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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Judge Averil Rothrock
Friday, June 12, 2020 at 11:00 AM
With Oral Argument

CITY OF SEATTLE, a Washington municipal corporation, acting through its Department of Transportation;

Plaintiff,

v.

BALLARD TERMINAL RAILROAD COMPANY, L.L.C., a Washington limited liability company;

Defendant.

NO. 19-2-01794-5 SEA

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT: RE PREEMPTION

This matter came on before the Court on Defendant Ballard Terminal Railroad Company, L.L.C.'s ("BTRC") Motion for Summary Judgment: Re Preemption, filed May 15, 2020. Plaintiff City of Seattle ("City") opposed the motion. This Court considered the pleadings, records, and files herein, including:

1. *Defendant's Motion for Summary Judgment: Re Preemption* (May 15, 2020);
2. *Declaration of Joshua C. Allen Brower in Support of Defendant's Motion for Summary Judgment: Re Preemption*, with exhibits attached thereto (May 15, 2020);
3. *City of Seattle's Opposition to Defendant's Motion for Summary Judgment: Re Preemption* (June 1, 2020);

1 4. *Declaration of Tadas Kisielius in Support of City of Seattle’s Opposition to*
2 *Defendant’s Motion for Summary Judgment: Re Preemption*, with exhibits attached
3 thereto (June 1, 2020); and

4 5. *Defendants’ Reply in Support of Motion for Summary Judgment* (June 8, 2020).

5 The Court heard argument of counsel for the parties on June 12, 2020, and considered that
6 argument in conjunction with the Motion, evidence, and pleadings referenced above. The motion seeks
7 only partial summary judgment, as additional claims remain.

8 **DECISION**

9 A. Defendant BTRC seeks a ruling that enforcement of Section 4 of the Franchise as
10 interpreted by the Court is expressly preempted by the Interstate Commerce Act, as amended by the
11 Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) as a matter of law, i.e.
12 categorical preemption. Plaintiff City argues that enforcement of Section 4 of the Franchise is not
13 categorically preempted, and that the matter should proceed to trial to determine on an “as applied”
14 basis whether enforcement of the Franchise is preempted because enforcement would result in
15 substantial interference with railroad operations. Neither party asserts that the Court should decide
16 the “as applied” issue on summary judgment.

17 B. The preemptive effect of the ICCTA is a question of law. *Franks Inv. Co. v. Union*
18 *Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir.2010) (en banc). Because of the presumption against
19 preemption, the party contending that preemption applies has the burden of persuasion. *Elam v.*
20 *Kansas City So. Ry. Co.*, 635 F.3d 796, 802 (5th Cir.2011). Yet, that presumption “applies with less
21 force when Congress legislates in a field with ‘a history of significant federal presence’ ” such as
22 railroads. *Id.* at 804 (quoting *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d
23 69 (2000)).

24 C. BTRC in its reply requested that the Court remand the preemption issue to the STB.
25 This request, coming in reply, is made too late. The City objected, and its objection is sustained.
26 Moreover, BTRC provides no authority for the request to remand. Additionally, the STB had the

1 opportunity to reach the preemption issue in the first instance when this matter was before it, but, in
2 its June 25, 2019 Decision, held its proceedings in abeyance and expressly contemplated that the
3 State court might reach the preemption issue first. The Court has an obligation to resolve the issues
4 before it, including preemption. No good cause or authority has been presented to persuade the
5 Court to avoid resolving the preemption issue in these proceedings.

6 D. The ICCTA establishes exclusive jurisdiction in the STB for regulation of
7 transportation by rail carrier, as follows:

8 The jurisdiction of the Surface Transportation Board over--

9 (1) transportation by rail carriers, and the remedies provided in this part with
10 respect to rates, classifications, rules (including car service, interchange, and other
operating rules), practices, routes, services, and facilities of such carriers; and

11 (2) the construction, acquisition, operation, abandonment, or discontinuance of
12 spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are
located, or intended to be located, entirely in one State,

13 is exclusive. Except as otherwise provided in this part, the remedies provided under this
14 part with respect to regulation of rail transportation are exclusive and preempt the
remedies provided under Federal or State law.

