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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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STB DOCKET NO. FD36104

THE CITY OF OZARK, ARKANSAS
--PETITION FOR RECONSIDERATION OF DECLARATORY ORDER—
REGARDING JURISDICTION OVER AT-GRADE CROSSING DISPUTE

EXPEDITED CONSIDERATION REQUESTED

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FILING FEE WAIVED

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB DOCKET NO. FD36104

EXPEDITED CONSIDERATION REQUESTED

**THE CITY OF OZARK, ARKANSAS' AMENDED PETITION FOR
RECONSIDERATION OF DECLARATORY ORDER**

Comes Now, the City of Ozark, Arkansas (the "City") an Arkansas municipal corporation, by and through its counsel, Christopher D. Brockett of Robertson, Beasley, Shipley & Robinson, PLLC, and pursuant to § 1115.3, the City hereby files this Amended Petition for Reconsideration of the Surface Transportation Board's Decision dated July 28, 2017 in Docket No. FD 36104 (the "Decision") on the basis that the Decision contains material errors of both fact and law that must be clarified and addressed.

In support of the City's Amended Petition, the City will show that facts stated in the Decision are contrary to the facts found by the Honorable Timothy Brooks, which facts were not challenged by Union Pacific Railroad Company ("UP"). Further, the Board's Decision ignores established Arkansas case law and statutory law regarding closing of public easements that includes the public at-grade railroad crossing in this matter.

I. REQUEST FOR FEE WAIVER

The City is a governmental entity and has previously obtained a fee waiver for the initial filing fee. Therefore, the City respectfully request that the Board waive the fee for the filing of the Petition for Reconsideration.

II. INTRODUCTION

1. This case involves a public at-grade crossing (the "Crossing") that has been in existence since UP's predecessor, the Little Rock and Fort Smith Railway, first installed tracks in the downtown of the City in 1876 or at a minimum since UP's predecessor, Missouri Pacific Railroad, developed a map dated 1916 showing the Crossing was and is a public at-grade crossing; therefore, any reinstallation of this Crossing is not an attempt to regulate UP's railroad operations, but is an attempt by the City to assert its possessory rights over and to the Crossing.

2. The City filed its action for a declaration by Board for a Declaratory Order that the Board lacks jurisdiction; or, alternatively, that the Board declines to exercise jurisdiction over this dispute regarding the City's demand on UP to reinstall the Crossing that UP illegally and without authority removed in 2001.

3. The Board declared on July 28, 2017, that reinstalling the Crossing at the previous location is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") 49 U.S.C. § 10501(b) as it would unreasonably interfere with UP's present and future rail operations on the tracks at issue.

4. The Board **failed** to address that UP illegally removed the Crossing by failing and refusing to follow Ark. Code Ann. § 14-301-301, which is the required

procedure the Arkansas General Assembly has set out for vacating or abandoning a public street, alleyway, and easement.

5. The Board **failed** to address whether the procedure under Arkansas State law is binding on UP or any other railroad in Arkansas as the Board appears to have ignored this required procedure.

6. The Board **failed** to address the conflict between UP's expert witness who found safety issues and unreasonable interference with the reinstallation of the public crossing and the City's safety expert who found no safety issues or unreasonable interference with UP's railroad operations.

7. The Board **failed** to explain what Federal law or basis allows UP to disregard Arkansas' established procedure for closing a public crossing.

III. SUMMARY OF FACTS IN JUDGE BROOKS ORDER THAT WAS NOT APPEALED BY UNION PACIFIC RAILROAD COMPANY

8. On December 10, 2015, the District Court issued a Memorandum Opinion and Order (the "2015 Order"). The 2015 Order found and declared the Crossing was a **public crossing** and had been in existence for over 80 years prior to it being removed illegally by UP. In support of this decision, Judge Brooks found the following fact relevant and also stated the following conclusions of law:

- a. The Crossing could **only** be closed by complying with the requirements of Arkansas law Ark. Code Ann. § 14-301-301, which **required** an **affirmative vote** of the City's city council and a public ordinance stating that the City was closing the Crossing, which **did not** occur in this disputed matter. [emphasis added]

9. UP did not challenge the determination of Judge Brooks that the Crossing was a public crossing nor did UP challenge they were required to comply with the procedure set forth in Ark. Code Ann. § 14-301-301.

