

1900 Gallows Road, Suite 700
Tysons Corner, Virginia 22182
Phone: (703) 790-1911
Fax: (703) 848-2530
www.reesbroome.com

Yvonne Dover
Legal Assistant

September 14, 2015

VIA COURIER

Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: HAMP, Inc. v. CSX Transportation, Inc.

Dear Sir/Madam:

Enclosed for filing in the above referenced matter is an original and ten (10) copies of HAMP, Inc.'s Opposition to CSXT'S Motion for Reconsideration and/or Clarification. Please return a filed stamped copy in the prepaid, self-addressed envelope provided.

Thank you for your attention to this matter. If you have any questions, please call our office at 703-790-1911. Thank you for your assistance in this matter.

Sincerely,

REES BROOME, PC

By: 
Yvonne Dover
Legal Assistant to Mariam Tadros

Enclosures

ENTERED
Office of Proceedings
September 14, 2015
Part of
Public Record

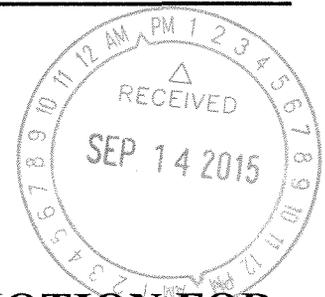
FOUNDERS
Joel M. Birken
Jonathan J. Broome, Jr.
James M. Rees (1941-1986)

(703) 790-6218
ydover@reesbroome.com



BEFORE THE SURFACE TRANSPORTATION BOARD

**Finance Docket No. 35832
Case 236145**



**HAMP, INC.'S OPPOSITION TO CSXT'S MOTION FOR
RECONSIDERATION AND/OR CLARIFICATION**

**Mark A. Moorstein
Courtney B. Harden
Mariam W. Tadros
Rees Broome, PC
1900 Gallows Road
Suite 700
Tysons Corner, Virginia 22182
Tel: (703) 790-1911
Fax: (703) 848-2530**

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 35832

**HAMP, INC.'S OPPOSITION TO CSXT'S MOTION FOR RECONSIDERATION
AND/OR CLARIFICATION**

INTRODUCTION

CSX Transportation, Inc. ("CSXT") filed a Motion for Reconsideration and/or Clarification (the "Motion") raising three non-meritorious arguments. First, CSXT, relying exclusively on the Board's decision in *Thomas Tubbs, et al.* – Petition for Declaratory Order (Docket No. 35792 (served on October 31, 2014)), asserts that the Board erred in not granting its Petition for Declaratory Order, even though the facts in *Tubbs* are inapposite. The Board even referenced the *Tubbs* case in its decision in this case ("Decision"), demonstrating that the Board thoroughly considered the applicability of the *Tubbs* case in reaching its Decision. Second, CSXT asserts that the state court should not determine the issue of preemption. CSXT makes this argument despite the clear legal authority authorizing the state court to determine preemption. Lastly, CSXT asserts that the Board issued a muddled Decision that suggests that this matter is not categorically preempted, but preempted as applied. The CSXT analysis is based upon a misreading of the Decision, which makes clear that the state court can determine all preemption issues. Accordingly, the Motion should be denied.

I. Introduction

HAMP filed a state court action against CSXT asserting claims for negligence, nuisance, inverse condemnation, injunctive relief and trespass arising from CSXT's failure to maintain or expand its culvert, resulting in flooding and property damage to HAMP's property.

In its Amended Complaint, HAMP asserted that CSXT built a 40 foot tall and 150 foot-wide berm (“CSXT Berm”) to support its railroad tracks. The CSXT Berm spans Marumsco Creek (the “Creek”), forming a man-made barrier or dam. CSXT also constructed a culvert through the CSXT Berm to permit the flow of Marumsco Creek (the “Culvert”). However, CSXT did not maintain the Culvert, resulting in its filling up with no less than three feet of sediment, in addition to rocks and debris. Moreover, CSXT has not widened the Culvert nor has it built additional tunnels through the CSXT Berm to support the natural flow of the Creek or the increased flow which has occurred over the last 109 years. Complaint ¶ 14.

