

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35196

REPLY TO PETITION FOR DECLARATORY ORDER
ON REFERRAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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The City of Birmingham, Alabama (hereinafter referred to as “City”) hereby initially replies to the Petition for Declaratory Order on Referral from the United States District Court for the Northern District of Alabama. In its order, the United States District Court, Northern District refers the case to the STB “to determine whether the ICCTA preempts Plaintiff City of Birmingham’s condemnation action.” The Court further ordered the parties to provide the STB with a copy of its order and the memorandum opinion that accompanied it. NSR has provided the STB with the Order but failed to provide the Memorandum Opinion which is attached hereto pursuant to the Court’s order as Exhibit A.

The City hereby replies and submits that the condemnation action filed by the City is not pre-empted by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. 10501(b).

I. Norfolk Southern has failed to prove that it has real legal interest in the property at issue.

NSR has failed to present any evidence that it has clear legal interest in the property which the City seeks to condemn. NSR contends in its Petition that it has fee simple interest in certain portions of the property but provides no legal description of the portion to which it contends it has fee simple ownership. NSR also contends it has an easement over a portion of the property but provides no evidence of its easement and provides, again, no legal property description in

which it contends it has an interest. Affidavits given by Jerry L Causey and Wilfred U. Leaks are ones the City challenges and will cross examine each by depositions which are noticed and attached hereto as Exhibit B and C. There are no legal property deeds that NSR has submitted relative to its legal interest in the property at issue.

The City could not determine by its title search which, if any, of the various Railroads had an ownership interest in the property upon which the park will be built. Thus, the City names all the potential railroads in its initial Complaint and thereafter Burlington Northern Santa Fe Railroad and CSX Railroad both disclaimed interest in the property. See Complaint attached hereto as Exhibit D. See also the Affidavit of Stephen M. Kuzma attached hereto as Exhibit E and the Affidavit of Betty D. Jones attached hereto as Exhibit F.

II. No Complete Preemption exists in this case and thus the STB should not exercise jurisdiction.

The taking of property for local purposes, such as in the instant case, is generally an issue of state or local law. As stated by the Seventh Circuit, “Questions arising from the taking of property by condemnation for state purposes are ordinarily matters for determination by the state court. . . . We have no right or justification to speculate that the state courts of Illinois will not protect any rights the plaintiffs may have.” Harrison –Halstead Community Group, inc. v Housing

and Home Finance Agency, 310 F.2d 99, 103, 106 (7th Cir. 1962)(involving condemnation, under urban renewal plan, of slum area for construction of public university campus).

Only if the City's complaint and property for the park are completely preempted should the STB take jurisdiction over the actual taking of property for the Railroad Preservation Park. Thus, it is important to distinguish the concept of "complete preemption" from that of "ordinary preemption. "Complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court." Smith v. GTE at 1313. As explained by the learned Judge Propst:

The doctrine of complete preemption is quite different from the concept of ordinary preemption. Ordinary preemption concerns itself with the issue of whether the plaintiff's state law claims may be dismissed because they are preempted by federal law. The issue may be raised at both state and federal levels. The doctrine of complete preemption focuses on whether the federal court, to which an action brought solely pursuant to state law claims has been removed, possesses federal question subject matter jurisdiction over the action.

Complete preemption operates as a corollary, or, more accurately, an exception, to the well-pleaded complaint rule. Ordinarily, the plaintiff is "master" of his own complaint, and can effectively prevent removal to a

federal forum by refraining from pleading federal claims. The defendant usually cannot remove a case brought solely pursuant to state law (assuming, of course, that diversity jurisdiction does not exist) simply by asserting a federal defense, even the defense of ordinary federal preemption. In such a situation, the plaintiff's reliance on *Romney*, supra, would be well-placed--there are indeed instances in which state law claims are preempted, but in which the state court can make such a decision. These situations arise when a plaintiff brings an action in state court, totally grounded in state law, in which the state cause(s) of action are preempted by federal law, but in which neither diversity jurisdiction nor complete preemption exists. In contrast, the Fifth Circuit has characterized a state law case that may be completely preempted as one in which the claims, regardless of the state labels that the plaintiff attaches to them, give a federal court subject matter jurisdiction. The Supreme Court has described complete preemption as arising under "extraordinary" circumstances, specifically, when "the preemptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Bear MGC Cutlery Co., Inc. v. Estes Exp. Lines, Inc., 132 F.Supp. 2d 937, 940

(N.D. Ala. 2001)(internal citations and quotations omitted). Thus, a state-law complaint filed in state court is removable only if its subject matter is "completely preempted" by federal law. If the complaint raises an issue of mere "ordinary preemption," then the complaint is not one that should be determined by the STB.

There is a presumption against preemption, and “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324, 1327 (11th Cir. 2001)(quoting Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224 (1993)). “Thus, if the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.” Id. at 1328 (quoting Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88 (1992)).

In City of West Palm Beach, the Eleventh Circuit addressed an analogous situation to the case at bar. There, the city sought to impose its zoning ordinances and occupational license requirements to prohibit certain business use of a railroad yard within its jurisdiction. 266 F.3d at 1326-27. The railroad then filed a complaint seeking a declaratory judgment that the city’s actions “were pre-empted by the ICCTA, and therefore, the City could not impose its zoning and occupational license requirements.” Id. at 1327. In response, the city sought a declaratory judgment of its own to the effect “that the application of its local laws were not pre-empted by federal law.” Id. Under *de novo* review, the Eleventh Circuit first noted that “the ordinances at issue in this case are entitled to this presumption of validity under the Supremacy Clause. Although the federal government through the ICCTA has legislated in ‘an area where there has been a

history of significant federal presence, West Palm Beach is not legislating in that field of historic dominance.” Id. at 1328-29. Instead, the “city is acting under the traditionally local police power of zoning and health and safety regulation. The Supreme Court has long recognized the authority of local governments to establish guidelines for the use of property through such zoning ordinances.” Id. at 1329.

The Court further explained:

As we reiterated more recently, ‘municipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community. Because the alleged encroachment upon federal jurisdiction here does not occur by the municipality’s legislating in a field of historic federal presence, but through the exercise of its inherently local powers, the principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption place a ‘considerable burden’ on appellant [*i.e.*, the railroad].

Id. (internal citations and quotations omitted).¹

¹ See also Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, (2nd Cir. 2005)(“Not all state and local regulations are preempted by the [ICCTA]; local bodies retain certain police powers which protect public health and safety. It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.”).

After reviewing the plain text of the ICCTA and applying general rules of construction of purported preemptory statutes, the Eleventh Circuit in City of West Palm Beach ultimately concluded that the ICCTA did not preempt the city's actions, stating, "In light of these general principles, the text, history, and purpose of the statute reveal that, because West Palm Beach's application of its ordinances does not constitute 'regulation of rail transportation,' 49 U.S.C. § 10501(b), the ICCTA does not pre-empt the City's actions." Id.

Regarding the scope of the ICCTA, the Eleventh Circuit stated, "Although this subsection [49 U.S.C. § 10501(b)] on its surface seems to provide for broad pre-emption, the text contains limitations on the reach of the pre-emption vis-à-vis local legislation such as West Palm Beach's zoning and occupational license ordinances." Id. at 1330. The statute's plain text "applies only to state laws 'with respect to *regulation* of rail transportation.'" Id. (emphasis in original). Therefore, "In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' *i.e.*, those 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.²

² See also City of Belton v. Smoky Hill Ry. & Historical Soc'y, Inc., 170 S.W.3d 429, 434 (Mo. App. 2005)(holding that Congress did not intend the ICCTA to preempt a local law having only a remote or incidental effect on rail transportation and that local laws may cause a railroad

In the instant case, the Defendants contend that the City's condemnation action is completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). The provision of the Act that Defendants cite relating to this case is as follows:

(b) The jurisdiction of the [Surface Transportation] Board 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) (emphasis added).

As explained in City of West Palm Beach, this statute does not have quite the sweeping effect that the Defendants have argued. Rather, its preemptive effect is expressly limited to federal or state law which amounts to "regulation of rail

some degree of hardship or inconvenience without resulting in the sort of economic impact that would trigger preemption).

transportation.” The question of whether a particular local law or action amounts to “regulation” and therefore is preempted by the ICCTA is necessarily a fact-intensive inquiry. See e.g. In re Vermont Railway, 769 A.2d 648, 654 (Vt. 2001); Village of Ridgefield Park v. New York, Susquehanna & W. Railway, 750 A.2d 57, 63 (N.J. 2000); Jones v. Union Pac. R.R., 79 Cal. App. 4th 1053, 94 Cal. Rptr. 2d 661, 666-67 (2000).

Under the facts applicable to the instant case, there is no tenable argument that the City’s condemnation of the subject property is a “regulation of rail transportation.” Here, the City intends to use the property for the development of the Railroad Reservation Park, which is a project of great public benefit. The project will convert approximately 18 acres of blighted, unused, industrial wasteland into a beautiful park that will be free for the public’s use and benefit. The creation of such a park clearly falls within the “inherent local powers” discussed by the Eleventh Circuit in City of West Palm Beach and will benefit the health, safety, and welfare of the community.

The Defendants’ arguments that (1) the subject property “is necessary to the operation and maintenance of active mainline tracks;” (2) the City’s taking of the property “would impair and inhibit the ability to utilize the property;” and (3) “the proximity of the proposed Railroad Reservation Park to the active mainline tracks also pose serious operating, safety, and maintenance concerns” are disingenuous

and without any factual or evidentiary basis. The City again challenges these blanket assertions. See deposition notices for Willie Benton and W. Braden Kerchof attached hereto as Exhibits G and H, respectively. The subject property has been vacant and unused for many years. The Defendants claim that the property is needed for “operation and maintenance” of the adjacent tracks, yet the Defendants have not used the property in decades. The City’s condemnation will have no actual effect on the railroad tracks which are actually present and in use on the adjacent property. The City is not proposing that any usable tracks be closed, removed, abandoned, or otherwise rendered inoperable. The Defendant railroads will have exactly the same track capacity they have had and used for as long as anyone can remember. While the Defendants allege that a public park near active railroad tracks will be a “serious safety concern,” one or more of the Defendants lease a parking lot to Compass Bank that is directly adjacent to the active tracks just a short distance away. In the same area, there is also an Alabama Power steam plant adjacent to the tracks that has been in operation for generations without any objection from the Defendants. It is clear that the Defendants are simply making pretextual arguments that have no basis in reality.

Additionally, the easement area which NSR identifies in its Petition has not been used for years and Alabama Power Company has an easement following Powell Avenue upon which no structures can be placed which prevent NSR from

using this easement for regulation of rail transportation. Alabama Power Company has had the power line installed, and continuously used over its easement in this location which appears to run concurrently with the easement which NSR contends it has located on Powell Avenue since the 1930s.

In short, the condemnation of the subject property and creation of a park is within the City's "inherent local powers" and is not "regulation of rail transportation." The condemnation will greatly benefit the public while having no actual effect on the Defendants' operations. It clearly does not fall within the scope of any "complete preemption" under the ICCTA. Because the City is not purporting to "regulate" the Defendant railroads, the ICCTA is not triggered, and the STB has no jurisdiction, much less "primary" jurisdiction. Hence, the STB should refrain from exercising jurisdiction over this matter.

III. Defendants' "Complete Preemption" Argument Depends On Numerous Factual Issues Which Are In Dispute.

The question of whether a particular local law or action amounts to "regulation" and therefore is preempted by the ICCTA is necessarily a fact-intensive inquiry. See e.g. In re Vermont Railway, 769 A.2d 648, 654 (Vt. 2001); Village of Ridgefield Park v. New York, Susquehanna & W. Railway, 750 A.2d 57, 63 (N.J. 2000); Jones v. Union Pac. R.R., 79 Cal. App. 4th 1053, 94 Cal. Rptr. 2d 661, 666-67 (2000). The City believes that it is undisputedly clear that its

condemnation of the subject property is not “regulation of rail transportation,” and the STB should not take jurisdiction of this matter. If, however, the Court finds that there is any merit to NSR’s arguments to the contrary, then there is a disputed issue of fact which this Court must resolve before it can determine whether there is any preemption by the ICCTA and/or jurisdiction of the STB. More specifically, discovery and an evidentiary hearing is necessary before the STB can make findings of fact on the issue of whether the City’s condemnation is “regulation of rail transportation.” If it is not, then the case must be heard by the probate court.

IV. NORFOLK SOUTHERN HAS NOT MET ITS BURDEN OF PROVING THAT THE FACTS OF THE INSTANT CASE FIT WITHIN THE SCOPE OF ICCTA PREEMPTION, AND THEREFORE STB JURISDICTION DOES NOT EXIST.

As the filing party, Norfolk Southern bears the burden of establishing and carry the burden of establishing STB jurisdiction. Norfolk Southern has not met this burden, which would require it to prove that the City’s condemnation of the subject property would unreasonably interfere with its railroad operations. Norfolk Southern apparently would have this Court believe that any action by any local authority that has any effect on any aspect of a railroad’s property is completely preempted by the ICCTA and must be submitted to the STB. This position plainly ignores the body of case law—specifically including the STB’s own decisions—that holds that preemption by the ICCTA is highly fact dependent and turns on whether

a railroad is being subjected to local “regulation” or “interference.” Norfolk Southern has failed to prove that the City’s taking of this relatively small parcel of vacant, unused land would “regulate” or “interfere” with its ability to conduct itself as a railroad. Accordingly, there is no preemption, and the STB should refrain from exercising jurisdiction of this matter.

V. The Federal Courts Have Held That ICCTA Preemption Is Not All-Encompassing And Instead Requires A Fact-Intensive Inquiry.

As far as the City’s research has shown, the only Eleventh Circuit decision on point with the instant case is Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001). In City of West Palm Beach, the Eleventh Circuit clearly held that there is no preemption by the ICCTA unless a city’s actions constitute “regulation of rail transportation.” The Court explained that the plain text of the ICCTA “contains limitations on the reach of the pre-emption,” “applies only to state laws ‘with respect to *regulation* of rail transportation,’” and is “narrowly tailored...to displace only ‘regulation,’ *i.e.*, those 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.¹ Thus,

¹ See also City of Belton v. Smoky Hill Ry. & Historical Soc’y, Inc., 170 S.W.3d 429, 434 (Mo. App. 2005).

according to the Eleventh Circuit, the scope of ICCTA preemption is much narrower than Norfolk Southern has argued, and it requires a fact-intensive inquiry to determine if local action is “regulation” having the effect of “managing” or “governing” rail transportation.

The Eleventh Circuit is not alone. Numerous other courts have held that whether or not there is preemption by the ICCTA is necessarily a fact-specific inquiry. See e.g. New York Susquehanna & W. Railway Corp. v. Jackson, 500 F.3d 238 (3rd Cir. 2007); Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, 434 F.Supp. 2d 241, 249 (S.D.N.Y. 2006); In re Vermont Railway, 769 A.2d 648, 654 (Vt. 2001); Village of Ridgefield Park v. New York, Susquehanna & W. Railway, 750 A.2d 57, 63 (N.J. 2000); Jones v. Union Pac. R.R., 79 Cal. App. 4th 1053, 94 Cal. Rptr. 2d 661, 666-67 (2000).

Similar to the Eleventh Circuit, the Third Circuit has held that the scope of ICCTA preemption is more narrow than Norfolk Southern argues. See New York Susquehanna & W. Railway Corp. v. Jackson, 500 F.3d 238 (3rd Cir. 2007). In Jackson, the Third Circuit explained:

Because the Act's subject matter is limited to deregulation of the railroad industry, courts and the Board [*i.e.*, the STB] have rightly held that it does not preempt *all* state regulation affecting transportation by rail carrier....Rather, it 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. What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as 'economic' or 'environmental.'

