

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, a municipal corporation)

Plaintiff,)

vs.)

UNION PACIFIC RAILROAD COMPANY,)
ARKANSAS STATE HIGHWAY)
COMMISSION, as Governing Body of the)
ARKANSAS STATE HIGHWAY AND)
TRANSPORTATION DEPARTMENT,)

CIVIL ACTION NO: 2:14-cv-02196-TLB

Defendants.

UNION PACIFIC RAILROAD COMPANY'S MOTION TO DISMISS

For its Motion to Dismiss, Union Pacific Railroad Company ("Union Pacific") states as follows:

1. The City of Ozark, Arkansas has brought this claim against Union Pacific requesting damages for conversion, that a former crossing be re-installed, that the former crossing be declared a public crossing, and for condemnation.

2. The Complaint should be dismissed for the following reasons: (1) because the City has waited 13 years after the removal of the crossing to file this lawsuit, the City is barred by the doctrine of laches from now bringing these claims; (2) the claims are preempted by federal law; (3) the City's request that Union Pacific remove the crossing constitutes a waiver of any claim by the City; (4) the City is estopped from now requesting that Union Pacific re-install the crossing; (5) the condemnation action should be dismissed because the City lacks the authority to condemn the property at issue; and (6) the conversion claim should be dismissed

because (a) the statute of limitations has expired; (b) Arkansas does not recognize a cause of action for conversion of real property; and (c) the City does not have an ownership interest in the real property.

3. Union Pacific adopts and incorporates herein its Memorandum of Law in Support of this Motion, which is filed contemporaneously herewith.

4. Union Pacific adopts and incorporates herein the following attached exhibits:

- a. Exhibit 1 – Map of former grade crossing
- b. Exhibit 2 – Affidavit of Charles Felkins
- c. Exhibit 3 – Affidavit of Bill Huston
- d. Exhibit 4 – Case of *Arkansas State Highway Comm'n v. UPRR*, Case No. 06-2010 (W.D. Ark. 2007)
- e. Exhibit 5 – Case of *Arkansas State Highway Comm'n v. Arkansas Midland Railroad Company*, 6:09-cv-06033 (E.D. Ark. 2009)
- f. Exhibit 6 – Case of *City of Siloam Springs, Ark. v. Kan. City S. Ry. Co.*, 12-5140 (W.D. Ark. Sept. 10, 2012)
- g. Exhibit 7 – Case of *City of North Little Rock v. Union Pacific Railroad Company*, 4:10cv01689 (E.D. Ark. April 21, 2011)
- h. Exhibit 8 – Affidavit of Rod Woods
- i. Exhibit 9 – Affidavit of Mathew Barr

WHEREFORE, premises considered, Union Pacific Railroad Company respectfully requests that the Complaint be dismissed in full, for its attorneys' fees and costs, and for all other relief to which it is entitled.

Respectfully submitted,

Scott H. Tucker, AR 87176
Joseph McKay, AR 99006
Jamie Huffman Jones, AR 2003125
Friday, Eldredge & Clark, LLP
400 West Capitol Avenue
Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: 501-370-1430
Facsimile: 501-244-5340
tucker@fridayfirm.com
jjones@fridayfirm.com

*Attorneys for Defendant, Union Pacific
Railroad Company*

By: /s/ Jamie Huffman Jones
Jamie Huffman Jones

CERTIFICATE OF SERVICE

I, Jamie Huffman Jones, do hereby certify that a copy of the foregoing was mailed on this 24th day of September, 2014 via prepaid U.S. Mail delivery to:

Christopher D. Brockett
Sayre & Brockett
401 West Commercial Street
Ozark, AR 72949

Rita S. Looney
Maria L. Schenetzke
Arkansas State Highway and
Transportation Department
P. O. Box 2261
Little Rock, AR 72203

By: /s/ Jamie Huffman Jones
Jamie Huffman Jones

AFFIDAVIT OF CHARLES FELKINS

I, Charles Felkins, being of lawful age, upon my oath state:

1. My name is Charles Felkins. I went to work for the Missouri Pacific Railroad in 1976. Missouri Pacific was merged into the Union Pacific Railroad Company and I continued to work for Union Pacific until I retired in 2012 as Manager Industry and Public Projects. Part of my job responsibilities was to oversee the opening and closing of highway and street crossings over the railroad in Arkansas. The testimony contained in this affidavit is based on my personal experience.

2. In approximately 2000 an individual living near the depot in downtown Ozark called me several times to complain, sometimes angrily, about the fact that the trains blew their whistles as they approached the crossing immediately south of the depot. This gentleman complained that no one used the crossing and asked that the railroad remove the crossing.

3. Shortly after those complaints, I received a call from the Mayor of Ozark. I believe that his name was Todd Timmerman. The Mayor reiterated the complaints from the previous gentleman, stated that no one used the crossing, and requested that the railroad remove the crossing.

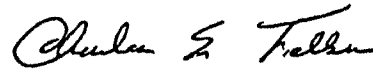
4. At that time, the only crossing in Ozark was the crossing immediately south of the depot. It was a private crossing used by a propane company to access a propane facility located on property it leased from the railroad. It was also used by the railroad to get maintenance equipment on and off the tracks. The approximate location of the crossing was in front of the peanut shelling plant on the North side of River Street. There was a large graveled area about 50 feet wide between River Street and the tracks but there was no developed street there. I do not recall a street sign ever being in place at the crossing. To use the crossing, one had to cross the graveled area, the spur track servicing the peanut shelling plant, the mainline track, and the



storage track next to the river. Once across the tracks, one turned sharply to the left and went along the ends of the ties to get to the propane plant. This was a very tight turn due to the proximity of the river.

5. After continued requests from the Mayor of Ozark that the crossing be removed, in approximately 2001 the railroad removed the crossing at a cost of several thousand dollars.

FURTHER THE AFFIANT SAITH NOT.



CHARLES FELKINS

VERIFICATION

STATE OF ARKANSAS)

COUNTY OF)

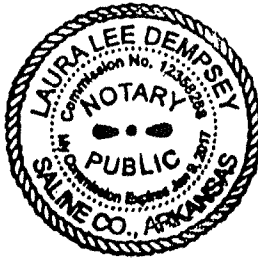
ss.

