

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

300655
ENTERED
Office of Proceedings
May 22, 2020
Part of Public Record

STB Docket No. FD 36408

LEE ROY HAYNES -- PETITION FOR DECLARATORY ORDER

Pursuant to 4 U.S.C. §554(e) and 49 U.S.C. §721, Lee Roy Haynes, an individual, (“Petitioner” or “Haynes”) hereby petitions the Surface Transportation Board (“Board” or “STB”) for an order declaring that his claims under Texas law alleging he suffered severe injuries because of Union Pacific Railroad Company’s (“Union Pacific”) unsafe design, construction, maintenance and operation of a rail crossing are not federally preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), specifically 49 U.S.C. § 10501(b). Rather, because Petitioner’s claims are rail safety-related claims, any questions of whether Petitioner’s state law tort claims against Union Pacific are federally preempted are governed by what is cognizable under 49 U.S.C. §20106(b).¹ Plaintiff believes his claims are not preempted by §20106(b).

¹ The applicable provisions of 49 U.S.C. §20106(b) state: (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

I.
INTRODUCTION AND FACTUAL BACKGROUND

A. Identity of Petitioner and Description of the Collision that Prompted the State Court Lawsuit

Petitioner is an individual whose address is 9726 Winfield, Houston, Texas 77050. On September 13, 2013, Petitioner was operating a tractor pulling a low-boy type trailer. He had been sent by his employer to pick up a piece of equipment. Haynes was attempting to cross a Union Pacific main line using a private road crossing which was part of a common easement benefitting properties owned by Burnett Forestry LLC, Windy McMichael, Gayla Jansen and Jared Jansen (“the Property Owners”).² There were no warning signs of the danger presented by the condition of the railroad crossing and Haynes had not been personally warned of the hazard and danger presented by the crossing.

Haynes’ trailer became stuck on the hump-type crossing as a result of the defective design, and/or construction and/or maintenance of the crossing and/or the roadway on one or each side of the actual railroad crossing. While Haynes attempted to pull the trailer over the crossing, a Union Pacific Railroad Company train collided with the tractor-trailer. Haynes was unaware of the impending collision until he heard the train horn sound immediately before impact. As a direct and proximate cause of the negligence of Union Pacific, Haynes sustained injuries which have

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)

² All of the Property Owners were original defendants in the Texas state court suit along with Union Pacific and the engineer and conductor of the train; however, all of the Property owners have now resolved the claims against them and have been dismissed from the suit. The engineer and conductor were voluntarily non-suited by Petitioner, leaving only Union Pacific as a defendant in the Texas state court suit.

required extensive medical treatment and caused him to be unable to work resulting in lost earnings and a loss of earning capacity.

The railroad crossing was a common easement for all the non-railroad defendants. Union Pacific constructed the crossing prior to 1970, and is believed to own the crossing; however, Union Pacific has neither admitted nor denied ownership in the state court proceeding filed by Haynes to recover his damages from the collision. Regardless, Union Pacific's right-of-way for its main line track extends 50 feet in length out from the center line of the tracks, on each side of the road crossing. When it built the crossing Union Pacific intentionally built it as a "hump" type crossing, and so it had actual knowledge of the dangers presented by such crossings, particular that low clearance vehicles can become high centered and stuck on the crossing. However, no warning sign was present to warn Petitioner.

B. Status of Petitioner's State Court Case

On September 15, 2015 Petitioner filed his original complaint in the District Court of the 189th District of Harris County, Texas against Union Pacific and the Property Owners seeking damages for his injuries and the consequences of his tractor trailer being struck by UP's train. All of Petitioner's claims before the state court against UP are state based tort claims based on allegations that the UP tracks and the crossing are unsafe, and that the unsafe condition caused Petitioner's injuries.³

Union Pacific filed its original answer in the Texas state court case on October 1, 2015, and included within it an affirmative defense that generally asserted Petitioner's state tort law claims were preempted by the Interstate Commerce Commission Termination Act of 1995

³ Petitioner's active complaint in the Texas state court case is attached as Exhibit 1.

(“ICCTA”), the Federal Rail Safety Act of 1970 (“FRSA”) and other federal statutes.⁴ Petitioner moved for partial summary judgment dismissing Union Pacific’s federal pre-emption defenses, and the trial court granted his motion an order dated April 25, 2019.⁵ Consequently, the affirmative defenses of federal preemption were struck from Union Pacific’s answer as the parties prepared for trial.

However, Union Pacific did not accept the judge’s dismissal of Union Pacific’s preemption affirmative defenses, and on January 28, 2020, prior to the scheduled start of the state court trial, Union Pacific took the unusual procedural step of filing a Motion to Exclude Evidence Relating to Design, Construction, and Maintenance of Crossing, Motion *in Limine*, and Motion to Vacate (“Pre-Trial Motions”). In its Pre-Trial Motions, Union Pacific again presented its allegation that the Petitioner’s tort law claims were preempted by 49 U.S.C. §10501(b) to the extent they alleged his injuries were due to Union Pacific’s negligence concerning the design, construction, and maintenance of the crossing. Notably, Union Pacific’s Pre-Trial Motions relied exclusively on §10501(b) for its claim of federal preemption and made no mention of the FRSA or other federal statutes upon which its affirmative defenses of preemption were originally based in its initial answer.

The case was called to trial on February 5, 2020. During a pre-trial conference the court considered Union Pacific’s Pre-Trial Motions, and ruled in favor of Union Pacific’s request in its Motion *In Limine* that evidence concerning the design, construction, or maintenance of the track could be excluded from the trial “based on pre-emption.”⁶ However, the court did not expressly

⁴ Union Pacific’s Original Answer is attached as Exhibit 2.

⁵ The Order is attached as Exhibit 3.

⁶ See Exhibit 4, the court’s February 20, 2020 Order at (unnumbered) page 2.

overrule its April 25, 2019 decision striking Union Pacific’s preemption affirmative defenses that Petitioner’s claims were preempted by 49 U.S.C. §10501(b). Instead, the Court delayed the start of the trial and permitted the parties to submit supplemental briefs on the preemption issue. Union Pacific subsequently submitted its Supplemental Briefing on Preemption under the Interstate Commerce Commission Termination Act, Motion for Reconsideration, and for Summary Judgement (“Supplemental Brief”) on February 28, 2020, which in part sought reconsideration of the April 25, 2019 order and also moved for summary judgment on all of Haynes’ negligence claims based exclusively on ICCTA preemption.⁷ Petitioner’s reply is due on or before June 20, 2020. The hearing on UP’s Motion for Summary Judgment and Motion to Reconsider (of the court’s order of April 25, 2019) is currently scheduled for July 27, 2020. Consequently, despite the April 25, 2019 order granting Petitioner’s motion to dismiss Union Pacific’s affirmative defenses of preemption, and despite issuing an order that inconsistently restricted certain evidence “based on pre-emption,” the State court has yet to definitively rule on the question of whether Petitioner’s state law tort claims are preempted by 49 U.S.C. §10501(b). Moreover, the court has reset the trial date to January 4, 2021.

Union Pacific’s Supplemental Brief relies exclusively on §10501(b) to assert Petitioners’ state law tort law claims are federally preempted, but Union Pacific makes no mention of recent decisions issued by the Board where the Board confirmed prior case precedent that questions about federal preemption of “safety-related” state tort law claims resulting from rail accidents at road crossings are *not* governed by §10501(b), but rather are governed by what is cognizable under 49 U.S.C. § 20106(b) of FRSA. STB Docket FD 35167, *Jimmy Lee Waneck and Starr Swearingen*

⁷ See Exhibit 5. Indeed, Union Pacific informed the Court that “it is no longer pursuing [the] defense [of FRSA preemption].” Supplemental Brief at 8, note 12.

Waneck FD 36167 (served May 25, 2018)(*Waneck I*); STB *recon. denied* (served October 31, 2018)(*Waneck II*). Moreover, Union Pacific further clouded the applicable legal principles governing federal preemption by citing only to the March 29, 2018 decision issued in the federal district court case associated with the *Waneck*.⁸ In that decision, *issued prior to both Waneck I* and *Waneck II*, the district court judge wrongly found for CSX on the §10501(b) preemption question.

Petitioner intends to inform the state court of these and other deficiencies in Union Pacific's Supplemental Brief when Petitioner files his reply on or before June 20, 2020. However, Petitioner believes that the state court, which has rendered inconsistent rulings on the preemption questions to date and is still seeking input from the parties, would greatly benefit from a declaration by the Board of the applicable principles governing the respective roles of §10501(b) and §20106(b) in resolving preemption issues that are raised by railroad defendants in response to safety-related state tort law claims arising out of train crossing accidents. At a minimum, the Board should provide the state court with informal guidance on the issue in order to assist its deliberations on the preemption issue should it still desire to do so. To this end, contemporaneously with the filing of this Petition, Hayne is filing a Motion to Abate the Texas state court proceeding pending the Board's consideration of this Petition, and Petitioner is also formally asking the state court to refer to the Board the specific question of whether any federal preemption questions about Petitioner's claims are not to be governed by §10501(b) but rather are to be governed by what is cognizable under §20106(b). Even if the court denies these requests and retains jurisdiction over

⁸ *Waneck v. CSX Transportation, Inc.*, C.A. No. 1:17-cv-00106, 2018 WL 1546373 (S.D. Miss. Mar. 29, 2018).

the preemption question, the STB should provide the court with “purely advisory” guidance on this important jurisdictional question. *See Waneck II* at 4.

