No. 08-30236

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANKS INVESTMENT COMPANY, L.L.C.,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

APPELLANT'S EN BANC BRIEF

John M. Madison, Jr.
James R. Madison
M. Allyn Stroud
WIENER, WEISS & MADISON
333 Texas Street, Suite 2300
Post Office Box 21990
Shreveport, Louisiana 77120-1990
Telephone: (318) 226-9100
Facsimile: (318) 424-5128

Warren W. Harris
J. Brett Busby
BRACEWELL & GIULIANI LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770
Telephone: (713) 223-2300
Facsimile: (713) 221-1212

ATTORNEYS FOR APPELLANT
FRANKS INVESTMENT COMPANY,
L.L.C.

CERTIFICATE OF INTERESTED PERSONS

No. 08-30236

Franks Investment Company, L.L.C. v. Union Pacific Railroad Co.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant

Franks Investment Company, L.L.C.

Counsel for Plaintiff-Appellant

Warren W. Harris
J. Brett Busby
BRACEWELL & GIULIANI LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

John M. Madison, Jr.
James R. Madison
M. Allyn Stroud
WIENER, WEISS & MADISON
333 Texas Street, Suite 2300
Post Office Box 21990
Shreveport, Louisiana 71120-1990

Scott C. Sinclair
SINCLAIR LAW FIRM, L.L.C.
Post Office Box 1026
Shreveport, Louisiana 71163-1026

Defendant-Appellee

Union Pacific Railroad Company

Counsel for Defendant-Appellee

William H. Howard III
Alissa J. Allison
Paul L. Peyronnin
Kathlyn G. Perez
Matthew A. Woolf
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
201 St. Charles Avenue, Suite 3600
New Orleans, Louisiana 70170

A.N. Yiannopoulos
662 Sunset Boulevard
Baton Rouge, Louisiana 70808

J. Brett Busby

Attorney of record for
Franks Investment Company, L.L.C.

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JURISDICTIONAL STATEMENT

This action was commenced in state court and removed by Union Pacific Railroad Company (Union Pacific) to the United States District Court for the Western District of Louisiana. R 11. The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1332. Union Pacific is a Delaware corporation with its principal place of business in Nebraska. R 12. Franks Investment Company, L.L.C. (Franks) is a Louisiana limited liability company having three individual members, each of whom is a Louisiana citizen. R 64. The value of the matter in controversy exceeds the sum of $75,000. R 11.

This is an appeal from a final judgment by the district court disposing of the claims of all parties. R 264. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final judgment was entered on February 29, 2008. On that same day, Franks timely filed its notice of appeal. R 265.

STATEMENT OF ISSUES

The district court held that Franks' action, which asserts a state-law property right to continue using four crossings over Union Pacific's railroad tracks, was expressly preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b). The panel affirmed on that same basis. Prior decisions of this Court, numerous other courts, and the agency that administers ICCTA hold that state-law claims regarding crossings are not expressly preempted, however. Even Union Pacific concedes that Franks' action is not expressly preempted by ICCTA, and it now advocates implied preemption instead.

The issues presented are:

1. Did the district court and panel err in holding that Franks' action is expressly preempted by ICCTA?

2. Is Franks' action impliedly preempted by ICCTA where Union Pacific did not offer evidence, and the district court did not find, that these particular crossings unreasonably interfered with rail transportation?

STATEMENT OF THE CASE

Franks filed a possessory action against Union Pacific in Louisiana state court, claiming a real property right to continue using four railroad crossings under generally applicable Louisiana law. It sought an injunction to compel reinstallation of two destroyed crossings and to prevent destruction of the other two. R 19. Union Pacific removed the action to federal district court based on diversity jurisdiction (R 10), and the court consolidated the preliminary injunction hearing with a bench trial on the merits. *See* FED. R. CIV. P. 65(a)(2).

Following a two-day trial, the district court orally ruled that Franks' action was expressly preempted by ICCTA and entered a judgment dismissing it with prejudice. Ignoring ICCTA's explicit statement that preemption applies to state-law "remedies" "with respect to regulation of rail transportation," 49 U.S.C. § 10501(b), the district court instead tied its preemption analysis to the definition of "transportation," holding that "a railroad grade crossing . . . necessarily falls within the definition." Ruling Tr. 6-7 (Record Excerpts, Tab 4). It reasoned that "'*[a]ny* physical improvement made to railroad tracks, such as those made to construct a crossing, will necessarily impact and be involved in the movement of passengers and property passing over those tracks.'" *Id*. at 7 (emphasis added) (quoting *Island Park, LLC v. CSX Transp., Inc.*, No. 1:06-CV-310, 2007 WL 1851784, at *12 (N.D.N.Y. June 26, 2007), *rev'd*, 2009 WL 585649 (2d Cir. Mar.

4, 2009)). It also noted trial testimony that, in general, "[a] crossing . . . affects safety, drainage, and maintenance issues." Ruling Tr. 7. The court did not reach the merits of Franks' claimed right to use the crossings. *Id.* at 8-9; *see* R 264.

On appeal, Union Pacific did not attempt to defend the district court's broad express preemption holding, arguing instead that implied preemption was warranted because these crossings "would interfere with Union Pacific's rail operations." UP Br. 17. A panel of this Court affirmed, however, holding that ICCTA "broadly preempt[s] state law as it relates to rail transportation." *Franks Inv. Co. v. Union Pac. R.R.*, 534 F.3d 443, 449 (5th Cir. 2008). Reasoning that all "railroad crossings fit within the purview of [rail] transportation," it agreed with the district court that any "state-law claims relating to ownership of the crossings" are "expressly preempted." *Id.* at 445-46. This Court subsequently granted rehearing *en banc*, thereby vacating the panel opinion. *See* 5TH CIR. R. 41.3.

STATEMENT OF FACTS

Franks Investment Company owns about 1,000 acres of land in Caddo Parish, Louisiana, and leases portions of it for farming. The eastern boundary of the property extends approximately two miles along Louisiana Highway 1, and Union Pacific owns a strip of land approximately 100 feet wide that is situated between Franks' property and Highway 1. Within that strip of land, Union Pacific

owns and operates a railroad line that provides freight service between Shreveport and Alexandria, Louisiana. Ruling Tr. 3.

For at least 70 years, and perhaps as long as 85 years (Exs. D47-A, D54), four private railroad crossings have provided access to the property from Highway 1. *See* Ex. P8 (map) (Record Excerpts, Tab 5). Union Pacific's predecessor agreed to provide three of the crossings and to furnish proper drainage outlets when it purchased the strip of land from Franks' predecessor in 1923.[1] The record discloses no action by any regulatory body regarding the crossings.

In 2005, Union Pacific advised Franks that it intended to remove the four crossings. Franks objected, advising Union Pacific of its belief that it owned the right to use the crossings. Union Pacific unilaterally destroyed two of the four crossings in December 2007, and it continued to threaten to destroy the other two crossings. Ruling Tr. 4; R 298.