Soon after Congress enacted the Termination Act, the newly created Surface Transportation Board ruled that, while broad, the Act's preemption clause 'does not usurp the right of state and local entities to impose appropriate public health and safety regulations on interstate railroads,' so long as those regulations do not interfere with or unreasonably burden railroading.... 'For the Board, the touchstone is whether the state regulation imposes an unreasonable burden on railroading.'

...

Thus, according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads. This is a fact-intensive inquiry. For example, the Board has ruled that a state may take easements over rail lines where the facts show that doing so will not significantly interfere with the railroad's ability to conduct business.

...

As for the unreasonably burdensome prong, the most obvious component is that the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion.

...

We hold that the Termination Act does not preempt state regulation if it is nondiscriminatory and not unreasonably burdensome.

Jackson, 500 F.3d at 252-57.

The import of these precedents is perfectly clear. Rather than there being all-encompassing preemption whenever local action affects alleged railroad property (as Norfolk Southern appears to be arguing here), there is only ICCTA preemption if the facts show that the local actor is seeking to regulate, govern, manage, unreasonably burden, and/or discriminate against the railroad. Other than offering conclusory, unsubstantiated allegations regarding “maintenance” and “safety,” Norfolk Southern has made no such showing and has failed to meet its burden of proving the facts necessary for preemption.

VI. The STB Has Recognized Its Limited Authority, The Limited Scope of ICCTA Preemption, And The Validity Of State-Court Jurisdiction.

Even the STB has recognized the limited scope of its authority and jurisdiction and the limited scope of ICCTA preemption. For instance, the STB has stated, “It should be noted that manufacturing activities and facilities not

integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption.” Borough of Riverdale, 4 S.T.B. 380, 1999 WL 751272 (1999). The STB went on to explain, “Our jurisdiction over railroad facilities, like that of the former [Interstate Commerce Commission], is limited to those facilities that are part of a railroad’s ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities.” Id.

More significantly, in a city condemnation case, the STB explained as follows:

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the [ICCTA], protects railroad operations that are subject to the Board’s jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. Thus, acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of 49 U.S.C. 10501(b) unless it would prevent or unreasonably interfere with railroad operations.

Maumee & Western Railroad Corp. V. City of Napoleon, OH, STB Finance Docket No. 34354, 2004 WL 395835 (2004)(internal citations omitted). Just like Norfolk Southern here, the railroad in Maumee argued that the ICCTA completely preempts all local condemnation actions. Id. The STB, however, did not buy that argument, stating,

This interpretation is overbroad. Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations.² But neither the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible. Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.

Id. (internal citations omitted). Even the STB recognizes that ICCTA preemption is not all-encompassing—even in cases of a city condemning railroad property. According to the STB, the fact-intensive test for preemption is whether a city's condemnation of property will “prevent,” “unreasonably interfere,” or “impede” a railroad's operations or pose “undue safety risks.”

² In making this distinction, it is notable that the STB specifically cited the case upon which Norfolk Southern is primarily relying here: Wisconsin Central Ltd. v. City of Marshfield, 160 F.Supp. 2d 1009 (W.D. Wis. 2000).

Norfolk Southern has offered no evidence to support its claim that placing a city park on a relatively small parcel of vacant, unused land allegedly owned (in part) by the railroad would prevent, unreasonably interfere, or impede Norfolk Southern's railroad operations. The subject property contains no active, usable tracks and has not been used for anything in decades. The City believes that Norfolk Southern's operations will not be affected (certainly not in any significant degree), and Norfolk Southern has failed to prove otherwise. Norfolk Southern also has failed to offer any evidence that the existence of a city park adjacent to the railroad right-of-way would pose an "undue safety risk." Norfolk Southern's unsubstantiated allegations relating to "maintenance" or "safety" concerns are not enough to support its preemption argument and create STB jurisdiction. Likewise pursuant to the fact intensive inquiry that may be needed on this issue, the City has noticed several depositions and made document requests pursuant to the STB General Rules and Regulations and Rules of Practice which govern the STB pursuant to 49 U.S.C. 10101 et seq. See Deposition Notices attached hereto as Exhibits I and J and Document Requests attached hereto as Exhibits K.

VII. NORFOLK SOUTHERN’S ARGUMENTS ARE BELIED BY THE EXISTENCE OF AT LEAST SIX OTHER BIRMINGHAM PARKS ADJACENT TO RAILROAD TRACKS.

Norfolk Southern has made unsubstantiated arguments that the creation of a city park adjacent to its railroad right-of-way will interfere with “the operation and maintenance of active mainline tracks” and “also pose serious operating, safety, and maintenance concerns.” In its Response Brief (Doc. No. 17), Norfolk Southern has gone so far as to argue that the City is disturbingly “casually dismiss[ive]” of “the railroad’s safety concerns for the public,” and further arguing, “There is clearly a big difference between having a park full of children and families adjacent to active mainline tracks and having a steam plant located there—in terms of potential injuries from a derailment or otherwise.”

Aside from their conclusory nature and lack of evidentiary support, these arguments are belied by the existence of at least six (6) other Birmingham city parks that are directly adjacent to railroad tracks. [See Affidavit of Gregory A. Brockwell, attached hereto as Exhibit L]. These other City parks include playgrounds, swimming pools, walking trails, and ball fields. [Id.]. In other words, these other City parks are exactly the sort of gathering places for “children and families” that Norfolk Southern now disingenuously argues would “interfere” with railroad operations and pose an “undue safety risk.” If the railroads are concerned about safety at these parks, they have made no apparent effort to address those

concerns, considering the lack of fencing, warning signs, and the like. [Id.]. In reality, the existence of City parks adjacent to railroad tracks does not appear to interfere with railroad operations in any significant way.

VIII. THE PRIMARY CASES RELIED UPON BY NORFOLK SOUTHERN ARE DISTINGUISHABLE AND INAPPLICABLE.

Norfolk Southern primarily relies on the cases of Wisconsin Central Ltd. v. City of Marshfield, 160 F.Supp. 2d 1009 (W.D. Wis. 2000) and City of Lincoln, STB Finance Docket No. 34425, 2004 WL 1802302 (2004), *aff'd* 414 F.3d 858 (8th Cir. 2005), for the premise that a city's condemnation of railroad property is necessarily preempted by the ICCTA and subject to the STB's jurisdiction. These cases are distinguishable from and inapplicable to the instant case.

Unlike the instant case, City of Marshfield involved the city's attempted condemnation and removal of over 6,800 feet (40% of the total track length) of the railroad's active, "passing" track that was necessary to allow trains to pass each other. 160 F.Supp. 2d at 1010. Thus, the condemnation would have involved both removing active track and significantly impeding the use of the remaining track. It was only in that context that the court held that "condemnation is regulation" preempted by the ICCTA. Id. at 1013-14. Even the STB has specifically held that City of Marshfield does not stand for the "blanket rule" that Norfolk Southern is arguing. See *supra* Maumee, 2004 WL 395835. Unlike the city in City of

Marshfield, the City here is not seeking to condemn or remove active track, nor is it seeking to impede the railroad's use of active track. What is at issue is the condemnation of a piece of vacant, unused land, which is wholly different than the situation addressed in City of Marshfield.