II. ARGUMENT AND REQUEST FOR DECLARATORY RELIEF

Pursuant to 5 U.S.C. § 554(c) and 49 U.S.C. §721, the Board has discretion to grant a request for a declaratory order to terminate a controversy or remove uncertainty in a court case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine if it will issue a declaratory order. FD No. 35792, *Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually-Petition for Declaratory Order* (Served October 31, 2014) at 3. In the present matter there is significant controversy over whether the state tort law claims of the Petitioner are preempted by 49 U.S.C. § 10501(b) or whether they are preempted should be governed by 49 U.S.C. § 20106(b).

Haynes’s state tort claims include allegations of negligence in the design, construction and maintenance of the rail crossing which together created a severe incline or hump at the crossing that was unsafe and caused his truck and trailer to become high-centered on the crossing. The allegedly unsafe crossing ultimately resulted in Haynes’ tractor being struck by a train operated by Union Pacific and him sustaining severe injuries. The facts of this case are therefore very similar to those recently examined by the Board in *Waneck I* and *Waneck II*. In the *Waneck* case, the petitioners were involved in a collision between a train operated by CSX Transportation and a vehicle (a tour bus) at a “humped” rail crossing after the tour bus became stuck on the crossing hump. The petitioners and many other affected individuals (most of whom were passengers on the bus or deceased passenger’s representatives) filed state tort claims against CSX alleging their

injuries (or death) were caused by the negligence in the construction, maintenance, and operation of the crossing. The CSX removed the cases to federal district court. There, like UP in this case, CSX argued that all of petitioners' state tort law claims were completely preempted by 49 U.S.C. §10501(b). CSX also argued that all the state tort law claims were completely preempted by §20106(b) of the FRSA. Petitioners in *Wancek* filed a petition for declaratory order with the Board seeking guidance on the interplay between §10501(b) and §20106(b). After the petition was filed but before the issuance of *Waneck I* the district court issued its March 2018 ruling that claims concerning negligent inspection, maintenance, and repair of the crossing by CSX were preempted by §10501(b). This Board subsequently disagreed with the district court, stating succinctly in a decision intended to provide guidance to the court on reconsideration, or to an appeals court:

Petitioner's claims here are rail safety-related claims, stemming from a train's collision with a bus that resulted in death and injury. Thus, like the claims at issue in *Tyrrell* any federal preemption questions concerning such claims are govern by what is cognizable under FRSA, including §20106 (b), not §10501(b).

Waneck I at 4 (citing *Tyrrell v. Norfolk Southern Railway*, 248 F.3d 517, 522 (6th Cir. 2001)). CSX sought reconsideration of the *Waneck I* decision and asked the Board to withdraw the guidance decision or "to clarify that preemption under §10501(b) applies to state law claims such as those brought by Petitioners." *Waneck II* at 1. The Board declined to take either action, and instead upheld and expanded on its initial ruling. Specifically, in denying the petition for reconsideration the Board first rejected the argument that it could not issue an advisory opinion because the district court had preliminarily ruled on the preemption issues, pointing out that the ruling was subject to appeal and/or reconsideration. The Board then explained its prior decision that "preemption

questions concerning safety-related claims are governed by §20106(b) and not §10501(b).”

Waneck II at 5. Specifically,

In 20106, Congress delineated which types of state laws, regulations, and tort claims are preempted by FRSA and which are saved from FRSA preemption. However, because the ICCTA preemption provision can be read to cover virtually everything related to rail transportation and because rail safety-related claims will almost always touch on rail transportation and operations, interpreting ICCTA preemption to apply generally to safety regulations and safety-related claims would amount to a repeal by implication of the savings provision of FRSA.

Id., citing *Tyrrell*, *supra*,⁹ and *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 106-08 (2d Cir. 2009).

In direct conflict with the Board’s rulings in *Waneck I* and *Waneck II*, Union Pacific has asserted that ICCTA completely preempts Haynes’s state law negligence claims that his injuries were due to Union Pacific’s negligence in designing, constructing and maintaining the crossing.

⁹ The *Tyrrell* case is particularly instructive. In that case the Sixth Circuit considered the interplay between the FRSA and §10501(b). There, the railroad argued that state law claims prescribing the clearance between tracks in a rail switching yard were preempted by §10501(b). The federal district court agreed and granted summary judgment favor of the railroad. *Tyrrell*, together with an *amici curiae* filed by this Board, argued that the state regulation was one dealing with rail safety therefore requiring analysis under the FRSA’s preemption provisions contained in §20106. In reversing the summary judgment in favor of the railroad the Sixth Circuit relied in part on the STB’s guidance in explaining why ICCTA does not preempt state law claims regarding rail safety that only tangentially touch on economic areas regulated by the ICCTA, stating “Unfortunately in ruling on the motion for summary judgment, the district court did not have the benefit of federal agency input regarding the jurisdictional relationship between the ICCTA and FRSA. As result of this critical handicap, it did not achieve a quote ‘reasoned understanding of the way in which Congress intended the [ICCTA] and its surrounding regulatory scheme’ to affect FRSA in its regulations. (Citation omitted). Rather, the district court’s decision erroneously preempts state rail safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA. As a result, this interpretation of the ICCTA implicitly repeals FRSA’s first saving clause. While the STB must adhere to federal policies encouraging ‘safe and suitable working conditions in the railroad industry,’ the ICCTA and its legislative history contained no evidence that Congress intended for the STP to supplant the FRA’s authority over rail safety. 49 U.S.C. §10101 (11). Rather, the agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the ICCTA and FRSA to be construed *in para materia*.” 248 F.3d at 522-523. (emphasis original).

Supplemental Brief at 2-3. Tellingly, all but one of the cases cited by Union Pacific in support of §10501(b) preemption in its Supplemental Brief predate *Waneck I* and *Waneck II*. The one case that post-dates *Waneck I* (but not *Waneck II*) is easily distinguished. In *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W. 2d 273 (Iowa 2018), Supplemental Brief at 5, the state court claims were not safety-related claims, and they dealt with property loss through flooding, not negligence resulting in an accident that caused injuries to persons. *Id.* at 277.

Due to the similarities of the claims in *Waneck* and the claims of Petitioner, and the fact that the application of §10501(b) to Petitioner's state law claims is still pending before the court, which has been asked to refer the question to this Board, this matter is particularly suited for a declaratory order. A declaratory order from the Board on this question will also serve to establish uniformity and prevent inconsistent decisions by various courts on the application of the interplay of preemption under the ICCTA and the FRSA. Finally, the Board's participation in this matter is essential to avoid a decision on federal preemption by the Texas state court that would be inconsistent with the *Waneck* decisions and the precedent cited therein.

In arguing that §10501(b) preempts all of Petitioner's state law claims Union Pacific would have the state court ignore the purpose of the 2007 amendment to the FRSA that resulted in §20106(b), which was to correct the harsh interpretations of that section which essentially prohibited individuals injured or killed by railroad negligence to obtain any relief under state tort laws. The interpretation of §10501(b) urged by Union Pacific that all state tort claims are automatically preempted by it would be contrary to the clear intent of that 2007 legislation.

IV. **CONCLUSION**

Based on all the foregoing, Petitioner Lee Roy Haynes submits that there is good cause for the Board to exercise its discretion and issue a declaratory order that resolves the current uncertainty over federal preemption in the Texas state court litigation as set out in this Petition. The uncertainty has been fostered by Union Pacific through its failure to advise the Texas state court of the Board's decisions in Waneck and by its failure to address with the court the interplay between §10501(b) and §20106(b). The failure of the Board to provide guidance to the state court will likely result in significant delay of the Texas state court litigation, multiple appeals and unnecessary cost. In summary, Petitioner Lee Roy Haynes seeks an order from the Board declaring: That §10501(b) does not preempt his rail safety-related claims under state tort laws, and that any questions of whether his rail safety-related claims are federally preempted are to be considered by examining whether they fall within the categories of state tort law claims preserved by 49 U. S. C. §20106(b).

If the Board decides in its discretion to decline to grant this Petition and issue a declaratory order, then the Petitioner asks that the decision denying the Petition nevertheless provide guidance to the parties and to the court on this question.

Respectfully submitted,



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May 22, 2022

EXHIBIT 1

4. Defendant Burnett Forestry LLC is a Texas limited liability company and has previously been served and answered herein and therefore service of the document can be had on its attorneys of record: Thomas J. Smith, Kelly C. Hartmann, Ryan B. Brown, GALLOWAY, JOHNSON, TOMPKINS BURR & SMITH, 1301 McKinney, Suite 1400, Houston, Texas 77010

5. Defendant Windy McMichael is an individual who is a resident of Texas, and has previously been served and answered herein and therefore service of the document can be had on her attorneys of record: John M. Causey, HOPE & CAUSEY, P.C., P. O. Box 3188, Conroe, Texas 77305-3188.