10. UP further did not challenge the determination that UP failed to obtain an affirmative vote of the City's city council nor did UP challenge that the City did not pass a public ordinance stating that the City was closing the public easement.

11. Judge Brooks found that preemption **was not an issue**, as the Crossing was **not** closed legally; therefore, UP's decision to increase rail operations at this location was made after the Crossing had been illegally removed, and thus, at UP's own peril.

12. Based on this determination, Judge Brooks' did not address whether reopening the crossing would negatively impact train operations or result in safety concerns, **as UP's lack of legal authority to close the Crossing is the controlling factor.**

13. Judge Brooks also rejected UP's argument of Defense of Laches wherein UP argued that the City slept on its rights by "delaying 13 years to file this lawsuit." However, Judge Brooks found "the undisputed facts show the following comminutions between the City and UP where the City attempted to recover the Crossing before they filed suit:

- a. December 14, 2004, three years after the Crossing was closed, the Mayor at the time, C.L. Coley, wrote a letter to the Chief Engineer for Safety at the Arkansas Highway Department, requesting the State's "approval for the reopening of a railroad crossing, for access to our proposed riverfront development," while also noting that "[t]he crossing was removed in 2002, in order to accommodate complaints by a resident about the noise of the train whistle."
- b. The letter was mistaken on the date the Crossing was removed; but clearly refers to the dispute at issue in this lawsuit and states the Mayor's belief that "there was **no action** taken by the Ozark City Council in support of the removal of the crossing."

- c. Another letter was sent in February 2005 and documentation supported that UP was involved in discussions with the City about the Crossing even before the February 2005 was sent.
- d. The February 2005 letter references “a recent meeting with the Department, the City and the Railroad” regarding the City’s desire to install a crossing to allow pedestrians access to the Arkansas River for “the proposed riverfront development.” The letter fails to state a date, but the fact of the meeting is noted in the letter and UP was silent in its summary judgment briefing about this contact, or any of the other contacts that took place between itself and the City over the 13 years.
- e. A correspondence between the City and UP was dated June 30, 2011 and addressed a Mr. Charlie Felkins of UP, explaining the City’s need for an at-grade crossing “to replace the one removed by UP in 2003.” Although Mayor Sneath was confused with what year the Crossing was removed, it is clear that Mayor Sneath refers to the dispute that is the subject of this lawsuit.
- f. In response to the City’s June 2011 letter, Judge Brooks reviewed a letter from Mr. Felkins on behalf of UP that referenced “a number of meetings in Little Rock and Ozark, as recently as 2010 in which these issues were discussed in detail,” as well as a “2009 letter” written by UP regarding its views about the City’s riverfront development project and the City’s interest in opening a crossing over UP’s tracks.
- g. In August 2012, Mayor Sneath on the City’s behalf sent another letter to Mr. Felkins of UP. In this August 2012 letter, Mayor Sneath referenced the “Oliver Street, a long established city street leading to the cited land” that was “removed a few years ago by UP. This letter also notes, without specifying a particular date, that “previous efforts to reopen the street rail crossing or to agree to an alternative rail crossing have failed.
- h. That after the August 2012 letter that it was clear that the parties exchanged correspondence regarding the crossing dispute, including an October 2012, November 13, 2012, November 30, 2012 letters and then this lawsuit was filed in August 2014.
- i. The evidence was undisputed that “the City and Union Pacific have been in nearly constant communication regarding this dispute over the past decade.” Furthermore, even if the evidence did show that Ozark “slept on its rights” by failing to file suit after it reasonably should have known of its claims,” UP would not prevail for two reasons.

