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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. FD 35960, *Petition of Union Pacific Railroad Company for Declaratory Order*

Dear Ms. Brown:

We write on behalf of SFPP, L.P. (“SFPP”), in response to the improper surreply letter filed by Union Pacific Railroad Company (“UP”) on November 23, 2015 (“Surreply”). Like its Petition for Declaratory Order (“Petition”), UP’s Surreply provides nothing to warrant issuance of a declaratory order, or a finding of preemption. Further, UP’s reference to the “stakeholder” letters – that it solicited – does not support Board involvement. The letters do not contain information specific to SFPP or its dispute with UP, and they are based on a misunderstanding of SFPP’s Contract Action. Even if the AREA is rescinded, UP will still have all applicable protections from the Board and ICCTA.

1. The Board Should Not Consider UP’s Surreply.

UP’s Surreply directly contravenes the Board’s rules prohibiting a reply to a reply, and thus the Board should not consider it. *See* 49 C.F.R. § 1104.13(c) (“A reply to a reply is not permitted.”); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. in Aroostook Cty., ME*, Docket No. AB-124 (Sub-No. 2), at 3 (STB served May 6, 2003) (“*Waterloo*”) (“the pleading process ends with the reply, and replies to replies are not permitted”). UP did not seek leave to file a surreply, but instead claims that its Surreply is “necessary to complete the record” and is “limit[ed] . . . to correcting certain misstatements that may be important to the Board’s analysis.” Surreply at 1 n.1.

UP is wrong, and its own authority proves the point. In *Waterloo*, which UP incorrectly cites as “accepting a reply,” the Board actually **rejected** similar contentions that a surreply was warranted because of alleged “blatant[] mischaracteriz[ations]” in the reply. *Waterloo*, at 3. The Board found that there was not good cause for filing a surreply, and that additional information was not necessary to develop a more complete record. *Id.* As such, the Board rejected the surreply, and the Board should do the same here.¹ *Id.*

Further, the Surreply is not “limited” to correcting alleged “misstatements.” UP raises new arguments and evidence that it could have raised in its Petition, but it did not, and it offers no valid reason for belatedly raising them in a surreply. Accordingly, the Surreply should be disregarded in its entirety. *See* 49 C.F.R. § 1104.13(c)

2. UP’s Surreply Does Not Favor Granting The Petition.

Even if the Board considers the Surreply, UP offers no basis to grant the Petition. Each of UP’s new arguments (organized by number below) fails to support issuance of a declaratory order or a finding of preemption.

First and second, SFPP has never refused to relocate its pipeline and there is no reason to believe that SFPP will refuse to relocate in the future. The purpose of the state court Contract Action is **not** to remove so-called “Railroad Right of Way Protections.” Rather, the Contract Action seeks to rescind the AREA and recover restitution for rent and expenses paid under the AREA. UP’s attempt to nevertheless manufacture a “right of way protection” controversy mischaracterizes SFPP’s pleading.

For example, UP claims that the Contract Action “expressly asks a California state court to vacate the ‘relocation provisions of the [AREA],’ on the theory that ‘SFPP cannot be forced to relocate its pipeline on property that is not property of the railroad.’” Surreply at 2. This takes statements in the complaint out of context. SFPP’s complaint alleges that “[b]oth the rent and relocation provisions of the AREA are expressly premised upon SFPP’s pipeline existing on and being relocated to property of the Railroad,” and that for SFPP to perform relocations **under the terms of the AREA**, SFPP’s pipeline must be on property of the railroad. Pet. Exhibit 5 ¶¶ 14, 23. SFPP is **not** alleging that it need not relocate its pipeline if

¹ UP’s citation to *Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, FD 30186 (Sub-No. 3) (STB served June 15, 2011) is also inapposite. That case did not involve reply “misstatements,” the alleged basis for UP’s Surreply. *See also Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912, at 3 (STB served April 20, 2011) (rejecting surreply and holding that “alleged misstatements do not [] constitute good cause for accepting a reply to a reply”); *E.-W. Resort Transp., LLC – Pet. for Decl. Order – Motor Carrier Transp. of Passengers in Colo.*, MC-F 21008, at 2 (STB served Apr. 8, 2005) (rejecting reply to a reply submitted on the ground that record was incomplete due to representations in the reply).

the AREA is rescinded. SFPP's position is only that it need not perform relocations **under the specific terms of the AREA** – because the AREA is invalid.

Also misleading is UP's claim that SFPP seeks an order to "remain indefinitely on [UP's] operating right of way." Surreply at 2. It does not. SFPP's pipeline is several feet **under** the right-of-way, not on the right-of-way, and in any event, the complaint seeks no such order. SFPP's complaint seeks only a declaration of rescission and restitution. Pet. Exhibit 5 ¶¶ 45-52.