The significance of the factual evidence presented at trial regarding the use of the crossings is best understood with reference to the Louisiana law principles upon which Franks staked its claim for legal relief. Franks sought to establish its

[1] The deed provides, in part, that "[i]t is understood and agreed that the Texas and Pacific Railway Company shall fence said strip of ground and shall maintain said strip of ground and shall maintain said fence at its own expense and shall provide three crossings across said strip at the points indicated on said Blue Print hereto attached and made part hereof, and the said Texas and Pacific Railway hereby binds itself, its successors and assigns, to furnish proper drainage out-lets across the land hereinabove conveyed." Ex. D44-F (Appendix, Tab B).

right to be continued in possession of a servitude of passage over the crossings. Ruling Tr. 4-5. Under Louisiana law, a servitude of passage is a "predial servitude." *See generally* La. Civ. Code arts. 533, 646, 699. "The servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, or vehicles are permitted to pass through the servient estate." *Id.* art. 705. In the absence of a contractual provision to the contrary, the right of passage shall be exercised in a manner "suitable for the kind of traffic necessary for the reasonable use of the dominant estate." *Id.*

A predial servitude is a "real right" (La. Civ. Code art. 476)—that is, a charge on the land similar to a common-law easement.[2] It "is inseparable from the dominant estate and passes with it," and it "continues as a charge on the servient estate when ownership changes." *Id.* art. 650. A party's right to enjoy and maintain a real right, such as a right of passage, may be established in a possessory action. La. Code Civ. Proc. art. 3655. The required showing by a plaintiff in a possessory action is that:

[2] *See* BLACK'S LAW DICTIONARY 1229 (5th ed. 1979), which defines a servitude as "a species of incorporeal right derived from the civil law . . . closely corresponding to the 'easement' of the common-law, except that 'servitude' rather has relation to the burden or the estate burdened, while 'easement' refers to the benefit or advantage or the estate to which it accrues."

(1) He had possession of the immovable property or a real right therein at the time the disturbance occurred;[3]

(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;

(3) The disturbance was one in fact or in law, as defined in Article 3659; and

(4) The possessory action was instituted within one year of the disturbance.

Id. art. 3658.

As shown by the evidence presented at trial, for more than one year prior to December 27, 2007, Franks and others acting with its consent continuously used the crossings, quietly and without interruption. Among other evidence on this point, Joe Dill, who leased a portion of Franks' property for farming, testified that he regularly and exclusively used Crossings 3 and 4 without interruption, and that Crossing 3 normally was the only mode of access for some of the equipment he used in his farming activities. Tr. 108, 113. This undisputed evidence provides a factual basis for concluding that the first three requirements for a possessory action were met, and there is no dispute that the fourth requirement (that the possessory action be instituted within one year of the disturbance) was also met.

[3] A "disturbance" includes "an eviction, or any other physical act which prevents the possessor of immovable property or of a real right therein from enjoying his possession quietly, or which throws any obstacle in the way of that enjoyment." La. Code Civ. Proc. art. 3659.

With respect to factual issues such as the impact of the crossings, if any, on safety, drainage, or maintenance of Union Pacific's railroad track, there is no evidence in the record specific to the these crossings. The only evidence presented regarding the alleged impact of railroad crossings on safety and other matters was general in nature and did not pertain to Franks' property specifically. *E.g.*, Tr. 156-61, 163-64, 176-78, 295-96. There is no evidence in the record that these particular crossings have posed maintenance issues or safety concerns, or have affected the velocity or traffic flow of Union Pacific's trains.

SUMMARY OF THE ARGUMENT

Franks' action claiming a state-law property right to use railroad crossings is not preempted by ICCTA. Decisions of the Surface Transportation Board ("STB") and the courts have defined the scope of both express and implied preemption under ICCTA. As the statutory text shows, ICCTA expressly preempts other "*regulation* of rail transportation." In addition, ICCTA impliedly preempts state laws that would have the effect of preventing or unreasonably interfering with rail transportation. The Second, Third, Fourth, Sixth, and Tenth Circuits, as well as this Court in *New Orleans & Gulf Cost Railway v. Barrois*, 533 F.3d 321 (5th Cir. 2008) have relied on the STB's settled preemption test.

Under this generally accepted test, the courts and the STB have consistently held that routine crossing disputes are not expressly or "categorically" preempted.

Rather, the facts of the dispute are analyzed to determine whether implied or "as applied" preemption is warranted. Yet here, the panel did not acknowledge the STB test, and it held that all state-law claims relating to ownership of railroad crossings are expressly preempted. Not even Union Pacific defends that sweeping position, which would allow railroads to close private or even public crossings at will.

Franks' claim is also not impliedly preempted. Implied preemption analysis requires a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with rail transportation. At trial, Union Pacific presented no evidence that Franks' crossings unreasonably interfered with its rail operations. Further, at least three of the four crossings were voluntarily provided by Union Pacific's predecessor to Franks' predecessor. Union Pacific cannot use ICCTA to avoid complying with its own commitments. Accordingly, Franks' claim is not preempted and this Court should reverse.

STANDARD OF REVIEW

Whether a state statute or cause of action is preempted by federal law is a question of law that this Court reviews *de novo*. *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 442 (5th Cir. 2001). The Court will disregard a factual finding that is clearly erroneous or influenced by an incorrect view of the law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999).

ARGUMENT

I. ICCTA Does Not Expressly Preempt State-Law Crossing Rights, And It Impliedly Preempts Such Rights Only To The Extent That They Unreasonably Interfere With Rail Transportation.

As other circuits and both parties to this case have recognized, ICCTA expressly preempts only state-law "remedies . . . with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added); Resp. to Pet. for Reh'g *En Banc* 3. Under that standard, as this Court concluded in *Barrois*, 533 F.3d at 332-33, "routine crossing disputes are *not* typically preempted." This conclusion is supported by federal preemption doctrine, ICCTA's text and history, decisions of the courts and the STB, and principles of agency deference.

A. Federal preemption doctrine shows that Franks' claim is presumptively not preempted.

Under the Supremacy Clause, state laws are preempted if they "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824); U.S. CONST. art. VI, cl. 2. As relevant here, express preemption occurs "where the intent of Congress to preempt state law is clear and explicit" (*Friberg*, 267 F.3d at 442), and implied conflict preemption occurs where "'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 758 (5th Cir. 2007) (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

This Court's preemption inquiry "must be guided by two cornerstones of [the Supreme Court's] preemption jurisprudence." *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009). "First, [t]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (internal quotation marks omitted). Because ICCTA contains an express preemption clause, the "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The existence of such a clause "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).

"Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S.Ct. at 194-95 (internal quotation marks omitted). "Thus, when the text of [an express] pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group*, 129 S.Ct. at 543 (internal quotation marks omitted).

The field of real property rights is unquestionably one that states have traditionally occupied. *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."); *Burlison v. United States*, 533 F.3d 419, 436 (6th Cir. 2008). Moreover, the Supreme Court long ago noted the States' traditional role regarding railroad crossings:

> The care of grade crossings is peculiarly within the police power of the states, and, if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear.

Lehigh Valley R.R. v. Bd. of Pub. Util. Comm'rs, 278 U.S. 24, 35 (1928) (internal citation omitted); *see also Erie R.R. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394, 409 (1921). Thus, as this Court recognized in *Barrois*, the presumption against preemption "applies with full force" when "generally applicable state property law" is "applied to permit a private, at-grade railroad crossing." 533 F.3d at 334.[4]

B. ICCTA's text and history show that it preempts only state and federal laws that directly regulate rail transportation.

