

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36408

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Public Record

LEE ROY HAYNES -- PETITION FOR DECLARATORY ORDER

**REPLY TO REPLIES OF UNION PACIFIC RAILROAD COMPANY AND
ASSOCIATION OF AMERICAN RAILROADS**

Petitioner Lee Roy Haynes (“Haynes” or “Petitioner”) hereby submits this Reply to the replies filed by Union Pacific Railroad Company (“UP”) and the Association of American Railroads (“AAR”) to the Petition for Declaratory Order filed by Petitioner on May 22, 2020 in this docket. Petitioner asks the Board to accept this Reply into the record despite 49 C.F.R. §1104.13(c) because UP expressly agreed to Petitioner filing this Reply in exchange for Petitioner consenting to UP’s request to the Board for an extension of time to file its Reply to the Petition. See UP’s Unopposed Motion for Extension of Time, filed June 3, 2020 at 1. The undersigned counsel for Petitioner is also authorized to represent that AAR also does not object to the filing of this Reply. The Board should also accept this Reply because it will assist the Board in developing a complete record on which to render a decision, and it will not prejudice any party. *City of Alexandria, Va.—Pet. for Declaratory Order*, Docket No. FD 35157, slip op. at 2 (STB served Nov. 6, 2008). Because UP and AAR (together “Railroads”) make many of the same arguments

against the relief sought in the Petition, and in the interests of efficiency, this Reply addresses the contents of both filings.

I. INTRODUCTION

For the most part, the arguments and assertions of the Railroads rehash arguments previously made by CSX Transportation (“CSX”) and rejected by the Board in STB Docket FD 36167, *Jimmy Lee Waneck and Starr Swearingen Waneck, et al – Petition for Declaratory Order* (served May 25, 2018)(*Waneck I*) and the Board’s decision denying CSX’s petition for reconsideration (served on October 31, 2018)(*Waneck II*). The Board should reject them again here. Like CSX in *Waneck*, the goal of the Railroads in this proceeding is to establish a set of rules that with one narrow exception would operate to foreclose any person who is injured or killed by being struck by a train at a road crossing from obtaining any money damages based on a claim under state tort law that the railroad created an unsafe condition at a road crossing due to negligent construction, design, operation, or maintenance of its track and right-of-way. Stated another way, the outcome of accepting the Railroads’ position would be to enable railroads to negligently create unsafe rail crossings with virtually no accountability in the courts because any tort law claim against the railroad would be preempted by 49 U.S.C. §10501(b) of the Interstate Commerce Termination Act of 1995 (“ICCTA”). Finally, adopting the Railroads’ positions would mean that §10501(b) partially repeals the 2007 amendment to 49 U.S.C. §20106(b)¹ of the Federal Railroad

¹ Section 20106((b) “Clarification Regarding State Law Causes of Action.—

(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;

Safety Act (“FRSA”), which was passed in large part for the express purpose of changing then-existing law to enable persons injured by the negligent acts of railroads to seek damages under state tort laws.²

Second, while the AAR seems to argue that all state tort law claims (other than claims arising from the railroad violating a federal regulation) are completely preempted, UP proposes that the “as applied” test for ICCTA preemption should be applied “if the Board sees some tension between FRSA and ICCTA,” and that application of this test results in Petitioner’s claims being preempted. UP’s arguments regarding the “as applied” test are not only legally flawed, they are based on a false factual premise that the *only* remedy for a railroad’s creation of an unsafe hump type crossing is to lower the railroad’s track at a huge cost and disruption of rail service. However, UP and other Class I railroads also correct “humped” road crossings without making *any* changes to the configuration of their rail lines. Rather, they simply work with state and local entities to raise the level of the road on either side of the crossing to match the level of the track. This is *exactly* what UP did, in part, at the crossing where Petitioner was injured shortly after he became stuck on the crossing and was hit by UP’s train, in what UP called a “tie gang replacement project” in 2015. Thus, the Railroads extensive laments about “layperson jurors in every state and county to second-guess[ing] the design of every rail crossing”³ are significantly overblown and contrary to reality.

(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

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

² In light of the fact that the 2007 amendment to §20106 was passed after ICCTA was enacted in 1995, UP’s statements that Petitioner’s position “requires an earlier statute to trump a later one” is puzzling. UP Reply at 2.

³ UP Reply at 1.

Finally, Haynes' tort law claims are also not preempted even if subject to the "as applied" test under §10501(b) because the simplest and least expensive way to resolve the humped track issue, at least in Texas, would have been for UP to post a "low clearance crossing sign" or a "no trucks sign" at the crossing,⁴ which it refuses to do. UP has argued before the state court that the failure to warn claims by Haynes are also preempted.⁵ In response to the terms of the Court's referral letter, the Board should also confirm that §10501(b) also does not preempt Petitioner's state law claims that UP's failure to post a warning sign at the crossing contributed to Petitioner's injuries.⁶

II. RESPONSE TO UP's "FACTUAL AND PROCEDURAL BACKGROUND"

As a preliminary matter, UP's Reply includes a section that purports to summarize relevant facts and the procedural background which contains false statements and mischaracterizations. Specifically, there is no evidence in the record before the state court supporting the statement that Petitioner had "experience getting vehicles stuck or 'high-centered' on crossings in the past." UP Reply at 5. In fact, as a professional truck driver, Haynes had never been high centered or stuck

⁴ See Exhibit A.

⁵ Exhibit 5 to the Petition for Declaratory Order at page 9.

⁶ The terms of the state court's order of referral broadly states "the issue of whether Plaintiff's state law tort claims are preempted under ICCTA will be referred to the Surface Transportation Board for its consideration." As such, the issue of whether Petitioner's claims about a lack of sufficient warning signs are preempted by §10501(b) are also before the Board in this proceeding. Accordingly, UP is incorrect that "the sole question before the Board in this matter is whether Haynes's design, construction and maintenance claim is preempted by ICCTA." UP Reply at 5, note 3. Further, UP's statement that "Union Pacific does not ask the Board to find that Haynes' inadequate notice and signage claims are preempted," *Id.*, could be read to mean UP intends to ask the state court to decide this question. If so, this position is contrary to the plain language of the court's order, which clearly asks the STB to resolve the preemption question for all of Petitioner's claims. It also makes no sense from an administrative efficiency standpoint. The Board should respond to the court's request for guidance by confirming that Petitioner's claims regarding inadequate notice and signage are not preempted by §10501(b).

on any railroad crossing, public or private.⁷ Attempting to influence the Board's deliberations by disparaging the Petitioner with unsupported factual statements is wrong and such statements should be ignored. UP has also included the January 27, 2020 affidavit of Mr. Paul Rathgeber with its Reply, which UP first attached to its Supplemental Briefing on Preemption Under the Interstate Commerce Commission Termination Act, Motion for Reconsideration, and for Summary Judgment ("Motion for Summary Judgment") before the state court. UP asserts Mr. Rathgeber's testimony in his affidavit is "unchallenged." UP Reply at 23. However, Petitioner's ability to formally challenge Mr. Rathgeber's testimony before the state court has been held in abeyance pending the resolution of this declaratory order proceeding. In fact, Petitioner takes great issue with Mr. Rathgeber's affidavit and indeed his purported qualifications to even offer such evidence. Petitioner also disputes Mr. Rathgeber's testimony about the alleged disruption to UP's operations that would occur if Petitioner prevailed at the state court. As discussed in more detail below, Petitioner, when permitted by the state court intends to submit as part of his response to UP's Motion for Summary Judgment the affidavits of Thomas Turk and Kelley Adamson attached as Exhibits C and D to this Reply, respectively, which refute Mr. Rathgeber's conclusions and confirm that there was sufficient road space on each side of the actual rails to raise the grade/slope of the road properly at minimal cost to UP and likely with no disruption to train traffic. Pictures showing how after the accident UP partially raised the road when it re-asphalted the crossing in the tie gang project and fixed the humped crossing without any alteration of its tracks or disruption to UP's service are attached as Exhibit E.

