

ROBERTSON, BEASLEY, SHIPLEY & ROBINSON, PLLC
ATTORNEYS AT LAW
www.rbs-attorneys.com

■ Please respond to this mailing address
FORT SMITH, ARKANSAS OFFICE:
315 North Seventh Street
Fort Smith, Arkansas 72901
PHONE: (479) 782-8813
FAX: (479) 785-0254

JOHN R. BEASLEY
BENJAMIN H. SHIPLEY
JON P. ROBINSON
CHRISTOPHER D. BROCKETT
ALFRED F. ANGULO, JR.
JAY W. KUTCHKA
ROBERT D. KELLY
M. CODY FLYNN †
AMELIA L. SIPES
† Also Licensed in Oklahoma

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Office of Proceedings
February 13, 2017
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□ Please respond to this mailing address
OZARK ARKANSAS OFFICE:
401 W. Commercial St.
Ozark, Arkansas 72949
PHONE: (479) 667-3000
FAX: (479) 667-4188

OF COUNSEL:

THOMAS E. ROBERTSON, JR.
THOMAS B. PRYOR, P.A.

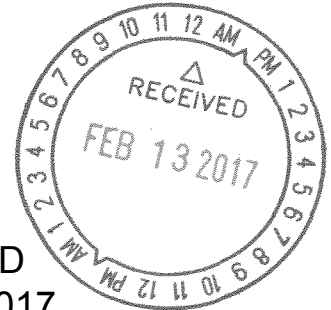
Writer's E-mail Address:
cbrockett@rbsr-attorneys.com

FILED
February 13, 2017
SURFACE
TRANSPORTATION BOARD

February 9, 2017
VIA USPS ONLY

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E. St. SW
Washing, D.C. 20423

FEE RECEIVED
February 13, 2017
SURFACE
TRANSPORTATION BOARD



RE: STB Docket No. 36104
City of Ozark, Arkansas
Petition for Declaratory Judgment Order

Dear Chief Brown:

The undersigned represents the City of Ozark, Arkansas, which is a government entity of the State of Arkansas; therefore, the City requests a waiver of the \$1,400.00 filing fee for filing the enclosed Petition for Declaratory Judgment Order. However, as we have asked for an expedited review of this matter, we have enclosed a check in the amount of \$1,400.00 as a deposit until the Surface Transportation Board has ruled on the Petition for Fee Waiver.

Enclosed are the original and one (1) copy of the Petition for Fee Waiver and the original and eleven (11) copies of the Petition for a Declaratory Judgment Order seeking an Order from the Surface Transportation Board that it lacks or declines to exercise jurisdiction in a dispute regarding an at-grade public crossing located in Ozark, Arkansas. We have also provided the Board with one (1) copy of the relevant pleadings from the ongoing Federal District Court lawsuit currently pending in the Federal District Court for the Western District of Arkansas Fort Smith Division. Please acknowledge

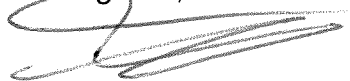
Petitions, by date stamping the enclosed 11th copy and returning it to my attention in the attached envelope.

On September 11, 2014, the City filed its initial complaint and on December 19, 2016, the United States Court of Appeals for the Eighth Circuit issued a reversal on the basis that the Appeal Court believes that the Surface Transportation Board has jurisdiction. Therefore, the opinion of the Appeal Court required the City to seek a Declaratory Order from the Board regarding the jurisdiction of the Board over this disputed issue.

Finally, the undersigned is authorized to practice law by the Supreme Court of the State of Arkansas and has so designated on the pleading. However, should a separate designation be necessary, please advise the undersigned and we will provide this to you immediately.

Should you have any questions or need any additional information to finalize the filing of the Petition, please contact me.

Regards,



Christopher D. Brockett

cc: Honorable Timothy L. Brooks, (via electronic filing system)
District Court Judge
Honorable Sarah Capp, (via email only)
Arkansas State Representative
Honorable T.R. McNutt, (via email only)
Mayor of Ozark
Honorable Rex Anderson, (via email only)
Councilmember
Honorable Harvey Waters, (via email only)
Councilmember
Honorable Chris Warden, (via email only)
Councilmember
Honorable Roxie Hall, (via email only)
Councilmember
Honorable Brandy Flannary, (via email only)
Councilmember
Honorable Susan Holman, (via email only)
Councilmember
Honorable Jeff Philips, (via email only)
Ozark City Attorney
Honorable Sandy Key, (via email only)
Main St. Ozark Director

Honorable Jamie Huffman Jones, (via email only)

Counsel for Union Pacific Railroad

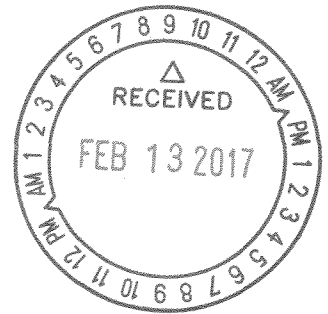
Honorable Scott H. Tucker, (via email only)

Counsel for Union Pacific Railroad

Honorable Joseph McKay, (via email only)

Counsel for Union Pacific Railroad

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



STB DOCKET NO. FD 36104

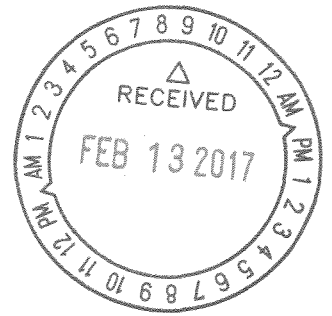
THE CITY OF OZARK, ARKANSAS
--PETITION FOR DECLARATORY ORDER--
REGARDING JURISIDICION OVER AT-GRADE CROSSING DISPUTE

EXPEDITED CONSIDERATION REQUESTED

Christopher D. Brockett
Ark. Bar No. 2005192
Robertson, Beasley, Shipley &
Robinson, PLLC
401 West Commercial Street
Ozark, Arkansas 72949
Telephone (479) 667-3000
Facsimile (479) 667-4188
Email: cbrockett@rbsr-attorneys.com
ATTORNEYS FOR THE PETITIONER

Dated: February 9, 2017

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



STB DOCKET NO. FD 36104

EXPEDITED CONSIDERATION REQUESTED

THE CITY OF OZARK, ARKANSAS' PETITION FOR 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 for its Petition for Declaratory Judgment and Request for Expedited Consideration Request against the Defendant, Union Pacific Railroad Company, an Omaha Nebraska for-profit corporation authorized to conduct business in the State of Arkansas ("Union Pacific, alleges and states as follows:

I. INTRODUCTION

1. This action is brought for declaration by the Surface Transportation Board (the "Board") for a Declaratory Order that the Board lacks jurisdiction; or, alternatively, that the Board declines to exercise jurisdiction over this long term existing dispute regarding the City's demand on Union Pacific to reinstall a public at-grade crossing that was in existence for over 85 years prior to its removal by Union Pacific in violation of Arkansas law.

II. BACKGROUND OF EXISTING LITIGATION

2. On September 11, 2014, the City filed a Complaint in the Circuit Court of Franklin County, Arkansas against Union Pacific, the Arkansas State Highway & Transportation Department and the Arkansas State Highway Commission (jointly “Arkansas State Highway Commission”) for a Declaratory Judgment seeking a determination that an at-grade crossing located in the city limits of the City commonly referred to as the Oliver St. Crossing was a public at-grade crossing (the “Crossing”) that according to the City’s records was established in approximately 1876 by Union Pacific’s predecessor, the Little Rock and Fort Smith Railroad, for the benefit of the City’s residents and citizens to access the Arkansas River. The Crossing has been in existence and classified as a public crossing according to Union Pacific’s records and authenticated maps, since at least 1916. This Crossing was the sole access point that the City can use to access land that the City has leased from the U.S. Corps of Engineers for development of walking trails and a transient boat dock.

3. The City sought in the Circuit Court filing, a declaration from the Circuit Court that the Crossing was removed illegally, without authority, and in violation of Arkansas law when Union Pacific unilaterally closed the Crossing in February 2001. Finally, the City sought a Circuit Court order to require Union Pacific to reinstall the Crossing at Union Pacific’s sole cost and expense and for damages related to Union Pacific’s activities that restricted the City’s access to the leased property south of Union Pacific’s railroad tracks.

4. In the alternative, the City sought authorization from the Circuit Court to survey and condemn the previous location of the Crossing for the installation of a new public at-grade crossing.

5. On September 17, 2014, Union Pacific filed a Motion to Remove the proceeding to the United States District Court for Western District of Arkansas Fort Smith Division (the "District Court") and on September 24, 2014 Union Pacific also filed a Motion to Dismiss and Memorandum of Law in Support of Its Motion to Dismiss.

6. On October 2, 2014, the City filed a First Amended and Restated Complaint, Request for Permanent Injunction and Writ of Mandamus ("Amended Complaint") setting forth the following causes of action and request for relief: Count (1) a Declaratory Judgment Regarding a Judicial Determination that the Crossing is a public crossing; Count (2) Unreasonable Interference of Plaintiff's Easement and Reestablishment of the Crossing; Count (3) Permanent injunction Against Union Pacific Defendant; Count (4) Writ of mandamus Against Separate Defendant Arkansas Highway and Transportation Department and the Highway Commission; and the Alternative Count (5) Action for Eminent Domain. A copy of the Amended Complaint is attached hereto as **Exhibit A** and it along with all other exhibits are incorporated herein as if set forth word for word.

7. On October 15, 2014, Union Pacific filed an Answer to the Amended Complaint. A copy of Union Pacific's Answer is attached hereto as **Exhibit B** and incorporated herein.

8. Union Pacific also filed a Motion to Dismiss on October 15, 2014 that incorporated the original Motion to Dismiss and Memorandum of Law that were both

filed on September 17, 2014 (all three jointly referred to as "Motion to Dismiss"). A copy of the original Motion to Dismiss, the original Memorandum of Law, the second Motion to Dismiss are all attached as Exhibit **C-1, C-2 and C-3** and are incorporated herein .

9. Union Pacific's Motion to Dismiss was based on the following reasons: "(1) the City 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 [Interstate Commerce Commission Termination Act of 1995]; (3) the City's request [by a former Mayor Todd Timmerman] 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." The City's claim for conversion was removed in the Amended Complaint, so this basis become moot upon the City filing the Amended Complaint.

10. The Arkansas State Highway Commission also filed a Motion to Dismiss and Memorandum in Support of the Motion to Dismiss the City's Amended Complaint on October 29, 2014.

11. The City filed a Response and Opposition to Union Pacific's Motion to Dismiss on November 13, 2014 and a Response and Opposition to the Arkansas State Highway Commission's Motion to Dismiss on November 17, 2014. A copy of the City's

Response and Opposition to Union Pacific's Motion to Dismiss and Memorandum of Law in Support is attached hereto as **Exhibit D and Exhibit E** and incorporated herein.

12. On December 10, 2014, the District Court issued a Memorandum Opinion and Order (the "December 10, 2014 Order") that **granted** the Arkansas Highway Commission's Second Motion to Dismiss the City's Amended Complaint on the basis of sovereign immunity and **denied as moot** the Arkansas Highway Commission's First Motion to Dismiss. The December 10, 2014 Order **denied** Union Pacific's first and second Motion to Dismiss. A copy of the December 10, 2014 Order is attached hereto as **Exhibit F** and incorporated herein.

13. In the December 10, 2014 Order the District Court specifically found as follows:

a. **Laches:** that the City set forth sufficient facts in its Amended Complaint to show that it was not sleeping on its rights since the crossing was closed by Union Pacific. It is evident that the City and Union Pacific have been in nearly constant communication regarding this dispute over the past decade. For these reasons, laches is not a proper basis for dismissal;

b. **Federal Preemption:** It is unclear to the Court, based on the pleadings and supporting exhibits, whether the relief demanded by the City would prevent or interfere with railroad operations and interstate commerce and trigger federal preemption. Accordingly, the Court declines to dismiss the case based on federal preemption at this state of the proceedings;

c. **Waiver and Estoppel:** Union Pacific contends that the Crossing was removed in 2001 at the City's request and at Union Pacific's sole expense.

The City responds that it never gave permission or authorization for Union Pacific to remove the Crossing, and the removal was done contrary to law. In addition, the City maintains that it continuously asserted its right as to the public's use of the Crossing almost immediately after the crossing was closed. For these reasons, the Court will not dismiss the case at this time based on waiver and estoppel theories.

d. **Propriety of Condemnation Action:** The Court deferred decision on the propriety of a condemnation action in favor of further fact-finding on the matter. After the parties have taken discovery and are able to provide the Court with more information as to the nature of the public's existing use and desired use of the Crossing, another determination on the issue may be appropriate.

14. On December 11, 2014, a case management hearing was held where the parties agreed to file cross motions for summary judgment as the facts of the case were generally undisputed.

15. Over the course of the next several months, the parties exchanged written discovery and also participated in approximately 50 oral depositions of witnesses who had familiarity with the Crossing that was the center of this ongoing dispute.

16. On April 29, 2015, Union Pacific filed its Motion for Summary Judgment on the following basis: (1) the claims are preempted by Federal law (Interstate Commerce Commission Termination Act of 1995); (2) 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; (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; and (5) condemnation action should be dismissed because the City lacks the authority to condemn the property at issue. A copy of Union Pacific's Motion for Summary Judgment, all attachments to the Motion for Summary Judgment, Memorandum Brief in Support of the Motion for Summary Judgment, and a Statement of Facts prepared by Union Pacific, are attached hereto as **Exhibit G-1, G-2, G-3, G-4, G-5, G-6, G-7, and G-8** and are incorporated herein.

17. On April 30, 2015, the City filed its Motion for Partial Summary Judgment. A copy of the City's Motion for Partial Summary Judgment, all exhibits to the City's Motion, and the City's Memorandum Brief in Support are attached hereto as **Exhibits H-1, H-2, H-3, H-4, H-5, H-6, H-7, H-8, and H-9**, which are all incorporated herein. In the City's Motion for Partial Summary Judgment the City requested the following relief:

a. a Declaration from the District Court that the Crossing was a public at-grade crossing and requested the Crossing be restored, as Union Pacific unilaterally removed the Crossing in February 2001 without, an affirmative vote authorizing the removal of the Crossing by the City's city council, as required by Arkansas law;

b. the District Court Ordering Union Pacific to reestablish the Crossing at Union Pacific's sole cost and expense.

c. A permanent injunction against Union Pacific from obstructing or interfering with the City's use of the Crossing.

18. On May 14, 2015, Union Pacific filed a Response to the City's Motion for Summary Judgment. A copy of Union Pacific's Response and exhibits are attached hereto as **Exhibits I-1, and I-2**, which are incorporated herein.

19. On May 25, 2015, the City filed a Response and Opposition to Union Pacific's Motion for Summary Judgment. A copy of the City's Response and Opposition along with filed exhibits are attached hereto as **Exhibit J-1, J-2, J-3, J-4, J-5 and J-6**, which are all incorporated herein.

20. On May 26, 2015, the City filed additional authenticating affidavits to authenticate maps that it obtained from the historical records of the City and from Union Pacific records, and other exhibits that were attached to the City's Response and Opposition to Union Pacific's Motion for Summary Judgment. A copy of the authenticating affidavits are attached hereto as **Exhibit K** and incorporated herein.

21. On June 8, 2015, Union Pacific filed a Reply to the City's Response and Opposition. A copy of Union Pacific's Reply is attached hereto as **Exhibit L** and incorporated herein.

22. On December 10, 2015, the District Court issued a Memorandum Opinion and Order (the "December 10, 2015 Order"). In the December 10, 2015 Order, the District Court **Denied** Union Pacific's Motion for Summary Judgment and **Granted** the City's Motion for Partial Summary Judgment, and found that Union Pacific's Motion to Exclude Testimony is **moot**. A copy of the District Court's December 10, 2015 Order is attached hereto as **Exhibit M** and it is incorporated herein.

23. The December 10, 2015 Order found in favor of the City regarding a declaration regarding the status of the at-grade crossing and public or private. The

District Court found that the Crossing that had been in existence for over 80 years prior to it being removed by Union Pacific was a public crossing. The District Court found that the evidence, including Union Pacific's own authenticated maps beginning in 1916, proved that the Crossing was a public crossing; therefore, the at-grade public crossing could only be closed by complying with the requirements of Arkansas law Ark. Code Ann. § 14-301-304, which required an affirmative vote of the City's city council and a public ordinance stating that the City was closing the public at-grade easement, which did not occur in this disputed matter. [emphasis added]

24. The December 10, 2015 Order rejected Union Pacific's affirmative defense of Federal Preemption by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C.A. §10101 et seq.). The Court found that preemption was not an issue, as the Crossing was not closed legally; therefore, Union Pacific's decision to increase rail operations at this location was made after the crossing had been illegally removed, and thus, at Union Pacific's own peril. There is no need to examine whether reopening the crossing would negatively impact train operations or result in safety concerns, **as Union Pacific's lack of legal authority to close the at-grade crossing is the controlling factor**. [emphasis added]

25. The December 10, 2015 Order rejected Union Pacific's request for Summary Judgment for the affirmative defense of Laches. The District Court determined that the evidence was undisputed that the City and Union Pacific have been in constant communication regarding this dispute over the past decade.

26. The December 10, 2015 Order rejected Union Pacific's request for Summary Judgment for the Affirmative Defense of Waiver, as the District Court rejected

the contention that First a lone city official, even a city's mayor-may, 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. Second, the evidence is undisputed 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 the use of a street, alley, or easement is through the procedures set forth in section 14-301-301 of the Arkansas Code. Finally, the District Court found that 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 Union Pacific's request for summary judgment on this affirmative defense is denied.

27. The December 10, 2015 Order rejected Union Pacific's request for Summary Judgment for the Affirmative Defense of Estoppel, as the District Court found that Union Pacific's reliance on Mayor Timmerman's oral request to remove the Crossing, without more, was unreasonable. The reason that such reliance was unreasonable, was because Arkansas law requires city offices and private companies like Union Pacific to follow certain procedures before the two may act to deprive the public of a right of access. The facts are undisputed that Union Pacific knew or should have known, by virtue of its own maps and records, that the Crossing was a public easement. As no ordinance to vacate the Crossing easement was prepared and adopted, the expenses incurred by Union Pacific were done at the railroad's own peril and not the City's.

28. Finally, the December 10, 2015 Order awarded the City its request to have Union Pacific reinstall the Crossing and awarded the City a permanent injunction. The District Court required Union Pacific to restore the Crossing to the same condition that the Crossing existed in February 2001 at its own cost. In addition, the District Court 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. The District Court acknowledged that Union Pacific 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, the Court held that Union Pacific invited this result by its own failure to comply with Arkansas State law. On balance, the Court finds 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. [emphasis added]

29. On January 8, 2016, Union Pacific filed a Notice of Appeal to appeal the District Court's December 10, 2015 Order to the United States Court of Appeals for the Eighth Circuit (the "Appeal Court"), specifically arguing that the District Court failed to fully analyze the factual Federal preemption of the 49 U.S.C. 10501(b) whether the action would have the effect of preventing or unreasonably interfering with railroad transportation. A copy of the Notice of Appeal is attached as **Exhibit N** and incorporated herein.

30. On December 19, 2016, the Appeal Court reversed the District Court. A copy of the Appeal Court December 19, 2016 Opinion and Mandate is attached hereto as **Exhibit O** and incorporated herein. The Appeal Court concluded that the ICCTA's

express preemption provision, 49 U.S.C. 10501(b), applies to this dispute. The Appeals Court emphatically disagreed with the District Court that since Union Pacific failed to comply with Arkansas State law when it unilaterally closed the Crossing without authority, the preemption does not apply. According to the Appeals Court, the STB's exclusive jurisdiction is interstate rail transportation, at present and in the future. Finally, the Appeals Court held that ICCTA preemption does not depend upon the source of a state law claim, but the claim is preempted if the requested remedy will, in the words of the STB's governing test, impede rail operations or pose not depend upon the source of state law claim.

31. The Appeal Court further concluded that Union Pacific has made a strong showing that the remedy the City seeks would "impede rail operations or pose undue safety risks," the STB's governing preemption standard. Therefore, the Appeal Court remanded to the District Court with instructions to rule on Union Pacific's motion to dismiss the City's amended complaint for lack of jurisdiction unless the City obtains a ruling from the STB that it lacks or declines exclusive jurisdiction over this dispute.

32. On January 11, 2017 the December 19, 2016 Appeal Court's Order was filed as a mandate with the District Court, which then issued an Order requiring the City to file for leave to pursue this Declaratory Judgment action. A copy of the District Court's Order requiring this filing is attached hereto as **Exhibit P** and incorporated herein.

33. The City filed a Motion for Leave to file this Declaratory Judgment Matter on January 12, 2017, which was granted by the District Court on January 13, 2017. A

copy of the motion and the order are attached hereto as **Exhibit Q-1 and Q-2** and both are incorporated herein.

III. SUMMARY OF FACTS

34. The City hereby incorporates and re-alleges paragraphs 1-33 as if set forth word for word.

35. The detailed facts of this matter are set out in the Amended Complaint attached hereto as Exhibit A; however, below are very brief facts regarding the plans of the City and the existence of the Crossing, which the District Court found to be a public crossing that was illegally removed by Union Pacific in violation of clear Arkansas statutory law.

36. The City has worked towards development of approximately 1.8 acres of real property located on the North shore of the Arkansas River that the City has leased from the U.S. Corps of Engineers since the early 1990s. The property can only be accessed by traveling across Union Pacific's real road tracks at the location of the Crossing as there is no other access to this real property. Prior to 1970 when a dam was built on the Arkansas river this 1.8 acres of property along with 15 other acres in the same location were all owned by private citizens and Union Pacific's predecessor in interest, Missouri Pacific Railroad.

37. This Crossing has been in existence since at least 1916 and over the course of the 85 years before its removal, the Crossing was used to travel to (1) the various residences located south of Union Pacific railroad tracks, (2) the town dump located south of the railroad tracks, (3) the large pallet plant that was located south of the railroad tracks that had 3 separate shifts of employees. After the dam was built in

1970 and a large portion of the real property was lost to the water of the Arkansas River, the Crossing was still used by residents of the City to fish and shoot skeet, shoot turtles and other recreation purposes. From the 1949 until 2001, Peach Valley Propane utilized a portion of the real property located south of Union Pacific railroad tracks to store large propane tanks and Peach Valley's trucks traveled across the Crossing on a daily basis until the tanks were moved in 2001 and the Crossing was closed unilaterally by Union Pacific. However, even with all of the traffic that occurred at this Crossing, there is only one possible accident that occurred at the Crossing and that is reportedly occurred in the mid 1980's; however, from the mid-1980s until 2001 when the Crossing was illegally closed by Union Pacific, no other accidents were ever reported at this location.

IV. LEGAL AUTHORITY

38. This dispute is not a type of dispute that has ever been addressed by the Board before and based on the legal research performed by the undersigned, to the no reported case or Board decision has addressed a situation where a railroad has **illegally in violation of a State law** removed a public crossing and then argued preemption to avoid having to comply with a state law when it was required to restore that public crossing.

39. The Board has issued direction regarding ICCTA's preemption of routine at-grade crossing disputes and there is other established case law, including in the United States District Court for Western District of Arkansas Fort Smith Division ("Western District Court")'s own decisions regarding the ICCTA preemption of Arkansas State law.

40. The Board has exclusive jurisdiction over the application of the ICCTA and in *Maumee & Western Railroad Corp. and RMW Ventures, LLC-Petition For Declaratory Order*, 2004 WL 395835 (S.T.B.), the Board has previously addressed the ICCTA's preemption.

41. In *Maumee*, the petitioners in that case, sought a declaratory judgment whether the condemnation proceedings by the City of Napoleon, OH (the "city"), to acquire an easement for a road crossing over and subsurface utilities under an 8,000 sq. ft. parcel of main line right-of-way, which is owned by RMW and operated by Maumee, are preempted by the ICCTA. *Id.*

42. Maumee argued that the ICCTA preempted any exercise of state eminent domain power with respect to railroad property, but the Board found that this interpretation is overbroad. *Id.*

43. The Board declined to issue a declaratory order, but did issue discussion and conclusion. *Id.*

44. The Board 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).

45. 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.*

46. 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] 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]

47. Finally, the Board stated “. . . , acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street **would not** implicate the Federal preemption of 49 U.S.C. 10501(b) (the ICCTA), unless it would prevent or unreasonably interfere with railroad operations. [emphasis added] *Id.* [emphasis added]

48. The Board also acknowledged that neither “the court cases, nor the Board’s precedent, suggested a blanket rule that any eminent domain action against railroad property is impermissible. Rather routine, non-conflicting uses, such as non-exclusive **easements for at-grade road crossings**, wire crossings, sewer crossing, etc., are **not** preempted so long as they would not impede rail operations or pose undue safety risks. [emphasis added]. *Id.* [emphasis added]

49. In *City of Siloam Springs, Arkansas v. Kansas City Southern Railway Co.*, 2012 WL 3961346 (W.D. Ark. 2012) the Western District Court addressed the issue of preemption of Arkansas State law by the ICCTA.

50. The City of Siloam Springs (“Siloam Springs”) sought 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”). *Id.* KCSR argued that the matter was preempted by the ICCTA and only the Board had the jurisdiction to rule on the issue in the case. *Id.*

51. Siloam Springs in response, relied on *Maumee Supra*, that the ICCTA was not as sweeping as claimed. *Id.* Siloam Springs asserted that state laws, such as eminent domain laws, are only preempted where their application would “prevent or unreasonably interfere with railroad operations. *Id.* citing *Maumee Supra*.

52. Western District Court Judge Hendren (“Judge Hendren”) addressed the general preemptive effect of a federal statute and noted “the party asserting federal preemption has the burden of persuasion. *Id.* citing *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011)(holding that § 10501 [ICCTA] only completely preempts claims attempting to “manage or govern a railroad’s decisions in the economic realm”). Judge Hendren acknowledged that “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)[ICCTA] does not preempt such laws unless the easement would “impede rail operations or pose undue safety risks.” [emphasis added] *Id.* at 2, citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir.2008).

53. Judge Hendren determined that “. . . preemption applies only **if** the easement sought by Siloam Springs “would unreasonably interfere with” KCSR rail operations, but not be required if it “only incidentally affects” KCSR railroad property.

54. Judge Hendren determined the proposed trail easement **contemplated structural modifications** to a railroad bridge and the potential implications those structural modifications have on KCSR’s **ability to inspect and maintain the bridge**, which constitutes more than an “incidental effect” on the operation of the railroad. [emphasis added] *Id.*

55. Judge Hendren further determined that the risk to the trail users (bicyclists or pedestrians) of potential falling debris from passing trains or from the bridge itself created an unreasonable safety risk. *Id.* Therefore, Judge Hendren determined the case was preempted by the ICCTA. *Id.*

56. The Fifth Circuit Court of Appeals has agreed with this interpretation in *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010).

57. 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.

58. 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.

59. Further the Fifth Circuit rejected Union Pacific'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.

60. Union Pacific will more than likely rely upon *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005), *Buffalo S. R.R. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006), *Dakota, Minn. & E.R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989 (D.S.D. 2002), *Soo Line R.R. Co. v. City of St. Paul*, 827 F. Supp. 2d 1017 (D. Minn. 2010), to support its position that this case is preempted and only the Board may exercise jurisdiction over this dispute.

61. However, the facts of each of these cases are distinguishable. First in the *City of Lincoln*, *supra*, the city proposed to acquire actual ownership of 20 feet of the railroad's 100 foot right-of-way, which was found to interfere with the storing of materials by the railroad on the remainder of its right of way; therefore the case was preempted.

62. Next, in *Buffalo S. R.R.*, *supra*, the Village intended to use the power of eminent domain to acquire ownership of a parcel of real property where the railroad was operating and if granted, the railroad would be prevented from doing business in that area completely.

63. *Dakota Minn. & E.R.R. Corp.*, *supra*, is not relevant as the facts relate to the State of South Dakota's attempt to regulate a railroad's eminent domain power by delegating the authority to the federal government to create additional restrictions on the railroad.

64. Finally, in *Soo Line*, supra, the city sought to acquire a 24-foot wide strip of right-of-way (2.1 miles of the railroad's right-of-way) for use as a bicycle/pedestrian trail.

V. Conclusion

65. Not a single case cited above relates to a situation where a railroad has illegally removed a public crossing by not complying with state law and then shielded itself from a state law requirement to replace the crossing by arguing preemption.

66. The facts before the Board in this case is a unique case, but the facts clearly show that a crossing that was in existence for at least 85 years prior to its illegal removal would not interfere with railroad operations and create undue safety risks.

67. Based on the above precedent, the City's action to seek the reinstallation of the Crossing should not be preempted by the ICCTA, as this matter is a routine at-grade crossing dispute that relates to a possessory interest in an existing Crossing that was illegally and without authorization removed by Union Pacific.

68. Unlike most of the above precedent, the City is not seeking to acquire ownership of any portion of Union Pacific's right-of-way and any plan for a walking trail will not be inside Union Pacific's 50 foot easement.

69. The Appeal Court's decision that an at-grade crossing is a regulation that impedes Union Pacific's operations of rail transportation and should be preempted, complete ignores the clear and undisputed language of the *Franks Inv. Co.*, supra, where the 5th Cir. held ". . . 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.”

70. This case involves a public at-grade crossing that has been in existence since Union Pacific’s predecessor, the Little Rock and Fort Smith Railway, first installed the tracks in 1876 or at a minimum since Union Pacific’s predecessor, Missouri Pacific Railroad, developed a map dated 1916 showing this crossing as a public at-grade crossing; therefore, any reinstallation of the crossing would merely incidentally affect Union Pacific’s rail transportation.

WHEREFORE, the Petitioner, the City of Ozark, Arkansas, a municipal corporation, respectfully prays that this Honorable Board issue an Order Declaring that is lacks jurisdiction in this routine dispute over an at-grade public crossing or in the alternative that it declines to exercise jurisdiction in this routine at-grade crossing dispute so that the District Court’s Order requiring the reinstallation of the Crossing should stand.

Respectfully submitted:

By: 

Christopher D. Brockett
Ark. Bar No. 2005192
Robertson, Beasley, Shipley &
Robinson, PLLC
401 West Commercial Street
Ozark, Arkansas 72949
Telephone (479) 667-3000
Facsimile (479) 667-4188
Email: cbrockett@rbsr-attorneys.com
ATTORNEYS FOR THE PETITIONER

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:

Scott H. Tucker
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340
Email: tucker@fridayfirm.com

Joseph McKay
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340

Jamie Huffman Jones
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340
Email: jjones@fridayfirm.com

Done at Ozark, Arkansas, this 9th day of February 2017.



Christopher D. Brockett