

BEFORE THE
SURFACE TRANSPORTATION BOARD ENTERED

14500 LIMITED LLC)	Office of Proceedings
)	January 8, 2014
Petitioner)	Part of
)	Public Record
v.)	
)	Docket No. FD 35788
CSX TRANSPORTATION, INC.)	
)	
Respondent)	
)	

**CSX TRANSPORTATION, INC.’S REPLY
TO PETITION FOR DECLARATORY ORDER**

Respondent CSX Transportation, Inc. (“CSXT”) hereby submits its Reply in Opposition to the Petition for Declaratory Order filed by 14500 Limited LLC (“Petitioner”) on December 2, 2013, asking the Board to declare that Petitioner “by common law application under the laws of Ohio of adverse possession” is the rightful owner of a small part of CSXT’s Collinwood Rail Yard in Cleveland, Ohio. A federal District Court has already properly concluded that Petitioner’s state-law claims are completely preempted by § 10501(b) of the Interstate Commerce Commission Termination Act (“ICCTA”). The Court could have dismissed the complaint with that finding as a matter of law. But concerned that it not inadvertently deny Petitioner an opportunity to be heard further on any possible claims under ICCTA, the Court chose instead – as a precautionary measure – to refer the matter to the Board to decide if there were any merit to Petitioner’s claims under ICCTA. The law is clear, however. There is no basis under ICCTA for Petitioner to acquire part of the active Collinwood Rail Yard under a state law theory based on either adverse possession or an exclusive

prescriptive easement. The Board should therefore dismiss this Petition and assure the District Court that the underlying complaint should in fact be properly dismissed with prejudice.

BACKGROUND

The relevant facts of this case are not in dispute. Petitioner is a trucking company with property in Cleveland, Ohio that abuts CSXT's Collinwood Rail Yard. Petitioner (and the previous owner of the property) claimed to have encroached on the rail yard to the point of erecting a fence around approximately 0.44 acres. Petitioner approached CSXT with a proposal to purchase this small portion of the Collinwood Rail Yard. *See* CSXT Notice of Removal, Declaration of Walsh, ¶7 (attached hereto as Exhibit 1). But CSXT ultimately concluded that the property was needed to preserve the ability of the rail yard to meet current and future rail transportation demands. *Id.* CSXT offered to lease the property to Petitioner, but Petitioner chose instead to file an action in state court to quiet title due to adverse possession and for an exclusive prescriptive easement. The case was removed to federal court based upon complete preemption under ICCTA.

To support preemption, CSXT explained to the District Court the critical importance of the Collinwood Rail Yard to its interstate rail operations. *See* CSXT Notice of Removal, Declaration of Ratcliffe (attached hereto as Exhibit 2). The Collinwood Rail Yard is located on CSXT's main rail corridor running between Chicago and New York, one of the densest rail corridors in the eastern United States. *Id.* at ¶6. This yard is a major rail transportation and intermodal hub used to serve CSXT's interstate and local rail customers. *Id.* at ¶7. Numerous trains move into, within, and out of this busy rail yard, where CSXT performs switching operations, mechanical inspections, and railcar and locomotive repairs. *Id.* CSXT explained that rail traffic through the yard has increased in recent years and CSXT projects significant growth in traffic through the rail corridor. *Id.* at ¶8.

CSXT stated that it was therefore critical that the rail yard maintain sufficient flexibility to expand or reconfigure its operations to accommodate the increased traffic. *Id.* Moreover, the rail yard is located in a densely populated urban area in Cleveland that lacks available room for expansion. CSXT, therefore, explained that the loss of the property at issue would have serious, negative consequences on rail transportation. If its future operational capabilities at Collinwood Rail Yard were limited or constrained, it “would result in delays in rail traffic across CSXT’s rail network” and “would also negatively impact CSXT’s ability to provide efficient rail service to its local rail transportation customers” in the Cleveland area. *Id.* at ¶9.

Petitioner offered testimony that the property at issue was not currently being used by CSXT and was unusable by CSXT in its current condition. *See* Petitioner Motion to Remand, Affidavit of Gloger at ¶7 (attached hereto as Exhibit 3). Petitioner maintained, therefore, that its encroachment into the CSXT’s rail yard and possession of the property would not affect CSXT’s operations now or in the future. *Id.* at ¶11.