Admittedly, the situation (involving condemnation of railroad right-of-way for a "green way" and bike trail) in City of Lincoln is closer to the instant case. However, City of Lincoln also falls well short of creating a "blanket rule" of preemption for all condemnation actions. Instead, City of Lincoln was decided under procedural circumstances that are entirely different from the instant case. There, the city specifically invoked the jurisdiction of the STB by filing with the STB a "petition for declaratory order" which requested the STB to hold that the proposed condemnation "would not be federally preempted" under the ICCTA. 2004 WL 1802302, *1. In so doing, the city placed the burden of proof on itself and then failed to meet its burden. Id. at *4. Furthermore, the railroad submitted evidence indicating that the full width of the right-of-way was currently in active use and necessary for railroad operations, including the loading, unloading, and storage of large loads of lumber. Id. at *3-4. The railroad also submitted evidence that the unloading of lumber would present a safety hazard to users of the proposed trail "because those articles would be directly above the trail while the forklift positioned them for unloading," meaning that an accidental drop would cause

lumber to land on pedestrians. Id. at *4. Significantly, the railroad also submitted evidence that “the edge of the proposed trail would be only 7.5 feet from the main track, less than the 10-foot minimum setback between a trail and rail line recommended by the United States Department of Transportation.” Id. Faced with the burden of proof, the city was unable to refute the railroad’s contentions “that it uses all of its right-of-way...for rail transportation purposes,” and the Board therefore declined “to allow a taking of actively used railroad property.” Id. The city appealed the STB’s decision to the Eighth Circuit, arguing that it was “arbitrary and capricious” and “unsupported by substantial evidence” and arguing that the STB improperly placed the burden of proof on the city. 414 F.3d 858, 860. Under a very narrow standard of review, the Eighth Circuit held that it could not say the STB’s decision was “unsupported by substantial evidence in the record as a whole.” Id. at 862. Regarding the burden of proof, the Eighth Circuit held that the city assumed the burden of proof when it filed its declaratory petition, for “by statute the burden of proof is on the petitioner seeking a declaratory order from an administrative agency.” Id. The court distinguished that situation from cases that “had started as a judicial proceeding,” such as the instant case. Id.

In City of Lincoln, the city specifically invoked the jurisdiction of the STB and assumed the burden of proving that its actions would not “interfere” with the railroad’s operations. Here, the City has not invoked the STB’s jurisdiction and

has not assumed the burden of proof. The burden is squarely on Norfolk Southern to prove that the City's condemnation of the subject property would amount to unreasonable interference with the railroad's operations. In City of Lincoln, the railroad submitted evidence that the property to be condemned was in active use and was necessary to its operations. The railroad also submitted evidence of a specific safety hazard—the loading of lumber directly above the proposed trail causing a risk of dropping of lumber onto pedestrians. Finally, the railroad submitted evidence that a portion of the proposed bike trail would be only 7.5 feet from the main, active track, which is less than the 10-foot setback recommended by the DOT. These facts do not exist here. Norfolk Southern has failed to show that the subject property is in active use or is necessary to its operations. Norfolk Southern has failed to show the existence of any specific safety hazard. Norfolk Southern has failed to show any “setback” violations. To the contrary, the “site plan” for the subject property indicates that no walking/biking trail or permanent structure will be erected within approximately twenty-five feet of the railroad's existing retaining wall (which separates the active tracks from the proposed Railroad Park). [Brockwell Affidavit, Ex. L].³ Norfolk Southern was provided this “site plan” on June 16, 2008, yet it has failed to identify any specific problem or

³ The “site plan” is a very large architectural drawing which is not amenable to e-filing. If the STB desires a copy of it, one can be delivered upon request.

safety issue with it. In short, Norfolk Southern simply has failed to meet its burden of proof.

City of Marshfield and City of Lincoln do not establish a blanket rule of ICCTA preemption for all city condemnations of railroad property, and Norfolk Southern's reliance on those cases is misplaced. Those cases were decided on their own peculiar facts, just as the instant case must be. Norfolk Southern has the burden of proving the facts necessary for ICCTA preemption, and it has failed to do so. Accordingly, the STB should determine that jurisdiction does not exist and refer the matter to the Probate Court of Jefferson County where it was originally filed.

IX. CONCLUSION

NSR has failed to carry its burden to show that the unused, abandoned (1) easement property and (2) fee simple property are ongoing railway operations and that the taking of the property by the City for the Railroad Preservation Park is "regulating railway operations", thus, the STB should refrain from exercising jurisdiction and find that the City's condemnation action for the Park is not preempted by the ICCTA.

Respectfully Submitted,

Brandy Murphy Lee

Attorney for City of Birmingham

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows by placing the same in the United States mail, first class postage prepaid and properly addressed this the 25th day of November, 2008.

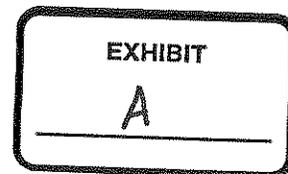
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Crawford S. McGivaren, Jr.
Cabaniss, Johnston, Gardner, Dumas & O'Neal, LLP
Park Place Tower
2001 Park Place North
Suite 700
Birmingham, AL 35203

Brandy Murphy Lee

Attorney for City of Birmingham

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION



CITY OF BIRMINGHAM,

Plaintiff,

v.

BNSF RAILWAY COMPANY, et al.,

Defendants.

Case No. 2:08-cv-1003-RDP

MEMORANDUM OPINION

Before the court are Defendant Norfolk Southern Railway Company's Motion to Dismiss or, in the alternative, to Stay Action for Referral to the Surface Transportation Board (Doc. # 8), filed on June 13, 2008, and Plaintiff City of Birmingham's Motion to Remand (Doc. # 14), filed on June 23, 2008. The parties have fully briefed the issues raised by the opposing motions.

I. Factual Background

Plaintiff City of Birmingham ("Birmingham" or "the City") seeks to condemn a strip of land that runs parallel to the mainline tracks that run through downtown Birmingham in order to create a city park. The City filed suit in the Probate Court of Jefferson County, Alabama. Defendant Norfolk Southern Railway Company ("Norfolk Southern"), along with other defendants who have disclaimed any interest in this litigation, removed the case to this court claiming that Birmingham's claims are completely preempted by the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA"), 49 U.S.C. § 10101 et seq. Norfolk Southern has produced deeds showing that it or its wholly-owned subsidiaries own at least of part the disputed land in fee simple. (Doc. # 8, Ex. 1).

II. Analysis

Both Plaintiff and Defendant argue that this dispute should be heard by a court or adjudicative body other than this one. Norfolk Southern asserts that the ICCTA completely preempts Birmingham's state law remedy of condemnation. It argues that the Surface Transportation Board ("STB" or "the Board") has exclusive jurisdiction over controversies of this type. Birmingham counters that Norfolk Southern has not yet proven that it has a property interest in the disputed property and that the ICCTA does not completely preempt its state law remedies. It argues that this court lacks subject matter jurisdiction and must therefore remand the case back to probate court.

After considering the parties' contentions and the relevant law, the court concludes that the proper course of action is to refer the matter of preemption to the STB. After receiving a recommendation from the Board, the court will then determine whether the action should be remanded to Jefferson County Probate Court or dismissed to be adjudicated before the STB.

a. The ICCTA

The subsection of the ICCTA relevant to this dispute provides:

(b) The jurisdiction of the [Surface Transportation] Board 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). The ICCTA defines “transportation” as including “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.” 49 U.S.C. § 10102(9)(A) (emphasis added).

b. The Question of Ownership

The court can quickly dispose of Birmingham’s contention that this case should be remanded because Norfolk Southern has not proved that it owns the property Birmingham seeks to condemn. The language of the ICCTA clearly vests the STB with jurisdiction to adjudicate claims relating to a railroad’s property. As a result, Birmingham’s argument that neither this court nor the STB can have jurisdiction over this case because Norfolk Southern has not yet proved that it owns the disputed property is without merit. The court sees no reason why the Board cannot adjudicate Birmingham’s contention that Norfolk Southern does not own the subject property. Furthermore, it certainly takes more to divest a court of jurisdiction than merely challenging (without any evidence and in the face of an apparently-valid deed) the ownership of a piece of property, especially when Birmingham instituted a condemnation action against Norfolk Southern

c. ICCTA Preemption

Birmingham has not contested that Norfolk Southern is a rail carrier and it is clear that the strip of land Birmingham seeks to condemn is “property.” Instead, Birmingham relies on the Eleventh Circuit’s opinion in *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) to argue that a city’s exercise of eminent domain is not preempted because condemnation is more closely analogous to the exercise of local police powers than the regulation

of a railroad. In *West Palm Beach*, the court allowed the city to enforce its zoning ordinances against a company that leased property from Florida East Coast Railway (“FEC”), holding that:

existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws with respect to regulation of rail transportation.