1. *The statutory text*

The guiding principles discussed above help define the scope of ICCTA's express preemption clause, which states:

[4] The history of federal regulation of rail transportation does not alter this conclusion. *Wyeth*, 129 S.Ct. at 1195 n.3.

> [T]he remedies provided under this part [49 U.S.C. §§ 10101 *et seq*.] 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) (emphasis added). Section 10501(b) also gives the STB "exclusive" jurisdiction over "transportation by rail carriers," ending the former practice of delegating some administrative authority to state agencies. *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R.*, 215 F.3d 195, 204 & n.7 (1st Cir. 2000). ICCTA includes a broad definition of "transportation," which includes a "property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," as well as "services related to that movement." 49 U.S.C. § 10102(9). These sections are set out in full in the Appendix to this brief at Tab A.

Courts analyzing the preemptive effect of the STB's exclusive jurisdiction to regulate rail transportation focus on the sentence block-quoted above because it expressly addresses "preempt[ion]." *See, e.g., Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1129 (10th Cir. 2007); *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). In this express preemption clause, Congress carefully defined the scope of other laws that it intended to preempt.

Most importantly, this clause limits ICCTA preemption to "remedies provided under Federal or State law" "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). It does not preclude the

application of "all other law," as Congress did with respect to railroad mergers and acquisitions. 49 U.S.C. § 11321(a); *see Fla. E. Coast Ry.*, 266 F.3d at 1331. Moreover, it must mean something different from the initial House version of ICCTA, which simply stated that "the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law." H.R. Rep. No. 104-311, § 10103, 104th Cong., 1st Sess., 1995 WL 683028, at *373 (Nov. 6, 1995).

Instead, as the Eleventh Circuit has explained, "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry.*, 266 F.3d at 1331 (internal citation omitted).[5] Other circuits agree. *E.g., PCS Phosphate Co. v. Norfolk S. Corp.*, No. 08-1266, 2009 WL 532540, at *4 (4th Cir. Mar. 4, 2009); *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

The panel did not discuss ICCTA's use of the phrase "remedies . . . with respect to *regulation* of rail transportation" to define the scope of preemption,

[5] *See also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (holding that federal law does not preempt state law "where the activity regulated [by the state is] merely a peripheral concern" of the federal law).

instead reading section 10501(b) to preempt "state law as it *relates to* rail transportation." *Franks Inv. Co.*, 534 F.3d at 445, 449 (second emphasis added). As the Supreme Court has recognized, however, these are very different standards: while "relates to" language could preempt laws that affect transportation only indirectly, the word "regulation" limits preemption to laws that are "specifically directed toward" transportation. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385-86 (1992); *see also Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) (holding that "the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor").

The express preemption clause also shows that "the *remedies* provided under this part with respect to regulation of rail transportation" are the type of remedies that Congress intended to entrust exclusively to the STB. 49 U.S.C. § 10501(b) (emphasis added); *see N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). The matters that ICCTA regulates include

> rail carriers' rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines. *See generally* 49 U.S.C. §§ 10101-11908. Thus it regulates the economics and finances of the rail carriage industry—and provides a panoply of remedies when rail carriers break the rules. *See* 49 U.S.C. §§ 11701-11707.

Jackson, 500 F.3d at 252. Congress's choice to limit ICCTA's preemptive scope to these types of regulatory "remedies" is important because it allows not only state

but also federal laws that have different remedial concerns—such as the Federal Railroad Safety Act ("FRSA") and environmental laws—to escape section 10501(b)'s express "preempt[ion of] remedies provided under Federal or State law." *See* Part II.C., *infra*. This congressional focus on ICCTA's "remedies" also helps prevent regulatory gaps: areas where state law is preempted but the STB is not authorized to regulate. *Id.*

2. *The statute's history and purpose*

Another relevant indication of Congress's preemptive intent is "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (internal citations and quotation marks omitted). One of Congress's principal purposes in ICCTA was to repeal statutes that had previously permitted direct regulation of railroads by state agencies. *Fla. E. Coast Ry.*, 266 F.3d at 1337-38.

Prior to ICCTA, the Interstate Commerce Commission ("ICC") had broad authority to regulate many facets of the railroad industry. Congress expressly authorized regulation of certain railroad activities to be undertaken concurrently by the ICC and state governments, however, and it assigned other railroad regulation exclusively to the states. To reverse the railroad industry's severe decline,

Congress significantly reduced the ICC's regulatory authority in the Staggers Rail Act of 1980. *See* Pub. L. No. 96-448, 94 Stat. 1895 (1980). Convinced by 1995 that even greater deregulation was needed, Congress enacted ICCTA, which terminated the ICC altogether and replaced it with the STB. ICCTA repealed much of the patchwork of economic regulation previously conducted by the ICC and by state agencies, providing instead for federal uniformity and less regulation of rail transport. *See Iowa, Chicago & E. R.R. v. Wash. County*, 384 F.3d 557, 558-59 (8th Cir. 2004); *Fla. E. Coast Ry.*, 266 F.3d at 1337-38.

This historical context confirms that Congress deliberately chose to focus ICCTA's preemptive force on other remedies "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). Congress used that language to "reflect the direct and complete pre-emption of State economic regulation of railroads," while allowing states to "retain the police powers reserved by the Constitution." H.R. Rep. No. 104-311, § 10301, 104th Cong., 1st Sess. (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08. The state regulatory authority eliminated by section 10501(b) was the remaining ability "of State regulatory agencies to administer economic regulation of railroads." H.R. Rep. No. 104-311, § 10301, 1995 U.S.C.C.A.N. at 807; *see Pejepscot*, 215 F.3d at 204 & n.7.

As the conference report explained:

> Also integrated into the statement of general jurisdiction is . . . the exclusivity of Federal remedies with respect to the regulation of rail transportation. . . . The Conference provision . . . clarif[ies] that the *exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally*. For example, criminal statutes . . . remain fully applicable unless specifically displaced, *because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation*.

H.R. Rep. No. 104-422, § 10501 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852 (Conf. Rep.) (emphasis added).

C. Courts apply the STB test to determine ICCTA preemption.

Applying these indicators of congressional intent, "courts and the [STB] have rightly held that [ICCTA] does not preempt *all* state regulation affecting transportation by rail carrier." *Jackson*, 500 F.3d at 252. As the agency charged with administering ICCTA, the STB has developed a detailed test for determining when state law is preempted as impermissible regulation of rail transportation.

Under the STB test, ICCTA preemption "does not completely remove any ability of state or local authorities to take action that affects railroad property." *Lincoln Lumber Co. – Petition for Declaratory Order*, Finance Dkt. No. 34915, 2007 WL 2299735, at *2 (STB Aug. 10, 2007). Instead, there are two categories of state actions that constitute expressly or "categorically" preempted regulation of rail transportation: (i) permitting or preclearance requirements that could be used to prevent a railroad from engaging in STB-approved activities; and (ii) efforts to

regulate matters directly regulated by the STB, such as the construction, operation, and abandonment of rail lines, railroad mergers and acquisitions, and railroad rates and service. *CSX Transp., Inc. – Petition for Declaratory Order*, Finance Dkt. No. 34662, 2005 WL 1024490, at *2 (STB May 3, 2005); *see Barrois*, 533 F.3d at 332.