6. Defendant Gayla Jansen is an individual who is a resident of Texas and has previously been served and answered herein and therefore service of the document can be had on her attorneys of record: Jay A. McKendree, Fanaff & Baldwin, P.O. Box 258829, Oklahoma City, OK 73125-8829.

7. Defendant Jared Jansen is an individual who is a resident of Texas and has previously been served and answered herein and therefore service of the document can be had on his attorneys of record: Jay A. McKendree, Fanaff & Baldwin, P.O. Box 258829, Oklahoma City, OK 73125-8829.

JURISDICTION AND VENUE

8. The subject matter in controversy is within the jurisdictional limits of this court.

9. This court has jurisdiction over the parties because Defendants are Texas residents.

10. Venue in Harris County is proper in this cause under Section 15.002 of the Texas Civil Practice and Remedies Code because Defendants reside in Harris County.

FACTS

11. This lawsuit concerns a collision between a train and a tractor-trailer at a private railroad crossing off of FM 1008 in Dayton, Texas.

12. On September 13, 2013, Plaintiff was operating a tractor pulling a low-boy trailer. Plaintiff had been sent by his employer to pick up a piece of equipment. Plaintiff was attempting to cross a private

railroad crossing which was owned and/or part of a common easement benefitting properties owned by Defendants Burnett Forestry LLC, Windy McMichael, Gayla Jansen and Jared Jansen. The trailer became stuck on the crossing as a result of the defective design, and/or construction and/or maintenance of the crossing and/or the roadway on one or each side of the actual railroad crossing. There were no warning signs of the danger presented by the condition of the railroad crossing and Plaintiff had not been personally warned of the hazard and danger presented by the crossing. While attempting to pull the trailer over the crossing, a Union Pacific train operated by Rufus W. Richmond and Clyde D. Williams, Jr. collided with the tractor-trailer. Plaintiff was unaware of the impending collision until he heard the train horn sound immediately before impact. Plaintiff had no opportunity to exit his vehicle before the collision. The railroad crossing was a common easement for all the non-railroad defendants. Defendant Union Pacific Railroad Company owned the crossing and 50 feet of the roadway out from the center line of the crossing on each side of the crossing and/or had a right of way easement 50 feet of the roadway out from the center line of the crossing on each side of the crossing. Union Pacific built the private crossing in approximately January 1, 1970. Union Pacific intentionally built the private crossing as a "hump" type crossing. At the time it constructed the "hump" type crossing Union Pacific had actual knowledge of the dangers presented by hump crossing and in particular that low clearance vehicles such as Plaintiff was driving can become high centered and stuck on the crossing. Despite Union Pacific's knowledge it did not warn of the danger or make the crossing safe to cross for low clearance vehicles. No warning sign was present to warn Plaintiff of the nature of the crossing and specifically that it was a low ground clearance crossing. This is in spite of the fact that Union Pacific had knowledge of the danger presented by the private crossing and that it was a low clearance crossing. Such knowledge came at least as early as July 1, 2010 and/or October 7, 2010 when a similar incident occurred at the very same crossing. Further under the law it is presumed that Union Pacific had knowledge of the dangers of the crossing since it created the crossing and the dangers presented by the crossing.

13. As a direct and proximate cause of each Defendants' negligence, Plaintiff sustained injuries which have required extensive medical treatment and caused him to be unable to work resulting in lost earnings and a loss of earning capacity.

NEGLIGENCE

14. Upon the trial of this case, the evidence will show that the collision in question and Plaintiff's resulting damages were proximately caused by the negligence generally of Defendants.

15. Pleading in the alternative and without waiving the forgoing general allegation of negligence, Plaintiff would allege that Defendant, Union Pacific Railroad Company was negligent generally and that such negligence was a proximate cause of the collision made the basis of this claim and Plaintiff's injuries and damages. Pleading in the alternative and without waiving the forgoing allegations of negligence generally, Plaintiff would show that Defendant, Union Pacific Railroad Company was negligent in one or more of the following ways and that they violated the duty which they owed Plaintiff to exercise ordinary care in the design, construction and maintenance of the rail crossing and adjacent roadway, including but not limited to its 50 foot right of way easement in one or more of the following particulars:

- A. Failing to provide proper notice and warning of the steep grade at the crossing and the potential to a "high center" a vehicle, such as Plaintiff was driving;
- B. in failing to properly design the railroad crossing and adjacent roadway;
- C. in failing to properly construct the railroad crossing and adjacent roadway;
- D. in failing to properly maintain the railroad crossing and/or adjacent roadway, including the private roadway within its 50 foot easements right of way on both sides of the crossing;
- E. in failing to provide any warning to Plaintiff and the motoring public that this was a low clearance crossing and the hazard thereby presented by the crossing;

- F. in failing to provide any warning to the adjacent landowners, Burnett Forestry LLC, Steve McMichael, Windy McMichael, Gayla Jansen, and Jared Jansen that the crossing was a low clearance crossing;
- G. in failing to contact the appropriate governmental agency about posting low clearance signs and/or No Trucks signs on the highway in advance of the private roadway;
- H. in failing to post appropriate warning signs, including but not limited to a low clearance sign within its right of way at the private road crossing, especially on the highway entrance side of the crossing;
- I. in failing to post appropriate warning signs, including but not limited to a No Trucks sign within its right of way at the private road crossing, especially on the highway entrance side of the crossing;
- J. in failing to post the Union Pacific sign, generally blue in color, with the emergency number on it to call to report a stalled vehicle blocking the crossing at proper locations on both sides of the crossing;
- K. in building the crossing as a “hump” type crossing;
- L. in building the crossing as a “hump” type crossing with knowledge of the dangers presented by “hump” type crossing and then not providing adequate warnings at the crossing of the dangers presented by the crossing especially that it was a low clearance crossing and/or working with the appropriate governmental agency to provide advance warnings of the dangers presented by the crossing on the highway adjacent to the crossing;
- M. in failing to properly maintain its easement right of way of 50 foot on both sides of the crossing.

16. Plaintiff would allege Defendants, Burnett Forestry LLC, Steve McMichael, Windy McMichael, Gayla Jansen, and Jared Jansen failed to properly design, construct, and/or maintain the

roadway at the crossing and/or failed to warn of the dangerous condition presented by the private railroad crossing and such other acts of negligence which may become known through discovery. Defendants, Burnett Forestry LLC, Windy McMichael, Gayla Jansen, and Jared Jansen had an easement to use the roadway on both sides of the crossing and the crossing and therefore each had a duty to maintain the easement. Their failure to properly design, construct and/or maintain the easement in a safe condition was negligence and a proximate cause of the incident in question and Plaintiff's injuries and damages; further, their failure to warn of the hazard presented by the crossing and especially that it was a low clearance crossing was negligence and a proximate cause of the collision in question and Plaintiff's injuries and damages.

ULTRA-HAZARDOUS CROSSING

17. Plaintiff would allege that this crossing where the incident occurred was ultra-hazardous and dangerous due to the steep grade and the potential for a "high centering" a vehicle and due to the complete lack of warning signs or devices regarding the danger of the crossing.

UNSAFE CONDITION OF THE PREMISES

18. As the owner and or occupier of the property where the incident took place, Defendant UNION PACIFIC RAILROAD COMPANY owed Plaintiff, a duty to inspect the premises and maintain them in a reasonably safe manner. Defendant UNION PACIFIC RAILROAD COMPANY was negligent in maintaining the premises in an unsafe condition and Plaintiff would show that Defendant UNION PACIFIC RAILROAD COMPANY had actual or constructive knowledge of the condition of the premises and, in particular, the condition of crossing, by and through its agents, servants and employees and/or prior incidents. In addition, Plaintiff would show that Defendant UNION PACIFIC RAILROAD COMPANY had actual and/or constructive knowledge and notice of the danger and hazard presented by the crossing and adjacent roadway as a near identical incident had occurred on or about either July 1, 2010 and/or October 7, 2010 when a semi-truck hauling a house had become stuck on the railroad crossing. Also,

Plaintiff would show that Defendant UNION PACIFIC RAILROAD COMPANY created the danger and is presumed to have knowledge of it. Plaintiff would further show that the condition causing this incident and his injuries posed an unreasonable risk of harm to Plaintiff making the crossing otherwise unreasonably dangerous. Plaintiff would show that Defendant UNION PACIFIC RAILROAD COMPANY had sufficient advance knowledge of the dangers and hazards present by the condition of the crossing and adjacent roadway so as to have sufficient time to correct the dangers and hazards presented by the crossing and adjacent roadway or to warn Plaintiff and the public of the dangerous condition of the crossing and the dangers and hazards presented by the crossing. Plaintiff would further show that Defendant UNION PACIFIC RAILROAD COMPANY, acting through their agents, servants and employees did not exercise reasonable care to reduce or eliminate the risk and further, that Defendant UNION PACIFIC RAILROAD COMPANY failed to set out any warning signs or in any other fashion warn Plaintiff of the hazard that would be presented by the condition of the crossing and roadway. In effect this was a humped crossing and a low ground clearance crossing yet Defendant UNION PACIFIC RAILROAD COMPANY failed to install the proper warning sign to provide notice to Plaintiff of the condition the crossing and roadway. The following sign(s) or one similar should have been installed:



Plaintiff would show that Defendant UNION PACIFIC RAILROAD COMPANY's breach of its duties owed to Plaintiff were a proximate cause of the incident and Plaintiff's injuries and damages. Plaintiff asserts he was an invitee when on the premises and crossing the tracks as he was specifically invited onto the roadway and private crossing by Defendant Gayle Jansen and at her request to pick up a piece of equipment. Defendant UNION PACIFIC RAILROAD COMPANY asserts that Plaintiff was a licensee. No matter, Defendant UNION PACIFIC RAILROAD COMPANY is still liable to Plaintiff as it was the owner and/or possessor of the property, railroad crossing and adjacent roadway where Plaintiff became stuck and this incident happened; Defendant UNION PACIFIC RAILROAD COMPANY had actual knowledge of the condition on the premises that posed an unreasonable risk of harm; Plaintiff did not have actual knowledge of the danger; the danger was not open and obvious; and Defendant UNION PACIFIC RAILROAD COMPANY failed to make the condition reasonably safe and failed to warn Plaintiff of the unsafe condition; and Defendant UNION PACIFIC RAILROAD COMPANY's breach was a proximate cause of Plaintiff's injuries and damages.

20. Pleading in the alternative and without waiving the forgoing allegations of negligence and without waiving same, Plaintiff would show that Defendants Gayle Jansen and/or Jared Jansen were negligent in not notifying Plaintiff that he should not cross the railroad crossing with his truck but rather he should stop his truck on the shoulder of the adjacent highway and bring the piece of equipment out from their property to the truck for loading. Defendant Jared Jansen has testified had he been present he would have done so but he was not present as he was in jail in Conroe, Texas on a DWI charge.

21. Pleading in the alternative and without waiving the forgoing allegations of negligence and without waiving same, Plaintiff would show that Defendant Gayle Jansen was negligent in leading Plaintiff over the crossing when she knew or should have known it was unsafe to do so.

DAMAGES

22. Upon trial of this case, it will be shown that Plaintiff was caused to sustain injuries and damages as a result of Defendants' negligence. Plaintiff would respectfully request the Court and Jury to determine the amount of the loss Plaintiff has incurred in the past and will incur in the future, not only from a financial standpoint, but also in terms of good health and freedom from pain and worry. Alternatively, and without waiving the foregoing allegations of injuries and damages, Plaintiff would show that if he was suffering from any bodily infirmity prior to the date of this incident that he same was not disabling nor preventing him from work or his activities of daily life, but as a result of the incident and the injuries Plaintiff suffered in the incident any preexisting matter was aggravated, accelerated and made worse by the injuries Plaintiff received in this incident.

23. There are certain elements of damages, provided by law, that Plaintiff is entitled to have the Jury in this case separately consider to determine the sum of money for each element that will fairly and reasonably compensate Plaintiff for his injuries, damages, and losses incurred and to be incurred. Those elements of damages, both past and future are as follows:

- A. The physical pain that Lee Roy Haynes suffered from the date of the incident and is likely to suffer in the future beyond the trial of this matter;
- B. The mental anguish and emotional distress that Lee Roy Haynes has suffered from the date of the incident and is likely to suffer in the future beyond the trial of this matter;
- C. The amount of reasonable medical expenses necessarily incurred in the past, and likely to be incurred in the future beyond the trial of this matter, for the treatment of Lee Roy Haynes' injuries;
- D. The damages, both past and future beyond the trial of this matter, resulting from the physical impairment suffered by Lee Roy Haynes and the resulting inability to do those tasks and services that Lee Roy Haynes ordinarily would have been able to perform;
- E. The physical disfigurement that Lee Roy Haynes has suffered from the date of the incident and is likely to suffer in the future beyond the trial of this matter; and
- F. The loss of wages and wage-earning capacity that Lee Roy Haynes has suffered in the past from the date of the incident to the time of trial and is likely to suffer in the future beyond the trial of this matter.

24. Because of all the above and foregoing, Plaintiff, Lee Roy Haynes, has been damaged and will continue to be damaged in a sum within the jurisdictional limits of this Court. Pursuant to TRCP 47 Plaintiff seeks monetary relief over \$1,000,000.00.

25. The damages sustained by the Plaintiff were aggravated by the kind of malice for which the law allows the imposition of exemplary damages. Defendant UNION PACIFIC RAILROAD COMPANY's conduct, when viewed objectively from the standpoint of Defendant UNION PACIFIC RAILROAD COMPANY, involved an extreme degree of risk, considering the possibility and magnitude of the potential harm to others, and Defendant UNION PACIFIC RAILROAD COMPANY and its employees were actually, subjectively aware of the risk involved, but nonetheless proceeded with conscious disregard to the rights, welfare and safety of others. Plaintiff therefore, seeks exemplary damages.

JURY DEMAND

26. Plaintiff hereby requests a jury trial of this matter.

REQUESTS FOR DISCLOSURE

27. Pursuant to Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose the information or material described in Rule 194.2 if they have not previously done so.

PRODUCTION OF DOCUMENTS SELF-AUTHENTICATING

28. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiff hereby gives actual notice that any and all documents produced by any party will be used at any pretrial proceeding and/or at the trial of this matter.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear and answer herein, and that after trial by jury, Plaintiff have and recover a judgment against the Defendants, jointly and severally, actual damages as set forth above, exemplary damages against Defendant UNION

PACIFIC RAILROAD COMPANY as well as pre-judgment interest and post-judgment interest at the legal rate on the appropriate elements of damages for the time periods permitted by law, costs of court, and such other and further relief, both at law and at equity, to which Plaintiff may show himself justly entitled.

Respectfully submitted,

BRANN SULLIVAN TRIAL LAWERS, PLLC

/s/ Scott R. Brann

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Scott@BSTrial.com

CERTIFICATE OF SERVICE

I certify that on this 31st day of August 2018, a true and correct copy of the foregoing document has been forwarded via E-Mail to the following known counsel of record according to the Texas Rules of Civil Procedure:

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/s/ Scott R. Brann
Scott R. Brann

Unofficial Copy Office of Marilyn Burgess District Clerk

EXHIBIT 2

LEE ROY HAYNES	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
UNION PACIFIC RAILROAD COMPANY	§	
RUFUS W. RICHMOND, JR., CLYDE D.	§	
WILLIAM A/K/A CLYDE D. WILLIAMS, JR.,	§	
BURNETT FORESTRY LLC, STEVE	§	
McMICHAEL, WINDY McMICHAEL,	§	
GAYLA JANSEN, JEREMY JANSEN and	§	
JARED JANSEN	§	189 th JUDICIAL DISTRICT

**DEFENDANTS UNION PACIFIC RAILROAD COMPANY, RUFUS W. RICHMOND, JR.
AND CLYDE D. WILLIAM a/k/a CLYDE D. WILLIAMS, JR.'S
ORIGINAL ANSWER AND DEMAND FOR JURY TRIAL**

COMES NOW Defendants Union Pacific Railroad Company, Rufus W. Richmond, Jr. and Clyde D. William a/k/a Clyde D. Williams, Jr. ("Defendants"), and files this their Original Answer to claims brought against it by Plaintiff Lee Roy Haynes, and would show the following:

GENERAL DENIAL

1. Defendants generally deny pursuant to Rule 92 of the T.R.C.P. each and every, all and singular, of the allegations brought against them, and upon trial will demand strict proof thereof by a preponderance of the evidence.

AFFIRMATIVE DEFENSES

2. Defendants deny that any fault on their part or that of their employees caused the railroad grade crossing accident that occurred on September 13, 2013. Defendants would show the injuries and damages claimed by Lee Roy Haynes were

caused by his own negligence and that of others for whom the Defendants are not responsible.

3. Defendants would show that at the time of the accident there was a failure on the part of Haynes to exercise that degree of care which would have been exercised by an ordinarily prudent person under the same or similar circumstances, and such failure was a proximate cause and/or sole proximate cause and/or a producing cause and/or the sole producing cause and/or a cause in whole or in part of the accident made the basis of this suit. Defendants would show the negligence of Haynes included the following:

- a. Haynes failed to notify the railroad before he proceeded across the crossing to allow the railroad an adequate opportunity to stop train traffic in the event Haynes was unable to clear the crossing;
- b. Haynes failed to adequately determine whether the vertical clearance of the low boy trailer was adequate to allow him to cross the railroad crossing;
- c. Haynes failed to raise the low boy trailer to its maximum vertical clearance before he proceeded across the railroad crossing;
- d. Haynes drove his vehicle on the railroad crossing without having sufficient undercarriage clearance;
- e. Haynes failed to yield the right of way to the train;
- f. Haynes failed to keep a proper lookout for the presence of the oncoming train;
- g. Haynes failed to heed the warnings of the oncoming train;
- h. Haynes failed to take proper evasive action to avoid the accident;
- i. Haynes failed to get out of his vehicle; and
- j. Haynes stopped on the railroad tracks.

