No. 08-30236

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANKS INVESTMENT COMPANY,
Plaintiff-Appellant

v.

UNION PACIFIC RAILROAD CO.,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

EN BANC BRIEF OF AMICUS CURIAE SURFACE TRANSPORTATION BOARD

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EN BANC BRIEF OF AMICUS CURIAE SURFACE TRANSPORTATION BOARD

The Surface Transportation Board (Board or STB)—an independent federal agency with broad authority under the Interstate Commerce Act over matters relating to the regulatory oversight of freight railroads and the transportation they provide as part of the interstate rail network, 49 U.S.C. 10501—has been invited by the Court to file this brief as amicus curiae. In its letter dated March 19, 2009, the Court asked the Board to address the following topics: (1) whether the Board has exclusive jurisdiction over all disputes involving railroad crossings; (2) if not,

the legal basis for any distinction between disputes over which the Board has preemptive jurisdiction and those over which it does not; (3) how that standard would apply to the facts set out in the panel's opinion in Franks Inv. Co. v. Union Pac. R.R., 534 F.3d 443 (5th Cir. 2008) (Franks), or in disputes that have been presented to the Board; (4) what level of deference is owed to the Board's interpretation of statutes that define the STB's own jurisdiction; and (5) whether a conclusion that the STB has exclusive jurisdiction over all crossing disputes would overburden the STB's resources. We address each of these issues in this amicus brief.

STATEMENT OF FACTS

Counsel for the Board has reviewed the briefs filed to date, the oral ruling of the district court, and the panel opinion in this case and understands the facts of this case as follows:

Union Pacific Railroad Company (UP) provides daily rail freight service between Shreveport and Alexandria, Louisiana. The UP line runs for two miles between the thousand-acre property of Franks Investment (Franks) and Louisiana Highway 1 in Caddo Parish, Louisiana. Prior to December 2007, four railroad/ private road crossings provided access to Franks' property from Highway 1. There are also other points of access to Franks' property that do not involve crossing the UP rail line. See District Court Ruling Transcript (Tr.) 3.

In 2005, UP posted signs at the four Franks private road crossings stating that UP intended to close them. UP removed two of those crossings in December 2007, after failing to reach agreement with Franks. Tr. 4.

In January 2008, Franks filed an action against UP in Louisiana state court, claiming a right to continue to use the crossings under generally applicable Louisiana real property law. It sought an injunction to compel reinstallation of the two crossings that had been removed and to prevent destruction of the other two. UP removed the action to federal district court based on diversity jurisdiction, and the district 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' state property law action was federally preempted under 49 U.S.C. 10501(b), the rail preemption provision as broadened in the ICC Termination Act of 1995 (ICCTA).[1] In reaching its decision, the district court tied its preemption analysis to the definition of "transportation" in 49 U.S.C. 10102(9), which includes "property … or equipment of any kind related to the movement of passengers or property, or both, by rail." Tr. 6. The district court reasoned that a railroad/private road

[1] In the ICC Termination Act of 1995 (ICCTA), Pub. L. 104-88, 109 Stat. 803, Congress revised the Interstate Commerce Act , abolished the Interstate Commerce Commission (ICC), transferred to the Board some of the rail regulatory responsibilities that had been assigned to the former ICC and provided that ICC precedent would remain applicable to the extent not superseded.

crossing "necessarily falls within [that] definition" because "any 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." Tr. 6-7, quoting Island Park LLC v. CSX Transp. Inc., No. 1:06-CV-310 (N.D.N.Y. June 26, 2007), rev'd, No. 07-3125 (2d Cir. Mar. 4, 2009) (Island Park II). The district court also noted trial testimony that, in general, a "crossing affects safety, drainage, and maintenance issues." Tr. 7. The court did not reach the merits of Franks' claimed right to use the crossings under Louisiana law. Tr. 5.

On appeal, a panel of this Court affirmed, agreeing with the district court that preemption was proper because "railroad crossings fit within the purview of 'transportation by rail carriers.'" Franks, 534 F.3d at 445.

Franks petitioned for rehearing and rehearing en banc. Franks argued that the panel's categorical holding conflicts with STB precedent construing section 10501(b), and that the STB's interpretation has been followed by other courts, including this Court in New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321 (5th Cir. 2008) (Barrois).[2] UP opposed rehearing and Franks replied.

[2] The Board was not a party in the Franks or Barrois litigation and was unaware of the litigation until after the opinions were issued.

On March 11, 2009, this Court granted rehearing en banc, thereby vacating the panel's opinion. See 5th Cir. R. 31.3. The Court then asked the Board to file this amicus brief.

