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Office of Proceedings
September 9, 2014
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Public Record

September 9, 2014

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: FD 35792, Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually—Petition for Declaratory Order

Dear Ms. Brown:

This letter will bring to the Board's attention a recent state court decision in a case similar to the present case now pending before the Board. For the reasons described below, this state court decision further supports BNSF's position in this matter that there is no need to initiate a declaratory proceeding here because the state court before which the Tubbs case is pending is well aware of and has enforced the preemption provision of ICCTA, 49 USC 10501(b), finding that state law tort and inverse condemnation claims may not infringe upon the design, construction and maintenance of interstate rail lines.

As previously explained, the Tubbses, who are Petitioners in the instant case, initially filed their claims for damages against BNSF Railway Company, Inc. ("BNSF") and its contractor in the Circuit Court of Holt County, Missouri. As relevant, the claims arise from flooding of their property which they assert was the result of the manner in which BNSF designed, constructed and maintained its transcontinental main line rail track, which is located adjacent to the Tubbses' property. The case was assigned to Judge Roger Prokes. After oral arguments on the defendants' motion for summary judgment, but before the court ruled, the Tubbses sought and obtained a stay of the court proceedings to allow them to seek a declaratory order from the Board on the issue of preemption.

Shortly after the Tubbses filed their case in the Circuit Court of Holt County, another case was filed against BNSF in the same court by other parties that, like the Tubbses, owned land adjacent to BNSF's mainline that had been flooded. The plaintiffs in that case are Tom and Catherine Bullock. That case, initiated by the same attorneys who represent the Tubbses, was

also assigned to Judge Prokes. The allegations made by the Bullocks are very similar to those made by the Tubbses and primarily focus on damages allegedly caused by the manner in which BNSF designed, constructed and maintained its rail line.¹ As explained further below, Judge Prokes recently dismissed all claims related to the design, construction and maintenance of BNSF's tracks in the Bullock case, finding that such claims regulate rail transportation and are preempted by ICCTA.

Specifically, on September 26, 2013, Judge Prokes granted BNSF's motion to dismiss in part in the Bullock case. The order dismissed the Bullock's nuisance claim in its entirety on the basis of ICCTA preemption but declined to dismiss the other claims. Following a subsequent discovery dispute, in July 2014, BNSF filed a motion for clarification requesting that the court issue an order clarifying that all of Bullocks' claims are dismissed to the extent that they relate to the design, construction or maintenance of BNSF's rail line. On August 6, 2014, the court issued the requested order, a copy of which is attached hereto at Exhibit 2. The order states that in addition to the nuisance claim being dismissed in its entirety, the portions of the inverse condemnation and negligence claims relating to the construction, design or maintenance of BNSF's rail line are dismissed on the basis of ICCTA because these claims seek impermissibly to regulate rail transportation. As the order explains, the only claims and allegations that remain are those that do not relate to rail transportation.

The Missouri state court's decision is thus consistent with the other precedents cited by BNSF in its Reply to the Petition for Declaratory Oder in this proceeding establishing that state law claims for damages are preempted where they related to a railroad's design, construction and maintenance of a rail line. *See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that regulations regarding the design and construction of railroad embankments are preempted); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004) *affd.*, No. 04-5448 (6th Cir. Feb. 7, 2005) (holding that a negligence claim related to the construction and maintenance of a track that allegedly caused water to drain onto adjacent property was preempted); *Pere Marquette Hotel Partners, L.L.C. v. U.S.*, No. 09-5921, 2010 U.S. Dist. LEXIS 36413, at *14-15 (E.D. La. March 10, 2010) ("The application of state law negligence principles to assess and evaluate the suitability of the design and construction of a railroad crossing, railroad tracks, and roadbed for railroad tracks qualifies as an attempt at state law 'regulation' in respect to rail transportation" and is preempted).

Moreover, the Missouri state court's decision demonstrates that the court in which this matter is pending is fully competent to rule on the preemption issue. Because the law is clear that state law claims such as those raised by the Tubbses are preempted, BNSF reiterates its position that the Board should dispense with initiating a declaratory proceeding and issue a decision that describes and reiterates the relevant ICCTA precedent, which as applied here supports a determination that the claims of the Tubbses are preempted under established federal

¹The allegations made by the parties can be compared by comparing the petitions filed by the parties in state court. The petition filed by the Bullocks in state court is attached hereto at Exhibit 1 and the petition filed by the Tubbses in state court was filed as an attachment to the Petition for Declaratory Order filed with the Board in this docket.

law. As explained in BNSF's Reply, the Board has taken this procedural approach in other cases. See *Mark Lange—Petition for Declaratory Order*, Finance Docket No. 35037, slip op. at 1, 5 (STB served Jan. 28, 2008) (denying a petition for declaratory order regarding ICCTA preemption and merely issuing a decision “address[ing] the relevant court and agency case law” because “[t]he parties’ submissions contain facts sufficient to enable us to provide appropriate guidance.”); *James Riffin—Petition for Declaratory Order*, Finance Docket No. 35245, slip op. at 4 (STB served Sept. 15, 2009) (“[T]he Board, in its discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Here, the law is clear and there is no need to institute a declaratory order proceeding to receive further information with respect to the issues Riffin raises.”).

