

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35832

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CSX TRANSPORTATION, INC.

– PETITION FOR DECLARATORY ORDER

**CSX TRANSPORTATION, INC.'S REPLY IN OPPOSITION
TO HAMP, INC.'S MOTION TO COMPEL RESPONSES
TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS**

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Dated: September 4, 2014

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CSX Transportation, Inc. (“CSXT”) respectfully submits this Reply in Opposition to HAMP, Inc.’s (“HAMP’s”) Motion to Compel Responses to Interrogatories and Request for Production of Documents (“Motion”). As a threshold matter, HAMP’s Motion is premature because the Board has not yet initiated a proceeding in response to CSXT’s Petition for a Declaratory Order. Moreover, the rhetoric used by HAMP in its Motion inappropriately and wrongly misstates CSXT’s position and actions before this Board and before a Prince William County, Virginia Circuit Court. Finally, the vast and unduly burdensome discovery HAMP seeks is unnecessary to resolve this controversy because the underlying state action is undeniably an unlawful attempt to regulate rail transportation subject to the exclusive jurisdiction of the Board. If the Board nonetheless decides to permit discovery when it institutes the declaratory order proceeding, it should sharply limit the scope of discovery to preclude the overly broad and burdensome nature of the requests HAMP has prematurely propounded.

BACKGROUND

HAMP owns Holly Acres Mobile Home Park, which is in the vicinity of a CSXT rail line maintained since approximately 1902 that runs across a roughly 40-foot tall and

150-foot wide berm crossing the Marumsc Creek in Prince William County, Virginia. A 12-foot concrete arch culvert permits the creek to flow beneath and through the CSXT right-of-way. In September 2011, flooding occurred after Tropical Storm Lee dropped an unprecedented amount of rain on the Mid-Atlantic region. The September 2011 storm was declared a “once-in-a-millennium” event by the National Weather Service and the torrential downpour caused Marumsc Creek to breach its banks and flood HAMP’s low-lying property.¹

HAMP filed a complaint against CSXT in the Circuit Court of Prince William County, Virginia that alleges that flooding rose to the level that it did because of CSXT’s culvert. HAMP claims that the CSXT berm over which the railroad right-of-way runs forms a man-made barrier or dam, and “impounding structure” to the natural flow of the creek. Compl. ¶ 14. The Complaint alleges that CSXT was aware of the potential for flooding and did not take any “action to widen or improve the Culvert.” *Id.* ¶ 19. HAMP’s Complaint is based on state law claims for negligence, trespass, nuisance, various sections of the Virginia Code and inverse condemnation.²

CSXT filed a motion with the Circuit Court for a stay pending a decision by the Board on a petition for declaratory order concerning the preemption of HAMP’s state law claims pursuant to Section 10501(b) of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”). *See* Defendant’s Motion to Stay Pending a Decision by the Surface Transportation Board on CSXT’s Petition for

¹ *See* Martin Weil, *D.C. area’s recent rainfall might be once-in-a-thousand-years event*, WASH. POST., Sept. 16, 2011, *available at* http://www.washingtonpost.com/local/dc-areas-recent-rainfall-might-be-once-in-a-thousand-years-event/2011/09/16/gIQAtU1qYK_story.html.

² A more detailed background discussion of the culvert, effects of the tropical storm, and HAMP’s claims can be found in *CSX Transp., Inc., Petition for Declaratory Order*, STB Fin. Docket No. 35832, at 1-9, (filed June 3, 2014) (“*Petition for Declaratory Order*”).

Declaratory Order, *HAMP, Inc. v. CSX Transp. Inc.*, Case No. CL14-1561 (Prince William Cty. Cir. Ct. Apr. 21, 2014). CSXT also filed a Demurrer to the Complaint alleging state law deficiencies and a Plea in Bar asserting all of HAMP's state law claims are preempted by ICCTA as a matter of law. On July 11, 2014, the Circuit Court stayed all discovery pending a hearing on CSXT's Demurrer scheduled for September 12, 2014.³