Weighing the evidence submitted, the District Court found the state law claims completely preempted by ICCTA. First, the District Court set forth the applicable legal standards. *See* Remand Decision at 4-8 (attached hereto as Exhibit 4). It correctly noted that § 10501(b) confers exclusive jurisdiction upon the STB over transportation by rail carriers and over the construction, acquisition, and abandonment of rail facilities. It further observed that, in general, ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *Id.* at 5 (*quoting Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008)). The District Court correctly noted that even

though property was not currently being used for railroad transportation, that the taking of the property was preempted if it prevented the railroad from using the property for future rail transportation use. *Id.* at 7 (citing *Union Pacific R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011)). And the District Court gave deference to a recent Board decision finding an adverse possession claim preempted by ICCTA based, in part, on “the strong federal policy in favor of retaining rail property in the national rail network, where possible.” *Id.* at 7-8 (quoting *Jie Ao and Zin Zhou – Petition for Declaratory Order*, STB Docket No. FD 35539 (served June 6, 2012) (*Jie Ao*)).

The District Court then resolved (in CSXT’s favor) the factual dispute over the importance of the property at issue to CSXT’s current and future uses of Collinwood Rail Yard. The Court found compelling CSXT’s uncontroverted testimony that the property in question is needed to accommodate the future needs of the yard due to increased traffic through this dense rail corridor. Emphasizing the strong federal interest in retaining rail property in the national rail network and the need to provide the Collinwood Rail Yard with the necessary flexibility to meet future rail transportation needs, the District Court found that permitting Petitioner to encroach on the yard and acquire the property through adverse possession would adversely affect railroad transportation and was therefore preempted by ICCTA. *Id.* at 9.¹

¹ Originally, the District Court questioned whether the state law prescriptive easement claim was preempted, citing the Board’s *Jie Ao* decision. *See* Remand Decision at 10-11. Ultimately, however, the Court agreed with CSXT that Petitioner’s claim for a prescriptive easement was, in essence, identical to the adverse possession claim because Petitioner sought an *exclusive* easement that would deprive CSXT of the use of its property. The District Court, therefore, also found the second state claim preempted by ICCTA for the same reasons the adverse possession claim was preempted, *i.e.*, “because [Petitioner] seeks to deprive the railroad of its property that would affect railroad transportation.” Referral Decision at 4.

Having found the state claims completely preempted by ICCTA and denying the Petitioner's motion to remand, the District Court expressed uncertainty as to the appropriate action it should take. It therefore ordered briefs from the parties, to which only CSXT provided a timely reply. The District Court reasoned that it had three options: proceed with the claims under ICCTA (although it failed to identify any cognizable claims with which to proceed), refer the matter to the STB, or dismiss the case with prejudice. Upon reflection, the District Court concluded that the appropriate course was not dismissal, but rather to "proceed on the merits of the claims under the ICCTA." Referral Decision at 4-5. The District Court reasoned that, if any surviving cognizable claims under ICCTA existed, they would fall within the primary jurisdiction of the STB. To ensure that Petitioner was not "unfairly disadvantaged by having its claims dismissed," the District Court referred the matter to the Board "to determine the merits of Plaintiff's claims." *Id.* at 7-8.

DISCUSSION

Petitioner asks the Board to begin a declaratory proceeding "to resolve the issues relating to the adverse possession of [CSXT's] property" and to declare that Petitioner, "by the common law application under the laws of Ohio of adverse possession is the rightful fee simple owner of the land in question." Petition at 1-2. The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to begin a declaratory order proceeding to eliminate a controversy or remove uncertainty. Where the law is clear, however, the Board will decline to institute a proceeding and instead describe the applicable law in sufficient detail to help the referring court resolve the matter. *See, e.g., Mark Lange – Petition for Declaratory Order*, STB Docket No. FD 35037 (served Jan. 28, 2008); *Town of Milford, MA – Petition for Declaratory Order*, STB Docket No. FD 34444 (served Aug. 12, 2004).

CSXT respectfully submits that the Board should decline to issue the declaratory order sought by Petitioner for two reasons. *First*, the issue of federal preemption of the state law property claims at issue has already been fully and properly resolved by the federal District Court. Issues involving the federal preemption provision contained in § 10501(b) “can be decided either by the Board or the courts in the first instance.” *Jie Ao* at 3. And the District Court—following well established preemption precedent from the federal courts and this agency—properly found that permitting Petitioner to acquire the contested parcel in the active Collinwood Rail Yard would interfere with the ability of CSXT to meet anticipated future growth in that important corridor.² Indeed, there is no suggestion in the decision that the District Court referred the preemption issue to the Board for a second opinion on that issue.