- i. First, the parties were actively negotiation an out of court solution to the crossing dispute so any delay by the City was not unreasonable or inexcusable.
- ii. Second the equitable doctrine of laches cannot be successful invoked to defeat the right of the city to open the street which was dedicated to that use. See *Bushmiaer*, 231 Ark. at 854 (quoting *City of Paragould v. Lawson*, 115 S.W. 379, 389 (Ark. 1908).
- j. The “city exception” or “public use/dedication” exception to the laches doctrine was sound and acknowledged that Ark. Code Ann. § 14-301-301 gives cities of the first class the power and authority to vacate public streets and alleys.” Further Judge Brooks relied upon *Thomas*, 52 Ark. App. At 27, to find that “the public’s right of access to these places should not be cavalierly dispended with, simply by referencing an equitable doctrine such as laches.

14. UP did not challenge any of Judge Brooks’ findings set forth in the 2015 Order as it relates to the constant communication of the City attempting to obtain the Crossing’s reinstallation, including the City’s request to the Arkansas Highway and Transportation Department’s for assistance.

15. The 2015 Order also rejected UP’s request for Summary Judgment based on the Affirmative Defense of Waiver, and UP’s contention that a lone city official, then Mayor Todd Timmerman, as a matter of law, could permanently waive the public’s right to access an easement without first possessing (1) the imprimatur of an affirmative vote of the city council and (2) the mandate of a city ordinance. **See Ark. Code Ann. § 14-301-301.** In support of this denial, Judge Brooks made the following factual findings:

- a. UP argued that Mayor Timmerman, acting in his capacity as chief executive officer requested the removal of the crossing.
- b. 5 out of 7 council members were deposed for this civil matter and although a **few (3)** recalled being asked by the Mayor whether they objected, all agreed that the conversation occurred **after** the council meeting had already adjourned.

- c. There is no evidence that the City's council members voted to approve the removal of the crossing and no city ordinance was ever passed closing the crossing.
- d. Based on the undisputed evidence, Judge Brooks made the legal finding that the City did not "intentionally relinquish a known right. . . ." According to [Arkansas] State Law, the **only way** that a city may relinquish the public's right to a street, alley, or easement is through the procedures set forth in section 14-301-301 of the Arkansas Code.
- e. Finally, that under Arkansas law, Mayor Timmerman's unilateral acts **do not bind the City** with respect to a decision to vacate a public easement, no knowing waiver of the City's rights occurred, and UP's request for summary judgment on this affirmative defense is denied.

16. UP again did not challenge any of Judge Brooks' factual and legal determination as it relates to the fact that Mayor Timmerman acting alone lacked the authority to authorize UP to remove the Crossing and that no member of the City's council voted to approve the removal of the Crossing; or, the City's council did not pass an ordinance to close the Crossing as required by Arkansas law.

17. In fact, the deposition of Roxie Hall and Rick McClellan, two of the members of the City's council in 2001, who would have been present when the alleged discussion took place both disputed that any discussion regarding the removal of the Crossing took place.

18. Roxie Hall went further and stated that if this communication had occurred, she would have objected to it as she was aware how important this crossing was to the City's riverfront development.

19. Judge Brooks next rejected UP's request for Summary Judgment for the Affirmative Defense of Estoppel, as he found that UP's reliance on Mayor Timmerman's oral request to remove the Crossing, without more, was unreasonable. In support of this position, Judge Brooks found the following facts:

- a. The reason that such reliance by UP was unreasonable, was because Arkansas law requires city officers and private companies like UP to follow certain procedures before the two may act to **deprive the public of a right of access.**
- b. UP conceded that it acted upon Mayor Timmerman's verbal authority when it removed the crossing "shortly" after UP's Manager of Industry and Public Projects, Charlie Felkins, spoke with Mayor Timmerman, who asked Mr. Felkins to remove the crossing.
- c. The facts are undisputed that UP knew or should have known, by virtue of its own maps and records, that the crossing was a public easement.
- d. No ordinance to vacate the crossing easement was prepared and adopted as required by Arkansas law.
- e. By failing to insure that the City's easement had been vacated in compliance with Arkansas law, UP's actions and the expenses incurred by UP were done at the railroad's **own peril** and not the City's.