State laws that fall outside these categories are not expressly preempted, though they may be barred by implied or "as applied" preemption if the facts show that they have the effect of preventing or unreasonably interfering with rail transportation. *See PCS Phosphate Co.*, 2009 WL 532540, at *7; *Barrois*, 533 F.3d at 332; *New England Transrail, LLC – Construction, Acquisition & Operation Exemption*, Finance Dkt. No. 34797, 2007 WL 1989841 (STB July 10, 2007). "[W]here the state or local law can be applied without interfering with [ICCTA], the courts have done so." *Cities of Auburn and Kent – Petition for Declaratory Order*, Finance Dkt. No. 33200, 1997 WL 362017, at *5 (STB July 2, 1997); *aff'd sub nom. City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *see id.* at *6 ("there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction").

"[C]ourts rely" on this "generally accepted" test to decide questions of ICCTA preemption. *PCS Phosphate Co.*, 2009 WL 532540, at *4, *7. Circuits that have applied the STB test include

- this Circuit: *Barrois*, 533 F.3d at 332;
- the Second Circuit: *Green Mountain R.R. v. Vt.*, 404 F.3d 638, 642-43 (2d Cir. 2005);
- the Third Circuit: *Jackson*, 500 F.3d at 254 ("We believe that the approach of the Board . . . is sound.");
- the Fourth Circuit: *PCS Phosphate Co.*, 2009 WL 532540, at *4, *7;
- the Sixth Circuit: *Adrian & Blissfield R.R.*, 550 F.3d at 539 ("The STB's approach is persuasive"); and
- the Tenth Circuit: *Emerson*, 503 F.3d at 1133 ("We agree with this standard and adopt it.").

To counsel's knowledge, no circuit has expressly declined to follow the STB test.

Applying this framework to routine crossing disputes, the STB has concluded that generally applicable state easement laws do not constitute expressly preempted "regulation" of rail transportation. As this Court made clear in *Barrois*,

> Crossing disputes, despite the fact that they touch the tracks in some literal sense, . . . do not fall into the category of "categorically preempted" . . . state actions. The STB has explained that "[t]hese crossing cases are typically resolved in state courts." *Maumee & W. R.R. Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, at *2 (S.T.B. March 2, 2004). "[R]outine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.*; *see also CSX Transp., Inc.*, 2005 WL 1024490, at *6 (approving the proposition that "a state's traditional authority over the safety of roads and bridges at grade-separated rail/highway crossings pursuant to other statutory schemes is not preempted by section 10501(b) so long as no unreasonable burden is imposed on a railroad") . . . .

533 F.3d at 333.[6]

These authorities show that the STB's exclusive jurisdiction to regulate rail transportation does not extend to all disputes over railroad crossings. Because a claim of crossing rights does not fall within the two categories of expressly preempted state actions discussed above, it does not constitute an "act of regulation" that ICCTA reserves exclusively for the STB. *CSX Transp., Inc.*, 2005 WL 1024490, at *3. Thus, state law remains applicable to crossing disputes unless it unreasonably interferes with rail transportation. In that event, according to the STB, state law would be impliedly preempted because it obstructs ICCTA's purposes. *Cities of Auburn and Kent*, 1997 WL 362017, at *5.

D. The STB test deserves deference.

Courts have deferred to the STB's expertise and applied its detailed test for ICCTA preemption without specifically addressing the level of deference owed.[7] As explained below, these decisions are correct because deference is proper under either a *Chevron* or a *Skidmore* analysis.

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[6] *See also City of Lincoln v. STB*, 414 F.3d 858, 863 (8th Cir. 2005) (discussing STB position that "it is well established that nonconflicting, nonexclusive easements across railroad property are not preempted if they do not hinder rail operations or pose safety risks"); *Lincoln Lumber Co. – Petition for Declaratory Order*, 2007 WL 2299735, at *2.

[7] *See, e.g., Green Mountain R.R.*, 404 F.3d at 642 n.2 ("Whether the [STB] is entitled to deference under *Chevron* . . . is not material to the Court's decision. We therefore decline to reach the issue.").

The law has long been settled that the STB (like its predecessor) has the primary authority to determine the scope of its own regulatory authority. *See Hayfield N. R.R. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 634 (1984); *Burlington N., Inc. v. Chicago & N. W. Transp. Co.*, 649 F.2d 556, 558 (8th Cir. 1981). Therefore, this Court has routinely held that the agency's interpretations of its governing statute are entitled to "great weight" and "respect." *Coca Cola Co. v. Atchison, Topeka, & Santa Fe Ry.*, 608 F.2d 213, 222-23 (5th Cir. 1979) (citing *Ind. Harbor Belt R.R. v. United States*, 510 F.2d 644, 649-50 (7th Cir. 1975)); *accord Cent. Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1272 n.5 (5th Cir. 1983) ("[ICC] interpretation of the statute it is charged with administering is entitled to deference"); *W. Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th Cir. 1982) (panel decision), *adopted in part, overturned in part on other grounds on reh'g en banc*, 719 F.2d 772 (5th Cir. 1983). On the question of the STB's jurisdiction, then, this Court should give the greatest deference to the STB's views, especially in resolving any ambiguity. *See Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 380-82 (1998) (Scalia, J., concurring in judgment) (citing Supreme Court cases that implicitly apply *Chevron* deference to an agency's interpretation of its own jurisdiction); *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283 (D.C. Cir. 1994) (*Chevron* deference appropriate for agency's determination of the scope of

its regulatory authority); *see generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

The STB's view of the preemptive effect of section 10501(b) is also owed substantial deference. When Congress delegates the authority to implement a statute to an agency, that agency is "uniquely qualified" to determine whether a state law or cause of action obstructs the purposes of its governing statute and should be preempted. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic*, 518 U.S. at 496. Here, Congress specifically delegated the exclusive authority to regulate rail transportation to the STB and gave its remedies preemptive force. 49 U.S.C. § 10501(b). Accordingly, this Court and others have recognized that "'the [STB] is uniquely qualified to determine whether state law should be pre-empted by the [ICCTA].'" *Barrois*, 533 F.3d at 331-32 (quoting *Emerson*, 503 F.3d at 1130); *see also Adrian & Blissfield R.R.*, 550 F.3d at 539; *Green Mountain R.R.*, 404 F.3d at 642-43.

Given these unique qualifications, some federal courts have deferred to the STB's views on ICCTA preemption on a level approximating *Chevron* deference. *See R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 548 (6th Cir. 2002) ("[T]his Court must give considerable weight and due deference to the [STB's] interpretation of the statutes it administers unless its statutory construction is plainly unreasonable." (internal quotation marks omitted)); *see also Emerson*, 503 F.3d at 1130 (same).