Further, the Contract Action is still at the pleading stage, and there are a range of possible outcomes in that proceeding, only one of which is that the AREA will be rescinded in its entirety. UP's allegations in the Surreply thus continue to rely on the same hypothetical, future controversies that are much too speculative to warrant issuance of a declaratory order. *See* Reply at 10-13.

UP's contentions about the Alhambra and Beaumont Hill relocations are also incorrect and unavailing. With respect to Alhambra, the letter UP cites **is not a refusal to relocate**. After UP demanded the relocation under the specific terms of the AREA, SFPP requested information about UP's title in the relevant right-of-way. This is not a refusal to relocate. UP also omits that SFPP and UP are in detailed settlement discussions for the Alhambra relocation, and that the Alhambra case was stayed for five months – at UP's request. *See* V.S. McClain at 7; Reply at 8. No delay is attributable to SFPP.

In its discussion of Beaumont Hill, UP omits the state court's finding that "[u]ltimately the time for the relocation of the pipeline did not arrive until 2007." Surreply Exhibit C at 7 (emphasis added). UP also omits that **SFPP completed the Beaumont Hill relocation in October 2007**. V.S. McClain at 6. Again, contrary to UP's assertions, SFPP completed the relocation without causing delay.

SFPP has a long history of relocating its pipeline under UP's right-of-way, and has never refused to relocate. V.S. McClain at 5-8. UP's attempts to manufacture alleged past controversies are insufficient to warrant Board involvement.

Third, SFPP's Reply correctly pointed out that UP has not "raised preemption to the state court as a defense" in the Contract Action. As SFPP stated in its Reply, UP filed a demurrer, and a separate motion to stay, and "[a]lthough UP argues in the demurrer that the complaint should be dismissed, it tellingly does not raise preemption." Reply at 6, 13. SFPP did not misstate the facts. UP's motion to stay did not raise preemption as a defense to the state court for it to decide. Instead, UP has only informed the state court about its making preemption arguments **to the Board** and requested that the state court stay its proceedings. UP is thus conflating bringing this Board proceeding to the state court's attention with raising an actual preemption defense in the state court.

Additionally, UP is attempting to prevent the state court from adjudicating the ICCTA preemption question altogether. In its reply in support of the motion to stay, UP argued that “an STB order determining the preemption issue would be binding in this Court” and “conclusively resolve the preemption question.”² Exhibit A at 1:24-2:1, 3:6-4:21. Setting aside that UP is wrong on this point, these statements by UP contradict its claim to have raised preemption to the state court as a defense, and further demonstrate that UP is attempting to use Board proceedings to interfere with an ongoing state court action.

Fourth, UP’s contract argument is inapposite, and does not change the Board’s repeated pronouncements that its involvement is not warranted in actions regarding rescission of a contract. UP’s argument to the contrary mischaracterizes SFPP’s Reply. SFPP did not “exclusively cite” contract interpretation cases. *See* Reply at 14-15 (citing cases involving, *e.g.*, contract “termination,” contract “validity,” and “existence of a contract”). Indeed, UP characterizes one of SFPP’s cases as “declining to address issues regarding whether contract was **breached or canceled** by the parties.”³ Surreply at 3 n.6 (describing *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, Docket No. 42094 (Sub-No. 1) (STB served Apr. 25, 2008)) (emphasis added).

In any event, it is well-settled that rescission of a contract is an issue for the courts, not the Board. For this reason, UP’s attempt to distinguish between contract interpretation and contract rescission is misplaced. The Board has repeatedly declared that cases involving rescission, interpretation, enforcement, termination, or reformation of contracts are strictly matters for the courts. *See* Reply at 13-18 (citing cases).⁴

² Among other things, such preclusive effect arguments stand in the face of a long line of court and agency precedent that squarely reject UP’s estoppel contentions. *See, e.g., CSX Transp., Inc. v. Williams*, 2005 WL 902130, at *14-18 (D.D.C. Apr. 18, 2005) *rev’d on other grounds*, 406 F.3d 667 (D.C. Cir. 2005).

³ UP is also mistaken about the other two cases it cites from SFPP’s Reply. *See Fillmore & W. Freight Serv., LLC – Emergency Pet. for Decl. Order*, FD 35813, at 1-3 (STB served Mar. 12, 2015) (denying petition for declaratory order on preemption when two lawsuits regarding termination of leases were already proceeding in California court); *Gen. Ry. Corp. – Exemption for Acquisition of R.R. Line*, FD 34867, at 4 (STB served June 15, 2007) (holding that the Board “is not the proper forum to resolve” disputes regarding “the validity of this agreement, or ownership of the Line” and that “these matters are best left for state courts to decide”).