20. UP again did not challenge the above factual and legal finds of Judge Brooks set out in the 2015 Order.

21. Finally, Judge Brooks granted the City's request to have UP reinstall the Crossing and awarded the City a permanent injunction. Judge Brooks found that the public faces irreparable harm as long as it continues to be denied access to the Crossing, as the Crossing was public for decades and was summarily removed without regard to Arkansas State law.

22. Judge Brooks acknowledged that UP would likely incur several thousand dollars of costs in re-paving the Crossing for public use, and will also suffer some net inefficiencies in its overall operations when the Crossing is reopened, but ultimately held that UP invited this result by its own failure to **comply with Arkansas State law.**

23. Judge Brooks found that the public benefit in reopening the Crossing outweighs any detriment the public will face in returning rail operations to conditions prior to the illegal closing.

IV. ERROR IN THE DECISION

24. The Board's Decision does not address the fact that UP clearly violated Arkansas law and did not follow the procedure set forth in Arkansas State law.

25. The Board's Decision allows UP to ignore State law procedures by closing a crossing illegally and without any authority.

26. The Board's Decision acts to deprive the City of its possessory interest in the Crossing and acts to deprive the public access to the Arkansas River, which it had prior to UP's illegal action by removing the Crossing.

27. The Board's Decision allows UP to use the ICCTA both as a shield to defend against the City's attempt to replace the Crossing and a sword to deny the City's its possessory interest in the illegally removed crossing.

28. Board Member Miller, in the concurring opinion, is the only Board Member that addresses to the true facts of this case by stating a railroad's past conduct would have bearing on whether preemption is applicable-particularly where a railroad's claim of present and future unreasonable interference is purely the result of its own improper conduct. However, Board Member Miller then erroneously concludes that the City's Mayor gave permission, the City council did not object and the City did not complain for years.

29. The facts, as found by Judge Brooks and not challenged by UP, clearly show that Mayor Timmerman did not have the legal authority to unilaterally allow UP to

remove the crossing. Further, the City council did not vote on the removal as required by Arkansas law and only 3 of 5 members recall any discussion with 2 members denying any discussion took place.

30. Finally, representatives of the City have constantly complained to UP regarding the removal of the Crossing and have attempted to obtain the reinstallation of the Crossing as early as 2004 and continued the attempts up to the time of filing the original lawsuit in 2014.

31. The Board's Decision overturns clear and undisputed Arkansas State law without any basis in Federal law, as the ICCTA is a comprehensive regulatory scheme designed to deregulate the railroad industry and remove all state efforts to regulate railroads. However, nothing in the ICCTA allows UP or any other railroad or even the Board to ignore State law regarding public ownership and possessory interest of the Crossing.

V. LEGAL AUTHORITY

32. The City would concede that in normal circumstances where the City must file a condemnation action to establish a new Crossing over UP's railroad tracks the ICCTA would preempt Arkansas state law. However, as previously stated, the facts of this case are not normal, as the facts herein clearly show that UP failed to comply with the procedure of the Arkansas General Assembly and illegally removed the Crossing.

33. UP has conceded that it did not comply with Arkansas State law and that it relied upon the verbal permission of the City's then Mayor Timmerman and UP did not insure that the City's council did not pass an ordinance closing the Crossing, which are

both the unambiguous requirements set forth by the Arkansas General Assembly in Ark. Code Ann. § 14-301-301.

34. It is undisputed that the Board has broad preemption powers under the ICCTA and the Board has stated the ICCTA protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. *Id.* citing *City of Auburn v. STB*, 154 F.3d 1025, 1029-1031 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999).

