No. 20-

IN THE

Supreme Court of the United States

BURGOYNE, LLC,

Petitioner,

v.

CHICAGO TERMINAL RAILROAD COMPANY, AN ILLINOIS CORPORATION, AND IOWA PACIFIC HOLDINGS, LLC, AN ILLINOIS LIMITED LIABILITY COMPANY,

Respondents,

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

GEORGE S. BELLAS
Counsel of Record
JILLIAN TATTERSALL
MISTY J. CYGAN
BELLAS & WACHOWSKI
15 North Northwest Highway
Park Ridge, Illinois 60068
(847) 823-9030
george@bellas-wachowski.com

Counsel for Petitioner

302649

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner owns a parcel of land in Chicago, Illinois. Chicago Terminal Railroad formerly had the right to operate a portion of rail line subject to a conditional easement over a portion of Petitioner's property. The easement terminated according to its terms. Nevertheless, Chicago Terminal Railroad entered into an agreement with the City of Chicago to receive compensation for the terminated easement pursuant to The National Trails System Act. There is an irreconcilable split between state courts regarding whether the Surface Transportation Board can convert an expired easement by compensating the railroad, which holds no valid title, for access to create a recreational trail, a purpose not permitted by the easement's terms.

The questions presented are:

1. Whether the National Trails System Act, 16 U.S.C. § 1241 *et seq.*, precludes state courts from resolving, for purposes of state property law, competing claims to property rights.

2. Whether Congress intended to create a massive takings scheme when it enacted the National Trails System Act.

CORPORATE DISCLOSURE STATEMENT

Petitioner Burgoyne, LLC, is an Illinois limited liability company with no parent company. No publicly held corporation owns 10% or more of Burgoyne, LLC.

Chicago Terminal Railroad Company is an Illinois corporation. Chicago Terminal Railroad's parent company is Iowa Pacific Holdings, LLC, a limited liability holdings company headquartered in Janesville, Wisconsin doing business as Permian Basin Railways.

Intervenor City of Chicago is an Illinois municipal corporation organized under Article VII of the Constitution of the State of Illinois.

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to this proceeding are:

- Petitioner Burgoyne, LLC, is an Illinois limited liability company with no parent company. No publicly held corporation owns 10% or more of Burgoyne, LLC.
- Chicago Terminal Railroad Company is an Illinois corporation. Chicago Terminal Railroad's parent company is Iowa Pacific Holdings, LLC, a limited liability holdings company headquartered in Janesville, Wisconsin doing business as Permian Basin Railways.
- Intervenor City of Chicago is an Illinois municipal corporation organized under Article VII of the Constitution of the State of Illinois.

Related cases to this proceeding are:

- *Alloy Property Company, LLC – Adverse Abandonment – Chicago Terminal Railroad in Chicago, IL,* Surface Transportation Board, Docket No. AB 1258, Decision and Certificate of Interim Trail Use or Abandonment Issued April 30, 2018.
- *Burgoyne, LLC v. Chicago Terminal Railroad Company, Iowa Pacific Holdings, and the City of Chicago,* Circuit Court of Cook County, Illinois, County Department, Law Division, No. 17-CH-6199, Dismissal Order issued December 18, 2018.
- *Burgoyne, LLC v. Chicago Terminal Railroad Company, Iowa Pacific Holdings, and the City of Chicago,* 2020 IL App (1st) 190098, Appellate Court of Illinois, First District. Judgment of the Illinois Circuit Court affirmed June 25, 2020.

- *Burgoyne, LLC v. Chicago Terminal Railroad Company, Iowa Pacific Holdings, and the City of Chicago*, No. 126224, Supreme Court of Illinois, Leave to Appeal denied on September 30, 2020.

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

OPINIONS BELOW

The opinion of the Illinois Appellate Court is located at *Burgoyne, LLC v. Chi. Terminal R.R. Co.*, 2020 IL App (1st) 190098 (Ill. App. 2020) and is reproduced in Appendix B.

The Illinois Supreme Court denied certiorari, thereby adopting the decision of the Illinois appellate court as the rule in Illinois at Appendix A.

The Decision and Notice of Interim Trail Use or Abandonment of the Surface Transportation Board is available at STB Docket No. AB 1259 (April 30, 2018) and is reproduced at Appendix E.

JURISDICTION

The Illinois Court of Appeals issued its decision on June 25, 2020. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on September 30, 2020. This Court issued an Order extending the deadline to file this petition to 150 days from the date of the Illinois Supreme Court's denial of leave to appeal. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are as follows and are reproduced at Appendix D:

The 5th Amendment to the United States Constitution

16 U.S.C. § 1247(d)

49 U.S.C. § 10501(b)

INTRODUCTION

This Petition presents a clear split in authority between state courts on a critically important question of state-based property rights and competing federal interests in preserving rail lines: whether private property owners retain any state-based or contract-based rights to their land if it contains a conditional railroad easement or whether the Surface Transportation Board holds the authority to negate contractual lease terms pertaining to the termination of railroad easements and revive railroad easements that have terminated according to their terms. This petition presents the unresolved questions cleanly and in a context where the competing interests of private property owners to privately contract can be balanced against the Surface Transportation Board's authority to preserve and regulate rail travel. There are no outstanding issues of fact. This Court's intervention is necessary to resolve the conflict between state courts and provide a clear means of establishing one truly uniform national rails-to-trails railbanking program.

State courts hold the authority to determine state law-based property rights. Simultaneously, the Surface Transportation Board ("STB") maintains that it retains exclusive jurisdiction over the abandonment of railroad lines pursuant to the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (certified at 49 U.S.C. § 10101 *et seq.*) and National Trails System Act ("NTSA" or "Trails Act"), 16 U.S.C. § 1241 *et seq.* This contradiction in authority has led to an irreconcilable split between the courts of different states regarding whether the STB has the authority to negate any and all state property contracts that provide for termination and conditional use with regards to easements or other access agreements granted to railroads in the interest of preserving any and all rail lines.

This Court should resolve this conflict now before additional states continue to splinter on the authority of the STB versus the obligation of rail companies to honor the terms of their leases and contracts leaving the 140,000 miles of rail lines throughout the United States operating under differing preservation rules.

STATEMENT OF THE CASE

This case involves a direct conflict between state and federal laws governing the ownership of real property and the rights of railroads to profit from property rights that they do not possess under state law. Because the STB maintains that they are the only entity that may authorize abandonment of a rail line, easements that terminate according to lease or contract terms may be revived by the STB and even converted to another use not permitted by the terms of any existing agreement.

Petitioner Burgoyne, LLC ("Burgoyne" or "Petitioner"), owns a parcel of property in Chicago in fee simple. Chicago Terminal Railroad Company, an Illinois corporation ("CTR"), is a railroad common carrier and Iowa Pacific Holdings, LLC ("IPH"), is its parent holding company. CTR formerly operated a rail line. A portion of that rail line was subject to a conditional easement over Burgoyne's property.

A Corrective Deed, approved by the United States District Court presiding over the national railroad's bankruptcy and reorganization proceedings in the 1970s and supervised by the Interstate Commerce Commission, created the conditional easement. (S.R. C19-48). The U.S. District Court presiding over the railroad bankruptcy proceedings approved the Corrective Deed, which stipulated that the railroad's easement would automatically terminate if the rail line was not used in the active operation of the railroad for a period of twelve (12) consecutive months. (*Id.*).

It is undisputed that: (1) Defendants failed to use the line for a period of over 12 months, (2) that Burgoyne notified Defendants that the conditional easement had terminated by its own terms, and (3) that the conditional easement had expired by operation of its express terms. Burgoyne filed an action in state court to enforce its title to the Property by seeking to enforce the expiration of the easement.

Alloy Property Company, LLC, ("Alloy") purchased vacant, formerly industrial property in the North Branch area of Chicago that it has been attempting to redevelop. Alloy filed an Application for Reverse Abandonment before the STB for a determination that the public convenience and necessity required the adverse abandonment of the authority of CTR to operate over portions of CTR's lines in Chicago. This portion included Petitioner's property which was subject to the former easement held by CTR despite the fact that Burgoyne was not a party to this STB action.

After CTR and IPH answered the complaint and filed affirmative defenses and counterclaims, the Defendants filed a motion to dismiss the complaint asserting that Plaintiff's claims were preempted because the STB had exclusive jurisdiction over this matter. The court stayed the action in light of an adverse possession proceeding before the STB in which Burgoyne was not a party.

Presented with an opportunity to profit from its expired easement, CTR agreed to convert the CTR rail line into a recreational trail pursuant to the Trails Act at the City's request. The STB ruled that the CTR rail corridor was "railbanked" under the National Trail System Act (the "Act"). The STB approved and issued the City a Certificate of Interim Trail Use ("CITU") under the Trails Act so that the CTR rail corridor could be used for public purposes. The CITU is the mechanism that ostensibly allows the City and CTR to

negotiate a trail use agreement for the railroad line in order for the City to develop that area. The STB issued the CITU without regard for CTR's lack of interest, easement, or title holding that they had exclusive jurisdiction over rail lines and need not give credence to state-based property rights or contractual agreements.

Burgoyne filed an action in state court to enforce its rights. CTR and the City filed motions to dismiss asserting that the Act preempted Burgoyne's claims. Defendants alleged that because the STB had issued the CITU, the Act was still in effect and Burgoyne's only remedy is to bring a claim under the Tucker Act before the U.S. Court of Claims. Burgoyne argued that Defendants had no right to enter into a trail use agreement with the City because Defendants had no property rights following termination of the easement by its express terms. The circuit court found that the CITU issued order precluded the Plaintiff from proceeding on its claim that the easement was terminated under State contract law. When the Illinois Supreme Court denied leave to appeal, the decision of the Illinois Appellate Court became the official position of the Illinois courts.

Courts are divided as to whether state courts may apply state law to preserve bargained for possessory property rights or the Surface Transportation Board has been given the power to negate fee simple possession.