Defendants assert Haynes' negligence resulted in the alleged injuries to himself.

4. Additionally, Haynes' conduct constitutes negligence per se. Haynes acted in violation of applicable traffic laws, including but not limited to, §§ 545.251, 545.302, 545.255, and 545.427 of the Tex. Transp. Code. Haynes' violations of the statutory provisions were approximate cause of the accident.

5. Defendants would further show that Haynes violated § 545.251 of the Tex. Transp. Code, which violation was negligence per se. Section 545.251 states in pertinent part as follows:

§ 545.251. OBEDIENCE TO SIGNAL INDICATING APPROACH OF TRAIN

- (a) An operator approaching a railroad grade crossing shall stop not closer than 15 feet or farther than 50 feet from the nearest rail if:
 - (1) a clearly visible railroad signal warns of the approach of a railroad train;
 - (2) a crossing gate is lowered, or a flagger warns of the approach or passage of a train;
 - (3) a railroad engine approaching within approximately 1,500 feet of the highway crossing emits a signal audible from that distance and the engine is an immediate hazard because of its speed or proximity to the crossing;
 - (4) an approaching railroad train is plainly visible to the operator and is in hazardous proximity to the crossing; or
 - (5) the operator is required to stop by:
 - (A) other law;
 - (B) a rule adopted under a statute;

- (C) an official traffic-control device; or
 - (D) a traffic-control signal.
- (b) An operator of a vehicle required by Subsection (a) to stop shall remain stopped until permitted to proceed and it is safe to proceed.
- (c) An operator of a vehicle who approaches a railroad grade crossing equipped with railroad crossbuck signs without automatic, electric, or mechanical signal devices, crossing gates, or a flagger warning of the approach or passage of a train shall yield the right-of-way to a train in hazardous proximity to the crossing, and proceed at a speed that is reasonable for the existing conditions. If required for safety, the operator shall stop at a clearly marked stop line before the grade crossing or, if no stop line exists, not closer than 15 feet or farther than 50 feet from the nearest rail.
- (d) An operator commits an offense if the operator drives around, under, or through a crossing gate or a barrier at a railroad crossing while the gate or barrier is closed, being closed, or being opened.
- (e) In a prosecution under this section, proof that at the time of the offense a train was in hazardous proximity to the crossing and that the train was plainly visible to the operator is prima facie evidence that it was not safe for the operator to proceed.
- (f) An offense under this section is punishable by a fine of not less than \$50 or more than \$200.

6. Defendants would further show that Haynes violated § 545.302 of the Tex. Transp. Code, which violation was negligence per se. Section 545.302 states in pertinent part as follows:

§ 545.302. STOPPING, STANDING, OR PARKING PROHIBITED IN CERTAIN PLACES

- (a) An operator may not stop, stand, or park a vehicle:

(8) on a railroad track.

7. Defendants would further show that Haynes violated § 545.427 of the Tex. Transp. Code, which violation was negligence per se. Section 545.427 states in pertinent part as follows:

§ 545.427. OPERATION OF VEHICLE WITH INSUFFICIENT UNDERCARRIAGE CLEARANCE

- a. An operator may not drive on or cross a railroad grade crossing unless the vehicle being operated has sufficient undercarriage clearance.

8. Defendants would further show that Haynes violated § 545.255 of the Tex. Transp. Code, which violation was negligence per se. Section 545.255 states in pertinent part as follows:

§ 545.255. MOVING HEAVY EQUIPMENT AT RAILROAD GRADE CROSSINGS

- a. This section applies only to:
 - (1) a crawler-type tractor, steam shovel, derrick, or roller; and
 - (2) any other equipment or structure with:
 - (A) a normal operating speed of 10 miles per hour or less; or
 - (B) a vertical body or load clearance of less than one-half inch per foot of the distance between two adjacent axles or less than nine inches measured above the level surface of a roadway.
- b. An operator of a vehicle or equipment may not move on or across a track at a railroad grade crossing unless the operator has given notice to a station agent of the railroad and given the railroad reasonable time to provide proper protection at the crossing.

- c. To move a vehicle or equipment on or across a track at a railroad grade crossing, the operator:
 - (1) shall spot the vehicle or equipment not closer than 15 feet or farther than 50 feet from the nearest rail of the railroad;
 - (2) while stopped, shall listen and look in both directions along the track for an approaching train and for signals indicating the approach of a train; and
 - (3) may not proceed until it is safe to cross the track.

9. Defendants further allege by way of affirmative defense that the crossing where the accident occurred was a private crossing, and that consequently any duties imposed on Defendants by statutes or regulations that apply to public crossings cannot serve as the basis for any liability findings against it in this case because the crossing is a private crossing.

10. Defendants allege that under the Supremacy Clause of the U.S. Constitution, any claims against Defendants with respect to the construction, maintenance, and inspection of the railroad tracks at the crossing in question are preempted by Federal law, including the Interstate Commerce Commission Termination Act, (49 U.S.C. § 10101 *et seq.*, the Federal Rail Safety Act of 1970 (49 U.S.C. § 2010 *et seq.*) ("FRSA"), and the Highway Safety Act of 1973 (23 U.S.C. § 130, *et seq.*), as amended, and the regulations pursuant thereto, including but not limited to, regulations promulgated by the FRA, as well as case law applying such preemption.

11. Defendants further allege by way of affirmative defense that under the Supremacy Clause of the U.S. Constitution, any claims against Defendants with respect to the speed of the train at the time of the collision are preempted by Federal law, more specifically the Federal Rail Safety Act, including, but not limited to, those regulations embodied in 49 C.F.R. Part 213, regulations promulgated by the Federal Railroad Administration, as well as case law applying such preemption.

12. Defendants further allege by way of affirmative defense that under the Supremacy Clause of the U.S. Constitution, any claims against Defendants with respect to crew training, crew qualifications, crew certifications, and crew fitness are preempted by Federal law, more specifically the Federal Rail Safety Act including, but not limited to, those regulations embodied in 49 C.F.R. Part 240.1 *et seq.*, regulations promulgated by the Federal Railroad Administration, as well as case law applying such preemption.

13. Defendants further allege by way of affirmative defense that Defendants' actions were in compliance with the regulatory or statutory standards and therefore such conduct of Defendants cannot be found to have been negligent.

14. Additionally and alternatively, without waiving the foregoing, any recovery of medical or healthcare expenses, if any, of Lee Roy Haynes, is limited to the amount actually paid or incurred by in accordance with § 41.0105 of the Tex. Civ. Prac. & Rem. Code.

15. Defendants further assert that they are entitled to all credits, offsets or contributions as provided by the laws and the statutes of the State of Texas including,

but not limited to, the provisions of Chapters 32 and 33 of the Tex. Civ. Prac. & Rem. Code, as well as all other applicable laws and statutes.

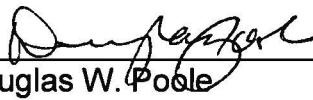
16. Pursuant to the provisions of Rule 216 of the Texas Rules of Civil Procedure, Defendants formally make a demand and application for a trial by jury.

PRAYER

WHEREFORE, Union Pacific Railroad Company, Rufus W. Richmond, Jr. and Clyde D. Williams, Jr. pray that after due proceedings are had, a judgment be rendered that all parties take nothing by virtue of their claims against the Defendants, that the Petition be dismissed with prejudice, and for all other relief to which it may be entitled in law or equity.

Respectfully submitted,

MCLEOD, ALEXANDER, POWELL & APFFEL,
A Professional Corporation



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**ATTORNEYS FOR DEFENDANTS
UNION PACIFIC RAILROAD COMPANY,
RUFUS W. RICHMOND, JR. AND
CLYDE D. WILLIAM A/K/A
CLYDE D. WILLIAMS, JR.**

CERTIFICATE OF SERVICE

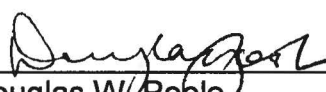
I hereby certify that a true and correct copy of the above and foregoing instrument was properly forwarded to counsel of record listed below by:

- ☐ United States Mail, postage prepaid
- ☒ United States Certified Mail (return receipt requested)
- ☒ E-Service
- ☐ Electronic Mail
- ☐ Facsimile Transmission

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Ronald E. Braswell
4544 Post Oak Place, Ste 350
Houston, Texas 77027
ronbraswell@hotmail.com

on this 1st day of October, 2015.