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 5th day of February 2014.

Laura Dempsey
Notary Public

My commission expires:

1-9-2017



AFFIDAVIT

Comes Bill Huston, upon oath, and after being duly sworn, states as follows:

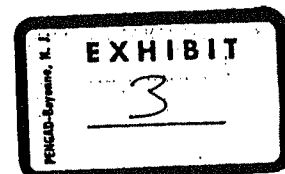
1. I am currently employed by Union Pacific Railroad Company ("UPRR") as a Manager of Train Operations. I have been in the railroad transportation business since 1997, and with UPRR since 2004. My office is located in Van Buren, Arkansas. My responsibilities include train operations for UPRR's service in and through the City of Ozark.

2. The mainline track at issue is maintained to Class 4 standards pursuant to the regulations promulgated by the Federal Railroad Administration. Under those federal regulations, the speed limit for freight trains on Class 4 track is 60 miles per hour. Approximately 10-20 trains travel over the mainline through the City of Ozark each day. These trains often carry hazardous materials such as petroleum, methyl bromide, yellow phosphorus, alcohol polyethoxylate, sodium hydrosulfide, and sodium hydroxide.

3. Parallel to the mainline track on the northside are two side tracks that are commonly referred to as house tracks. These house tracks are often used to set out cars.

4. In addition, parallel to the mainline track on the southside is a side track that serves two purposes.

5. The first purpose of this side track is as a storage track. This is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. If the proposed crossing existed, UPRR would lose approximately 600 feet of storage capacity because 300 feet on both sides of the crossing would be required to remain clear so that people traversing the crossing from the south would be able to see trains approaching the crossing on the mainline.



Currently, approximately 60 cars, depending on length, can be placed on this side track. If the proposed crossing existed, the storage capacity would be cut by approximately 12 cars. Stated differently, if the proposed crossing existed, the storage capacity would be reduced by 20%. In addition, the proposed crossing would unreasonably interfere with railroad operations by requiring additional switching of railcars at the crossing and additional brake safety inspections. The additional switching movements required to break cars that are coupled together and put them back together would double the time involved as compared to the time required for current switching movements. The additional switching movements and brake inspections would increase the risk of personal injury to train crews by increasing the number of times they have to get on and off equipment, tie handbrakes, and walk the train. It would also increase the amount of time that trains are parked on or near the crossing. The longer a crossing is blocked, the greater the risk that people will attempt to crawl under or climb through the train. If a train begins to move while someone is attempting to crawl under or climb through it, that person can be seriously injured or killed.

6. The second purpose of this side track is for train meets. In other words, it allows the mainline track to be open for other rail travel, which enhances the movement of commerce on the track. The side track makes it possible for one train to move from the mainline to the side track so that another train can pass on the mainline.

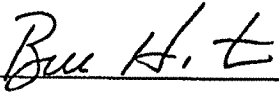
7. When a train uses the side track for train meets, it is possible that the proposed crossing would be blocked for several hours. As previously described, blocking a crossing can increase the risk of personal injury and death to pedestrians. Because of this increased risk, the crew will often cut the train so that it is not blocking the crossing. However, such additional switching increases the risk of personal injury to the crew members as previously described.

Additionally, where a crew needs to cut the train to unblock the crossing, the side track would not work for some train meets because, with 300 feet of clearance required on both sides of the crossing, some trains would no longer fit in the side track.

8. Allowing access to areas so close to UPRR mainline operations would also create security and safety issues affecting the railroad's interests as well as those of the public. For example, the area around the crossing would be accessible to the general public, which increases the risk of vandalism to UPRR property. If there is a pedestrian path placed along UPRR's right-of-way or just off the right-of-way, this would pose a safety risk because a pedestrian often takes the shortest path to his desired destination, which would be a straight line across the tracks. To prevent this, the City of Ozark would need to construct a fence on either side of the crossing for the length of the UPRR right-of-way. A fence, however, would restrict railroad personnel from accessing UPRR property for inspection, work, and needed repairs (including, if a derailment occurred).

9. The proposed crossing endangers both the public and UPRR employees. A freight train coming into Ozark (and approaching the proposed crossing) headed west on the mainline comes around a sweeping curve located next to the Arkansas River. The curve makes it more difficult for a person to look down the tracks and see oncoming trains. If a locomotive engineer had to apply the train's emergency brakes to avoid striking a pedestrian or vehicle on the crossing, this could result in a derailment. The risk of a derailment is increased here because the proposed crossing is in a curve. Given the extremely close proximity of the tracks to the Arkansas River, a derailment at this location could cause severe environmental contamination in view of the hazardous materials that are transported on these tracks.

Further, Affiant sayith not.



Bill Huston, Manager of Train Operations

Union Pacific Railroad Company

ACKNOWLEDGEMENT

STATE OF ARKANSAS)

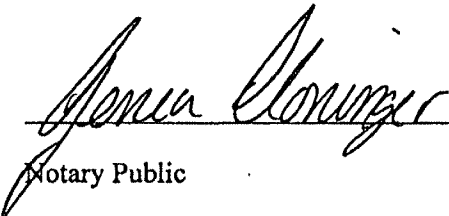
)ss.

COUNTY OF Pulaski)

On this day personally appeared before me, the undersigned Notary Public within and for the County and State aforesaid, duly qualified, commissioned, and acting _____, to me well known as the AFFIANT, in the foregoing AFFIDAVIT and stated that he had executed the same for the purposes therein mentioned and set forth.

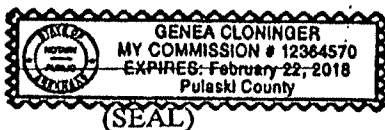
IN WITNESS WHEREOF, I set my hand and official seal as such Notary Public on this

4th day of September, 2014.



Notary Public

My Commission Expires:



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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ARKANSAS STATE HIGHWAY COMMISSION

PLAINTIFF

v.