266 F.3d at 1331 (quotations omitted). The court based its holding on two factors: (1) the ICCTA preemptive sweep does not reach municipal, only “Federal and State law;” and (2) the ICCTA’s “express preemption applies only to state laws ‘with respect to regulation of rail transportation.’” *Id.* (quoting 49 U.S.C. § 10501(b)). Because the zoning ordinance in *West Palm Beach* was a municipal ordinance instead of a state law, and because the ordinance could not “reasonably be said to have the effect of managing or governing rail transportation,” the ICCTA did not preempt the ordinance. *Id.* (quotations omitted). Also, the court included a caveat in concluding its preemption analysis:

[w]e are not called upon to decide whether federal law would constrain the City’s exercise of its police power to limit [the Railway’s] operations should it engage in an aggregate distribution business in exactly the same way as [the lessor]. It is clear, however, that in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad.

Id. at 1332.

The *West Palm Beach* decision is distinguishable on its facts from this case. First, Birmingham has conceded that the law to be applied by the Jefferson County Probate Court is state law, not a municipal ordinance. Second, the exercise of eminent domain is far more specific in its application than a generally-applicable zoning ordinance, and is therefore much more likely to be

used as a form of *ad hoc* regulation on a specific railroad's transportation than a zoning ordinance. Finally, there are no leases or entities other than a railroad involved in this dispute.

It is clear that *West Palm Beach* does not require this court to find that the ICCTA does not preempt Birmingham's claims for relief. To be sure, *West Palm Beach* does not apply to this case at all. Therefore, the court must address whether the condemnation sought in this case rises to the level of regulating rail transportation, a question not addressed by *West Palm Beach* or any other binding precedent.

Courts have split over whether condemnation is necessarily regulation of rail transportation. At least one United States District Court has held that condemnation is always regulation. *See Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F.Supp. 2d 1009, 1013 (W.D. Wis. 2000) (“[t]he Court holds that condemnation is regulation”). On the other hand, other courts have stated that condemnation proceedings do not necessarily cross the threshold into regulation. Some of these cases conclude that the particular condemnation sought is preempted. *See Franks Inv. Co. LLC v. Union Pacific R. Co.*, --- F.3d ----, 2008 WL 2612060 (5th Cir. July 3, 2008); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 861-63 (8th Cir. 2005) (affirming the STB's determination that the condemnation sought amounted to regulation). Other courts have held that the ICCTA did not extend to the particular condemnation sought before them. *See City of Sachse v. Kansas City Southern*, No. 4:07-cv-269, 2008 WL 783559 *3-5 (S.D. Tex., Mar. 20, 2008) (holding that removing railroad had not met its burden of proof of showing that the condemnation sought would interfere with its operations).

The STB stated that:

neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible. Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.

Lincoln Lumber Co., STB Finance No: 34915, 2007 WL 2299735 *2 (Aug. 10, 2007). A determination of whether the condemnation at issue here will result in impermissible regulation will necessarily involve the resolution of fact issues. Therefore, the court elects to refer the case to STB. The Board is particularly well-suited to determine if the ICCTA preempts the condemnation Birmingham seeks.

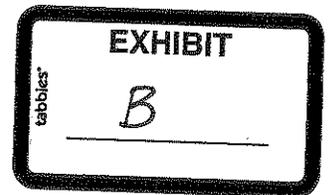
III. Conclusion

Accordingly, the court refers the case to the Surface Transportation Board and administratively terminates the pending motions. A separate order will be entered consistent with the memorandum opinion.

DONE and ORDERED this 8th day of July, 2008.



R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE



UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35196

NOTICE OF DEPOSITION

**TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203**

**John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 9:00 a.m. or at a mutually convenient time.

DEPONENT: JAMES CAUSEY

**PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253**

You are hereby notified that at **9:00 a.m.** on the **15th** day of **December 2008**, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of **JAMES CAUSEY** upon oral examination before a notary public or other officer duly authorized by

law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. Mail to the following parties and/or counsel of record on this the 25th of November, 2008:

Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

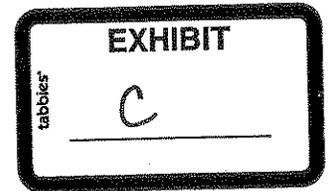
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

J.T. Smallwood, Tax Collector
Room 160
Jefferson County Courthouse
716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203



OF COUNSEL

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET 35196

NOTICE OF DEPOSITION

**TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203**

**John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 10:00 a.m. or at a mutually convenient time.

DEPONENT: WILFRED U. LEAKS

**PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253**

You are hereby notified that at **10:00 a.m.** on the **15th** day of **December 2008**, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of **WILFRED U. LEAKS** upon oral examination before a notary public or other officer duly authorized by

law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. mail to the following parties and/or counsel of record on this the 25th of November, 2008:

Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

J.T. Smallwood, Tax Collector
Room 160
Jefferson County Courthouse
716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203



OF COUNSEL

IN THE PROBATE COURT OF JEFFERSON COUNTY, ALABAMA

EXHIBIT
D

CITY OF BIRMINGHAM

Plaintiff,

vs

BNSF RAILWAY COMPANY, CSX
TRANSPORTATION, INC., and
NORFOLK SOUTHERN RAILWAY
COMPANY, INC.; J.T. SMALLWOOD,
TAX COLLECTOR

Defendants.

-200454--

CASE NO.: _____

COMPLAINT FOR CONDEMNATION

COMES NOW, the City of Birmingham (hereinafter referred to as "Plaintiff"), and sets forth its Complaint for Condemnation against the above named defendants as follows:

ARTICLE I

That by virtue of the Constitution and the Laws of the State of Alabama, Plaintiff is authorized to exercise the power of eminent domain for the purpose of acquiring land for public use,

ARTICLE II

It is necessary and expedient in the public interest for Plaintiff to acquire, by the exercise of its power of eminent domain, fee simple title in and to the hereinafter described parcels of land in connection with the Railroad Reservation Park See Resolution attached hereto as Exhibit A.

ARTICLE III

That by appointment by the Mayor of the City of Birmingham, and approval of said appointment by the Birmingham City Council, on November 13, 2007, Campbell, Gidiers, Lee, Sinclair & Williams, Attorney at Law, became empowered and authorized to render such legal services as required, including the institution and prosecution of this proceeding on behalf of the City of Birmingham in connection with the Railroad Reservation Park.

ARTICLE IV

The Plaintiff seeks to acquire by condemnation the following described real property in a fee simple, free of any leasehold interests or rights of possession in or to the property for the purposes set forth in Article II above:

Blocks 112A, 112B, 112C, 112D, 112E, 112F, 112G and 112H of Elyton Land Company's Survey of Birmingham, also Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South and also acreage lying northwest of said Blocks 112A, 112B, 112C and 112D, being in the SW 1/4 of Section 36, Township 17 South, Range 3 West, Jefferson County, Alabama, more particularly described as follows:

Begin at the south corner of said Block 112E, said corner being the intersection of the northwest line of 1st Avenue South and the northeast line of 14th Street South; thence run northeast along the said northwest line of 1st Avenue South, said line being the southeast line of said Blocks 112E, 112F, 112G and 112H, a distance of 1840.00 feet to the east corner of said Block 112H, said corner being on the southwest line of 18th Street South; thence angle left 90°00'27" and run northwest along the said southwest line of 18th Street South and a projection thereof, said line being the northeast line of said Blocks 112H and 112A, a distance of 445.97 feet to a point; thence angle left 89°59'53" and run southwest 3.50 feet to a point; thence angle right 89°59'53" and run northwest 5.38 feet to a point, thence angle left 89°59'53" and run southwest 1606.66 feet to a point; thence angle left 90°00'04" and run southeast 38.74 feet to a point; thence angle right 90°00'06" and run southwest 229.83 feet to a point on the northeast line of 14th Street South; thence angle left 90°00'06" and run southeast along said northeast line of 14th Street South, said line being the southwest line of said Blocks 112D and 112E, a distance of 412.43 feet to the Point of Beginning.