ARGUMENT

I. The Board's Jurisdiction Extends To Grade Crossing Disputes, But Its Jurisdiction Is Not Exclusive.

The Commerce Clause of the Constitution (art. I, § 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Gibbons v. Ogden, 9 Wheat. 1, 196 (1824). One of the areas in which Congress has done so is with respect to interstate railroads. In the Interstate Commerce Act, as revised over the years, Congress has established a comprehensive scheme of federal rail regulation,[3] which is "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). It vests in the STB broad jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), which extends to property, facilities, instrumentalities or equipment of any kind

[3] Now codified as pertinent at 49 U.S.C. 701-727 (general administrative provisions), 10101-11908 (rail provisions). Board authorization is required for the construction, operation, and abandonment of lines by rail carriers that operate as part of the interstate rail network. See 49 U.S.C. 10901-10907. Also, the Board has exclusive jurisdiction over railroad common carrier rates and service. See 49 U.S.C. 10501(b), 10701-10747, 11101-11124. And with respect to railroads, antitrust laws are displaced by the Board's exclusive authority over railroad mergers, line acquisitions, and other forms of consolidation. See 49 U.S.C. 11321-11328.

that are used for that transportation, see 49 U.S.C. 10102(9). It obviously covers railroad tracks, including the tracks located at the site of crossings with public or private roads, and the Board has a regulatory interest in a crossing not unreasonably impeding rail operations or posing undue safety risks. But this does not mean that all aspects of crossings are within the Board's exclusive jurisdiction.

Other federal agencies also may have an interest in and jurisdiction over aspects of a railroad/road crossing. For example, the Federal Railroad Administration (FRA) has primary responsibility for matters involving the safety of rail operations under the Federal Railroad Safety Act (FRSA), 49 U.S.C. 20101 et seq.[4] See generally Barrois, 533 F.3d at 336-338 (discussing FRSA statutory scheme).[5] The Board and FRA exercise their respective statutory responsibilities in complementary fashion. See Island Park II, slip op. at 17-19. It is not uncommon for their jurisdiction and regulatory responsibilities to overlap,[6] and the

[4] FRSA has its own preemption provision at 49 U.S.C. 20106. UP did not make FRSA preemption claims in the Franks litigation, and FRSA was not discussed by the panel or the district court.

[5] The jurisdiction and regulations of the Federal Highway Administration can also come into play with respect to railroad/public highway crossings that are constructed or improved as part of a federally-funded highway project.

[6] The Board's principal function is economic regulation. However, under the National Rail Transportation Policy, the Board is directed to "promote a safe and efficient rail transportation system," 49 U.S.C. 10101(3), and "to encourage safe and suitable working conditions in the railroad industry," 49 U.S.C. 10101(11). Safety is thus one of the factors that the Board must take into consideration in making its public interest determinations.

two agencies coordinate and cooperate with each other as appropriate.[7] The governing statutes of both the STB and FRA manifest an express congressional intent to preempt state law to some extent in order to establish national uniformity. See Tyrrell, 248 F.3d at 523.

The preemption provision in the Board's governing statute, at 49 U.S.C. 10501(b), states that "the remedies provided under [49 U.S.C. 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."[8] Section 10501(b), which was broadened in

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[7] See, e.g., Iowa, Chicago & E. R.R. v. Washington County, IA, 384 F.3d 557, 559 & 561 (8th Cir. 2004) (Iowa, Chicago & Eastern); Adrian & Blissfield R.R. Co. v. Blissfield, 550 F.3d 533, 537 n.1 (6th Cir. 2008) (Blissfield), citing Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001) (Tyrrell); National R.R. Pass. Corp.—Petition for Declaratory Order—Weight of Rail, STB Finance Docket No. 33697 (STB served June 29, 2001, Jan, 31, 2003, Mar. 25, 2003), aff'd Boston & Me. Corp. v. STB, 364 F.3d 318 (D.C. Cir. 2004) (STB sought FRA assistance and relied on FRA track safety standards governing the speed at which railroads can operate); 49 CFR 1106.1 (procedures established through a joint FRA/STB rulemaking, to ensure adequate and coordinated consideration by both agencies of safety integration issues in certain railroad consolidation cases).