CASE No. 06-2010

UNION PACIFIC RAILROAD COMPANY;
6.57 ACRES, MORE OR LESS, OF CERTAIN
LANDS IN SEBASTIAN COUNTY, ARKANSAS;
AND ANY PERSONS OR ENTITIES CLAIMING
AN INTEREST THEREIN

DEFENDANTS

FORT SMITH RAILROAD COMPANY

INTERVENOR

MEMORANDUM OPINION & ORDER

Before the Court are Plaintiff's Motion to Remand (Doc. 8) and Brief in Support (Doc. 9); Defendant's Response to Plaintiff's Motion to Remand (Doc. 10); and Defendant's Motion to Strike Declaration of Taking (Doc. 1-4). Plaintiff filed in State Court to condemn certain lands owned by Defendant, and Defendant removed the case to this Court. Plaintiff now argues this Court does not have jurisdiction because the Interstate Commerce Commission Termination Act ("ICCTA") does not preempt state law under these circumstances and further, pursuant to the *Younger* doctrine, this Court must abstain in this matter. For the reasons stated herein, Plaintiff's Motion to Remand is **DENIED** and the Defendant's Motion to Strike Declaration of Taking is **GRANTED**.

A. Background

On December 20, 2005, Plaintiff initiated this action in



Case 2:06-cv-02010-RTD Document 21 Filed 03/27/2007 Page 2 of 7

the Circuit Court of Sebastian County asserting its right under the power of eminent domain and the police power pursuant to the authority and provisions of Ark. Act 419 of 1953, codified at Ark. Code Ann. §§ 27-67-301 to 321, to condemn land for highway system improvements. Plaintiff also requested temporary and permanent easements and an order granting immediate possession of the lands upon a Declaration of Taking. (Doc. 1-2).

The Defendant removed the case, pursuant to 28 U.S.C. § 1441, claiming this Court has original federal question jurisdiction of the action, pursuant to 28 U.S.C. § 1331, because Plaintiff's claims arise under the Constitution and laws of the United States. (Doc. 1-1). The Defendant also filed a Motion to Strike the Declaration of Taking alleging that the state court lacked jurisdiction to grant the order. The Defendant contends the property at issue includes railroad tracks used for railroad transportation and the Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers, pursuant to 49 U.S.C. § 10501(b), and the ICCTA, 49 U.S.C. § 10101, which preempts all state efforts to regulate rail transportation. (Doc. 1-4). On March 10, 2006,¹ this Court granted Fort Smith Railroad

¹ The case was stayed upon request of the parties on March 23, 2006, until it was lifted on October 30, 2006, while the parties attempted to resolve the issues.

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Company's Motion to Intervene in this case.

B. Standard of Review

A defendant may remove a state law claim to federal court when the federal court would have had original jurisdiction if the suit had been originally filed in federal court. 28 U.S.C. § 1441 (b); 28 U.S.C. § 1331. A case arises under federal law, for purposes of § 1331, when it is apparent from the face of the complaint, either that the cause of action was created by federal law or, if the claim is based upon state law, a substantial and disputed question of federal law is a necessary element of the state cause of action. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Removal based on federal question jurisdiction is usually governed by the "well-pleaded complaint" rule. *Crispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000). This rule provides that federal jurisdiction may be invoked "only where a federal question is presented on the face of the Plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

The "complete preemption" doctrine applies when "the preemptive force of certain federal statutes is deemed so 'extraordinary' as to convert complaints purportedly based on the preempted state law into complaints stating federal law claims from their inception." *Crispin*, 218 F.3d at 922. The

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presence of a single federal claim gives the defendant the right to remove the entire case to federal court. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

C. Discussion

Plaintiff argues the ICCTA does not preempt state law in the area of condemnation for the purpose of construction and improvements of a highway system. Defendant contends this Court has jurisdiction pursuant to the Commerce Clause, which was unchallenged by Plaintiff, and pursuant to the ICCTA wherein Congress expressly preempted State law. Defendant contends when Congress created ICCTA it abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board ("STB"). Plaintiff also argues the Court should abstain under the *Younger* doctrine.

In 1995 Congress enacted the ICCTA and included a "broadly worded preemption provision." *Iowa, Chicago, & Eastern R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004). Plaintiff argues the *Iowa* case is on point as ICCTA fails to address the issue of highway safety and highway improvement. Defendant contends that argument is misplaced because in *Iowa*, the County was requesting a replacement of four bridges because of highway safety concerns which the County had proven to exist. *Id.* Defendant asserts the Eighth Circuit Court of Appeals recently upheld a determination by

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the STB that a city's proposed condemnation of a railroad right of way was preempted by the ICCTA. *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005).

The Court finds *Iowa* distinguishable from the case at hand because *Iowa* did not address condemnation but rather centered on highway safety. *Iowa*, 384 F.3d at 558. The issue was replacing existing bridges that were unsafe for crossing. *Id.* The Court noted it was the Federal Railroad Safety Act--not the ICCTA--that allowed for state regulation in cases involving safety. *Id.* at 560. The Federal Railroad Safety Act is not implicated since highway safety is not the issue in this case, and the *City of Lincoln* analysis is applicable.

In *City of Lincoln*, the Eighth Circuit made it clear that a taking which would prevent or unduly interfere with railroad operations and interstate commerce would be preempted by ICCTA. *City of Lincoln*, 414 F.3d at 860. The Court finds the ICCTA controls and preempts state law because the case involves highway construction and not highway safety.

Plaintiff also argues this Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), from exercising jurisdiction over this action. Defendant contends comity is not undermined and this Court has an obligation to exercise jurisdiction given to it. The *Younger* abstention doctrine has a three-part test which must be satisfied for a case to merit

abstention: (1) whether the state proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is adequate opportunity in the state proceedings to raise constitutional challenges. *Younger*, 401 U.S. at 39.

Abstention is an extraordinary and narrow exception to the "virtually unflagging obligation" of federal courts to exercise the jurisdiction given them. *In re Burns & Wilcox, Ltd.* (8th Cir. 1995). In general, the *Younger* abstention doctrine "directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings." *Night Clubs, Inc. v. City of Fort Smith, Ark.* (8th Cir. 1998). Plaintiff argues that state judicial proceedings are ongoing because Plaintiff deposited the estimated amount of just compensation with the State Court and an Order of Possession was entered by the State Court. There are no ongoing judicial proceedings that require abstention in this case. The ICCTA clearly controls and the case was properly removed by the Defendant to this Court.

