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May 29, 2020

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 36408, *Lee Roy Haynes – Petition for Declaratory Order*

Dear Ms. Brown:

This letter hereby submits for the Surface Transportation Board's information Plaintiff's Motion to Abate and to Refer the Preemption Issue to the Surface Transportation Board (without accompanying Exhibits) filed in the case the Petitioner in this proceeding has brought against Union Pacific Railroad Company in the 189th Judicial District Court in Harris County, Texas. Petitioner's intent to file this motion with the state court is referenced on page 6 of the Petition for Declaratory Order filed in this docket on May 22, 2020. Please note that Exhibit 4 to the Motion is the Petition for Declaratory Order. Consequently, both counsel for Union Pacific Railroad Company and the presiding judge in the state court proceeding have been furnished a copy of the petition filed in this proceeding.

GKG Law, P.C.

Ms. Cynthia T. Brown

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Please do not hesitate to call me if you have any questions.

Sincerely,



Thomas W. Wilcox
Attorney for Lee Roy Haynes

Enclosure

Cc: Scott R. Brann, Esquire
(via email, w/encl.)



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ATTACHMENT

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 (UP) 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.

3. As a direct and proximate cause of each Defendant Union Pacific's 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.

II. PROCEDURAL HISTORY AND CASE STATUS

On September 11, 2015 Plaintiff filed its 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 as a result of his tractor trailer being struck by UP's train. All of

Plaintiff's claims against UP are state based tort claims based on allegations that the UP crossing is unsafe, and that the unsafe condition caused Plaintiff's injuries.

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 that Plaintiff's state tort law claims were preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), the Federal Rail Safety Act of 1970 ("FRSA") and other federal statutes. For over 4 years UP failed to request that the court take any action on its preemption claims.

Plaintiff moved for partial summary judgment dismissing UP's federal pre-emption defenses, which the trial court granted in an order dated April 25, 2019. Consequently, the affirmative defenses of federal preemption were struck from Union Pacific's answer as the parties prepared for trial.

However, UP did not accept the Court's dismissal of its preemption affirmative defenses, and on January 28, 2020, prior to the 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, UP again presented its allegation that the Plaintiff's tort law claims were preempted by 49 U.S.C. §10501(b) to the extent they alleged that Haynes' injuries were due to Union Pacific's negligence concerning the design, construction, and maintenance of the crossing. Notably, Union Pacific's motion 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 defense of preemption was arguably based.

The case was called to trial on February 5, 2020. During a pre-trial conference the court

considered UP's Pre-Trial Motions, and ruled in favor of UP'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." However, the court did not expressly overrule its April 25, 2019 decision striking Union Pacific's preemption affirmative defenses that Plaintiff's claims were not preempted by 49 U.S.C. §10501(b) because they alleged his injuries were due to Union Pacific's negligence in constructing, maintaining, designing the tracks and the crossing. Due to procedural requirements, the Court postponed the trial and permitted UP to submit supplemental briefs and a summary Judgment on the preemption issue. Union Pacific submitted its "Supplemental Briefing on Preemption under the Interstate Commerce Commission Termination Act, Motion for Reconsideration, and for Summary Judgment ("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. Union Pacific also plead preemption under the FRSA, but has abandoned that defense. (see page 8 of its Supplemental Brief and Motion for Summary Judgment). Plaintiff's reply is due on or before July 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. The court has reset the trial date to January 4, 2021.

III. ARGUMENT

Union Pacific's Supplemental Brief relies exclusively on §10501(b) of the ICCTA to assert Plaintiff's state law tort law claims are preempted; however, Union Pacific makes no mention of the recent decisions issued by the Surface Transportation Board ("STB" or "Board"), the agency which administers §10501(b) and has therefore had considerable experience with preemption

