
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,)	On appeal from the United
a Delaware corporation,)	States District Court,
)	Northern District of Illinois,
Plaintiff-Appellee,)	Eastern Division
v.)	
)	Case No. 07 CV 229
CHICAGO TRANSIT AUTHORITY,)	
a municipal corporation,)	Hon. Robert M. Dow, Jr.
)	United States District Judge
Defendant-Appellant.)	

BRIEF OF DEFENDANT-APPELLANT
CHICAGO TRANSIT AUTHORITY

Richard F. Friedman
Jacinta Epting
Neal & Leroy, LLC
203 North LaSalle Street, Suite 2300
Chicago, Illinois 60601
(312) 641-7144

Attorneys for Defendant-Appellant
Chicago Transit Authority

Disclosure Statement

This disclosure is provided pursuant to Circuit Rule 26.1. Attorneys in private practice representing the Chicago Transit Authority who appeared in this court and in the district court are members of Neal & Leroy, LLC and Douglas G. Felder, P.C.

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Jurisdictional Statement

Federal question jurisdiction exist here pursuant to 28 U.S.C. § 1331 because the case arises under the commerce clause of the United States Constitution, art. I, § 8, and the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, et seq. (“ICCTA”). Jurisdiction also exists pursuant to 28 U.S.C. § 1337 because the case arose under ICCTA, an act of Congress regulating commerce.

The district court’s final judgment order and permanent injunction were entered April 1, 2009. The CTA did not file a motion for relief from the judgment, but it did file a notice of appeal on April 29, 2009.¹ No issues remain pending in the district court.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. § 1291 because this is an appeal from a final judgment of the United States District Court.

Issues Presented for Review

1. Whether state condemnation of railroad property, such as the CTA’s proposed condemnation to acquire its leasehold right to run trains on railroad property, is categorically preempted as regulation of rail transportation pursuant to § 10501(b) of ICCTA, irrespective of the scope or impact of the condemnation?

2. Whether the CTA’s proposed condemnation of its existing lease rights is preempted as regulation of rail transportation pursuant to § 10501(b) of ICCTA, where the interest that the CTA proposed to condemn was substantially the same as the rights and obligations of its existing perpetual lease with the railroad?

3. Whether CTA’s proposed condemnation of its existing lease rights violates the commerce clause of the United States Constitution, U.S. CONST., art. I, § 8.

¹ Pursuant to circuit Rule 33, the briefing was stayed while the parties attempted to resolve their differences. The parties were unable to do so.

Statement of the Case

In 2006, the Chicago Transit Authority (the “CTA”) commenced proceedings in the Illinois Commerce Commission (the “Commission”) to acquire its leasehold interest in the Right of Way owned by Union Pacific Railroad Company (the “railroad”). Pursuant to a perpetual lease executed in 1959 (the “Lease”), the CTA leased from the railroad for exclusive use two of the five tracks on the elevated embankment between Laramie Avenue and Austin Avenue in Chicago. (The condemnation case was before the Commission, because it must approve the taking of railroad property before a condemnation complaint may be filed in the state circuit court). The CTA’s Green Line runs on the two leased tracks. The CTA has no interest in the three other tracks on the embankment, which are used for the railroad’s interstate traffic and are used by the railroad to operate Metra commuter rail.

The railroad subsequently filed three count complaint against the CTA. The railroad’s complaint sought a declaratory judgment stating that the CTA’s attempt to condemn was preempted by ICCTA and violated the Commerce Clause. The CTA subsequently amended its petition in the Commission to modify the description of the interest it sought to take, but otherwise the parties suspended proceedings in the Commission pending the disposition of the federal case.

The district court granted the railroad’s motion for summary judgment on the Count I declaratory claim, finding that ICCTA preempted the state court condemnation. The court found Count II, the commerce clause claim, moot because the condemnation was preempted by ICCTA. Under count III, the court granted a permanent injunction prohibiting the CTA from proceeding with the condemnation before the Commission.

The court considered the CTA's motion for judgment on the pleadings as a cross-motion for summary judgment and denied it.

The CTA appeals, seeking reversal of the district court's judgment and entry of judgment in favor of the CTA.

Statement of Facts

The Parties. The CTA is a municipal corporation organized and operated under the laws of the State of Illinois, and created pursuant to the Metropolitan Transit Authority Act, 70 ILCS 3605/1 *et seq.* Its principal place of business is Chicago, Illinois. The CTA provides mass transportation service in the City of Chicago and surrounding areas (Docket #1, para. 5)², operating eight rail lines in the Chicago area. (Docket #105, para. 1.) The railroad is a rail common carrier engaged in the business of interstate freight rail transportation. (Docket #1, para. 4.) It is organized under the laws of the State of Delaware, and its principal place of business is in Omaha, Nebraska. *Id.*

The CTA's Historic Relationship with the Railroad. The Chicago and Northwestern Railway Company, the railroad's predecessor, owned the embankment and the five rail tracks from Laramie Avenue in Chicago. This area, which is referred to as the "Right of Way," extends for 2.8 miles to Oak Park, Illinois. (Docket #1, paras. 8-9, Docket #92, para. 13.) Prior to 1959, the CTA operated services parallel to the embankment at street level on the Green Line. (Docket #1, para. 9.) On January 6, 1959, the Northwestern and CTA signed a lease providing that the CTA would pay rent on a monthly basis for the exclusive use of two of the elevated rail tracks. The CTA and the Northwestern, and later the railroad, also executed amendments to the Lease. (Docket #106, Ex. D.)

² The references are to the official record, the relevant portions of which are bound in a separate appendix for the Court's convenience.

The Railroad's Operations. On its three tracks, the railroad operates approximately thirty freight trains each day, transporting more than 100,000 tons of freight over the Right of Way each day. (Docket #106, Ex. Q, pp. 14, 16.) Also, pursuant to a Purchase of Service Agreement, the railroad allows Metra to operate approximately sixty commuter trains on the railroad's three tracks each weekday. (Docket #106, Ex. Q, pp. 14, 16, 38-39.) The railroad forecasts four percent annual growth in freight traffic through the Chicago area or more than seventeen percent growth overall from 2007-2011. (Docket #106, Ex. Q, pp. 15 and 37.)

The leased portion of the Right of Way—that is, the Right of Way used by the CTA—constitutes approximately 40% of the width of the Right of Way and is at all times parallel to the railroad's operations. (Docket #93, Ex. 3, Aff. James Harrel, para. 9.) The distance between the railroad's closest railroad track and the leased portion of the Right of Way is approximately five feet along the entire length of the Right of Way. (Docket #93, Ex. 4, Aff. Bryon Thiesse, para. 5) The railroad alleged that the close proximity between the railroad and CTA operations required the railroad to utilize non-standard procedures for safety inspection and maintenance of the elevated structure. (Docket #93, Ex. 4, Aff. Bryon Thiesse, para. 6.) However, in the over fifty years that CTA has leased the Right of Way, the railroad is aware of only one instance, in 1978, in which CTA's operation interfered with the railroad's operations. (Docket #106, Ex. Q, pp. 54-57.)

The Lease. The Lease allows the CTA the exclusive right to use two tracks for mass transit service between Laramie Avenue and Harlem Avenue. (Docket #1, paras. 8-9, Lease para. 1, p. 2.) The Lease also provides mutual obligations and rights with respect to joint facilities, which are defined as the north and south streets that pass

through the Right of Way, the drainage facility and all other jointly used facilities. (Docket #106, Ex. D, January 6, 1959 Lease, para. 4, p. 5.) The railroad retains all rights to the air rights and subsurface rights of the CTA's leased area, as long as there is no interference with CTA's operation. (Docket #106, Ex. D., January 6, 1959 Lease, para. 1, p. 2.) The Lease further provides that the railroad and the CTA will divide the expenses and liability associated with the joint facilities on a 60%-40% basis. (Docket #106, Ex. D, January 6, 1959 Lease, paras. 5 and 7.)

Pursuant to the Lease, the railroad is in charge of the maintenance of and capital improvements to the elevated facility, its retaining walls and underpasses. (Docket #106, Ex. D., January 6, 1959 Lease, para. 5, p. 6.) In contrast, each entity is responsible for the operation of its own trains and track maintenance. (Docket #106, Ex. D., January 6, 1959 Lease, para. 5, p. 7.) Specifically, the Lease provides that the CTA "at all times during the term of this lease shall maintain at its sole costs and expense the tracks, platforms, stations, stairway and other facilities used by it." (Docket #106, Ex. D, January 6, 1959 Lease para. 5, p. 7.) Additionally, the Lease provides that the CTA "at all times during the term of this lease shall have full and exclusive right, power and authority to occupy, control, manage and operate all of the demised property and such additional railroad tracks, building and other facilities as it may deem desirable." (Docket #106, Ex. D, January 6, 1959 Lease, para. 4, p. 5.)

The Lease is perpetual. However, if either party discontinues transportation operations, the Lease terminates. (Docket #106, Ex. D, January 6, 1959 Lease, para. 1 p. 2.) The Lease is also subject to termination if the CTA, after 90 days notice, fails to make a payment or defaults under any other provision of the Lease. (Docket #106, Ex. D, January 6, 1959 Lease, para. 1, p. 2 and para. 8 p. 10.)

The History of the Right of Way. During the more than fifty years that the Lease has been in effect, there has been frequent and ongoing communication between the CTA and the railroad concerning maintenance of the Right of Way. (Docket #106, Ex. Q, Dep. of Eric Wilson, pp. 22-24.) The railroad has never notified the CTA that the CTA failed to properly maintain its tracks and facilities of its leased portion of the Right of Way in “good order, condition, and repair.” (Docket #106, Ex. R, Aff. Michael Wrenn, para. 6.)

The CTA has no outstanding obligations to the railroad with respect to CTA’s contributions to the maintenance and upkeep of the leased Right of Way. (Docket #106, Ex., K, Aff. Dennis Anosike, para. 8.) Further, the CTA has never received a notice of any default, delinquency or late payment with respect to CTA’s obligations to contribute to the maintenance or the upkeep of the leased portion of the Right of Way, or any joint facilities. (Docket #106, Ex. K, Aff. Dennis Anosike para. 8) And the railroad has not offered any evidence that the CTA failed to make any payments to the railroad for repairs or maintenance of the joint facilities. (Docket #106, Ex. Q, Dep. of Eric Wilson, p. 70.)

The CTA’s Negotiations with the Railroad for a Permanent Easement.