Additionally, Plaintiff filed a Declaration of Taking with the State Court on December 20, 2005, setting out the specific properties to be condemned and asking the State Court to issue an order effectuating the Declaration. Because the State Court does not have jurisdiction over this matter, the

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Defendant's Motion to Strike Declaration of Taking should be granted.

D. Conclusion

Accordingly, Plaintiff's Motion to Remand (Doc. 8) is DENIED, and the Defendant's Motion to Strike Declaration of Taking (Doc. 1-4) is GRANTED.

IT IS SO ORDERED this 27th day of March, 2007.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

ARKANSAS STATE HIGHWAY COMMISSION

PLAINTIFF

vs.

Civil No. 6:09-cv-06033

ARKANSAS MIDLAND RAILROAD COMPANY, INC.,
A DELAWARE CORPORATION, *et al.*

DEFENDANT

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

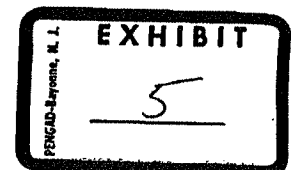
On April 16, 2009, Defendant Arkansas Midland Railroad Co., Inc. ("AMR") filed a Motion To Strike and Vacate Order of Possession. (Doc. No. 4).¹ On April 16, 2009, Defendant Union Pacific Railroad Company ("UP") filed a Motion to Strike Declaration of Taking and Motion to Set Aside Order of Possession. (Doc. No. 5). On May 5, 2009, Plaintiff filed a response and brief to these motions. (Doc. Nos. 13,14). These motions were referred to this Court by the Honorable Robert T. Dawson pursuant to 28 U.S.C. § 636(b)(1). (Doc. No. 11). On May 18, 2009, the Court conducted a hearing on these motions. This matter is now ready for decision.

1. Procedural Background

Plaintiff filed a complaint in the Circuit Court of Hot Spring County, Arkansas, requesting, through the power of eminent domain and the authority and provisions of Ark. Act 419 of 1953, codified at Ark. Code Ann. §§ 27-67-301 to 321, to condemn land for highway system improvements.² Plaintiff also requested temporary and permanent easements and an order granting

¹ The docket numbers for this case are referenced by the designation "Doc. No."

² *Arkansas State Hwy Commission v. Arkansas Midland Railroad Co., et al*, Cause No. CV-2009-65-2.



immediate possession of the lands through a Declaration of Taking. (Doc. No. 2). The property Plaintiff seeks to condemn includes property used by Defendants for their railroad operations. On March 26, 2009, the Arkansas state court entered an Order of Possession granting Plaintiff immediate possession of Defendants' property which is used for their railroad operations.

Thereafter, Defendants removed this action to this Court pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction, pursuant to 28 U.S.C. § 1331 (issues arising under the Commerce Clause and the Interstate Commerce Commission Termination Act ("ICCTA")). The Defendants contend the property at issue includes railroad tracks used for railroad transportation and that the Surface Transportation Board ("STB") has exclusive jurisdiction over transportation by rail carriers in the United States, pursuant to the ICCTA, 49 U.S.C. § 10501(b), and 49 U.S.C. § 10101. Defendants further contend the ICCTA preempts all state action regulating rail transportation. (Doc. No. 1).

2. Factual Background

As stated above, Plaintiff seeks to acquire an interest, by way of a permanent construction easement, in the subject property located near Malvern, Arkansas. This property includes railroad tracks operated by the Defendants. Specifically, Plaintiff seeks to establish an "at grade" railroad crossing in an area where the AMR and UP conduct interchange operations.³ There is currently no crossing located in this area of track and Plaintiff is constructing a new road extension as part of the Hwy. 270 West Bypass Project, which will include the crossing at issue here.

Charles Laggan, Vice president and General Manager of AMR testified at the hearing.

³An "at grade" crossing is a crossing where the roadway and railroad are at the same level. Typically vehicles traveling on a roadway with an "at grade" crossing must stop and wait when a train is traveling on the railroad crossing the "at grade" crossing. Plaintiff's other option in this instance would be to construct an overpass or "grade separation" crossing, at significantly higher cost, to allow vehicle traffic to pass over the railroad.

According, to Mr. Laggan, AMR operates a freight rail service from Malvern, Arkansas to Mountain Pine, Arkansas. AMR's railroad line connects with the UP railroad line at a Malvern, Arkansas, interchange facility. The interchange facility is used to switch unloaded UP trains to AMR operation for the purpose of taking the unloaded train to a Martin-Marietta Quarry for loading. The fully loaded trains are then taken back to the interchange facility where operation control is returned to UP.

This interchange process occurs on an approximately two mile stretch of track. The typical length of train involved in this process is 95 cars or approximately one mile and can be longer.⁴ As part of the interchange process, several federally mandated procedures involving safety must be performed before the train can be moved. According to Mr. Laggan this process takes a minimum of one hour and can take up to four hours depending on schedules and crew availability. The parties agree that Arkansas law prohibits a train from blocking a highway railroad crossing for more than ten minutes. *See* A.C.A. 23-12-1007(b).

According to Mr. Laggan's testimony, based on the location of Plaintiff's proposed crossing, Defendant's will not be able comply with federally mandated safety procedures without violating Arkansas state law regarding the blocking of railroad crossings if an "at grade" crossing is established at the proposed location. Mr. Laggan also indicated there was no other location on AMR's rail line where interchange operations can occur other than the current location. It is the opinion of Mr. Laggan that AMR's operations, and consequently those of UP, will be adversely impacted by the construction of Plaintiff's proposed crossing.

⁴Mr. Laggan indicated the defendants plan to increase the typical size for the trains at issue from 95 to 135 cars in the near future.

3. Removal to Federal Court

This Court previously set out the applicable law regarding removal of an action from state court and the doctrine of preemption in a case similar to this one. *See Arkansas State Highway Commission v. Union Pacific Railroad Co.*, Cause No. 2:06-CV-02010 (W.D. Arkansas 2006)(Doc. 21).