[8] 49 U.S.C. 10501(b), in full, provides:

> (b) The jurisdiction of the Board over - (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

ICCTA, thus preempts other regulation that would unreasonably interfere with railroad operations that come within the Board's jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved.[9]

Although the section 10501(b) preemption is broad and far-reaching, it does have limits. The Board and the courts have construed section 10501(b) to harmonize it to the extent possible with other federal statutes, including federal environmental statutes that are implemented in part by the states.[10] Moreover, the provision applies, as the statute makes clear, only to "transportation by rail carriers."[11] Finally, as acknowledged in the legislative history accompanying ICCTA,[12] states and localities retain their reserved police powers to protect the

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[9] See Friberg v. Kansas City Southern Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001) (state statute restricting a train from blocking an intersection preempted even though there is no regulation of that particular activity by the Board). See also PCI Transp. Inc. v. Fort Worth & W. R.R. Co., 418 F.3d 535, 544-45 (5th Cir. 2005).

[10] See Tyrrell, 248 F.3d at 523; Joint Pet. for Declaratory Order—Boston & Me. Corp. and Town of Ayer, 5 S.T.B. 500, 508 (2001) (Ayer), aff'd sub nom., Boston & Me. Corp. v. Town of Ayer, 206 F. Supp.2d 128 (D. Mass. 2002), rev'd on other grounds, 330 F.3d 12 (1st Cir. 2003).

[11] Thus, application of city zoning and licensing ordinances to an aggregate distribution plant operated by a non-railroad entity has been found not to be preempted, despite the fact the plant was located on railroad-owned property. Fla. E. Coast Ry. v. City of Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (because the railroad's involvement ended with the delivery to the shipper's plant, the plant itself was not part of rail transportation).

[12] See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-808 ("Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive."). The Conference Report notes that, while federal remedies are exclusive with respect to rail regulation, state and federal law remain applicable

health and safety of their citizens, so long as their actions do not unreasonably burden interstate commerce or interfere with railroad operations. See Iowa, Chicago & Eastern, 374 F.3d at 561-62 (in regard to rail/highway crossing grade separation structures, traditional state regulation of roads and bridges is not preempted by ICCTA so long as no unreasonable burden is imposed on the railroad).

II. The Standards For Determining Whether A Matter Is Preempted Are Well Defined.

In construing section 10501(b), the Board and the courts have identified two broad categories of state regulation that are wholly preempted for rail transportation by rail carriers. First, the section 10501(b) preemption prevents states or localities from imposing any form of permitting or preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct rail operations or to proceed with activities the Board has authorized.[13] Second, it prevents states or localities from intruding into matters that are regulated

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unless they collide with the scheme of economic regulation of rail transportation. See H.R. Conf. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 852.

[13] Thus, building permits, zoning ordinances, and environmental and land use permitting requirements are preempted. See Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005) (Green Mountain); City of Auburn v. United States, 154 F.3rd 1025, 1031 (9th Cir. 1998) (Auburn). Otherwise, state and local authorities could deny a railroad the right to conduct operations, which would irreconcilably conflict with the Board's authorization of those operations. Id.

by the Board, such as a state or local regulation determining how a railroad's traffic should be routed.[14]

Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-bound case-specific determination.[15] For example, courts have found that, while section 10501(b) does not generally preempt state eminent domain statutes, the Interstate Commerce Act does preempt the states' use of that power when it would have the effect of state "regulation" of railroads.[16]

III. How Those Standards Would Apply In A Case Such As This Is Also Clear.

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[14] See CSX Transportation, Inc.—Petition For Declaratory Order, STB Finance Docket No. 34662, slip op. at 7 (STB served Mar. 14, 2005) (DC Hazmat Decision), reh'g denied (STB served May 3, 2005).

[15] See Barrois, 533 F.3d at 332; Island Park II, slip op. at 11-14; Green Mountain, 404 F.3d at 642; N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (Jackson) (ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation); Blissfield, 550 F.3d at 539; Ayer, slip op. at 9-10.

[16] See Dakota, Minn & E. R.R. v. State of South Dakota, 236 F.Supp. 2d 989, 1005-08 (D.S.D. 2002) (DM&E), aff'd in part, vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004). See also City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (City of Lincoln) (city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way preempted); Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (Congress did not intend in section 10501(b) to bar only direct economic regulation of railroads by states; rather, condemnation of railroad property can be "regulation" by the state and thus is preempted under section 10501(b)).

Disputes involving private grade crossings would fall into the category of as-applied preemption analysis. As this Court stated in Barrois, 533 F.3d at 333:[17]

> Crossing disputes, despite the fact that they touch the tracks in some literal sense … do not fall into the category of "categorically preempted" or "facially 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 35985, at *2 (S.T.B. March 2, 2004) [Maumee]. [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.

