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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

LEE ROY HAYNES—PETITION FOR DECLARATORY ORDER

STB FINANCE DOCKET NO. 36408

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO PETITION FOR DECLARATORY ORDER**

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SUMMARY

The issue here is whether the ICC Termination Act (“ICCTA”) preempts an effort to use state tort law to regulate the design and construction of an active rail line. Petitioner Lee Roy Haynes, a plaintiff in a tort action against Union Pacific, argues that ICCTA allows a Texas jury to apply state negligence law to decide whether a particular Union Pacific rail line was built at an appropriate height, or whether it must instead be lowered to conform to the jurors’ views of how rail lines should be constructed.

To state that proposition is to refute it. Through ICCTA, Congress broadly preempted state and local regulation that either encroaches into matters directly regulated by the Board or unreasonably burdens interstate commerce. It is hard to imagine a more intrusive form of state regulation than allowing layperson jurors in every state and county to second-guess the design of every rail crossing. Indeed, courts and the Board have recognized many times that ICCTA preempts tort claims like these, which attempt to regulate the design or construction of rail facilities. *See infra* p. 4 nn. 1–2 (collecting cases).

Haynes claims, however, that ICCTA stands mute on any state or local regulation “related to railroad safety.” Relying on the Board’s *Waneck* guidance, he contends that all safety-related state laws lie beyond ICCTA’s reach and must be analyzed *only* under the Federal Railroad Safety Act’s (“FRSA”) preemption provision. But *Waneck* and the cases it cited saw a conflict between FRSA and ICCTA where none exists. Basic statutory interpretation principles establish that, when ICCTA and FRSA overlap, they can—and therefore must—both apply. The great weight of Board and court precedent confirms this conclusion. Haynes’s contrary view not only requires an earlier statute to trump a later one, which makes no sense; it also creates a vast exception to ICCTA’s uniform deregulatory regime that would defeat Congress’s goals in enacting this comprehensive law.

Union Pacific therefore urges the Board to declare that Haynes’s negligence claim is preempted by ICCTA because it seeks to regulate the design, construction, and maintenance of Union Pacific’s active main line track. **Section I** of this Reply explains that, because FRSA’s and ICCTA’s preemption provisions do not conflict, both statutes can apply to, and thus preempt, a safety-related state law or claim. It also responds to Haynes’s contention that applying ICCTA preemption to safety-related state laws impliedly repeals part of FRSA. And it explains why the recent Board guidance and cases on which Haynes relies misunderstand the interplay between FRSA and ICCTA. **Section II** explains that, even if the Board sees some tension between FRSA and ICCTA, it should harmonize the two laws by preserving the “as applied” test for ICCTA preemption, which prohibits state regulation of rail transportation that would unreasonably burden interstate commerce. **Section III** shows Haynes’s negligence claim is preempted under either test for ICCTA preemption.

STATUTORY BACKGROUND

Railroads are subject to one of “the most pervasive and comprehensive of federal regulatory schemes,” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981), including a “nationally uniform system of economic regulation,” S. REP. NO. 104-176, at 6 (1995). This regime of interlocking federal statutes and regulations broadly preempts state laws—including state common law claims—that intrude into federally regulated areas. These preemptive laws include (in order of passage) the Locomotive Inspection Act of 1915 (“LIA”), 49 U.S.C. § 20701 *et seq.*; the Signal Inspection Act of 1937, 49 U.S.C. § 20501 *et seq.*; FRSA, 49 U.S.C. § 20101, *et seq.*; the Noise Control Act of 1972 (“NCA”), 42 U.S.C. § 4901 *et seq.*; the Hazardous Materials Transportation Act of 1975 (“HMTA”), 49 U.S.C. § 5101 *et seq.*; and, most recently, ICCTA, 49 U.S.C. § 10501(b). The pattern over

time is clear. Starting with the regulation of locomotives, then signals, then rail safety matters already covered by federal law, then noise control, and then the shipment of hazardous materials, Congress drew an increasingly narrow role for state and local authorities to regulate rail transportation.

This progression culminated with ICCTA. The statute’s preemption provision gives the Board “exclusive” jurisdiction over a broad range of subjects:

(b) The jurisdiction of the [STB] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. City of Seabee*, 924 F.3d 276, 283 (6th Cir. 2019) (citation and brackets omitted); *Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 894 (7th Cir. 2017) (citation omitted) (observing that “Congress’s intent in the [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping”). ICCTA centralized jurisdiction over the rail network at the federal level to avoid the burden on interstate commerce from a patchwork of state and local regulations.

ICCTA preempts not only state laws and regulations, but also common law claims, which are an equally “potent method of governing conduct and controlling policy.” *See Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012) (citation omitted) (holding that “state ‘regulation’” includes “an award of damages”); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (holding that ICCTA preempted negligence claims). Many courts have thus applied ICCTA’s broad language to hold that state laws or tort claims attempting to regulate the design or construction of rail facilities are preempted.¹ The Board has reached the same conclusion.²

¹ *See, e.g., City of Seabee*, 924 F.3d 276, 285 (6th Cir. 2019) (ordinance prohibiting railroad from raising crossing grade to perform maintenance); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (ordinance controlling design and construction of embankments); *Friberg*, 267 F.3d 439, 444 (5th Cir. 2001) (negligence claims related to railroad’s side track operations); *Gordon v. New England Cent. R.R., Inc.*, No. 2:17-CV-00154, 2019 WL 5084160, at *9 (D. Vt. Oct. 10, 2019) (state law claim related to railroad’s embankment maintenance); *Waubay Lake Farmers Ass’n v. BNSF Ry. Co.*, No. 12-CV-4179, 2014 WL 4287086, at *6 (D.S.D. Aug. 28, 2014) (state law claims that the railroad failed to reconstruct its facilities, culverts, and roadbed); *Pere Marquette Hotel Partners, L.L.C. v. United States*, No. 09-5921, 2010 WL 925297, at *5 (E.D. La. Mar. 10, 2010) (state law claims that railroad negligently designed and constructed crossing, tracks, and roadbed); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 224072, at *6 (E.D. La. Jan. 26, 2009) (same); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (negligence claims premised on flooding caused by construction and maintenance of side tracks); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 286–87 (Iowa 2018) (negligence claims related to the design, operation, and maintenance of rail bridges); *A & W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 347–49 (Tex. App. 2006) (state law claims related to the design of drainage structures).

