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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 36104

THE CITY OF OZARK, ARKANSAS
--PETITION FOR DECLARATORY ORDER--

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO THE CITY OF OZARK'S
PETITION FOR RECONSIDERATION**

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Union Pacific Railroad Company ("UP") hereby replies to the Petition for Reconsideration filed on August 21, 2017 ("Petition") by The City of Ozark, Arkansas (the "City") seeking reconsidering of the Board's decision in this matter served on July 28, 2017 ("Decision").¹ The Petition plainly does not meet the standard for granting reconsideration because it merely recycles the same evidence and legal arguments that were considered and rejected by the Eighth Circuit and the Board. The Petition fails to substantiate any claim of material error and should be denied.

I. Introduction

The City seeks reconsideration based on alleged material error in the Decision. Petition at 2. "In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error." *The Atlanta Development Authority—Pet. For Declaratory Order*, FD 35991, slip op. at 10-11 (STB served May 26, 2017). If the City has not presented material error that would mandate a different result, then the Board will not

¹ Under 49 C.F.R. § 1115.3(e), the City's Petition was due on August 17. On August 16, UP received a copy of a petition that was substantially similar to the filed Petition. Therefore, UP was not prejudiced by the City's late filing at the Board.

grant reconsideration. *Id.* Although the City's Petition alleges eight errors by the Board, the allegations do not justify reconsideration whether considered individually or collectively.

II. The City May Not Rely on the Crossing Closure for Material Error

As stated by the Eighth Circuit, the only remaining issue when this matter came before the Board was whether reinstalling the crossing would interfere with rail operations or create undue safety risks. *City of Ozark, Arkansas v. Union Pacific*, 843 F.3d 1167, 1172 (8th Cir. 2016). The Eighth Circuit explicitly found that the circumstances of the crossing closure in 2001 could not be used to avoid preemption, “[t]hus, an order requiring Union Pacific to restore the Crossing ‘to its pre-2001 condition’ *because it was closed in violation of state law* more than fifteen years ago is preempted if that restoration will unreasonably interfere with rail operations as they are conducted today or are likely to be conducted in the future.” *City of Ozark*, 843 F.3d at 1172 (emphasis added).

The City's argument that the Board must now consider the circumstances of the closure² is contrary to the Eighth Circuit's decision and runs afoul of the law-of-the-case doctrine. Under the law-of-the-case, a party may not attempt to revisit an earlier court finding by making the same argument that was unsuccessful in court. *Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company*, FD 35087 (Sub-No. 8), slip op. at n. 69 (STB served Nov. 8, 2012). This doctrine applies to issues of law that have been explicitly decided or decided by necessary implication. *R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa.*, AB 556 (Sub-No. 2X), slip op. at 6 (STB served Apr. 28, 2008); *see also Hulsey v. Astrue*, 622 F.3d 917, 924 (8th Cir. 2010) (“The law-of-the-case doctrine generally prevents relitigation of an issue previously resolved, and requires courts to

² Petition at 10-11, ¶¶ 24-31.

adhere to decisions rendered in earlier proceedings. This doctrine applies to administrative agencies on remand.”).

The Eighth Circuit explicitly decided that the circumstances around the crossing closure, including UP’s compliance or non-compliance with state law, cannot override the ICCTA preemption analysis:

The district court concluded that ICCTA preemption does not apply -- “is not at issue” -- in this case, because the City seeks to restore a rail crossing that was *closed in violation of state law*. Neither the court nor the City cite authority supporting this conclusion. *We emphatically disagree*. Whether § 10501(b)(1) applies to preempt a state-law claim or remedy is a question of federal law that turns on congressional intent to broadly preempt state laws and remedies that interfere with “transportation by rail carriers.” The focus of the STB’s exclusive jurisdiction is interstate rail transportation, at present and in the future. [citations omitted] *ICCTA preemption does not depend upon the source of a state law claim. The claim is preempted if the requested remedy will, in the words of the STB’s governing test, “impede rail operations or pose undue safety risks.”* Whether that interference with rail transportation arises from a public or private easement, or from opening a new crossing or restoring an abandoned crossing, is irrelevant to the federal preemption analysis.

City of Ozark, 843 F.3d at 1172 (emphasis added).

The City may not collaterally attack the Eighth Circuit’s decision in this proceeding by relitigating issues regarding the crossing closure that the Eighth Circuit ruled on. The City could have continued to litigate these issues by appealing the Eighth Circuit’s decision. The City chose not to appeal that decision and must now abide by the law of the case as decided by the Eighth Circuit. By alleging error resulting from issues already decided, the Petition is asking the Board to disregard the Eighth Circuit and the law-of-the-case doctrine. The Board should decline this invitation and deny the Petition.

III. The Board's Preemption Analysis Presented No Error

In its Decision, the Board correctly followed the Eighth Circuit's decision by conducting the ICCTA preemption analysis. The Board examined the evidence submitted by the City and UP and found that reinstalling the crossing would unreasonably interfere with UP's railroad operations and cause undue safety risks. The Board agreed with the Eighth Circuit that UP presented "concrete evidence" that reinstalling the crossing would interfere with UP's operations. *City of Ozark*, 843 F.3d at 1173; Decision at 5. The Board also agreed with the Eighth Circuit that the City failed to present specific evidence on interference with rail operations and safety with respect to the crossing as it would exist if reinstalled. *Id.*; Decision at 5.

The Petition claims that the Board failed to address the conflict between UP's expert witness and the City's safety expert (Petition at 4, ¶ 6), but that is simply not true. The Board addressed the evidence submitted by both parties. Decision at 5-6. While the Decision did not name either party's witness, the evidence summarized by the Board came from witness testimony. In reviewing this evidence, the Board correctly found UP's "concrete evidence" more persuasive. This was the correct result because, as noted by the Eighth Circuit, the City countered UP's evidence, "with an expert who opined that the reopened Crossing 'causes no more safety concerns to railroad employees or the general public than those experienced in any other small town with low volume vehicular traffic.'" *City of Ozark*, 843 F.3d at 1173. The City failed to submit sufficient evidence to the Eighth Circuit and failed to submit sufficient evidence

to the Board.³ The Petition provides no reason why the Board should review this evidence again. The Board did not commit any error in its preemption analysis and the Petition should be denied.

IV. Conclusion

For all of the foregoing reasons, the Board should deny the City's Petition for Reconsideration.

Respectfully submitted,



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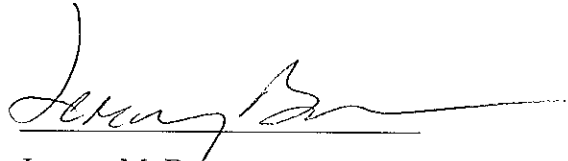
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³ The City cannot claim that the law-of-the-case doctrine bars the Board from finding installation of the crossing would interfere with railroad operations. The trial court made no such fact finding in its original decision since it considered the issue irrelevant on grounds later reversed by the Eighth Circuit. In its January 11, 2017 order allowing the City to file its petition for declaratory order at the Board, the trial court effectively referred the question of whether the crossing could be accommodated without interference with railroad operations to the Board.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery, on:

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