A defendant may remove a state law claim to federal court when the federal court would have had original jurisdiction if the suit had been originally filed in federal court. 28 U.S.C. § 1441 (b); 28 U.S.C. § 1331. A case arises under federal law, for purposes of § 1331, when it is apparent from the face of the complaint, either that the cause of action was created by federal law or, if the claim is based upon state law, a substantial and disputed question of federal law is a necessary element of the state cause of action. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Removal based on federal question jurisdiction is usually governed by the “well-pleaded complaint” rule. *Crispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000). This rule provides that federal jurisdiction may be invoked “only where a federal question is presented on the face of the Plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

The “complete preemption” doctrine applies when “the preemptive force of certain federal statutes is deemed so ‘extraordinary’ as to convert complaints purportedly based on the preempted state law into complaints stating federal law claims from their inception.” *Crispin*, 218 F.3d at 922. The presence of a single federal claim gives the defendant the right to remove the entire case to federal court. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

Id. Further, the Plaintiff has not objected to the removal of this action to this court. Removal was appropriate in this case.

4. Discussion

a. Preemption: In 1995 Congress enacted the ICCTA and included a “broadly worded preemption provision.” *Iowa, Chicago, & Eastern R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004)(Court found no preemption as issues of public safety were paramount in the State action at issue). Subsection 10501(b) of the ICCTA not only gives the STB exclusive jurisdiction over rail transportation, but also contains an express preemption provision. It provides, in full, as

follows:

(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 the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.* (emphasis added)

The Court in *Iowa* held that a state statute was not preempted by the ICCTA. Plaintiff argues the *Iowa* case controls in the instant situation. The Defendants contend that reliance on *Iowa* is misplaced because of the factual differences in the instant case. In *Iowa*, the County requested replacement of four bridges because of highway safety concerns, which the County established regarding the four bridges. *Id.* In the instant case Defendants point out there is no allegation or proof of a public safety concern. Further, the Defendants assert the Eighth Circuit Court of Appeals has upheld a determination by the STB that a city's proposed condemnation of a railroad right of way was preempted by the ICCTA. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005). 

Just as it did in *Arkansas State Highway Commission*, Cause No. 2:06-CV-2010, this Court should distinguish *Iowa* from the instant case because the decision in *Iowa* did not address the state's right of condemnation but rather centered on the issue of highway safety. *Iowa*, 384 F.3d at 558. The issue in *Iowa* was replacing four existing bridges that the state proved were unsafe for crossing. *Id.* Here, the Plaintiff seeks to condemn railroad property to "provide for adequate right of way and highway facilities for the travel needs of the public." (Doc. No. 1-2, Declaration of Taking). The

Court in *Iowa* noted it was the Federal Railroad Safety Act-- not the ICCTA--that allowed for state regulation in cases involving safety. *Id.* at 560.

The Federal Railroad Safety Act is not implicated in this matter since highway safety is not the issue in this case. Plaintiff has shown no evidence of any legitimate safety concern involved in this condemnation case.⁵ Plaintiff's stated purpose for this condemnation does not refer to any safety issue at all. Plaintiff makes no mention of safety issues in the Declaration of Taking or the Complaint. The Plaintiff did not present any evidence at the hearing regarding the issue of highway safety in construction of this proposed crossing. (Doc. No. 1-2). In short this is not a case which involves an issue of highway safety.

It is clear that a taking which would prevent or unduly interfere with railroad operations and interstate commerce is preempted by ICCTA. *See City of Lincoln*, 414 F.3d at 860. The Arkansas Supreme Court has recently held that attempts by Plaintiff to reopen a private crossing were preempted by the ICCTA. *See Anderson v. BNSF Ry. Co.*, 375 Ark. 466, ___ S.W.3d ___ (2009). Plaintiff argues the *Anderson* case is inapplicable here because *Anderson* involved a private crossing and this action involves a public crossing. Plaintiff's argument lacks persuasive force, as there is nothing in *Anderson* which can be read as limiting that holding to matters involving private crossings.

In this case the ICCTA controls and preempts state law because this case involves highway construction and not highway safety.⁶ The evidence shows that the construction of the proposed

⁵Plaintiff attempted to raise the issue of safety at the hearing on the instant motions. However, the issue of safety was raised only as a general duty of the Plaintiff to consider safety in all decisions regarding the exercise of its authority over the highway system in the State of Arkansas. There were no specific safety issues raised in regard to the proposed "at grade" crossing in this matter.

⁶Plaintiff's Complaint actually states the proposed condemnation is for "highway purposes" to allow the Plaintiff to construct and maintain highway facilities in Hot Spring County, Arkansas.

crossing would adversely impact railroad operations. Further, the only evidence presented in this case unequivocally shows that railroad operations would be burdened if the proposed condemnation were allowed to proceed.

The State regulatory scheme relied on by Plaintiff in this matter has been preempted by the ICCTA.

b. Abstention: Plaintiff urges this Court to abstain from exercising jurisdiction in this case pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Defendant contends the court should not exercise its discretion and should not abstain in this case. Generally, the Court should consider three factors the issue of abstention is raised: (1) whether the state proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is adequate opportunity in the state proceedings to raise constitutional challenges. *Younger*, 401 U.S. at 39.