In Petitioner's case, the Illinois Supreme Court refused to acknowledge the property rights of Illinois landowners, holding all such rights that involve railroads are necessarily subservient to the determinations of the Surface Transportation Board – even where, as in the case at bar, the ICC oversaw the creation of the governing deed and its terms that the STB subsequently refused to enforce. The Illinois courts allowed the STB to disregard Illinois property law in order to fundamentally alter and expand the rights of

an expired easement holder. They not only permitted the sale of a terminated easement but also created an easement for a use wholly distinct from, and not contemplated in, the original deed.

The Alabama Supreme Court reached an opposite and irreconcilable holding in *Monroe County Comm'n v. A.A. Nettles, Sr. Properties Ltd.*, 288 So. 3d 452 (Ala. 2019). The *Nettles* court held that Congress never intended to grant the STB absolute power to negate all contractual property agreements involving railroads. Instead, Congress intended to create a scheme within which, through proper procedures and without violating established state court authority to adjudicate state property disputes or contractual rights, the STB has jurisdiction over railroad lines. That is partly why it is so critical to review cases like this one, which test the Surface Transportation Board's uncertain boundaries, affording it seemingly limitless power to negate contractual rights.

In the present case, oversight of the drafting of the deed by the ICC was not enough to validate its terms. If approval of the controlling deed by the STB is not sufficient to validate its terms, property owners need to know if they retain any rights to their own land whatsoever once they allow the railroad access. Moreover, property owners across the country need to know if the termination provisions in their deeds and leases remain valid.

This Court should resolve this conflict now before state courts continue to split and fracture over the issue. The STB has made clear that they will continue to adjudicate, without regards to state laws, disputes involving abandonment of rail lines even where the railroad's easement or other right of access has otherwise terminated under state law. Property owners require clarity regarding the validity of their existing contracts. Moreover,

property owners negotiating for new railroad easements and other rights of way need clarity with regards to the reach of railroad agreements. Property owners have the right to know whether the basic terms of their agreements will be honored or whether the STB may alter the contractual terms by changing the type of access granted by a negotiated instrument. In addition, there remains an unresolved question as to whether, in authorizing the Trails Act, the United States Congress ever intended for a scheme as massive and costly as the current rails-to-trails program to develop – and certainly there remains the question of whether Congress ever intended for a rails-to-trails program to fundamentally alter the very nature of contract and land rights, particularly those of an individual property owner with no railroad or government affiliation.

REASONS FOR GRANTING THE WRIT

This case represents a direct conflict between the courts of two states that landed on opposite sides of a property rights issue. The Alabama courts now recognize state property rights and allow state courts to independently determine what rights exist under state law. Illinois courts, on the other hand, have allowed the Surface Transportation Board to determine all property rights related to rail lines, destroying contractual fee simple possession and perpetuating terminated rights in contradiction of the plain contractual bargained-for terms creating a windfall for CTR.

I. The Decision Of The Illinois Courts Directly Conflicts With The Decision Of the Alabama Courts.

The Petition presents a direct split in legal authority between the Alabama state courts and the Illinois state courts. Both Illinois and Alabama courts considered whether the Surface Transportation Board is the ultimate arbiter of rail rights to the negation of all

private property rights, regardless of contractual agreements or a non-rail owner's possession in fee simple.

A. The reasoning and conclusions of the Illinois courts and Alabama courts are irreconcilable.

The decisions of the Illinois courts and the Alabama courts are opposed on every material point. In holding that Petitioner's claims were pre-empted, the Illinois appellate court declined to follow the decision of the Alabama Supreme Court even though the issue addressed in *Monroe County Commission v. A.A. Nettles, Sr. Properties Limited and Eula Lambert Boyles*, 288 So.3d 452 (Ala. 2019), mirrors the issue decided by the Illinois appellate court for all practical purposes. The Alabama Supreme Court summarized the issue before it as follows:

> In this case, we are not faced with an Alabama regulation attempting to regulate rail transportation and to limit the use of rail property to deter interstate commerce. Rather, we are dealing with state property laws that existed before the advent of railroads, and we are asked to consider the impact of a railroad right-of-way, reserved in a quitclaim deed, on the rights of an adjoining property owner when the purpose of the right-of-way has lapsed by nonuse and the holder of the right-of-way attempts to transfer its interest to create a new use, not envisioned by the reservation of rights in the initial instrument conveying the right-of-way.

Id. at 457.[1]

The *Nettles* Court then began its analysis by acknowledging that while the STB has "undisputed" and "exclusive" jurisdiction over abandonment and interim trail use proceedings, "even in a regime of federal preemption, determining the ownership of real

[1] Rather than address the fact that *Nettles* relied on a breadth of precedent from a breadth of state and federal case law, the appellate court both declined to distinguish *Nettles* and declined to follow it. Decision at 20-21. Instead, the appellate court again reverted to its cherry-picked language from inapplicable non-analogous cases that, contrary to the appellate court's assertion, are not inconsistent with *Nettles*. The appellate court simply declined to follow the only authority directly on point in furtherance of its inexplicable quest to cede its own authority.

property requires a review of state law." *Nettles* 288 So.3d at 458. Under the Alabama Supreme Court's analysis, trail use was "not envisioned by the reservation of rights in the initial instrument conveying right of way" which provided for a right of way only for a rail line. *Id.* at 457. Because the railroad did not own a blanket right of way across the land, it could not quitclaim its interest to another entity, regardless of the rails to Trails Act. As a result, the Alabama Supreme Court held that Monroe County could not have obtained a valid fee title to the easement from the railroad pursuant to state property laws. As Alabama Chief Justice Parker explained in his dissent, the railroad had "negotiated for the right to use the easement for railroad operations. The railroad did not negotiate for a public recreational trail." *Id.* at 463.

Rather than address the fact that *Nettles* relied on a breadth of precedent from a breadth of state and federal case law, the Illinois appellate court both declined to distinguish *Nettles* and declined to follow it. App. B at 20-21. Instead, the Illinois court found the deed and its terms to be of no import because only the STB could authorize abandonment of a rail line. Pursuant to the Illinois appellate court's ruling and the STB's holding, the termination of the easement and the limited purpose of the easement set forth in the controlling deed were of no import.

B. The Decisions of the Illinois courts and Alabama courts are both supported by precedent, suggesting a pre-existing split.

At the center of both the Illinois and Alabama decisions is a question over state law property rights in a former rail path running through a private owner's property. In both Alabama and Illinois, the railroad held a limited easement that allowed for rail line access. In Petitioner's case, this limited easement terminated according to its terms when the railroad ceased operations for more than a year. In the Alabama case, the railroad sold

whatever remaining easement rights it had to a third party after over a decade of nonuse. The purchasing third party then claimed it held a fee title to the right-of-way from its purchase of the limited easement.

State courts traditionally have the authority to resolve state law. The Illinois courts refused to consider or resolve any of the state law issues in Petitioner's case while the Alabama courts had no such reservations. In *Nettles,* the Alabama Supreme Court concluded that "even in a regime of federal preemption, determining the ownership of real property requires a review of state law." *Nettles* 288 So.3d at 458. This Court recognizes "that '[p]roperty interests … are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabu-lous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (alterations in *Ruckelshaus*)). *Cf. Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 104-05 (2014) ("The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law.").

In *Preseault v. ICC* (*Preseault I*), 494 U.S. 1, 8, 15-16 (1990), this Court examined the role of state law in rails-to-trails conversion schemes. Justice O'Connor, joined by Justices Scalia and Kennedy, emphasized in her concurrence that "state law determines what property interest petitioners possess." *Id.* at 20 (O'Connor, J., concurring). Moreover, Justice O'Connor went so far as to suggest that allowing the decisions of the STB to pre-empt the rights guaranteed by state property law would render "a result incompatible with the Fifth Amendment." *Id.* at 22.

While the STB itself has frequently claimed absolute jurisdiction over abandonment, it has also recognized the significant role state law plays in assessing property rights in the context of rail regulation. *See Allegheny Valley R.R. Co.*, S.T.B. Dkt. No. FD 35388, at 3 (Apr. 25, 2011) (determining 49 U.S.C. § 10501(b) did not preempt plaintiff's claims because "the size and extent of a railroad easement is a matter of state property law and best addressed by state courts"); *see also Ingredion Inc.*, S.T.B. Dkt. No. FD 36014, at 3 (Sept. 30, 2016) (declining to exercise jurisdiction over "a claim that an easement agreement was violated" because it "primarily involves the application of state property law" and "the state court is able to address any preemption arguments").

The Supreme Court of Alabama recognized that the STB's jurisdiction over "abandonment" of railroad lines is "exclusive," 49 U.S.C. §§ 10501(b)(2), 10903(a), and it noted that § 8(d) of the Trails Act provided interim trail use of a railroad line would "not be treated … as an abandonment," 16 U.S.C. § 1247(d). The Supreme Court of Alabama's decision turned on a traditional analysis of state law and relied on the state court's power to determine state property rights. The Commission traced its ownership of the right-of-way to its purchase, by quitclaim deed, of land from the railroad. Under the law of Alabama (as almost all states), the railroad could only transfer by quitclaim deed the property rights it actually possessed at the time of execution. *Nettles* 288 So.3d at 457-458. Thus, the Alabama Supreme Court held that when the "purpose" for a limited purpose easement "ceases to exist" or "is rendered impossible of accomplishment," the easement "terminates." *Nettles,* 288 So.3d at 459 (citing *Tatum v. Green*, 535 So.2d 87, 88 (Ala. 1988)). The Court held that as a matter of Alabama property law, the railroad's easement

had been extinguished by operation of law long before any trail conversion or rail abandonment proceedings were even contemplated.

In deciding which state-law rights passed from the railroad to the Commission, the *Nettles* Court examined the limited language of the railroad's deed and determined the original limited easement held by the railroad did not include the right to recreational trail use. *Nettles,* 288 So.3d at 459. According to the Alabama Supreme Court, limited easement rights could not be expanded unilaterally by an easement holder. *Nettles,* 288 So.3d at 459. Alabama property law, as interpreted by the Alabama Supreme Court, did not allow the grant of a right-of-way for recreational trail purposes where such an interest could not be conveyed via quitclaim deed. This conclusion comports with basic principles of property law and common sense, as well as with the laws of other states. *See*, e.g., *Toews v. United States*, 376 F.3d 1371, 1375-77 (Fed. Cir. 2004) (California law); *Preseault v. United States (Preseault III),* 100 F.3d 1525, 1534 (Fed. Cir. 1996) (en banc) (discussing the importance of Vermont state law in ascertaining the parties' property interests); *Lawson v. State*, 730 P.2d 1308, 1311-12 (Wash. 1986). *Cf. Lawson*, 730 P.2d at 1316 ("We note that, insofar as the present record reveals, the County has only acquired, through a quitclaim deed, whatever interest Burlington Northern held. There is a strong argument to be made that Burlington Northern had no interest to convey to the County: upon abandonment of the right-of-way the land automatically reverted to the reversionary interest holders."); *Toews*, 376 F.3d at 1376 (concluding rail use easement did not include recreational hiking or biking because it is "beyond cavil that use of these easements for a recreational trail is not the same use made by a railroad").

The Alabama Supreme Court fully adopted the position that the STB's authority under the Trails Act does not empower it to redefine state property rights. *See also, e.g.*, *Dana R. Hodges Trust v. United States*, 111 Fed. Cl. 452, 456-57 (2013) (holding the "Trails Act has not 'destroyed' or 'eliminated' [adjacent landowners'] pre-existing [property] crossing rights," and rejecting the "argument that the Trails Act precludes all state law property law claims"). The Illinois Court of Appeals reached the completely opposite result when it determined that terminating a railroad easement required abandonment of the rail line and only the STB may authorize abandonment. Without the intervention of this Court, state courts will continue to divide on this issue.

II. This Court Should Address The Underlying Question Whether Congress Actually Authorized The Surface Transportation Board To Oversee A Broad, Costly Program Of Trails Act Takings.

The plain language of the Trails Act does not contemplate takings like this one. Congress did not envision the extensive taking of property for the rails-to-trails program. Congress failed to address how takings should proceed or be assessed in the context of rails-to-trails conversions. *See Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004) (the Trails Act "does not specify in detail what procedures are to be followed" when the STB's actions constitute a federal taking). The NTSA provides no authority or procedure for the Board to condemn private land burdened by a railroad easement. Similarly, the NTSA does not provide any timeframe for seeking just compensation. The Trails Act's plain language and history strongly suggest that the Board lacks condemnation authority. *See Nat'l Wildlife Fed'n, v. ICC,* 850 F.2d 694, 699-702 (D.C. Dir. 1988). This Court has previously observed that even the STB acknowledges that limit to its own power. *See Preseault I*, 494 U.S. at 15 n.8.

The "conspicuous absence" in NTSA § 8(d) "of any explicit condemnation power," *Nat'l Wildlife Fed'n,* 850 F.2d. at 700, is especially striking when compared to neighboring sections of the Trails Act that grant takings power to other entities for similar trail projects. In the context of these adjacent provisions, Congress expressly empowers the Secretary of the Interior to "utilize condemnation proceedings" for trail acquisition. 16 U.S.C. § 1246(g). Congress also expressly limits the use of takings powers, authorizing condemnation only where; "all reasonable efforts to acquire such lands or interests therein by negotiation have failed"; moreover, the amount of land the Secretary may condemn is limited by a statutorily prescribed ratio. *Id.* In addition, Congress explicitly provides a funding mechanism for the federal acquisition of private land for trails. *See generally* 16 U.S.C. § 1249; *see also, e.g.*, *id.* § 1249(a)(1) (authorizing $5 million in appropriations for the Appalachian National Scenic Trail and $500,000 for the Pacific Crest National Scenic Trail). There is no funding mechanism for takings involving former rail lines, indicating that Congress never contemplated creating such a massive takings program in the first place.

Though the STB, in conjunction with the Court of Federal Claims, has developed a massive inverse condemnation regime, there is no indication that Congress actually contemplated or authorized it. While the *Preseault* Court held that the availability of just compensation under the Tucker Act prevented the Trails Act from violating the Fifth Amendment, the availability of damages under the Tucker Act does not evidence the intent of Congress. There is no evidence that Congress ever intended the National Trails System Act to become an extensive expensive takings program.

Rather, it should require clear and unambiguous congressional authorization. *Cf. Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2180 (2019) (Thomas, J., concurring) ("This 'sue me' approach to the Takings Clause is untenable."). This Court should consider whether the current takings program, encroaching on the property rights of landowners throughout the country, costing tax-payers hundreds of millions of dollars should simply be assumed as intended by Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted for plenary review. In the alternative, the Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

GEORGE S. BELLAS
Counsel of Record
JILLIAN TATTERSALL
MISTY J. CYGAN
BELLAS & WACHOWSKI
15 North Northwest Highway
Park Ridge, Illinois 60068
(847) 823-9030
george@bellas-wachowski.com

Counsel for Petitioner

APPENDIX A

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

George Steven Bellas
Bellas & Wachowski
15 N. Northwest Highway
Park Ridge IL 60068

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

September 30, 2020

In re: Burgoyne, LLC, etc., petitioner, v. Chicago Terminal Railroad Company, etc., et al., respondents. Leave to appeal, Appellate Court, First District.
126224

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 11/04/2020.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

APPENDIX B

Lawyers

2020 IL App (1st) 190098
No. 1-19-0098
Opinion filed June 25, 2020

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BURGOYNE, LLC, an Illinois Limited Liability Company, Plaintiff-Appellant, v. CHICAGO TERMINAL RAILROAD COMPANY, an Illinois Corporation, and IOWA PACIFIC HOLDINGS, LLC, an Illinois Limited Liability Company, Defendants-Appellees (The City of Chicago, a Municipal Corporation, Intervenor-Appellee).	)	Appeal from the Circuit Court of Cook County No. 17 CH 6199 Honorable Pamela McLean Meyerson, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Reyes concurred in the judgment and opinion.

OPINION

¶ 1 This appeal arises from a dispute between a rail carrier and the owner of land over which the rail carrier held an easement to operate its rail line. Contending that the easement terminated due to nonuse, the landowner, Burgoyne, LLC (Burgoyne), sued the rail carrier, Chicago Terminal

Railroad Company, and its parent company, Iowa Pacific Holdings, LLC (which we will collectively call CTR), to enforce its reversionary interest in the property. While the case was pending, CTR received permission from the federal agency that oversees rail transportation to transfer its right-of-way to the City of Chicago (City) for use as a recreational trail. The City then intervened and both it and CTR filed motions to dismiss Burgoyne's suit as preempted under federal law. The circuit court granted the motions, and Burgoyne now appeals. For the reasons that follow, we affirm.[1]

¶ 2 I. BACKGROUND

¶ 3 A. Statutory Background

¶ 4 This case concerns the preemptive effect of two federal statutes: the ICC Termination Act of 1995 (ICCTA) (codified at 49 U.S.C. § 10101 *et seq.*) and the National Trails System Act (Trails Act) (codified at 16 U.S.C. § 1241 *et seq.*). The ICCTA vests the United States Surface Transportation Board (STB or Board) with exclusive jurisdiction over "transportation by rail carriers" and the "abandonment" of rail lines. 49 U.S.C. § 10501(b) (2018). "[T]he remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.*

¶ 5 Under the ICCTA, a rail carrier may abandon a rail line "only if the Board finds that the present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. § 10903(d) (2018). An application for authorization to abandon a line may be filed by either the rail carrier or an interested third party, such as an adjacent landowner with a claim to a reversionary

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

interest in the railroad's right-of-way. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145 (1946); *City of South Bend v. Surface Transportation Board*, 566 F.3d 1166, 1168 (D.C. Cir. 2009); see *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (explaining that "many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests" that "revert[ ] to the abutting landowner upon abandonment of rail operations"). An application filed by a third party is called an application for adverse abandonment. *Howard v. Surface Transportation Board*, 389 F.3d 259, 261 (1st Cir. 2004). If the Board determines that the public convenience and necessity support abandonment, it may either "approve the application as filed" or "approve the application with modifications and require compliance with conditions that [it] finds are required by public convenience and necessity." 49 U.S.C. § 10903(e)(1). The Board maintains jurisdiction over a rail line, and the line remains part of the national rail network, until the Board issues an unconditioned certificate of abandonment (*Hayfield Northern R.R. Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 633 (1984)) and the rail carrier notifies the Board that it has consummated the abandonment (49 C.F.R. § 1152.29(e)(2) (2019)).

¶ 6 The second federal statute at issue, the Trails Act, was enacted to create a national system of recreational trails. See 16 U.S.C. § 1241 (2018). Congress amended the Trails Act in 1983 (see Pub. L. 98-11, § 208, 97 Stat. 42, 48) to allow for unused railroad rights-of-way to be converted to recreational trails on an interim basis as an alternative to abandonment. See 16 U.S.C. § 1247(d) (2018). The purpose of the amendment was to promote the development of recreational trails while preserving established rail corridors for possible future reactivation of rail service. *Preseault*, 494 U.S. at 17-18. To that end, when an abandonment application is filed, a state, local government, or private organization acting as a "trail sponsor" may submit a request to use the right-of-way for

interim trail use. 49 C.F.R. § 1152.29(a). The trail sponsor must be willing to assume responsibility for the right-of-way and acknowledge that its interim trail use will be subject to possible future reactivation of the right-of-way for rail service. 49 C.F.R. § 1152.29(a)(2), (3). If the rail carrier is willing to negotiate a trail use agreement, and the conditions for abandonment are otherwise satisfied, the STB will issue a certificate of interim trail use or abandonment (CITU), allowing the parties to negotiate an interim trail use agreement. 49 C.F.R. § 1152.29(b)(1)(ii). If the parties are unable to reach an agreement on interim trail use, the rail carrier will then be authorized to abandon the line. See *Preseault*, 494 U.S. at 7 & n.5.

¶ 7 If the rail carrier and trail sponsor do come to an agreement, the rail carrier may transfer the right-of-way to the trail sponsor for interim trail use, "subject to restoration or reconstruction for railroad purposes." 16 U.S.C. § 1247(d); see *Preseault*, 494 U.S. at 7. As noted above, railroads often hold their rights-of-way under easements that are limited to use for railroad purposes. *Preseault*, 494 U.S. at 8. The terms of these easements (and state property law) frequently "provide that the property reverts to the abutting landowner upon abandonment of rail operations." *Id.* If rails-to-trails conversions were to trigger such reversionary interests, however, it would largely impede the Trails Act's dual goals of creating recreational trails and preserving established rail corridors for future reactivation of rail service. To address these problems, the Trails Act (as amended) provides that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). In other words, when a right-of-way held under a limited-use easement is transferred for interim trail use, the Trails Act "prevent[s] property interests [in the right-of-way] from reverting under state law." *Preseault*, 494 U.S. at 8. In such cases, the Trails Act effects a taking

of the abutting landowner's reversionary interest, for which it may seek just compensation in the United States Court of Federal Claims. *Id.* at 11-12.

¶ 8 B. Factual and Procedural History

¶ 9 Burgoyne owns a parcel of land near the site of the planned Lincoln Yards development in Chicago. The property is bounded by North Avenue to the south, Kingsbury Street to the northeast, and the North Branch of the Chicago River to the west. A single, mainline railroad track extends across a portion of the property. The track is part of a larger rail line spanning approximately 2.875 miles, which originates northwest of the property, at Union Pacific's North Avenue Yard, and proceeds east and south to a terminus at the southern end of Goose Island, south of the property.

¶ 10 Burgoyne purchased the property in 2000 from CMC Real Estate Corporation (CMC). In 1987, CMC granted an easement across the property for railroad purposes to Soo Line Railroad Company (Soo Line). The corrective deed conveying the easement provided that the easement would terminate automatically if it was not used in the active operation of a railroad for 12 consecutive months. The deed further provided that, upon termination of the easement, Soo Line would remove the tracks and other railroad equipment from the property and execute documentation to evidence the easement's termination. The deed was issued under the supervision of the federal bankruptcy court overseeing the railroad reorganization proceedings for CMC's predecessor-in-interest, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. In 2006, CTR acquired Soo Line's interest in the rail line at issue, including the easement across Burgoyne's property.

¶ 11 In August 2016, Burgoyne notified CTR that the easement had terminated because it had not been used in active railroad operations for 12 consecutive months. Burgoyne instructed CTR

to remove the tracks and other railroad equipment from the property and reserved its right to request that CTR execute documentation evidencing the termination. CTR disputed that the easement had terminated and refused to remove its tracks and other equipment from the property. Burgoyne responded by erecting a fence around the property and across the tracks.

¶ 12 On two occasions in April 2017, CTR entered Burgoyne's property and cut down the fence. Each time, Burgoyne reinstalled the fence. After the second such incident, Burgoyne commenced the present action in the circuit court, alleging that the easement across its property had terminated under the terms of the corrective deed. Burgoyne's complaint sought to enjoin CTR from further damaging or removing its fencing. It also sought an order directing CTR to remove the railroad tracks from the property and seek and obtain any authorization required to effectuate the easement's termination. In addition, Burgoyne requested monetary damages for CTR's alleged breach of the corrective deed and for CTR's destruction of its fencing.

¶ 13 CTR moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)), asserting that Burgoyne's claims were preempted by the ICCTA. CTR argued that, because the STB has exclusive jurisdiction over the abandonment of rail lines, the circuit court lacked jurisdiction to grant Burgoyne's requested relief, which would effectively cause an unauthorized abandonment of CTR's rail line. In response, Burgoyne acknowledged that the STB had exclusive jurisdiction over the abandonment of rail lines, but it insisted that its claims did not implicate any issue of abandonment. Rather, Burgoyne argued, its claims rested on state property and contract law, the enforcement of which did not constitute regulation within the STB's exclusive jurisdiction.

¶ 14 In June 2017, while the motion to dismiss was pending, Alloy Property Company (Alloy), which owns land to the north of Burgoyne's property that is also traversed by CTR's rail line, filed a petition with the STB indicating its intent to file an application for adverse abandonment of the rail line and requesting a waiver of certain regulations. In September 2017, after the STB granted its waiver request, Alloy filed a notice of intent to file an adverse abandonment application, which it formally filed in October 2017. Over Burgoyne's objection, the circuit court stayed the present action until the STB issued a decision on Alloy's adverse abandonment application. We affirmed the stay order on appeal. *Burgoyne, L.L.C. v. Chicago Terminal R.R. Co.*, 2018 IL App (1st) 172500-U.

¶ 15 In January 2018, CTR notified the STB that it would not oppose Alloy's application and agreed that the public convenience and necessity supported abandonment of its line. The City then filed a request for interim trail use, stating that it was willing to assume responsibility for the right-of-way and acknowledging that any trail use would be subject to possible future reconstruction and reactivation of the right-of-way for rail service. CTR indicated that it was willing to negotiate an interim trail use agreement with the City. Burgoyne then submitted a letter discussing the pending state-court litigation. Burgoyne asserted that CTR had no authority to negotiate an interim trail use agreement for the portion of the rail line that crossed its property because CTR's easement over the property had terminated. Burgoyne thus asked that the STB not to include its property in any CITU.

¶ 16 In April 2018, the STB granted Alloy's application and issued a CITU allowing the City and CTR to negotiate an interim trail use agreement. The order stated that if the City and CTR reached an agreement, interim trail use would be permitted, subject to possible future

reconstruction and reactivation of the right-of-way for rail service. If the parties were unable to reach an agreement, CTR would be authorized to abandon the line. The Board denied Burgoyne's request to exclude its property from the CITU, explaining that it had no discretion to deny a request for interim trail use that satisfied the requirements of the Trails Act and the Board's rules, but it noted that issuance of the CITU was "not intended to address the merits of any pending litigation."

¶ 17 After the STB issued its decision, the circuit court lifted the stay in the present action and granted the City's motion to intervene to protect its interest in the rail corridor. CTR and the City then filed separate motions to dismiss, each arguing that Burgoyne's claims were preempted by the ICCTA and the Trails Act. In December 2018, the circuit court granted the motions to dismiss. The court explained that, because the STB had authorized interim trail use, the Trails Act "precludes [Burgoyne] from arguing that the easement terminated under State contract law" and preempts Burgoyne's claims. The court noted that its decision was without prejudice to any takings claim Burgoyne may bring in the federal court of claims. Burgoyne then filed a timely notice of appeal.[2]

¶ 18 II. ANALYSIS

¶ 19 Federal preemption arises from the supremacy clause of the United States Constitution, which provides that federal law "shall be the supreme Law of the Land." U.S. Const., art. VI., cl. 2. Under the supremacy clause, a state law that contradicts or interferes with federal law is

[2] While briefing was underway, the City filed a notice with the STB to acquire CTR's right to reactive rail service on the line that is subject to the CITU. See City of Chicago—Acquisition Exemption—Chicago Terminal Railroad, 84 Fed. Reg. 37,944 (Aug. 2, 2019). CTR later assigned to the City its right to resume rail service and its interest in the easement across Burgoyne's property. See Cook County Recorder of Deeds, Online Recordings Search, https://www.ccrecorder.org/recordings/recording/show/130376223 (last visited June 11, 2020) [https://perma.cc/WE6X-WNFH]. The City then notified the STB that it had reached an agreement for interim trail use with CTR.

preempted. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). Federal law may preempt state law either expressly or by implication. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). In either case, "[t]he key inquiry *** is to determine the intent of Congress." *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 40 (2010). Because federal preemption presents a question of law, we review the issue *de novo*. *People v. Williams*, 235 Ill. 2d 178, 186 (2009). We likewise review *de novo* a circuit court's order dismissing an action under section 2-619. *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 16.

¶ 20 Congress enacted the ICCTA to abolish the Interstate Commerce Commission (ICC) and transfer its regulatory authority over the rail transportation system to the STB. *Wedemeyer v. CSX Transportation, Inc.*, 850 F.3d 889, 894 (7th Cir. 2017). The ICCTA provides that:

> "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).

The ICCTA's predecessor statute, the Interstate Commerce Act, was "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The same is true of the ICCTA. Indeed, "Congress's intent in the [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pacific R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 678 (7th Cir. 2011).

¶ 21 As relevant here, the ICCTA endows the STB with exclusive authority to regulate the abandonment of rail lines. See *Chicago & North Western Transportation Co.*, 450 U.S. at 320 (describing the ICC's authority to regulate abandonments under the Interstate Commerce Act as "exclusive" and "plenary"). Under the ICCTA, a rail carrier may not "abandon any part of its railroad lines" unless "the Board finds that the present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. § 10903(d). Unless the Board issues an unconditioned certificate of abandonment for a rail line, the Board retains jurisdiction over the line and the line remains part of the national rail network. See *Hayfield Northern R.R. Co.*, 467 U.S. at 633.

¶ 22 State and local actions may be preempted by the ICCTA either categorically or on an as-applied basis. *Union Pacific R.R. Co.*, 647 F.3d at 679; *CSX Transportation, Inc.*, STB Finance Docket No. 34662, 2005 WL 1024490, at *2-3 (May 3, 2005). As noted, the ICCTA's express preemption clause states that "the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under *** State law." 49 U.S.C. § 10501(b). By focusing on "regulation," the ICCTA expressly preempts only those state laws that "have the effect of manag[ing] or govern[ing] rail transportation," while allowing

"application of laws having a more remote or incidental effect on rail transportation." (Internal quotation marks omitted.) *Franks Investment Co. v. Union Pacific R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010). Thus, "actions by a state or local body [that] would directly conflict with exclusive federal regulation of railroads" are categorically preempted. *CSX Transportation*, 2005 WL 1024490, at *3. Such actions include "any form of state or local permitting or preclearance that *** 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" and "state or local regulation of matters directly regulated by the Board[,] such as the construction, operation, and abandonment of rail lines." *Id.* at *2.