This means that the panel's view that any "state-law claims relating to ownership of the crossings" are "expressly preempted"[18] is over broad and inconsistent with precedent and Congress' intent. It could lead to absurd results because, notwithstanding the longstanding role that states have played in determining the needs of the public and of landowners for safe and adequate non-exclusive railroad/highway crossings,[19] railroads could permanently close or

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[17] See also Island Park II, slip op. at 12; Blissfield, 550 F.3d at 540-41; Home of Econ. v. Burlington N. Santa Fe R.R., 694 N.W. 2d 840, 842-43 (Sup. Ct. N.D. 2005) (ICCTA has not preempted all state authority over issues regarding railroads and grade crossings); Lincoln Lumber Co.—Pet. for Declar. Order—Condemnation of a Railroad Right-of-Way for a Storm Sewer, STB Finance Docket No. 34915, slip op. at 3 (STB served Aug. 13, 2007) (Lincoln Lumber); Mid-America Locomotive and Car Repair, Inc.—Pet. for Decl. Order, STB Finance Docket No. 34599, slip op. at 5 (STB served June 6, 2005) (Mid-America) (extending the precedent that pertains to state eminent domain actions to cases where the dispute is between a private party and a railroad).

[18] Franks, 534 F.3d at 445-46.

[19] See Barrois, 533 F.3d at 333.

relocate any private railroad crossing at will. See Island Park II, slip op. at 12-13 ("If we adopted a definition of rail transportation for preemption purposes that includes the movement of people and property across railroad tracks, then any entity—an automobile, bicycle, or even a pedestrian passing over the crossing would arguably be beyond the reach of state regulatory authority." (emphasis in original)).[20]

In short, the field of real property rights is one that states have traditionally occupied. See Butner v. United States, 440 U.S. 48, 55 (1979); Barrois, 533 F.3d at 334; DM&E, 236 F.Supp. 2d at 1005-08 (overturning only the particular revisions of a state's eminent domain statute that amounted to regulation of a railroad); Maumee, slip op. at 2. However, the right to proceed under state law is conditioned upon the action taken under state law not unreasonably interfering with railroad operations or interstate commerce, and not constituting regulation of the railroad's operations.

[20] See also Emerson v. Kansas City Ry., 503 F.3d 1126, 1132 (10th Cir. 2007) (Emerson) (definition of "transportation" should not be read in a way that avoids absurd results).

IV. The Board's Interpretation Of The Reach Of Section 10501(b) Is Entitled To Deference.

The courts have long held that the STB (like its predecessor, the ICC) has primary authority to determine the scope of its regulatory authority. See, e.g., Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 634 (1984) (ICC decision that Minnesota condemnation statute was preempted entitled to deference); Coca-Cola Co. v. Atchison, Topeka, and Santa Fe Ry., 608 F.2d 213, 223 (5th Cir. 1979) (agency's interpretations of its governing statute are entitled to "weight and respect"); Illinois Commerce Comm'n v. ICC, 749 F.2d 875, 880-883 & 882 n.10 (D.C. Cir. 1984) (according deference to ICC preemption decision); BLE v. United States, 101 F.3d 718, 729 (D.C. Cir. 1996) (Chevron)[21] deference applies to STB's decision concerning the scope of its jurisdiction).

More specifically, the courts have held that the STB's view of the reach of preemption under section 10501(b) is entitled to great weight because the agency is interpreting the scope of its governing statute and addressing issues involving interstate commerce, an area squarely within its expertise.[22] See Green Mountain,

[21] Chevron U.S.A. v. NRDC, Inc., 467 U.S. 837, 842-44 (1984).

[22] As discussed in more detail below, the Board typically addresses the reach of ICCTA preemption in declaratory order proceedings. The courts employ a highly deferential standard in reviewing those determinations: they may overturn an STB adjudicatory ruling, including a declaratory order, only if the agency's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See Central Freight Lines v. ICC, 899 F.2d 413, 419 (5th Cir. 1990) (Central Freight); Texas v. United States, 866 F.2d 1546, 1555-56 (5th Cir. 1989). See also City of Lincoln, 414 F.3d at 860-61.

404 F.3d at 642-43; Emerson, 503 F.3d at 1130; 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.") As this Court recently stated in Barrois, 533 F.3d at 331, "[a]s the agency authorized by Congress to administer the [Interstate Commerce Act], the [STB] is uniquely qualified to determine whether state law should be preempted by the [Interstate Commerce Act]." Finally, deference is particularly appropriate because the Board's application of the section 10501(b) preemption has been consistent since the preemption provision was broadened in ICCTA. See Emerson, 503 F.3d at 1132-33.

In any event, in regard to the contours of the section 10501(b) rail preemption provision, the Board and the courts have been in general agreement about the nature and extent of the preemption and the role of the agency vis-à-vis the courts. Indeed, every other circuit that has addressed section 10501(b) has

analyzed it in a manner that is consistent with the Board's interpretation, as has this Court in its Barrois decision.[23]

V. Either The Board Or A Court Can Address A Crossing Dispute In The First Instance.

The Board has discretion under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to terminate a controversy or remove uncertainty in any case that relates to the subject matter jurisdiction of the Board.[24] The agency has instituted a number of declaratory order proceedings to address the reach of the section 10501(b) preemption as it relates to specific situations, generally at the request of parties to a ripe dispute or a referring court.[25] See, e.g., DC Hazmat Decision; Auburn.

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[23] See Pejepscot Indus. Park v. Me. Cent. R.R. Co., 215 F.3d 195 (1st Cir. 2000); Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238 (3d Cir. 2007); PCS Phosphate Co. v. Norfolk Southern Corp., No. 08-1266 (4th Cir. Mar. 4, 2009); New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321 (5th Cir. 2008); Adrian & Blissfield R.R. Co. v. Blissfield, 550 F.3d 533 (6th Cir. 2008); City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005); City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998); Emerson v. Kansas City Ry., 503 F.3d 1126 (10th Cir. 2007); Fla. E. Coast Ry. v. City of Palm Beach, 266 F.3d 1324 (11th Cir. 2001).

[24] See Central Freight, 899 F.2d at 418-19.

[25] Issues involving private or public grade crossings (generally related to safety) also sometimes arise during the Board's environmental review of proposed rail constructions or railroad mergers and acquisitions. If it is found to be warranted, the Board can impose appropriate environmental conditions on the transactions it authorizes requiring the railroad to take specific action involving railroad/public or private road crossings.

However, several of its rulings in declaratory order cases have noted that preemption issues involving section 10501(b) also can be decided by the courts in the first instance.[26] For example, in Green Mountain, the Board chose not to issue a declaratory order, in deference to a federal district court before which the same matter was pending and which had made clear its desire to resolve its case without referral to the Board. Under those circumstances, the Board chose to assist the court by summarizing existing law with regard to the section 10501(b) preemption without expressing a view on the application of the law to that case. See also Blissfield, 550 F.3d at 537.

In Mid-America and Lincoln Lumber, the agency found that, while the Board has broad discretion to institute a declaratory order proceeding,[27] its involvement in those cases involving preemption for routine non-exclusive easements for at-grade crossings and sewer crossings was not needed. The Board noted that the first issue that would have to be addressed—what property rights the landowner had—was the type of issue that the courts are well suited to address. The Board further noted that, if the court determined that, under state property law, the landowner had an adequate property interest, then that court could go on to

[26] When the Board issues a declaratory order to settle rights and remove uncertainty, it is reviewable in an appropriate court of appeals under the Hobbs Act, 28 U.S.C. 2342, 2344. Central Freight, 899 F.3d at 417-18; Auburn, 154 F.3d at 1030.

[27] Lincoln Lumber, slip op. at 2.

determine, using Board and court precedent interpreting section 10501(b) as a guide, whether continued use of the road crossing or other property would unreasonably interfere with the railroad's operations.[28]

To date, only a few preemption cases involving railroad/private road or sewer crossings have been brought to the Board (i.e., Maumee; Mid-America; and Lincoln Lumber). That is because the Board consistently has made it clear that states continue to play their traditional role in resolving disputes in this area. If the Board had to resolve all crossing disputes, the crush of cases would significantly overburden the STB's resources. This is so, not only because of the sheer number of cases that could be brought given the thousands of crossings that exist throughout the country, but also because the Board has no particular expertise or familiarity with the property laws of each state.

CONCLUSION

For the foregoing reasons, the Board respectfully suggests that this Court should remand this matter so that an appropriate factual as-applied preemption analysis can be conducted.

Respectfully submitted,

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[28] Mid-America, slip op. at 5.

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CERTIFICATE OF COMPLIANCE

I, Evelyn G. Kitay, hereby certify that this brief complies with the type-volume limitations of Federal Rule 32(a)(7)(B). The brief uses a 14-point proportionate spaced font, and, based on the word count provided by the word processing program used to prepare the brief, contains 4,398 words.

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CERTIFICATE OF SERVICE

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