As Defendants note in their briefing, Federal Courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). The doctrine of abstention “directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings.” *Night Clubs, Inc. v. City of Fort Smith, Ark.* 163 F. 3d 475 (8th Cir. 1998). Plaintiff make the same argument for abstention here that was made in *Arkansas State Highway Commission*, Cause No. 2:06-CV-2010. That argument is as unavailing now as it was it was in *Arkansas State Highway Commission*. Judge Dawson held in that case:

Plaintiff argues that state judicial proceedings are ongoing because Plaintiff deposited the estimated amount of just compensation with the State Court and an Order of Possession was entered by the State Court. There are no ongoing judicial proceedings that require abstention in this case. *The ICCTA clearly controls and the case was properly removed by the Defendants to this Court.*

Additionally, Plaintiff filed a Declaration of Taking with the State Court on December 20, 2005, setting out the specific properties to be condemned and asking the State Court to issue an order effectuating the Declaration. *Because the State Court does not have jurisdiction over this matter, the Defendant's Motion To Strike Declaration of Taking should be granted.* (emphasis added)

Abstention is applicable where the relief sought would interfere with a pending state matter in a way that offends principles of comity and federalism. This is not a case where only state or local issues are raised. In fact this action raises significant federal issues of commerce and is subject to a comprehensive and preemptive federal regulatory scheme. For the foregoing reasons abstention is not appropriate here.⁷

4. Conclusion

Accordingly, the undersigned recommends, Defendant's AMR's Motion To Strike and Vacate Order of Possession (Doc. No. 4) and Defendant's UP's Motion to Strike Declaration of Taking and Motion to Set Aside Order of Possession (Doc. No. 5) be **GRANTED**.

The parties have ten (10) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

ENTERED this 26th day of May, 2009.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE

⁷Based on these findings, I do not find it necessary to reach to other point raised by Defendant UP that Plaintiff's actions violate the dormant commerce clause.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CITY OF SILOAM SPRINGS, ARKANSAS,
A Municipal Corporation

PLAINTIFF

v. Civil No. 12-5140

KANSAS CITY SOUTHERN RAILWAY COMPANY

DEFENDANT

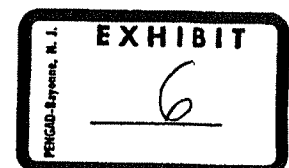
O R D E R

Now on this 10th day of September, 2012, come on for consideration **Plaintiff's Motion to Remand** (document #10), and defendant's **Motion To Dismiss** (document #12), and from said motions, and the responses thereto, the Court finds and orders as follows:

1. In this condemnation action, the City of Siloam Springs, Arkansas ("City") seeks to exercise its power of eminent domain to acquire a permanent trail easement over land running underneath a railroad bridge owned by the Kansas City Southern Railway Company ("KCSR").

2. The City originally filed this action in the Circuit Court of Benton County, Arkansas on June 8, 2012.¹ It was removed to this Court by KCSR on July 6, 2012. The City now seeks to remand the matter to state court, insisting that federal jurisdiction is lacking over this state law condemnation action.

¹This is the second condemnation action pertaining to the recreational trail easement which is the subject of the instant action. The City's previous action, City of Siloam Springs v. Kansas City Southern Transport Co., by the Kansas City Southern Railway Company, Civil No. 11-5233 (W.D. Ark. 2012), was dismissed for lack of subject matter jurisdiction by this Court on February 14, 2012.



3. KCSR, however, argues that the matter is preempted by federal law and therefore moves to dismiss for lack of subject-matter jurisdiction, pursuant to **F.R.C.P. 12(b)(1)**. It contends that jurisdiction to determine the issue lies with the Surface Transportation Board ("STB") under **49 U.S.C. § 10501(b)**, which grants the STB exclusive jurisdiction over "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."

4. The City responds that **§ 10501(b)** is not as sweeping as claimed by KCSR, in that state laws -- such as those providing for eminent domain -- are only preempted where their application would "prevent or unreasonably interfere with railroad operations," citing Maumee & W.R.R. Corp. and RMW Ventures, LLC - Petition for Declaratory Order, 2004 WL 395835 (S.T.B., March 2, 2004).

5. The statute in question, **§ 10501(b)(1)**, provides that

[t]he jurisdiction of the Board over -- (1) transportation by rail carriers, and the remedies provided in this part with respect to . . . facilities of such carriers; and (2) the . . . operation . . . of . . . 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.

6. The STB has explained the reach of **§ 10501** preemption as

follows:

Section 10501(b) . . . shields railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would unreasonably interfere with or discriminate against rail operations. . . . But state or local authorities may take action when it only incidentally affects railroad property. See, e.g., N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-54 (34d Cir. 2007) (§ 10501(b) preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. . . .")

Allegheny Valley Railroad Company -- Petition For Declaratory Order, 2011 WL 1546589 (S.T.B., April 21, 2011).

7. "The preemptive effect of a federal statute is a question of law," and "[t]he party asserting federal preemption has the burden of persuasion." Elam v. Kansas City Southern Ry. Co., 635 F.3d 796, 802 (5th Cir. 2011) (holding that § 10501 only completely preempts claims attempting to "manage or govern a railroad's decisions in the economic realm").

In cases involving state laws of eminent domain, particularly those involving non-exclusive easements for routine at-grade crossings, courts have held that § 10501(b) does not preempt such laws unless the easement would "impede rail operations or pose undue safety risks." New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 333 (5th Cir. 2008), citing cases, including City of Lincoln v. Surface Transportation Board, 414 F.3d 858, 863 (8th Cir. 2005).

In light of the foregoing authorities, the Court believes that preemption applies in this case if the easement sought by the City "would unreasonably interfere with" KCSR rail operations, but not required if it "only incidentally affects" KCSR railroad property.



8. In support of its Motion To Dismiss, KCSR offers the Amended Affidavit of Allen Pepper² ("Pepper") and the Declaration Under Penalty of Perjury of Srikanth Honnur ("Honnur").

(a) Pepper states that, in his capacity as U.S. Director of Public Safety for KCSR, he has considered the City's proposal for a "recreational trail under a bridge on the KCSR mainline in Siloam Springs," and specifically avers the following:

- * that the bridge is a 172' ballast deck timber bridge built in 1918;

- * that approximately twenty trains cross it each day;

- * that the trains that cross the bridge travel between 25 to 40 miles per hour;

- * that trail users would be exposed to hazards associated with rail transportation;

- * that although the use of corrugated roofing material may provide some protection from the danger of small objects, the roof would provide little protection from large, heavy objects; and,

²The Amended Affidavit of Allen Pepper was substituted in place of the Affidavit of Allen Pepper as Exhibit 1 to KCSR's Motion to Dismiss following this Court's text only order granting KCSR's Unopposed Motion to Substitute Amended Affidavit with Brief Incorporated (document #20).