Contains 18.86 acres, more or less.

A copy of a map of the subject property is attached hereto as Exhibit B.

ARTICLE V

Plaintiff avers that the following named parties Defendant own, or are reputed to own, or to claim some right, title or interest in the subject real property, described above. To Plaintiff's knowledge and information, all named Defendants are over the age of nineteen (19) years and are of sound mind. The addresses where such Defendants may be found, and the interests they are reputed to have, are as follows;

<u>Name and address</u>	<u>Interest</u>
BNSF Railway Company 2650 Lou Meak Drive Ft. Worth, Texas 76131-2830	Claimed Owner
CSX Transportation, Inc c/o CSC Lawyers Incorporating SVC, Inc 150 South Perry Street Montgomery, AL 36104	Claimed Owner
Norfolk Southern Railway Company, Inc c/o Crawford S. McGivern, Jr. 2001 Park Place North, Suite 700 Birmingham, AL 35203	Owner of Easement
J.T. Smallwood, Tax Collector Room 160 Jefferson County Courthouse 716 North Richard Arrington Jr. Blvd. Birmingham, AL 35203	Taxes

That the Attorney for the Plaintiff has, with reasonable diligence, attempted to ascertain the existence of any unknown claimants and the respective ownership or claimed ownership interest of said in the aforesaid tract of land, but has been unable to ascertain same.

ARTICLE VI

Plaintiff has provided the current owner of the property a written statement of the appraised amount and a brief summary showing the basis for the amount established as just compensation for the property, and did provide the owner with a written offer equal to the present value of the property interest involved prior to the filing of this Complaint in Condemnation.

ARTICLE VII

The City of Birmingham proposes to acquire the following items which it deems to be equipment or fixtures attached to or a part of the real estate: easement

ARTICLE VIII

The City of Birmingham requires the right to enter the remaining property to remove structures located partially thereon

WHEREFORE, THE PLAINTIFF PRAYS:

That upon the filing of this complaint, the Court enter an Order appointing a day for hearing of said complaint, within thirty (30) days, at which time, on the day appointed, or any other day to which the hearing may be continued the allegations of said complaint, any objections which may be filed to the granting thereof, and any legal evidence touching upon the same, and, within ten (10) days after such hearing, make an Order granting said complaint.

That the Court issue to each Defendant a copy of the complaint and Notice of the Day set for Hearing, service upon each Defendant of same to be made in accordance with Rule 4 of the Alabama Rules of Civil Procedure.

That if any Defendant is an infant, a person of unsound mind or unknown, the Court, on the day appointed for the hearing, appoint a Guardian Ad Litem to, after written acceptance of the appointment, appear and protect the rights and interests of such infant, person of unsound mind or unknown

That the Court, within ten (10) days after granting said complaint, appoint three (3) of citizens the county in which said lands sought to be condemned are situated, possessing the qualifications of jurors, who shall be disinterested, to act as Commissioners and immediately issue notice of said appointment; that said Commissioners file a certificate, along with their award, that neither of them had ever been consulted advised with or approached by any person in reference to the value of the land or the proceedings to condemn the same, prior to the assessment of damages and that they knew nothing of said prior to their appointment.

That the Commissioners, thus appointed, or a majority of them, assess separately the damages and compensation to which the owners and other parties interested in the tract of land are entitled; that the Commissioners, sworn as jurors are sworn, may view the land to be subjected and hold a hearing, after notice to all parties, to receive all legal evidence offered by any party touching the amount of damages the owners of the land and other parties interested therein will sustain and the amount of compensation they are entitled to receive, including damages based on the taking and entry onto the remaining land.

That the Commissioners, within twenty (20) days from their appointment, make a report in writing to the Court stating the amount of damages and compensation ascertained and assessed by them for the owners of said tract of land, or persons injured and other parties interested therein, and that within seven (7) days, the Court issue an Order that the report be recorded and the property condemned upon payment or deposit into the Court of the damages and compensation so assessed. That notice of entry of said Order and the amount of the award immediately be mailed by first class mail to each party whose address is known, together with a Notice of the Right to Appeal therefrom to the Circuit Court within thirty (30) days from the date of said Order.

That the Court grant the Plaintiff the right to enter the remaining property to remove structures located partially thereon.

That the Court grant such other, further or different relief as will cause to vest in Plaintiff good and merchantable title to said property, together with the right to possession, unencumbered by, and superior to the claims or rights of all parties made defendant to this action, upon payment or deposit into this Court by Plaintiff of the amount of just compensation fixed therefore

Plaintiff prays for such other and further relief as may be necessary or proper

Respectfully submitted,

Brandy Lee
Brandy Murphy Lee
Attorney for the Plaintiff

OF COUNSEL:
CAMPBELL, GIDIERE, LEE,
SINCLAIR & WILLIAMS
2100A Southbridge Parkway, Suite 450
Birmingham, AL 35209
Tel 205-803-0051
Fax 205-803-0053

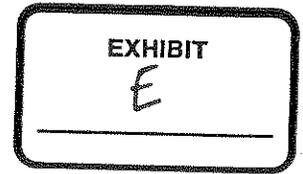
STATE OF ALABAMA)
)
JEFFERSON COUNTY)

Before me, the undersigned Notary Public in and for said County, in said State, personally appeared Brandy Murphy Lee, who being known to me, and having been first duly sworn, deposes and says that she is an attorney for the State of Alabama, and as such is authorized to verify the foregoing complaint, and that the allegations of same are true and correct

Sworn to and subscribed before me this the 29th day of April, 2008.

Notary Public Susan Drey Carren
My Commission Expires 04-05-09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION



CITY OF BIRMINGHAM,

Plaintiff,

vs.

BNSF RAILWAY COMPANY, CSX
TRANSPORTATION, INC., et. al.,

Defendants.

*
*
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*
*
*
*
*
*
*

CIVIL ACTION NO: CV 08-P-1003-S

AFFIDAVIT OF STEPHEN M. KUZMA

STATE OF TEXAS)

COUNTY OF TARRANT)

Before me, the undersigned authority, in and for said County and State, personally appeared STEPHEN M. KUZMA, who is known to me and being first duly sworn upon his oath, deposes, and says as follows:

1. My name is Stephen M. Kuzma. I am over the age of nineteen (19) years. I am employed by BNSF Railway Company as Manager Land Revenue Management.
2. I have personal knowledge regarding BNSF's land holdings in the City of Birmingham, Alabama.
3. I have reviewed the Complaint for Condemnation ("the Complaint") filed by the City of Birmingham, including the map of the property the City seeks to condemn, which was attached to the Complaint as Exhibit B. From the Complaint and map of the subject property, I understand that the City of Birmingham seeks to condemn "Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South" for the Railroad Reservation Park.



Campbell, Gidiere, Lee
Sinclair & Williams

ATTORNEYS AT LAW

ANDREW P. CAMPBELL
acampbell@cgl-law.com

4. BNSF Railway Company has no ownership interest in the property the City of
Birmingham is seeking to condemn.

FURTHER AFFIANT SAITH NOT.

November 20, 2008

Dated this 18th day of June, 2008.

Via Email and U.S. Mail
Mr. Tim Wadsworth
P.O. Box 987
Sulligent, Alabama 35586-0987

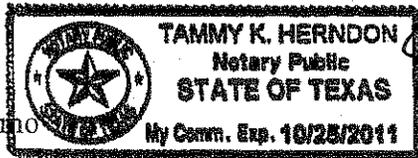
Stephen M. Kuzma
STEPHEN M. KUZMA

STATE OF Texas
RE: Etha King Trust v. Wachovia, et al.