The Lease provides that the rent for the Right of Way will be adjusted every ten years (Docket #106, Lease, July 15, 1960, para. 2.) In 2004, during the time that CTA and the railroad negotiated the decennial adjustment of rental, the railroad and the CTA also began discussions concerning the CTA’s purchase of a permanent easement in the Right of Way. (Docket #106, Ex. G 000115-000116.) The railroad had the easement appraised. In a letter to the CTA dated May 3, 2005, the railroad stated that it would accept

\$14,808,400 as payment for the permanent easement and would recommend the sale to senior management. (Docket #106, Ex. G, 000115-000116.)

In regard to the possible purchase of a permanent easement for the above portion of Right-of-Way, Union Pacific had the property appraised by an MAI appraiser. The value is as follows:

Land (\$30,800,000 x .40% (FMV Appraisal)	\$12,320,000
Road Property (1959 book value \$1,563,000 x .40%)	625,200
Bridges (1959 book value \$2,492,000 x 40%)	996,800
Retaining Walls (1959 book value \$2,166,000 x .40%)	866,500
TOTAL	\$14,808,400

This is the amount we would recommend to UPRR Senior Management, should the CTA request purchase of a permanent easement.

[CTA Employee) Mr. Barry Mullen by letter dated November 8, 2004, and during discussions with other CTA staff, we were advised CTA as obtaining a real estate appraisal report. Please advise if the report has been completed and when we might discuss the lease revaluation or possible purchase of permanent easement?

However, this letter should not be construed as a commitment on behalf of Union Pacific Railroad Company to sell the property, as it will require final Railroad Company management and board approval.

Further, in an internal memorandum, the railroad determined that it would be beneficial to allow CTA to purchase a permanent easement. (Docket #106, Ex. G, 1-2.)

Since the CTA has requested UPRR to provide our estimated value for a permanent easement for the subject Right of Way, it is my recommendation we offer the easement for a one-time payment of \$14,808,400 as outlined above. I believe the price represents the fair market value and the highest achievable in the foreseeable future. Given the political ramification and the financing difficulties the CTA has had, I believe it is in UPRR's and the CTA's best interest to negotiate an easement sale with a one time payment. Any potential agreement would specify that should the CTA discontinue transportation operations on the Right of Way, the easement would revert to UPRR.

The CTA was interested in a permanent easement in order to ensure it could continue to provide mass transit services along the leased portion of the Right of Way if the railroad discontinued operations along the Right of Way. (Docket #106, Ex. E, Dep. Michael Wrenn, pp. 82, 159-161, Ex. K, Dep. Dennis Anosike, pp. 29-31.) Moreover, purchasing a permanent easement would allow the CTA to make a one-time payment from its capital funds as opposed to monthly payments from its operating budget, and would eliminate the necessity of having the property appraised every ten years. (Docket #106, Ex. E, Dep. Mike Wrenn, pp. 159-161, Ex. F Dep. Dennis Anosike pp. 29-30.) During his deposition, Mike J. Wrenn, manager of real estate services testified as follows:

Q Mr. Wrenn, I'd like to bring you back to some questions that Mr. Andreoli asked you concerning the reason that you understood that the CTA is interested in acquiring an easement as against the adjustment of the annual rental. Do you recall that line of questioning?

A Yes.

Q And I've heard you say that you didn't recall all of the reasons that the CTA was interested in acquiring an easement as against the adjustment of the price; is that correct?

A That's correct.

Q Is one of the reasons that the CTA considered acquiring an easement as against adjustment of the price is the expense of going through the appraisal process every ten years?

A Yes.

Q Is another one of these reasons the elimination of the necessity of making a payment each and every month under the lease agreement as against a one-time payment?

A Yes.

Q Is another one of those reasons the elimination of the consequences of administrative person forgetting to pay the monthly lease payment for a period time.

A That's correct.

Q And is another one of the reasons the convenience to the CTA of making a single payment on a one-time basis rather than having to make it every single month throughout the period of the lease

A Yes.

Q And is another one of the reasons that the CTA consider was the elimination of the adversarial process that involved every ten years in trying to determine the value of the lease for the ensuing ten years. (Docket #106, Ex. E, Dep. Mike Wrenn, pp. 159-161.)

A Yes.

During his deposition, Dennis Anosike, senior vice president/treasurer of the CTA, testified as follows:

Q Why would a permanent easement benefit the CTA?

A In a couple of ways, you referred to the legislation in Springfield and the operating impact. To the extent that -- the way CTA operates, by law CTA has to recover -- has a recovery ratio that it has to meet on the operating budget, which are not required under the capital funds. So each dollar the CTA spends in operations is what I referred to in capital.

So as a result, CTA looks at its operations on an ongoing basis and makes the determination to reduce operating costs where we can use capital funds. That's the same decision that we made with respect to this building.

Instead of paying for a lease, in a much less amount, we use capital funds to actually buy or purchase a building, thereby reducing our operating costs and allowing us to maintain service on the street. That was the driving force for me when I looked at the monthly cost and the annual cost for that easement and understanding and realizing that this a longtime obligation which is more appropriate for -- as a capital expense.

(Docket #106, Ex. F Dep. Dennis Anosike pp. 29-30.)

The negotiations over a permanent easement stalled when the CTA considered the railroad's purchase price to be too high. (Docket #106, Ex. E, pp. 123-125.) However, the railroad never took the offer to sell the Right of Way off the table. (Docket #106, Ex. J., Dep. Pat Moran, pp. 52-55.)

The Condemnation Proceedings and Amendment. The CTA filed its Petition for Approval to Take Property before the Commission on December 8, 2006. (Docket #106, Ex. A, Petition for Approval to Take Property.) Pursuant to the Illinois

Eminent Domain Act, the condemnation of property of utilities (like the railroad) must be approved by the Commission. 735 ILCS 30/10-5-10(g) (as codified effective January 1, 2007).

The CTA filed its Amended Petition before the Commission on October 16, 2007, in which it clarified the description of the rights it sought to acquire. (Docket #106, Ex. H. Amended Petition for Approval to Take Property.) The amendment provided:

6. The property sought to be condemned is not the fee interest in the subject property described on Exhibit A, but is a perpetual easement upon such property that is coextensive with the Lease. In acquiring the easement, the CTA shall succeed to its obligations, and shall have the benefit of its rights, that are now in effect between the lessor and lessee pursuant to the terms and conditions of the Lease. Upon payment of just compensation, the CTA shall own the easement in perpetuity and as owner shall not be obligated to pay annual rent for its easement interest. Further, the CTA's obligations, interests and rights under the easement shall run with the land and not be subject to termination for any reason.

The CTA acknowledged that if it acquired the property, it would continue to maintain and honor its rights as set forth in the Lease. (Docket #106, Ex. I, Dep. Kathleen Herrmann, pp. 75-76, Ex. H, Amended Petition, para. 6) Additionally, the railroad presented no evidence that the CTA would fail to cooperate with the railroad if it needed to improve the Right of Way. (Docket #106, Ex. Q, Dep. Eric Wilson, pp. 57-59.)

The Surface Transportation Board. The Surface Transportation Board (the "STB") established in 1996, is the agency charged with administering the ICCTA. The STB exercises jurisdiction over interstate rail transportation. 49 U.S.C. § 10501(b) (2010). The STB's responsibilities include resolving railroad rate and service disputes and reviewing proposed railroad mergers. 49 U.S.C. § 10701 et seq. The STB's jurisdiction does not extend to local mass transportation. *Id.* 49 U.S.C. § 10501(b)-(c) (2010).

The Disposition of the Case in the District Court. On January 12, 2007, the railroad filed its Complaint for a Declaratory Judgment and Injunction (the “Complaint”). (Docket #1.) The railroad alleged in its Complaint that the CTA’s condemnation action before the Commission was preempted by ICCTA, and that it also violated the commerce clause of the United States Constitution. On February 23, 2009, District Judge Robert M. Dow, Jr. issued a memorandum opinion granting the railroad’s motion for partial summary judgment and enjoining the CTA from proceeding with its condemnation proceeding before the Commission. (Docket #118, SA-1.) Judge Dow also denied the CTA’s motion for judgment on the pleadings because he considered its motion as a cross-motion for summary judgment. (Docket #118, SA-1.) On April 1, 2009, the court entered a final judgment and permanent injunction order. (SA-20.) The CTA filed its notice of appeal on April 30, 2009. (Docket #124.)

Summary of Argument

1. The Proposed condemnation is not, as the district court found, categorically preempted by § 1050(b) of ICCTA. ICCTA provides that the STB has the exclusive authority to regulate rail transportation. However, condemnation is not automatically deemed regulation, and therefore preemption should not be presumed. In fact, there is a presumption against preemption, and the court or STB will engage in a fact-based inquiry. Before a state action is preempted, it must “prevent or unreasonably interfere with” rail transportation. The proposed condemnation must be measured against such a standard.

With very few exceptions, when rail carriers challenge state efforts to take their property by eminent domain, federal courts review the facts and base their decisions on the impact the taking would have on rail transportation. In particular, the STB’s

decisions in cases involving challenges to state condemnation have consistently reviewed the facts; none of the STB decisions involving condemnation found them to be per se preempted. Because the STB is the agency authorized to enforce ICCTA, its interpretation of the application of ICCTA should be accorded deference.

2. The material undisputed facts did not show that the CTA's proposed condemnation of its Lease rights would unreasonably interfere with the railroad's operations. In most respects, the parties' rights and obligations would continue as set forth in the existing lease. As expressly stated in the CTA's amendment filed in the Commission, the CTA "shall succeed to its obligations, and shall have the benefit of its rights" under the Lease.

Specifically, the proposed condemnation would not interfere with the railroad's operations because it would not change the CTA's obligations to pay its share of costs and liabilities with respect to the Right of Way. Similarly, there would be no change in the railroad's ability to control the air rights and subsurface rights in CTA's easement area. The proposed condemnation would eliminate the provision that terminates the Lease if either party ceases transportation operations. Thus, the railroad could not regain the CTA's Right of Way in that circumstance. But that loss cannot be considered unreasonable interference because the occurrence of such an event is entirely speculative, and the railroad submitted no evidence concerning, when, if ever, that would happen.

Similarly, the proposed condemnation's elimination of the default terms of the Lease would not unreasonably interfere with rail transportation because the railroad has provided no evidence that the CTA had ever violated a term of the Lease in its fifty-year

history or proven that a default might occur. Moreover, federal preemption of the rail transportation was not intended to protect a railroad's ability to collect debts.

3. The commerce clause prevents a state or local government from discriminating against interstate commerce, which presupposes that the involved entities engaged in the same business activity. In this instance, there is no discrimination because the CTA provides local mass transit service, and the railroad provides interstate freight rail transportation.

Incidental effects on interstate commerce do not violate the commerce clause. Under the *Pike* balancing test, the gains to the CTA from the proposed condemnation of its Lease rights outweigh the incidental effects on the railroad's operations because the parties' existing mutual obligations and responsibilities would remain the same as under the Lease.

Argument

The Standards of Review

The district court granted summary judgment to the railroad. This court reviews such judgments *de novo*. *Woodruff v. Mason*, 542 F.3d 545, 550 (7th Cir. 2008). The same standard will be applied to the district court's denial of the CTA's motion for judgment on the pleadings. *Alexander v. City of Chi*, 994 F.2d 333, 335 (7th Cir. 1993.) Similarly, the district's disposition of the CTA's motion to dismiss is reviewed *de novo*. *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010).

The district court's entry of summary judgment is appropriate only if there is no genuine issue of material fact and "the moving party is entitled to judgment as a matter of law." Facts are to be construed in the light most favorable to the CTA, the non-moving party. Fed. R. Civ. P. 56(c). Moreover, the court is not required to draw every

conceivable inference from the record, but only reasonable inferences. *Woodruff*, 542 F.3d at 550. In reviewing affidavits and testimony tendered to support summary judgment, the court will distinguish between facts and conclusions. *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985). Conclusions unsupported by specific facts will be ignored. *Dempsey v. A. T. & S.F. Ry. Co.*, 16 F.3d 832, 842 (7th Cir. 1994); *First Commodity Traders v. Heinhold Commodities*, 766 F.2d 1007, 1011 (7th Cir. 1984); Fed. R. Civ. P. 56(e). Courts also disregard individual’s opinions about legal questions as set forth in affidavits or depositions. *Resolution Trust Corp. v. Juegens*, 965 F.2d 149, 153 (7th Cir. 1992); *Pfeil*, 757 F.2d at 862 (7th Cir. 1985).

On the preemptive effect of a federal statute, the standard of review also is *de novo* because the question is of one of law. *Island Park, LLC v. CSX Transp. Inc.*, 559 F.3d 96, 100 (2d Cir. 2009); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001); *Franks Inv. Co., LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010).

I. The Taking of Railroad Property for Public Use by Eminent Domain Is Not Per Se Preempted by ICCTA.

The district court held that the CTA’s proposed acquisition of its lease rights was preempted because condemnation of property used for rail transportation is categorically preempted. (Slip Op. p. 13; SA 13) However, categorical preemption is not the rule for state activities that impact rail carriers. This principle was reinforced in *Island Park, LLC v. CSX Transp. Inc.*, 559 F.3d 96, 104 (2d Cir. 2009), where the court stated: “We think it important to emphasize that although ICCTA’s pre-emption language is unquestionably broad, it does not categorically sweep up all state regulation that touches upon railroads—interference with rail transportation must always be demonstrated.” Preemption is not mechanical. “Instead, the appropriate questions are:

what does the state seek to regulate and does [it] burden rail transportation?” *Island Park*, 559 F.3d at 103.

ICCTA confers exclusive jurisdiction upon the STB for any activity that regulates rail transportation. Section 10501(b) provides as follows:

The jurisdiction of the 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).

In the district court’s view, all condemnation is regulation, regardless of the scope or impact of the taking. (Slip. Op. p. 12.) But categorical preemption is contrary to the presumption against preemption. Preemption is not to be presumed; rather, there is a presumption against preemption. “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors*, 507 U.S. 218, 224 (1993) (quoting *Md. v. La.*, 451 U.S. 725, 746 (1981)); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). This presumption extends to ICCTA. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008).

Controlling case law consistently reinforces the notion that state law should not be disregarded in the context of preemption. *See, Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87 (2006) (stating “we do not lose sight of the general

‘presum[ption]’ that Congress does not cavalierly pre-empt state-law causes of action”); also *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 664 (1993) (“[i]n the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption”). Eminent domain, which is the subject at issue here, is a power traditionally exercised by the states. *Green St. Ass’n v. Daley*, 373 F.2d 1, 6 (7th Cir. 1967).

At least one other circuit court of appeals and several district courts do not consider eminent domain to be categorically preempted. In those cases, the courts evaluated the facts to determine the impact of the proposed condemnation on rail transportation before deciding whether the action was preempted. *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005) (upholding the STB decision, in part, because it was supported by evidence showing interference with railway operations); *County of Dutchess v CSX Transp.*, 2009 WL 2913684 *2 (S.D.N.Y. 2009); *City of Sache v. Kan. City S.*, 564 F. Supp. 2d 649, 656 (E.D. Tex. 2008); *Buffalo S.R.R. Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 248 (S.D.N.Y. 2006) (no basis existed for finding that city's proposed design for railroad grade crossing would impede rail operations or pose undue safety risks, and therefore ICCTA did not completely preempt city from condemning railroad's property); *Dist. of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 *3 (D.D.C. 2005) (holding that the STB has held that federal action does not completely relieve state or local authorities to take action that affects railroad).

In holding that all condemnation of rail property is preempted by ICCTA, the district court relied on *Wisconsin Cent., Ltd. v. City of Marshfield*, 160 F. Supp. 2d

1009, 1013 (W.D. Wis. 2000). In *Marshfield*, the court held that “condemnation is regulation.” However, the STB, the agency committed to interpreting ICCTA, has consistently held to the contrary. *Maumee & W.R.R. Corp. & RMW Ventures, LLC—Petition for Declaratory Order*, STB Fin. Docket No. 34354, 2004 WL 395835 *2 (March 2, 2004). (“But neither the court cases, nor the Board’s precedent, suggest a blanket rule that *any* eminent domain action against railroad property is impermissible” (emphasis in original); *Lincoln Lumber Co.—Petition for Declaratory Order—Condemnation of Railroad Right-of-Way for a Storm Sewer*, STB Fin. Docket No. 34915, 2007 WL 2299735 *2 (August 10, 2007) (“Thus, acquisition by eminent domain. . . would not implicate the § 10501(b) preemption unless it would prevent or unreasonably interfere with railroad operations.”); *Norfolk S.R.R. Co. & the Ala. Great S.R.R. Co. Petition for Declaratory Order*, STB Fin. Docket No. 35196, 2010 WL 691256 *3 (February 26, 2010) (“Therefore, under § 10501(b) and relevant precedent, we must consider whether the taking proposed by the City would prevent or unduly interfere with railroad operations and interstate commerce.”).³

The STB’s consistent practice, as demonstrated by the cited cases, has been to consider state condemnation of railroad property on a case-by-case basis on the merits, rather than rejecting it as categorically preempted. As the interpretation of the agency charged with carrying out ICCTA, the STB’s view of the law is authoritative. “We review a determination of the Board under ‘the high level of deference accorded to an agency’s reasonable interpretation of the statutes which the agency administers.’” *Decatur County*

³ In a few non-condemnation cases, the STB cited the *Wisconsin Cent.* case for the proposition that condemnation is per se preempted. *CSX Transp.—Petition for Declaratory Order*, STB Fin. Docket No. 34662, 2005 WL 1024490 *2 (May 3, 2005); *City of Creede—Petitioner for Declaratory Order*, STB Fin. Docket No. 34376, 2005 WL 1024483 *5 (May 3, 2005). But it does not adhere to this principle in reviewing proposed condemnations.

Comm'rs v. Surface Transp. Bd., 308 F.3d 710, 714 (7th Cir. 2002), citing *United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 476 (7th Cir. 1999), citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Pursuant to *Chevron* deference, if a statute is ambiguous and falls within the subject matter of a federal agency, the court will defer to the agency's interpretation of the statute if it is reasonable. *Chevron* deference is applied to the STB, *Decatur*, as it is to the decisions of other federal agencies, such as the CFTC, *MBH Commodity Advisors, Inc. v. Commodity Futures Trading Comm.*, 250 F.3d 1052, 1060-61 (7th Cir. 2001) and the Department of Labor, *Ziegler Coal Co. v. Director, Office of Worker's Comp.*, 326 F.3d 894, 901 (7th Cir. 2003).

The *Chevron* analysis is a two-step process. First, the agency or court examines the text of the statute to determine whether its plain meaning controls the agency's interpretation. If not, the agency's interpretation governs if it is reasonable. *MBH Commodities*, 250 F.3d at 1060-1061. In the present case, § 10501(b) is silent on the question of whether condemnation is regulation. The taking of property for public use is a one-time event and it does not inherently "regulate" railroads, because as previously discussed, it does burden the railroad at issue. The text of § 10501(b) do not even mention condemnation, let alone equate it with regulation:

The jurisdiction of Board over. . .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 rail carriers. . .is exclusive. . . [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

It was within both the authority and the reasonable judgment of the STB to weigh each proposed instance of state condemnation to determine its impact on rail

transportation. Preemption appropriately depends on “the degree to which” the challenged state action burdens rail transportation. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 103 (2d Cir. 2009). “The appropriate questions are: what does the state seek to regulate and does the proposed regulation burden rail transportation.” *Id.*

II. The CTA’s Proposed Condemnation Would not Prevent or Unreasonably Interfere with Rail Transportation.

Courts determine whether condemnation is preempted by analyzing the facts of each case. “Under this fact-based test, state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation.” *Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010). *See also Buffalo S.R.R. Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 241, 249 (S.D.N.Y. 2006); *County of Dutchess v. CXS Transp., Inc.*, 2009 WL 2913684 *2 (S.D.N.Y. 2009).

Federal courts apply the “prevent or unreasonably interfere with railroad operations” standard (or standards similarly worded) to state condemnation actions. In those cases where preemption was found, the courts considered each case on its facts and evaluated the impact of the proposed taking on rail operations. *See Wisconsin Cent., Ltd. v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (attempted condemnation of 6,800 feet of the railroad’s 14,475 feet of passing track was preempted because it would have unreasonably interfered with railroad operations because passing track was an integral component in the operation of a single-track line); *See also Holland v. Delray*, 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004) (noting that in *Wisconsin Cent.*, the municipal authority was attempting to use its law to directly regulate rail transportation by requiring the railroad to tear up track). *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005), (City’s proposed condemnation of railroad right of way would unreasonably interfere with railroad’s ability to use space to move

freight, store lumber, unload railroad cars, and stage unload freight for further movement into shipper facilities).

The STB's exclusive authority is reserved for rail operations, railroad rates, or governance. "For a state court action to be expressly preempted under ICCTA, it must seek to regulate the *operations* of rail transportation." *Franks Inv. Co., LLC*, 593 F.3d at 413 (emphasis added).

Framed differently, condemnation is preempted where it would "prevent or unreasonably interfere with railroad operations." *Buffalo S.R.R. Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 241, 249 (S.D.N.Y. 2006); *Maumee & W.R.R. Corp.*, STB Fin Docket No. 34354 (March 2, 2004); *Dist. of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 *3 (D.D.C. 2005). This is consistent with the STB's position that "[a] key element in the preemption doctrine is the notion that only 'unreasonable' burdens, *i.e.*, those that 'conflict with' Federal regulation, 'interfere with' Federal authority or unreasonably burden' interstate commerce -- are superseded." *Cities of Auburn & Kent, WA—Petition for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, STB Fin. Docket No. 33200, 1997 WL 362017 (July 1, 1997). Ultimately, state actions are preempted if they have the effect of managing or governing rail transportation, but not if they have a more remote or incidental effect. *Island Park, LLC v. CSX Transp., Inc.*, 559 F.3d 96, 102, n.11 (2d Cir. 2009).

The railroad did not in its motion for summary judgment show undisputed facts to satisfy its burden of demonstrating that the CTA's proposed condemnation interfered with its operations. In fact the undisputed facts showed that the proposed condemnation would change little in the fifty-year relationship between the parties. The

little in the relationship that would be changed would have an indefinite and speculative impact on the railroad.

Moreover, the evidence that the railroad submitted in support of its motion for summary judgment did not satisfy its burden of overcoming the presumption against preemption. Preemption is not to be presumed, even when, as here, there is a preemption statute. *Franks Inv. Co., LLC v. Union Pacific R.R. Co.* 593 F.3d 404, 407 (5th Cir. 2010).

A. As a Legal Matter, the CTA's Assumption of its Existing Obligations and Rights is not Unreasonable Interference.

Paragraph 23 of the Complaint alleged that the CTA's proposed condemnation will cause the railroad the following losses:

its future possessory right to the leased Right of Way; its right of control over the joint facilities on the Right of Way, including the retaining walls and bridges; Union Pacific's use of the property under and over the leased Right of Way; the limitations on the CTA's use of the leased railroad operating property; the CTA's proportionate share of expense payments, including for maintenance of joint facilities; the limitations on Union Pacific's legal liability provided for under the Lease. . . .

Despite the railroad's allegations of interference with rail operations, it cannot be disputed that the proposed condemnation will not change the railroad's operations as they have existed under the lease for fifty years. After the proposed condemnation, the trains operated by the parties will continue to run on their separate sides of the Right of Way and the CTA will still be bound by its obligations to let the railroad control the joint facilities. Additionally, the CTA will still be bound to pay its 40% share of the costs of maintaining, operating, and improving the elevated right of way.

The railroad argued below that the CTA's proposed condemnation poses a threat or a limitation upon the railroad's control that puts the railroad's operations and facilities at risk. (Docket #106, Ex. Q, p. 62.) To the contrary, there is no threat to the

railroad's operations. The CTA's Amended Petition before the Commission specifically provides that in "acquiring the easement, the CTA shall succeed to its obligations, and shall have the benefits of its rights, that are now in effect between the lessor and lessee pursuant to the terms and conditions of the Lease." (Docket #106, Ex. H, Amended Petition for Approval to take Property, para. 6.) That amendment preserves the railroad's right to make capital improvements to the joint facilities, and continues the CTA's obligation to permit and pay its share for such improvements. In essence, the Lease ensures that the parties' obligations would remain the same.

Even after the proposed condemnation, the relationship between the parties would be unchanged from the way it has existed for the past fifty years. Because this constitutes a voluntary agreement on the use of trackage, it is not a regulation subject ICCTA. *Sacramento Reg. Transit Dist. -- Petition for Declaratory Order*, 2000 WL 893421 * (June 29, 2000)(voluntary trackage agreements not subject to oversight).

The railroad also argued below that the parties' obligations are nullified because, after the proposed condemnation, the current lease is no longer in effect, and the railroad's right to regain the property is eliminated. Even so, the essential underlying relationship -- *i.e.*, the railroad's right to control the joint facilities and the CTA's obligation to pay its share of those costs, remains unchanged.

Below, the railroad maintained that even after the CTA's amendment to the petition before the Commission, the condemnation would eliminate the railroad's control of property under and over the leased Right of Way. But this is an inaccurate interpretation of the proposed condemnation as clarified by the amendment. As amended, the CTA's proposed condemnation would be of the rights "now in effect between lessor and lessee." (Amended Petition, par. 6.) The Lease now in effect does not

confer upon the CTA any rights above or below the surface. The lease grants the Right of Way for passenger transportation purposes, “reserving unto the Lessor the right to use the property over and under the Right of Way.” Lease, §1. (Docket #106, Ex. D, January 16, 1959 Lease, para. 1, p. 2.)

After the proposed condemnation, the CTA would assume no more than it already has. It may continue to run its trains on the Right of Way, but would have no right to use the air rights or subsurface space. The CTA’s proposed condemnation would not diminish the railroad’s rights to use these areas.

B. The Railroad’s Loss of Landlord-Tenant Remedies Does Not Preempt the CTA’s Proposed Condemnation.

The railroad also asserted below that the CTA’s proposed condemnation puts the railroad in jeopardy because the railroad would no longer be able to exercise its preemptory right to oust the CTA from the Right of Way if the CTA misses a monthly payment. The Lease allows the railroad preemptorily to recover the CTA’s leasehold interest after 90 days notice upon a default. (Docket #106, Ex. D, January 6, 1959 Lease, para. 8, p. 10.) The Lease also provides that the CTA shall “forfeit all rights and interest hereby granted” and that the railroad may “with or without process of law exclude the Lessee” from any further use or possession of the premises. *Id.*

However, the railroad’s remedy of ouster is more hypothetical than real. The railroad does not maintain that in the fifty years of the Lease, the CTA ever failed to pay or was untimely on any of its financial obligations. Dennis Anosike, CTA’s financial officer (Docket #106, Ex. K, par. 8.), testified, in fact, that CTA has timely made every Lease payment. Unlike the railroad’s hope to regain the leased tracks in the future if the CTA ceased transportation operations, that default termination provision was not a consideration in the railroad’s proposed sale of the easement to the CTA in 2005.

Instead, the railroad's staff recommended selling the easement to the CTA, but only with the proviso that the railroad have the ability to regain the Right of Way if the CTA discontinued its transportation operations. (Docket #106, Ex. G 1-2.)

The remedy of peremptory ouster is drastic, and it is unlikely that the railroad would terminate CTA service to thousands of commuters if the CTA was late with or failed to make a payment (neither of which has occurred in over fifty years). It is much more likely that the railroad would pursue its contractual remedies. A judgment against a party for non-payment is a known and practical way of enforcing financial obligations. Because CTA "shall succeed to its obligations under the Lease," its obligations may, after the proposed taking, be enforced as any may be.

In fifty years, and despite the CTA's ever-changing financial position, it has still fulfilled its obligations under the Lease. (Docket #106, Ex. K, Aff. Anosike, paras. 5-6.) Additionally, even if the CTA successfully condemns the leased Right of Way, it would continue to meet the obligations set forth in the Lease. (Docket #106, Ex. I, Dep. of Herrmann, pp.75-76.) The railroad would have several causes of action available to it if the CTA failed to fulfill any of its Lease obligations, including, but not limited to, the following: temporary restraining orders, preliminary injunctions, permanent injunctions, declaratory judgment, breach of contract, judgment for debt and specific performance. In short, the loss of one remedy does not unreasonably interfere with rail transportation when there are many other effective enforcement remedies available to the railroad.

The district court placed great emphasis on the railroad's loss of the remedy of peremptory ouster. (Slip op. at 15.) Without any evidence in the record, the court observed that traditional contract and creditor's rights actions would be insufficient

because the consequence of any potential CTA violation under the existing Lease is costless (or low-cost) in contrast to other remedies the railroad could use if necessary. Without the peremptory right of ouster, the railroad “may find itself in the position of a pestering debt collector rather than a landlord with a potent self-help remedy.” *Id.* This is hardly the stuff of “unreasonable interference with rail transportation” that was envisioned by the ICCTA. Congress did not likely enact the ICCTA to protect a rail carrier’s ability to collect its bills, nor should this court endorse such a position.

C. There Is No Real Loss of Future Use.

The railroad maintains that the loss of future use of the leased Right of Way preempts the CTA’s proposed condemnation. If railroad property were otherwise available for future use, and that use were imminent, one could argue that a condemnation would interfere with future operations. However, the CTA is not seeking to displace or otherwise destroy any of the existing railroad track or infrastructure for which the railroad has an identifiable prospect of future use. Moreover, CTA’s condemnation will not preclude future rail transportation by the railroad on any property it currently has the right to use.

The Lease provides that if the CTA ceases transportation operations on the Right of Way, the Lease would terminate. According to the railroad, its operations are capacity-constrained on the railroad’s three tracks and it will need the CTA tracks for future operations. However, the railroad submitted no evidence that CTA would discontinue transportation operations on its leased tracks, or when such an event would likely occur.⁴

⁴ The only evidence the railroad advances to support the possibility of its recovering the CTA’s leased track is a report submitted to the CTA Board in May, 2007. (Docket #106, Ex. L) The May, 2007 report, recommended alternatives to alleviate financial difficulties that were

Absent any evidence, the railroad's likelihood of regaining CTA's tracks is simply speculative. The Green Line has operated on the Right of Way for half a century. One can only guess whether it will continue to serve commuters in Oak Park and the West Side for another half century. During that time period, the railroad may or may not see the same demand for its services. The railroad cannot provide any facts to support its claim that its operations will be substantially impacted in the coming years by the "possibility" that it could not regain the CTA's tracks.

In this case, accepting the railroad's loss of future use argument would set an unfortunate precedent. State and local governments would be unable to exercise any of its police powers or inherent powers, such as eminent domain, if a railroad could simply claim that it will need the subject property at some indeterminate time in the future. Railroads could retain property they do not need to conduct their operations, or maintain property not used in decades, simply by stating "perhaps we will need it someday." State and local governments would also lack the ability to make any necessary changes to better serve their residents and constituencies. Congress did not intend railroads to use the ICCTA to so easily limit the inherent powers of state and local governments. Uncertain and speculative impact on future operations cannot be a basis for federal preemption. *City of Lincoln v. Lincoln Lumber Co.*, 2006 WL 1479043, *9 (D. Neb. 2006).

expected if the State of Illinois did not provide additional financing. The report analyzed five scenarios, one of which was the suspension of Brown, Orange, Green, Pink, Purple and Yellow Line rail service. The report rejected this scenario and did not recommend it. (Docket #106, Ex. L, p. 28.) The Chicago Transit Board, the CTA's governing body, never accepted such a draconian solution. There is no evidence that the Board considered or even discussed termination or even suspension of any rail service, let alone Green Line service.