⁴ *See also, e.g., Kansas City S. Ry. Co. – Adverse Discontinuance Application – A Line of Ark. and Mo. R.R. Co.*, Docket No. AB-103 (Sub-No. 14), at 7 (STB served Mar. 26, 1999) (“We reiterate here, as we have stated in the past, that the Board will not undertake to interpret or enforce . . . contracts”); *Takoma E. Ry. Co. – Adverse Discontinuance of Operations Application – A Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA*, Docket No. AB-548, at 4 (STB served Mar. 3, 1999) (“The dispute over the alleged

Fifth, UP cannot escape the fact that its counterclaim in the Alhambra action asserts that UP can require SFPP to relocate **regardless of the AREA**. UP overlooks that the paragraph of the counterclaim it quotes seeks “**a judicial determination of [UP’s] rights under the Congressional Acts** and the parties’ respective rights and duties under the [AREA].” Surreply at 4 n.7 (emphasis added). Although the original version of UP’s counterclaim contained several references to relocation under the terms of the AREA, including the AREA’s phrase “sole cost and expense,” UP later amended its counterclaim to delete these references. *See* Exhibit B. If the counterclaim was actually limited to the AREA, as UP now contends, it would make no sense to remove the references to the AREA. UP cannot re-write its counterclaim now to suit its position before the Board.

Finally, UP’s attempt to downplay the potential conflict between federal regulatory schemes falls short. UP admits that “[o]il pipelines like SFPP’s are common carriers subject to rate regulation by the Federal Energy Regulatory Commission” (“FERC”). Surreply at 4. UP tries to minimize this potential for conflict, however, by asserting that FERC lacks jurisdiction to regulate the construction, relocation, or abandonment of SFPP’s pipeline. Even if UP were right (which it is not),⁵ these issues are separate from SFPP’s common carrier service obligations under the Interstate Commerce Act (“ICA”), which are fundamental. *See* 49 U.S.C. § 1(4) (1988); *see also* V.S. McClain at 2; Reply at 20-21.

UP’s Petition and demand for a “right to eject” SFPP (Pet. at 7), another federally regulated common carrier, raise the potential for conflict between the Board’s authority over common carriers under the ICCTA, such as UP, and FERC’s authority over common carriers under the ICA, such as SFPP. The Board should avoid action that may conflict with FERC’s ability to ensure that essential liquid petroleum products are transported to the public.

must be left to settlement by the parties or by the courts” and “[i]t also has been held many times that we have no power . . . to reform contracts or relieve carriers of their . . . obligations arising therefrom”).

⁵ UP cites *Farmers Union Cent. Exch. v. FERC*, 584 F.2d 408, 413 (D.C. Cir. 1978) (“*Farmers Union I*”), but neglects to inform the Board that the passage it quotes was significantly limited and criticized in *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984) (“*Farmers Union II*”). In *Farmers Union II*, the D.C. Circuit held that “FERC misconstrued the significance of the *Farmers Union I* passage [UP cites] and overstated the significance of its lack of abandonment authority.” *Id.* The court also chided FERC for being “too modest about its own powers.” *Id.*

3. UP's "Stakeholder" Argument Is Unavailing.

UP's references to the "stakeholder" letters that it solicited, including from two of its railroad trade associations, do not create "a dispute of broad public interest," or favor granting UP's Petition.

Rather than provide specific facts or arguments, UP's "stakeholder" submissions are generalized and do not relate to SFPP or the issues raised in the Contract Action or these proceedings. None of UP's "stakeholders" are parties to the AREA (or have a direct interest in the agreement), and none of them are in a position to weigh in on whether SFPP's presence prevents or otherwise unreasonably interferes with UP's operations, or whether SFPP has ever refused to relocate its pipeline to accommodate UP's development plans. Tellingly, the Alameda Corridor-East Construction Authority ("ACE"), who was directly involved in the Pomona relocation, does not mention the Pomona relocation in its letter. This is likely because SFPP did not cause delay at Pomona or refuse to relocate its pipeline. *See Reply at 7; V.S. McClain at 6.*

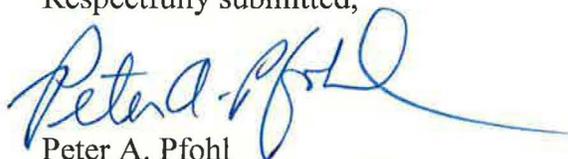
Further, UP's "stakeholder" submissions are all predicated on a misunderstanding of the Contract Action. The Contract Action presents no issue of whether UP (let alone other railroads) can invest in future railroad infrastructure projects or whether SFPP (let alone other underground utilities) will refuse to relocate or unreasonably interfere with railroad operations in the future. Again, the Contract Action pertains only to a contract between SFPP and UP, and whether that contract should be rescinded and SFPP awarded restitution. These are not issues of "broad public interest."