None of the actions HAMP asserts relate to CSXT’s railroad track or lines and otherwise do not have any impact on rail transportation under 49 U.S.C. § 10501(b). Despite this, CSXT filed a Petition for Declaratory Order (“Petition”), which was denied by the Board on July 31, 2015. The Board held that the state court could determine whether HAMP’s claims are preempted under the Interstate Commerce Commission Termination Act (“ICCTA”) based upon the facts as they develop in the state court proceedings.

Prior to the filing of the Petition, CSXT filed in the state court a Demurrer by CSX Transportation, Inc. (“Demurrer”), Plea in Bar by CSX Transportation, Inc. (“Plea in Bar”), and Motion to Stay Action Pending the Decision of the United States Surface Transportation Board on Defendant’s Petition for Declaratory Order (“Motion to Stay”). The state court heard arguments on the Demurrer and ultimately overruled it, allowing five of HAMP’s six causes of actions to proceed. In CSXT’s Plea in Bar (a preliminary evidentiary analysis), CSXT asserted, among other things, that the ICCTA preempted the entirety of HAMP’s claims. CSXT never noticed its Plea in Bar for a hearing.¹ However, since the denial of CSXT’s Petition, CSXT has

¹ Despite the state court’s order requiring that CSXT respond to discovery related to its Plea in Bar, CSXT refused to provide any materials sought by HAMP regarding the construction and maintenance of the Culvert. Counsel for

indicated that it will notice its Plea in Bar. By filing a Plea in Bar and attempting to notice it for hearing, CSXT has acknowledged that the state court indeed can determine the issue of preemption, which lies at the center of its Plea in Bar.

In addition to requesting that the state court rule on its Plea in Bar, CSXT has also filed the Motion with the Board. CSXT has offered no new facts in its Motion, which is unpersuasive and only serves to increase the legal fees expended by HAMP in CSXT's effort to short-circuit litigation.

II. Argument

(A) *Tubbs* has no precedential value because the Plaintiffs in *Tubbs* sought remedies that affected the mainline track and rail transportation.

In *Tubbs*, BNSF raised its embankment and mainline track, and fortified the entire track structure by placing rock, rip-rap and other material trackside. *Tubbs*, page 2. However, when the Missouri River flooded, the flood waters breached the embankment. BNSF repaired the embankment and track. The repairs, however, directed additional current toward the Plaintiffs' farm and caused additional damage. According to the Plaintiffs, BNSF intentionally created breaches in the embankment in order to prevent the floodwaters from washing out the track. The breaches channeled the floodwater to their property, resulting in flooding and irreparable harm.

In finding that the case was preempted, the Board recognized that the harms asserted by *Tubbs* were related to the active rail lines and had a direct impact on rail transportation. In its Decision, the Board stated:

- (1) "These claims are based on alleged harms stemming directly from the actions of a rail carrier, BNSF, in designing, construction and maintaining an active rail line – actions

HAMP indicated to counsel for CSXT that its discovery response was inadequate—in fact, non-existent. CSXT indicated that it would provide a substantive response to the discovery requests, which, to date, it has failed to do.

that clearly are part of “transportation by rail carriers” and therefore subject to the Board’s exclusive jurisdiction under § 10501(b).” Opinion, page 4.

- (2) In distinguishing *Emerson v. Kansas City Southern Railway Co.*, 503 F.3d 1126 (10th. Cir. 2007), the Board stated that the actions complained of in *Emerson* consisted of discarding old ties into the drainage ditch and failing to maintain the ditch and were not related to the movement of passengers or property. “On that basis, the court concluded that plaintiffs’ claims were not preempted by federal law. Unlike the situation in *Emerson*, however, BNSF’s actions here are an integral part of rail transportation as they involve the railroad’s design, construction and maintenance of its rail lines.” *Tubbs*, page 5.
- (3) “In contrast, this case involves tort claims that challenge a railroad’s design, construction and maintenance of its track.” *Id.*
- (4) “In contrast, Petitioners here seek to pursue state law claims that would have the effect of governing or managing transportation-related activities on an active rail line.” Opinion, page 6.