D. The Size of The Proposed Taking Is Not Determinative.

Although the district court found it to be “massive” (Slip op. at 16-17), the Right of Way that the CTA seeks to condemn is small compared with the railroad’s trackage. Specifically, the CTA’s proposed condemnation of the Right of Way consists of 2.8 miles. (Docket #92, para. 13.) In contrast, Union Pacific operates more than 52,000 miles of track across the western two-thirds of the United States. (Docket #92, para. 8.) Additionally, the STB classifies the railroad as a Class I railroad, which is the largest of the national freight railroads. (Docket #92, para. 7.) The CTA’s proposed condemnation is insubstantial in comparison to Union Pacific’s total rail operations, and the district court erred in its characterization of the proposed condemnation. In all events, the proper measure of preemption under ICCTA is not size but whether there is unreasonable interference with rail transportation.

III. The Proposed Condemnation is Not Contrary to the Commerce Clause.

Count II of the railroad’s complaint alleged that the CTA’s proposed condemnation will impose significant economic and operational burdens on the railroad’s interstate rail transportation operations. It argued that such burdens are unnecessary and constitute an impermissible burden on interstate commerce in violation of the commerce clause of the Union States Constitution, U.S. CONST., art. I, § 8. The district court found no need to decide that claim because it ruled for the railroad on the other counts of the complaint. In any event, the railroad’s claim is meritless.

The commerce clause provides that “[t]he Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Though phrased as a grant of regulatory power to Congress, the clause has long been understood to have a ‘negative’ aspect that denies the States the power to

unjustifiably discriminate against or burden interstate flow of articles of commerce. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). The commerce clause’s “[f]undamental objective is to preserve a national market for competition undisturbed by *preferential advantages conferred by a State* upon its residents or residents competitor.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (emphasis added).

The commerce clause is not, however, without limits. Courts interpret the commerce clause’s state regulatory power as not being absolute. “[T]he States retain authority under their general power police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986), *citing Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980). Although “[t]he Commerce Clause significantly limits the ability of State and localities to regulate or otherwise burden the flow of interstate commerce, it does not elevate free trade above all other values.” *Id.* at 151. “The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978).

A. The Commerce Clause Does Not Apply to the CTA’s Proposed Condemnation Because It Provides a Different Service than the Railroad.

The threshold question presented here is whether interstate commerce is affected. Discrimination in violation of the commerce clause presupposes entities engage in the same business activity. “Conceptually of course, any notion of discrimination assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). “Thus in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market, there can be no local preference whether by express discrimination against interstate

commerce or undue burden upon it, to which the dormant Commerce Clause may apply.” *Id.* at 300. *See also United Haulers Assoc., v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens, and treating public and private entities the same under the commerce clause would lead to unprecedented and unbounded interference by the courts with state and local government).

The CTA is an urban mass transit agency operating in the Chicago area. In contrast, the railroad is a private corporation providing interstate freight rail transportation. Pursuant to a Purchase of Service Agreement with the Commuter Rail Division (“CRD”) of the Regional Transportation Authority (“RTA”),⁵ the railroad, on behalf of the CRD, acts as an independent contractor in operating Metra commuter train services within the Chicago metropolitan region in an exchange for receiving a fee (Docket #106, Ex. O Docket #106, Ex. O, p. 5.)

As stated in paragraph 4 of its Complaint, the railroad is a private corporation providing interstate freight rail transportation services. The CTA is an Illinois municipal corporation that operates urban mass transit. (Docket #1, para. 5.) Because the CTA and the railroad provide completely different services, to entirely different users, there is no actual or prospective competition, and for that reason, the CTA’s proposed condemnation will not violate the commerce clause.

⁵ Pursuant to the Regional Transportation Authority Act, 70 ILCS 3615 *et seq.*

B. At Most, the CTA’s Proposed Condemnation Would Impose Only Incidental Effects on Interstate Commerce Which Are Not Outweighed by the Local Benefits.

Courts utilize a two-tier test to determine whether a regulation violates the commerce clause. “[T]he first step in analyzing any law subject to judicial scrutiny under the negative commerce clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless “the burden imposed on such commerce is clearly excessive in regulation to the putative local benefits.” *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). “There is however, no clear line between these two strands of analysis.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

1. The CTA’s Proposed Condemnation Does Not Discriminate Against Interstate Commerce.

As courts use the term, ‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys. v. Dept. of Env. Quality*, 511 U.S. 93, 99 (1994). Because the CTA is seeking a permanent easement with substantially the same terms as the current Lease, it is illogical to say that that the proposed acquisition favors in-state interests over out-of-state interests.

2. The Benefits of the Proposed Condemnation Outweigh Any Alleged Burdens to the Railroad.

When a regulation or action does not clearly discriminate against interstate commerce, courts will use the *Pike* balancing test to determine whether the state or local government has violated the commerce clause. *Midwest Title Loans Inc, v. Ripley*, 616

F. Supp. 2d 897, 906-907 (S.D. Ind. 2009). Under that test, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike*, 397 U.S. at 142.

Under the *Pike* test, the undisputed facts show that the incidental burdens placed upon the railroad are clearly not excessive in relation to the putative local benefits. The most important benefit is that the CTA is assured that it can continue to provide mass transit services if the railroad decided to discontinue transportation operations over the Right of Way. The benefits to the CTA also include eliminating the costs and process of the decennial appraisal of the leased portion of the Right of Way. Additionally, for budgetary reasons, it is beneficial for the CTA to make a one-time payment from capital funds versus single monthly payments from operating funds during the term of the Lease.

Courts employing the *Pike* balancing test have routinely found that regulations affecting railroads do not violate the commerce clause. *See In re Chicago Milwaukee, St. Paul & Pac. R.R. Co. v. Barfknecht*, 852 F.2d 960, 964 n.5 (7th Cir. 1988); (applying *Pike* balancing factor test found that state statute which prevented railroad company from instituting furlough days for railroad employees did not violated commerce clause). *Civil City of South Bend v. Consol Rail Corp.*, 880 F. Supp. 595, 602-603 (N.D. Ind. 1995) (ordinance prohibiting audible training warnings at specific railroad crossings favored neither state nor local interests, and effectuated legitimate public interests with a minimal effect on interstate commerce); *Duluth, Winnipeg & Pac. Ry. Co. v. City of Orr*, 2007 WL 1576119 (D. Minn. 2007) (ordinance providing for a maximum speed of 30 miles per hour had the same effect on both in-state and out-of state trains and the

ordinance did not violate the commerce clause); *Burlington N.R.R. Co. v. Dept. of Pub. Regulation*, 763 F.2d 1106, 1114 (9th Cir. 1985) (statute that required railroads to maintain staff station facilities in towns of at least 1,000 persons did not violate the commerce clause, rejecting railroad's argument that statute produced economic waste and adversely effected operating efficiency).

It is clear that the CTA's proposed condemnation would at most impose only incidental effects on interstate commerce because the CTA and the railroad would substantially maintain their respective rights and obligations as they now exist. Additionally, any alleged burden upon the railroad resulting from the condemnation is minor in relative the benefit to the CTA of continuing to provide services to passengers along the Green Line. Accordingly, the proposed condemnation will not violate the commerce clause.

Conclusion

For the foregoing reasons, the judgment below should be reversed and a judgment entered in favor of the CTA.

Respectfully submitted,

The Chicago Transit Authority, an Illinois municipal corporation and unit of local government, defendant-appellant

By: _____
One of its Attorneys

Richard F. Friedman
Jacinta Epting
Neal & Leroy, LLC
203 North LaSalle Street, Suite 2300
Chicago, Illinois 60601
(312) 641-7144
*Attorneys for Defendant-Appellant
Chicago Transit Authority*

April 21, 2010

Certificate of Compliance with Rule 32

I Richard F. Friedman, an attorney for the defendant, hereby certify pursuant to Rule 32, FRAP, that this brief complies with the type-volume limitation of FRAP Rule 32(a)(7)(B)(iii) because it contains no more than 11,000 words, excluding parts of the brief exempted by such rule. This brief complies with the typeface requirements of FRAP Rule 32(a)(5) and the typestyle requirements of FRAP Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12 pt. Georgia font.

Richard F. Friedman
Attorney for Defendant-Appellant Chicago

Proof of Service

The Undersigned, Counsel for Defendant-Appellant, Chicago Transit Authority, hereby certifies that on April 21, 2010, two copies of the Brief and required short Appendix of Appellant and one copy of the Separate Appendix as well as a digital version containing the brief were delivered by Neal & Leroy LLC to counsel for Plaintiff-Appellee, Union Pacific Railroad Company.

Dated: April 21, 2010

Neal & Leroy LLC

Jacinta Epting
Attorney for Defendant-Appellant
Chicago Transit Authority

Neal & Leroy LLC
203 North LaSalle, Suite 2300
Chicago, Illinois 60601
(312) 641-7144

Circuit Rule 30 (d) Statement

Pursuant to Circuit Rule 30 (d), counsel certifies that all material required by Circuit Rule 30 (a) and (b) are included in the Appendix.

Dated: April 21, 2010

Neal & Leroy LLC

Jacinta Epting
Attorney for Defendant-Appellant
Chicago Transit Authority

Neal & Leroy LLC
203 North LaSalle, Suite 2300
Chicago, Illinois 60601
(312) 641-7144

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 07-cv-229
)	
CHICAGO TRANSIT)	Judge Robert M. Dow, Jr.
AUTHORITY,)	
)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Currently pending before the Court are Plaintiff Union Pacific’s (“UP”) motion for partial summary judgment [91] and Defendant Chicago Transit Authority’s (“CTA”) motion for judgment on the pleadings [89]. For the reasons set forth below, Plaintiff’s motion is granted and Defendant’s motion is denied.¹

I. Procedural Background

UP filed its complaint [1] after CTA commenced state law condemnation proceedings pursuant to 735 ILCS 30/10-5-10. The Chicago Transit Authority’s ultimate aim in the condemnation proceedings is to effect a taking of property that CTA currently leases from UP under a perpetual lease. The proposed taking would effectively convert CTA’s lease into an easement. UP contends that CTA’s proposed use of condemnation authority is preempted by federal law (specifically the Interstate Commerce Commission Termination Act (49 U.S.C. §

¹ Because the federal preemption issue proves dispositive, the Court need not address the parties’ Commerce Clause arguments. See, e.g., *Buffalo Southern R.R., Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 255-56 (S.D.N.Y. 2006) (declining to reach constitutional question arising under Commerce Clause where resolution of other issues in case were dispositive).