COUNTY OF Tarrant
Dear Tim:

Attached is a ~~copy of an agreement for Robert to~~ Notary Public in and for said County in said will
State, hereby certify that ~~STEPHEN M. KUZMA~~ whose name is signed to the foregoing Affidavit
case and who is known to me acknowledged before me on this day that, being informed of the contents I
of such instrument, he executed the same voluntarily on the day the same bears date.
thank you for thinking of us.

Given under my hand and seal, this 17th day of June, 2008.
Sincerely,



Tammy K. Herndon
NOTARY PUBLIC

APC/jho

My Commission Expires: _____

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 SOUTHERN DIVISION**

EXHIBIT
F

CITY OF BIRMINGHAM)	
)	
)	
Plaintiff,)	
)	CIVIL ACTION NO.:
vs.)	
)	CV 08-P-1003-S
BNSF RAILWAY COMPANY, CSX)	
TRANSPORTATION, INC., NORFOLK)	
SOUTHERN RAILWAY COMPANY,)	
INC., J.T. SMALLWOOD, TAX)	
COLLECTOR)	
)	
)	
Defendants.)	

AFFIDAVIT OF BETTY D. JONES

STATE OF FLORIDA)

COUNTY OF DUVAL)

Before me, the undersigned authority, in and for said County and State, personally appeared BETTY D. JONES, who is known to me and being first duly sworn upon his oath, deposes, and says as follows:

1. My name is Betty D. Jones. I am over the age of nineteen (19) years. I am employed by CSX Transportation, INC. ("CSX") as a Manager-Closings.
2. I have personal knowledge regarding CSX's land holdings in the City of Birmingham, Alabama.

3. I have reviewed the Complaint for Condemnation ("the Complaint") filed by the City of Birmingham, including the map of the property the City seeks to condemn, which was attached to the Complaint as Exhibit B. From the Complaint and map of the subject property, I understand that the City of Birmingham seeks to condemn "Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South" for the Railroad Reservation Park.

4. CSX has no ownership interest in the property the City of Birmingham is seeking to condemn.

FURTHER AFFIANT SAITH NOT.

Dated this 12th day of June, 2008.

Betty D. Jones
Betty D. Jones

STATE OF FLORIDA)

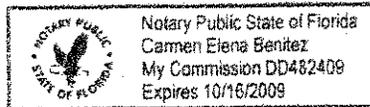
COUNTY OF DUVAL)

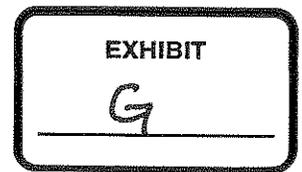
I, Carmen Elena Benitez, a Notary Public in and for said County in said State, hereby certify that **Betty D. Jones**, whose name is signed to the foregoing Affidavit, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and seal, this 13th day of JUNE, 2008.

Carmen Elena Benitez
NOTARY PUBLIC

My Commission Expires: 10-16-2009





UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35196

TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 2:00 p.m. or at a mutually convenient time.

DEPONENT: WILLIE BENTON

PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253

NOTICE OF DEPOSITION

You are hereby notified that at 2:00 p.m. on the 15th day of December 2008, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of WILLIE BENTON, upon oral examination before a notary public or other officer duly authorized by

law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. mail to the following parties and/or counsel of record on this the 25th of November, 2008:

Crawford S. McGivaren, Jr.
Diane B. Maughan -
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

J.T. Smallwood, Tax Collector
Room 160
Jefferson County Courthouse
716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203



OF COUNSEL



UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35196

TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 3:00 p.m. or at a mutually convenient time.

DEPONENT: W. BRADEN KERCHOF

PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253

NOTICE OF DEPOSITION

You are hereby notified that at 3:00 p.m. on the 15th day of December 2008, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of **W. BRADEN KERCHOF** upon oral examination before a notary public or other officer duly authorized

by law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIÈRE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. mail to the following parties and/or counsel of record on this the 25th of November, 2008:

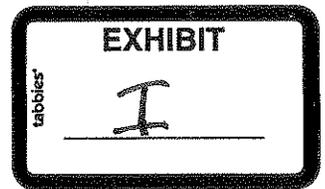
Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

J.T. Smallwood, Tax Collector
Room 160
Jefferson County Courthouse
716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203



OF COUNSEL



**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET 35196

**TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203**

**John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 11:00 a.m. or at a mutually convenient time.

DEPONENT: JAMES N. CARTER, JR.

**PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253**

NOTICE OF DEPOSITION

You are hereby notified that at **11:00 a.m.** on the **15th** day of **December 2008**, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of **JAMES N. CARTER, JR.**, upon oral examination before a notary public or other officer duly authorized

by law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. Mail to the following parties and/or counsel of record on this the 25th of November, 2008:

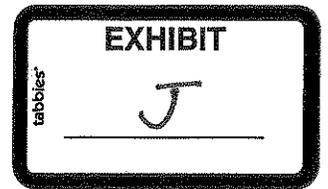
Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

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Norfolk, VA 23510

J.T. Smallwood, Tax Collector
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716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203



OF COUNSEL



UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35196

NOTICE OF DEPOSITION

TO: Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

DATE: Dec. 15, 2008 or a mutually convenient date.

TIME: 1:00 p.m. or at a mutually convenient time.

DEPONENT: RANDALL B. SMITH

PLACE OF TAKING DEPOSITION: Campbell, Gidiere, Lee, Sinclair & Williams, P.C.
2100-A Southbridge Parkway, Suite 450
Birmingham, Alabama 35253

You are hereby notified that at 1:00 p.m. on the 15th day of December 2008, or a time mutually agreed upon by all parties, continuing through completion, at the offices of Campbell, Gidiere, Lee, Sinclair & Williams, 2100-A SouthBridge Parkway, Suite 450, Birmingham, Alabama 35209, City of Birmingham, will take the deposition of **RANDALL B. SMITH**, upon oral examination before a notary public or other officer duly authorized by

law to administer oaths pursuant to the applicable Alabama Rules of Civil Procedure.



Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205.803.0051

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing via the CM/ECF system which will electronically deliver notice and/or via U.S. mail to the following parties and/or counsel of record on this the 25th of November, 2008:

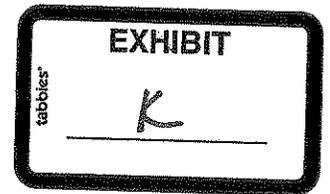
Crawford S. McGivaren, Jr.
Diane B. Maughan
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J.T. Smallwood, Tax Collector
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Birmingham, AL 35203



OF COUNSEL



UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET 35196

**FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS TO NORFOLK SOUTHERN RAILWAY COMPANY (NSR)**

COMES NOW the CITY OF BIRMINGHAM by and through its attorney of record, and propounds the following Document Requests to a Norfolk Southern Railway Company (“NSR”) to be answered within the time allowed by law:

DEFINITIONS

For purposes of these interrogatories and/or requests for production of documents, and as used herein, the following words shall have, and be construed with reference to, the following meanings and definitions:

1. “Communication” means any correspondence, contact, discussion, or written or oral exchange between any two or more persons. Without limiting the foregoing, the term “communication” includes all letters, memoranda, telephone conversations, face-to-face conversations, meetings, visits and conferences.

2. “Describe” or “description” shall mean to provide a narrative statement of the matter in question, identifying all documents relating to or referring thereto, identifying all persons having knowledge thereof, stating the subject matter of each person’s knowledge and the manner in which his knowledge was obtained and stating what acts were done by each person who, in any way, participated in the matter in question.

3. “Document” and “documents” shall mean all documents subject to discovery under the Federal Rules of Civil Procedure, and shall include, without limitation, every original and non-

identical copy of each and every paper, writing (including blind copies), letter, telegram, teletype, telex, telecopy, facsimile transmission, drawing, picture, photograph, negative, slide, movie, film, visual or audio transcription or record, memorandum, sketch, charter, report, note (including, but not limited to, notes used to prepare any letter, memorandum, report, or other document as herein defined), contract, agreement, change order, form, worksheet, memorandum or tape recording of telephone conversation, witness (including, but not limited to, potential witness) interview, sound recording, sound recording transcription, engineering study, cross section, plan, expert analysis, computer printout, diary, journal, ledger, work memorandum, report of investigation and/or inspection, file memorandum, brochure, book, microfilm, tape, videotape, magnetic storage medium, exhibit, attachment, draft, certificate, chart, table, testimony, transcript of testimony, affidavit, printed or readable material, and any other means of storage and/or transmission of human intelligence.

4. "Facts" include, but are not limited to, events, transactions, and occurrences, the location of such events, transactions, or occurrences, all of which relate to, concern, or are concerned with, in any way whatsoever, directly or indirectly, the interrogatory subject.

5. "Identify" when used in reference to a natural person shall mean to state his or her full name and current, or last known, residence address, current employer, and current business address; when used in reference to a corporation, shall mean to state its full name, the names of each officer and director, its principal place of business, and its business address; when used in reference to a partnership, shall mean to state its full name, the names of each partner, and its principal place of business; when used in reference to a person other than a natural person, corporation, or partnership, shall mean to state its official name, its organizational form, and its address; when used with respect to a document (as hereinafter defined) "identify" means to state the date, subject or

substance, author, all recipients, type of document (e.g., letter, telegram, memorandum, computer printout, sound reproduction chart, etc.), its present location and identity of each of its current custodians, and shall include every document with respect to which a privilege is or may be claimed; when used with respect to a communication (as hereinafter defined), “identify means to state the date, time and place each communication was made, the address and phone number of every party and witness who were present, witnesses, or overheard such communication, and any documents (including recordings) relating to such communication; when used in reference to an act, shall mean to state the time and place of the act, the nature of the act, the name of the person or persons performing or joining in the act, and the names of all persons witnessing or having knowledge of such act.

6. “Injury” includes any injury or injuries, direct or consequential, allegedly sustained in the incident.

7. “Person” or “individual” includes individuals, corporations, firms, sole proprietorships, partnerships, associations, trusts, and governmental agencies, bodies and officials.

8. “Relating to” means regarding, concerning, involving, in connection with, reflecting, referring to and/or appertaining to.

9. “You” and “your” shall mean Norfolk Southern Railway Company, its affiliates, predecessors, successors, including but not limited to Great Southern Railway, or any persons, entities, agents, or representatives acting or purporting to act for or on your behalf, including but not limited to, any experts whom you expect to be called as witnesses at trial, attorneys, and persons who have access to the information requested from whom the Plaintiff can obtain such information.

REQUESTS FOR PRODUCTION

1. Please produce any and all documents, information, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to Petition filed with the STB by NSR involving the City of Birmingham's Railroad Preservation Park
2. Please produce any and all documents, information, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to the ownership of the property referenced in the Complaint filed by the City of Birmingham in the probate Court of Jefferson County relating to the Railroad Preservation Park
3. Please produce any and all documents, information, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to the contention that NSR owns in fee simple a portion of the property described in the Complaint filed by the City of Birmingham in the probate Court of Jefferson County relating to the Railroad Preservation Park
4. Please produce any and all documents, information, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to the contention that NSR owns an easement interest in a portion of the property described in the Complaint filed by the City of Birmingham in the probate Court of Jefferson County relating to the Railroad Preservation Park
5. Please produce any and all documents, information, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to the use of the property described in the Complaint filed by the City of Birmingham in the probate Court of Jefferson County relating to the Railroad Preservation Park.

6. Please produce any and all photos, maps, drawings, or other depiction of the property described in the Complaint filed by the City of Birmingham in the probate Court of Jefferson County relating to the Railroad Preservation Park.
7. Please produce any and all information, petition, notification, correspondence, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to abandonment proceedings by NSR or related to property owned by NSR and/or its affiliates, predecessors and/or successors.
8. Please produce any and all information, petition, notification, correspondence, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to abandonment proceedings by NSR related to the profit, receipts, and/or cost of the areas described in the City of Birmingham's complaint filed in the Probate Court of Jefferson County.
9. Please produce any and all information, petition, notification, correspondence, memorandums, emails, notes, drawings, sketches, plans, or other information in whatever form it exists related to profits, gross receipts, expenses, and/or costs related to the specific portion of (1) fee simple property and (2) easement property referenced in NSR Petition.

Respectfully submitted,

Brandy Murphy Lee

Brandy Murphy Lee (MUR039)
Attorney for City of Birmingham

OF COUNSEL:

CAMPBELL, GIDIERE, LEE, SINCLAIR & WILLIAMS
2100-A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
(205) 803-0051
(205) 803-0053, fax

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing via electronically and/or via U.S. mail to the following parties and/or counsel of record on this the 25th of November, 2008:

Crawford S. McGivaren, Jr.
Diane B. Maughan
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL, LLP
2001 Park Place North, Suite 700
Birmingham, AL 35203

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

J.T. Smallwood, Tax Collector
Room 160
Jefferson County Courthouse
716 N. Richard Arrington Jr. Blvd.
Birmingham, AL 35203

Brandy Murphy Lee
OF COUNSEL

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**



CITY OF BIRMINGHAM,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO.: 2:08-cv-1003-RDP
)	
NORFOLK SOUTHERN RAILWAY)	
COMPANY, INC., et al.,)	
)	
Defendants.)	

AFFIDAVIT OF GREGORY A. BROCKWELL

Before me, the undersigned authority, personally appeared GREGORY A. BROCKWELL, who, after being first duly sworn by me, deposes and states that he is over the age of 19 years and has personal knowledge of the following:

1. I am one of the attorneys representing the City of Birmingham in this action.
2. On July 2, 2008, I visited six (6) city parks located in Birmingham. Those parks were Norwood Park, North Birmingham Park, Stockham Park, Woodward Park, Harrison Park, and Cooper Green Park. True and correct copies of the Google maps which led me to the parks are attached hereto.
3. These parks include playgrounds, swimming pools, walking trails, and ball fields. I observed numerous children and adults using the park facilities.
4. When I visited the parks, I observed that they are all adjacent to what appear to be active railroad tracks. In fact, I observed a train pass Norwood Park and North Birmingham Park.
5. I observed that, although in some places the tracks are separated from the parks' open spaces by a line of trees, in other places the parks' grassy areas are not in any way separated from

the tracks (such as by trees or a fence, guardrail, or wall). In those places, there is seemingly nothing that would prevent train debris and/or a derailed train from entering the park space.

6. I also did not observe "warning" signs advising park users to stay away from the tracks, etc. It is possible such signs exist, but I did not notice any.

7. In addition to my visits to the parks listed above, I have also reviewed the current site plan for the proposed "Railroad Park" that is the subject of the above-styled action. The site plan indicates that the closest the Park's walking/biking trail will be to the railroad's existing retaining wall (which separates the active tracks from the property proposed for the Park) is approximately twenty-five (25) feet. I understand that, while the approximately 25-foot setback area will need to be subject to a construction easement during the construction of the Park, no permanent structures will be erected within the setback area, and the setback area can, if necessary, revert back to its rightful owner after construction of the Park is completed.

8. I have read the foregoing Affidavit and it is true and correct.

Further affiant saith not.



GREGORY A. BROCKWELL

[notary on following page]

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned, a Notary Public, in and for said County, in said State, do hereby certify that, after being duly sworn, GREGORY A. BROCKWELL, an individual whose name is signed to the foregoing Affidavit and who is known to me, acknowledged before me on this day, that, being informed of the contents of said Affidavit, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this 3rd day of July, 2008.

Janie M. O'Leary
NOTARY PUBLIC

MY COMMISSION EXPIRES:

12/10/08.