CSXT filed a Petition for Declaratory Order with the Board on June 3, 2014. Prior to the Board acting on CSXT's petition and after discovery was stayed in the state court action, HAMP served sweeping discovery requests on CSXT consisting of 13 interrogatories and 14 requests for production of documents seeking information dating back over 100 years and relating to approximately 60,000 culverts across the CSXT system. See *HAMP, Inc.'s First Interrogatories*, STB Fin. Docket No. 35832 (served July 25, 2014); *HAMP, Inc.'s First Request for Production of Documents*, STB Fin. Docket No. 35832 (served July 25, 2014). HAMP filed what it characterized as a "Certificate of Discovery" with the Board on July 30, 2014. CSXT replied in a letter to the Director of the Office of Proceedings in which it explained that because the Board had yet to rule on the *Petition for Declaratory Order*, there is no proceeding at the present time and discovery was therefore not authorized. See Letter from G. Paul Moates to R. Campbell, STB Fin. Docket No. 35832 (filed Aug. 4, 2014) ("*Reply Letter*"). HAMP's Motion followed.

I. HAMP'S DISCOVERY REQUESTS ARE PREMATURE AND UNTIMELY.

HAMP's Motion to Compel has ignored the fundamental point made by CSXT in its *Reply Letter* to the Board: at this time there is no existing proceeding before the Board and, therefore, discovery requests are premature and untimely. HAMP's Motion

³ On May 2, 2014, HAMP served its Notice of Corporate Designee Deposition and First Request for Production of Documents in the state court action, containing 11 overly broad and sweeping requests, none of which seek information necessary to the threshold legally dispositive ICCTA preemption issue.

invokes Section 1114.21 of the Board's rules in seeking to compel discovery, but it misconstrues the key language of that provision. *See* Motion at 3-4. The Board's discovery procedures apply to "a proceeding other than an informal proceeding." 49 C.F.R. § 1114.21. At the present time, there is no proceeding. A proceeding is not initiated by a party filing a petition for declaratory order, but rather by the discretionary act of the Board issuing a decision instituting such a proceeding. *See, e.g., CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 5 (S.T.B. served Mar. 14, 2005) (explaining that the Board "has discretion to grant a request for a declaratory order" pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721). Because the Board has yet to issue a decision, there is currently no proceeding.

The Board recently reaffirmed two principles that HAMP blithely ignores: (1) that the Board has discretionary authority to initiate a declaratory order proceeding—before that time there is no "proceeding" within the meaning of 49 C.F.R. §1114.21; and (2) that discovery is "not typically order[ed]" in declaratory order proceedings. *Diana Del Grosso et al. – Petition for Declaratory Order*, STB Fin. docket No. 35652 (S.T.B. served May 8, 2013) ("*Grosso*"). In *Grosso*, several town residents filed a petition for declaratory order in August of 2012 for the Board to find that a transloading facility was not preempted from local zoning and other regulations. The petitioners also sought discovery at that time. But the Board did not institute a declaratory order proceeding until a January 24, 2013 decision, where it addressed the Petitioners' discovery requests. *Grosso* at 3. The January 24 decision—issued by the Director of the Office of Proceedings—instituted a declaratory order proceeding and denied petitioners' requests for discovery. Petitioners sought reconsideration before the Board. In rejecting Petitioners' arguments, the Board affirmed the principle that declaratory orders are initiated upon Board order, and only at that point can a request to seek discovery be considered: "Petitioners are correct that 49 C.F.R. § 1114.21 permits a party to obtain discovery in formal proceedings But here, the Board did not initiate a proceeding

until the January 24 Decision, and discovery was addressed at that time.” *Id.* at 3, n.7. The Board further found that “the Director . . . correctly stated that the Board does not typically order discovery in declaratory order proceedings.” *Id.* at 3.⁴ The same logic applies here and the Board should deny HAMP’s pending motion to compel and address discovery when and if it institutes a proceeding.

HAMP also invokes 49 U.S.C. § 721(d)(1) as grounds for its discovery request and argues that the provision allows HAMP to seek documents related to an affidavit CSXT included with its *Petition for Declaratory Order*. See Motion at 3. Section 721(d)(1) allows parties to take testimony of a witness by deposition and may require the witness to produce documents. In support of its *Petition for Declaratory Order*, CSXT included an affidavit from Edward D. Sparks II, an Assistant Chief Engineer of Structures with the railroad.⁵ Regardless, Section 721(d)(1) applies to witnesses “[i]n a proceeding.” *Id.* As no proceeding has been initiated – and the Board has not determined that discovery is necessary – HAMP’s reliance on Section 721(d)(1) is also premature.