Additionally, even if the AREA is fully rescinded at some time in the future, the AREA is not the only source of UP's rights concerning its right-of-way. UP will still be entitled to all applicable protections from this Board and the ICCTA.

At best, UP's "stakeholder" submissions demonstrate that UP's Petition is extremely broad and unending, and they evidence an attempt by UP to enlist the Board to assist UP in dictating and controlling alleged "conflicting users" in and around railroad rights-of-way. This contravenes the strictures of the National Rail Transportation Policy, *e.g.*, 49 U.S.C. § 10101(5), (8), and the Board's charge "to promote, as well as to protect and preserve, the vitality of all modes." *Investigation into Limitations of Carrier Service on C.O.D. and Freight-Collect Shipments*, 343 I.C.C. 692, 729 (1973).

SFPP respectfully reiterates its request that UP's Petition be denied.

Respectfully submitted,



Peter A. Pfohl

An Attorney for SFPP, L.P.

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of December 2015, I served copies of the foregoing by First Class United States Mail and/or more expedited means upon all counsel/parties of record as identified on the STB's electronic service list for this docket.

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1 **I. INTRODUCTION**

2 SFPP, L.P.'s ("SFPP") causes of action for rescission and declaratory relief seek
3 remedies that would 1) permit it to maintain its pipeline indefinitely on Union Pacific
4 Railroad Company's ("Union Pacific") operating railroad right of way without Union
5 Pacific's consent and 2) eliminate their Agreement's (the "AREA") protections that ensure
6 Union Pacific's control over its operating railroad. If granted, the remedies SFPP seeks
7 would unduly interfere with interstate rail transportation. On September 24, 2015, Union
8 Pacific therefore filed its Petition for Declaratory Order ("Petition") with the Surface
9 Transportation Board ("STB"), asking that "uniquely qualified" federal agency to evaluate
10 this issue and declare that the ICC Termination Act ("ICCTA") preempts SFPP's causes of
11 action. In response, several critical stakeholders who rely on rail transportation, including
12 the Port of Los Angeles, the Port of Long Beach, and the Alameda Corridor-East
13 Construction Authority, submitted filings with the STB urging the agency to determine the
14 issues raised in Union Pacific's Petition.¹ On November 13, 2015, SFPP filed a Reply in
15 Opposition to the Petition. Union Pacific has filed a response to SFPP's Opposition to the
16 Petition.² The issue is now fully briefed and awaiting the STB's decision.

17 Union Pacific asks the Court to stay this action to allow the STB to determine the
18 issues raised in Union Pacific's Petition. SFPP opposes any stay. It argues a stay would be
19 inefficient and impose unreasonable delay because the Court somehow would need to
20 resolve the same federal preemption issue all over again once the STB issued a declaratory
21 order. It also argues incorrectly that the primary jurisdiction doctrine does not apply to this
22 case because there is no need for the specialized expertise of the STB.

23 The Court should reject both arguments. First, staying this action offers the most
24 prudent and efficient process to resolve this dispute. It would maximize efficiency because
25 an STB order determining the preemption issue would be binding in this Court under

26 ¹ Other stakeholders that submitted these filings with the STB include the Association of
27 American Railroads, the American Short Line and Regional Railroad Association, and Hub
28 Group. The filings submitted by these stakeholders are attached as **Exhibit A**.

² Attached at **Exhibit B**.

1 bedrock principles of collateral estoppel. Second, federal preemption under ICCTA, as
2 applied to SFPP’s state law remedies requested in this case, hinges on the degree to which
3 those remedies interfere with rail transportation. The STB, the federal agency which
4 oversees ICCTA, is “uniquely qualified” to evaluate those preemption issues.

5 Instead, SFPP urges the Court to adopt a process that would unnecessarily waste
6 judicial resources by not deferring to the STB’s technical expertise and jurisdiction. There is
7 simply no reason to proceed down that path. The parties have been operating under the
8 AREA and predecessor agreements for more than 50 years. SFPP has not demonstrated any
9 urgency to upset the status quo, or any good reason not to prudently await expert agency
10 guidance. The Court should therefore enter a stay to provide the STB an opportunity to rule.