¶ 23 In addition to those actions that are expressly and categorically preempted, the ICCTA also impliedly preempts, on an as-applied basis, any state or local action that "would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.* at *3; see *Union Pacific R.R. Co.*, 647 F.3d at 679. To determine whether an action would prevent or unreasonably interfere with rail transportation, courts must conduct "a factual assessment of the effect of providing the claimed remedy." *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559 F.3d 212, 221 (4th Cir. 2009).

¶ 24 Under these principles, we conclude that Burgoyne's claims are not categorically preempted by the ICCTA, but that they are preempted as applied. With respect to categorical preemption, we note that Burgoyne's claims rest on general principles of state property and contract law that cannot be said to "have the effect of manag[ing] or govern[ing] rail transportation." (Internal quotation marks omitted.) *Franks Investment Co.*, 593 F.3d at 410. Moreover, Burgoyne's claims arise from a "[v]oluntary agreement[ ] between private parties."

PCS Phosphate Co., 559 F.3d at 218. Because such agreements "are not presumptively regulatory acts," they do not "constitute the sort of 'regulation' expressly preempted by the statute." *Id.*

¶ 25 Although not categorically preempted, Burgoyne's claims are preempted as applied due to the effect that the claimed remedies would have on rail transportation. Burgoyne's complaint seeks to force CTR to remove its tracks from the right-of-way and prohibit it from removing a fence that blocks access to its rail line. That relief would make it impossible for CTR to conduct rail service on the line and would effectively result in the line's unauthorized abandonment. It is difficult to see how such relief would not prevent or unreasonably interfere with rail transportation. The same is true of Burgoyne's request for monetary relief, which rests on its contention that CTR has lost the right to access the tracks that cross its property. To prevent CTR from continuing to access and operate its rail line "through an award of damages" would prevent and unreasonably interfere with rail transportation "as effectively" as an award of "preventive relief." (Internal quotation marks omitted.) *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (opinion of Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ.).

¶ 26 Burgoyne's complaint also asked the circuit court to order CTR to "seek[ ] and obtain[ ]" authorization to abandon the line. Even assuming that the circuit court could have ordered CTR to seek abandonment authority (a point on which we express no opinion), it certainly could not require the STB to grant such authority. Nor could the circuit court have prevented CTR from negotiating an interim trail use agreement as an alternative to abandonment. Such relief would unreasonably interfere with the STB's exclusive jurisdiction to impose conditions on a rail carrier's abandonment of a rail line (49 U.S.C. § 10903(e)(1)(B)) and conflict with "the national policy to preserve established railroad rights-of-way for future reactivation of rail service" (16 U.S.C.

§ 1247(d)). Indeed, once the STB declined to authorize abandonment and instead issued a CITU, granting Burgoyne's requested relief would have required the circuit court to effectively invalidate the CITU. But Congress has given the federal courts of appeals exclusive jurisdiction over challenges to the Board's decisions. See *Grantwood Village v. Missouri Pacific R.R. Co.*, 95 F.3d 654, 658 (8th Cir. 1996) (citing 28 U.S.C. § 2342(5) (1994)). Burgoyne could have challenged the CITU in the proper federal appeals court, but it cannot do so in the state circuit court.

¶ 27 In its attempt to resist this conclusion, Burgoyne insists that it seeks only to enforce its state law property and contract rights and that its complaint raises no issue of abandonment under the ICCTA. But a party may not avoid the STB's exclusive jurisdiction to regulate abandonments "by mere artful pleading." *Chicago & North Western Transportation Co.*, 450 U.S. at 324. "ICCTA preemption does not depend upon the source of a state law claim" but on the effect "the requested remedy" would have on rail transportation. *City of Ozark v. Union Pacific R.R. Co.*, 843 F.3d 1167, 1172 (8th Cir. 2016). As explained above, granting Burgoyne's requested relief would prevent and unreasonably interfere with rail transportation and conflict with the STB's exclusive jurisdiction over the abandonment of rail lines. For that reason, Burgoyne's claims are preempted by the ICCTA.

¶ 28 Burgoyne argues that enforcement of a voluntary agreement cannot be preempted by the ICCTA because such agreements do not constitute state regulation. But while the ICCTA's express preemption provision is limited to state or local action regulating rail transportation, an implied preemption analysis under the statute is not similarly cabined. The Fourth Circuit's decision in *PCS Phosphate Co.*, on which Burgoyne places great emphasis, demonstrates this point. There, the court held (as noted above) that voluntary agreements between private parties "are not

presumptively regulatory acts" and thus do not "constitute the sort of 'regulation' expressly preempted by the statute." *PCS Phosphate Co.*, 559 F.3d at 218. Nevertheless, the court proceeded to consider whether enforcement of the agreement at issue was impliedly preempted under the particular facts of the case. *Id.* at 220. The court ultimately concluded that the agreement did not unreasonably interfere with rail transportation, but it did not rule out the possibility that enforcement of voluntary agreements could be impliedly preempted under different circumstances. See *id.* at 221-22 ("This is not to say that a voluntary agreement could never constitute an 'unreasonable interference' with rail transportation ***.").

¶ 29 Burgoyne also relies on the Seventh Circuit's *dictum* that "there is no issue of federal preemption" where "a state or local government secures the use of property in a way that affects railroad transportation by contract or other agreement." *Union Pacific R.R. Co.*, 647 F.3d at 682. According to Burgoyne, that statement supports its position that the enforcement of a private contractual agreement is never preempted by the ICCTA. But we find that position impossible to square with *Thompson*, 328 U.S. at 146-49, which held that a private contract could not be used to bypass the ICC's exclusive jurisdiction to regulate abandonment of rail lines. There, one railroad company (Brownsville) contracted to operate its trains over the tracks of another railroad company (Tex-Mex). *Id.* at 136. Tex-Mex later attempted to cancel the agreement under the terms of the contract, but Brownsville continued to use the tracks and refused to pay any additional fees. *Id.* at 137. In reversing a lower court's award of damages, the Supreme Court held that, even "[t]hough the contract [had been] terminated pursuant to its terms, a certificate [of abandonment from the ICC] would still be required" before Brownsville could be forced to stop using the tracks. *Id.* at 145. "Until abandonment is authorized," the Court explained, "operations must continue." *Id.* at

147. The same principle governs here. Even if CTR's easement over Burgoyne's property has terminated under the terms of the corrective deed, CTR may not be forced off the right-of-way and prevented from operating its rail line until the STB has authorized the line's abandonment.

¶ 30 Burgoyne notes that *Thompson* involved a dispute between two rail carriers, while this case pits a rail carrier against a private property owner. That distinction is immaterial. *Thompson* rests on the principle that "rail lines cannot be removed from the national rail system without authorization from the [STB] even if their underlying leases have expired." *Pinelawn Cemetery*, STB Finance Docket No. 35468, 2015 WL 1813674, at *7 (Apr. 21, 2015). As the STB explained in *Pinelawn Cemetery*, the same principle that limits "the authority of a public body to regulate a rail carrier under state and local law" applies to "the rights of a private party to remove a rail carrier under contract law." *Id.* at *9. "Just as state regulatory laws must yield to federal law under [the ICCTA]," the Board explained, "the expiration of a contract between a railroad and a landowner does not, by itself, amount to an abandonment" and cannot be used "to evict the [railroad] from the property." *Id.* Likewise, the termination of a rail carrier's easement under state contract or property law cannot be used to oust the carrier from its right-of-way unless and until the STB has authorized an abandonment of the affected rail line.

¶ 31 Burgoyne next asserts that enforcement of a rail carrier's voluntary agreement can never be deemed to unreasonably interfere with rail transportation. But the cases Burgoyne cites do not support that blanket proposition. While a rail carrier's voluntary agreements should generally "be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce," that presumption does not mean "that a voluntary agreement could never constitute an 'unreasonable interference' with rail

transportation." (Internal quotation marks omitted.) *PCS Phosphate Co.*, 559 F.3d at 221. Thus, when deciding whether the enforcement of a voluntary agreement would unreasonably interfere with rail transportation, a court must consider the details of the agreement at issue and conduct "a factual assessment of the effect of providing the claimed remedy." *Id.*

¶ 32 In *PCS Phosphate Co.*, the court considered a dispute between a rail carrier and a mine operator over a covenant in the deed conveying an easement to the rail carrier that required the carrier to relocate its rail line to another portion of the mine operator's property if the mine operator deemed the relocation necessary for mine operations. *Id.* at 215. In rejecting the rail carrier's contention that enforcing the covenant would unreasonably interfere with rail transportation, the court explained that the carrier's agreement to the covenant's terms "reflect[ed] a market calculation that the benefits of operating the rail line for many years would be worth the cost of paying to relocate the line in the future." *Id.* at 221. In light of that cost-benefit analysis, the court concluded that any interference with rail transportation caused by the relocation could not be deemed unreasonable. *Id.* For that reason, enforcement of the agreement was not impliedly preempted by the ICCTA. *Id.* at 222.