II. HAMP’S RHETORIC INAPPROPRIATELY AND WRONGLY MISTATES CSXT’S POSITION AND ACTIONS.

HAMP’s Motion contains misleading rhetoric about CSXT’s position. According to HAMP, CSXT “has employed a series of legal gymnastics to delay any resolution of HAMP’s claims.” Motion at 3. HAMP further states that CSXT is “hoping to leave HAMP with no adequate remedy”, is engaged in a “series of delay maneuvers”, and is “playing its shell game.” *Id.* These suggestions of impropriety on the part of CSXT are

⁴“In any proceeding, the Board may determine the proper scope of discovery.” *Id.*

⁵ By contrast, HAMP failed to include any affidavits in support of its opposition to CSXT’s *Petition for Declaratory Order* or the factual allegations in its Motion. For example, HAMP’s Motion claims that CSXT has previously reinforced the culvert at issue and granted permission for the Virginia Department of Transportation to tunnel beneath the railroad. See Motion at 4. Whether or not these allegations are accurate, it was incumbent upon HAMP to support such factual claims.

both inappropriate and incorrect. CSXT has sought a stay at the state court because the matters at issue are preempted by federal law. It is common for parties to seek – and courts to issue – a stay while the Board considers a petition for declaratory order. *See, e.g., V&S Ry., LLC – Petition for Declaratory Order – Railroad Operations in Hutchison, Kan.*, STB Fin. Docket No. 35459 (S.T.B. served July 12, 2012) (District court granted stay motion pending Board review of three specific questions); *14500 Limited LLC – Petition for Declaratory Order*, STB Fin. Docket No. 35788 at 2 (S.T.B. served June 5, 2014) (Court found preemption applied, stayed the action, and referred the matter to the Board). CSXT has also filed a Demurrer and a Plea in Bar at the state court seeking dismissal of the Complaint, which are both appropriate mechanisms in the Circuit Court provided for by Virginia law. As is common practice, the Circuit Court has indicated it will rule on discovery requests after it has resolved the objections raised by CSXT.

HAMP implies that CSXT is somehow misleading the Circuit Court and the Board by informing each of the proceedings pending in the other body. *See* Motion at 3. CSXT has not misled either the Circuit Court or the Board, but rather has simply informed each tribunal of the matters pending before the other. CSXT is not engaged in a “shell game,” as HAMP argues. *Id.* at 3. CSXT is pursuing a reasonable and well tread course of obtaining a declaratory ruling from the Board as to preemption and seeking a stay of judicial action until the preemption issue has been resolved.

III. DISCOVERY IS DISFAVORED IN PREEMPTION CASES BEFORE THE BOARD AND, IF GRANTED, SHOULD BE LIMITED IN SCOPE.

As CSXT has previously explained, even if the Board does initiate a declaratory proceeding, discovery is not automatic, and is in fact not ordinarily necessary in preemption cases. *See Petition for Declaratory Order* at 16. Preemption cases generally present legal issues for which discovery is not necessary. *See CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 6 (S.T.B. served Mar. 14, 2005); *see also Consolidated Rail Corp. – Declaratory Order Proceeding*, STB Fin. Docket No. 34319 at 7

(S.T.B. served Oct. 10, 2003); *United States Environmental Protection Agency – Petition for Declaratory Order*, STB Fin. Docket No. 35803 (S.T.B. served Feb. 6, 2014). CSXT has, therefore, proposed a procedural schedule that excludes discovery and will allow the parties to expeditiously resolve the dispute. *See Petition for Declaratory Order* at 15-16.

If the Board ultimately permits discovery, it should carefully delimit the scope of permissible discovery to avoid the kind of overly broad and unduly burdensome requests included in HAMP's premature interrogatories and requests for production. For example, HAMP's sweeping requests include four interrogatories and three requests for production that would require CSXT to collect information from 1902 to the present, an absurdly lengthy 112 year period.⁶ The breadth of these requests is completely unreasonable and needlessly burdensome. The Board may find a request relevant but still limit production to a more reasonable period of time. *See Sierra Pac. Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012 at 8 (S.T.B. served Jan. 26, 1998) (finding a request for documents relevant but restricting discovery to two years instead of 17 years because that length of time was overly broad). HAMP's requests cover an extraordinarily unreasonable time range.