Douglas W. Poole

EXHIBIT 3

CAUSE NO. 2015-53909

7A

LEE ROY HAYNES	§	IN THE DISTRICT COURT OF
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	HARRIS COUNTY, TEXAS
UNION PACIFIC RAILROAD COMPANY,	§	
RUFUS W. RICHMOND, JR., CLYDE D.	§	
WILLIAM A/K/A CLYDE D. WILLIAMS,	§	
JR., BURNETT FORESTRY LLC, STEVE	§	
McMICHAEL, WINDY McMICHAEL,	§	189 th JUDICIAL DISTRICT
GAYLA JANSEN, JEREMY JANSEN and	§	
JARED JANSEN	§	
	§	
<i>Defendants</i>	§	

ORDER ON PLAINTIFF LEE ROY HAYNES'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

ON the below-entered date came on to be heard plaintiff Lee Roy Haynes' No-evidence Motion for Summary Judgment under Texas Rule of Civil Procedure 166a(i) as to the affirmative defenses of Defendant Union Pacific Railroad Company concerning Union Pacific Railroad Company's affirmative defenses that Plaintiff violated Texas Transportation Code § 545.251 (Obedient to Signal Indicating Approach of a Train); § 545.302 (Stopping, Standing, or Parking Prohibited in Certain Places); § 545.427 (Operation of a Vehicle with Insufficient Undercarriage Clearance); and § 545.255 (Moving Heavy Equipment at Railroad Grade Crossings) and the Court after considering Plaintiff's Motion, all responses thereto and argument of counsel is of the opinion that plaintiff's Motion for a No-evidence Summary Judgment is in all things meritorious and should be and is hereby GRANTED; It is further ORDERED, ADJUDGED AND DRCREED that Defendant UNION PACIFIC RAILROAD COMPANY affirmative defenses under Texas Transportation Code § 545.251 (Obedient to Signal Indicating Approach of a

Train); § 545.302 (Stopping, Standing, or Parking Prohibited in Certain Places); § 545.427 (Operation of a Vehicle with Insufficient Undercarriage Clearance); and § 545.255 (Moving Heavy Equipment at Railroad Grade Crossings) are hereby stricken from Defendant UNION PACIFIC RAILROAD COMPANY'S pleadings.

FURTHER, came on to be heard Plaintiff Leroy Haynes' Motion for No-evidence Motion for Summary Judgment on Defendant Union Pacific Railroad Company's affirmative defense that certain of Plaintiff's claims are preempted under the Supremacy Clause of the United States Constitution and particularly the affirmative defenses that plaintiff violated the Federal Motor Carrier Safety Regulations §§§ 49 C.F. R. 383.111, 49 C.F.R. 329.12 and 49 C.F.R. 392.16 and the Court after considering Plaintiff's No-evidence Motion for Summary Judgment and all responses thereto and argument of counsel is of the opinion that the Motion for Summary Judgment is meritorious and should be in all things granted. It is therefore,

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment on Defendant Union Pacific Railroad Company's affirmative defenses that the Supremacy Clause of the U. S. Constitution preempts plaintiff's claims as to any negligence claim that Union Pacific Construction Company was negligent in construction, maintenance and inspection of the railroad tracks at the crossing where the incident made the basis of this suit occurred and further that plaintiff violated the Federal Motor Carrier Safety Regulations §§§ 49 C.F. R. 383.111, 49 C.F.R. 329.12 and 49 C.F.R. 392.16 is in all things GRANTED. It is further,

ORDERED, ADJUDGED AND DECREED that Defendant UNION PACIFIC RAILROAD COMPANY affirmative defenses that the Supremacy Clause of the U. S. Constitution preempts Plaintiff's claims as to any negligence claim that Union Pacific

Construction Company was negligent in construction, maintenance and inspection of the railroad tracks at the crossing where the incident made the basis of this suit occurred and further that plaintiff violated the Federal Motor Carrier Safety Regulations §§§ 49 C.F. R. 383.111, 49 C.F.R. 329.12 and 49 C.F.R. 392.16 are hereby stricken from Defendant UNION PACIFIC RAILROAD COMPANY'S pleadings.

SINGED and ENTERED this 25th day of April, ²⁰¹⁹~~2018~~

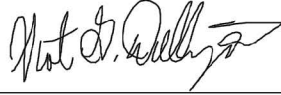
Signed: 
4/25/2019
JUDGE PRESIDING

EXHIBIT 4

HAYNES, LEE ROY,	§	IN THE DISTRICT COURT OF
<i>Plaintiff(s)</i>	§	
	§	
vs.	§	HARRIS COUNTY, TEXAS
UNION PACIFIC RAILROAD	§	
COMPANY,	§	189th JUDICIAL DISTRICT
<i>Defendant(s)</i>	§	

ORDER

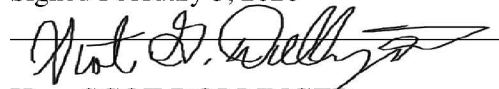
The court rules on Union Pacific Railroad Company's Motions in Limine as follows:

1. Granted based on pre-emption.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted – limited to Golden Rule.
8. Granted.
9. Granted as to liability portion of trial.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted.
16. Granted.
17. Granted.
18. Granted.
19. Granted.
20. Denied
21. Granted.
22. Granted.
23. Denied.
24. Granted.
25. Granted.
26. Granted.
27. Granted.
28. Granted.
29. Granted.
30. Denied.
31. Granted.
32. Granted.

33. Granted.
34. Granted.
35. Granted.
36. Granted.
37. Denied.
38. Granted.
39. Granted.
40. Denied.
41. Granted.
42. Granted.
43. Granted.
44. Granted.
45. Granted.
46. Denied.
47. Denied.
48. Granted based on pre-emption.
49. Granted.
50. Granted.
51. Granted.
52. Withdrawn.
53. Granted.
54. Granted.
55. Granted.
56. Granted.
57. Granted.
58. Granted.
59. Denied.
60. Granted.
61. Denied – no bolstering beyond basic background.
62. Granted.
63. Granted.
64. Granted.
65. Denied.
66. Denied.
67. Denied.
68. Granted.
69. Granted based on pre-emption.
70. Denied.
71. Granted based on pre-emption but to the extent right of control is at issue, subsequent remedial measures may be discussed.
72. Granted based on pre-emption. If within the scope of pre-emption, the matter is excluded. To the extent the matter goes to warning or ultra-hazardous crossing, the matter is not excluded.

It is so ORDERED.

Signed February 5, 2020

A handwritten signature in black ink, appearing to read "Hon. SCOT DOLLINGER", with a stylized flourish at the end.

Hon. SCOT DOLLINGER

Judge, 189th District Court

Unofficial Copy Office of Marilyn Burgess District Clerk

EXHIBIT 5

CAUSE NO. 2015-53909

LEE ROY HAYNES,	§	IN THE DISTRICT COURT
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
UNION PACIFIC RAILROAD	§	
COMPANY, RUFUS W. RICHMOND, JR.,	§	HARRIS COUNTY, TEXAS
CLYDE D. WILLIAM A/K/A CLYDE D.	§	
WILLIAMS, JR., BURNETT FIRESTRY	§	
LLC, STEVE McMICHAEL, WINDY	§	
McMICHAEL, GAYLA JANSEN,	§	
JEREMY JANSEN, and JARED JANSEN,	§	
	§	
	§	
<i>Defendants.</i>	§	189TH DISTRICT COURT

**UNION PACIFIC'S SUPPLEMENTAL BRIEFING ON PREEMPTION
UNDER THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT,
MOTION FOR RECONSIDERATION, AND FOR SUMMARY JUDGMENT**

At the pretrial conference held February 5, 2020, this Court expressed a willingness to revisit the issue of federal preemption and permitted Union Pacific to file a motion for reconsideration. Accordingly, Union Pacific files this supplemental briefing on preemption, motion for reconsideration, and motion for traditional and no-evidence summary judgment. Alternatively, if the Court does not grant summary judgment on all causes of action, Union Pacific moves to exclude evidence pertaining to the design, construction, or maintenance of the railroad crossing.

BACKGROUND

Plaintiff Lee Roy Haynes alleges that he was injured when his tractor-trailer became stuck at a railroad crossing and was struck by a Union Pacific locomotive.¹ Haynes brings negligence and premises liability claims alleging that Union Pacific: (1) failed to properly design, construct,

¹ Plaintiff's Third Amended Original Petition, at ¶ 12, Sept. 4, 2018.

and maintain a “humped” crossing, and (2) failed to erect a sign warning of the “humped” crossing.²

Union Pacific contends that these theories are preempted by the federal Interstate Commerce Commission Termination Act (“ICCTA”). 49 U.S.C. § 10501(b).³ However, on April 25, 2019, this Court granted Haynes’s motion for summary judgment on Union Pacific’s preemption defense and struck that defense from Union Pacific’s pleadings.⁴

As trial approached, in connection with its motion to exclude evidence relating to the design, construction, and maintenance of the crossing, Union Pacific re-urged its preemption defense.⁵ At the pretrial conference held February 5, 2020, this Court found that claims regarding the design, construction, and maintenance of the crossing were preempted. It then allowed both parties to file additional briefing, if they deemed it appropriate. In that vein, Union Pacific now files its motion for reconsideration of this Court’s original order, which struck its affirmative defenses, and motion for summary judgment.