¶ 33 The Board reached a similar result in *Township of Woodbridge*, 5 S.T.B. 336, 2000 WL 1771044 (Nov. 28, 2000). At issue there was an agreement between a rail carrier and a local government in which the carrier agreed "to curtail the idling of locomotives and the switching of rail cars" during overnight hours to address noise complaints from local residents. *Id.* at *1. When the local government sought to enforce the agreement, the rail carrier argued that the action was preempted by the ICCTA. *Id.* at *2. In rejecting that contention, the Board explained that the carrier's "voluntary agreements must be seen as reflecting the carrier's own determination and

admission that the agreements would not unreasonably interfere with interstate commerce." *Id.* at *3. Because the carrier "ha[d] not shown that enforcement of its commitments would unreasonably interfere with the railroad's operations," the local government's action was not preempted by the ICCTA. *Id.*

¶ 34 The agreement that Burgoyne seeks to enforce here is fundamentally distinguishable from the agreements in *PCS Phosphate Co.* and *Township of Woodbridge*. While a rail carrier may voluntarily commit to relocate a line or reduce noise produced by its operations without necessarily causing an unreasonable interference with rail transportation, it "cannot voluntarily contract away [the STB's] jurisdiction over the abandonment of [its] [l]ine." *Salt Lake City Corp.*, STB Docket No. AB-33 (Sub-No. 183), 2002 WL 368014, at *5 (Mar. 8, 2002). As discussed above, granting Burgoyne's requested relief would prevent CTR from conducting service over its rail line and would result in an unauthorized abandonment of the line. Thus, even though Burgoyne's claims arise from a voluntary agreement, we conclude that its claims are preempted by the ICCTA because its requested relief would unreasonably interfere with rail transportation.[3]

¶ 35 We are similarly unpersuaded by Burgoyne's reliance on decisions concerning a state court's authority to adjudicate property claims with respect to "the size and extent of a railroad easement." *Allegheny Valley R.R. Co.*, STB Finance Docket No. 35388, 2011 WL 1546589, at *3 (Apr. 25, 2011). The dispute here concerns the existence of an easement rather than its size and extent, and that distinction is critical. In *Allegheny Valley*, the parties' "primary

[3] Burgoyne contends that a different result is warranted here because the corrective deed was issued in the course of railroad reorganization proceedings overseen by a federal bankruptcy court. Burgoyne asserts that the ICC was a party to the bankruptcy proceeding and was "fully aware" of the terms of the corrective deed. Even if true, we see nothing in the terms of the deed or the circumstances surrounding its execution that suggest that either the bankruptcy court or the ICC preemptively authorized a future abandonment of the rail line.

dispute *** involve[d] the size, location, and nature of property rights for the [rail carrier's] right-of-way," issues that "involve[d] the application of state property law and properly [were] before the state court." *Id.* at *4. The Board stressed, however, that the parties agreed "that a railroad right-of-way exist[ed]" and that the rail carrier "[had] the right to conduct rail operations within the *** right-of-way." *Id.* Here, in contrast, Burgoyne disputes the continued existence of CTR's easement and seeks an order that would prevent CTR from conducting rail operations over the right-of-way. Unlike the types of property claims that may proceed in state court, Burgoyne's claims, if successful, would prevent or unreasonably interfere with rail transportation and are thus preempted by the ICCTA. See *Jie Ao and Xin Zhou*, STB Finance Docket No. 35539, 2012 WL 2047726, at *6 (June 6, 2012) (finding state-law adverse possession claim preempted because it sought "to claim title to a strip of rail-banked [right-of-way] that is within the national rail network system and has not been abandoned").

¶ 36 We also conclude that Burgoyne's claims are preempted by the Trails Act. After Alloy filed a petition for the adverse abandonment of CTR's rail line, the City submitted a request for interim trail use as an alternative to abandonment. Under the Trails Act and the STB's rules, the Board issued a CITU that allowed the City and CTR to negotiate an agreement for interim trail use. See 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29. If the parties had failed to reach an agreement, CTR would have been authorized to abandon the line (*Preseault*, 494 U.S. at 7) and Burgoyne would have been able to enforce the terms of the corrective deed terminating CTR's easement due to its nonuse for railroad purposes. Because the parties were able to reach an agreement, however, the CITU blocked the line from being abandoned and authorized CTR to transfer the right-of-way to the City for interim trail use, "subject to restoration or reconstruction for railroad purposes."

16 U.S.C. § 1247(d). The Trails Act provides that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *Id.* The Trails Act thus "prevent[s] [Burgoyne's] property interests [in the right-of-way] from reverting under state law" (*Preseault*, 494 U.S. at 8) and preempts its claims seeking to enforce the easement's termination.

¶ 37 Burgoyne attempts to avoid the preemptive effect of the Trails Act on several grounds, but none is availing. First, Burgoyne relies on *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014), but that case simply applied "basic common law principles" to a dispute over reversionary interests in a railroad easement that terminated due to nonuse. *Id.* at 106.[4] The decision did not consider any issue under the Trails Act, nor does anything in the opinion suggest that the easement had been transferred for interim trail use. The decision thus has no bearing on the preemption question we address here.

¶ 38 Next, Burgoyne argues that the Trails Act does not prevent enforcement of its reversionary interest because that interest arises from the terms of a corrective deed rather than state property law. But the Trails Act states that interim trail use "shall not be treated, for purposes of *any law or rule of law*, as an abandonment of the use of such rights-of-way for railroad purposes." (Emphasis added.) 16 U.S.C. § 1247(d). That language is broad enough to encompass any reversionary interest triggered by nonuse of an easement for railroad purposes, whether the interest arises from

[4] The Court also explained that "it does not make sense under common law property principles to speak of the grantor of an easement having retained a 'reversionary interest.'" *Marvin M. Brandt Revocable Trust*, 572 U.S. at 105 n.4. Instead, the grantor of an easement retains its ownership interest in the property subject to an easement, and that interest returns to its unencumbered state when the easement terminates. See *id.* at 105. "Under either characterization the result upon termination of the easement is the same." *Preseault v. United States*, 100 F.3d 1525, 1534 (Fed. Cir. 1996). Because rails-to-trails cases generally employ the "reversionary interest" terminology, see, *e.g.*, *Preseault*, 494 U.S. at 8, we do so here as well.

property law or a contractual arrangement. In *Preseault*, the Court held that the Trails Act "prevent[s] property interests from reverting under state law." 494 U.S. at 8. We see no reason to think that the Court meant to distinguish between different sources of state law. Whether Burgoyne's reversionary interest arises under state property law or state contract law does not affect the preemption analysis.

¶ 39 Burgoyne also contends that the Trails Act cannot prevent enforcement of its reversionary interest in the right-of-way because CTR's easement terminated *before* the STB authorized interim trail use. But the same was true in *Preseault*, where the rail carrier ceased operations and removed its tracks from the right-of-way well in advance of any request for interim trail use. *Preseault*, 494 U.S. at 9; see *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151, 152 (Vt. 1985) (prior state court decision in the case). Indeed, one of the issues in the landowners' subsequent suit seeking compensation for an alleged taking was whether the "easements [had] terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements." *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996). The resolution of that question was relevant in determining whether any state law property rights were taken from the landowners as a result of the right-of-way's conversion to interim trail use (see *id.* at 1544-45), but the timing of the conversion did not affect the validity of the CITU and was immaterial to the preemption question addressed by the Supreme Court.

¶ 40 Finally, Burgoyne directs our attention to *Monroe County Comm'n v. A.A. Nettles, Sr. Properties Ltd.*, 288 So. 3d 452 (Ala. 2019). There, under circumstances similar to those presented here, the Alabama Supreme Court held that a landowner's state law action to quiet title to a former railroad right-of-way that had been converted to interim trail use was not preempted by federal law

because the state law principles governing limited-use easements did not "attempt[ ] to regulate rail transportation [or] limit the use of rail property to deter interstate commerce." *Id.* at 457. The court thus approved the state trial court's application of "state-law principles to conclude that the right-of-way had been extinguished by operation of law [when it ceased to be used for railroad purposes], causing title to the right-of-way to revert" to the abutting landowner. *Id.* at 459. The court did not explain how the application of state law in this context was consistent with the Trails Act's admonition that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Nor did the court discuss *Preseault*'s holding that the Trails Act "prevent[s] property interests from reverting under state law" when a railroad right-of-way is converted to interim trail use. 494 U.S. at 8. We are, of course, not bound by the decision of a sister state court. See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 82. Respectfully, we are unpersuaded by the decision in *Nettles* and thus decline to follow it. Rather, as discussed above, we conclude that enforcement of any reversionary interest Burgoyne may hold in the right-of-way under state contract or property law is preempted by the Trails Act.

¶ 41 In closing, we note that this result does not leave Burgoyne without a remedy. As the circuit court recognized, to the extent that application of the Trails Act effected a taking of its reversionary interest in the right-of-way, Burgoyne may seek compensation for the taking in the United States Court of Federal Claims under the Tucker Act (28 U.S.C. § 1491(a)(1)). See *Preseault*, 494 U.S. at 11-17. Contrary to Burgoyne's suggestion, recognizing the Trails Act's preemptive effect will not leave the nature and scope of its property rights unresolved. "Although [the Trails Act] may pre-empt the operation and effect of certain state laws [governing reversionary interests]," it does

"not displace state law as the traditional source of the real property interests" that are affected. *Preseault*, 494 U.S. at 22 (O'Connor, J., concurring, joined by Scalia and Kennedy, JJ.). Thus, when considering any takings claim that Burgoyne may bring, the federal court of claims will consider "the nature of the state-created property interest that [Burgoyne] would have enjoyed absent" application of the Trails Act and "the extent that [application of the Trails Act] burdened that interest." *Id.* at 24. As in all rails-to-trails takings cases, moreover, the court will "analyze the property rights of the parties *** under the relevant state law." *Rogers v. United States*, 814 F.3d 1299, 1305 (Fed. Cir. 2015).

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 44 Affirmed.

No. 1-19-0098

Cite as:	*Burgoyne, LLC v. Chicago Terminal R.R. Co.*, 2020 IL App (1st) 190098
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 17-CH-6199; the Hon. Pamela McLean Meyerson, Judge, presiding.
Attorneys for Appellant:	George S. Bellas and Misty J. Cygan, of Bellas & Wachowski, of Park Ridge, for appellant.
Attorneys for Appellee:	Mark A. Flessner, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Elizabeth Mary Tisher, Assistant Corporation Counsel, of counsel), for intervenor-appellee. No brief filed for other appellees.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ORIGINAL

BURGOYNE, LLC, an Illinois LIMITED LIABILITY COMPANY,

Plaintiff,

vs.

No. 17 CH 06199

CHICAGO TERMINAL RAILROAD, et al.,

Defendants.

RECORD OF PROCEEDINGS held before the HONORABLE PAMELA MCLEAN MYERSON, Judge of said Court, taken in the above-entitled cause, before Donna Wadlington Shavers, a Certified Shorthand Reporter within the State of Illinois, at the Richard J. Daley Center, Room 2305, Chicago, Illinois, commencing on the 18th day of December, 2018, at approximately the hour of 2:00 p.m.