10101 *et seq.*) (“ICCTA” or “the Act”) and runs afoul of the Commerce Clause of the United States Constitution (Art. I., § 8, cl. 2). Union Pacific’s complaint requests declaratory and injunctive relief.

After discovery closed, UP filed a motion for partial summary judgment [91] seeking a determination that CTA’s state law condemnation proceedings are preempted by federal law. On the same day, CTA filed a motion for judgment on the pleadings [89], requesting a determination that neither federal statutory law nor the Commerce Clause is a bar to CTA’s state law condemnation proceedings. The Court will construe CTA’s motion for judgment on the pleadings as a cross motion for summary judgment. See *Church v. General Motors Corp.*, 74 F.3d 795, 798 (7th Cir. 1996) (construing a motion for judgment on the pleadings as a motion for summary judgment where evidence outside the pleadings was presented to the district court and “not rejected”).²

² Construing CTA’s motion for judgment on the pleadings as a cross motion for summary judgment is appropriate because the Court is considering matters outside of the pleadings in resolving the motion. *Carter v. Stanton*, 405 U.S. 669, 671 (1972). Federal Rule of Civil Procedure 12(d) provides that when a Court construes a motion for judgment on the pleadings as motion for summary judgment, all parties “must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). That requirement easily is satisfied here, because in opposing UP’s motion for partial summary judgment, CTA presented record evidence in its response to UP’s Local Rule 56.1 statement of facts and in CTA’s own Local Rule 56.1 statement of additional facts. See *Carter v. Signode Industries, Inc.*, 688 F. Supp. 1283, 1284 (N.D. Ill. 1988). Moreover, in its motion for judgment on the pleadings, CTA seeks the very same relief that it seeks in its opposition to UP’s motion – in other words, the evidence on which CTA relies in its opposition to UP’s motion for summary judgment is germane to the matters raised in CTA’s own motion. In any event, converting CTA’s motion for judgment on the pleadings puts its motion on sounder footing than it otherwise would have been because the motion as originally styled surely would have been denied. “A motion for judgment on the pleadings may be granted only if the moving party establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law.” *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987). In this case, the inquiry is simple because considering only the pleadings would have the effect of excluding material issues of fact that came to light during discovery and that, it turns out, entitle the *plaintiff* to judgment as a matter of law.

II. Facts

A. Local Standards on Summary Judgment

The Court takes the relevant facts from the parties' respective Local Rule ("L.R.") 56.1 statements.³ The Court expresses no position as to whose version of disputed factual matters is correct. Local Rule 56.1 requires that statements of fact contain allegations of material fact, and that the factual allegations be supported by admissible record evidence. See L.R. 56.1; *Malec v. Sanford*, 191 F.R.D. 581, 583-85 (N.D. Ill. 2000). The Seventh Circuit teaches that a district court has broad discretion to require strict compliance with L.R. 56.1. See, e.g., *Koszola v. Bd. of Educ. of the City of Chicago*, 385 F.3d 1104, 1109 (7th Cir. 2004); *Curran v. Kwon*, 153 F.3d 481, 486 (7th Cir. 1998) (citing *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir. 1995) (collecting cases)).

Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider the statement. See, e.g., *Malec*, 191 F.R.D. at 583. Additionally, where a party improperly denies a statement of fact by failing to provide adequate or proper record support for the denial, the Court deems admitted that statement of fact. See L.R. 56.1(a), (b)(3)(B); see also *Malec*, 191 F.R.D. at 584. The requirements for a response under Local Rule 56.1 are "not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted." *Bordelon v. Chicago Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528 (7th Cir. 2000). In addition, the Court disregards additional statements of fact contained in a party's response rather than in its statement of additional facts. See, e.g., *Malec*, 191 F.R.D. at 584 (citing *Midwest Imports*, 71 F.3d at 1317).

³ See [92], UP's Local Rule 56.1(a)(3) Statement of Facts ("Pl. SOF"); [104], Defendant's Response to UP's Local Rule 56.1(a)(3) Statement of Facts ("Def. Resp. Pl. SOF"); [105], Defendant's Local Rule 56.1(b)(3)(C) Statement of Additional Facts ("Def. SOAF"); [112], UP's Response to Defendant's Local Rule 56.1(b)(3)(C) Statement of Additional Facts ("Pl. Resp. Def. SOF").

B. Pertinent Facts for Purposes of Cross-Motions for Summary Judgment

In 1959, CTA and UP's predecessor entity entered into a lease ("the Lease") of the property at issue. Def. Resp. Pl. SOF ¶¶ 20, 24. The property at issue ("the Right of Way") is ninety to ninety-five feet wide in most places and runs east-west for approximately 2.8 miles, from Laramie Avenue (in Chicago) to beyond Harlem Avenue (in Oak Park, Illinois). Def. Resp. Pl. SOF ¶¶ 13, 14. Union Pacific operates three railroad tracks, and CTA operates two railroad tracks, along the Right of Way. Def. Resp. Pl. SOF ¶¶ 15, 21; Pl. Resp. Def. SOAF ¶ 2. Rail traffic along the Right of Way is "among the most intense" in UP's interstate rail network. Def. Resp. Pl. SOF ¶ 19.

The Lease, which has been amended a handful of times (Def. Resp. Pl. SOF ¶ 24), outlines the rights and obligations of the lessor (UP) and the lessee (CTA) and provides for the termination of the lease in certain circumstances. See Def. Resp. Pl. SOF ¶¶ 39, 41, 43. The Lease has several important features. Among those features are that the Lease restricts the type of traffic that CTA can run along the Right of Way, requires the CTA to obtain UP's approval before making "additions, alterations or changes" to the Right of Way, and requires CTA to ensure that everything related to CTA's operations on the Right of Way is in "good order, condition, and repair." Def. Resp. Pl. SOF ¶¶ 25-28. The Lease also describes the parties' respective burdens with respect to maintenance of jointly used facilities (certain retaining walls, bridges, support structures, and the like). Def. Resp. Pl. SOF ¶¶ 32-35. In addition, the lease can terminate if CTA defaults on its obligations under the lease or either party ceases its rail operations (Def. Resp. Pl. SOF ¶¶ 39, 41), at which point UP is entitled to re-take its property and eject CTA (Def. Resp. Pl. SOF ¶ 43). Otherwise, the Lease will not terminate. The

possibility of future possession of the leased Right of Way has “substantial economic and strategic value” to UP. Pl. SOF ¶ 45.

In the end, a dispute over money appears to have paved the way for the instant legal action. The amount of rent that CTA pays under the Lease is recalculated every ten years based on the fair market value of the Right of Way. Def. Resp. Pl. SOF ¶ 46. In their most recent discussions, the parties varied widely on the proposed amount of rent. Compare Def. Resp. Pl. SOF ¶ 52 (\$30.8 million), with Def. Resp. Pl. SOF ¶ 54 (\$11.3 million). During that rent dispute, the parties engaged in discussions for a one-time payment by CTA that would have replaced the Lease with an easement. Def. Resp. Pl. SOF ¶ 59. The negotiations for an easement ended when CTA presented UP with both a carrot and a stick: CTA offered to pay UP \$7,564,400 for a “perpetual easement” in the Right of Way, or else CTA would initiate condemnation proceedings. Pl. SOF ¶ 63. Union Pacific declined the offer (Def. Resp. Pl. SOF ¶ 64), and CTA resorted to the stick, initiating condemnation proceedings before the Illinois Commerce Commission (Pl. SOF ¶ 65).

The CTA’s takings petition, as amended, describes the proposed easement that CTA seeks to take (“the Easement”). Based on the petition, the Easement has three salient features: (1) the “property sought to be condemned * * * is a perpetual easement upon such property that is coextensive with the Lease;” (2) under the easement “CTA shall succeed to its obligations, and shall have the benefit of its rights,” under the Lease; and (3) “CTA’s * * * *rights under the easement shall * * * not be subject to termination for any reason.*” Def. Resp. Pl. SOF ¶ 66 (emphasis added).

CTA admits that under the proposed Easement, UP “will not have the ability to evict the CTA from operating along the right of way” in the event of a breach. Def. Resp. Pl. SOF ¶ 68.

The Lease currently specifies that, after written notice and 90 days, a failure by CTA to perform any of the covenants in the lease gives UP the right, “with or without process of law, [to] exclude the [CTA] from the further possession and use of” the Right of Way. Def. Resp. Pl. SOF ¶ 43; [116], ex. D at 13. CTA’s response to UP’s Local Rule 56.1(a)(3) Statement of Facts clarifies that which is not obvious from the plain language of CTA’s takings petition: the proposed Easement is not actually “coextensive” with the lease (Def. Resp. Pl. SOF ¶ 66) because although CTA “succeed[s] to its obligations” and rights under the Lease (*id.*), UP *does not* succeed to all of its remedies: it would lose the ability to evict CTA for a breach of the Lease and re-take its property.

III. Analysis

A. Standard of Review

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether there is a genuine issue of fact, the Court “must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party.” *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir. 2004).

To avoid summary judgment, the opposing party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477

U.S. 317, 323 (1986). Summary judgment is proper against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In other words, a “mere existence of a scintilla of evidence in support of the [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 252.

B. Federal Preemption Law and the ICCTA

The basic principles of preemption law are both relatively straightforward and well-established. The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Art. VI, cl. 2. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). When determining if such a conflict exists, the “purpose of Congress” is the ultimate touchstone. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

In general, there are three settings in which a state law conflicts with, and hence is preempted by, federal law: (1) express preemption, in which Congress “define[s] explicitly the extent to which its enactments pre-empt state law;” (2) field preemption, in which state law is pre-empted because “it regulates conduct in a field that Congress intended the federal government to occupy exclusively;” and (3) conflict preemption, in which, for example, complying with both federal and state law is a physical impossibility. *English v. General Elec.*

Co., 496 U.S. 72, 78-79 & n. 5 (1990) (explaining that the three categories are not “rigidly distinct”); see also *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997).

Particularly pertinent for present purposes is express preemption. See *English*, 496 U.S. at 79 (“[W]hen Congress has made its intent known through explicit statutory language, the courts’ task is an easy one”). The Supreme Court teaches that the *scope* of express preemption is informed by (a) the presumption that Congress “does not cavalierly pre-empt state-law causes of action,” and (b) the purpose of Congress in enacting the legislation, as revealed by the text, statutory framework and “the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Lohr*, 518 U.S. at 485.