Second, there is no basis to declare that Petitioner is the rightful fee simple owner of the railroad property in question under ICCTA. Simply put, there are no federal adverse possession or exclusive prescriptive easement provisions in

² These facts present stronger grounds for ICCTA preemption than those in the *Jie Ao* case. There, the property had been rail banked under the Rails-To-Trails program; it was not being used to conduct any interstate rail transportation. Nonetheless, the Board found the state adverse possession claim preempted under either a “categorical” preemption or an “as applied” preemption analysis. *Jie Ao* at 2. The agency was concerned that the loss of rail-banked property would limit the capacity of the line should it be needed for future active rail service. Citing with approval *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005), the Board reasoned that even with rail-banked property, condemnation via adverse possession is a “permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *Jie Ao* at 7. These concerns are exponentially more manifest when a landowner seeks to encroach on an active rail yard along a dense rail corridor in a populated urban area. If this claim were not preempted, neighboring property owners located anywhere along CSXT’s 21,000 interstate rail network could seek to carve off tiny strips of railroad property for non-rail use. CSXT and the industry would then be exposed to the threat of “death by a thousand cuts.”

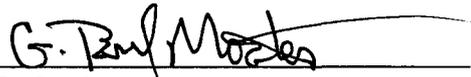
ICCTA. Were it otherwise, the STB would become the principal forum to resolve preempted state law property claims and its limited resources could readily be threatened by such litigation. There may well be limited circumstances where a finding of complete preemption of state claims should result in a referral to the STB to resolve the merits of the complaint. *Accord Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 811-12 (5th Cir. 2011)(suggesting it might be an abuse of discretion for a district court to dismiss a claim after a finding of preemption if the plaintiff had identified any substantive claim or issue under ICCTA requiring resolution by the STB). But after the District Court here found these state claims completely preempted, there is nothing left for the STB to resolve.

With the state law claims preempted by ICCTA, the District Court could have properly dismissed this case. Yet the District Court was plainly concerned that it not prematurely shut the door on Petitioner. It also could find “no binding precedent on how to proceed on the merits once the Court has determined complete preemption.” Referral Decision at 5-6. Rather than try to master the subtle intricacies of the ICCTA, the District Court ultimately deferred further ruling and referred this matter to the Board for any further adjudication on the merits of Petitioner’s claims under ICCTA. With guidance from the Board that there is in fact no basis under ICCTA for the District Court to declare Petitioner the owner of a part of the Collinwood Rail Yard under a state law theory of either adverse possession or exclusive easement by prescription – and that the District Court can and should dismiss the underlying case with prejudice – this controversy can come to an end.

CONCLUSION

For the reasons discussed, CSXT urges the Board to dismiss this Petition while providing the guidance sought by the District Court. The Board should advise the District Court that there are no merits to Petitioner's claims under the ICCTA and that the underlying case can and should be dismissed with prejudice.

Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: January 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2014, I caused a copy of CSXT's
Reply to Petition for Declaratory Order to be served by email upon:

David J. Horvath
7100 East Pleasant Valley Road
Suite 110
Independence, OH 44131



Marc A. Korman

EXHIBITS

EXHIBIT 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

14500 LIMITED, an Ohio Limited
Liability Company

Plaintiff,

Case No.

vs.

CSX TRANSPORTATION, INC., a
Virginia Corporation.

Defendant.

DECLARATION OF ELIZABETH WALSH

1. My name is Elizabeth Walsh. I am an adult individual over the age of eighteen years and am competent to make this Declaration. Unless stated otherwise herein, the facts set forth herein are from my own personal knowledge or from my review of business records kept in the ordinary course of business by CSX Transportation, Inc. (“CSXT”).

2. I am currently employed as a Title Specialist for CSX Real Property, Inc. (“CSX RPI”) which maintains title and property records for CSXT. I have held that position with CSX RPI for approximately 7 years.

3. I am aware that the Plaintiff, 14500 Limited, LLC, has filed an action to quiet title and for a prescriptive easement against CSXT (the "Action"), and I have reviewed the Complaint filed in the Action. This Action seeks to adversely possess a portion of CSXT owned property located within CSXT's Collinwood Rail Yard in Cleveland, Ohio (the "CSXT Property"). The portion of the CSXT Property at issue totals approximately .44 acres (the "CSXT Parcel").

4. Based upon a review of CSXT property records, the CSXT Property is owned by CSXT in fee simple, and has been owned by CSXT and its predecessors since approximately 1873. The CSXT Property, including the CSXT Parcel, is identified in the Cuyahoga County, Ohio Auditor's property records as parcel number 112-27-003.

5. All of the CSXT Property, including the entire CSXT Parcel, is designated by CSXT as part of the Collinwood Rail Yard. A portion of the CSXT Parcel also falls within CSXT's regulated rail system under the exclusive jurisdiction of the Surface Transportation Board.

6. As the Collinwood Rail Yard is located in a densely populated and urban area of Cleveland, Ohio, there is limited available land surrounding the Collinwood Rail Yard for acquisition or expansion by CSXT.