² *See, e.g., CSX Transp., Inc.—Petition for Declaratory Order*, Finance Docket No. 35832, 2015 WL 4597223, at *2, 4 (S.T.B. served July 31, 2015) (“The Board and the courts have decided in a number of cases that § 10501(b) preempts state and local attempts to regulate the design, construction, maintenance, and repair of rail lines and their associated structures.”) (collecting cases); *Wichita Terminal Ass’n, BNSF Ry. Co. & Union Pac. R.R. Co.—Petition For Declaratory Order*, Finance Docket No. 35765, 2015 WL 3875937, at *7 (S.T.B. served June 23, 2015) (“The interstate rail network could not function properly if states and localities could

FACTUAL AND PROCEDURAL BACKGROUND

Haynes tried to cross Union Pacific’s main line near Dayton, Texas while pulling a low-clearance trailer. Despite his training as a truck driver and experience getting vehicles stuck or “high-centered” on crossings in the past, Haynes failed to identify or investigate the potential clearance issues associated with the private, elevated crossing. Instead, Haynes attempted to drive over the crossing and his trailer became high-centered on the tracks. A Union Pacific train struck the vehicle with Haynes inside. Haynes survived the collision but was injured.

Haynes now seeks to hold Union Pacific liable for the collision. Among his state law claims, Haynes advances a negligence claim premised on Union Pacific’s alleged failure to:

- properly design, construct (or build), and maintain the railroad crossing;
- “properly maintain its easement right of way” on either side of the crossing;
- provide adequate notice and warning of the elevated crossing; and
- “contact the appropriate government agency about posting low clearance signs.”

Pet. Ex. 1 ¶ 15(A)–(M). The design, construction, and maintenance claim is a direct attempt to use state law to regulate how Union Pacific manages an active rail line.³

A jury verdict in Haynes’s favor would require Union Pacific to substantially alter

impose their own potentially differing standards for the design, construction, maintenance, and repair of rail lines”); *Thomas Tubbs—Petition for Declaratory Order*, Finance Docket No. 35792, 2014 WL 5508153, at *4–5 (S.T.B. served Oct. 31, 2014) (similar).

³ The sole question before the Board in this matter is whether Haynes’s design, construction, and maintenance claim is preempted by ICCTA. Union Pacific does not ask the Board to find that Haynes’s inadequate notice and signage claims are preempted.

its rail line for miles on either side of the crossing. Ex. A to Union Pacific’s Reply, Rathgeber Affidavit at 2. Planning and conducting this extensive redesign would cost millions of dollars and would require permission from local governments to modify several nearby public road crossings. *Id.* at 5, ¶¶ a, d–e. This main line would be closed for construction, potentially for weeks, causing significant delays to freight service. *Id.* ¶¶ c, f. And reducing the height of this stretch of main line would increase the risk of pooling water, which can cause derailments. *Id.* ¶ h.

Union Pacific thus raised ICCTA preemption as an affirmative defense to Haynes’s negligence claim. Although the state court struck the ICCTA defense at summary judgment, Union Pacific renewed its preemption argument by motion *in limine*. After granting Union Pacific’s motion *in limine* at the pretrial conference, the trial court expressed a willingness to reconsider its summary judgment ruling and permitted the parties to submit additional briefing on the issue of preemption. After Haynes filed this petition for declaratory order, the state court stayed the case and referred “the issue of whether [Haynes’s] state law tort claims are preempted under the ICCTA to the Surface Transportation Board for its consideration.” Haynes Letter, Attachment at 1 (filed June 10, 2020).

ARGUMENT

I. Because ICCTA’s and FRSA’s preemption provisions do not conflict, both must apply when they overlap.

Haynes’s state-law negligence claim challenges Union Pacific’s design, construction, and maintenance of an inclined grade crossing. He says that FRSA alone governs this claim because it relates to allegedly unsafe conditions. Pet. 7. But whether or not this claim is “related to railroad safety” under FRSA, it seeks to regulate rail transportation and is thus preempted by ICCTA. Allowing claims like this in every state and county would produce precisely the patchwork of regulation

that Congress enacted ICCTA to prevent. Nothing in FRSA, which predates ICCTA by 25 years, requires that result.

Haynes argues that applying ICCTA to safety-related state-law claims would impliedly repeal FRSA's first savings clause. He relies mainly on the non-binding guidance in *Jimmy Lee Waneck & Starr Swearingen Waneck, et al.—Petition for Declaratory Order* (“*Waneck II*”), Finance Docket No. 36167, 2018 WL 5723286 (S.T.B. served Oct. 31, 2018), and the Sixth Circuit's decision in *Tyrrell v. Norfolk Southern Railway Company*, 248 F.3d 517 (6th Cir. 2001). But these decisions assumed a conflict between FRSA and ICCTA where none exists. These laws can, and therefore must, both be given full effect at the same time. Further, adopting Haynes's view would create conflicts with several other federal railroad laws. And contrary to his suggestion, recognizing the full scope of ICCTA preemption does not undermine the validity of federal rail-safety regulations or the 2007 amendment to FRSA.

A. Interpreting FRSA to limit ICCTA's preemptive effect violates basic statutory interpretation principles.

Courts and agencies “are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Here, FRSA's and ICCTA's preemption provisions are fully capable of co-existing. Each provision simply specifies what the relevant law does or does not preempt. In turn, a given state law or claim can be preempted by ICCTA, FRSA, neither, or both—as the respective preemption provisions dictate. There is thus no statutory conflict, and no justification for reading FRSA to create a safe harbor from ICCTA preemption for safety-related state laws.

Congress enacted FRSA in 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. The Federal Railroad Administration (“FRA”) is tasked with promulgating and enforcing all federal railroad safety laws. *Id.* § 20103(b), (g). FRSA embodies Congress’s mandate that “[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.” *Id.* § 20106(a)(1). To that end, Congress defined the scope of FRSA preemption through two savings clauses. The first clause clarifies that states “may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the [FRA] . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.” *Id.* § 20106(a)(2). The second clause clarifies that FRSA does not preempt “an additional or more stringent” state law if it (1) is designed to address an essentially local safety or security hazard, (2) is not incompatible with federal law, and (3) “does not unreasonably burden interstate commerce.” *Id.* § 20106(a)(2)(A)–(C).

After FRSA’s passage, Congress enacted a series of statutes to partially deregulate the railroad industry, culminating with ICCTA in 1995. *See* H.R. REP. NO. 104-311, at 90, *reprinted in* 1995 U.S.C.C.A.N. at 802. ICCTA was designed to, among other things, “minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2). Congress also recognized that continuing state regulation “would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.” *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (quoting H.R. REP. NO. 104-311, at 96, *reprinted in* 1995 U.S.C.C.A.N. at 808).

ICCTA thus gives the Board “exclusive” jurisdiction over “transportation by rail carriers,” 49 U.S.C. § 10501(b), which Congress defined broadly to include a “yard, property, facility, instrumentality, or equipment of any kind related to the

movement of passengers or property, or both, by rail,” *id.* § 10102(9)(A). ICCTA’s remedies “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* § 10501(b). This language “categorically” preempts state laws that “may reasonably be said to have the effect of managing or governing rail transportation.” *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) (citations omitted). State laws that do not manage or govern rail transportation are still preempted “as applied” if “they would have the effect of unreasonably burdening or interfering with rail transportation.” *Id.* at 19 (citations omitted).

The FRSA and ICCTA preemption provisions do not conflict. There is nothing in the language of either statute that explicitly prevents the application of both preemption provisions in any given case. Each provision simply states which state laws or claims are preempted by the federal law in question. And because the two federal acts have different scopes, a state law or claim will sometimes be preempted by one but not the other. That does not mean the two laws conflict. As the Board has recognized, “[i]n areas where both the Board and FRA have jurisdiction, the later-enacted ICCTA preemption may impose restraints on state action even where the FRSA preemption does not.”⁴

FRSA’s use of the phrase “may adopt or continue in force” does not change this conclusion. This language in FRSA’s preemption provision simply defines the boundaries of FRSA preemption. It does not give the states regulatory authority over safety issues that they previously lacked, or that other federal statutes

⁴ *Amicus Curiae* Brief of Surface Transportation Board at 9, *Iowa, Chicago & E. R.R. Corp. v. Washington Cty., Iowa*, No. 03-3136 (8th Cir. June 9, 2004); *see also CSX Transportation, Inc.—Petition for Declaratory Order (“CSX I”)*, Finance Docket No. 37186, 2005 WL 584026, at *8 (S.T.B. served Mar. 14, 2005) (recognizing that ICCTA applied to a District of Columbia law seeking to regulate transportation of hazardous commodities by rail “even though other federal agencies have primary responsibility over rail safety and national security matters”).

withdraw. And it certainly does not imply that Congress in 1970 meant to limit the reach of *later-enacted* federal laws. “Congress legislates against the backdrop of existing statutes,” *Orton Motor, Inc. v. HHS*, 884 F.3d 1205, 1214 (D.C. Cir. 2018), and “where two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of legislative will,” *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 374 (3d Cir. 2012) (citation omitted). The Board must therefore presume that when Congress crafted ICCTA’s preemptive language in 1995, it did so with full knowledge of the FRSA and the related safety regulations promulgated by FRA since its passage. *See id.* (assuming Congress was “aware of the preemptive language” of one statute when it later amended a second, related statute to “contain a preemptive provision with a different scope,” and therefore declining to limit the preemptive scope of the second statute).

If Congress intended FRSA’s preemption provision not merely to define the scope of FRSA preemption but also to carve out a negative space from other federal laws, it would have said so explicitly—in 1970, 1995, or any time since then. For example, it could have used a “notwithstanding any other provision of law” clause in FRSA. *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). It did not. In fact, of the two statutes, it is *ICCTA*’s preemption provision that controls in the event of a conflict. *See* 49 U.S.C. § 10501(b) (*ICCTA* “preempt[s] the remedies provided under Federal and State law.”). There is simply no textual or structural basis to read FRSA as affirmatively empowering states to regulate matters that *ICCTA* entrusts to the Board alone.

Haynes nevertheless urges that, as *Waneck II* said, applying *ICCTA* preemption to safety-related state laws and claims “would amount to a repeal by implication of the savings provision of FRSA.” Pet. 9 (quoting 2018 WL 5723286, at *5). For the reasons just explained, that concern is misplaced. Although Congress “display[ed] considerable solicitude for state law” by limiting the scope of FRSA’s

preemptive effect through the use of saving clauses, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993), these clauses are not affirmative grants of legislative or regulatory authority to the states that override other federal laws—let alone later-enacted ones. A “saving clause” is merely a “statutory provision exempting from coverage something that would otherwise be included.” *See Black’s Law Dictionary* (11th ed. 2019). That is all FRSA’s first savings clause does: It merely defines the scope of FRSA preemption.

Nor does the Sixth Circuit’s *Tyrrell* decision support Haynes. *Tyrrell* misunderstood both FRSA and ICCTA. The Sixth Circuit said that the district court’s decision in that case “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.” *Tyrrell*, 248 F.3d at 522–23 (emphasis added).

There are two problems with this conclusion. First, there can be no statutory conflict—and no question of any implied repeal—unless FRSA’s first savings clause is read to create a carve-out from other federal laws. But *Tyrrell* simply assumed that this implausible reading was correct. The court made no effort to show that this reading flows from FRSA’s text, precedent, or Congress’s intent. As explained above, there is no indication that Congress meant this language to have that sort of sweeping effect. FRSA’s preemption clause simply defines the scope of FRSA preemption. In turn, there is no basis for *Tyrrell*’s conclusion that applying ICCTA preemption to safety-related state laws impliedly repeals FRSA.

Second, *Tyrrell*’s reasoning appeared to be influenced by a misunderstanding of ICCTA’s preemptive scope. ICCTA preempts a state law if it manages or governs rail transportation or unreasonably burdens interstate commerce. It thus “permit[s] the continued application of laws having a more remote or incidental effect on rail transportation.” *Delaware*, 859 F.3d at 18 (citations omitted). The Sixth Circuit

itself has recognized this in more recent cases. *See Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008). So, to the extent *Tyrrell*'s reasoning was driven by the court's conclusion that ICCTA would reach a state law that only "tangentially touche[d] upon an economic area," 248 F.3d at 522, it was simply mistaken.⁵

Later Sixth Circuit precedent also does not support a broad reading of *Tyrrell*. Last year, the Sixth Circuit held that a city ordinance seeking to govern a railroad's ability to construct or maintain a "peaked" or "humped" crossing was preempted under both ICCTA and FRSA. *City of Seabee*, 924 F.3d at 285–86. Even though the local ordinance was aimed at "safety-related" concerns such as line-of-site obstructions and low-profile vehicles, the Sixth Circuit nonetheless conducted an analysis under ICCTA and held that the ordinance "amount[ed] to impermissible [local] regulation of [the railroad's] operations by interfering with the railroad's ability to uniformly design, construct, maintain, and repair its railroad line." *Id.* at 281, 283–85 (some alterations in original) (citing *Tubbs*, 2014 WL 5508153, at *5). The court also explained that, had the district court found the ordinance was safety-related, it was still preempted under FRSA. *Id.* at 285–86. In its own description of *Tyrrell*, the court observed: "We note that *Tyrrell* suggests that if a regulation has a connection with rail safety then the 'FRSA provides the applicable standard for assessing federal preemption.'" *Id.* at 285 (emphasis added) (quoting *Tyrrell*, 248 F.3d at 524). This lukewarm endorsement of *Tyrrell* in its own circuit

⁵ Haynes also cites *Island Park, LLC v. CSX Transportation*, 559 F.3d 96 (2d Cir. 2009). *Island Park* said that FRSA provided the appropriate standard for determining whether a state safety law was federally preempted, *id.* at 107, but then went on to say that FRSA was merely the "principal governing statute" for such an inquiry—not the only one. *Id.* at 108. And the Second Circuit conducted a comprehensive ICCTA preemption analysis before it even mentioned FRSA. *Id.* at 103–06. Thus, *Island Park* does not adopt Haynes's preferred approach.

cautions against concluding that FRSA allows a state to impose a regulation that *City of Seabee* properly found would unreasonably burden interstate commerce.⁶

What is more, post-*Tyrrell* Board precedent confirms that both ICCTA and FRSA can preempt the same state law. For example, in *CSX I*, the Board declared a District of Columbia statute regulating the transportation of hazardous materials within a certain radius of the United States Capitol categorically preempted by ICCTA as a “direct regulation of a railroad’s activities.” 2005 WL 584026, at *1, *8–9. Although the statute was indisputably related to railroad safety and security, “the fact that the preemption contained in [ICCTA] overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of [ICCTA] or vice-versa.” *Id.* at *8 (citing *Tyrrell*, 248 F.3d at 523). And in denying reconsideration, the Board explained that *Tyrrell* “does not suggest that particular state regulations cannot be preempted under more than one applicable federal statutory scheme.” *CSX Transp., Inc.—Petition for Declaratory Order (“CSX II”)*, Finance Docket No. 34662, 2005 WL 1024490, at *5 (S.T.B. served May 3, 2005). The Board reiterated its conclusion that ICCTA preempted the District of Columbia statute even though the Department of Transportation (“DOT”) had already concluded that the statute was preempted by FRSA. *Id.* at *6–7.

⁶ Haynes asserts that Union Pacific’s position is “contrary to the clear intent of” the 2007 FRSA amendments, which clarified that FRSA does not preempt state law claims based on violations of FRA rules. Pet. 10; 49 U.S.C. § 20106(b). But no one argues that ICCTA limits a plaintiff’s ability to sue a railroad for violating the standard of care created by an FRA safety regulation. In that scenario, there is no conflict between ICCTA and FRSA because FRA’s safety regulations are nationally uniform. See 49 U.S.C. § 20106(a); *Tubbs*, 2014 WL 5508153, at *7 (citations omitted). And when a plaintiff sues based on a violation of an FRA safety regulation, *state law* is not managing or governing rail transportation because the controlling standard is federal. See *Ward v. Soo Line R.R. Co.*, 901 F.3d 868, 880 (7th Cir. 2018), *reh’g denied* (Sept. 21, 2018) (explaining that, in the context of the LIA, applying uniform federal standards of care through state common-law claims “does not threaten railroads with conflicting standards of care”).

Waneck II's explanation of *CSX I* and *CSX II* shows that its analysis of ICCTA and FRSA's interaction is untenable. As discussed above, *Tyrrell* assumed, and *Waneck II* thus agreed, that FRSA's first saving clause affirmatively authorizes states to regulate rail-safety matters despite the preemptive effect of other federal laws. Yet *Waneck II* carved out an exception for "rare cases" where FRSA and ICCTA preemption may apply simultaneously—without offering a textual basis for that conclusion or trying to reconcile it with the supposed "implied repeal" problem. Simply put, there is no statutory basis for the conclusion that ICCTA *can* preempt safety-related state laws, but only sometimes.⁷

The test articulated in *Tyrrell*, and adopted by *Waneck II* and Haynes, is also unworkable. According to *Tyrrell*, FRSA alone governs a state law with "a connection with rail safety." 248 F.3d at 523 (quoting *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 629 (6th Cir. 1996)); see *Waneck II*, 2018 WL 5723286, at *5 (adopting the *Tyrrell* test). On this view, a state regulation may be related to (or have a connection with) railroad safety by its terms, by "the potential safety aspects that arise from complying with the regulation," or by its "legally recognized purpose." *Tyrrell*, 248 F.3d at 523–24 (quoting *City of Plymouth*, 86 F.3d at 629). The relationship between a regulation and railroad safety can be "from an 'effect [that] is only indirect.'" *City of Plymouth*, 86 F.3d at 629–30 (citation omitted). This broad, nebulous standard leaves railroads vulnerable to all manner of state regulations that were previously unavailable under ICCTA.

For example, states could enact laws seeking to control how railroads operate their rail lines to protect against flooding so long as they proffered a rail safety

⁷ Notably, after *Waneck II*, the district court disagreed with the Board's guidance and refused to change its finding that, under Fifth Circuit precedent, the regulation of the design and construction of an active rail line is preempted by ICCTA. See Docket Order, *Waneck v. CSX Corp.*, No. 1:17-CV-106 (S.D. Miss. Sept. 30, 2019).

concern. *See, e.g., Clark v. Providence & Worcester R.R. Co.*, No. 09-10328, 2011 WL 3236087, at *1, *3 (D. Mass. July 26, 2011) (finding that a state statute directing railroads to provide minimum distances between tracks and other structures in rail yards was related to rail safety based on the legislative history). And states could regulate track clearance requirements on active rail lines, thereby requiring railroads to substantially alter their tracks, rail beds, and embankments. *See, e.g., Tyrrell*, 248 F.3d at 525 (finding that no FRA regulation substantially subsumes the subject of track clearances); *Clark*, 2011 WL 3236087, at *3 (same). Plaintiffs could bring state common-law claims alleging that railroads were negligent by failing to properly design, construct, and maintain their rail lines to prevent flooding by identifying the rail safety aspects associated with modifying the rail lines to avoid liability such as pooling water and embankment breaches. *Cf. Waubay*, 2014 WL 4287086, at *4 (holding that ICCTA applied to a state statute aimed at railroad construction that interferes with water ways, rather than FRSA, merely because the plaintiffs invoked the statute “as a construction statute and not a safety statute”). The upshot is that following *Tyrrell* would leave a massive gap in ICCTA’s comprehensive, uniform regime, allowing states to adopt all sorts of rail-transportation controls in the guise of safety regulation.

B. Accepting Haynes’s premise would gut the preemption provisions of other federal railroad laws.

The Board said in *Waneck II* that when a state law or regulation has “a connection with rail safety . . . FRSA provides the applicable standard for assessing federal preemption,” to the exclusion of other statutes. *Waneck II*, 2018 WL 5723286, at *5 (quoting *Tyrrell*, 248 F.3d at 524). If that were true, FRSA would not only create a broad carve-out from ICCTA preemption; it would also neutralize several other statutes’ preemption provisions.

To start, the logic of Haynes’s position would mean that FRSA trumps the preemption provisions in two pre-FRSA laws, the LIA and the SIA. Under the LIA, the DOT has broad authority to regulate all aspects of locomotive maintenance and design. *See* 49 U.S.C. §§ 20701, 20702(a). A railroad “may use or allow to be used a locomotive” only if the locomotive—and all of “its parts and appurtenances”—(1) “are in proper condition and safe to operate”; (2) “have been inspected” as statute and DOT’s regulations require; and (3) “can withstand every test prescribed by [DOT] under” the LIA. *Id.* § 20701. The Supreme Court has explained that this statutory language occupies “the entire field of regulating locomotive equipment.” *Kurns*, 565 U.S. at 637 (citation omitted); *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 611–13 (1926). That is, it does not matter whether a specific federal regulation covers the subject matter of a plaintiff’s claims. Instead, the LIA exclusively governs “the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.” *Kurns*, 565 U.S. at 631 (citation omitted). But on Haynes’s view, a safety-related state law or claim that regulates locomotives must be analyzed under FRSA—and only FRSA. Yet the Supreme Court has held that the LIA’s exclusivity is not affected by the FRSA; “the FRSA left the LIA, and its pre-emptive scope . . . intact.” *Id.* at 633.

The SIA would suffer a similar fate. The DOT can “order a railroad carrier to install, on any part of its railroad line, a signal system that complies with requirements of [DOT].” 49 U.S.C. § 20502(a). A railroad may only utilize a signal system that “may be operated safely without unnecessary risk of personal injury” and has been inspected and tested. *Id.* § 20502(b)(1)–(2). When the DOT requires a railroad to implement a signal system on a portion of its rail line pursuant to the SIA, that railroad “may not be held negligent for not installing the system on any part of its line that was not included in the order.” *Id.* § 20502(a)(2). Under *Waneck II*’s reasoning, an individual could bring a negligence action against a railroad for

failing to install an adequate signal system on a portion of its line to reduce legitimate safety risks irrespective of whether the SIA would bar such a claim. This would render SIA's preemptive effect ineffective or repealed by implication and such a result defies logic and FRSA's own statutory language.

Waneck II's reasoning also unreasonably diminishes the preemptive effect of two other statutes—in addition to ICCTA—that post-date the FRSA: The Noise Control Act and the Hazardous Materials Transportation Act.

The NCA authorizes the Administrator of the Environmental Protection Agency ("EPA") to promulgate "emission regulations for surface carriers engaged in interstate commerce by railroad," after consulting with the DOT "to assure appropriate consideration for safety and technological availability." 42 U.S.C. § 4916(a)(1)–(4). Once the EPA Administrator regulates the noise emissions of a railroad's operation of equipment or a facility, "no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section." *Id.* § 4916(c)(1). States and their political subdivisions may establish or continue to enforce "standards or controls on levels of environmental noise" if the EPA Administrator, in consultation with the DOT, determines that such standard or control "is necessitated by special local conditions" and is not in conflict with NCA regulations. *Id.* § 4916(c)(2).

Under the HMTA, the DOT must "prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(b). State laws concerning the transportation of hazardous materials are preempted to the extent they render compliance with HMTA regulations impossible or, when applied or enforced, serve as an obstacle to carrying out HMTA regulations. *Id.* § 5125(a). The HMTA also sets

forth a series of subjects on which states may not regulate unless those state regulations are substantively the same as the federal provisions.⁸ *Id.* § 5125(b).

The natural reading of *Waneck II* is that FRSA provides the *only* standard for federal preemption of any state laws and claims that have “a connection to rail safety.” Under this reading, NCA’s and HMTA’s preemptive effect are eviscerated. And just as with ICCTA’s preemption provision, there is no reason to think that Congress in 1970 drafted the first saving clause of FRSA with the intention of carving out space for state regulation of rail safety issues addressed by these later statutes.

The logic of the *Waneck II* guidance would also invalidate protections provided by the Dormant Commerce Clause. Before FRSA’s passage, the Supreme Court ruled that states could not constitutionally regulate train length. *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 773–75 (1945) (holding that a state law limiting train length “impose[d] a serious burden on [] interstate commerce” by impairing the “uniformity of efficient railroad operation”). The Court properly understood that such state regulation would place an unreasonable burden on interstate commerce. But train length regulations can obviously be related to rail safety; for example, a crash may be more serious if it involves a longer train. If the *Waneck II* guidance were correct and FRSA’s first saving clause were an affirmative grant of authority for states to adopt safety-related regulations, then states would have the authority to regulate train size as related to rail safety until DOT covered the subject matter. *See White v. Mass. Council of Const. Emp’rs, Inc.*, 460 U.S. 204, 213 (1983) (citing *S. Pac. Co.*, 325 U.S. at 761) (Congress may authorize a state or

⁸ Section 5125 clarifies that State laws concerning the transportation of hazardous materials will survive HMTA preemption if “authorized by another law of the United States.” 49 U.S.C. § 5125(a), (b). This language does not save state laws and claims related to rail safety because, as discussed extensively above, FRSA’s first saving clause is not an affirmative grant of State regulatory authority.

local government to regulate interstate commerce in a manner which the Dormant Commerce Clause would otherwise prohibit). That untenable interpretation of FRSA follows inevitably from *Waneck II*'s logic.

II. If the Board perceives a conflict between ICCTA and FRSA, it should harmonize the statutes by retaining ICCTA's protection against unreasonable burdens on interstate commerce.

As just explained, ICCTA's and FRSA's preemption provisions do not conflict. They therefore can—and must—be given full and simultaneous effect. But if the Board perceives some tension between the first test for ICCTA preemption (“managing or governing rail transportation,” which the Board calls “categorical” preemption) and FRSA's preemption provision, the solution is not to jettison *both* tests for ICCTA preemption. Rather, the two statutes can be harmonized by preserving the *second* test for ICCTA preemption, which prohibits state regulation of rail transportation that would impose an unreasonable burden on interstate commerce. See *CSX II*, 2005 WL 1024490, at *2 (setting forth the categorical and as applied ICCTA preemption tests).

This simple resolution of any perceived conflict finds support in the plain language of both FRSA and ICCTA. Applying ICCTA's “unreasonable burden” test for preemption to state rail-safety laws is consistent with FRSA's second saving clause. That clause clarifies that, after the FRA regulates a subject of railroad safety, a state may adopt or continue enforcing a law pertaining to railroad safety only if that state law is not incompatible with federal law and is tailored to address a local safety hazard without “unreasonably burdening interstate commerce.” 49 U.S.C. § 20106(a)(2)(A)–(C). There is no logical reason why a state could unreasonably burden interstate commerce through a rail safety law before FRA regulates on the same subject matter but not after. And as previously noted, ICCTA itself has unusual language that would preempt other *federal* laws.

The Board has never considered this method of resolving any perceived conflict between the dual preemption provisions. Nor did *Tyrrell* consider this solution. *Waneck II* expressed concern that ICCTA would wipe out all state regulation of rail safety issues because “rail safety-related claims will almost always touch on rail transportation and operations.” 2018 WL 5723286, at *5. As explained above, this concern is overstated. ICCTA preemption is not triggered by merely “touching on” rail transportation. *Delaware*, 859 F.3d at 18. But at most, the Board’s stated concern militates against applying ICCTA’s *categorical* preemption test to state regulation of rail safety. And yet, the Board in *Waneck II* stated that it was the categorical preemption standard that should survive harmonization of ICCTA and FRSA. 2018 WL 5723286, at *7 (citing *CSX II*, 2005 WL 1024490, at *5–7) (describing the *CSX II* holding that a primarily safety-related law prohibiting the shipment of hazardous materials by rail through the District of Columbia was preempted by ICCTA because it “directly conflicted with the Board’s exclusive jurisdiction over rail transportation”). *Waneck II* thus leaves parties and courts without a clear standard for evaluating whether a given state law should be analyzed under ICCTA or FRSA preemption.

This approach would prevent a parade of absurd outcomes that Congress clearly did not intend. If ICCTA never preempts state laws related to rail safety, states could begin regulating aspects of rail transportation that were previously unavailable to them. For example, states could attempt to rationalize regulating train length with a rail safety justification because FRA does not regulate train length. Or a community unhappy that the Board had failed to condition a transaction upon construction of separated grade crossings could effectively override the Board by passing a “safety-related” ordinance prohibiting the railroad from operating additional trains over the line without constructing separated grade crossings, without any fear of ICCTA preemption.

Haynes’s position, by contrast, violates the longstanding principle that states may not unreasonably burden interstate commerce for any reason. *See S. Pac. Co.*, 325 U.S. at 770–71 (explaining that, in the context of state regulation of trains for safety reasons, “the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference”). This principle is embodied in ICCTA’s preemption clause. *See H.R. REP. NO. 104-311*, at 96, *reprinted in* 1995 U.S.C.C.A.N. at 808 (“Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.”).

In sum, there is no credible argument that Congress intended to permit state and local authorities to regulate rail safety in a fashion that creates an unreasonable burden on interstate commerce, and thus run afoul of the second well-established test for ICCTA preemption. Accordingly, if the Board believes that ICCTA and FRSA conflict and cannot be applied simultaneously, it should harmonize the two statutes by preserving the second test. This permits the two statutes to co-exist in a way that retains ICCTA’s critical backstop against a burdensome patchwork of state and local regulation that would balkanize the freight rail industry.

III. Haynes’s crossing-design claim is preempted under either test of ICCTA preemption.

As stated above, Union Pacific believes that state regulation related to rail safety can be preempted by ICCTA under either the categorical or as applied tests. Haynes’s claim that Union Pacific negligently designed, constructed, and maintained the at-issue crossing is preempted under both tests.