⁶ *See* HAMP Interrogatory No. 3 ("Identify and describe all revisions, additions and improvements to the Culvert from the time it was constructed to the present day"); No. 4 ("Identify and describe any maintenance or work on the Culvert from 1902 to present..."); No. 5 ("Identify all inspections performed on the Culvert from 1902 to present..."); No. 6 ("Describe the results of the inspections identified in Interrogatory #5..."); HAMP Request for Production No. 1 ("All documents, studies, plans, revisions, additions and improvements in connection with or related to the Culvert from the time it was planned to the present."); No. 2 ("All documents pertaining to any maintenance performed or work performed on the Culvert from 1902 to present..."); No. 3 ("All documents in connection with or relating to any inspections performed on the Culvert from 1902 to present...").

HAMP also propounded discovery requests related to the approximately 60,000 culverts on CSXT's system.⁷ HAMP's state court action concerns a single culvert in Prince William County, Virginia that was affected by a tropical storm in 2011. The fact that CSXT pointed out that there are approximately 60,000 culverts on its system to which HAMP's legal theories might apply does not justify HAMP's attempt to engage in a massive fishing expedition. In prior cases, the Board has found that when a discovery request is burdensome on its face – as a request for information relating to 60,000 culverts in a case involving a single culvert surely is – “a substantial showing of relevance and need” must be made in order to outweigh the burden of producing the evidence. *See, e.g., FMC Wyoming Corp. v. Union Pacific R.R. Co.*, STB Docket No. 42022 at 5 (S.T.B. served Feb. 5, 1998). Such a showing would be inconceivable here given that a single culvert is at issue, and HAMP has not even attempted to provide one.

Moreover, the discovery HAMP seeks regarding the other 60,000 culverts on CSXT's system is wholly irrelevant to the legal issues presented to the Board. All of HAMP's state law claims undeniably arise from the construction, operation, and design of CSXT's railroad culvert and berm. It cannot credibly be disputed that the culvert supporting CSXT's railroad right-of-way for more than a century is an integral part of “rail transportation” under ICCTA. As such, HAMP's claims constitute the impermissible “regulation of rail transportation” that ICCTA preempts as a matter of

⁷ *See* HAMP Interrogatory No. 11 (“Identify each CSX culvert, out of all of CSX's alleged 60,000 culverts (See, Declaration, ¶7) which required some alteration to its original design/construction...”); No. 12 (“For each culvert listed in the response to Interrogatory 11, list the costs of the alteration.”); No. 13 (“For each culvert listed in the response to Interrogatory No. 11, provide all information pertaining to whether or not CSX railway operations were disturbed, interfered with, or halted...”).

law.⁸ 49 U.S.C. § 10501(b); *see also* 49 U.S.C. § 10102(6)(A), (9)(A) & (B) (defining “transportation” and “railroad”).

CSXT is not filing formal objections to HAMP’s requests at this time because such requests – and any responses – are premature. But should the Board ultimately allow discovery – which as CSXT has demonstrated is unnecessary here – it should reasonably limit the scope of discovery in both time and scope.⁹

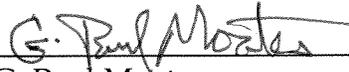
CONCLUSION

For the reasons discussed herein, CSXT requests that the Board deny HAMP’s Motion to Compel Responses to Interrogatories and Request for Production of Documents.

⁸ HAMP’s discovery requests related to the potential costs of the redesign or reconstruction of the culvert at issue or the other 60,000 culverts on the CSXT system are equally abusive and irrelevant. Even if the costs to redesign the culvert totaled \$1 million or less (which is highly unlikely), state law claims seeking damages of even a small fraction of that amount constitute regulation preempted by ICCTA. *See Mark Lange – Pet. for Decl. Order*, STB Docket No. 35037 (S.T.B. served Jan. 28, 2008) (even a minimal amount of damages – \$20,000 – equals preempted regulation).

⁹ In the event that the Board allows discovery, CSXT reserves the right to file substantive formal objections to each of HAMP’s discovery requests.

Respectfully submitted,



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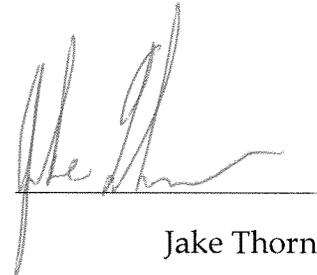
Counsel to CSX Transportation, Inc.

Dated: September 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2014, I served a copy of the foregoing CSX Transportation, Inc.'s Reply in Opposition to HAMP, Inc.'s Motion to Compel Responses to Interrogatories and Request for Production of Documents by U.S. Mail or more expeditious method of delivery upon:

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