The Court has the authority to grant this motion for summary judgment and vacate its prior order granting Haynes’s motion for summary judgment. *See Rush v. Barrios*, 56 S.W.3d 88, 98 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“A trial court has the inherent authority to change or modify any interlocutory order or judgment until the judgment becomes final.”); *Trevino v. Trevino*, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.) (holding that a trial court may implicitly modify its docket control order to grant a summary judgment to avoid an unnecessary trial); *Schoen v. Redwood Constr., Inc.*, No. 01-09-00371-CV, 2011 WL 478563,

² Plaintiff’s Third Amended Original Petition, at ¶¶ 14-21.

³ Defendants Union Pacific Railroad Company, Rufus W. Richmond, Jr. and Clyde D. William a/k/a Clyde D. Williams, Jr.’s Third Amended Answer, at ¶ 11, Sept. 4, 2018.

⁴ Order on Plaintiff Lee Roy Haynes’s No Evidence Motion for Summary Judgment, Apr. 25, 2019.

⁵ Union Pacific’s Motion to Exclude Evidence Relating to Design, Construction, and Maintenance of Crossing, Motion in Limine, and Motion to Vacate, Jan. 28, 2020.

at *3 (Tex. App.—Houston [1st Dist.] Jan. 31, 2011, no pet.) (mem. op.) (holding that the trial court implicitly modified the deadline in its docket control order by setting a motion for summary judgment for submission).

SUMMARY JUDGMENT STANDARDS

Union Pacific moves for traditional and no-evidence summary judgment. A traditional summary judgment “shall be rendered” if the pleadings and evidence show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In addition, after an adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim. TEX. R. CIV. P. 166a(i). “The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.” TEX. R. CIV. P. 166a(i).

ANALYSIS

As shown below, ICCTA preempts Haynes’s claims that Union Pacific failed to properly design, construct, and maintain a “humped” type crossing. Likewise, ICCTA preempts Haynes’s claims that Union Pacific failed to warn of the “humped” crossing, which also arise from the design, construction, and maintenance of the crossing. Moreover, independent of ICCTA preemption, Union Pacific is entitled to summary judgment on the warning claims because Union Pacific had no duty to erect a sign at the crossing. There is no evidence that the crossing was extra-hazardous, so no additional warnings were required.

I. This Court should grant summary judgment for Union Pacific on claims relating to the design, construction, and maintenance of the crossing.

A. Courts consistently hold that similar claims are preempted by ICCTA.

ICCTA preempts Haynes’s claims that the humped crossing was improperly designed, constructed, or maintained.

Numerous courts have held that ICCTA preemption reaches common law tort claims, like the humped crossing claims that Haynes brings here. For example, in a remarkably similar case, a tractor-trailer high-centered and got stuck on a humped or elevated railroad crossing, resulting in an accident. *Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, No. 15-0074, 2018 WL 1750516, at *1-2 (W.D. La. Apr. 10, 2018). The tractor-trailer's lessee argued that the railroad "negligently failed to properly **construct, repair, and/or maintain** the Crossing and approaching road." *Id.* at *2 (emphasis added). In particular, the lessee complained about the crossing's raised elevation and slope. *Id.* at *2, *7. The court held that this negligence claim was preempted under ICCTA because it would interfere with rail transportation. *Id.* at *9. Thus, negligence based on the railroad's construction and maintenance of the crossing could not be raised at trial. *Id.*

Many other courts have reached the same conclusion. For example:

- Claims for negligently **maintaining** a railroad crossing by allowing the roadway on both sides of the tracks to be repaved with a severe hump or incline were dismissed, because these claims rested "on the '**design and construction**' of the crossing, making them completely preempted by the ICCTA." *Waneck v. CSX Corp.*, No. 1:17CV106, 2018 WL 1546373, at *2, *5-6 (S.D. Miss. Mar. 29, 2018) (emphasis added).
- "[T]he plaintiff's claim that [the railroad] negligently **designed and constructed** the railroad crossing, tracks, and roadbed [wa]s preempted" by ICCTA and thus was dismissed, because it was "an attempt at state law 'regulation' in respect to rail transportation." *Pere Marquette Hotel Partners, L.L.C. v. United States*, No. 09-5921, 2010 WL 925297, at *4-5 (E.D. La. Mar. 10, 2010) (emphasis added); see also *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 224072, at *5-7 (E.D. La. Jan. 26, 2009) (same).

- The Dallas Court of Appeals held that the plaintiff's state-law claims were preempted by ICCTA and thus affirmed summary judgment in favor of the railroad, because the claims involved **construction** of the railroad bridge crossing and thus would interfere with rail operations. *A & W Props., Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 344 & n.2, 346 n.5, 350-51 (Tex. App.—Dallas 2006, pet. denied).
- State-law claims regarding the **design, construction, maintenance, inspection, and building** of railroad bridge crossings were preempted by the ICCTA. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 277-79, 287 (Iowa 2018).

In sum, there is “abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance.” *CSX Transp., Inc.—Petition for Declaratory Order*, No. FD 35832, 2015 WL 4597223, at *2 (S.T.B. July 29, 2015).

B. Haynes's claims impermissibly interfere with Union Pacific's ability to uniformly design, construct, and maintain its railroad line.

As in the claims in the cases outlined above, Haynes's claims involving the crossing's design, construction, and maintenance are preempted by ICCTA. Congress enacted ICCTA to effectuate a “national policy to promote an adequate and efficient rail transportation service.” *Burlington N. & Santa Fe Ry. Co. v. City of Houston*, 171 S.W.3d 240, 242 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The statute grants the federal Surface Transportation Board exclusive authority to regulate numerous aspects of rail facilities and operations. 49 U.S.C. § 10501(b). “[State law] claims . . . amount to impermissible state regulation of [a railroad's] operations by interfering with the railroad's ability to uniformly design, construct, maintain, and repair its railroad line.” *Thomas Tubbs—Petition for Declaratory Order*, No. FD 35792, 2014 WL 5508153, at *5 (S.T.B. Oct. 29, 2014), *review denied*, *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1146 (8th Cir. 2015). Accordingly, such claims are preempted. 49 U.S.C. § 10501(b).

The claims at issue here would cause precisely the type of interference that ICCTA prohibits. If Haynes were to prevail, Union Pacific “would be forced to change not only the elevation of the railroad crossing but also redesign the track adjacent to the crossing for a significant distance on both sides.”⁶ The construction costs alone would exceed millions of dollars,⁷ and those costs pale in comparison to the harm caused by the disruption to rail transportation. Union Pacific would have to shut down rail transportation at not only the crossing at issue, but several other crossings as well, for several days or weeks.⁸ These crossings contain a mainline track on which trains run 24 hours per day, 365 days per year. Thus, the disruption would have “a significant negative impact on [Union Pacific’s] operational efficiency and capacity” and result “in train delay losses and other logistical issues for both the railroad industry, its customers, as well as the users of the highways and roads impacted.”⁹ Last, but certainly not least, are the significant safety concerns. Lowering the track would increase the risk of train derailments and create a greater risk of danger for train operators.¹⁰

Fortunately, ICCTA precludes any such interference with the railroad’s ability to design, construct, and maintain its rail line. The Court should therefore grant summary judgment for Union Pacific on these claims.

C. ICCTA preemption applies to public and private crossings alike.

Haynes’s motion for summary judgment asserts just one ground for rejecting Union Pacific’s ICCTA preemption defense—he contends that ICCTA preemption does not apply to private crossings.¹¹ This is a misstatement of the law.

⁶ Affidavit of Paul Rathgeber, at 2, attached as Ex. A.

⁷ *Id.* at 5.

⁸ *Id.* at 3.

⁹ *Id.* at 2, 4-5.

¹⁰ *Id.* at 4-5.

¹¹ Plaintiff’s Motion for Summary Judgment on No-Evidence Grounds, at ¶ 2.4, July 23, 2018.

The plain language of ICCTA does not distinguish between public and private crossings, but rather, applies to railroads generally. ICCTA grants the federal Surface Transportation Board exclusive authority to regulate rail transportation and preempts all state regulation of rail transportation:

The jurisdiction of the [Surface Transportation] Board over transportation by rail carriers . . . is exclusive. Except as otherwise provided in this part, ***the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.***

49 U.S.C. § 10501(b) (emphasis added); *see also Fort Bend Cty. v. Burlington N. & Santa Fe Ry. Co.*, 237 S.W.3d 355, 356-58 & n.1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). “Transportation” includes “property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail.” 49 U.S.C. § 10102(9).

“Courts have consistently interpreted this preemption language to be broad in scope.” *Burlington N.*, 171 S.W.3d at 247. “Indeed, [i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *Id.* (citation omitted). Accordingly, ICCTA preemption applies to all rail transportation, regardless of whether the railroad crossing is public or private. *See* 49 U.S.C. § 10501(b) (providing no preemption exclusion for private crossings); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 406, 411, 415 (5th Cir. 2010) (determining whether a claim regarding a private crossing was preempted by ICCTA based on considerations that had nothing to do with the crossing’s private status).

Haynes’s cases do not hold that ICCTA is inapplicable at private crossings. Haynes relies primarily on *New Orleans & Gulf Coast Railway Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008). Although the facts of *Barrois* involved a private crossing, the court did not hold that ICCTA does not apply to private crossings. In fact, it did not consider that question anywhere in its lengthy opinion. Rather, the court in *Barrois* examined whether federal subject-matter jurisdiction could

be conferred by “complete preemption” under ICCTA. *Id.* at 330-36. Complete preemption is a jurisdictional doctrine, which is “less common and more extraordinary than defensive or ordinary preemption” and is not at issue in this state court case. *Id.* at 331.