7. Earlier this year, I was aware that representatives of CSXT were approached by representatives of Plaintiff 14500 Limited, LLC regarding a request to purchase the CSXT Parcel. Per CSXT's customary procedure, CSX Real Property representatives initially reviewed the request to purchase the CSXT Parcel. The request was then sent to CSXT's rail transportation and operations personnel for their review and consideration. Based on CSXT's evaluation of current and anticipated future uses of the Collinwood Rail Yard, CSXT rail transportation and operations personnel declined to sell the CSXT Parcel.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 13, 2012.


ELIZABETH WALSH

V40556134.1

EXHIBIT 2

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

14500 LIMITED, an Ohio Limited
Liability Company

Plaintiff,

Case No.

vs.

CSX TRANSPORTATION, INC., a
Virginia Corporation.

Defendant.

DECLARATION OF LAWRENCE L. RATCLIFFE

1. My name is Lawrence L. Ratcliffe. I am an adult individual over the age of eighteen years and am competent to make this Declaration. Unless stated otherwise herein, the facts set forth herein are from my own personal knowledge or from my review of business records kept in the ordinary course of business by CSX Transportation, Inc. ("CSXT").

2. I am currently employed as the Director Network Planning for CSXT. I have held that position for approximately eight years. I have been employed by CSXT for a total of approximately thirteen years. Prior to joining CSXT, I worked for Consolidated Rail Corporation ("ConRail"). I have a total of over thirty years experience working for railroads.

3. CSXT is one of the largest railroad transportation companies in the United States. CSXT provides common carrier rail transportation services across a rail network consisting of approximately 21,000 railroad route miles linking communities and commercial markets in 23 states (including the State of Ohio), the District of Columbia, and two Canadian provinces (the "CSXT System"). CSXT is a Class I railroad as defined by the Surface Transportation Board.

4. As Director Network Planning for CSXT, I am responsible for planning and analysis of the CSXT rail network. My duties and responsibilities include evaluation of CSXT's long-term rail network capacity needs. My responsibilities extend to the entire CSXT System.

5. The CSXT System includes more than 4,000 railroad route miles in the State of Ohio, including the Collinwood Rail Yard in Cleveland, Ohio. In my current capacity and based upon my prior experience, I am familiar with the Collinwood Rail Yard, its rail transportation activities, layout, the surrounding area, and the current and potential future railroad operations and uses of the Collinwood Rail Yard.

6. For more than a century, CSXT and its predecessor railroads have used the Collinwood Rail Yard as an active and operating rail yard engaged in interstate rail commerce. CSXT and its predecessor railroads have also operated a mainline track through Cleveland, Cuyahoga County, Ohio for more than 100 years. CSXT's main rail corridor between Chicago, Illinois and St Louis, Missouri on one hand and Buffalo, New York; New England; and the New York metropolitan area on the other hand runs through Cleveland, Ohio (the "Rail Corridor"). The Collinwood Rail Yard is an integral part of CSXT's Rail Corridor. The Rail Corridor is one of the densest rail freight corridors in the entire eastern United States.

7. CSXT's Collinwood Rail Yard is a major rail transportation and intermodal hub used to serve CSXT's interstate and local rail customers. Collinwood Rail Yard is centrally

located on the Rail Corridor and is the primary CSXT rail transportation facility in the Cleveland, Ohio area. Numerous CSXT trains stop at the Collinwood Rail Yard to exchange traffic and a number of trains originate and terminate at Collinwood Rail Yard. In addition, several trains each day stop at the Collinwood Rail Yard to receive federally mandated mechanical inspections. Besides these freight car switching operations CSXT uses the Collinwood Rail Yard to refuel CSXT trains running on the Rail Corridor, to service locomotives and to repair freight cars. CSXT also uses the Collinwood Rail Yard to switch rail traffic and to provide rail services to CSXT rail served customers in and around the Cleveland, Ohio area.

8. The Collinwood Rail Yard has seen an increase in rail traffic in recent years and CSXT currently projects significant growth in rail traffic on the Rail Corridor running through Cleveland, Ohio and increased use of the Collinwood Rail Yard. As such, it is critical that CSXT maintain adequate capacity and flexibility to expand or to reconfigure the Collinwood Rail Yard as interstate and local rail served traffic increases in the coming years.

9. I am aware that the Plaintiff, 14500 Limited, LLC, has filed a lawsuit (the "Action") seeking to adversely possess a portion of CSXT owned property located within the Collinwood Rail Yard (the "CSXT Property"), and I have reviewed the Complaint filed by the Plaintiff in the Action. The portion of the CSXT Property at issue totals approximately .44 acres (the "CSXT Parcel").

9. If CSXT's future operational capabilities at Collinwood Rail Yard are limited or constrained, it would result in delays in rail traffic across CSXT's rail network, including the critical Chicago / St Louis - Buffalo / New England / New York rail corridor. Any operational disruption or interference at Collinwood Rail Yard would also negatively impact CSXT's ability to provide efficient rail service to its local rail transportation customers.

