

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID A. SUCHON,  
d/b/a DAVE'S BODY SHOP,

Plaintiff,

v.

WISCONSIN CENTRAL LTD.,

Defendant.

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OPINION AND ORDER

04-C-0379-C

This is a civil action in which plaintiff David A. Suchon, d/b/a Dave's Body Shop, is suing defendant Wisconsin Central Ltd. for inverse condemnation and for damages for nuisance and trespass. Plaintiff alleges that defendant made changes to a rail track that runs past his business and that the construction work and resulting increase in operations have subjected him and his employees to increased vibrations from passing trains and diesel fumes from locomotives. The vibrations have interfered with the operation of his body shop. He has been unable to mix paint properly and has had to re-do paint jobs when dust fell on newly painted cars. The diesel fumes have created a health hazard for him and his employees. He lives with the fear that a railroad car containing hazardous materials might

derail and spill its contents onto his property or that someone might be killed or injured by a train at a nearby grade crossing.

The case is before the court on defendant's motion for partial summary judgment on plaintiff's claims of nuisance and inverse condemnation. Plaintiff asserts jurisdiction under the diversity statute, 28 U.S.C. § 1332, alleging that defendant is an Illinois corporation with its principal business in Homewood, Illinois, but neglecting to allege facts to support a finding about his own citizenship. He alleges only that he is a resident of Stevens Point, Wisconsin and operates his business there. Although this falls short of alleging citizenship, I will assume for the purpose of deciding defendant's motion that he is a citizen of Wisconsin and that he will supply proof to that effect promptly after this motion is decided.

I conclude that defendant's motion must be granted. Plaintiff has not shown that defendant has taken actual physical possession of his property or deprived him of all or substantially all of the property's beneficial use; therefore, he cannot show that defendant has taken his property without instituting condemnation proceedings as he must in order to bring a successful inverse condemnation action under Wis. Stat. § 32.10. In addition, he cannot sue defendant under the common law of nuisance because such an action is preempted by the Interstate Commerce Commission Termination Act of 1995.

For the purpose of deciding this motion, I find from the facts proposed by the parties that the following facts are both material and undisputed.

## UNDISPUTED FACTS

Plaintiff David A. Suchon is a resident of Stevens Point, Wisconsin. Defendant Wisconsin Central Ltd. is incorporated under the laws of Illinois and has its principal place of business in Homewood, Illinois. Defendant is a common carrier, engaged in the business of providing interstate rail transportation service. It owns track, right of way and other property in Wisconsin, Illinois, Minnesota and the Upper Peninsula of Michigan and operates its rail transportation service in those states.

Defendant operates three principal rail lines through Wisconsin. One of them runs north and west from Neenah to Owen, where it splits into two lines, one running to Superior, the other to St. Paul, Minnesota. Although defendant handles some rail cars received from shippers located on one of its lines and delivered to consignees on its lines, the vast majority of the cars are received from shippers in Wisconsin or the Upper Peninsula and delivered to other railroads, usually in Chicago, for delivery to consignees or are received from consignees outside defendant's service area, again, usually in Chicago, and then delivered by defendant to consignees within its area. Defendant handles rail cars that come from or return to Canada; these cars pass through the Superior interchange.

All trains operating on defendant's St. Paul/Superior line operate through defendant's rail yard in Stevens Point. As rail traffic has grown, the Stevens Point yard has become a point of congestion, slowing train movements, causing delays and leading to increased costs

for more frequent crew changes.

In 2002, defendant developed a plan to ease congestion that required reconfiguring the tracks in the Stevens Point yard to create a through track for the trains that did not need to stop. Defendant dedicated and upgraded a track at the south end of the yard as a through track and moved a switching track seven feet further to the south of the main line track, still within defendant's existing right of way, upgrading it with new rail and new ties and connecting it to the through track at the south end of the yard, so that it would serve as a bypass track running through the yard from the switch west of the yard. Defendant completed work on the portion of the bypass track located west of the yard in November and December 2003. Under Federal Railroad Administration regulations, defendant was able to upgrade the bypass track to Class 3, which has a maximum operating speed of 40 mph. The new classification was in effect when defendant began rail operations on the bypass track in January 2004.

Plaintiff owns and operates an auto body shop business in Stevens Point on two parcels of property on Park Street, both located to the west of defendant's rail yard. The main line track and the bypass track are located north and east of plaintiff's property, within defendant's right of way.

When trains pass plaintiff's business property, dust rolls off the wheels and covers the parking lot. During track construction, rocks landed on plaintiff's property; some lodged in

his building. During construction and afterward, defendant's trucks were parked on plaintiff's property without permission, causing damage to the lot.

Since completion of the bypass track construction, plaintiff has not had to lay off any employees, close down his business for any period of time or shorten his hours of operation because of defendant's operation of trains on the track. Through the first eight months of 2004, plaintiff's business operated at a profit of \$20,000 to \$30,000, which is approximately what it earned in preceding years.