⁷ See Exhibit B, which consists of relevant pages of Haynes's testimony in the state court proceeding that have been extracted from his sworn deposition testimony.

III. ARGUMENT

A. The Board's *Waneck* Decisions were Correctly Decided

In their respective replies, UP and AAR both urge the Board to reconsider the guidance it offered to the state court in the *Waneck* decisions, largely repeating many of the arguments CSX unsuccessfully made in those proceedings. There, the Board was presented with a similar fact pattern: the railroad's allegedly negligent maintenance of its tracks and right-of-way at a road crossing had resulted in the creation of a dangerous "hump" on which vehicles could be stranded. In the *Waneck* case, the vehicle was a tour bus which became stuck on the crossing and was then struck by a CSX train, killing several passengers and injuring many more. The injured passengers and survivors of the deceased passengers sought damages from CSX under state tort law negligence claims. In Petitioner's state court case, he similarly alleges UP negligently maintained its track and right-of-way in a manner that resulted in the creation of a humped crossing, which caused Petitioner's vehicle to become stuck and then be struck by a UP train, resulting in him sustaining severe injuries. When the Board was asked for either a declaratory order or guidance on the issue of whether the possible federal preemption of the *Waneck* passengers' and their survivors' state tort law claims were to be determined by ICCTA or by the FRSA savings clause found at 49 U.S.C. §20106(b), the Board conducted a careful analysis of the interplay between ICCTA and the FRSA as analyzed in prior agency and court precedent. The Board then concluded that the tort law damage claims brought by the plaintiffs in *Waneck* were "safety-related claims" because they "stemm[ed] from a train's collision with a bus that resulted in death and injury." *Waneck I* at 4; and "because they related to the risk of injury and death created by CSXT at a rail crossing." *Waneck II* at 6. In *Waneck II* the Board painstakingly responded to all of CSXT's

arguments asking the Board to reconsider its conclusion and explained how its determination was consistent with well-established precedent that “rail safety” includes the highway safety risks created at rail crossings. *Id.*; citing *Iowa, Chicago & Eastern RR v. Washington County, Iowa*, 384 F.2d 557, 560 (8th Cir. 2004)(concluding that “rail safety” for purposes of FRSA jurisdiction includes “highway safety risks created at rail crossings” is, in part, “common sense.”); accord, *Cody Rawls v. UP*, Case No. 1:09-CV-01037, 2012 WL 2803764, U.S. District Court for W.D. Arkansas (July 10, 2012 (“*Rawls*”) Slip op. at 8 (case involving claims for negligence arising out of a train-crossing wreck was a case about “safety claims” and therefore preemption was to be determined by the FRSA and “ICCTA’s place is not in this crossing-safety case”). The Board also relied on the Sixth Circuit’s decision in *Tyrrell v. Norfolk Southern Railway*, 248 F.3d 517 (6th Cir. 2001)(“*Tyrrell*”), where the court concluded tort claims for damages by a person who lost his leg because the railroad created an unreasonably dangerous condition by not complying with state track clearance regulations were not preempted by ICCTA because the state regulation was “safety related.” Specifically, in *Tyrrell* the court determined that the state clearance law only tangentially touched on the economic regulation of the railroad and was primarily passed for rail safety reasons and compliance with the law benefitted rail safety. *Id.* at 524. Therefore, FRSA provided the applicable standard for preemption questions. Here, Petitioner’s state tort law claims for damages from his injuries arise out of UP’s creating of an unsafe condition at a road crossing because it negligently constructed, designed, and/or maintained its track and right-of-way. These claims are clearly “safety-related” and the Board’s determination that such claims are to be reviewed under the FRSA for preemption should apply here.⁸

⁸ As the Board observed in *Waneck II* “the overwhelming weight of precedent holds that safety issues are generally governed by FRSA preemption.” *Waneck II* at 5; Other cases include *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 106–08 (2d Cir. 2009) (“Several circuits that have

The Railroads' arguments in favor of the Board (again) reconsidering its conclusions in *Waneck* is essentially a rehash of the arguments made by CSX in that proceeding. Each attempt to substantially broaden the scope of §10501(b) to completely preempt all tort law claims by parties injured or killed by trains unless the party could make the narrow showing that the railroad violated a federal regulation. AAR in particular argues that the scope of preemption under §10501(b) is so broad that "in truth, practically all efforts to regulate those [rail] operations could be characterized as safety-related," and so therefore, any and all tort law claims by a person for damages due to injuries from being struck by a train would impermissibly regulate railroad operations and are therefore preempted by §10501(b). AAR Reply at 12. While the AAR states on the one hand that "[a]pplying ICCTA's preemption provision will not necessarily mean that a state tort claim will be preempted," AAR at 16, it undercuts this statement by asserting that all claims against railroads seeking damages for personal injury under state tort laws are an attempt to impermissibly regulate railroad operations which are preempted by §10501(b) because "tort awards are intended to create a strong behavior-modifying incentive." *Id.* at 19; *See also* UP Reply at 4. In the first place, this statement is not correct as general damage awards in tort cases are to compensate the party for their actual losses, economic and non-economic. Moreover, while the cases are not uniform, there is authority holding that an award of money damages to Haynes in his state court case would not be the functional equivalent of an order demanding that UP locate its tracks. *See Rawls, supra*, slip op at 5. Furthermore, "while tort suits may operate as regulation," state liability laws that result in damage awards that are based on safety do not necessarily conflict with ICCTA

examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration ("FRA"), not the STB. We agree."); *Boston & Me. Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 321 (D.C. Cir.2004) ("[P]rimary jurisdiction over railroad safety belongs to the FRA, not the STB."); and *Rawls, supra*, among others.

preemption rules, which are designed to address state “*economic regulation* of railroads.” *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 442-44 (5th Cir. 2001) (emphasis added) (stating that ICCTA preemption is designed to address state and local restrictions that “reach into the area of the economic regulation of railroads ... in such areas as train speed, length and scheduling.”).

The Railroads also assert that there is no conflict between §§10501(b) and 20106(b) for the Board or a court to attempt to harmonize. UP Reply at 7; AAR Reply at 19-20. The Board rightfully rejected similar claims by CSX in *Waneck II*, stating

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.* See *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 522-23 (6th Cir. 2001); accord *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 106-08 (2d Cir. 2009). Where two federal statutes are in apparent conflict, courts and the Board must attempt to read them in harmony and give effect to both to the extent possible rather than assuming Congress repealed one by implication. E.g., *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1998). *Thus, § 10501(b) does not broadly subsume safety-related claims, as CSXT suggests.*

Waneck II at 5 (emphasis added). Thus, both the Board and the Sixth Circuit recognized that §10501(b) as written could be interpreted so broadly as to subsume and therefore completely preempt all safety-related claims that would otherwise be cognizable under §20106(b), which is what the AAR is urging the Board to conclude. In *Waneck* the Board acknowledged this conflict between the statutes, and properly and reasonably applied them in a way that recognized the potentially broad scope of §10501(b) and the purpose and language of §20106(b) and gave effect to both statutes.