10. If the Plaintiff is allowed to adversely possess or to take the CSXT Parcel, it would directly limit or reduce CSXT's future ability and operational flexibility to efficiently conduct railroad operations at Collinwood Rail Yard. Such negative impacts would include precluding CSXT's ability to use the CSXT Parcel to add or expand tracks, to construct additional rail support facilities, and to offload or store products shipped by rail. In addition, if CSXT's ability to expand or reconfigure the Collinwood Rail were restricted, CSXT would then be forced to incur substantial capital investment to explore alternative locations (to the extent such locations exist and are suitable).

11. As the Collinwood Rail Yard is located in a densely populated and urban area of Cleveland, Ohio, there is no readily available property surrounding the Collinwood Rail Yard for future railroad operations. As such, the loss of the CSXT Parcel from the Collinwood Rail Yard would have a significant impact on CSXT's ability to conduct future railroad operations. Although the harm would be difficult to quantify, the potential loss and impact upon CSXT's future railroad operations would far exceed \$75,000.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 13, 2012.


LAWRENCE L. RATCLIFFE

V40549543.1

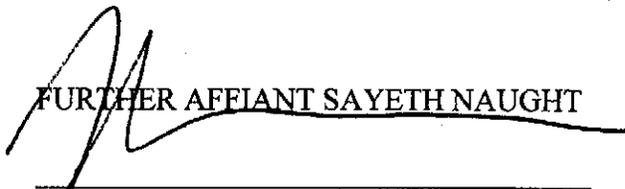
EXHIBIT 3

STATE OF OHIO)
)
COUNTY OF CUYAHOGA) AFFIDAVIT OF
) SS: NEIL GLOGER

I Neil Gloger being first duly sworn and cautioned according to law, do hereby depose state, allege, aver as enumerated hereunder:

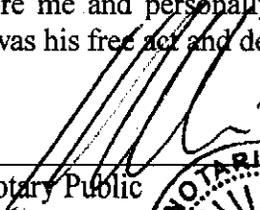
1. That I am Managing Partner for 14500 Limited, an Ohio Limited Liability Company, the Plaintiff in the instant litigation.
2. That Plaintiff owns certain property which abuts property owned by CSX Transportation.
3. That I made due and diligent inquiry as to the ownership and use of this land prior to purchasing said land for the company.
4. That I was assured by the previous owner that no one else had used this particular piece of land for decades. This includes the Defendant CSX Transportation.
5. That at the end boundaries of the parcel of land that we are trying to take by adverse possession is a fence which has precluded anyone from CSX from entering on to the property from their adjacent property.
6. That at all times all parties assumed that this particular piece of land was indeed owned by the previous owners and not CSX Transportation.
7. In its current state the land is not usable for CSX nor can it conceivably be used for them in any future railroad endeavors. There is no evidence of tracks ever being on this property nor is there any indication that this property was ever intended to be used for railroad transportation purposes.
8. Furthermore, I entered into negotiations with CSX for the purchase of adjacent land. **They represented this value at \$20,000.00-\$28,000.00 of this land in question.**
9. I understand that CSX is now representing to this court that the value of this land is in excess of \$75,000.00. This is simply false. It was their valuation of the land that caused me to consider legal options for obtaining this land including this lawsuit. Again, this land was valued by them at only \$20,000.00-\$28,000.00. Stating otherwise is nothing more than an argument of convenience to improperly force this matter into Federal Court.
10. I am in no way attempting to regulate or otherwise affect the affairs of the Defendant.
11. In no way will the change of ownership in this land affect the operations of CSX Transportation currently or in the future.

12. The ownership of this land is necessary to the continued operation and profitability of my business and the worth of the land in general. It is worthless to CSX.
13. Representatives from CSX had expressed to me they have no plans now or in the future for the use of this land.
14. Again, my company is in no way trying to interfere with the operations of CSX. Ownership of this land is irrelevant to the continued operations of CSX.


FURTHER AFFIANT SAYETH NAUGHT

Neil Gloger

On July __, 2012 Neil Gloger appeared before me and personally subscribed that the above is his signature and did attest that this affidavit was his free act and deed.



Notary Public



Kevin R. Collins
Notary Public
State of Ohio
My Comm. Exp.
Feb. 23, 2014

EXHIBIT 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

14500 LIMITED)	CASE NO.1:12CV1810
)	
Plaintiff,)	JUDGE CHRISTOPHER A. BOYKO
)	
Vs.)	
)	
CSX TRANSPORTATION, INC.,)	<u>OPINION AND ORDER</u>
)	
Defendant.)	

CHRISTOPHER A. BOYKO, J:

This matter is before the Court on Plaintiff 14500 Limited’s Motion to Remand (ECF # 5). For the following reasons, the Court denies Plaintiff’s Motion.