For these reasons, BNSF urges the Board not to initiate the requested declaratory proceeding.

Respectfully submitted,



David H. Coburn
Christopher G. Falcone

Attorneys for BNSF Railway Company

Exhibit 1

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI
DIVISION I

TOM BULLOCK)	
)	
and)	
)	
CATHERINE BULLOCK)	
)	
Plaintiffs.)	
)	
v.)	Case No. 12HO-CC00063
)	
BNSF RAILWAY COMPANY)	
)	
and)	
)	
MASSMAN CONSTRUCTION CO.)	
)	
Defendants.)	

SECOND AMENDED PETITION

COME NOW Plaintiffs, Tom Bullock and Catherine Bullock, by and through their attorneys Murphy, Taylor, Siemens & Elliott P.C., and for their Second Amended Petition, state as follows:

1. This is an action for trespass, negligence, nuisance, inverse condemnation, and statutory torts.
2. Plaintiffs Tom Bullock and Catherine Bullock (herein "Bullocks") are husband and wife and residents of Holt County, Missouri.
3. The Bullocks are the owners of certain real property located in Holt County, Missouri, which is more particularly described on Exhibit A, attached hereto and made a part hereof (herein "Bullock Property"). At all times referenced herein, the Bullocks were entitled to exclusive possession and quite enjoyment of the Bullock Property.

4. BSNF Railway Company is a Delaware entity that is registered as a Missouri foreign corporation (“BNSF”) and conducts business within the State of Missouri.

5. Massman Construction Company is a Missouri corporation (“Massman”) with its principal place of business located in Jackson County, Missouri.

6. Venue is proper in this Court because (a) the alleged torts were committed in Holt County, Missouri, and (b) the subject real property is located in Holt County, Missouri.

7. The allegations set forth in paragraphs 1 through 6 above are incorporated by reference into each separate count of this Petition, as if fully set forth therein.

COUNT I—STAUTORY TRESPASS

COME NOW Plaintiffs, and for Count I of their Second Amended Petition, state as follows:

8. In the summer of 2011, Defendants entered onto the Bullock Property without the consent of the Bullocks.

9. Defendants did not obtain the authorization of any governmental agency or other entity to enter upon the Bullock Property.

10. Defendants had no right to be on the Bullock Property.

11. While on the Bullock Property, Defendants dug up dirt, gravel, and other materials owned by the Bullocks and caused said materials to be removed or carried away.

12. Defendants’ acts resulted in damage to the Bullock Property in the amount of \$350,000.

13. The Bullocks are entitled to treble damages from Defendants pursuant to §537.340 RSMo 2008.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in the amount of \$1,050,000 for their costs, and for such other and further relief as the Court deems just and proper

COUNT II—COMMON LAW TRESPASS

COME NOW Plaintiffs, and for Count II of their Second Amended Petition, state as follows:

14. In the summer of 2011, Defendants willfully entered onto the Bullock Property without the consent of the Bullocks.

15. Defendants did not obtain the authorization of any governmental agency or other entity to enter upon the Bullock Property.

16. Defendants had no right to be on the Bullock Property.

17. Defendants' use of barges on the Bullock Property caused a massive sinkhole and substantial damage to the Bullock Property.

18. While on the Bullock Property, Defendants dug up dirt, gravel, and other materials owned by the Bullocks and caused said materials to be removed or carried away.

19. Defendants' acts resulted in damage to the Bullock Property in the amount of \$350,000.

20. The conduct of Defendants as outlined herein was outrageous because of their reckless indifference to the rights of others, including Plaintiffs.

WHEREFORE, Plaintiffs pray for judgment against Defendants in an amount that is fair and reasonable and for punitive damages, for their costs and attorney fees incurred herein, and for such other and further relief as the Court deems just and proper.

COUNT III-- INVERSE CONDEMNATION

COME NOW Plaintiffs, and for Count III of their Second Amended Petition, state as follows:

21. Defendant BNSF has the statutory power of eminent domain the State of Missouri.

22. Defendant BNSF has not sought to legally invoke its powers of eminent domain with respect the Bullock Property.

23. Defendant BNSF has taken the Bullock Property for its use by causing a substantial portion of the Bullock Property to be under water and/or susceptible to recurrent flooding.