In addition, one federal court has expressly held that *Chevron* deference applies to STB preemption determinations. *See Grafton & Upton R.R. v. Town of Milford*, 417 F. Supp. 2d 171, 174-75 (D. Mass. 2006).[8]

In the alternative, it is at least clear that *Skidmore* deference is owed. As the Supreme Court recently explained, agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth*, 129 S.Ct. at 1201 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, an agency's explanation of how state law impacts federal interests—which directly informs the federal preemption analysis—is entitled to weight commensurate with its "thoroughness, consistency, and persuasiveness." *Wyeth*, 129 S.Ct. at 1201 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001), and *Skidmore v. Swift*

[8] The STB typically addresses preemption and the scope of its exclusive authority in declaratory order proceedings under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), which are most often initiated at the behest of a referring court or of parties to a ripe dispute. *See, e.g., Town of Milford — Petition for Declaratory Order*, Finance Dkt. No. 34444, 2004 WL 1802301 (STB Aug. 12, 2004). In reviewing those determinations, the courts of appeals employ a highly deferential standard: "[T]he Board decision can be overturned only if it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law. 5 U.S.C. § 706(2). The scope of judicial review is therefore quite narrow, and we are not allowed to substitute our judgment for that of the Board." *City of Lincoln*, 414 F.3d at 860-61 (citing *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 460 (8th Cir. 1989)).

& Co., 323 U.S. 134, 140 (1994)). As the Supreme Court stated in *Mead*, *Skidmore* deference focuses on "the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 533 U.S. at 235.

Skidmore deference is particularly compelling in the context of implied obstacle preemption because it involves factual analysis of the impact of state laws on federal action, but deference also applies in the express preemption context where factual determinations inevitably inform the analysis. *See Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1009 (2008). In addition, there is all the more reason for deference in a case like this, where the expert federal agency is taking a view *against* preemption—*i.e.*, against the breadth of federal power. *Altria Group*, 129 S.Ct. at 549-51; *Sprietsma v. Mercury Marine*, 537 U.S. 51, 68 (2002); *Medtronic*, 518 U.S. at 496-500. Where a federal agency is advancing the non-preemption position, the federalism concerns attending the preemption analysis are dramatically reduced, and the agency's view is entitled to particular deference.

Thus, substantial deference is owed even under the *Skidmore* standard, and this Court could reject the STB's analysis only by concluding that the agency does not have expertise in this area, that its views have not been consistent, or that its views were not thoughtful or persuasive. *Cf.* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235

(Oct. 2007) (studying circuit court cases applying *Skidmore* deference and concluding that courts apply a very deferential standard). To the contrary, the STB's expert views regarding ICCTA preemption have been thorough, consistent, and persuasive.

As discussed in Part I.C. above, the STB's jurisprudence concerning the scope of section 10501(b) holds that two categories of state actions amount to expressly preempted regulation. Otherwise, the inquiry is one of implied preemption, which requires a factual assessment of whether resort to generally applicable state law would prevent or unreasonably interfere with railroad transportation. The STB has applied this test consistently since the enactment of ICCTA. *See Emerson*, 503 F.3d at 1132-33.

As relevant here, the STB has determined that the application of state law to crossing disputes is not categorically preempted by section 10501(b). Rather, the agency's precedents hold that "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks." *Maumee & W. R.R.*, 2004 WL 395835, at *2. This is precisely the sort of "explanation of state law's impact on the federal scheme" that warrants deference. *Wyeth*, 129 S.Ct. at 1201.

Moreover, the STB's view of the statute's preemptive scope has been squarely endorsed by numerous courts of appeals. *See* Part I.C., *supra*. It is also consistent with the text and history of ICCTA. *See* Part I.B., *supra.*

In sum, the STB's preemption determinations are rendered in an area where Congress has indicated its awareness of the continuing operation of state law in a field of federal interest, thus requiring a consistent and balanced application of federal law. In such a circumstance, there is a need for the agency to ensure uniformity of regulation while preserving the principles of federalism that generally determine federal preemption of state laws. Where, as here, the agency has undertaken a reasoned, thorough, and careful review of the goals of the statute of and complex policy issues, "the agency's interpretation is based on its . . . unique ability to assess the policies with which it must grapple on a day-to-day basis,"[9] and its analytical standard has been consistently applied, its interpretation of its own governing statute is entitled to substantial deference. *Mead*, 533 U.S. at 234-35; *Skidmore*, 323 U.S. at 140. Accordingly, this Court should defer to the STB's analysis.

[9] *Ill. Commerce Comm'n v. ICC*, 749 F.2d 875, 882 n.10 (D.C. Cir. 1984).

II. Franks' Claim Is Not Expressly Preempted.

A. Franks is not seeking a remedy with respect to regulation of rail transportation.

ICCTA's text, history, and interpretation by the courts and the STB, as well as the presumption against preemption, confirm that Franks' claim of crossing rights under Louisiana property law is not expressly preempted. Indeed, Union Pacific "does not take issue" with the STB's preemption test as articulated by this Court in *Barrois*, and concedes it is "undisputed" that Franks' claim is not expressly or categorically preempted under that test. *See* UP Letter of Jan. 26, 2009 (Appendix, Tab C).

The STB has determined that routine crossing disputes—like the one in this case—are *not* typically preempted. *Maumee & W. R.R.*, 2004 WL 395835, at *2. There is no conflict between the STB's exclusive jurisdiction with respect to regulation of rail transportation and the states' traditional police powers regarding crossings. *Home of Economy v. Burlington N. Santa Fe R.R.*, 694 N.W.2d 840, 846 (N.D. 2005).[10] "Crossing disputes, despite the fact that they touch the tracks in some literal sense, thus do not fall into the category of 'categorically preempted'

[10] Indeed, as the Federal Railroad Administration has explained, "[t]he Federal Government exercises no regulatory authority over the closing of existing grade crossings or the opening of new crossings." Ex. D63, at 5; *see also* Ex. D60-6 ("In general, private crossings are not subject to regulation at the State or Federal level.").

or 'facially preempted' state actions." *Barrois*, 533 F.3d at 333; *see also Adrian & Blissfield R.R.*, 550 F.3d at 540.[11] Routine, non-conflicting uses, such as non-exclusive easements for road crossings, are not preempted unless they unreasonably interfere with railroad transportation. *Maumee & W. R.R.*, 2004 WL 395835, at *2; *CSX Transp.*, 2005 WL 1024490, at *3. For these reasons, preemption challenges in crossing cases fall into the category of implied preemption, not express preemption. *Barrois*, 533 F.3d at 333.

ICCTA's text and purpose also show that Franks' claim is not a remedy "with respect to *regulation* of rail transportation," as required for express preemption under section 10501(b). As discussed in Part I.B. above, the quoted phrase preempts laws specifically directed toward rail regulation, and the history confirms that it was Congress's purpose to displace direct state rail regulation, not generally applicable law. Here, the Louisiana code provisions on which Franks' claim is based are generally applicable, not specific to railroads. Accordingly, they are not expressly preempted.

[11] Although *Barrois* addressed ICCTA preemption in the context of a challenge to the court's federal question jurisdiction, it applied the STB's "ordinary preemption analysis" in resolving that challenge. 533 F.3d at 332. Thus, as the Sixth Circuit has explained, *Barrois*' reasoning is "persuasive in deciding . . . question[s] of ordinary preemption" like those here. *Adrian & Blissfield R.R.*, 550 F.3d at 539 & n.5.

Moreover, Franks' claim does not constitute prohibited "regulation" because at least three of the four crossings were voluntarily provided by Union Pacific's predecessor to Franks' predecessor. *See* Ex. D44-F (Appendix, Tab B). Courts and the STB have held that suits to enforce voluntary agreements do not constitute prohibited regulation of rail transportation. *E.g.*, *PCS Phosphate Co.*, 2009 WL 532540, at *4-*8 (holding suit against railroad for breach of easement covenants was not preempted); *Twp. of Woodbridge v. Consol. Rail Corp.*, No. 42053, 2000 WL 1771044 (STB Dec. 1, 2000).

Finally, Franks' claim is not preempted because it is not the type of "*remed[y]* provided under this part with respect to regulation of rail transportation" that section 10501(b) entrusts exclusively to the STB. As discussed above, ICCTA regulates the economics and finances of the rail industry and provides remedies for breaking those rules. *See* Part I.B.1., *supra*. None of ICCTA's regulatory or remedial provisions addresses grade crossings, however. *Home of Economy*, 694 N.W.2d at 844; *cf. Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) ("[I]t is far from clear that the ICCTA provides private redress for the kind of nuisance claims that the Fayards are advancing."). For all of these reasons, ICCTA does not expressly preempt Franks' use of generally applicable state-law remedies to enforce its crossing rights.

B. The panel's express preemption analysis is flawed.

The panel and the district court in this case disagreed, reasoning that ICCTA expressly preempts all state-law claims regarding crossings because it gives the STB exclusive jurisdiction over "transportation by rail carriers" and crossings fall within the statute's broad definition of "transportation." *Franks Inv. Co.*, 534 F.3d at 445-46; Ruling Tr. 7. They based this reasoning on a district court decision from New York, but that decision was recently reversed by the Second Circuit. *See Island Park, LLC v. CSX Transp., Inc.*, No. 1:06-CV-310, 2007 WL 1851784 (N.D.N.Y. June 26, 2007), *rev'd*, 2009 WL 585649 (2d Cir. Mar. 4, 2009).

In *Island Park*, the Second Circuit rejected the idea that "*all* state action related to a railroad crossing is pre-empted." 2009 WL 585649, at *5. As to express preemption, it held that crossings do not fall within the definition of "transportation by rail carriers" because they relate to the movement of people and property across railroad tracks, not "'the movement of passengers or property . . . *by rail*.'" *Id.* (quoting 49 U.S.C. § 10102(9)(A)). In addition, the Second Circuit emphasized that "interference with rail transportation must always be demonstrated" to trigger implied preemption. *Id.* at *6. Because there was no

evidence that closure of a private rail crossing had caused such interference, the court held that ICCTA did not preempt the closure.[12]

The *Franks* panel's focus on the definition of "transportation" is flawed for another reason as well. Even if crossings fell within that definition, Franks' claim of crossing rights would not be expressly preempted unless it constituted a remedy with respect to "regulation" of rail transportation. As discussed in Part II.A. above, however, generally applicable state property law does not directly regulate matters within the exclusive jurisdiction of the STB. Accordingly, ICCTA does not expressly preempt Franks' state-law claim.

None of the other cases cited by the panel support preemption here either. *See Franks Inv. Co.*, 534 F.3d at 446-47. Instead, each case simply applied the STB test in other contexts.[13] These cases do not suggest that ICCTA would

[12] The Second Circuit attempted to distinguish the panel's decision in this case by suggesting that Franks' claim had interfered with rail transportation. *See Island Park*, 2009 WL 585649, at *6. As discussed in Part III below, however, Union Pacific failed to carry its burden to prove unreasonable interference.

[13] In *CSX Transportation*, 2005 WL 1024490, at *2, the STB cited *City of Auburn*, 154 F.3d 1025, as an example of expressly preempted permitting requirements for STB-approved activities, and *Friberg*, 267 F.3d 439, as an example of expressly preempted state regulation of matters directly regulated by the STB. *See also City of Lincoln*, 414 F.3d at 860 (upholding STB decision impliedly preempting proposed taking that "would prevent or unduly interfere with railroad operations and interstate commerce").

expressly preempt a crossing-related claim brought under generally applicable state property law.

In particular, the panel relied on this Court's decision in *Friberg*. *Friberg* held that ICCTA made the "regulation of railroad operations" an exclusively federal effort, and thus it expressly preempted a state statute that directly regulated the time a train could occupy a crossing. 267 F.3d at 443. As this Court recognized in *Barrois*, however, disputes over "routine, non-conflicting uses" of crossings do not fall into this category of prohibited regulation of railroad operations. 533 F.3d at 333.

C. The panel's analysis would produce absurd results.

Finally, the panel's broad preemption holding runs afoul of the principle that statutes should be interpreted to avoid absurd results. *Emerson*, 503 F.3d at 1132. If the panel were correct that railroad crossings generally "fit within the purview of 'transportation by rail carriers,' thereby evincing Congress' intent to preempt" all crossing-related claims (*Franks Inv. Co.*, 534 F.3d at 445-46), then a railroad could permanently close any private or public railroad crossing at will. Over 94,000 farmers, residents, and businesses nationwide are dependent upon the non-conflicting use and enjoyment of private crossings to allow adequate ingress to and egress from their property. In addition, there are more than 140,000 public grade crossings in the United States, most of which were built at considerable taxpayer

expense.[14] It cannot plausibly be assumed that Congress intended such a sweeping application of section 10501(b) to override generally applicable state law and promote a railroad's private interest over the demonstrated needs of the public and of landowners for safe and adequate railroad crossings. Not even the railroad industry has taken that position, instead acknowledging that, "[i]n most cases, railroads have no authority to close or relocate private crossings."[15]

Moreover, the panel's holding that ICCTA "broadly preempt[s] state law as it relates to rail transportation" (*Franks Inv. Co.*, 534 F.3d at 449) has no logical stopping point. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995) (discussing problems with using phrase "relate to" in measuring preemption). If ICCTA truly preempted the application of all other laws that "affect transportation" by rail carriers, including rail "safety, drainage, and maintenance" (*Franks Inv. Co.*, 534 F.3d at 446), it would implicitly repeal a vast swath of "remedies provided under Federal . . . law." 49 U.S.C. § 10501(b). These laws include the FRSA, which recognizes a continuing role for state regulation of grade crossing safety, as well as federal

[14] *See* Fed. R.R. Admin., U.S. Dep't of Transp., *Private Highway – Rail Grade Crossing Safety Research and Inquiry*, at 1, 11 (Final Report May 2008), *available at* http://tinyurl.com/63vmbh.

[15] *Id.* at 41.

environmental laws. Other courts and the STB have correctly rejected the view that ICCTA displaces these laws.[16]

The panel's broadly exclusive interpretation of ICCTA would also override circuit and STB decisions that allow state and local governments to exercise some police powers over development of railroad property, such as enforcement of generally applicable building codes. *E.g., Green Mountain R.R.*, 404 F.3d at 643; *CSX Transp.*, 2005 WL 1024490, at *4; *Cities of Auburn and Kent*, 1997 WL 362017, at *6. In addition, the panel's approach would preempt the application of state laws to rail transportation in areas where the STB lacks specific authority to act, creating regulatory gaps. *See* Maureen E. Eldredge, Comment, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 573-75 (2004). Finally, interpreting ICCTA to preempt state-created property rights that affect railroads could trigger the government's obligation under the Takings Clause to pay just compensation for the destroyed rights. *See Preseault v. United States*, 100 F.3d 1525, 1537, 1550-52 (Fed. Cir. 1996) (en banc) (finding taking

[16] *See Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir. 2001) ("the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety" in FRSA); *Iowa, Chicago & E. R.R.*, 384 F.3d at 560 ("FRSA, not ICCTA, determines whether a state law relating to rail safety is preempted"); *Boston & Me. Corp. and Town of Ayer – Joint Petition for Declaratory Order*, Finance Dkt. No. 33971, 2001 WL 458685, at *5 (STB Apr. 30, 2001) ("nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes"), *aff'd*, 191 F. Supp. 2d 257 (D. Mass. 2002).

where federal railroad laws preempted private property rights in former railroad easement).

The *Barrois* decision, which follows the STB's carefully delineated approach, avoids these unintended absurd results. The Court should therefore adhere to *Barrois* and apply it to these facts, holding that Franks' claim is not expressly preempted.

III. Franks' Claim Is Not Impliedly Preempted.

Having conceded that Franks' claim is not expressly preempted, Union Pacific argues that Franks' claim is "preempted 'as applied'" under *Barrois* because it claims there is evidence that these particular crossings detrimentally affected railroad operations. *See* UP Letter of Jan. 26, 2009 (Appendix, Tab C). This argument is wrong for three reasons.

A. Implied preemption is disfavored in this case.

First, courts and the STB have recognized that the concept of "as applied" ICCTA preemption is a type of implied conflict or "obstacle" preemption. *See PCS Phosphate Co.*, 2009 WL 532540, at *7; *Cities of Auburn and Kent*, 1997 WL 362017, at *5-*6. Because ICCTA contains an express preemption clause that provides a reliable indicium of Congress's intent to displace state law, however, there is an "inference" against finding implied preemption. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S.

504, 517 (1992); *Campo v. Allstate Ins. Co.*, No. 07-31165, 2009 WL 682619, at *5 & n.39 (5th Cir. Mar. 17, 2009); *Fla. E. Coast Ry.*, 266 F.3d at 1329 n.3. In addition, as discussed in Part I.A. above, the presumption against preemption applies given the traditional role of states with respect to real property rights and railroad crossings. *See Wyeth*, 129 S.Ct. at 1194-95 (applying presumption in implied preemption case). Moreover, some judges are reluctant to apply the doctrine of implied obstacle preemption given the difficult and malleable nature of its inquiry into the purposes and objectives of Congress. *See, e.g., id.* at 1204-08 (Thomas, J., concurring in judgment); *City of Morgan City v. S. La. Elec. Co-op. Ass'n*, 49 F.3d 1074, 1078-79 (5th Cir. 1995) (Jones, J., dissenting from denial of rehearing en banc).

B. Voluntary agreements do not unreasonably interfere with rail transportation.

Even apart from these considerations, Union Pacific's argument for implied preemption fails because it did not carry its burden to prove that defense. *AT&T Corp. v. Pub. Util. Comm'n*, 373 F.3d 641, 645 (5th Cir. 2004) (party claiming preemption bears burden of demonstrating it). The STB's as-applied preemption analysis "requires a factual assessment of whether [the state] action would have the effect of preventing or unreasonably interfering with railroad transportation." *CSX Transp.*, 2005 WL 1024490, at *3. Routine, non-conflicting use of a private grade

crossing is "not preempted so long as [it] would not impede rail operations or pose undue safety risks." *Barrois*, 533 F.3d at 333.

Here, Franks' claim of non-exclusive crossing rights does not unreasonably interfere with rail transportation because Union Pacific's predecessor voluntarily agreed to provide at least three crossings and to "furnish proper drainage" when it purchased its right-of-way from Franks' predecessor. *See* Ex. D44-F (Appendix, Tab B). This Court can assume that the parties' agreement reflected a market calculation by the railroad that the benefits of operating the rail line outweighed the future cost of maintaining the crossings. *See PCS Phosphate Co.*, 2009 WL 532540, at *7. Thus, as both the Fourth Circuit and the STB have held, this voluntary agreement "'must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce.'" *Id.* (quoting *Twp. of Woodbridge*, 2000 WL 1771044, at *3).

C. The record does not show that these particular crossings unreasonably interfered with rail transportation.

Finally, even apart from this admission, Union Pacific did not prove an implied preemption defense at trial. Franks and its predecessors had used the crossings for at least 70 years, and perhaps as long as 85 years (Exs. D47-A, D54), yet Union Pacific concedes there is no evidence that these particular crossings had

ever unreasonably interfered with rail operations or caused a safety problem.[17] Indeed, Union Pacific deliberately chose not to pursue an implied preemption defense of unreasonable interference at trial, electing instead to assert express preemption—an assertion it has now abandoned.[18] Because the district court did not find unreasonable interference and the evidence cannot support such a finding under the controlling law discussed above, the Court should hold that Franks' claim is not preempted. *LULAC v. Clements*, 999 F.2d 831, 877 (5th Cir. 1993) (en banc). Remanding for further findings regarding preemption would be an inappropriate waste of judicial and party resources. *Sierra Club v. Froehlke*, 816 F.2d 205, 213 (5th Cir. 1987).

As the district court recognized, Union Pacific offered generalized evidence that "[a] crossing . . . affects safety, drainage, and maintenance issues." Ruling Tr. 7. But this obvious fact, which Franks does not dispute, cannot help Union Pacific for two reasons. First, a mere "effect" on safety or maintenance does not rise to

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[17] *See* Appellee's Orig. Br. 26 ("[R]ailroad witnesses did not recall and/or identify specific slow orders or staging events or scientifically quantify information measuring impact on Union Pacific's rail operations.").

[18] *Compare* R 184-85 (Union Pacific's Proposed Findings of Fact and Conclusions of Law) (including no findings on unreasonable interference but urging the conclusion, based on the district court decision in *Island Park*, that ICCTA preempts the "subject matter" of rail crossings and "[a]ny attempt to apply land use regulations to rail transportation") *with* UP Letter of Jan. 26, 2009 (Appendix, Tab C) (disclaiming argument that crossing conflicts with exclusive federal regulation and warrants categorical preemption).

the level of an *undue* safety risk or an *unreasonable* interference with rail operations. *Barrois*, 533 F.3d at 335 ("We doubt whether increased operating costs are alone sufficient to establish 'unreasonable' interference with railroad operations."); *see also Adrian & Blissfield R.R.*, 550 F.3d at 541.

Second, Union Pacific's evidence was not specific to the condition of the crossings in this case or Franks' use of them. Such generalized evidence cannot provide the foundation for a ruling that Franks' right to use its four crossings is "preempted *as applied*." *Barrois*, 533 F.3d at 332; *see CSX Transp.*, 2005 WL 1024490, at *3 (describing inquiry as "fact-bound").

For example, in its response to the petition for rehearing *en banc* (at 7), Union Pacific pointed to evidence of potential water drainage problems that can result in track instability at crossings. Union Pacific's witnesses admitted, however, that they had no knowledge of any drainage problems or speed reductions at these particular crossings. Tr. 162-64, 176, 295-96.[19] Furthermore, any complaints about drainage cannot serve as a basis for implied preemption given that Union Pacific's predecessor voluntarily agreed to "furnish proper drainage" across the right-of-way. Ex. D44-F.