15 49 U.S.C. § 10501(b). BTRC puts at issue Subsection (2), arguing that the City's attempt to
16 force relocation of the tracks at issue pursuant to the Franchise constitutes an exercise of
17 jurisdiction over "construction" and "operation" of "tracks" or "facilities" that is categorically
preempted. The Court agrees for the reasons stated below.

18 E. First, the Court agrees with BTRC that the City cannot avoid categorical preemption
19 based on its argument that the Franchise is a voluntary agreement and citation to the line of federal
20 case law and STB decisions holding that preemption does not ordinarily apply to enforcement of
21 voluntary agreements. *See Township of Woodbridge, NJ v. Consolidated Rail Corporation, Inc.*, 256
22 F.3d 718, 2000 WL 1771044, 2001 WL 283507 (STB clarified 2001). The Supreme Court of the
23 State of Washington has held that franchises, though subject to interpretation like a contract, are
laws and rejected the argument that franchises be treated as voluntary agreements in an ICCTA

1 preemption analysis. *City of Seattle v. Burlington Northern*, 145 Wn.2d 661 (2002). *See also City of*
2 *Tacoma v. Bonney Lake*, 173 Wn.2d 584, 589-90 (2012) (municipalities enter franchise agreements
3 in their propriety capacity, so courts should interpret franchises like contracts; municipalities grant
4 franchise agreements in their governmental capacity). Our Supreme Court has observed that
5 franchises are a form of regulation, stating, “The agreement is nonetheless an ordinance—that is, a
6 law. Like any state law, a local ordinance is subject to Congressional preemption.” *Id.* at 673. In
7 *Burlington Northern* the terms of the franchise at issue held to be categorically preempted regulated
8 switching, not construction and reconfiguration of existing rail. Thus, the result in *Burlington*
Northern does not necessarily control the outcome here.

9 F. The Court focuses on application of the express language of the federal statute to the
10 undisputed facts. The language of Congress is the best indication of its intent. *Demarest v.*
11 *Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991)(“When we find the terms of
12 a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.”);
13 *United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997)(“Given the
14 straightforward statutory command, there is no reason to resort to legislative history.”). Here,
15 “construction” and “operation” of tracks and facilities is expressly stated to be within the exclusive
16 jurisdiction of the Board “even if the tracks are located, or intended to be located, entirely in one
17 State.” 49 U.S.C. § 10501(b). This plainly includes within the acts subject to categorical
18 preemption regulation of the physical construction of tracks or other rail facilities, including their
19 design and configuration. The City’s enforcement of Section 4 of the Franchise to control and dictate
20 the relocation and construction of tracks and facilities must yield to the STB’s exclusive jurisdiction.

21 G. The City argues that the reference to construction in 49 U.S.C. § 10501(b)(2) should
22 be limited to the type of construction subject to the licensing requirement of 49 U.S.C. § 10901. The
23 Opposition 7-8. Court does not find the available authorities support the City’ interpretation.
Moreover, that is not what the statute says.

1 H. The Court recognizes that the ICCTA does not categorically preempt all exercise of
2 local police power that incidentally touches tracks. “Congress narrowly tailored the ICCTA pre-
3 emptio (sic) provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be
4 said to have the effect of ‘managing’ or ‘governing’ rail transportation, Black’s Law Dictionary 1286
5 (6th ed.1990), while permitting the continued application of laws having a more remote or incidental
6 effect on rail transportation.” *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d
7 1324, 1331 (11th Cir.2001). For example, “[c]rossing disputes, despite the fact that they touch the
8 tracks in some literal sense, thus do not fall into the category of ‘categorically preempted’... state
9 actions.” *New Orleans & Gulf Coast Ry. Co. v. Varrois*, 533 F.3d 321, 333 (5th Cir. 321).
10 “[R]outine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire
11 crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations
12 or pose undue safety risks.” *Id.* See also *CSX Transp., Inc.*, 2005 WL 1024490, at *6 (approving the
13 proposition that “a state’s traditional authority over the safety of roads and bridges at grade-separated
14 rail/highway crossings pursuant to other statutory schemes is not preempted by section 10501(b) so
15 long as no unreasonable burden is imposed on a railroad”); *City of Lincoln v. Surface Transp. Bd.*,
16 414 F.3d 858, 863 (8th Cir.2005) (STB adopting the position that “it is well established that
17 nonconflicting, nonexclusive easements across railroad property are not preempted if they do not
18 hinder rail operations or pose safety risks.”); *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550
19 F.3d 533, 541-42 (6th Cir. 2008) (installation of pedestrian crossings and adjacent pedestrian
20 sidewalks is subject to as-applied-preemption analysis). Thus, if the terms of the Franchise at issue
21 acted more remotely upon the tracks such that they could be considered to only incidentally regulate
22 the construction and configuration of the tracks, the Court likely would reach a different conclusion.