The facts of this case are largely not in dispute. Plaintiff is a trucking company with property located in the city of Cleveland, Ohio. Defendant CSX Transportation, Inc. (“CSX”) owns the Collinwood Railyard whose property abuts Plaintiff’s. Plaintiff contends that the previous owner of its property and subsequently Plaintiff thereafter, have encroached on Defendant’s property to the point of erecting a fence around a portion of Defendant’s property. As a result, Plaintiff and its predecessors have excluded Defendant from the property for more

than twenty-one years. In June 2012, Plaintiff filed an action in state court to quiet title due to adverse possession and for prescriptive easement. Plaintiff alleges that the adversely possessed property is necessary for it to maintain its operation.

On July 13, 2012, Defendant removed the case to this Court alleging complete federal preemption under Section 10501(b) of the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10101 *et seq.* and, alternatively, under 28 U.S.C. §1332 due to the diversity of the parties. According to Defendant, this parcel is necessary for its present and future operation of the railyard. In fact, Defendant contends the parties entered into preliminary discussions for the sale of the disputed property but Defendant ultimately determined the property was essential to its future expansion.

At issue before the Court is whether the ICCTA completely preempts Plaintiff’s claims to quiet title based on adverse possession and prescriptive easement under state law.

LAW AND ANALYSIS

Standard of Review

28 U.S.C. § 1441 “provides that an action is removable only if it could have initially been brought in federal court.” *Cole v. Great Atl. & Pacific Tea Co.*, 728 F.Supp. 1305, 1307 (E.D.Ky.1990). Put another way, “[a] civil case that is filed in state court may be removed by the defendant to federal district court if the plaintiff could have chosen to file there originally.” *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F.3d 1055, 1059 (6th Cir.2008). The burden of establishing federal jurisdiction rests upon the removing party, i.e., the defendant. *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir.1994). “Concern about encroaching on a state court’s right to decide cases properly before it, requires this court to construe removal

jurisdiction narrowly.” *Cole*, 728 F.Supp. at 1307 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941)). A removed case **must** be remanded if the district court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). In addition, “[w]here there is doubt as to federal jurisdiction, the doubt should be construed in favor of remanding the case to the State court where there is no doubt as to its jurisdiction.” *Walsh v. Am. Airlines, Inc.*, 264 F.Supp. 514, 515 (E.D.Ky.1967); see also *Breymann v. Pennsylvania, O. & D. R.R.*, 38 F.2d 209, 212 (6th Cir.1930).

Federal district courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803)). “Subject matter jurisdiction is the unwaivable *sine qua non* for exercise of the federal judicial power.” *Crabtree v. Wal-Mart*, 2006 WL 897210 at *1 (E.D.Ky. Apr. 4, 2006), slip copy; *Richmond v. Int’l Bus. Machs. Corp.*, 919 F.Supp. 107 (E.D.N.Y. 1996) (citing Fed.R.Civ.P. 12(b)(1)). Want of subject matter jurisdiction may be raised at any time by the parties or by the Court on its own initiative. Fed.R.Civ.P. 12(b)(1) and 12(h)(3); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). “[D]efects in subject matter jurisdiction cannot be waived by the parties and may be addressed by a court on its own motion at any stage of the proceedings.” *Curry v. U.S. Bulk Transp., Inc.*, 462 F.3d 536, 540 (6th Cir.2006) (citing *Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir.1988)).

In the absence of diversity, a civil action filed in state court may be removed to federal court only if the claim “arises under” federal law. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003). “Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be

removable without regard to the citizenship or residence of the parties.” 28 U.S.C.

§ 1441(b). “Since a defendant may remove a case only if the claim could have been brought in federal court, . . . the question for removal jurisdiction must also be determined by reference to the ‘well-pleaded complaint.’” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

However, an exception to the “well-pleaded complaint” rule is the “complete preemption” doctrine. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 399 (1987) “[A]ny claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” *Id.* at 393. Because CSX is the party seeking removal, and since the face of Limited’s well-pleaded Complaint does not state a federal claim, CSX carries the burden of establishing Limited’s cause of action is completely preempted. *See Valinski v. Detroit Edison*, 197 Fed. Appx. 403, 2006 WL 2220979 at *12 (6th Cir., Aug. 4, 2006).

ICCTA and Complete Preemption

The ICCTA, 49 U.S.C. § 10101 *et seq.* was implemented by Congress to regulate railroads and broaden the express preemption of the Interstate Commerce Act. It created the Surface Transportation Board and conferred upon it exclusive jurisdiction over certain interstate railroad activity as outlined in 49 U.S.C. § 10101, including: encouraging competitive rates, minimizing the need for federal regulatory control, requiring fair and expeditious regulatory decisions, promoting a safe and efficient railroad system and promoting public health and safety. The ICCTA defines “railroad” as: . . .”(C) a switch, spur, track, terminal, terminal facility, and a freight depot, **yard**, and ground, used or necessary for transportation.”(Emphasis added). It also

defines “transportation” to include: 9(A) “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” (Emphasis added).