The categorical test preempts a state regulation that has “the effect of managing or governing rail transportation.” *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010) (en banc); *Delaware*, 859 F.3d at 18. A state tort suit that attempts to mandate how a railroad must design, construct, and operate a rail crossing is an attempt “to manage or govern rail transportation in a direct way.” *Franks*, 593 F.3d at 411.⁹ Haynes’s claim that Union Pacific was negligent in failing to properly design, construct, and maintain the railroad crossing and adjacent roadway, Pet. Ex. 1, ¶ 15(B)–(D), (K)–(M), is expressly or categorically preempted by ICCTA. Permitting state law claims that seek to control how a railroad constructs its crossings would result in the patchwork of state regulation that ICCTA seeks to prevent. *See Kurns*, 565 U.S. at 637 (“regulation can be . . . effectively exerted through an award of damages” (citation omitted)).

State laws that do not have the effect of managing or governing rail transportation are still preempted if, as applied to a given factual situation, they “would have the effect of unreasonably burdening or interfering with rail transportation.” *Franks*, 593 F.3d at 413–14 (quoting *CSX II*, 2005 WL 1024490, at *2–3). That is true here, for three reasons.

First, courts and the Board have concluded that regulating the design and construction of an active rail line would unreasonably burden interstate commerce. *See, e.g., City of Seabee*, 924 F.3d at 283–85 (holding that an ordinance aimed at inclined rail crossings unreasonably burdened a railroad by forcing it to use certain maintenance methods and interfering with the railroad’s “ability to uniformly

⁹ *See also Texas Cent. Bus. Lines*, 669 F.3d at 533 (holding that ordinances seeking to control the design and construction of railroad embankments were expressly preempted by ICCTA); *Pere Marquette Hotel Partners*, 2010 WL 925297, at *4–6 (holding that a state negligence claim premised on “the design and construction of a railroad crossing, roadbed, and railroad tracks” was preempted because it intruded upon the Board’s exclusive jurisdiction “over the ‘construction’ of railroad tracks”); *In re Katrina*, 2009 WL 224072, at *5–7 (same).

design, construct, maintain, and repair its railroad line” (citation omitted)); *Gordon*, 2019 WL 5084160, at *9 (holding that allowing a state law claim concerning a railroad’s maintenance of a track embankment to proceed would “subject a railroad to unpredictable, piecemeal state regulation with little to no guidance as to which repairs are permissible and which are not”); *Tubbs*, 2014 WL 5508153, at *4–5 (“The interstate rail network could not function properly” if state law claims imposing differing standards on a railroad’s design, construction, and maintenance of its active rail line were not preempted by ICCTA.), *aff’d Tubbs v. STB*, 812 F.3d 1141, 1146 (8th Cir. 2015). Haynes’s negligence allegations fall squarely within this universe of preempted claims.

Second, Union Pacific submitted unchallenged testimony about the burden of redesigning just the private crossing at issue here. Should Haynes prevail on his state law claim, 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,” which would be “an enormous, burdensome, and expensive undertaking.” Ex. A to Union Pacific’s Reply, Rathgeber Affidavit at 2. This project would require Union Pacific to conduct “[e]xtensive studies and redesign work” that would touch on numerous issues including “drainage/hydrology, land surface/subsurface, topography, fiber optic cables, nearby public crossings, and other nearby structures such as a highway underpass, and drainage culverts.” *Id.* ¶ a. Such an extensive redesign would necessarily impact existing fiber optic cable and several public road crossings in Dayton, Texas, which Union Pacific does not have the authority to modify without government approval. *Id.* ¶¶ d–e. Closing this line for potentially weeks of construction work would result in significant delays to Union Pacific’s freight service, *id.* ¶¶ c, f, and cost millions of dollars, *id.* at 5. And Union Pacific’s track is currently elevated to guard against water pooling on or around the track which can compromise track integrity and result in derailments of

heavy tonnage and sometimes hazardous materials. *Id.* ¶ h. For all of these reasons, Haynes’s state law claim pertaining to the design, construction, and maintenance of this inclined grade crossing would unreasonably burden or interfere with rail transportation should he prevail.

Third, the “unreasonable burden” is determined not by weighing the effect of a single case filed by a single plaintiff, but by considering the proliferation of similar cases throughout the entire rail network. *See S. Pac. Co.*, 325 U.S. at 775 (explaining that the practical effect of multiple states enacting different train-length laws would necessitate the breaking up and reassembling of trains at each state boundary resulting in a “serious impediment to the free flow of commerce”); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (assessing whether a state law unreasonably burdens interstate commerce requires a court “to consider the practical and cumulative impact were other States to enact [similar] legislation”); *Tubbs*, 2014 WL 5508153, at *4–5 (the “interstate rail network could not function properly” if state law claims imposing differing standards on a railroad’s design, construction, and maintenance of its active rail line were not preempted by ICCTA). Union Pacific operates over tens of thousands of crossings in different communities across 23 states. Allowing juries in each of those jurisdictions to regulate the height of an active main line would plainly and significantly burden interstate commerce.

CONCLUSION

ICCTA preempts an effort to use state tort law to regulate the height of an active rail line. Congress did not contemplate such an intrusive role for the states, and FRSA’s preemption provision does not throw open the door to such burdensome state regulation. We appreciate that the *Waneck* non-binding guidance suggests a different result. But as Justice Frankfurter famously wrote, “Wisdom too often

never comes, and so one ought not to reject it merely because it comes late.” *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting). As shown above, *Waneck*’s statutory analysis is flawed, and its reasoning would allow states to regulate a host of issues not currently covered by FRA rules, from train length to locomotive design to the height of an active rail line. That result would upset Congress’s design, which has marched steadily toward greater uniformity and less state regulation of railroads.

Union Pacific therefore urges the Board to issue a declaratory order finding Haynes’s common law claims preempted to the extent they seek to regulate the design, construction, and maintenance of an active rail line, because a patchwork of local regulations or jury verdicts seeking to regulate the height of an active rail line would place an unreasonable burden on interstate commerce.

Union Pacific would be pleased to offer oral argument if the Board would find it helpful. But Union Pacific also recognizes the substantial delay in this case already and the public interest in an expeditious decision from the Board.