35. The Board also acknowledged that "Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations." *Id.* citing *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009 (W.D. Wis. 2000)(state eminent domain action preempted where passing track necessary to railroad's operations would have been **eliminated**). [emphasis added] *Id.*

36. The Board went on to announce that ". . . this broad Federal preemption does **not completely remove** any ability of state or local authorities to take action that affects railroad property." *Id.* [emphasis added]

37. The Board stated to the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain **police powers to protect public health and safety**. *Id.* citing Joint Petition for Declaratory Order--- Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9 (STB served May 1, 2001). [emphasis added]

38. In *Franks*, the Fifth Circuit determined that a **possessory action** brought by a property owner seeking to enjoin the railroad from removing **two private crossings** was neither expressly nor impliedly preempted by the ICCTA. *Id.* at 415. The Fifth Circuit explained that “for a state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations of rail transportation.” *Id.* at 413.

39. The Fifth Circuit reasoned “. . . that the property owner’s possessory action, which involved a private servitude of passage over the railroad track, invoked laws, which **merely incidentally affected** rail transportation, and thus, did not manage or govern rail transportation.” [emphasis added] *Id.* at 411.

40. Further the Fifth Circuit rejected UP’s “. . . argument that railroad crossings were encompassed in the ICCTA’s definition of “transportation,” which would have resulted in federal preemption of the claims if that were the case.” *Id.* at 409.

41. The facts of this case are clearly akin to *Franks*, as the City has a clear possessory interest in a public Crossing that was illegally removed by UP.

42. Further, the public health and safety is at issue in this case, as the Crossing is the only access that the City has to access the Arkansas River on the Northshore.

43. The City does not seek to take UP’s railroad tracks or regulate its actions. The City seeks to have the Crossing that was in existence for approximately 125 years be reinstalled as it was illegally removed.

44. Alternatively, this case is also akin to a reverse eminent domain case, as UP has removed the City’s public Crossing without just compensation or even without authority and the Board’s Decision has authorized such taking in violation of both the

U.S. Constitution and Arkansas Constitution as both Constitutions and established case law provide that no party (including UP) can adversely take against the Crown (the State).

VI. Conclusion

45. No case cited in the Board's Decision provides facts similar to the facts of this case nor does any case provide authority for UP to illegally remove a public Crossing by not complying with state law and then shield itself from Arkansas State law requirement to replace the Crossing by arguing preemption.

46. All factual findings in the 2015 Order stand, as UP did not appeal those findings.

47. UP acknowledges and concedes that it failed to comply with Arkansas law and that Arkansas law applies to the removal of a public crossing, including this Crossing.

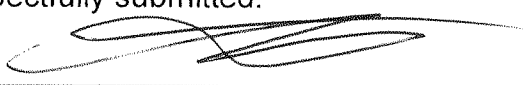
48. If the Board's Decision stands as written, then the Board is authorizing UP to illegally remove any crossing in Arkansas and then claim preemption when a city, county or State seeks to have that crossing reinstalled.

49. If the Board's Decision stands, the City's possessory interest in the Crossing will be lost through an unconstitutional taking and the *Franks* case will be effectively overturned by this decision.

WHEREFORE, the Petitioner, the City of Ozark, Arkansas, a municipal corporation, respectfully prays that this Board reconsider its July 28, 2017 Order and enter an new Decision as follows:

1. Finding that the Fee for the Filing of the Petition for Reconsideration is Waived as the City is a Governmental Entity;
2. Finding that the City has a possessory interest in the Crossing;
3. That UP illegally removed the Crossing by failing to follow the procedure set forth by the Arkansas General Assembly in Ark. Code Ann. § 14-301-301;
4. That the City has maintained communication with UP since at least 2004 in an attempt to obtain a reinstallation of the Crossing;
5. That UP's action by illegally removing the Crossing and failing to reinstall the Crossing upon written request from the City were improper and as such those actions have a bearing on whether preemption is applicable;
6. That based on UP's improper action, UP must reinstall the Crossing and such reinstallation will not be preempted by the ICCTA;

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Christopher D. Brockett, an attorney-at-law of the State of Arkansas, hereby Certify under penalty of perjury that I served a copy of the within pleading by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 21st day of August 2017.



Christopher D. Brockett