#### OPINION

Wis. Stat. § 32.10 allows a person to obtain just compensation if his property has been taken by a condemnation authority without condemnation proceedings. Plaintiff contends that his property has been "taken," because its value as a place to operate his business has diminished. Unfortunately for plaintiff, Wisconsin law does not recognize "mere consequential damage to property resulting from governmental action." Howell Plaza, Inc. v. State Highway Commn., 66 Wis. 2d 720, 725, 226 N.W.2d 185, 188 (1975). An actionable taking requires either an actual physical occupation by the condemning authority or a restriction on the use of the property that "deprives the owner of all, or substantially all of the beneficial use of his property." Id. at 726, 185 N.W.2d at 188.

Plaintiff does not deny that it is his burden to show that he has been deprived of all

or substantially all of the beneficial use of his property. He argues that this is exactly what he has suffered because, he alleges, customers and suppliers are frequently cut off from access to his building when trains block the railroad crossings, visitors to his business feel as if they are experiencing an earthquake when a train goes by and his shop is exposed to dust, fumes and debris thrown up by passing trains. Although the dust, inconvenience and noise are unpleasant impediments to the shop's operation, they fall far short of a taking. Howell Plaza, 66 Wis. 2d at 726-27, 185 N.W.2d at 188 (observing that taking requires more than impairment of value of farm from noxious odors from municipal sewerage disposal plant, or partial obstruction of ingress to and egress from plaintiff's property or obstruction of view from property). Plaintiff can continue his operations by taking precautions such as painting vehicles inside and mixing paint when trains are not passing by. He does not offer any evidence that such precautions are unusual for persons with businesses located near railroad tracks; common experience would suggest that they are not. Anyone who has traveled by train or spent time in downtown Chicago has observed innumerable businesses located in close proximity to busy railroad tracks, including those of the El. More to the point, plaintiff has not shown that he has had to shut down his business or lay off employees or that he is no longer able to operate at a profit.

Plaintiff has adduced no evidence of any actual physical possession of his property or of a deprivation of substantially all of the property's beneficial uses. Therefore, defendant

is entitled to summary judgment on plaintiff's claim of inverse condemnation.

### B. Nuisance

Defendant contends that plaintiff's nuisance claim is preempted by the Interstate Commerce Commission Termination Act of 1995. Plaintiff disputes this contention, arguing that he is not trying to apply Wisconsin law to tracks or railroad operations but merely seeking compensation for the nuisance created by the actions taken by the railroad.

The ICC Termination Act amended and recodified the Interstate Commerce Act, which regulated railroads. In the Act, Congress replaced the Interstate Commerce Commission with a new Surface Transportation Board and gave it exclusive jurisdiction over rail transportation. 49 U.S.C. § 10101. 49 U.S.C. § 10501(b) specifies that the board has exclusive jurisdiction over transportation by rail carriers and remedies with respect to rates, classifications, rules, practices, routes, services and facilities of such carriers and "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." Section 10501(b) ends with this provision:

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.

This section preempts Wisconsin nuisance law *expressly*, when an effort is made to

apply the law to tracks used in providing rail transportation service; it preempts it under the principle of *field preemption*, which is applicable when either Congress's regulation of a field or the federal interest in a matter is so pervasive that the court can infer an intent to occupy the entire field; and it preempts it under the principle of *conflict preemption*, which applies when the application of state law would frustrate the objectives of Congress in enacting a particular law.

Although the parties are not arguing about a Wisconsin regulation intended to apply specifically to railroads, they are arguing about a state law that plaintiff wants to use to affect the conduct of a railroad, by causing the railroad either to stop running its trains at 40 mph on the bypass track or requiring it to reimburse plaintiff for any damage attributable to the trains' passage. Allowing plaintiff to obtain a monetary or injunctive remedy by application of the state's nuisance law to defendant's actions is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations. In either case, the effect would be the same. Defendant would be restricted in the use of its property, in derogation of the ICC Termination Act. Friberg v. Kansas City Southern Ry. Co., 267 F.3d 439, 444 (5th Cir. 2001) (holding that Texas could not regulate length of time train could block crossing and that plaintiffs could not assert common law claim of negligence against railroad for blocking crossings and interfering with traffic to their nursery; ICC Termination Act preempts state statute as well as plaintiffs' common law claim); see also City of Auburn



v. United States, 154 F.3d 1025 (9th Cir. 1998) (holding that plaintiffs City of Auburn and King County could not enforce zoning ordinances or land use and environmental regulations against railroad to prevent it from constructing facilities on existing rail line).

Defendant's motion for partial summary judgment will be granted as to plaintiff's claim of nuisance.

ORDER

IT IS ORDERED that defendant Wisconsin Central Ltd.'s motion for partial summary judgment on plaintiff David A. Suchon's claims of inverse condemnation and nuisance is GRANTED.

Entered this 23rd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge