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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 DECLARATORY ORDER**

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<u>Document Title</u>	<u>District Court Document</u>	<u>Petitioner's Exhibit</u>
Deposition of Timothy McNutt	37-1	11a – Exhibit G-1
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Union Pacific Railroad Company ("UP") hereby replies to the Petition for Declaratory Order filed on February 13, 2017 ("Petition") by The City of Ozark, Arkansas (the "City").¹ UP requests that the Board terminate this controversy by issuing a declaratory order that the City's action seeking to reinstall the crossing is preempted by the ICC Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10501(b).

I. INTRODUCTION

This matter concerns a court action brought by the City seeking to install an at-grade road crossing over UP's tracks in the City of Ozark, Arkansas at the same location of a crossing removed in 2001. Petition at 3. The City requests that the Board issue an order declaring that the Board either: (1) lacks jurisdiction over installation of the crossing, or (2) declines to exercise jurisdiction over installation of the crossing. Petition at 22.

The matter began when the City sued UP in state court. UP removed the action to federal court and, following discovery, the parties filed cross motions for summary judgment. The

¹ Because the Petition was presented as a complaint, UP answers the numbered paragraphs as follows. Paragraphs 2 – 37 contain background facts that UP does not dispute. Paragraphs 1 and 28 – 70 are legal arguments addressed by this Reply. UP denies the allegations in Paragraphs 1 and 28 – 70 to the extent such denials are necessary.

District Court granted summary judgment for the City. The District Court rejected UP's defense that the ICCTA preempted an order to restore the crossing because it would interfere with rail operations and impair safety on grounds that UP lacked legal authority to close the crossing. UP appealed to the United States Court of Appeals for the Eighth Circuit arguing that the District Court erred by refusing to consider whether the City's action was preempted by ICCTA. The Eighth Circuit agreed with UP that an order "requiring Union Pacific to restore the Crossing 'to its pre-2001 condition' ...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, Arkansas v. Union Pacific*, 843 F.3d 1167, 1172 (8th Cir. 2016). The Eighth Circuit remanded the case with instructions that the district court should allow the City an opportunity to file petition with the Board resolving whether the crossing is preempted. *Id.* at 1173. The District Court gave the City leave to file and stayed the court action pending the outcome before the Board. *See* Doc. 92, at 1.²

In effect, the City's Petition requests a determination that its action seeking to reinstall the crossing is not preempted by ICCTA. Thus, under the well-settled preemption standard in crossing disputes, the only issue for the Board to decide is whether installation of the crossing would have the effect of unreasonably interfering with rail operations or creating undue safety risks. If the crossing would unreasonably interfere with rail operations or create undue safety risks then the City's action seeking to reinstall the crossing falls within the Board's exclusive jurisdiction under § 10501 and is preempted.

² As presented, many of Petitioner's exhibits contain multiple separate documents. For brevity and ease of reference, this Reply will cite to exhibits by using the District Court Document number, found in the second column in the Table of Cited Documents. Page number citations are references to the page number of the cited document.

During the several years of litigation leading up to the Petition, UP conclusively showed that reinstalling the crossing would unreasonably interfere with UP's rail operations *and* create undue safety risks to UP employees and persons using the crossing. Therefore, UP requests that the Board issue an order finding that the City's action seeking to reinstall the crossing is preempted.

II. THE BOARD SHOULD ISSUE A DECLARATORY ORDER TO RESOLVE THE CONTROVERSY

While the Board has sometimes encouraged courts to resolve routine crossing disputes, the Board should issue a declaratory order in this matter due to its history and current procedural posture. The preemption issue was effectively referred to the Board when the District Court gave the City leave to file its Petition and stayed the matter pending a Board decision. The Eighth Circuit also stated it would be appropriate for the District Court to defer making a judicial determination to allow the Board to resolve the issue of the Board's jurisdiction. *City of Ozark*, 843 F.3d at 1173. The City's Petition and its exhibits together with this Reply are a sufficient record for the Board to address the merits of this controversy.

A. Preemption is Ripe for a Board Determination

The Petition did not ask for a procedural schedule or for the opportunity to introduce new evidence. UP agrees new evidence is not needed because this case has been extensively litigated since 2014, and the City submitted the relevant parts of the record with its Petition. Both the City and UP took full advantage of discovery during the District Court litigation as evidenced by the numerous deposition transcripts and affidavits submitted with the Petition. As the Eighth Circuit noted, "[b]oth parties submitted extensive evidence regarding the impact of restoring the Crossing on railroad operations and safety, as well as argument on the preemption issue." *City of Ozark*, 843 F.3d at 1170. Both parties also agreed that the record was complete with respect to

the preemption issue and that this case could have been decided by the District Court on summary judgment, without the need for a trial or further evidence:

Plaintiff [the City] and Defendant [UP] have *both fully briefed the issue of preemption* in the Defendant's Motion to Dismiss and the Plaintiff's Response and *they have again fully briefed the issue of Federal preemption* in Defendant's Motion for Summary Judgment and the Plaintiff's Response and Opposition to the Defendant's Motion for Summary Judgment.

Doc. 63 at 2 (emphasis added).

The parties are now briefing the preemption issue for the third time. There is no reason for the Board to delay final resolution of this matter by requiring the parties to submit additional evidence. UP respectfully requests the Board issue a declaratory order based on the evidence and arguments presented in the Petition, its voluminous exhibits, and this Reply.

B. Preemption is the Only Issue for the Board to Decide

As stated by the Eighth Circuit, the only remaining issue in this matter is whether reinstalling the crossing would interfere with rail operations or create undue safety risks, “[t]hus, an order requiring Union Pacific to restore the Crossing ... 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.

The previous existence of a crossing at this location is irrelevant to the current preemption issue. *Id.* (whether action seeks “opening a new crossing or restoring an abandoned crossing, is irrelevant to the federal preemption analysis.”). Likewise, the circumstances surrounding UP’s 2001 closure of the crossing, at the request of the then-mayor of the City, is irrelevant to the Board’s preemption analysis. *Id.* (“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 effect of the proposed crossing on current and future rail operations and on safety is the issue before the Board.

The Board should issue an order finding that the City’s action to reinstall the crossing is preempted based on the evidence submitted by UP, and not refuted by the City, that the crossing would unduly interfere with rail operations *and* create undue safety risks.

III. THE CITY’S ACTION TO REINSTALL THE CROSSING IS PREEMPTED

A. Legal Standard for ICCTA Preemption

The Board is well aware of the legal standard to be applied in this matter because it recently applied this standard in two remarkably similar proceedings, *Tri-City R.R.--Pet. for Declaratory Order*, FD 35915 (STB served Sept. 14, 2016) and *Wichita Terminal Ass’n—Pet. for Declaratory Order*, FD 35765 (STB served June 23, 2015). In cases seeking to install an at-grade crossing over railroad tracks, the Board engages in a fact-specific analysis to consider whether the crossing would prevent or unduly interfere with railroad operations and interstate commerce. *Tri-City*, slip op. at 7. “In conducting this analysis, the Board considers both the railroad’s current and future plans.” *Id.* If the Board finds the crossing would unreasonably burden or interfere with rail operations or create undue safety risks, then the action seeking a crossing falls within the Board’s exclusive jurisdiction and is preempted. *Id.* slip op at 6; *Maumee & W. R.R.--Pet. for Declaratory Order*, FD 34354, slip op. at 2 (STB served Mar. 3, 2004). This approach to preemption has been approved by no fewer than seven of the United States Circuit Courts of Appeals. *See Tubbs v. STB*, 812 F.3d 1141, 1144 (8th Cir. 2015). UP is not aware of any Circuit Court of Appeals that has rejected this approach. As established by the Eighth Circuit, the City’s action seeking to reinstall the crossing is subject to preemption under this fact-specific inquiry. *City of Ozark*, 843 F.3d at 1172.

The Board correctly applied this test in *Tri-City* and *Wichita Terminal Ass'n* to find that crossings sought in both of those cases were preempted. As explained below, the facts of this matter bear a striking resemblance to the facts presented in both *Tri-City* and *Wichita Terminal Ass'n*. The Board should reach the same result here. The Board found the following circumstances, among others, relevant to the preemption in question in *Tri-City*:

- Crossing would have made as much as 600 feet of the 1900-foot long parallel track unusable for TCRY's switching, storage, and interchange operations. (slip op. at 7)
- The parallel track was the only location along a 16-mile line where these railroad operations could be performed. (slip op. at 7)
- Loss of useable parallel track would impinge on railroad's ability to conduct its current operations. (slip op. at 7)
- Crossing would have required railroad to reconfigure its operations making it less efficient. (slip op. at 7)

Similarly, in *Wichita Terminal Ass'n* the proposed crossing, which was found preempted by the Board, would have bisected two 1000-foot tracks, reducing the railroad's capacity on the tracks and requiring additional train movements to allow operations to continue on the tracks. slip. op. at 1, 5. Reinstalling the crossing as requested by the City would cause similar interference with UP's operations *and* create safety risks that were not present in *Tri-City* or *Wichita Terminal Ass'n*.

B. The Crossing Will Unreasonably Interfere with Rail Operations

In support of its motion for summary judgment before the trial court, UP presented evidence on track characteristics and train operations at the location of the proposed crossing from Bill Huston, UP Manager of Train Operations and Stephen Kifer, former UP Manager of Operating Practices (retired). UP also presented expert testimony on the burden to UP's

operations and safety risks posed by the crossing from Gary Wolf, who has over 40 years of experience in the rail industry.³

Track Characteristics

The City asks that UP install a crossing at a location with four tracks: a mainline track, a long side-track used as a storage track and for train meets, and two side-tracks (or house tracks) used to set out cars. Doc. 37-2 at 1-2.

The mainline track at this location is maintained to Federal Railroad Administration Class 4 standards, which sets the speed limit for freight trains at 60 miles per hour. *Id.* at 1. UP operates 10-20 trains per day over the mainline track. *Id.* Trains running through downtown Ozark often carry hazardous materials such as petroleum, methyl bromide, yellow phosphorus, alcohol polyethoxylate, sodium hydrosulfide, and sodium hydroxide. *Id.*

The longer side-track allows a train traveling in one direction to move off the mainline so that a train traveling in the opposite direction can pass. *Id.* at 1; Doc. 39-2 at 1. When not being used to meet and pass trains, this siding in Ozark is also the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren, Arkansas. Doc. 37-25 at 2-3.

The shorter house tracks are used primarily for setting out and staging rail cars for local customers and storing maintenance-of-way equipment and locomotives. Doc. 37-25 at 2. Currently, approximately 60 cars, depending on length, can be placed on the house tracks. *Id.* Doc. 37-2at 1-2. Trains also change crews at this location. *Id.*

³ To avoid redundancy, UP incorporates the facts set forth in UP's Memorandum of Law in Support of its Motion for Summary Judgment, Doc. 43, specifically pages 18-35, as if fully set forth herein. This Reply summarizes the most relevant facts.

Interference with Rail Operations

Reinstalling the crossing would cause significant adverse effects on UP's operations. The crossing would:

- Prevent UP from fully utilizing the storage track. (Doc. 37-2 at 1- 4; Doc. 37-25 at 1-3; Doc. 38 at 17-21; Doc. 39-2 at 2)
- Reduce rail line capacity on the Van Buren Subdivision by as much as 44-118%. (Doc. 38 at 17-18)
- Cause loss of approximately 625 feet or 16% of siding storage capacity. (Doc. 38 at 19)
- Prevent local train meets at this location, forcing a reduction in line capacity. (Doc. 37-25 at 1-2);
- Increase the number of switching operations because cars would have to set out on different sides of crossing. (Doc. 38 at 14, 20)
- Increase UP's labor costs. (Doc. 38 at 23)
- Increase transit times over the entire Van Buren subdivision (Doc. 38 at 19-20)

The Eighth Circuit characterized as both "extensive" and "concrete" UP's evidence showing that reinstalling the Crossing "would have significant adverse effects on current rail operations." *City of Ozark*, 843 F.3d at 1173. The City's own witness, George Soliz, also agreed that reinstalling the crossing would interfere with UP's operations. Doc. 65-1 at 57.

Based on applicable precedent, these adverse impacts constitute unreasonable interference with UP's operations such that ICCTA preemption bars the City's action to reinstall the crossing. *See Tri-City; Wichita Terminal Ass'n; Fort Bend Cty. v. Burlington N. & Santa Fe Ry. Co.*, 237 S.W.3d 355, 359 (Tex. App. 2007) (Action seeking crossing over mainline and side track found preempted based on loss of ability to fully utilize side track.).

C. The Crossing Will Create Undue Safety Risks

Under the City's development plans, the vehicles and pedestrians would use the at-grade rail crossing either to access the walking trail from the City or to access the City's shops and restaurants in the historic district from the Arkansas River. Doc. 37-3 at 28-29, 33; Doc. 37-5. at 23. There is an obvious risk of injury—including fatal injury—to a pedestrian if the crossing is

reinstalled. The inadequate sight lines would not allow a pedestrian or a vehicle to see oncoming trains when attempting to pass over the crossing. Doc. 38 at 6-7. The City admits that it intends to market its downtown drinking establishments to tourists, creating a real possibility that pedestrians under the influence of alcohol and unfamiliar with the surroundings would cross the tracks at their peril. Doc. 37-3 at 28, 33; Doc. 37-5 at 23. The City's plan to attract families to use the land between the tracks and the river for recreation creates a real possibility that children will be playing in close proximity to passing trains. Doc. 37-1 at 15.

Reinstalling the crossing would also create safety risks to UP employees due to the resulting increase in the number of switching operations. Doc. 37-2 at 1-3; Doc. 38 at 14-15. Switching operations to reconnect cars spotted on either side of crossing would require crew members to leave the locomotive and walk along the track, exposing them to an increased possibility of slips, trips and falls, which are a leading cause of railroad employee injuries. Doc. 38 at 14-15.

The risk of train derailments would increase at this location due to the particular factors of a downgrade, "sweeping" curve on the approach to the crossing, the inadequate sight lines, and the potential for trains to be placed into emergency braking in order to avoid a pedestrian or a playing child. Doc. 37-3 at 28, Doc. 38 at 8, 38-39. The safety risk from such derailments could be quite serious. The line through Ozark comprises UP's route for chemicals from the Gulf moving to Midwestern and eastern gateways. These chemicals are highly toxic and potentially deadly if spilled. Doc. 37-3 at 29. A derailment that caused these chemicals to spill into the Arkansas River could result in severe environmental contamination. Doc. 37-1 at 14; Doc. 37-3 at 29. These safety concerns are significant and supported by the City's own witnesses (Key, Doc 37-3 at 29; Sneath, Doc 37-5 at 23; and McNutt, Doc. 37-1 at 15).

Again, as the Eight Circuit recognized, these facts constitute “extensive” and “concrete” evidence that reinstalling the crossing “would pose significant safety risks to Union Pacific employees; to those traversing the Crossing, which sits on a curve in the main line track where there are limited sight lines; and to those using recreational trails on a narrow strip of land between the tracks and the river, risks that would create a danger of disastrous derailments of high-speed trains that often transport hazardous materials.” *City of Ozark*, 843 F.3d at 1173.

D. The City Offers No Evidence on Interference or Safety

The City relies wholly on the record below, which both parties agree is complete, regarding the effect of the crossing on rail operations and safety and provides no new evidence with its Petition. In the record below, the City failed to refute the conclusion that the crossing would interfere with UP operations and create undue safety risks; indeed its witnesses agreed with UP’s facts on these points. *See* Doc 37-5 at 23; Doc. 37-1 at 15.⁴ The City admitted the facts that UP relies on to establish the safety concerns. *See* Doc. 44, ¶¶ 64-74, at 5, and Doc. 57, ¶¶ 64-74, at 15-16. The City’s expert regarding crossings, crossing safety and railroad operations admitted he is *not* an expert in any of these areas. *See* Doc. 65 at 3-6. Even taking Mr. Soliz’s testimony at face value, he admitted the crossing would have negative impacts on, and would interfere with, UP’s operations. Doc. 65-1 at 57.

⁴ The City primarily relied on “expert” testimony from George Soliz to establish that the crossing would not interfere with UP’s operations or create safety risks. UP filed a *Daubert* motion seeking to exclude Mr. Soliz’s testimony. The District Court denied this motion as moot when it incorrectly granted summary judgment for the City, but did not rule on the merits of this motion. *See* Doc. 71 at 15. Given the more relaxed rules of evidence before the Board and in the interest of the Board having a complete record, UP does not object to the Board considering Mr. Soliz’s testimony solely for the purpose of this proceeding and without prejudice to UP’s right to renew its *Daubert* challenge to Mr. Soliz’s testimony, if ever necessary in any later proceedings. *See* Doc. 57-3 and Doc. 65-1.

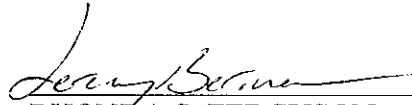
As pointed out by the Eighth Circuit, Mr. Soliz's testimony on safety at the crossing boiled down to an opinion that the crossing "causes no more safety concerns to railroad employees or the general public than those experienced in any other small town with low volume vehicular traffic." *City of Ozark*, 843 F.3d at 1172. This is precisely the type of generalized and conclusory testimony that courts have found insufficient to satisfy the fact-specific preemption analysis. *See Franks Inv. Co. LLC v. Union Pacific*, 593 F.3d 404, 415 (5th Cir. 2010). Moreover, Mr. Soliz's opinion completely overlooked the increased pedestrian traffic the City hopes to attract with planned development associated with the crossing.

The City failed to marshal any evidence to support a finding that the Board lacks jurisdiction over installation of the crossing or that the Board should decline to exercise jurisdiction. The only appropriate result is a finding the City's action to reinstall the crossing is preempted.

IV. CONCLUSION

For all of the foregoing reasons, the Board should terminate this controversy by issuing a declaratory order that reinstallation of the crossing as requested by the City falls within the Board's exclusive jurisdiction and is preempted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jeremy Berman", is written over a horizontal line.

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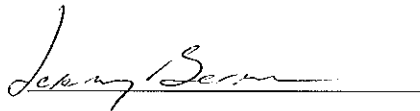
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March 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March 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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