Nor can Haynes support his arguments regarding ICCTA preemption by pointing to a portion of the *Barrois* opinion examining an entirely different kind of preemption—Federal Railroad Safety Act (FRSA) preemption.¹² Under the FRSA, railroad safety regulations prescribed by the Secretary of Transportation have their own preemptive effect, independent from ICCTA. *See Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 289 (Iowa 2018) (“[T]he FRSA deals with rail safety, and the ICCTA with economic issues relating to railroad operations and facilities.”). Haynes relies on the following passage from *Barrois* addressing the FRSA:

[T]he Railroad has not demonstrated that there are any federal safety standards regulating the implementation of private, at-grade crossings. The Federal Railroad Administration (“FRA”), the administrative body charged with enforcing the FRSA, has acknowledged that private crossings are governed by—if anything—state law, and not federal, law. *See* Safety of Private Highway–Rail Grade Crossings; Notice of Safety Inquiry, 71 Fed. Reg. 42716 (Dep’t of Transp. July 27, 2006).¹³

Barrois, 533 F.3d at 337-38. This passage pertains only to the FRSA, does not address ICCTA, and appears in the court’s opinion *after* the court concluded its discussion about ICCTA. Neither *Barrois*, nor any other case cited in Haynes’s briefing supports the notion that ICCTA does not apply to private crossings. Under the plain language of ICCTA, it does.

This Court should therefore grant summary judgment for Union Pacific on Haynes’s claims relating to the design, construction, and maintenance of the crossing.

¹² Union Pacific separately pleaded an FRSA preemption defense in its answer, but it is no longer pursuing that defense.

¹³ Plaintiff’s Brief in Support of His Motion for Summary Judgment and Reply to Defendant Union Pacific Railroad Company’s Response to His Motion for Summary Judgment, at 2-3, Apr. 18, 2019.

II. This Court should also grant summary judgment for Union Pacific on Haynes's claims relating to warning signs.

The Court should also grant summary judgment for Union Pacific on Haynes's remaining claims, which allege that Union Pacific failed to provide an adequate warning sign at the humped crossing. Haynes's allegations that Union Pacific failed to warn of the humped crossing are nothing more than reiterations of his humped crossing allegations, which are preempted by ICCTA as discussed above. Haynes cannot circumvent ICCTA by repackaging his "humped crossing" claims as warning sign claims. See *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (holding that ICCTA cannot "be circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions . . .").

Moreover, separate and apart from preemption, Union Pacific is entitled to summary judgment on the warning claims because it had no duty to erect additional signage. Union Pacific's duty to provide warning signs is limited—it must provide only those warning signs, such as cross-arm signs, required by statute. *Fort Worth & Denver Ry. Co. v. Williams*, 375 S.W.2d 279, 283 (Tex. 1964); *Rankin v. Union Pac. R.R. Co.*, 319 S.W.3d 58, 63 (Tex. App.—San Antonio 2010, no pet.). A railroad has no duty to provide further, extraordinary warnings to the traveling public, such as a humped crossing sign, unless the crossing is extra-hazardous. *Missouri Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 235 (Tex. 1978); *Rankin*, 319 S.W.3d at 63-64; *Fitch v. Missouri-Kansas-Texas Transp. Co.*, 441 F.2d 1, 2 (5th Cir. 1971). Thus, a plaintiff who seeks to prove negligence based on failure to provide additional warnings must establish that the crossing was extra-hazardous on the day of the collision. *Rankin*, 319 S.W.3d at 64. "[W]here there is no evidence which supports the finding that the crossing is extrahazardous, judgment must be rendered for the railroad." *Richards v. S. Pac. Transp.*, 666 F.2d 99, 103 (5th Cir. 1982).

“A crossing is extra-hazardous if it is so dangerous that persons using ordinary care cannot pass over it in safety without some warning other than the cross-arm sign.” *Rankin*, 319 S.W.3d at 64; *Port Terminal R.R. Ass’n v. Richardson*, 808 S.W.2d 501, 505 (Tex. App.—Houston [14th Dist.] 1991, writ denied). A crossing may be classified as extra-hazardous if a temporary or permanent condition obstructs a driver’s view of an approaching train. *Rankin*, 319 S.W.3d at 64; *Richardson*, 808 S.W.2d at 505; *see also Allen v. Arnett*, 525 S.W.2d 748, 751 (Ky. 1975) (holding that a crossing is not extra-hazardous “unless there is a real and substantial obstruction to sight or hearing”).

Here, Haynes does not contend that his view of oncoming trains was obstructed in any way.¹⁴ In the absence of allegations or evidence that an obstruction prevented safe passage over the crossing, the crossing was not extra-hazardous. *See Missouri-Kansas-Texas R.R. Co. v. Bernhardt*, 418 S.W.2d 368, 374 (Tex. Civ. App.—Austin 1967, writ ref’d n.r.e.) (holding that the slope of a crossing did not render it extra-hazardous where there was no obstruction that would have prevented the driver from seeing the crossing).

Haynes alleges that the crossing is extra-hazardous because there is a “*potential* for ‘high centering’ a vehicle”¹⁵ But that is not the standard; the standard is whether an ordinarily prudent truck driver “could not safely pass over [the crossing] in safety without some warning other than the cross-arm sign.” *Rankin*, 319 S.W.3d at 64. There is no such evidence here. On the contrary, a truck driver could become high-centered on the tracks at this crossing only if he did not follow the standard of care. The standard of care for commercial truck drivers requires that they ensure they have sufficient clearance before traversing a railroad crossing. *See TEX. TRANSP. CODE* § 545.427(a) (“An operator may not drive on or cross a railroad grade crossing unless the

¹⁴ Plaintiff’s Third Amended Original Petition, at ¶ 17, Sept. 4, 2018.

¹⁵ Plaintiff’s Third Amended Original Petition, at ¶ 17, Sept. 4, 2018 (emphasis added).

vehicle being operated has sufficient undercarriage clearance.”); 49 C.F.R. § 383.3(a) (“The rules in this part apply to every person who operates a commercial motor vehicle (CMV) in interstate, foreign, or intrastate commerce”); 49 C.F.R. § 383.110 (“All drivers of CMVS must have the knowledge and skills necessary to operate a CMV safely as contained in this subpart.”); 49 C.F.R. § 392.12 (“No driver of a commercial motor vehicle shall drive onto a highway-rail grade crossing without having sufficient space to drive completely through without stopping.”). Because the crossing is not unusually dangerous for drivers using ordinary care, it is not extra-hazardous.

In sum, Haynes’s claims concerning warning signs are preempted by ICCTA, and in any event Union Pacific had no duty to erect additional signs. Accordingly, the Court should grant summary judgment for Union Pacific.

III. Alternatively, the Court should exclude evidence pertaining to the design, construction, or maintenance of the railroad crossing.

In the event the Court grants summary judgment for Union Pacific on Haynes’s claims concerning the design, construction, and maintenance of the crossing (*see* Part I of this motion), but not his claims concerning warning signs (*see* Part II of this motion), the Court should exclude any evidence suggesting that Union Pacific improperly designed, constructed, or maintained a humped crossing. Evidence pertaining to those preempted issues is irrelevant and inadmissible. *See* TEX. R. EVID. 401-02.

If the jury is permitted to consider this evidence in answering the negligence question, a new trial could be required under *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (“When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant’s objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury’s finding.”); *Benge v. Williams*, 548 S.W.3d 466, 475 (Tex. 2018) (holding that there is

Casteel error “when the question allows a finding of liability based on evidence that cannot support recovery”).

To avoid the potential for retrial, the Court should exclude evidence regarding the design, construction, and maintenance of the crossing.

PRAYER

For these reasons, Union Pacific respectfully requests that the Court: (1) grant summary judgment as to all of Haynes’s claims, and (2) vacate the April 25, 2019 summary judgment order striking Union Pacific’s affirmative defense that Haynes’s claims with respect to the construction, maintenance, and inspection of the railroad tracks at the crossing are preempted.

Alternatively, if this Court does not grant summary judgment as to all of Haynes’s claims, Union Pacific requests that the Court: (1) grant summary judgment that Haynes’s claims with respect to the design, construction, and maintenance of the crossing are preempted (2) vacate the April 25, 2019 summary judgment order striking Union Pacific’s affirmative defense that Haynes’s claims with respect to the construction, maintenance, and inspection of the railroad tracks at the crossing are preempted, and (3) exclude any evidence that relates to the design, construction, or maintenance of the railroad crossing, adjacent roadway, or easement, or that relates to building the crossing as a hump-type crossing. Union Pacific also requests all further relief to which it is entitled.

Respectfully submitted,

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In accordance with the Texas Rules of Civil Procedure, I certify that a true and correct copy of the foregoing document was served on the following counsel of record via e-service on the 28th day of February, 2020:

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