23 I. Here, however, enforcement of Section 4 cannot be characterized as having a remote
or incidental effect on rail transportation. By enforcing Section 4, the City would directly control
and enforce the precise location and configuration of the tracks. The City seeks to enforce Section 4
to direct the construction of BTRC’s rail line for over one-half mile. The reconfiguration is a

1 significant change. The City is attempting to manage an area reserved to the STB, i.e., the
2 configuration and construction of tracks and rail facilities. Multiple authorities convince the Court
3 that this type of regulation is categorically prohibited. See *Franks Inv. Co. LLC v. Union Pacific R.*
4 *Co.*, 593 F.3d 404, 406 (5TH Cir 2010) (Noting the Eleventh Circuit’s holding that “Congress
5 narrowly tailored the ICCTA pre-emption provision to displace only ‘regulation,’ i.e., those state
6 laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail
7 transportation, ... while permitting the continued application of laws having a more remote or
8 incidental effect on rail transportation.”); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d
9 1324, 1331 (11th Cir.2001) (“We find this interpretation of the ICCTA to be persuasive.... For a
10 state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations
11 of rail transportation.”); *Davis v. Davis*, 170 F.3d 475, 481 (5th Cir.1999) (en banc) (The
12 presumption against preemption is applicable to “areas of law traditionally reserved to the states, like
13 police powers and property law”); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d
14 525, 533 (5th Cir. 2012) (“If the Board directly regulates the activity, as it does the construction of
15 rail lines, state and local regulation is prohibited. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533
16 F.3d 321, 332 (5th Cir.2008). Thus, the ordinances that would apply to the slope or other features of
17 the embankments for the railroad tracks themselves are expressly preempted”); *Friberg v.*
18 *Kansas City Southern Railway Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (“The language of the statute
19 could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as
20 well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of
21 the STB unless some other provision in the ICCTA provides otherwise.”). The City’s attempted
22 regulation through Section 4 of the Franchise goes beyond the traditional realm of municipal
23 regulation outlined in the examples in Paragraph H, into direct regulation of rail reconfiguration and
construction that is reserved to the STB.

J. The Court concludes that Congress intended categorical preemption of local government acts such as the forced relocation and reconstruction of one-half mile of track according

1 to a municipal design, which would operate directly, not incidentally, to regulate construction and
2 operation of tracks and facilities. BTRC has met its burden to establish categorical preemption.

3 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that
4 Defendant's Motion for Summary Judgment: Re Preemption is GRANTED. Additional claims remain
5 for adjudication.

6 DATED this _____ day of _____, 2020.


7 *Signed electronically/see attached*
8 Judge Averil Rothrock

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-01794-5
Case Title: CITY OF SEATTLE vs BALLARD TERMINAL RAILROAD CO

Document Title: ORDER RE GRANTING PMSJ RE PREEMPTION

Signed by: Averil Rothrock
Date: 6/25/2020 11:22:18 AM

A rectangular box containing a handwritten signature in black ink. The signature is written in a cursive style and reads "Averil Rothrock".

Judge/Commissioner: Averil Rothrock

This document is signed in accordance with the provisions in GR 30.

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