24. Defendant BNSF has unreasonably interfered with the Plaintiffs' exclusive rights to possession and use of the Bullock Property.

25. Defendant BNSF failed to follow the required procedure to condemn the Bullock Property.

26. Defendant BNSF's actions constituted an inverse condemnation of the Bullock Property.

27. Article 1, Section 26 of the Missouri Constitution requires just compensation to be paid for private property taken or damaged for public use.

28. Defendant BNSF has failed to pay just compensation to Plaintiffs for Defendant BNSF's unlawful taking of the Bullock Property.

WHEREFORE, Plaintiffs request that the Court determine that Defendant BNSF inversely condemned the Bullock Property, award Plaintiffs a just and reasonable amount of

damages for the value of the Bullock Property, award Plaintiffs for their costs and attorney fees incurred herein, and for such other and further relief as the Court deems just and proper.

COUNT IV—NUSIANCE

COME NOW Plaintiffs, and for Count IV of their Second Amended Petition, state as follows:

29. The Bullocks are sole owners and hold legal title to certain real property located in Holt County, Missouri, which they use as their residence.

30. Plaintiffs are entitled to reasonable enjoyment and possession of their residential property.

31. Defendants BNSF and Massman have caused direct injury to Plaintiffs' property which has substantially prevented Plaintiffs from the reasonable enjoyment and use of their property.

32. Defendants BNSF and Massman were capable of designing, constructing, and maintaining a new rail bridge and widened culvert which did not redirect and relocate river water directly onto and around Plaintiffs' property, but they did not do so. Their failure to build the new rail bridge and widened culvert with adequate allowance for rapidly flowing water caused injury to the Bullock Property and interfered with Plaintiffs' reasonable use and enjoyment of their property.

33. The actions of Defendants BSNF and Massman were unreasonable.

34. Defendants BNSF and Massman acted intentionally and with such willful, wanton or reckless disregard for the rights and interest of Plaintiffs and the consequences of their actions that punitive damages lie herein and should be imposed.

WHEREFORE, Plaintiffs pray for judgment against Defendants in an amount that is fair and reasonable and for punitive damages, for their costs and attorney fees incurred herein, and for such other and further relief as the Court deems just and proper.

COUNT V--NEGLIGENCE

COME NOW Plaintiffs, and for Count V of their Second Amended Petition, state as follows:

35. Defendants had a duty to Plaintiffs to exercise ordinary care in performing their activities on and around the Bullock Property.

36. Defendants failed to exercise ordinary care and were thereby negligent in the following manner:

- a. Relocating and redirecting water on, around and over the Bullock Property;
- b. Removing earth, rock, and other materials from the Bullock Property;
- c. Destroying a levy that then caused water to flow toward the Bullock Property;
- d. Damaging the Bullock Property with the storage and use of heavy machinery and materials on the Bullock Property.

37. As a direct result of such negligence, Plaintiffs have been damaged.

38. Defendants BNSF and Massman acted intentionally and with such willful, wanton or reckless disregard for the rights and interest of Plaintiffs and the consequence of their actions that punitive damages lie herein and should be imposed.

WHEREFORE, Plaintiffs pray for judgment against Defendants in an amount that is fair and reasonable and for punitive damages; for their costs and attorney fees incurred herein, and for such other and further relief as the Court deems just and proper. -

COUNT VI--STATUTORY VIOLATIONS

COME NOW Plaintiffs, and for Count VI of their Second Amended Petition, state as follows:

39. BNSF is a railroad corporation under Missouri law and governed by Chapter 388 of the Revised Statutes of Missouri.

40. RSMo 388.420 provides for a specific manner by which BNSF was required to obtain permission from the Bullocks to use the Bullock Property and to remove materials from the Bullock Property.

41. RSMo 388.420 requires BNSF to compensate the Bullocks for the removal of materials by BNSF.

42. BNSF failed to go through the procedure required by RSMo 388.420 in removing materials from the Bullock Property and failed to compensate the Bullocks for the removal of materials by BNSF from the Bullock Property.

43. Defendants' acts and omissions and failure to comply with Missouri statute have caused damages to Plaintiffs and continue to cause damages.

44. The conduct of Defendant BNSF as outlined herein was outrageous because of its evil motive or reckless indifference to the rights of others, including Plaintiffs. Additionally, the conduct of Defendant BNSF as outlined in this Petition showed complete indifference to and/or conscious disregard for the rights of others. As such, Plaintiffs are entitled to an additional amount of damages as punitive damages in such sum as will serve to punish BNSF, and to deter BNSF and others from like conduct.

WHEREFORE, Plaintiffs pray for judgment against Defendant BNSF in an amount that is fair and reasonable and for punitive damages; for their costs and attorney fees incurred herein, and for such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

MURPHY, TAYLOR, SIEMENS & ELLIOTT P.C.

By *R. Edward Murphy* ^{by Jck}

R. EDWARD MURPHY -#27968

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ATTORNEYS FOR PLAINTIFFS.

Exhibit 2

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI
DIVISION I

FILED

TOM BULLOCK,)
)
and)
)
CATHERINE BULLOCK,)
)
)
Plaintiffs,)
)
v.)
)
BNSF RAILWAY COMPANY, INC.,)
)
and)
MASSMAN CONSTRUCTION CO.,)
)
Defendants.)

AUG 6 2014

VICKI BOOK
CIRCUIT CLERK - DIV. I
HOLT COUNTY, MISSOURI

Case No. 12HO-CC00063

**AMENDED ORDER GRANTING DEFENDANTS' JOINT MOTION
TO DISMISS IN PART AND DENYING SAID MOTION IN PART**

ON THE 6 day of Aug, 2014, this matter came on for hearing on Defendants' Motion to Amend Order Granting Defendants' Joint Motion to Dismiss in Part and Denying Said Motion in Part. Appearances: R. Edward Murphy and Nancy I. Blake for plaintiffs; Douglas R. Dalgleish, J. A. Felton, and Scott Ross for defendants.

WHEREUPON, upon consideration of Defendants' Motion To Amend Order Granting Defendants' Joint Motion to Dismiss in part and Denying Said Motion in Part, the written suggestions filed by the parties and the authorities cited and discussed therein, and the arguments of counsel, the court finds and rules as follows:

1. In its original Order Granting Defendants' Joint Motion to Dismiss in Part and Denying Said Motion in Part, filed herein on September 26, 2013, the Court intended to grant Defendants' Motion to Dismiss as to all of plaintiffs' claims in its Second Amended Petition that relate to construction, design, and maintenance of BNSF rail lines because such claims seek to regulate railroad transportation and are thus

preempted by the Interstate Commerce Commission Termination Act (the "ICCTA").

2. A dispute has arisen between plaintiffs and defendants as to whether certain claims and allegations contained in Plaintiffs' Second Amended Petition are preempted by the ICCTA, with plaintiffs contending that such claims and allegations are not preempted by the ICCTA and thus plaintiffs are entitled to pursue discovery as to such claims and allegations, and with defendants contending that such claims and allegations are preempted by the ICCTA and thus plaintiffs are not entitled to pursue discovery as to such claims and allegations.

3. In order to further clarify the claims and allegations that are preempted by the ICCTA and thus are not subject to discovery, the court makes the following more specific findings and rulings.

4. The claims and allegations of Count IV-Nuisance, of Plaintiffs' Second Amended Petition relate to construction, design, and maintenance of BNSF's rail line and thus are preempted by the ICCTA because they seek to regulate railroad transportation.

5. The claims and allegations of Count III-Inverse Condemnation, ¶23, relate to construction, design, and maintenance of BNSF's rail lines and thus are preempted by the ICCTA because they seek to regulate railroad transportation.

6. The claims and allegations of Count IV-Negligence, ¶36, Subparagraphs a. and c. relate to construction, design, and maintenance of BNSF's rail lines and thus are preempted by the ICCTA because they seek to regulate railroad transportation.

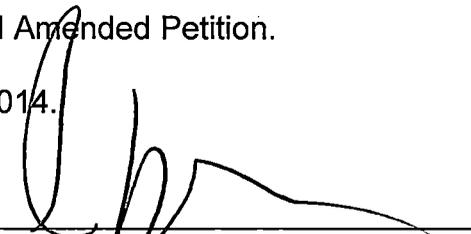
7. The balance of the claims and allegations contained in paragraphs Second Amended Petition relate to defendants' physically entering upon plaintiffs' property; digging up, removing, and carrying away dirt, gravel, and other materials

owned by plaintiffs; encroaching upon plaintiffs' property with barges and thereby causing a massive sinkhole and substantial damage to Bullock's property; all without the consent of Bullocks or other justification, and such claims are not sufficiently related to the construction, design, and maintenance of BNSF's rail lines to constitute regulation of railroad transportation and thus such claims and allegations are not preempted by the ICCTA.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss be and it is hereby SUSTAINED as to Count IV-Nuisance; Count III-Inverse Condemnations, ¶23, and Count IV-Negligence, ¶36, subparagraphs a. and c., and the claims and allegations contained therein are hereby stricken from Plaintiffs' Second Amended Petition.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss be and it is hereby DENIED as to the balance of the claims and allegations contained in Plaintiffs' Second Amended Petition.

SO ORDERED this 8 day of Aug, 2014.



Roger M. Prokes, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2014, I have caused a copy of the foregoing to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 35792.

A handwritten signature in cursive script that reads "David H. Coburn". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

David H. Coburn