BRC’s Reply Comments (filed April 29, 2016) at 4 (“BRC supports and incorporates Ingredion’s Petition and Exhibits.”).

²⁹ See, e.g., id. at 7.

³⁰ See, e.g., Petition at 7.

rail service for the public's use, including shippers like Ingredion.³¹ Coulas Viking has cited no authority that undermines this basic tenet or the recent Board statement that shippers have a "federal right" to receive rail service.³² The fact that Ingredion receives service from railroads other than BRC does not obviate the Board's jurisdiction over BRC operations or Ingredion's standing to file the Petition.³³

On the issue of standing, Coulas Viking cited to several cases for the general proposition that "the fact that a railroad is involved in a dispute does not mean this Board will exercise jurisdiction or that it is automatic." See Motion at 9-11. This general statement is simply irrelevant to the Board's consideration of whether the specific relief requested by Coulas Viking in the underlying court case is preempted. For example, Coulas Viking cites to Maumee & Western, STB Docket No. 34354, as a means to show that there is no blanket rule preventing eminent domain proceedings against railroad property.³⁴ This authority fails to support a denial of Ingredion's Petition. First, the issue of eminent domain is not even implicated in the court proceedings or Ingredion's Petition, thus, the case is irrelevant to the issues at hand. Second, even if it were, the Board's eminent domain precedent is clear that when a condemnation effort "would cause...undue interference [with rail transportation], then it is federally preempted."³⁵

³¹ Petition at 17-19.

³² Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declaratory Order, STB Docket No. 35749, slip op. at 4 (served July 19, 2013).

³³ See, e.g., Petition at 12. See also 49 U.S.C. §§ 10101(1), (4), (5), and (12) (importance of competition); Omaha Public Power District – Petition under 49 U.S.C. 10901(d), STB Docket No. 32630 (Sub-No. 1), slip op. at 3 (served Aug. 1, 1996) (referring to "the Congressional directive that we foster competition").

³⁴ See Motion at 9.

³⁵ Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order, STB Docket No. 35196, slip op. at 3 (served Mar. 1, 2010).

Similarly, Coulas Viking cites a 7th Circuit decision to assert that preemption does not apply to every use of property that would interfere with rail transportation.³⁶ Again, this generalized statement is simply immaterial to the specific concerns raised by Ingredion in its Petition, namely, whether Coulas Viking's request for the court to enjoin use of the BRC rail line would unreasonably interfere with BRC operations, and Ingredion's ability to obtain rail service on reasonable request.³⁷ Coulas Viking's Motion simply cannot overcome the long-established principle that the action of courts under state law is a form of regulation and, under the U.S. Constitution's Supremacy Clause, such action is preempted if it would unreasonably interfere with rail operations: "[i]t is well settled that the provisions of § 10501(b) preempt...legal processes...that could be used to deny a railroad's ability to conduct rail operations."³⁸

³⁶ See Motion at 10, citing to Union Pacific Railroad Company v. Chicago Transit Authority, 647 F.3d 675 (7th Cir. 2011).

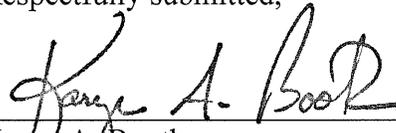
³⁷ See 49 U.S.C. § 11101(a).

³⁸ Wichita Terminal, STB Docket No. 35765, slip op. at 6 (served June 23, 2015).

II. Conclusion.

For the reasons stated herein, the Board should deny the Motion filed by Coulas Viking. A stay is not warranted and the Board can and should address the preemption issue raised in this case. Ingredion respectfully requests that the Board issue a declaratory order as described in the Petition.

Respectfully submitted,



Karyn A. Booth
David E. Benz
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

Rodney Perry
BRYAN CAVE LLP
161 N. Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5000

Attorneys for Ingredion Incorporated

May 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2016, I served a copy of the foregoing upon counsel for the entities listed below via U.S. first-class mail, postage prepaid.

<p>John M. Touhy John C. McIlwee Baker & Hostetler LLP 191 North Wacker Drive, Suite 3100 Chicago, IL 60606</p> <p>Katharine E. Heitman Baker & Hostetler LLP Washington Square, Suite 1100 1050 Connecticut Ave. NW Washington, DC 20036</p> <p>Joseph Nevi Hosteny, III Niro Law, Ltd. 181 West Madison Street, Suite 4600 Chicago, Illinois 60602</p> <p><i>Counsel for Coulas Viking Partners LP</i></p>	<p>Thomas I. Matyas Aaron J. Hersh Locke Lord LLP 111 South Wacker Drive Chicago, IL 60606</p> <p><i>Counsel for The Belt Railway Company of Chicago</i></p>
--	--



David E. Benz