In addition, Union Pacific noted that the crossings intersect track that it uses as a train staging area to regulate traffic flow at a nearby terminal. In this regard,

[19] *See, e.g.,* Tr. 163 ("Q. You don't have any knowledge of the drainage aspect of any of the crossings, do you? A. No, sir, not in particular.").

the district court was concerned that "[Franks'] lessee, Farmer Joe Dill, [could] on occasion cause the morning freight train to stop while he crossed with his tractors and harvesters and accompanying trucks." Ruling Tr. 5. The STB test addresses this concern by preempting "unreasonable interference" with railroad operations. In this case, however, the concern was entirely hypothetical: there is no evidence that Dill or his predecessors ever caused—or desired to cause—trains to stop or otherwise unreasonably interfered with railroad operations. Nor is there any evidence that Franks or Dill have objected to Union Pacific's use of this track as a staging area to regulate traffic flow.[20] To the contrary, all that Franks has ever sought is the ability to continue safely crossing the tracks before or after a train passes, without interfering in any way with railroad operations.

Regarding maintenance, Union Pacific offered no evidence of how much money it had spent on these crossings. Tr. 163. With respect to safety, one witness was not aware of any accident at any of the crossings during his 35-year tenure with Union Pacific, and another witness did not list safety among the reasons for Union Pacific's decision to destroy the crossings. Tr. 180, 302. In any event, rail safety concerns do not provide a basis for ICCTA preemption. Such concerns are addressed by the FRSA, which Union Pacific has not raised as a defense here. *See Tyrrell*, 248 F.3d at 522-24.

[20] Indeed, this Court held in *Friberg* that ICCTA preempted a landowner's state-law complaint about waiting trains blocking a crossing. 267 F.3d at 443-44.

Finally, when the railroad in *Barrois* made similar arguments in favor of preemption, this Court held them insufficient to demonstrate an unreasonable interference with railroad operations.[21] Moreover, like the railroad in *Barrois*, Union Pacific has not shown that the Louisiana statutory scheme at issue here "is [in]capable of being applied in a manner" that would "minimize any interference" with operations. *Barrois*, 533 F.3d at 335; *see* La. Civ. Code art. 743 (providing that rights "are to be exercised in a way least inconvenient for the servient estate").

Union Pacific also suggests that the district court made a "finding that drainage, safety and maintenance issues presented by the crossings interfered with Union Pacific's rail operations." Resp. to Pet. for Reh'g *En Banc* 5, 8. The court made no such finding. Instead, in explaining its erroneous theory that express preemption applies because all crossings fall within ICCTA's broad definition of transportation, the court included the following sentence: "A crossing is a physical addition to the tracks that allows vehicles to cross the tracks; and that, according to trial testimony, affects safety, drainage, and maintenance issues." Ruling Tr. 7.

This general statement about crossings is simply not relevant to the STB's preemption inquiry: it does not address the *particular* crossings at issue or make a fact-specific assessment of whether they interfere at all—much less "*unreasonably*

[21] *See Barrois*, 533 F.3d at 334-36 (addressing arguments that substandard workmanship of 12 crossings increased railroad's operating costs and impaired its ability to regularly inspect and maintain tracks in accordance with federal safety standards).

interfer[e]"—with rail transportation. *Barrois*, 533 F.3d at 332 (emphasis added). Moreover, even if this statement were relevant, it must be disregarded because it is based on an erroneous legal theory of preemption. *Theriot v. United States*, 245 F.3d 388, 395 (5th Cir. 1998) (per curiam); *LULAC*, 999 F.2d at 877. Thus, Union Pacific cannot benefit from the clearly erroneous standard of review. *AT&T Universal Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 402 (5th Cir. 2001); *Johnson v. Hosp. Corp.*, 95 F.3d 383, 395 (5th Cir. 1996).

D. This Court should hold that Franks' claim is not preempted.

For these reasons, Union Pacific has not carried its burden to secure a finding supporting its implied preemption defense. Nor could such a finding be sustained on this record. This Court should, therefore, hold that Franks' claim is not preempted by ICCTA and reverse the district court's judgment dismissing the claim. Because the parties tried the merits of Franks' claim of crossing rights under Louisiana law and briefed those issues before the panel, this Court may choose to resolve them now. Alternatively, given that the district court did not reach those issues in its decision, this Court may wish to remand for findings and conclusions on the merits.

This Court should not, however, postpone a ruling on implied preemption until Franks' claim of state-law crossing rights has been decided on the merits. The right to use four crossings that Franks claims here is the same right that it and its predecessors have exercised for over 70 years. Moreover, this case has already

been tried and the record shows that these crossings do not unreasonably interfere with Union Pacific's rail operations. Thus, even if Franks prevails completely on the merits, there can be no finding of unreasonable interference. Accordingly, this Court should dispose of the preemption issues and hold that Franks' claim is not preempted by ICCTA. *See Adrian & Blissfield R.R.*, 550 F.3d at 542 & n.7 (finding no preemption, declining to reach merits of state-law claims, and remanding for further proceedings).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court hold that Appellant's claim is not expressly or impliedly preempted by ICCTA, reverse the district court's judgment dismissing that claim, and either (a) render judgment in its favor on the merits of its state-law claim of property rights as requested in its opening brief or (b) remand for the district court to enter findings and conclusions on the merits. Appellant also requests all other relief to which it may be justly entitled.

Respectfully submitted,

John M. Madison, Jr.
James R. Madison
M. Allyn Stroud
WIENER, WEISS & MADISON
333 Texas Street, Suite 2300
Post Office Box 21990
Shreveport, Louisiana 77120-1990
Telephone: (318) 226-9100
Facsimile: (318) 424-5128

Warren W. Harris
J. Brett Busby
BRACEWELL & GIULIANI LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770
Telephone: (713) 223-2300
Facsimile: (713) 221-1212

ATTORNEYS FOR APPELLANT
FRANKS INVESTMENT COMPANY, L.L.C.

CERTIFICATE OF SERVICE

I certify that on April 7, 2009, I served two copies of this Appellant's En Banc Brief in paper form, and one copy on an electronic computer-readable compact disc in Portable Document Format, by Federal Express, on counsel for Appellee addressed as follows:

William H. Howard III
Alissa J. Allison
Paul L. Peyronnin
Kathlyn G. Perez
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
201 St. Charles Avenue, Suite 3600
New Orleans, Louisiana 70170

Attorneys for Defendant/Appellee
Union Pacific Railroad

In addition, on April 7, 2009, I sent this Appellant's En Banc Brief in paper and electronic form to the Clerk of the Fifth Circuit by Federal Express.

J. Brett Busby

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) and 5TH CIR. R. 32.2 because it consists of 9,371 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and 5TH CIR. R. 32.2. This brief also complies with FED. R. APP. P. 32(a)(5)-(6) and 5TH CIR. R. 32.1 because it has been prepared in Word 2003 in proportionally spaced typeface, using Times New Roman font in 14-point size for text and footnotes.

J. Brett Busby