The ICCTA confers exclusive jurisdiction upon the STB over:

(1) 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

(2) 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, is exclusive. Except 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).

“With the enactment of ICCTA, effective January 1, 1996, Congress codified an explicit preemption clause at 49 U.S.C. § 10501(b)(2), which provides that: ‘Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.’”

Columbiana County Port Authority v. Boardman Tp. Park Dist. 154 F.Supp.2d 1165, 1180 (N.D. Ohio, 2001).

The Sixth Circuit has held that the ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”

Adrian & Blissfield R. Co. v. Village of Blissfield 550 F.3d 533, 539 (6th Cir. 2008)(Citations

omitted.)

Defendant contends Plaintiff's state court actions for adverse possession and prescriptive easement are necessarily preempted by the ICCTA because taking the property of Defendant would deprive Defendant of the future use of its property. In opposing Plaintiff's Motion to Remand, Defendant offers the declaration of Lawrence L. Ratcliffe, Director of Network Planning for CSX. Mr. Ratcliffe declares that he is responsible for planning and analysis of Defendant's rail network, including its long-term rail network needs. According to Ratcliffe, the property in question is part of the Collinwood Railyard, located within the City of Cleveland. The Collinwood Railyard is an integral part of the Rail Corridor which is CSX's main rail corridor running between Chicago, Illinois and St. Louis Missouri on one side and Buffalo, New York; New England; and New York City on the other. The line runs through Cleveland and is one of the densest rail corridors in the eastern United States, according to Ratcliffe. Ratcliffe asserts that the Collinwood Railyard is of crucial importance because it is centrally located, serves as a mechanical inspection point and acts as an exchange center for traffic. Several trains each day originate and terminate at the Collinwood Railyard.

Ratcliffe further declares that traffic through the Collinwood Railyard has increased in recent years and CSX projects significant growth in traffic through the Rail Corridor. Therefore, Ratcliffe states it is critical that the Collinwood Railyard maintain sufficient flexibility to expand or reconfigure its operations to accommodate the increased traffic. Ratcliffe declares that rail service would be impacted negatively if the Collinwood Railyard lacks the ability to reconfigure. Because the Collinwood Railyard is located in a densely populated urban area that lacks available property nearby for expansion of rail road operations, Ratcliffe asserts that the loss of the

property at issue would have serious, negative consequences on rail transportation.

Plaintiff offers the affidavit of Neil Gloger, Managing Partner of Limited. He attests that the property at issue is not presently being used by Defendant, is not usable by Defendant in its present condition and bears no evidence of ever having been used for rail transportation. He attests that his possession of the property will not affect CSX's operations now or in the future.

Upon consideration of the parties' respective briefs, the Court holds that the ICCTA completely preempts Plaintiff's state law claims. Both a United States Circuit Court and the STB have concluded that attempts to take railroad property are preempted by the ICCTA.

In *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011), the Seventh Circuit determined that even though property of a railroad was not currently being used for railroad transportation, a taking of the property would prevent the railroad from using it for future transportation use and such action was preempted by the ICCTA.

In *B & S Holdings LLC v. BNSF Railway Co.* No. 12CV387, 2012 WL 3966320 (E.D. Wash. Sept. 11, 2012), the district court determined "the ICCTA completely preempts this state law adverse possession cause of action because not only would it interfere with railroad operations, but would divest the railroad of the very property with which it conducts its operations."

Similarly, in a decision by the STB in *Jie Ao and Xin Zhou, Petition for Declaratory Order*, FD 35539, 2012 WL 2047726 (STB June 6, 2012), the Board determined the ICCTA completely preempted Petitioners' state adverse possession claims to ownership of property belonging to a railroad. The STB reached its conclusion based on its assessment that although the property at issue was not currently used by the railroad for transportation, "the record here

shows that transferring ownership of Parcel D would directly affect the amount and type of maintenance that could be performed on this railroad ROW (right of way), and limit future options for reactivation.” *Id* at*7 The Board also based its decision on “the strong federal policy in favor of retaining rail property in the national rail network, where possible.” *Id*.

This Court further holds that the STB’s ruling in *Jie Ao* is entitled to deference under the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–844, (1984).