Nevertheless, the Railroads attempt to undercut the Board's reliance on *Tyrrell* by criticizing the Sixth Circuit's analysis. See, e.g., UP Reply at 11 ("*Tyrrell* misunderstood both FRSA and ICCTA"). However, such criticisms are misplaced and should be rejected. In that case the Court engaged in a permissible and straightforward analysis of two conflicting statutes, and concluded that the legislative intent of the state clearance law at issue was to protect safety, the Ohio Supreme Court had previously confirmed this purpose, the terms of the law were safety-oriented, and the law only tangentially touched on rail construction or rail operation matters. *Tyrrell*, 248 F.2d at 524.

UP's claim that the subsequently decided *CSX Transportation, Inc. v. Seabee*, 924 F.3d 276 (6th Cir. 2019) weakens *Tyrrell* is wrong as well. In *Seabee*, there was no issue of whether CSXT had created an unsafe rail crossing through negligent construction or maintenance. There was also no issue before the Sixth Circuit of whether the local ordinance was related to rail safety as determined by the court in *Tyrrell* since the district court made no finding on this point. *Id.* at 285. Rather, in contrast to the track clearance law in *Tyrrell* the ordinance in *Seabee* was so broadly written concerning changing grades at crossings that it "could thus be used to deny CSX the ability to conduct its preferred method of maintenance both pretextually and indefinitely. Indeed, the ordinance was used to deny CSX the ability to conduct maintenance – even the maintenance at Jefferson Street that would not have raised the grade of the crossing." *Id.* at 284. Consequently, there should be little surprise that such an ordinance was preempted by §10501(b). However, nothing in *Seabee* indicates that the Board's conclusions in *Waneck* would not apply to a situation where a person suffered injuries or was killed due to CSX's negligent construction, design or maintenance of a road crossing that resulted in the creation of a humped crossing on which vehicles became stuck and then struck by the railroad's train. Clearly, any tort law claims for damages arising out of the collision would be "safety-related" and not preempted by ICCTA.

In summary, there is no reason for the Board to backtrack from the guidance it provided in *Waneck I* and *Waneck II* that questions of whether state tort law claims for damages from being struck

by a train at a rail crossing are federally preempted are to be considered under §20106(b) of the FRSA, and not §10501(b) of ICCTA. To decide otherwise would enable the Railroads to achieve their goal of eliminating the ability of persons injured or killed by trains at road crossings from seeking damages from railroads who create unsafe and dangerous crossings through their negligence in construction, designing and/or maintenance practices. This would be bad public policy. A finding that UP's crossing maintenance practices are completely preempted by §10501(b) would mean that *none* of UP's actions falling into the category of "maintenance," no matter how unsafe, could be challenged under state tort law, nor would they be reviewable under the FRSA. Specifically, if §10501(b) preemption is determined, then the statute provides that "the remedies provided under [49 U.S.C. 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law." *14500 Limited LLC – Pet. for Declaratory Order*, FD35788 (STB served June 5, 2014), slip op. at 3. This means the negligence claim would be preempted even though a federal remedy may not exist under ICCTA for all instances where a state or local law is preempted. *Tubbs, supra*, slip op. at 7. Indeed, it is well established that ICCTA does not create a federal remedy for tort actions. *Trejo v. Union Pacific R. Co.*, Case No. 3:10-CV-00285, 2011 WL 309614 (E.D. Ark January 28, 2011) ("*Trejo*"), Slip op. at 4, and cases cited therein; *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1132 (10th Cir. 2007).

By concluding in *Waneck* that ICCTA and FRSA are to be construed *in pari materia* on the particular facts presented and that questions of federal preemption of claims found to be "safety-related" are governed by FRSA, the Board has avoided the harsh result sought by the Railroads; namely that §10501(b) preemption would leave Petitioner with no ability to seek damages for the injuries he sustained from UP's unsafe crossing maintenance practices, without even the option of testing whether remedies are cognizable under the FRSA, whose primary purpose is railroad safety. This result would attach despite and in the face of the savings clause of

49 U.S.C. §20106(b), which was enacted for the specific purpose of clarifying that state tort law claims could properly be pursued for allegations of railroad violations of safety rules and practices and federal standards of care. *Trejo*, slip op. at 5 (“It would be strange indeed to conclude that the ICCTA, which is concerned with economic regulation rather than railroad safety, completely preempts a state tort action for personal injury when the FRSA, which is concerned with railroad safety, does not.”).

B. Even if Petitioner’s Tort Law Claims are Subject to §10501(b) They are Not Preempted

As summarized above FRSA, not ICCTA should govern any questions of whether Petitioners’ state tort law claims for damages are preempted. The AAR seems to argue that such claims should be completely preempted. In its Reply UP posits that if the Board still sees a conflict between ICCTA and FRSA, it should not rule that safety-related claims are governed by FRSA, but “preserve” the “as applied” test for ICCTA preemption, which prohibits state “regulation” of rail transportation that imposes an unreasonable burden on interstate commerce. UP Reply at 19. Petitioner disagrees with this assertion but states that even if the “as applied” test was applicable to Petitioner’s claims, they would not be preempted.

Petitioner’s claims before the state court are that UP negligently (1) created an unsafe crossing through its construction, design and maintenance of the crossing, and (2) failed to post warning signs at the crossing. As to the first category of claims, UP’s argument and evidence about the alleged unreasonable burden posed by Haynes’ claim is based on the false assumption that remedying the humped crossing that resulted in the collision and his injuries would in all cases require lowering miles of the track at and upstream and downstream of the crossing at a huge cost to UP and major disruptions in service. Mr. Rathgeber’s affidavit provides a list of alleged projects, costs and interruptions that would be required as a result of “[l]owering the railroad tracks

through the crossing to accommodate the allegations in this lawsuit.” Rathgeber Affidavit at 3. But this evidence rests on the completely unproven assumption that the *only* way to remedy Haynes’s complaint about the hump crossing is to lower the track. To the contrary, the remedy sought by Haynes is an award of money damages to compensate him for his injuries and other monetary damages. He does not seek an order from the court directing UP to do anything, let alone undertake any of the projects described by Mr. Rathgeber. In any event, as mentioned previously, the danger posed by the humped crossing could have been remedied by not lowering the track but by simply raising the level of the road as it approaches the crossing. In fact, as shown in Exhibit E, UP did exactly that shortly after this accident, presumably for a relatively low cost. UP’s actions were consistent with those of other railroads. In the *Waneck* case, after the collision with the tour bus CSX similarly did not make any changes to its tracks to prevent future incidents of vehicles being high centered on the humped crossing. Rather, CSX worked with the state and local entities raised the level of the road on either side of the tracks to smooth out the hump.⁹

Thus, UP’s attempt to assert as fact that the *only* remedy for UP’s negligence would be to “redesign the track adjacent to the crossing for a significant distance on both sides” at a cost of “millions of dollars” and “significant delays to Union Pacific’s freight service,” UP Reply at 23, are highly questionable and belied by UP’s own behavior subsequent to the incident. There is,

⁹ The Biloxi crash and resulting injuries and death prompted an extensive investigation by the National Transportation Safety Board. The investigative materials are located under NTSB No. HWY17MH010 on the agency’s website. One of the reports issued was the Highway Factors Group Chairman’s Factual Report, which reported that after the accident the humped crossing was to be corrected in part by the City of Biloxi by raising the asphalt road on either side of the CSX’s rail tracks. See Docket No. HWY17MH010, National Transportation Safety Board, *Highway Factors Group Chairman’s Factual Report* at 28-30, (July 20, 2018) <https://dms.nts.gov/pubdms/search/document.cfm?docID=465187&docketID=61376&mkey=94832> at page 28. It does not appear that CSX modified its mainline tracks at this crossing, or the numerous other crossings in Biloxi reviewed in the report.

therefore, no evidence that the parade of horrible consequences listed in Rathgeber's affidavit would be "required" to remedy the issues identified in Haynes' complaint against UP. Instead, the affidavits of Thomas Tuck and Kelley Adamson demonstrate that no extensive burden would be placed on UP to remedy the danger caused by this crossing. For example, Mr. Tuck's affidavit estimated that the road on both sides of the crossing could have been completely re-built at the proper slope for a cost of under \$40,000.00 and with minimal disruption, if any, to train operations. Exhibit C at 2. In his affidavit, Mr. Adamson concurs that the humped crossing defect could have been fixed "by simply adding 'base' fill material to correct the slope" of the roadway approach to the UP's tracks. Exhibit D at 1. Thus, even if the "as applied" test were applicable to Haynes tort claims based on UP's negligent maintenance of its crossing, his claims would not be preempted because (1) he is merely seeking monetary damages for his injuries; and (2) remedying the condition that led to his injuries would not unreasonably interfere with UP's interstate operations.

Petitioner has also alleged in the state court that UP negligently failed to provide adequate warning of the elevated crossing and failed to "contact the appropriate government agency about posting low clearance signs." Exhibit 1 of the Petition for Declaratory Order. As stated above, UP has argued in the state court case that this claim is also preempted by ICCTA. In Petitioner's view, under state law, UP could have addressed the premises defect posed by the hump crossing at issue by providing adequate warning. A premises owner "can provide the required protection by either warning the plaintiff or making the premises reasonably safe." *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996). Here, a simple signing warning of the danger posed by a hump crossing would have remedied the premises defect. The sign could be a "NO TRUCKS" sign or a "Low Clearance Crossing" sign as is displayed in Petitioners Active Pleading. See page 7 of Exhibit 5 to the Petition for Declaratory Order. The cost of such a sign is under \$50.00. See Exhibit A. At this private crossing UP could have posted a warning sign without permission from

any governmental agency. Before the state court UP claimed it was unable to do so but offered no authority to support this claim.

In *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), the court held that (1) the ICCTA does not completely preempt an ordinary negligence claim for injuries resulting from the failure to provide adequate warnings at a railroad crossing. *Id.* at 814. *Elam* held that the plaintiff's ordinary negligence claim based on inadequate warning of a railroad crossing was not preempted. *Id.* The Court emphasized that complete preemption *does not apply to a "typical negligence claim seeking damages for a typical crossing accident."* *Id.* at 808 (emphasis added). Thus, complete preemption does not apply to state laws such as "property laws," "negligence law," and "rules of civil procedure" because any effects of those laws "on rail operations are merely incidental." *Id.* at 813. The court explained that ICCTA "will not completely preempt valid exercises of a state's police powers in most cases" and noted that the "Federal Railroad Safety Act (FRSA) expressly provides that states may enact (and citizens may enforce) rail safety laws in certain circumstances." *Id.* at 807–08. The court emphasized that this type of preemption is rare. *Id.* at 808 ("We do not anticipate many state law claims will be completely preempted (and thus removable to federal court) under the standards we have discussed."). Like the negligence claim in *Elam*, Haynes' adequate warning claims are typical state-law tort claims. Thus, under *Elam*, complete preemption does not apply to any of Haynes's claims.

Although complete preemption does not apply to Haynes' claims of inadequate signage, in *Elam* the Fifth Circuit determined that the "as applied" preemption test did apply, explaining under the facts of that case, "[t]he issue is whether [the railroad company] has demonstrated that providing such warnings would unreasonably burden or interfere with its switching operations." *Id.* The court then held that there was no "as applied" preemption of the negligence claim because the railroad company had not established that providing adequate warnings of the train's presence

at the crossing at issue would “*unreasonably* burden or interfere with” the railroad’s operations. *Id.* at 814 (emphasis in original), and that “general evidence that rail crossings affect rail transportation is insufficient.” *Id.* UP has made no allegation or demonstration in Petitioner’s case that providing adequate warning signs at the crossing would unreasonably burden or interfere with its operations, and it would appear such a showing would be highly unlikely given that an appropriate sign cost less than \$50.00 and would not disrupt UP’s operations in any way.¹⁰

Additionally, when a jury finds that a railroad crossing is extra hazardous, Texas law places “the higher duty upon the railroad to use extraordinary means to warn travelers along the road.” *Missouri Pac. R. Co. v. Cooper*, 563 S.W.2d 233, 235 (Tex. 1978). There is evidence that this crossing was extra-hazardous. The standard is not whether the crossing posed a danger to an ordinary driver, but rather: “A railroad crossing is extra hazardous when, *because of surrounding conditions*, it is so dangerous that persons using ordinary care cannot pass over it in safety without some warning other than the usual cross arm sign.” *Missouri Pac. R. Co. v. Cooper*, 563 S.W.2d 233, 235 (Tex. 1978). So, the question is whether a truck driver using ordinary care could pass over the tracks under these circumstances — that is, driving Mr. Haynes’s truck — without some warning other than the usual cross signs.

IV.

¹⁰ In another case, the Fifth Circuit reached a similar result. In *Guild v. Kansas City S. Ry. Co.*, 541 Fed. Appx. 362, 367–68 (5th Cir. 2013), the court held that the ICCTA did not preempt a negligence claim for property damage caused by a railroad’s use of a private spur track by overweight rail cars. The railroad pointed to evidence that, if it were “subject to ordinary state law negligence claims for the weight of its railcars, [it] would be forced to make adjustments to that weight to avoid liability, as best it could.” *Id.* But the Fifth Circuit held this was insufficient to establish preemption because “in advancing their negligence claim for damage caused to the spur track, the Guilds are not attempting in any way to undertake economic regulation of railroads.” *Id.*

CONCLUSION

For all the reasons set forth above Petitioner Lee Roy Haynes respectfully requests that the STB respond to the referral letter of the presiding Judge in the state court proceeding with a decision that provides an appropriate ruling that Petitioner's state law negligence claims, including his claims of inadequate warnings, are not preempted by ICCTA but rather the issue of whether such claims are preempted should be analyzed under the savings clause of the FRSA.

Respectfully submitted,



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Attorneys for Lee Roy Haynes

July 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of July 2020, a copy of the foregoing Reply to the Replies of Union Pacific Railroad Company and Association of American Railroads Petition was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox

EXHIBIT A

April 29. We are open for business and shipping on schedule.



Railroad Low Ground Clearance: Railroad Low Ground Clearance

★★★★★ based on 2 customer reviews

1 Select Size:

18" x 18"

24" x 24"

30" x 30"

36" x 36"

2 Select Material:

Quantity / Price (Per Sign)

For size: 18" x 18"

1-2

Reflective Aluminum Signs



3M Engineer Grade Reflective Alum.

\$38.76



3M Hi Intensity Reflective Aluminum

\$45.82

Reflective Aluminum Signs - Premium

3M DiamondGrd Fluoresc'nt Yellow

\$66.41

[View all quantity based discounts](#)

3 Select Adder:



3M SmartShield POF Laminate – Superior protection against Fading and Graffiti. \$15.24 for 1 Sign

4 Order Quantity:

Size
Material

18" x 18"

3M Engineer Grade Reflective Alum.

Qty

-

1

+

Sign

Total
Per Sign

Ships Today.

Order within

Sign orders over \$100 ship UPS/Expedited 2nd Day for free. Get your signs on Friday!

Part# X-W10-5
SPN# DY3U
Color Black on Yellow
Shape Diamond

MUTCD Regulation: Section 8B.23 Low Ground Clearance Grade Crossing Sign (W10-5)



Standard. 01 Because this symbol might not be readily recognizable by the public, the Low Ground Clearance Grade Crossing (W10-5) warning sign shall be accompanied by an educational plaque. LOW GROUND CLEARANCE. The LOW GROUND CLEARANCE educational plaque shall remain in place for at least 3 years after the initial installation of the W10-5 sign (see Section 2A.12).

For more info [click here](#)

3M Engineer Grade R

Configuration:
(click to zoom)

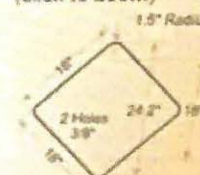


EXHIBIT B

CAUSE NO. 2015-53909

LEE ROY HAYNES) IN THE DISTRICT COURT
VS.) 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) 189TH JUDICIAL DISTRICT

ORAL DEPOSITION OF

LEE ROY HAYNES

OCTOBER 18, 2016

ORAL DEPOSITION OF LEE ROY HAYNES, produced as a
witness at the instance of DEFENDANTS, GAYLA JANSEN,
JEREMY JANSEN, AND JARED JANSEN, and duly sworn, was
taken in the above-styled and numbered cause on TUESDAY,
OCTOBER 18, 2016, from 1:08 p.m. to 2:56 p.m., before
Kristina Bender, CSR in and for the State of Texas,
recorded by machine shorthand, at the offices of THE
BRANN LAW FIRM, 1770 St. James Place, Suite 350,
Houston, Texas, pursuant to the Texas Rules of Civil
Procedure and the provisions stated on the record or
attached hereto; that the deposition shall be read and
signed before any notary public.

JOB NO. 1-221442

1 Q. Is that what you'd normally used working for
2 that company?

3 A. Yes.

4 Q. Okay. Ever gotten hung up before with the
5 trailer?

6 A. Not on a track. No, I haven't.

7 Q. Anywhere else?

8 A. I -- we get a whole a lot of oil field work
9 back up in the woods, Arkansas and stuff like that.
10 Dirt roads. And some of them dirt roads, you would
11 center out on when you get back up in the woods.

12 Q. Weather that day was clear?

13 A. Yeah, weather was good.

14 Q. What are some of the challenges in driving a --
15 a haul trailer versus just a normal -- like, you know,
16 if you're hauling a container or something?

17 A. Right.

18 Q. What are some of the differences?

19 A. The difference is the way that it hooks up.
20 The way that it comes together. A regular trailer, that
21 little, round ball that fifth wheel on your tractor, you
22 just back up under the trailer. And you hooked up, you
23 roll your dolly legs up, and you go. On a haul trailer,
24 it's a little different. That neck stays with you at
25 all times, that thing that comes around. And what it

1 trailers at S & T?

2 A. Now, they just didn't put me in a haul trailer
3 and say, Take off.

4 Q. Right.

5 A. No. There was some training to it.

6 Q. Okay.

7 A. Yeah. Quite a bit training to it. Yeah.

8 Q. So how many years before this accident do you
9 think that you had pulled a haul trailer?

10 A. 2013. I would say 8, 9 years at max.

11 Q. And did you exclusively pull a haul trailer?

12 A. Yeah, I exclusively pulled a haul trailer.
13 Yeah.

14 Q. You mentioned that you'd been high-centered or
15 hung up on some dirt roads in Arkansas.

16 A. Yeah.

17 Q. Any -- any other occurrences where you've been
18 high-centered or caught up?

19 A. No.

20 Q. All right. Now, on this trip, was -- did
21 this -- did this trip that you were going to take and
22 this load you were going to carry, did it require any
23 type of permit?

24 A. No.

25 Q. And I -- and I think you've already answered

EXHIBIT C

CAUSE NO. 2015-53909

LEE ROY HAYNES

Plaintiff,

v.

UNION PACIFIC RAILROAD

COMPANY, et al

Defendants

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

189th JUDICIAL DISTRICT

THE STATE OF TEXAS

COUNTY OF Comal

BEFORE ME, the undersigned authority, personally appeared Thomas N. Turk, P. E., who being duly sworn, deposed as follows:

My name is Thomas N. Turk. I am of sound mind, over the age of 18, and capable of making this affidavit. I have never been convicted of a felony or of a crime of moral turpitude. I am personally acquainted with the facts herein stated and such facts are true and correct.

I am a licensed professional civil engineer in the state of Texas. My license number is 63124. I have been a professional engineer since 1987 and have over 37 years of experience in civil engineering. I have extensive experience in the design and construction of roadways. A copy of my current Curriculum Vitae is attached to this affidavit as Exhibit 1.

As a principal of Freeland Turk Engineering Group, LLC, I have been asked to provide an opinion of probable cost for modifications of the roadway leading up to and crossing the railroad crossing where Mr. Lee Roy Haynes became stuck. The modifications would be for the purpose of redoing the roadway on either side of the crossing to significantly reduce the "humped" or low clearance crossing condition. The roadway improvements on either side of the crossing would have no more than a 3 inch drop in 30 foot out from the end of the concrete pad or last railroad plank. In providing the estimate of the probable cost for the crossing modifications I have reviewed the Beck diagram attached as Exhibit 2 and the A&M Forensics Engineering Profile Exhibit attached as Exhibit 3. In preparing the opinion of probable cost, TxDOT Standards and Specifications were used to provide a basis for the work and means and methods widely used in the industry. TxDOT Unit Prices for the Houston District were used for the average 3 – and 12 – month periods ending April 2020 as found on the TxDOT website.

This cost analysis was performed without finalized roadway design plans. The opinion of probable cost is a construction estimate.

The modification to the roadway could be done in one of two ways. Additional asphalt could be installed over the existing roadway without reconstruction required or the existing roadway could be completely removed and then reconstructed. Attached as Exhibit 4 is the opinion of probable cost for the option of installing additional asphalt over the existing roadway and includes pricing and quantity amounts. The probable cost for this modification procedure would be \$50,685.06.

Attached as Exhibit 5 is the opinion of probable cost for the option of complete removal of the current roadway and then reconstructing it. As less asphalt will be required in this option and the road could be built utilizing a cheaper base material to build up the area to grade and then install a surface course of asphalt, very similar to standard roadway construction, the opinion of probable cost for this modification would be \$38,325.01.

The option to simply overlay additional asphalt on the current roadway should be completed within 1-2 weeks assuming no unforeseen circumstances. The option to completely remove the current roadway and reconstructed to be completed in 4 – 6 weeks assuming no unforeseen circumstances.

Both options would require working near the railroad tracks and the railroad may require a flagger or other representative to be present. The work should not interfere with trains continuing to use the tracks. The contractor doing the road work would simply need to stop work and move away from an approaching train allowing it to pass the construction site. Such conditions would be stipulated by UPRR and/or TxDOT during the engineering and permitting process.

Both options could be completed without any change to the current configuration of the railroad tracks. Both options could be completed with the roadway generally remaining open for the adjacent property owners. However, short term closures may be required to accommodate repositioning of equipment.

FURTHER AFFIANT SAYETH NAUGHT.

AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 12th day of May, 2020.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission Expires:

Printed Name of Notary

Billie Blaschka

EXHIBIT # 1

CURRICULUM VITAE

THOMAS N. TURK, P.E.



Thomas N. Turk, P.E. is a co-founder and principal of Freeland Turk Engineering Group, LLC. He is a Senior Project Manager who has been providing infrastructure related engineering services to TxDOT, cities, counties and public sector clients in Texas for over 37 years (since 1982).

His expertise includes the design and management of infrastructure projects, such as TxDOT roadways, city/county streets, drainage, water, wastewater, facilities and parks. Mr. Turk also has considerable experience providing routine day-to-day engineering services to small municipalities and counties. He has conceived, planned and implemented hundreds of successful assignments and capital projects in the San Antonio area and across Texas.

Mr. Turk is skilled in all phases of project development including feasibility studies, planning, scheduling, preliminary engineering, design, permitting, cost estimating, budgeting, agency coordination, public involvement, bidding, and construction management. He has acquired considerable working knowledge with supporting disciplines including surveying, sub-surface utility engineering (SUE), geotechnical engineering, pavement design, traffic engineering, environmental, ADA accessibility and compliance, right-of-way acquisition, structures, MEP, grants, architecture, landscape architecture, GIS, and public relations.

Mr. Turk, through the successful execution of hundreds of roadway related project assignments for (or with) numerous public and private sector clients and agencies, has gained considerable knowledge and insight regarding the partners and stakeholders and their roles and responsibilities in the delivery of roadway. Furthermore, he understands the day to day inner workings that take place between project partners and stakeholders during the development of complex projects.

EDUCATION

Mr. Turk graduated from Texas A&M University in 1982 with a B.S. in Civil Engineering.

LICENSURE

Mr. Thomas N. Turk, PE is a registered professional engineer in the State of Texas #63124. He has been a professional engineering since 1987 and has over 37 years of experience in the civil engineering field.

CERTIFICATIONS

Local Government Project Procedures (LGPP) – TxDOT

Project Implementation - TxDBG

LITIGATION CONSULTING AND EXPERT WITNESS EXPERIENCE

City of Del Rio vs. Lockwood, Andrews & Newnam, Inc. – Cienegas Martinez Blvd. E&O (Consultant)

TxDOT vs. Dannenbaum Engineering, Inc. – SH 289 Errors and Omission Claim (Consultant)

Lockwood, Andrews & Newnam, Inc. vs. TxDOT – SH 162 Contractor Claim (Consultant)

City of Hillsboro vs. Lockwood, Andrews & Newnam, Inc. –Wastewater Treatment Plant Errors and Omission Claim (Consultant)

Floyd Cantwell vs. HNTB Corporation & HDR Engineering – 183-A Turnpike Errors and Omission Claim (Expert Witness)

City of Texas City vs. Marathon Oil Company – Texas City Dike Road Damage Claim (Consultant)

Serene Homes vs. Northstar Development Company – US 287 Access Agreement (Consultant)

Seaway Crude Pipeline Co. vs. Austin Road and Bridge – Oil Pipeline Rupture (Expert Witness)

City of Kerrville vs. Freese and Nichols – Utility Bridge Collapse (Consultant)

Mr. Palmer vs. City of Blanco – WWTP Illegal Discharge (Consultant)

Haynes Vs. UPRR – Railroad Crossing Accident (Expert Witness including deposition)

Aerial Coleman Vs. Law – Motor Vehicle Accident (Consultant)

WORK EXPERIENCE

Principal – Freeland Turk Engineering Group, LLC (2019 – Present)

Mr. Turk is responsible for leading, managing and overseeing engineering, business development and operations.

Sr. Project Manager - M&S Engineering, LLC (2012 - 2019)

Mr. Turk was responsible for leading, managing and overseeing transportation and municipal projects including operations, strategic planning, business development and project management. His primary clients were small to medium sized cities in central and south Texas.

President – Camino Real Consulting Engineers, LLC (2012)

Mr. Turk was responsible for providing litigation support, consulting and expert witness services.

Vice President & Transportation Business Group Director - Lockwood, Andrews, & Newnam, Inc. (1999 to 2012)

Mr. Turk was responsible for leading, managing and overseeing all operations of a business group including strategic planning and implementation, business development and operations. This business group provided six primary services including transportation planning, traffic engineering, schematic development, NEPA documentation, design (PSE) and real estate acquisition. He oversaw hundreds of successful projects for several clients including multiple TxDOT Districts, toll authorities, counties and municipalities across Texas.

San Antonio Branch Manager - Lockwood, Andrews, & Newnam, Inc. (1993 to 1999)

Mr. Turk was responsible for leading, managing and operating the San Antonio branch office. In this role, he managed a broad range of civil engineering projects for public sector clients including roadway, drainage, utility and site development projects. The primary clients Mr. Turk served included the City of San Antonio, Bexar County and TxDOT San Antonio.

Project Manager - Lockwood, Andrews, & Newnam, Inc. (1989 to 1993)

Mr. Turk provided project management on a wide variety of civil engineering projects in the San Antonio area including roadway, drainage, utility and site development projects. He managed many successful projects for public sector clients such as the City of San Antonio, Bexar County, Alamo Community College District and others.

Project Engineer – Pape Dawson Engineers, Inc. (1984 to 1989)

Mr. Turk was responsible for providing engineering and design production on a broad range of civil engineering projects including roadways, drainage, utilities, subdivisions, site development and surveying. He made significant design contributions on numerous successful projects for public sector and private land development organizations.

Project Engineer – Winder and Associates, Inc. (1982 to 1984)

Mr. Turk was responsible for providing engineering and design production on a broad range of civil engineering projects including roadways, drainage, utilities, subdivisions, site development and surveying.

CONTACT INFORMATION

Thomas N. Turk, P.E.

Freeland Turk Engineering Group, LLC

2115 Stephens Place, Suite 410-A

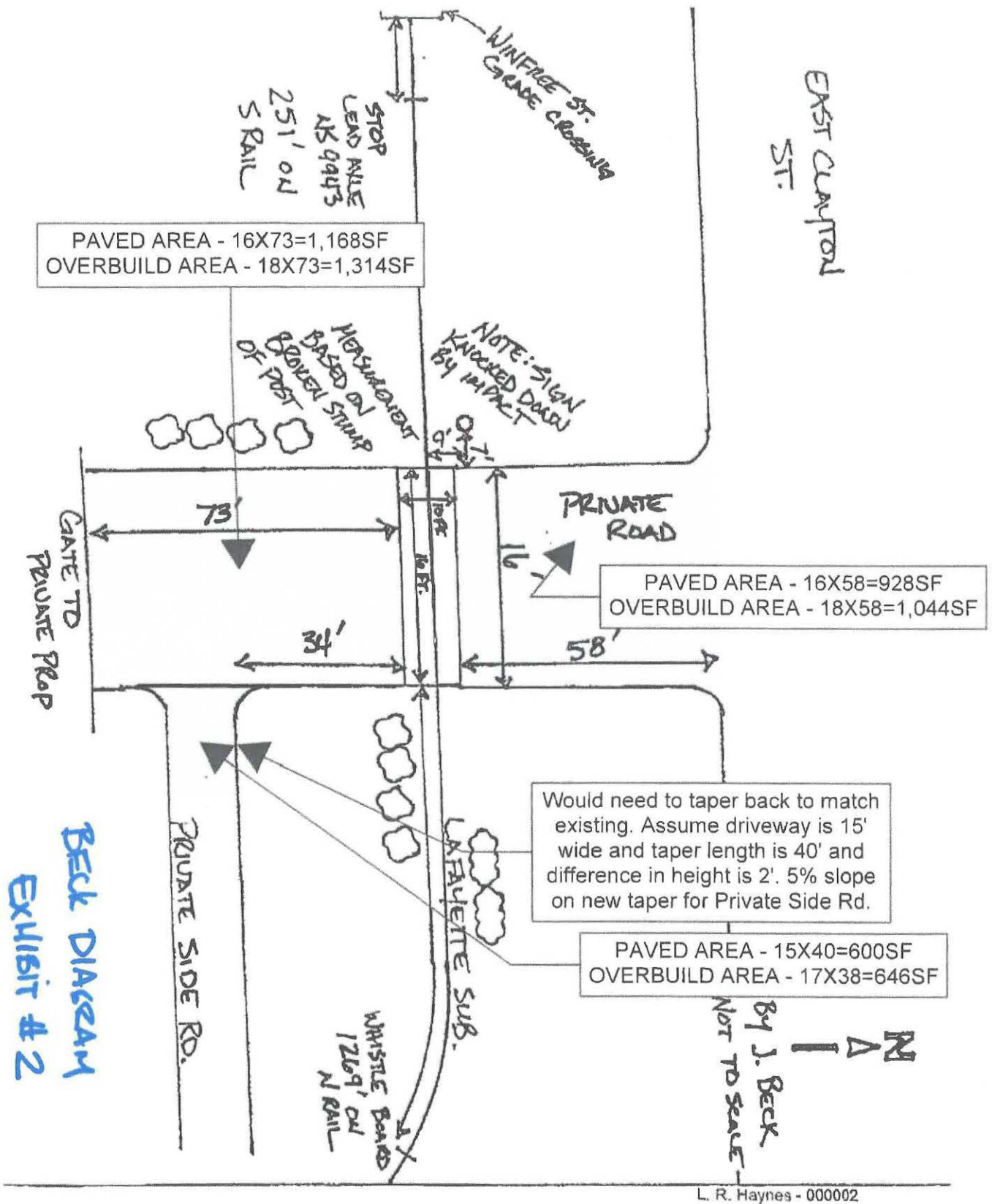
New Braunfels, Texas 78130

Phone: (830) 322-6208

Email: tturk@freelandturk.com

Website: www.freelandturk.com

Date: 2/17/2020



NOTE:

- 1 DRIVEWAY MODIFICATION OPTION PAVES AREA SHADED BLUE.
- 2 DRIVEWAY RECONSTRUCTION OPTION BUILDS NEW DRIVEWAY IN AREA SHADED BLUE.

DRIVEWAY MODIFICATION OPTION INFORMATION

LEFT SIDE - EXHIBIT

RIGHT SIDE - EXHIBIT

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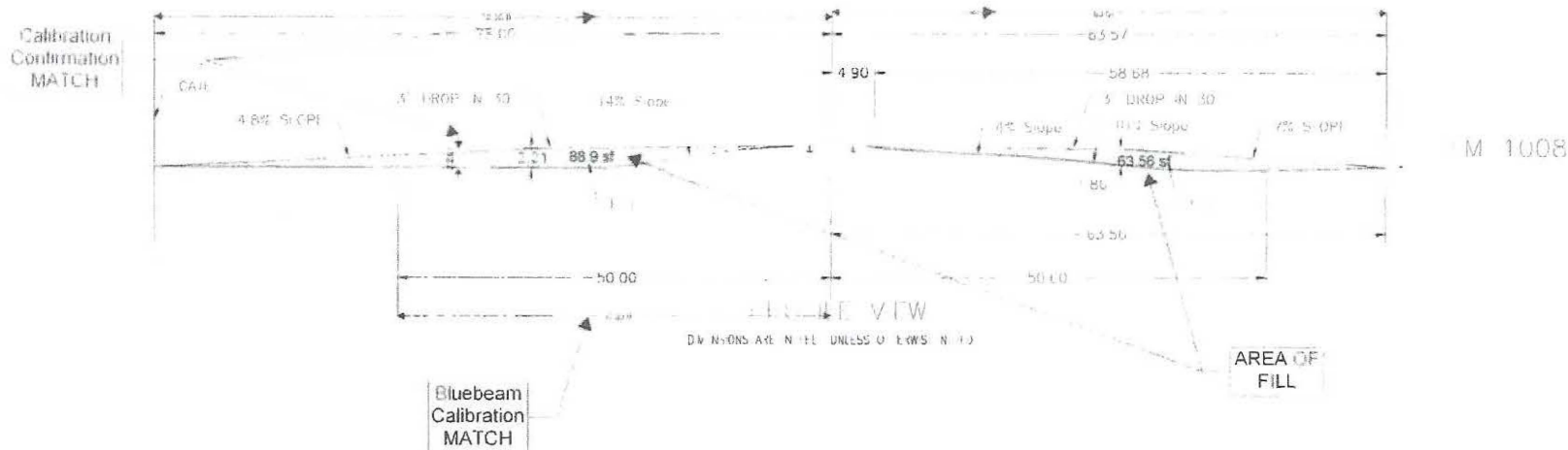


EXHIBIT #3

Sheet		of 2
Title		III. ROADWAY
Project		1008
Client		1008
Date		10/1/10
Author		1008
Reviewer		1008
A&M FORENSIC AND ENGINEERING, INC.		Kelly S. Adamson, M.E., P.E.
KSA		1008
Revision Description		Draft



EXHIBIT #415

April 22, 2020

Brann Sullivan Trial Lawyers
Scott R. Brann
602 Sawyer Street, Suite 700
Houston, Texas 77007

RE: Lee Roy Haynes vs UPRR

Dear Mr. Brann:

As requested in your email to Thomas Turk, P.E., dated Thursday, April 16, 2020, Freeland Turk Engineering Group, LLC (FTEG) has reviewed the exhibits provided and prepared a preliminary opinion of probable cost for the railroad crossing modifications shown in the exhibits.

In preparing the opinion of probable cost, we used TxDOT Standards and Specifications to provide a basis for the work and a typical method widely used in the industry. We also utilized TxDOT Unit Prices from Harris County for the average 3- and 12-month periods ending April 2020 found on the TxDOT website. In preparing our analysis, we utilized the two exhibits provided by your office, the Beck Diagram and the A&M Forensics Engineering Profile Exhibit. Our cost analysis was performed without a complete topographic survey of the area and without a finalized roadway design. The opinion of probable cost is a construction estimate and does not include the price of civil or geotechnical engineering design, topographic design survey, or any jurisdictional permits that may be required.

Our initial evaluation assumed that asphalt material would be imported and installed over the existing driveway, and no reconstruction would be required. After quantifying those materials, we prepared an opinion of probable cost of \$50,685.06. Due to the cost of the volume of asphalt material to be placed, we evaluated and prepared a second option and opinion of probable cost to completely remove and reconstruct the roadway using a cheaper base material to build up the area to grade and then install a surface course of asphalt, very similar to standard roadway construction. The reconstruction option was the more economical result at \$38,325.01 based on the extent of the reconfiguration of the vertical alignment of the driveway.