questions, that have established that “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 the FRSA. STB Docket No. FD 35167, *Jimmy Lee Waneck and Starr Swearingen Waneck* (served May 25, 2018)(*Waneck I*); STB recon. denied (served October 31, 2018)(*Waneck II*). Moreover, Union Pacific further clouded the preemption issue for this court by citing only to the March 29, 2018 decision issued in the federal district court case associated with the *Waneck*. 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. Union Pacific wholly failed to inform the trial court of the Board’s decisions in *Waneck I* and *Waneck II* in which the Surface Transportation Board held that preemption questions about rail safety related tort law claims almost identical to the claims made by Haynes are not governed by the preemption provisions of the ICCTA but rather are to be considered under the FRSA, including § 20106(b) (the savings provision providing that actions under state law for personal injury and death are not preempted). The *Waneck I* and *Waneck II* decisions of the STB are attached hereto as Exhibits Numbers 1 & 2.

In its Supplemental Brief and Motion for Summary Judgment Union Pacific makes multiple references to the jurisdiction of the STB and the fact that it was created by the ICCTA and that the STB has exclusive authority to regulate most aspects of rail facilities and operations. The Board and this Court have concurrent jurisdiction to consider the issue of preemption. STB Docket No. FD 35819, *Brookhaven Rail Terminal-Pet. For Declaratory Order*, (STB served Aug. 28, 2014) at 4. However, Plaintiff submits that due to the complexity of issues surrounding preemption under ICCTA and FRSA, and in order to promote national uniformity on the issue of

federal preemption of rail safety related state law claims, the court should seek the guidance of the Board on the preemption question raised by Union Pacific. Pursuant to 4 U.S.C. §554(e) and 49 U.S.C. §721, the Board has discretionary authority to issue a declaratory order in order to terminate controversy or remove uncertainty. *Waneck I* at 3. A party may petition the Board for a declaratory order on matters within its jurisdiction. It is also common for state and federal courts to refer preemption (and other issues within the Board's jurisdiction and expertise) to the STB to obtain the benefit of its expertise while retaining jurisdiction over the case. See, e.g. Docket No. FD 35477, *Allied Industrial Development Corp. – Petition for Declaratory Order* (served September 17, 2015) (the *Allied* case is attached as Exhibit No. 3). To this end, Plaintiff has recently filed with the STB a Petition for Declaratory Order (the Petition is attached hereto as Exhibit No. 4) seeking not only the Board's guidance on the preemption issue, but a declaratory order that Plaintiff's state law tort claims are not preempted under by §10501(b). Additionally, Plaintiff moves this Court to refer the issue of whether Plaintiff's claims are preempted under the ICCTA to the STB and to abate the current action until such time as the agency has ruled on Plaintiff's petition.

As explained in the *Allied* and *Waneck* decisions, Court referral of an issue to the Board will trigger a declaratory order proceeding to resolve the issue for the Court, whereas the Board will exercise its discretion to grant or deny the petition in the absence of a referral. As illustrated by the *Waneck* case, even if the Board declines to institute a declaratory order proceeding it can and has provided parties and courts with guidance on the principles to apply in resolving the ICCTA questions in the court proceeding. In order to promote national uniformity on the issue of preemption under the ICCTA and in order to avoid what likely would be multiple appeals

resulting in significant cost, time, delays and possible multiple trials in this matter, Plaintiff urges the court to refer the preemption issue to the Board so it can provide the court with its particular expertise and experience.

CERTIFICATE OF CONFERENCE

Counsel for Plaintiff has spoken with Ms. Elizabeth Graham, lead counsel for Union Pacific and she has advised that she anticipates UP objecting to this motion.

/s/ Scott R. Brann

Scott R. Brann

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon consideration the Court grant his Motion to Abate and issue an order of referral of the ICCTA preemption issue to the Surface Transportation Board.

Respectfully submitted,

BRANN SULLIVAN TRIAL LAWERS, PLLC

/s/ Scott R. Brann

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was e-served upon al counsel in accordance with Rule 21 of the Texas Rules of Civil Procedure on this 26th day

of May, 2020.

Elizabeth Graham
Brody E. Dawson
Union Pacific Railroad Co.
25125 Old Aldine Westfield Rd.
Spring, TX 77373

ATTORNEYS FOR DEFENDANT UNION PACIFIC RAILROAD COMPANY

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