APPEARANCES:

BELLAS & WACHOWSKI
BY: GEORGE "GEO" BELLAS, ESQ.
15 N. Northwest Highway
Park Ridge, Illinois 60068
(847) 823-9030 x219
george@bellas-wachowski.com
Appeared on behalf of the Plaintiff.

CITY OF CHICAGO - DEPARTMENT OF LAW
AVIATION, ENVIRONMENTAL, REGULATORY & CONTRACTS DIVISION
BY: JARED POLICICCHIO, ESQ. and
SARAH WILBANKS, ESQ.
30 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312) 744-1438
(312) 744-9010
jared.policicchio@cityofchicago.org
sarah.wilbanks@cityofchicago.org
Appeared on behalf of the Defendant, Chicago Terminal Railroad.

LAW OFFICES OF DANIEL K. MARKO
DANIEL K. MARKO, ESQ.
4448 West Oakton
Skokie, Illinois 60076-3259
(312) 933-6348
dan@markolawfirm.com
Appeared on behalf of Iowa Pacific Holdings.

P R O C E E D I N G S

THE COURT: Good morning.

Good afternoon.

THE CLERK: Burgoyne versus Chicago Terminal Railroad.

MR. BELLAS: Good afternoon, your Honor. George Bellas on behalf of the Plaintiffs.

MR. POLICICCHIO: Good afternoon, your Honor. Jared Policicchio on behalf of the City.

MS. WILBANKS: Sarah Wilbanks on behalf of the City.

MR. MARKO: Daniel Marko on behalf of Iowa Pacific Holdings.

THE COURT: All right. We are here this afternoon for status on ruling on two 2-619 motions to dismiss by Defendant, Chicago Terminal Railroad and the Intervenor, City of Chicago.

And as you know, I heard oral arguments on October 22nd. I have since reviewed the transcript, and the briefs, and the cases cited by both sides, and the Appellate

Court's decision on the earlier motion to strike, and I am prepared to give you an oral ruling.

So to very briefly recap, I know you all know the facts here, but just for the record, this case is about rights under an easement for railroad tracks.

In its Complaint the Plaintiff, Bourgoyne LLC, seeks a finding that it owns certain property pursuant to a corrective deed unburdened by any easement or other property rights. It seeks an injunction, specific performance and damages. The crux of its argument is that we have contract rights and under the corrective deed, which was approved by Bankruptcy Court years ago, the Defendant has an easement but Defendant's easement is to "automatically cease and determine" when the Defendant stopped using the track's "inactive operation of the railroad" for 12 consecutive months.

Last fall I stayed this case because an abandonment proceeding had been filed before the Surface Transportation Board, which I

will call STB, related to these tracks. At that time the Defendant argued and I agreed that Federal law pre-empted this Court from deciding the issue of abandonment of the tracks.

Plaintiff appealed my stay order and the Appellate Court affirmed that decision on March 23rd of this year. STB issued its decision about a month later.

And now both Defendant and the City have filed motions to dismiss arguing that essentially because of the STB's decision abandonment is now off the table, and they've advised the Court that the City has entered into an agreement approved by the STB for an interim trail use of the railroad right-of-way. They argued that the Federal Trails Act provides that as long as the trail use is in effect State property rights are suspended and Burgoyne's only remedy is to bring a claim before the U.S. Court of Claims.

Bourgoyne argues that Defendant had no right to enter into that trails use agreement with the City. It had no property rights to bargain away to the City because its

easement had already expired by its own terms under the contract, which was the corrective deed.

The key provision of the Trails Act is 16 U.S. CA Section 1247(d), which deals with interim use of railroad rights-of-way. It provides for what the case is called railbanking. Essentially, "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation" if a state or municipality is prepared to step in and manage the rail property, that section provides that the STB shall impose conditions for interim use and shall not permit abandonment or discontinuance.

That's what the STB approved for the City on April 30, 2018, a certificate of interim trail use, which I will call a CITU.

So how does that impact this case. I found the Presault line of cases -- that's P-r-e-s-a-u-l-t -- which were in the Federal Circuit Court of Appeals and the U.S. Supreme Court to be persuasive. They had similar facts. They held that even though an

easement for rail tracks would otherwise have expired under State law, if a CITU is in place, the railroad retains the right to use that property as railroad corridor unless and until the STB issues a decision authorizing abandonment.

The cases cited by Plaintiff did not involve the Trails Act, so I did not find them as persuasive. I find that the CITU issued in this case precludes the Plaintiff from arguing that the easement terminated under State contract law, and I'm going to grant the motion to dismiss without prejudice to Plaintiff's ability to bring a claim in the U.S. Court of Claims.

So that is the final order disposing of this case. What I would like the written order to say today is, for the reasons stated on the record, I'm granting the motions to dismiss and please include in the order that this is a final order disposing of all matters in this case.

And I would like -- I would like the Defendant movant to file a copy of

the -- of the transcript with the Court within, say, 14 days. Okay?

MR. POLICICCHIO: Thank you, your Honor.

THE COURT: All right.

MR. BELLAS: So that disposes of the cross-claims for damages as well?

THE COURT: Yes, it does. All claims need to be brought before the U.S. Court of Claims; okay?

Thank you.

MS. WILBANKS: Thank you, Judge.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER.)

APPENDIX D

The 5th Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

16 U.S.C. § 1247 provides in part:

§ 1247. State and local area recreation and historic trails

* * *

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

* * *

49 U.S.C. § 10501 provides in part:

§ 10501. General jurisdiction

* * *

(b) 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, inter- change, 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.

* * *

APPENDIX E

46322
EB

SERVICE DATE – LATE RELEASE APRIL 30, 2018

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1258

ALLOY PROPERTY COMPANY, LLC—ADVERSE ABANDONMENT—CHICAGO TERMINAL RAILROAD IN CHICAGO, ILL.

Digest:[1] The Board is granting, subject to trail use, environmental, and labor protective conditions, the application by Alloy Property Company, LLC, for adverse abandonment.

Decided: April 30, 2018

On October 12, 2017, Alloy Property Company, LLC (Alloy) filed an application under 49 U.S.C. § 10903, requesting that the Board authorize the third-party ("adverse") abandonment of 2.625 miles of rail line owned by the Chicago Terminal Railroad (CTM) in Chicago, Cook County, Ill., originating at the western side of North Elston Avenue and proceeding east and south to Goose Island to a terminus near the intersection of North Branch Street and Halsted Street (the Line). Alloy states there is no need for rail service on the Line. CTM does not oppose the application. Notice of the application was served and published in the Federal Register on November 27, 2017 (82 Fed. Reg. 56,101).

BACKGROUND

On June 1, 2017, Alloy filed a petition seeking a waiver of certain Board regulations and exemptions from related statutory provisions in anticipation of its filing of an adverse abandonment application. CTM filed a reply to Alloy's waiver petition on June 21, 2017, opposing some of Alloy's requests for waivers and stating that it would oppose an application for adverse abandonment. In a decision served August 16, 2017, the Board granted in part Alloy's waiver petition. On September 18, 2017, CTM filed a motion to compel discovery from Alloy. In a decision served October 25, 2017, the Board referred the handling of all discovery matters to an Administrative Law Judge (ALJ).

Alloy filed its adverse abandonment application on October 12, 2017, stating that there is no need for rail service on the Line. Alloy contends that no rail shipments have originated or terminated on the Line since 2015 and that any businesses on the Line that could have sought rail

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

service have ceased operations, relocated, or are using non-rail transportation options. Alloy asserts that it is working with the City of Chicago (the City) to redevelop the property into a mixed-used urban center.

On January 16, 2018, CTM filed a motion to withdraw its motion to compel and a reply indicating it no longer opposes Alloy's application for adverse abandonment. The same day, Alloy and CTM filed a joint motion to restart the procedural schedule. The ALJ granted CTM's motion to withdraw on January 25, 2018. By decision served on January 31, 2018, the Board restarted the procedural schedule.

The Board has received letters in support of Alloy's application from the City, United States Representative Mike Quigley, Alderman Walter Burnett, Jr., Alderman Bruce Hopkins, and the Friends of Goose Island.

On February 14, 2018, the City submitted a request for the issuance of a Certificate of Interim Trail use (CITU) over the Line except for the portion north of West Cortland Street. That same day, CTM filed a letter stating that it is willing to negotiate for trail use with the City. Alloy filed a reply on March 1, 2018, indicating that it does not object to the issuance of a CITU over the requested portion of the Line.

DISCUSSION AND CONCLUSIONS

As explained below, the Board finds that granting adverse abandonment here, subject to certain conditions, is consistent with § 10903. Accordingly, the Board grants Alloy's unopposed application for adverse abandonment.

Legal Standard. Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in a third-party or adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. See N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf Ry.—Adverse Aban.—in Lee Cty., Fla., AB 400 (Sub-No. 4) (STB served Nov. 18, 2004). As part of the PC&N analysis, the Board must consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d). The environmental impacts of the proposed abandonment also must be considered, and, pursuant to 49 U.S.C. § 10903(b)(2), affected rail employees must be adequately protected.

The Board has exclusive and plenary jurisdiction over rail abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981). Accordingly, the Board typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea Prop. Owners—Aban.—Portion of Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., 8 I.C.C. 2d 773, 779 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir.

1994). On the other hand, the Board does not allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest. See Kan. City Pub. Serv. Freight Oper.—Exemption—Aban. in Jackson Cty., Mo., 7 I.C.C. 2d 216 (1990). See also CSX Corp. & CSX Transp., Inc.—Adverse Aban. Application—Can. Nat'l Ry. & Grand Trunk W. R.R., AB 31 (Sub-No. 38) (STB served Feb. 1, 2002). If adverse abandonment is granted, the decision removes the agency's jurisdiction, enabling the applicant to pursue other legal remedies against the incumbent carrier, if necessary. See Consol. Rail Corp., 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

PC&N Analysis. Applying the above principles to this case, the Board finds that the present and future PC&N permit the proposed adverse abandonment. The record demonstrates that there is no present or future need for common carrier rail service. Alloy states, and CTM agrees, that no shipments have originated or terminated on the Line since 2015 and that there are no reasonable prospects for developing future rail traffic over the Line. Further, Alloy contends that the public interest favors granting its application because it is working to transform the property "into a major mixed-use development that will benefit residents, businesses, and visitors." (Alloy Appl. 2.) CTM does not contest this assertion.