* that constructing the proposed corrugated roof would interfere with KCSR's ability to operate the bridge, specifically KCSR's ability to inspect and maintain the bridge and its supporting structures.

(b) Further, Honnur, in his capacity as a bridge engineer and the KCSR Track and Bridge Construction Director, states:

* that "at some point in the future, this bridge will be replaced with a new bridge;"

* that destruction of the trail and proposed corrugated metal roofing will be required when the bridge is replaced or repaired;

* that KCSR will need the proposed location of the recreational trail for the construction and maintenance or improvements to its railway lines in the future;

* that KCSR may need to reinforce and repair the bridge prior to replacement through the installation of intermediate support bents; and, the installation of intermediate support bents would require removal of the proposed roofing structure;

* that the construction of the trail and proposed roofing structure could cause delays in repair response time; which could, in turn, potentially cause a collapse in the bridge; and

* that construction of the trail could interfere with water flow of an adjacent waterway and the potential need of KCSR

to widen the channel of that waterway to increase the capacity of the channel.

9. The City presents the Affidavit testimony of Randy Atkinson, who serves as the City's Public Works Director. Atkinson states, in pertinent part, that -- based on studies -- underpass rail crossings, such as the one proposed by the recreational trail, are far safer than at-grade crossings for pedestrians and bicyclists.

10. Based upon the submissions, it would appear to the Court that the proposed trail easement contemplates structural modifications to a railroad bridge -- which is unquestionably a "facility" of KCSR. In the Court's view, those structural modifications -- and the potential implications those structural modifications have on KCSR's ability to inspect and maintain the bridge -- constitute more than an "incidental effect" on the operation of the railroad.

Further, the proposed trail easement would allow pedestrians and bicyclists to cross under the track while trains are passing by overhead. Despite the proposed roofing structure, the Court believes that arrangement would still present the risks that some sort of debris -- from passing trains or from the bridge itself -- might fall and strike the trail users. Such risks expose not only the trail users, but also the railroad.

11. The City argues that at-grade crossings are considered

more dangerous than underpass crossings which, of course, may well be true. However, the issue before the Court is whether this proposed crossing will "impede rail operations or pose undue safety risks" -- not whether this proposed form of crossing will pose *less* of a safety risk than some other form.

12. In light of the foregoing, the Court concludes that the case falls within the ambit of 49 U.S.C. § 10501(b) -- thus preempting state law and placing exclusive jurisdiction of the matter with the Surface Transportation Board per that statute. It further concludes that, in these circumstances, the motion to remand should be denied and this case should be dismissed because the Court lacks subject matter jurisdiction.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand (document #10) is denied.

IT IS FURTHER ORDERED that defendant's Motion To Dismiss (document #12) is granted, and this matter is dismissed without prejudice.

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

CITY OF NORTH LITTLE ROCK,
ARKANSAS

PLAINTIFF

v.

No. 4:10CV01689 JLH

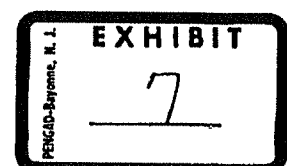
UNION PACIFIC RAILROAD COMPANY;
and ARKANSAS MIDLAND RAILROAD
COMPANY, INC.

DEFENDANTS

OPINION AND ORDER

The City of North Little Rock, Arkansas, commenced this action in the Circuit Court of Pulaski County, Arkansas, seeking to acquire an easement on railroad property for a pedestrian and bicycle trail through the power of eminent domain. The defendants removed the action to this Court pursuant to 28 U.S.C. § 1441. Subsequently, Arkansas Midland Railroad Company filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. 12(b)(1) arguing that the Interstate Commerce Commission Termination Act of 1995 vests exclusive jurisdiction over the action in the Surface Transportation Board, preempts Arkansas law, and divests both state and federal courts of jurisdiction. Union Pacific Railroad Company filed a motion to dismiss pursuant to Fed. R. Civ. 12(b)(6) making the same arguments as Midland and adding that North Little Rock's proposed taking violates the Dormant Commerce Clause of the United States Constitution and Section 22 of Article 2 of the Arkansas Constitution. Both defendants have incorporated each other's arguments into their own motions.

The property in question contains a 100 foot wide railroad right-of-way located on "certain lands lying southeast of East Washington Avenue and Vance Street in North Little Rock, Pulaski



County, Arkansas" owned by Union Pacific. Midland leases this property and operates a railroad line. According to the complaint, the City seeks:

A 30 foot wide right-of-way for a bike path/walking trail on lands owned by Union Pacific Railroad and leased to the Arkansas Midland Railroad, said lands lying in Section 6, Township 1 North, Range 11 West, and Section 31, Township 2 North, Range 11 West, and Spanish Grant #2431, all lying in the City of North Little Rock, Pulaski County, Arkansas, said easement centerline being more particularly described as follows:

Commencing at a point which is the intersection of the centerline of Baucum Pike (Hwy. #165) and the centerline of the Union Pacific Railroad property; thence N 67°30'00" West 21.0 feet; thence S 22° 30' 00" West 45.0 feet to the point of beginning, said point being 15 feet South of the Southerly right-of-way line of said Baucum Pike; thence N 67°30'00" West on a line that is 15 feet South of and parallel with said Southerly right-of-way of said Baucum Pike, a distance of 183.14 feet to the point of curvature of a 1,493.76 foot radius curve to the left; thence along said curve to the left, a chord bearing and distance of S 83°57'31" West 130.12 feet to the point of tangency; thence S 80°44'16" West and on a line that is 15 feet South of the North right-of-way of said Union Pacific Railroad Properly, a distance of 3122.00 feet; thence N 68°59'44" West 90.00 feet; thence S 73°39'18" West 245.15 feet to the end of this easement, containing 59,113.15 square feet or 1.36 acres, more or less.

Midland is a short-line rail carrier operating on small, branch lines. It retrieves loaded railroad cars from shippers and delivers them to interstate carriers, such as Union Pacific, for transportation to destinations in other states. Midland has a two mile track, the Ashgrove lead, running through the property with the center of the track located 50 feet from the boundary of the property. The proposed easement cuts across the Ashgrove lead adjacent to Baucum Pike. It then runs alongside the track between the boundary of the railroads' property and the Ashgrove lead.