The Board in *Tubbs* recognized that the damage caused by the maintenance of the track is precisely the type of activity that ICCTA preempts. In contrast to *Tubbs*, the factual allegations in HAMP’s Amended Complaint centered on the failure of CSX to maintain the Culvert. Nowhere in HAMP’s Amended Complaint did HAMP assert any causes of action relating to CSX’s tracks or rail line, nor did HAMP request any relief that impacted rail transportation.

Specifically, HAMP alleged the following in its Amended Complaint²:

12. In or about the same timeframe as the construction of the CSX Berm in 1905, CSX also constructed [the Culvert].

² The paragraph numbers herein correspond to the paragraph numbers in HAMP’s Amended Complaint.

15. CSX has not maintained the Culvert and it has filled up with no less than three (3) feet of sediment, in addition to rocks and debris. The obvious effect of the sediment is to reduce the volume of flow through the Culvert during heavy rainstorms to create a damming and impounding effect.

16. In addition to the CSX failure to maintain the Culvert, CSX has not widened the Culvert or built additional tunnels through the CSX Berm to support either the natural flow of the Creek or the increased flow which has occurred over the last 109 years.

18. Frequent, regularly recurring and continuing flooding of the Creek, directly as a result of the Culvert, has affected Holly Acres, including flooding in 1976, 1985, 1996, 2001, 2006 and 2011.

21. The flooding of Holly Acres is a foreseeable result of CSX's failure to maintain the Culvert and failure to permit the natural water flow of the Creek to pass through the CSX Berm.

46. CSX has a common law duty to maintain and to adjust to the natural flow of the Creek through the Culvert in a reasonable manner so as to not increase or decrease the flow of the Creek or to cause flooding and damage to upstream or downstream properties.

48. CSX is negligent because it has not cleaned the sediment and debris from the "floor" of the Culvert. The silt and debris has built up almost three (3) feet.

49. CSX is negligent because it has not increased the size of the Culvert in 109 years. Nor has CSX made any effort to account for or accommodate the increased flow of water in the Creek over the last 109 years.

All of the allegations in HAMP's Amended Complaint focused on CSXT's failure to maintain the Culvert. They do not relate to the track or any activity that is preempted under the ICCTA. Accordingly, CSXT's reliance on *Tubbs* is misplaced.

(B) The trial court can ably determine whether HAMP's claims are preempted by the ICCTA.

CSXT unpersuasively argues that the “Board should not shy away from issuing clear and decisive decisions in this area, particularly in a case like this, in which an unfavorable decision in the state court proceeding could well result in widespread negative impacts across the rail industry.” CSXT's argument ignores the Board's prior decisions that authorize the state courts to make preemption determinations, particularly because those courts are well-suited to determine the nature of the state regulations and whether the regulations impact rail transportation.

The Board, within its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e). However, either the Board or the local courts can decide issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b). See *CSXT Transportation, Inc.* – Petition for Declaratory Order, STB Finance Docket No. 34662, slip op. at 5 (S.T.B. served Mar. 14, 2005) (“The Board has discretion under 5 U.S.C. § 554(e) as to whether to grant a request for a declaratory order, and several of its rulings in declaratory order cases have noted that preemption issues involving section 10501(b) can be decided either by the Board or the courts in the first instance.”); *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79 (2012) (“State courts across the nation regularly evaluate preemption under the [ICCTA]”; *14500 Ltd.*—Pet. for Declaratory Order (14500), FD 35788, slip op. at 2 (STB served June 5, 2014); *Mid-Atlantic Locomotive & Car Repair, Inc.* – Pet. For Declaratory Order, FD 34599, slip op. at 3 (STB served June 6, 2005).

In this case, HAMP has raised common law property damage claims and CSXT, in turn, has raised several state law defenses in its Demurrer and Plea in Bar, including defenses relating to the elements of trespass, the alleged lack of a justiciable controversy, the statute of limitations, and inverse condemnation under the Virginia state constitution. Given that the state law case and the defensive pleadings involve state law relating to property damage, and that the local courts have the expertise to address the state law claims, the Board correctly determined that it should defer to the state court to determine the issues before it, including the issue of preemption, which the Board is undisputedly authorized to do. *See Allegheny Valley Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35388 (S.T.B Served Apr. 25, 2011) (denying the issuance of a declaratory order where a dispute involves the application of state property law and is before the state court for determination).