1. The ICCTA Expressly Preempts Regulation of “Transportation” by Rail Carriers

When it enacted the Interstate Commerce Commission Termination Act, Congress included an express preemption provision to effectuate its aim of centralizing railroad regulation. The preemption provision at once describes the breadth of the federal Surface Transportation Board’s (“STB”) jurisdiction and eliminates the jurisdiction of states over railroad regulation:

The jurisdiction of the Board over transportation by rail carriers * * * 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 defined in the Act, “transportation” has a meaning that is far broader than the term’s ordinary meaning; the term includes “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 agreement concerning use.” 49 U.S.C. § 10102(9)(A) (emphasis added).

In view of that panoptic definition of transportation, the Court agrees that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than the language contained in Section 10501(b). *CSX Transp. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). The overwhelming weight of authority accords with that view. See, e.g., *Franks Investment Co., LLC v. Union Pac. R.R.*, 534 F.3d 443, 446, 449 (5th Cir. 2008) (noting the breadth of, and lack of ambiguity in, § 10501(b)); *City of Lincoln v. S.T.B.*, 414 F.3d 858, 861 (8th Cir. 2005) (reviewing an STB decision “in the context of the Board’s broad authority over rail transportation”); *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (reasoning that “nothing in the case law” supported a narrower interpretation of Section 10501(b)); *Wisconsin Cent. LTD v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (“It is clear that the ICCTA has preempted all state efforts to regulate rail transportation”); *City of Creede, CO—Pet. for Declaratory Order*, 2005 WL 1024483 (S.T.B. May 3, 2005) (collecting cases and observing that “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping”).

The history of regulation in this realm and the evolution of the statutory scheme confirm the broad reading of Section 10501(b): Congress’s unambiguous intent in enacting the IICTA was to unburden railroads from regulation while consolidating the remaining regulatory work in federal hands. Accord House Rep. No. 104-311, at 90-93 (1995), reprinted in 1995 U.S.C.C.A.N. 164, 802-05. By means of the Interstate Commerce Act (ch. 104, 24 Stat. 379 (1887)), the federal government has exerted control over interstate rail transportation for more

than one hundred twenty years. (The Interstate Commerce Act, as amended, includes the ICCTA. See 49 U.S.C.A. Subt. IV, Interstate Commerce Act Disposition Tables.) The Supreme Court has noted that the Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes” (*Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)), and that the reach of federal authority over railroads “frequently” leads to the invalidation of state regulations. *Id.* See also *City of Auburn*, 154 F.3d at 1029 (collecting Supreme Court railroad preemption cases); *CSX Transp.*, 944 F. Supp. at 1582-85 (describing the history of railroad regulation and placing the ICCTA in the context of that history).

Recent decades have seen Congress move to concentrate regulatory authority over railroads in the federal government. Prior to 1980, the Interstate Commerce Commission (“ICC”) “was empowered to preempt state regulation of intrastate lines” only in certain circumstances. See *City of Auburn*, 154 F.3d at 1029 n. 6. In 1980, Congress passed the Staggers Rail Act (Pub. L. No. 96-448, 94 Stat. 1895 (1980) (“the Staggers Act”)), the predecessor statute of the ICCTA. The Staggers Act further narrowed the state regulatory playing field by preempting state regulation of intrastate rail practices (although Congress created an exception to preemption where the state employed federal standards and obtained certification from the ICC). See *CSX Transp.*, 944 F. Supp. at 1583; Staggers Rail Act of 1980, Pub. L. No. 96-448, § 214(b), 94 Stat. 1895, 1913. The Staggers Act’s regulatory winnowing was consistent with the legislation’s stated purposes, which included fostering competition and minimizing “regulatory control over the rail transportation system.” Staggers Act, § 101(a). Finally, when Congress enacted the ICCTA, it completed the deregulatory trend, codifying in Section 10501(b) “the exclusivity of Federal remedies with respect to the regulation of rail

transportation.” House Conf. Rep. No. 104-22, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 164, 852.

In sum, although the Supreme Court’s decision in *Lohr* teaches that the scope of an express preemption provision should be read in light of a presumption that Congress does not cavalierly preempt state remedies, the history and sequence of legislation in the area of railroad “transportation” reveal that Congress’s actions were anything but cavalier. Rather, they were the result of a considered policy of deregulation.

Given the broad preemptive reach of Section 10501(b), the task for this Court is to determine (i) whether CTA’s condemnation proceeding concerns “transportation” by a “rail carrier,” and (ii) whether the condemnation is a form of “regulation.” CTA’s state law condemnation proceedings are preempted only if the answer to both questions is yes. *Cf. Cipollone*, 505 U.S. at 517 (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted”).

2. CTA’s Condemnation Action Concerns “Transportation” by a “Rail Carrier”

The Right of Way (and that which it comprises) falls squarely within the definition of “transportation” in 49 U.S.C. § 10102(9). The proposed Easement touches and concerns the 2.8 mile Right of Way, bridges, retaining walls, abutment walls, the “Oak Park station subway,” and “street facilities” under the Right of Way. Def. Resp. Pl. SOF ¶¶ 13, 15, 32. Moreover, the “joint facilities” shared by UP and CTA “extend under and provide physical support for the entire elevated Right of Way, including the portion leased to the CTA.” Def. Resp. Pl. SOF ¶ 33. These features can variously be described as “property,” “facilit[ies],” “instrumentalit[ies],” and “equipment” that “relate[] to the movement of passengers or property, or both, by rail.” See 49 U.S.C. § 10102(9).

Under the Act, a rail carrier “means a person providing common carrier railroad transportation for compensation * * *.” 49 U.S.C. § 10102(5). On the undisputed facts, UP falls within the definition of a “rail carrier.” See Def. Resp. Pl. SOF ¶ 1 (“Union Pacific is a rail common carrier engaged primarily in the business of interstate freight rail transportation”).

3. CTA’s Condemnation Action is a (Preempted) Form of Regulation

Because UP is a rail carrier engaged in transportation, the only remaining question is whether the CTA’s proposed condemnation is a “regulation.” That term is not defined in the statute, but its dictionary definition jibes with its common meaning: regulation is the “act or process of controlling by rule or restriction.” BLACK’S LAW DICTIONARY 1311 (8th ed. 2004); *City of Marshfield*, 160 F. Supp. 2d at 1013. Because the Court concludes that CTA’s condemnation proceeding is a form of regulation, the action is preempted. In reaching this conclusion, the Court notes that nearly every judicial or STB opinion to have considered the question has concluded that the use of eminent domain power is a preempted form of state regulation. CTA’s arguments and authorities to the contrary prove unconvincing.

As an initial matter, courts have employed a variety of tests for determining whether a particular non-federal action is a preempted regulation under the ICCTA.⁴ One particularly helpful gloss on the ICCTA preemption case law, however, is that certain types of state regulation are considered preempted *per se* and other regulations are analyzed “as applied.” See, *e.g.*, *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644-45 (2d Cir. 2005) (holding that a

⁴ For example, one court has stated that a state’s action must “pass” a two-part test to avoid preemption: (1) it must not be unreasonably burdensome and (2) it must not discriminate against railroads. *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007) (citing *Maumee & W. Ry. Corp.*, 2004 WL 395835, at *2 (S.T.B. 2004)). Another case, evaluating a state land use law that would have affected a railroad’s ability to construct a transloading facility, used a five-part test. See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643-44 (2d Cir. 2005) (reasoning that “states and towns may exercise traditional police powers over the development of railroad property” to the extent they complied with the five specified limitations, but finding the act facially preempted).

state's land use statute was preempted and concluding that a fact-based inquiry was unnecessary in order to resolve the case). As the STB has noted:

[C]ourts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.

Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; rail mergers, line acquisitions, and other forms of consolidation; and railroad rates and service. * * * For state or local actions that are not facially preempted, the Section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.

CSX Transp., Inc.—Pet. for Declaratory Order, 2005 WL 1024490, *2-3 (S.T.B. May 3, 2005) (citations omitted); see also *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539-40 (6th Cir. 2008) (describing *per se* and as applied preemption under the ICCTA); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331-33 (5th Cir. 2008) (same).

The Court concludes that CTA's proposed taking is the type of action that belongs in the *per se* camp. As with the categorical prohibitions that other courts have found, taking an easement that gives to CTA an exclusive, perpetual right to occupy UP's property "would directly conflict with the exclusive federal regulation of railroads." *CSX Transp.*, 2005 WL 1024490, at *3. Like the zoning and land use cases that conclude that certain state conduct is categorically preempted,⁵ CTA's proposed taking is "impermissibly attempting to subject to state law property that Congress specifically put out of reach." *City of Marshfield*, 160 F. Supp. 2d at

⁵ See also *City of Auburn*, 154 F.3d at 1029-31 ("[T]he pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific statute"); *City of Marshfield*, 160 F. Supp. 2d at 1013 (holding that "condemnation is regulation" and omitting references to the as-applied framework); *Norfolk S. Ry. Co. v. City of Austell*, 1997 WL 1113647, at *4-6 (N.D. Ga. Aug. 18, 1997) (facial preemption of zoning limitation that would have prevented the plaintiff from constructing and operating an intermodal facility).

1013-14; see also *Green Mountain*, 404 F.3d at 645 (“[T]he State’s effort to regulate rail transportation through [a pre-construction permitting process] is necessarily preempted”).