As noted, the Board has received four letters of support favoring Alloy's application. The City submitted a detailed letter with exhibits explaining that the Line is located within an area known as the North Branch Industrial Corridor (the Corridor). According to the City, the Chicago Plan Commission adopted a land use policy called the North Branch Framework Plan (Framework Plan) in May 2017, which "embraces changes to land use policy within the Corridor to attract innovation and technology-oriented businesses (as opposed to new heavy industrial ones) with the goals of fostering new mixed-use neighborhoods and publicly accessible open space." (The City Ltr. 2-3.) Congressman Quigley, Alderman Burnett, Alderman Hopkins, and the Friends of Goose Island all, likewise, support Alloy's application for adverse abandonment. (See generally Quigley Ltr.; Burnett Ltr.; Hopkins Ltr.; Friends of Goose Island Ltr.)

Given the record evidence that there is no present or future need for rail service over the Line and the support of the Framework Plan from the City and public officials, the Board determines that the present and future PC&N support the requested adverse abandonment.

Environmental Matters. The Board is required to consider the environmental impacts of the proposed abandonment to meet its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. Alloy submitted a combined environmental and historic report with its application and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) examined the environmental and historic report, verified its data, and analyzed the probable environmental effects of the proposed action. OEA issued for public review and comment an Environmental Assessment (EA) on November 13, 2017.

In the EA, OEA recommended that two conditions be placed on any decision granting abandonment authority. First, in response to a comment in the historic report from the Illinois State Historic Preservation Officer (SHPO), OEA recommended a condition requiring Alloy and

CTM to retain interest in and take no steps to alter the historic integrity of all sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed. Second, OEA recommended a condition requiring Alloy to consult with the National Geodetic Survey (NGS) and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

OEA received comments on the EA from Alloy, the Miami Tribe of Oklahoma, and the U.S. Coast Guard (Coast Guard), and addresses those in its Final EA dated March 7, 2018. As a result of these comments and its own analysis, OEA recommends modifying one condition and adding three more conditions, as discussed below.

In its comment on the EA, Alloy contends that the Section 106 condition under NHPA should be limited to the swing bridge, as this is the only structure identified by the SHPO as eligible for listing on the National Register and as being adversely affected by the proposed abandonment, and that the condition should apply only to Alloy, not Alloy and CTM. OEA agrees that the Section 106 condition should apply only to the swing bridge and recommends modifying that condition accordingly. OEA does not, however, agree that the entire Section 106 condition should be imposed only on Alloy. As OEA notes, the portion of the condition requiring both the third-party applicant and the railroad to keep the swing bridge intact until the Section 106 process is complete ensures that the Board will fulfill its obligation under the NHPA. Thus, OEA continues to recommend imposing that portion of the Section 106 condition on both Alloy and CTM.

Alloy also suggests that the NGS consultation condition be removed. Alloy states that it does not believe that any geodetic station markers exist along the Line because Alloy narrowed the scope of the proposed abandonment from 2.875 miles to 2.625 miles. In response, OEA notes that NGS originally identified three geodetic station markers, but that NGS later modified that to two station markers, presumably after learning that Alloy had shortened the length of the line proposed for abandonment. Therefore, because it is not clear whether any geodetic station markers remain on the Line, OEA believes the NGS consultation condition is still warranted.

The Miami Tribe of Oklahoma submitted a letter dated December 4, 2017, indicating that it has no objection to the abandonment, but requesting immediate consultation if any human remains or Native American cultural items falling under the Native American Graves Protection and Repatriation Act or archeological evidence is discovered during any phase of the proposed abandonment. OEA, accordingly, recommends that, in the event any unanticipated archeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, Alloy will immediately cease all work and notify OEA, interested federally recognized tribes, the SHPO, and the Miami Tribe of Oklahoma Tribal Historic Preservation Officer (THPO), pursuant to 36 C.F.R. § 800.13(b).

On November 30, 2017, the Coast Guard commented that the proposed abandonment includes a federally permitted drawbridge over the North Branch Canal of the Chicago River, a federal navigable waterway, and a bridge under the jurisdiction of the Coast Guard. The Coast

Guard indicated that the federal permit is transferable, with all the responsibilities and requirements to comply with federal bridge statutes and regulations transferred to the new legal owner. Accordingly, OEA recommends a condition that Alloy consult with the Coast Guard regarding the permit for the bridge.

Upon its own review, OEA also recommends an additional condition requiring CTM to cooperate as necessary to facilitate the successful and timely completion of the recommended conditions. OEA notes that a third-party applicant does not typically have any right to access the property until the adverse abandonment is granted and the line is no longer part of the national rail network. OEA believes that such a condition will improve and expedite the process and ensure compliance with the conditions that must be satisfied before salvage.

The Board adopts the analysis and recommendations in the Final EA. Based on OEA's recommendations, the Board concludes that the proposed adverse abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Labor Protection. In approving this application, the Board must ensure that affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). The Board has found that the conditions imposed in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), satisfy the statutory requirements and will impose those employee protective conditions here.

Trail Use. On February 14, 2018, the City submitted a request for the issuance of a CITU over most of the Line. The City is not seeking a CITU over the portion of the Line north of West Cortland Street. In a letter filed February 14, 2018, CTM states that it is willing to negotiate for trail use with the City. In a reply filed March 1, 2018, Alloy indicates that it does not object to the issuance of a CITU over the requested portion of the Line.[2]

[2] On March 5, 2018, Burgoyne, LLC (Burgoyne), filed a letter stating that the portion of the Line covered by the CITU includes a disputed easement over Burgoyne's land. Burgoyne indicates that it is engaged in state court litigation with CTM regarding the contract for the easement. Burgoyne argues that the easement terminated per the terms of the contract and that CTM no longer has any rights to the easement. Burgoyne asks that the Board not include the easement portion as part of the CITU. On March 23, 2018, the City and CTM—in separate filings—requested leave to file replies to Burgoyne's letter.

The Board will deny Burgoyne's request. The property at issue in Burgoyne's state litigation is part of the Line being authorized for abandonment. Under the National Trails System Act and the Board's implementing rules, if a prospective trail user (here, the City) requests a trail condition and the carrier indicates a willingness to negotiate a trail agreement, the Board has a limited ministerial role and must issue the CITU. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); see also Caddo Valley R.R.—Aban. Exemption—In Clark, Pike, & Montgomery Ctys., Ark., AB 1076X (STB served Feb. 27, 2013); Rutherford R.R. Devel. Corp.—Aban.

(continued...)

The Board's role under the National Trails System Act, 16 U.S.C. §§ 1241-51, is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990). Here, the City has satisfied the requirements for interim trail use/rail banking by providing a statement of willingness to assume financial responsibility for the Line and acknowledging that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. Moreover, CTM has stated that it agrees to interim trail use negotiations. (CTM Ltr., Feb. 14, 2018.) Alloy has also consented. (Alloy Reply 3, Mar. 1, 2018.) Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and CTM is willing to negotiate for interim trail use, a CITU will be issued. See Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., AB 167 (Sub-No. 1094A), slip op. at 8 (STB served June 13, 2005). The parties may negotiate an interim trail use agreement for the Line during the 180-day period prescribed below. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(c)(2), (h). Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, the Line may be fully abandoned, subject to the other conditions described below. 49 C.F.R. § 1152.29(c). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

It is ordered:

1. Alloy's adverse abandonment application is granted subject to the employee protective conditions set forth in Oregon Short Line Railroad–Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the conditions that:

(a) Alloy and CTM shall retain their interest in and take no steps to alter the historic integrity of the swing bridge located on the rail line until the Section 106 process of the NHPA, 54 U.S.C. § 306108, has been completed. Alloy shall report back to OEA regarding any consultations with the SHPO, any other Section 106 consulting parties, and the public. Alloy may not file a consummation notice or initiate any salvage activities for the swing bridge until the Section 106 process has been completed and the Board has removed this condition.

(b) Alloy shall consult with the NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

(c) In the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, Alloy shall immediately cease all work and notify the OEA, interested federally recognized tribes, the SHPO, and the THPO pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO (or THPO),

---

(...continued)
Exemption—In Rutherford Cty., N.C., AB 567 (Sub-No. 1X) (STB served Aug. 25, 2000). The issuance of the CITU here is not intended to address the merits of any pending litigation.

interested federally recognized tribes, Alloy, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

(d) Prior to the commencement of any salvage activities, Alloy shall consult with the Coast Guard regarding the permit for the bridge.

(e) CTM shall cooperate as necessary to facilitate the successful and timely completion of the above conditions.

2. The City's request for a CITU, under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, for the Line is granted for the portion of the Line extending from the western side of North Elston Avenue and proceeding east and south to Goose Island to a terminus near the intersection of Chicago Avenue and Halsted Street. This does not include the small portion of the Line north of West Cortland Street, which Alloy may abandon upon the effective date of this proceeding provided that all other relevant conditions have been met.

3. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

4. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 3 above.

5. If an agreement for interim trail use/rail banking is reached by October 27, 2018, the parties shall jointly notify the Board within 10 days that an agreement has been reached, 49 U.S.C. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, the abandonment authority granted in this decision and certificate shall be fully effective, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29 (c)(1).

6. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.

7. Burgoyne's March 5, 2018 request that the Board not include the portion of the rail line involving the disputed easement as part of the CITU is denied.

8. CTM's and the City's requests to file replies to Burgoyne's March 5, 2018 letter are denied.

9. This decision is effective on May 30, 2018. Any petition to stay or petition to reopen must be filed as provided at 49 C.F.R. § 1152.25(e).

By the Board, Board Members Begeman and Miller.