Respectfully submitted,

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Dated: July 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2020, a copy of the foregoing Reply to Haynes's Petition for Declaratory Order was served by email on the following counsel of record:

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Cause No. 2015-53909

LEE ROY HAYNES

v.

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

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

189th JUDICIAL DISTRICT

AFFIDAVIT OF PAUL RATHGEBER

STATE OF NEBRASKA

COUNTY OF DOUGLAS

BEFORE ME, the undersigned notary public personally came and appeared Paul Rathgeber, who, after being duly sworn, declared the following:

My name is Paul Rathgeber. I am over the age of twenty-one, I have never been convicted of a felony or a crime of moral turpitude, and I am fully competent to make this Affidavit. The facts in this Affidavit are based on my personal knowledge, and they are true and correct.

I am currently employed by Union Pacific Railroad Company as Director of Industry and Public Projects. I was initially hired by Union Pacific Railroad Company in 1997 as an entry level Maintenance of Way employee. I have worked in roles including Heavy Equipment Operator, Track Foreman, Track Inspector, and other similar positions. In 2003 I was promoted to the position of Manager of Industry and Public Projects. In all of my roles at Union Pacific Railroad Company I have been involved in

EXHIBIT A

the design, maintenance, and construction of tracks, railroad grade crossings, and affiliated structures.

During my career at Union Pacific Railroad Company my areas of responsibility have included the greater Houston area including the railroad grade crossing where this incident occurred, DOT inventory No. 762784H. The crossing is located near Dayton, Texas and is located at Mile Post 326.420. The crossing is designated as a "private crossing" and its sole purpose is to provide vehicular transit and access for the adjacent property owners. The crossing has never been a public crossing.

I have given testimony in this case and I am familiar with the underlying facts and contentions made by the Plaintiff. Among those contentions is that Union Pacific Railroad Company was negligent in "building the crossing as a 'hump' type crossing." My understanding of this allegation is that the Plaintiff contends that the track structure is unnecessarily higher than the adjacent ground.

In order to comply with Plaintiff's contention, Union Pacific Railroad Company 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. This reconstruction would be an enormous, burdensome, and expensive undertaking.

Union Pacific Railroad Company, an interstate freight railroad, operates on the mainline track that runs through this crossing 24 hours per day, 365 days per year. This mainline track is an integral part of Union Pacific Railroad Company's primary corridor running between Avondale, Louisiana and Houston, Texas. Up to 31 trains use this mainline track per twenty four hour period.

Lowering the railroad tracks through the crossing to accommodate the allegations in this lawsuit would include but not be limited to the following:

- a) Extensive studies and redesign work that would include, but not limited to, drainage/hydrology, land surface/subsurface, topography, fiber optic cables, nearby public crossings, and other nearby structures such as a highway underpass, and drainage culverts.
- b) If the above studies confirm that lowering the track is feasible, possible, and safe, which is no guarantee, the project would include extensive construction work that would include not only the railroad track that runs directly through the crossing but also the track for a considerable distance in both directions to satisfy the Federal Railroad Administration's (FRA) Track Safety Standards run-off requirements. Specifically, if the track were lowered at the crossing, the FRA Track Safety Standards would require that it also be lowered in increments for specified distances depending on the amount of lowering.
- c) In my professional opinion, the work would require closure of Union Pacific Railroad's mainline railroad track through the area along with nearby public roadway crossings for several days or weeks.
- d) In my professional opinion, several public road crossings, including an existing highway underpass, in Dayton would be impacted and closed to perform the work. There is fiber optic cable that would be affected and would require coordination with the fiber optic company and possible relocation. This would involve relaying ties and lowering the elevation in

conjunction of lowering of the main line. This activity would also have to be evaluated by the drainage study and the potential impacts on both the railroad and the community.

- e) The project would require coordination with the Texas Department of Transportation and the City of Dayton to close the roadways that intersect with the railroad track for an extended period of time to allow for completion of the work. This would also include coordination with local road authorities to close other crossings depending on how much track would have to be lowered to satisfy the FRA track Safety Standards run-off requirements. Additionally, a grade separation structure would either have to be altered, or would set limitations on the geometry of the track, as it is a fixed structure. Union Pacific Railroad Company does not have authority to close or adjust highways and or local roads on its own initiative.
- f) If this stretch of track were closed, Union Pacific Railroad Company would experience a significant negative impact on its operational efficiency and capacity along the entire mainline stretch in the area and beyond. Shipments would have to be rerouted and trains would have to be rescheduled. Delays in freight service can also disrupt the daily operations of the many shippers and consumers who depend upon timely rail service. In addition to delays, safety issues could arise in light of the rescheduling and rerouting.

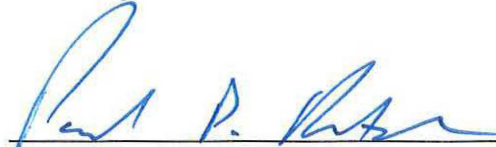
- g) Coordination with local roadway authorities to redesign and reconstruct the roadway approaches to the crossing after the track is lowered.
- h) Union Pacific Railroad Company transports heavy tonnage and hazardous materials on this mainline of track. Water pooling on or around railroad tracks compromises the track's integrity and can lead to train derailments. The current height of the track protects against water pooling on or around the tracks. Conversely, lowering the track would create a greater risk of flood water entering into the crushed stones (known as ballast) on top of the embankment or flowing over the tracks – both of which would create a dangerous condition for train operations.

The above described tasks and construction work would come at an extremely high cost and would shut down rail transportation on the railroad line at issue for a considerable amount of time, thus resulting 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.

Based on my experience and knowledge of the work that this project would entail, the construction costs alone would exceed millions of dollars.

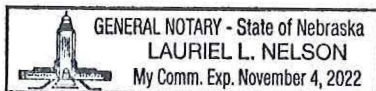
The above statements are true and correct based on my personal knowledge.

FURTHER AFFIANT SAYETH NAUGHT.



PAUL D. RATHGEBER

SUBSCRIBED AND SWORN to on this 27th day of January, 2020





NOTARY PUBLIC