Indeed, at least three other courts have concluded that eminent domain proceedings against rail property were a preempted form of state regulation. Most similar to the facts of this case, the court in *City of Marshfield* held that the ICCTA preempted the use of an eminent domain statute to condemn 6,800 feet of the plaintiff’s passing track. 160 F. Supp. 2d at 1012-14. It did not matter to the court that the city merely wanted the railroad to relocate its track: “In using state law to condemn the track defendant is exercising control – the most extreme type of control – over rail transportation as it is defined in section 10102(9).” *Id.* at 1013. Moreover, the Court did not even mention the as applied, “unreasonable interference” framework,⁶ instead holding unambiguously that “condemnation is regulation.” *Id.* Similarly, in *Buffalo S. R.R. Inc. v. Village of Croton-on-Hudson*, the court unequivocally ruled that eminent domain proceedings against a rail yard “exceed[] what is permitted under the ICCTA.” 434 F. Supp. 2d 241, 244, 249 (S.D.N.Y. 2006). Although the court in that case purported to resort to the as applied framework and stated that making such a determination was a fact intensive inquiry (*id.* at 248-49) the court also concluded that there was “no question” that a taking of an entire rail yard that was used as a transloading facility was impermissible (*id.*). To be sure, some of the condemnation cases at least nominally refer to the as applied framework (or something like it), but there appears to be only a single case, *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 (D.D.C. Apr. 21, 2005), in which a federal court actually has held that condemnation was not preempted by the ICCTA. Because the Court agrees with the authorities

⁶ Although specific formulations vary, the essential question in an as applied framework is whether the state regulation unreasonably or unduly interferes with railroad operations. See, e.g., *Maumee & W. R.R. Corp and RMW Ventures, LLC—Pet. for Declaratory Order*, 2004 WL 395835, at *1.

cited by UP holding that condemnation is an extreme form of regulation, the Court respectfully declines to follow the interpretation set forth in *District of Columbia*.⁷

Moreover, the analysis does not change merely because CTA is seeking to bootstrap its condemnation proceedings onto its currently operative Lease with UP. The Court need not decide what the outcome would be were CTA seeking an easement that truly was coextensive with the Lease;⁸ CTA's easement is *not* coextensive with the Lease. It would eliminate UP's current right to re-take the property in the event that CTA defaults or ceases operations. If UP is unable to exclude CTA from the Right of Way, it will not matter that CTA technically "succeeds to its obligations" to, among other things, run only passenger trains and pay forty-percent of maintenance cost for the joint facilities (Def. Resp. Pl. SOF ¶ 35) along the Right of Way. If violating those provisions is costless (or low-cost), UP may find itself in the position of a pestering debt collector rather than a landlord with a potent self-help remedy. Had UP contracted with CTA for such a relationship there would be no preemption problem. See *Sacramento Reg'l Transit Dist.—Pet. for Declaratory Order*, 2000 WL 893421, at *1-2 (S.T.B. June 29, 2000) (no federal preemption of a voluntary sale). But by seeking to impose on UP the terms associated with the use of UP's Right of Way, CTA is acting in a quintessentially regulatory capacity: it is "controlling, by rule or restriction" (BLACK'S LAW DICTIONARY at

⁷ As far as the Court can determine, only *District of Columbia*, in which the district court held that the District of Columbia was not preempted from taking two parcels of land for a pedestrian and bike trail, supports CTA's argument. See 2005 WL 975745, at *3.

⁸ Consider whether such a case could arise given that the characteristics, rights, and remedies associated with a leasehold interest may vary from those associated with an easement. And if a state or local government were able to devise an easement that truly mirrored a lease, it is unclear whether there would be any need or desire to effect a taking in the first place.

1311) UP's ability to eject CTA and re-take its property. This, Section 10501(b) of the ICCTA tells us, CTA cannot do.⁹

The parties' pleadings do not address the distinction between categories of regulation that are preempted *per se* and those that are subject to more fact intensive inquiry. Instead, CTA argues that the question "is whether the condemnation action will unreasonably interfere with the railroad's operations" (*i.e.*, under the "as applied" framework). Def. Resp. Pl. Mot. Summ. J. at 1. For that proposition, CTA leans heavily on the STB's decision in *Maumee & W. R.R. Corp. & RMW Ventures, LLC—Pet. for Declaratory Order*, 2004 WL 395835 (S.T.B. Mar. 2, 2004). In *Maumee*, the STB declined to interfere with local condemnation proceedings aimed at allowing a city to acquire an easement to construct a public, at-grade crossing over the railroad's line. In reaching its decision, the STB concluded that "routine, non-conflicting uses, such as non-exclusive easements for at-grade rail crossings, 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.* at *2.

But even viewing CTA's proposed taking through the more fact intensive, as applied framework, the Court concludes that Plaintiff still is entitled to summary judgment on the undisputed facts of this case. The Court reaches this conclusion because the proposed easement (i) would affect actively used railroad property and (ii) is massive both with respect to the land area that it would take and the facilities that it would affect.

⁹ Although it does not enter into the Court's analysis of this case, the Court notes that since the parties' dispute began, Congress created a mechanism for resolving disputes between local commuter systems and rail carriers. See 49 U.S.C. §§ 28502, 28503. Under the provisions, when a "public transportation authority" cannot reach agreement with a rail carrier regarding use of the trackage of a rail carrier or the acquisition of an interest in a right of way, either party "may apply to the Board for nonbinding mediation." See *id.*

CTA's proposed taking would affect actively used railroad property. In the handful of takings cases that have dealt with actively used railroad property, courts have found preemption. See, e.g., *City of Marshfield*, 160 F. Supp. 2d at 1011 (passing track); *Village of Croton-on-Hudson*, 434 F. Supp. 2d at 244 (industrial rail yard containing track). For example, in *City of Lincoln—Pet. for Declaratory Order*, the STB held that taking a five-block long, twenty-foot wide swath of a railroad's right of way would unduly interfere with railroad transportation. See 2004 WL 1802302, *2-4 (S.T.B. Aug. 11, 2004). In reaching its determination, the STB characterized the city's "request to allow a taking of actively used railroad property" as "extraordinary." *Id.* at *4. See also *City of Lincoln*, 414 F.3d at 862 (upholding the STB's decision). Even in *District of Columbia*, the single case that works in Defendant's favor, there is little to indicate that the land that the District of Columbia sought for pedestrian use was actively used railroad property.¹⁰ See 2005 WL 975745, at *2-3. In contrast, the traffic on the property that CTA seeks is "among the most intense on Union Pacific's interstate railroad." Def. Resp. Pl. SOF ¶ 19. And far from being a "routine, non-conflicting use" (*Maumee*, 2004 WL 395835, at *2), CTA runs more than 60 commuter trains on the Right of Way and Plaintiff operates more than 30 freight trains on the right of way. Def. Resp. Pl. SOF ¶¶ 7-18. The distance between UP's tracks and the property that CTA uses is just five feet, and UP must use "non-standard procedures" for inspection and maintenance of the Right of Way. Def. Resp. Pl. SOF ¶¶ 22-23.

Moreover, the Right of Way is not just actively used; it is massive. The Right of Way is 2.8 miles long, which means that CTA operates about 29,000 feet of track on the Right of Way. The total land area in the Right of Way is about 1,407,812 square feet (or 32 acres). Def. Resp. Pl. SOF ¶ 14. And because CTA uses approximately 40 percent of the Right of Way (Def. Resp.

¹⁰ Based on the limited factual background provided in the court's opinion, it appears that, at most, the railroad might have been using the parcels in question to access signal boxes and perform other track maintenance. See *District of Columbia*, 2005 WL 975745, at *3.

Pl. SOF ¶ 21), the proposed easement comprises approximately 563,125 square feet (a little under 13 acres). Such a proposed taking simply dwarfs the amount of land at issue in *District of Columbia*, and exceeds the amount of land at issue in all of the other ICCTA takings cases of which the Court is aware. See *District of Columbia*, 2005 WL 975745, at *1 (easement over 194,855 square feet); *Village of Croton-on-Hudson*, 434 F. Supp. 2d at 244 (acquisition of approximately 10 acres); *City of Marshfield*, 160 F. Supp. 2d at 1011 (removal of 6,800 feet of passing track); *City of Lincoln*, 2004 WL 1802302, at *1 (acquisition of twenty-foot wide, five-block long strip of land). And allowing Defendant to take the proposed Easement would affect Plaintiff's rights not only to the square footage involved, but also with respect to its legal rights regarding maintenance of the joint facilities along the Right of Way – including twenty-two bridges and other support structures. See Wilson Dep. 25, Sept. 19, 2007.

Under the as applied framework, too, the fact that Defendant is seeking to convert its lease into an easement does not change the analysis. The unilateral change of Plaintiff's rights with respect to this massive stretch of railroad property, including its right to eject Defendant, itself would constitute unreasonable interference.

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for partial summary judgment [91] is granted and Defendant's motion for judgment on the pleadings [89] is denied.



Dated: February 23, 2009

Robert M. Dow, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2
Eastern Division

Union Pacific Railroad Company

Plaintiff,

v.

Case No.: 1:07-cv-00229

Honorable Robert M. Dow Jr.

Chicago Transit Authority

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, February 23, 2009:

MINUTE entry before the Honorable Robert M. Dow, Jr: Pursuant to Memorandum Opinion and Order dated 2/23/09, Plaintiffs motion for partial summary judgment [91] is granted and Defendants motion for judgment on the pleadings [89] is denied. Status hearing set for 3/4/2009 at 09:00 AM. Mailed notice(tbk,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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

UNION PACIFIC RAILROAD COMPANY,)	
a Delaware corporation,)	
)	
Plaintiff,)	Case No. 07 CV 229
)	
v.)	Judge Dow
)	
CHICAGO TRANSIT AUTHORITY,)	Magistrate Judge Keys
a municipal corporation,)	
)	
Defendant.)	

FINAL JUDGMENT AND PERMANENT INJUNCTION ORDER

On May 2, 2008, plaintiff, Union Pacific Railroad Company, filed its Motion for Partial Summary Judgment [91] (“Motion”) against defendant, the Chicago Transit Authority. Having considered the papers filed in support of [92, 93, 108, 112, 115] and in opposition to [103, 104, 105, 106] the Motion, and having now GRANTED the Motion [117, 118], the Court enters this Final Judgment and Permanent Injunction Order. It is hereby ORDERED, ADJUDGED and DECREED that:

(a) this Court hereby incorporates the findings set forth in its Memorandum Opinion and Order, dated February 23, 2009;

(b) the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et seq.*, preempts any condemnation authority the Chicago Transit Authority has pursuant to the Metropolitan Transit Authority Act, 70 ILCS 3605/1, *et seq.*, and the Illinois Code of Civil Procedure, 735 ILCS 30/10-5/10, to the extent the Chicago Transit Authority seeks to employ such authority to condemn the Right of Way;

(c) the Chicago Transit Authority is enjoined from taking action under authority of state law to condemn that portion of the Right of Way currently leased from Union Pacific

Railroad Company, whether through proceedings initiated by the Chicago Transit Authority before the Illinois Commerce Commission or otherwise;

(d) The relief granted herein is without prejudice to other rights or remedies, if any, the Chicago Transit Authority may have to proceed or initiate proceedings before the Surface Transportation Board pursuant to the Interstate Commerce Commission Termination Act;


(e) this Court shall retain jurisdiction to enforce this Order; and

(f) Count II of the Complaint is dismissed as moot.

SO ORDERED:

DATED:

April 1, 2009



Judge Robert M. Dow, Jr.
United States District Judge