We have included the original exhibits with our commentary included for preliminary approach as well.

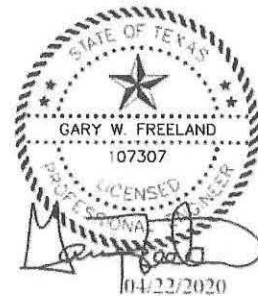
If you have any questions, please feel free to call me at (830) 377-4555.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary Freeland', written over a horizontal line.

Gary Freeland, P.E.
Principal

Attachments





FREELAND TURK
ENGINEERING GROUP

FREELAND TURK ENGINEERING GROUP, LL FIRM F-21047
2115 STEPHEN'S PLACE, SUITE 410-A
NEW BRAUNFELS, TX 78130 830-377-4555

PROJECT HAYNES VS UPRR (DRIVEWAY MODIFICATIONS - FILL WITH ASPHALT)

DATE 4/21/2020

OPINION OF PROBABLE COSTS

TxDOT SPEC	BID CODE	DESCRIPTION	UNITS	ESTIMATED QUANTITY	UNIT PRICE	TOTAL
100	6002	PREPARING ROW	STA	2	\$2,930.01	\$5,860.02
500	6001	MOBILIZATION	LS	1	15%	\$5,748.78
502	6001	BARRICADES, SIGNS AND TRAFFIC HANDLING	MO	1	\$4,477.54	\$4,477.54
SUBTOTAL						\$16,086.34

DRIVEWAY MODIFICATIONS

247	6041	FL BS (CMP IN PLC)(TYA GR1-2)(FNAL POS)	CY	49	\$59.91	\$2,935.59
340	6122	D-GR HMA(SQ) TY-D PG70-22	TON	202	\$124.02	\$25,052.04
SUBTOTAL						\$27,987.63

GRAND SUBTOTAL \$44,073.97

CONTINGENCY (15%) \$6,611.10

GRAND TOTAL \$50,685.06

NOTES:

1. 247-6041 IS TO TAPER THE SIDE SLOPES OF THE FILLED AREA TO MEET TXDOT AND TYPICAL DESIGN STANDARDS.
2. 340-6122 IS TO FILL THE ENTIRE AREA SHADED BLUE IN THE BECK DIAGRAM AT THE VOLUME SHOWN IN THE SHADED BLUE AREA OF THE PROFILE VIEW OF THE A&M FORENSICS EXHIBIT.

EXHIBIT
#4



FREELAND TURK ENGINEERING GROUP, LL FIRM F-21047
 2115 STEPHEN'S PLACE, SUITE 410-A
 NEW BRAUNFELS, TX 78130 830-377-4555

PROJECT HAYNES VS UPRR (DRIVEWAY RECONSTRUCTION)

DATE 4/21/2020

OPINION OF PROBABLE COSTS

TxDOT SPEC	BID CODE	DESCRIPTION	UNITS	ESTIMATED QUANTITY	UNIT PRICE	TOTAL
100	6002	PREPARING ROW	STA	2	\$2,930.01	\$5,860.02
500	6001	MOBILIZATION	LS	1	15%	\$4,346.88
502	6001	BARRICADES, SIGNS AND TRAFFIC HANDLING	MO	2	\$4,477.54	\$8,955.08
SUBTOTAL						\$19,161.98

DRIVEWAY MODIFICATIONS

105	6011	REMOVING STAB BASE AND ASPH PAV (2"-6")	SY	301	\$4.32	\$1,300.32
260	6006	LIME TRT (EXST MATL) (6")(6%)	SY	334	\$4.04	\$1,349.36
260	6002	LIME (HYDRATED LIME (SLURRY))	TON	8	\$171.07	\$1,368.56
247	6041	FL BS (CMP IN PLC)(TYA GR1-2)(FNAL POS)(8")	CY	161	\$59.91	\$9,645.51
310	6009	PRIME COAT (MC-30)(0.2 GAL/SY)	GAL	68	\$4.44	\$301.92
340	6122	D-GR HMA(SQ) TY-D PG70-22(2")	TON	34	\$124.02	\$4,216.68
SUBTOTAL						\$14,164.11

GRAND SUBTOTAL \$33,326.09

CONTINGENCY (15%) \$4,998.91

GRAND TOTAL \$38,325.01

NOTES:

1. 105-6011 IS SHADED AREA SHOWN IN BECK DIAGRAM
2. 260-6002 IS 6% BY VOLUME AT 150LBS/CF.
3. 260-6006 IS SHADED AREA SHOWN IN BECK DIAGRAM WITH 1' OVERBUILD ALL AROUND.
4. 247-6041 INCLUDES 1' OVERBUILD AND TAPER SIDE SLOPES.
5. 310-6009 IS APPLIED ON BASE INCLUDING OVERBUILD.
6. 340-6122 IS PAVED ON SAME AREA AS ITEM 1.

EXHIBIT
#5

EXHIBIT D

LEE ROY HAYNES

v.

Defendants

100

HARRIS COUNTY, TEXAS

189th JUDICIAL DISTRICT

COUNTY OF

www

BEFORE ME, the undersigned authority, personally appeared Kelly S. Adams, who being duly sworn, deposed as follows:

My name is Kelley S. Adamson. I am of sound mind, over the age of 18, capable of making this Affidavit. I have never been convicted of a felony or of a crime of moral turpitude. I am personally acquainted with the facts herein stated and such facts are true and correct.

I am a licensed professional civil engineer in the State of Texas. I have experience in the design and construction of roadways. A copy of my current Curriculum Vitea is attached to this affidavit.

I have performed an analysis of the crossing and found it not to be in conformance with the American Association of State Highways and Transportation Officials – A Policy on Geometric Design of Highways and Streets. Specifically, section “Railroad-Highway Grade Crossings” that addresses this roadway crossing. The vertical alignment of the approach grade was greater than 3 inch drop over 30 feet in length from the railroad plank, approximately 2 feet from the rail. A 3 inch drop in 30 feet is equivalent to a 0.833% slope. My analysis shows that the slope to and from the track was 10% and 14% respectively. There is sufficient width/area on each side of the railway so that the crossing roadway can be constructed to meet the American Association of State Highway Transportation Officials (AASHTO) design recommendations for railroad crossings to prevent humped or low clearance crossings.

I was asked to address the remediation of the humped crossing defect. The roadway approach can be constructed by simply adding “base” fill material to correct the slope. The based fill material can be lime stabilized soil or other suitable material. The asphalt wear course (pavement) is overlaid on top of the fill material to form the roadway surface for vehicle traffic at the appropriate slope. Diagram 1, attached to

this affidavit, shows the corrected slope and will eliminate the humped crossing defect to prevent a low clearance vehicle from hanging on the railroad tracks.

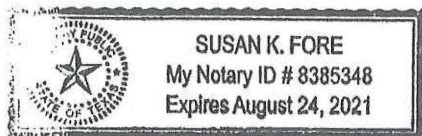
Based upon my experience in the construction field, the construction can be performed without interference with the tracks and trains. Note that the previous construction at the crossing placed asphalt up to the concrete planks, approximately 2 feet from the rails.

This construction would not require the railroad tracks to be closed nor affect the railroad tracks. This construction would not require the railroad tracks to be changed.

FURTHER AFFIANT SAYETH NAUGHT.

Philly Coleman
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME, on this 1 day of May, 2020.



Susan K. Fore

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires:

August 24, 2021

Printed Name of Notary:

Susan K. Fore

EXHIBIT E





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