Additionally, by having multiple attorneys appearing for various hearings and by requesting that the state court hear the Plea in Bar, which raises the issue of preemption, CSXT cannot, in good faith argue that the state court is not suited to determine preemption issues. CSXT cannot avail itself of the remedies provided by the state court and complain that the state court is not suited to provide such remedies.

III. This Board made no determination regarding whether this matter is categorically preempted.

CSXT argues that the Board’s Decision suggests that the state court is impaired because it can only engage in an as-applied preemption analysis and cannot consider whether this case is categorically preempted. This assertion is false.

In its Decision, the Board explained the difference between categorical and as applied preemption. “Under 49 U.S.C. § 10501(b), two broad categories of state regulation are categorically preempted for rail transportation by rail carriers: (1) permitting or preclearance

requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized; and (2) attempts to intrude into matters that are regulated by the Board.” Categorical preemption includes preemption of actions intruding upon the Board’s regulation of abandonments and its regulation of the instrumentalities of transportation. § 10501(b); § 10102(9); *see also CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662, slip op. at 3 (STB decided May 3, 2005).

State and local actions may also be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation. *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th. Cir. 2010) (en banc).

Here, the Board deferred the decision of whether the matter was preempted, either categorically or as applied to the state court.³ In its Decision, the Board cited several authorities, some of which involved categorical preemption, some of which involved as applied preemption and some which found preemption without specifying whether the matter was categorically preempted or preempted as applied. *See Thomas Tubbs—Pet. for Declaratory Order*, FD 35792, slip op. at 4-5 (STB served Oct. 31, 2014) (Petitioners’ state law claims are federally preempted, whether they are viewed as “categorical” or “as applied,” because they have the effect of regulating and interfering with rail transportation); *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th. Cir. 2012) (finding categorical preemption for transloading activities); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836 (E.D. K.Y. 2004) (common law nuisance claims were preempted where plaintiffs contended the tracks themselves and their foundation blocked natural drainage).

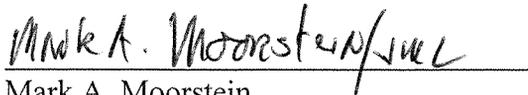
³ The facts of this case suggest that the matter is not categorically preempted. *City of Sachse v. Kan. City Southern*, 564 F. Supp. 2d 649 (E.D. Tex. 2008) (“[T]he courts and the Surface Transportation Board have not found it to categorically preempt state condemnation proceedings.”).

The Board's Decision makes clear that CSXT, which is represented by multiple attorneys at two prestigious law firms, can raise all preemption issues with the state court and can continue to argue that HAMP's claims are categorically preempted. While HAMP contends that the entirety of the matter is not preempted whatsoever by the ICCTA, HAMP does not dispute CSXT's ability to raise all preemption issues with the state court, which HAMP expects the state court to ultimately reject.

III. Conclusion

For the reasons stated herein, HAMP requests that the Board deny CSXT's Motion and grant all other relief deemed appropriate.

REES BROOME, PC



Mark A. Moorstein

Virginia State Bar No. 21201

Courtney B. Harden

Virginia State Bar No. 65470

Mariam W. Tadros

Virginia State Bar No. 75502

1900 Gallows Road, Suite 700

Tysons Corner, VA 22182

Tel: (703) 790-1911

Fax: (703) 356-0893

mmoorstein@reesbroome.com

charden@reesbroome.com

mtadros@reesbroome.com

Counsel for HAMP, Inc.

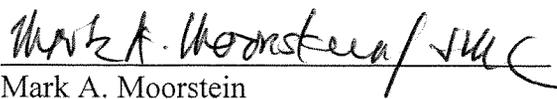
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid to:

G. Paul Moates
Hanna M. Chouest
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, DC 20005

R. Eric Bilik
McGuire Woods
50 N. Laura St., Ste. 3300
Jacksonville, FL 32203

this 14th day of September, 2015.


Mark A. Moorstein