“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. (Internal citation omitted). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”

The Sixth Circuit has expressly stated “[w]hen faced with a problem of statutory construction, federal courts should show ‘great deference to the interpretation given the statute by the officers or agency charged with its enforcement.’” *Herman v. Fabri-Centers of America, Inc.* 308 F.3d 580, 592 (6th Cir. 2002). There is no dispute that the STB is granted exclusive jurisdiction over railroad transportation. *Railroad Ventures, Inc. v. Surface Transp. Bd.* 299 F.3d 523, 530 (6th Cir. 2002) (“The STB is now the federal agency with exclusive jurisdiction over transportation by railroad.”) Congress intended to delegate to the STB decisions concerning railroad transportation. At least one circuit court has determined that STB decisions are entitled

to *Chevron* deference. *Assoc. Of American Railroads v. South Coast Air Quality Management Dist.* 633 F.3d 1094, 1097 (9th Cir. 2010).

Based on the evidence and arguments before the Court, the Court finds that the ICCTA preempts Plaintiff's adverse possession claim because the evidence presented demonstrates that the taking of Defendant's property would affect railroad transportation in the future. The Court finds persuasive Defendant's representation that the property in question is needed to potentially accommodate future needs of the Collinwood Railyard due to increased traffic through the Rail Corridor therefore, the adverse possession claim would affect rail transportation. Given the Government's overarching interest in "retaining rail property in the rail network" and Defendant's own representations that it needs the flexibility afforded the property in question to meet future needs, the Court finds it affects railroad transportation and is preempted by the ICCTA.

Diversity Jurisdiction

Defendant also based its removal on diversity jurisdiction. In order to establish diversity jurisdiction under 28 U.S.C. § 1332(a)(1), there must be complete diversity of citizenship between the parties *and* an amount-in-controversy exceeding Seventy-Five Thousand Dollars (\$75,000). The burden is on removing party "to show by a preponderance of the evidence that the allegations in the complaint at the time of removal satisfy the amount-in-controversy requirement." *Northup Properties, Inc. v. Chesapeake Appalachia, L.L.C.* 567 F.3d 767, 769 - 770 (6th Cir. 2009)

The parties do not dispute they are diverse citizens as Plaintiff is an Ohio company while Defendant is a citizen of both Florida and Virginia. The parties dispute the amount-in-

controversy. Defendant contends the amount in controversy exceeds \$75,000. In support, Defendant offers the declaration of Ratcliffe who states:

11. As the Collinwood Rail Yard is located in a densely populated and urban area of Cleveland, Ohio, there is no readily available property surrounding the Collinwood Rail Yard for future railroad operations. As such, the loss of the CSXT Parcel from the Collinwood Rail Yard would have a significant impact on CSXT's ability to conduct future railroad operations. Although the harm would be difficult to quantify, the potential loss and impact upon CSXT's future railroad operations would far exceed \$75,000.

In response, Plaintiff offers the affidavit of Neil Gloger who attests that when he entered into discussions with CSX to purchase the property they assessed the value of the property at \$20,000 - 28,000.00. He further attests the land in question is not usable by CSX for any future railroad endeavors. Finally, he attaches an email from Matt Coffing, a CSX Sales Associate who relays the above valuation of the property and offers to lease the land to Plaintiff for \$1,800.00 a year.

The Court holds that Defendant has not met its burden to show by a preponderance of the evidence that the amount in controversy is met. Ratcliffe's declaration merely speculates, without support, that the potential loss and impact on CSX would exceed \$75,000. This was contradicted by Plaintiff's evidence that another CSX representative placed a value below \$30,000 on the property and offered to lease it to Plaintiff for \$1800/yr. Therefore, there is no diversity jurisdiction.

This leads us to a final issue which the parties have not fully briefed. While the *Jie Ao* decision determined that a state law adverse possession claim is expressly preempted by the ICCTA, it also held that a state law prescriptive easement claim, like the one asserted in

Plaintiff's Complaint, is not preempted and may be heard by the state court. While other courts and the STB agree that both have concurrent jurisdiction to determine preemption issues, See *Elam v. Kansas City Southern Railway Co.* 635 F.3d 796, 810 (5th Cir. 2011); *Jie Ao* at *3, it is less clear how a court should proceed upon a finding of preemption. Courts have dismissed claims upon finding preemption when the STB has exclusive jurisdiction over the preempted claim. See *B & S* at *6. And courts have stayed the action and referred the claim to the STB. Given the holding in *B & S* that Plaintiff's adverse possession claim falls under the exclusive jurisdiction of the STB, and the STB decision in *Jie Ao* finding that prescriptive easement claims are not preempted, the Court orders the parties to show cause why this action should not be dismissed without prejudice. Parties shall submit cross briefs no later than April 12, 2013 on the above issues. Briefs shall be limited to ten pages.

Therefore, for the foregoing reasons, the Court denies Plaintiff's Motion to Remand.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: March 14, 2013