An additional track, the team track, separates from the Ashgrove lead and runs parallel with it. The team track is primarily used to park overflow railcars and for transloading, that is, moving product from railcars to trucks and vice versa. The center of the team track is 17 feet 7 inches from the center of the Ashgrove lead. A freight car on the team track normally extends another 5.5 feet

from the center of the team track. With a train upon it, the team track extends about 23 feet from the Ashgrove lead. Thus, there are only about 27 feet between the team track and the boundary of the railroads' property. The proposed 30 foot wide easement overlaps with the team track. Charles Laggan, vice president and general manager of Midland, testified that granting the easement would render the team track unusable.

Part of the railroad property at issue is adjacent to East Washington Avenue. Midland uses a portion of this area as a transloading facility. Trucks drive onto the railroads' property from East Washington Avenue to load cargo onto and to unload cargo from railroad cars located on the team track. The evidence established that the transloading operations use most or all of the railroads' property between the team track and Washington Avenue in this area. The proposed easement encroaches upon this area.

Midland operates a switch stand where the Ashgrove lead and the team track join. The switch stand extends beyond the tracks onto the property that would be taken by the proposed easement.

Should a derailment occur on the team track or the Ashgrove lead, the railroad would likely need to bring large equipment onto the proposed easement. In response to evidence that the City might build a fence to separate the bicycle trail from the railroad track, Laggan testified any fence would interfere with Midland's ability to bring in the large equipment needed in the rerailing process. Even the trail itself could constitute an obstacle because the necessary equipment would likely damage the trail. Laggan testified that the railroad switch itself is a high-risk area for derailments. Laggan also testified that the construction of a trail on the proposed easement would

severely impact Midland's ability to conduct transloading and switching operations and to deal with derailments.

The ICCTA states:

The jurisdiction of the Board 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). The term "transportation" has been defined broadly in the ICCTA to include:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

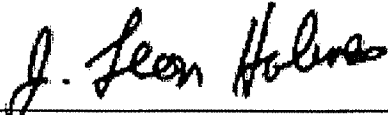
49 U.S.C. § 10102(9). Courts have said that "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations' than the language contained in Section 10501(b)." *Union Pac. R.R. Co. v. Chi. Transit Auth.*, No. 07CV229, 2009 WL 448897, *5 (N.D. Ill. Feb. 23, 2009) (citing *CSX Transp. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga.1996)). See also *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998); *Soo Line R. Co. v. City of St. Paul*, 2010 WL 2540695, *3 (D. Minn. June 17, 2010); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *City of*

Creede, CO-Pet. for Declaratory Order, STB Finance Docket No. 34376, 2005 WL 1024483, *4 (S.T.B. May 3, 2005).

The evidence demonstrates that the proposed easement could interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and could interfere with efforts to address derailments. Whether to allow the taking is a decision that, on these facts, involves the regulation of rail transportation. Congress has vested exclusive jurisdiction over the regulation of rail transportation in the Surface Transportation Board.

Therefore, the defendants' motions to dismiss are GRANTED. Documents #4 and #9. This action is dismissed without prejudice.

IT IS SO ORDERED this 21st day of April, 2011.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF ROD WOODS

I, Rod Woods, being of lawful age, upon my oath state:

1. My name is Rod Woods. I am a Manager of Claims for Union Pacific Railroad Company. The testimony contained in this affidavit is based on my personal experience.

2. On June 26, 2013, Union Pacific employee Tommy Wilkinson and I visited the location in the City of Ozark where the City proposes a crossing. The City had placed a new street sign at the proposed crossing location. I stood in the middle of the mainline track parallel to the street sign, as indicated by the photographs attached as Exhibit 1 to this affidavit. I had Mr. Wilkinson walk east to where I could last see him. At that point, I photographed him from my position parallel to the street sign. We marked our locations and measured the sight-distance. That distance was 468 feet.

FURTHER THE AFFIANT SAITH NOT.


Rod Woods



VERIFICATION

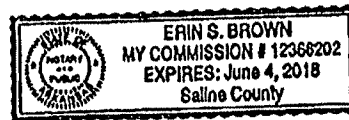
STATE OF ARKANSAS)
)
COUNTY OF Saline) ss.

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 30 day of July,¹⁸
2013.

Erin S. Brown
Notary Public

My commission expires:

June 4, 2018



AFFIDAVIT OF MATHEW BARR

The undersigned, Mathew Barr, being of legal age and capacity to so testify, doth state under oath:

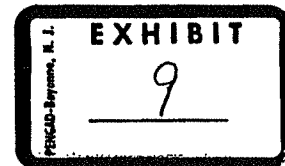
1. My name is Mathew Barr. I am a licensed surveyor in the State of Colorado. I am an employee of Survtech, Inc. which was engaged by Union Pacific Railroad Company to establish its rights-of-way in the vicinity of the railroad depot/museum in Ozark, Arkansas
2. I was responsible for performing the work by Survtech, Inc. related to its engagement by Union Pacific Railroad Company and I have taken measurements of and am familiar with the relative location of the Arkansas River to the Union Pacific Railroad Company rights-of-way in downtown Ozark, Arkansas. At various locations in the vicinity of the railroad depot/museum, the mainline track is less than 15 feet from the edge of the Arkansas River.
3. In some places, the Union Pacific right-of-way goes into the Arkansas River.

I certify under penalty of perjury that the foregoing is true and correct.



Mathew Barr
Affiant

NOTARY'S ACKNOWLEDGEMENT FOLLOWS ON NEXT PAGE



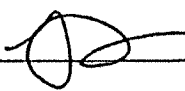
STATE OF Colorado

COUNTY OF Denver

)
)
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ACKNOWLEDGMENT

Subscribed and sworn to before me on this 28 day of August, 2014.

Notary Public

My Commission Expires:
(SEAL)

BRITTANY M DANIELS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID # 20134088848
MY COMMISSION EXPIRES SEPTEMBER 25, 2015