11 **II. A STAY WOULD GREATLY PROMOTE JUDICIAL EFFICIENCY.**

12 **A. STB is Best Equipped to Consider the Potential Interference with Rail**
13 **Transportation and Its Impact on All Stakeholders.**

14 The U.S. Supreme Court recognizes that expert agencies, such as the STB, have a big-
15 picture perspective on the statutes they administer, including “how state requirements may
16 pose an obstacle to the accomplishment and execution of the full purposes and objectives of
17 Congress.” (*Wyeth v. Levine* (2009) 555 U.S. 555, 577.) In the “as-applied” preemption
18 analysis, the STB is best suited to consider how SFPP’s requested state law remedies will
19 unreasonably interfere with Union Pacific’s rail transportation, and negatively affect the
20 specific interests of important stakeholders, such as the port authorities, shippers, and short-
21 line railroads who have urged the STB to resolve Union Pacific’s Petition. (See Exhibit A.)
22 These stakeholders agree that Union Pacific’s Petition presents important policy questions
23 that demand the STB’s expertise. (See *id.*) They are concerned that SFPP’s requested
24 remedies under state law will impede improvements and investment in the rail transportation
25 system and diminish safety standards. (See *id.*) They also warn that disparate and non-
26 uniform regulation of railroad operations will negatively affect their operations and interstate
27 commerce. (See *id.*) The Alameda Corridor-East Construction Authority already has
28

1 experienced the impact of underground utilities’ unwillingness to relocate. (Exhibit A [“We
2 have experienced delays and increased costs to some of our past and current projects as a
3 direct consequence of underground utilities’ failure to relocate in a timely manner or at times
4 refusing to move at all.”].) The STB is best suited to determine the important issues of
5 national concern raised by Union Pacific’s Petition.

6 **B. An STB Order Declaring Preemption Would Conclusively Resolve the**
7 **Preemption Question.**

8 In opposition to a stay SFPP incorrectly argues that even if the STB issued a
9 declaratory order on the preemption question presented, this Court would still be required to
10 litigate the same issue. This claim is specious; under bedrock principles of collateral
11 estoppel, neither SPFF nor Union Pacific would get another bite at the apple.

12 If the STB’s decides that SFPP’s causes of action are preempted by the ICCTA, its
13 decision, once final, would be entitled to collateral estoppel effect in this Court. The U.S.
14 Supreme Court has explained that “[w]hen an administrative agency is acting in a judicial
15 capacity and resolves disputed issues of fact properly before it which the parties have had an
16 adequate opportunity to litigate, the courts have not hesitated” to apply collateral estoppel.
17 (*B&B Hardware, Inc. v. Hargis Indus.* (2015) 135 S.Ct. 1293, 1303, quoting *University of*
18 *Tenn. v. Elliott* (1986) 478 U.S. 788, 797-98; see also *Astoria Fed. Sav. & Loan Ass’n v.*
19 *Solimino* (1991) 501 U.S. 104, 108 [collateral estoppel principles apply “equally when the
20 issues has been decided by an administrative agency, be it state or federal”]; accord *Azusa*
21 *Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165,
22 1221 [California courts give “collateral estoppel effect to a final decision of an agency acting
23 in a judicial capacity”].)

24 Indeed, the STB’s decisions (and its predecessor, the Interstate Commerce
25 Commission’s) repeatedly have been given preclusive effect. (See e.g., *West Coast Truck*
26 *Lines, Inc. v. American Indus., Inc.* (9th Cir. 1990) 893 F.2d 229, 235 [“The doctrine of res
27 judicata bars any recovery as a matter of law because of the ICC’s determination of
28

1 unreasonableness.”]; *Seatrains Lines, Inc. v. Penn. R.R. Co.* (3rd Cir. 1953) 207 F.2d 255, 260
2 [applying collateral estoppel to a decision of the ICC because “[t]here was a contested
3 proceeding before the Commission, with decision depending on the present issue and present
4 parties taking opposite sides upon it”]; *Baltimore & Ohio R.R. Co. v. N.Y., New Haven &
5 Hartford R.R. Co.* (S.D.N.Y. 1961) 196 F.Supp. 724, 745 [“There is no reason why the
6 [Interstate Commerce] Commission’s decision should not have the status of a judgment so as
7 to come within the doctrine of collateral estoppel by judgment.”].)

8 The inapposite cases cited by SFPP do not change this result. None of these cases
9 involved the application of the collateral estoppel doctrine to enforce a decision of the STB.

10 After the STB proceeding is concluded, either Union Pacific or SFPP could appeal the
11 STB’s determination. In its opposition to the stay, SFPP conflates the standard to be applied
12 by an appellate court on review of a final STB decision – which is not presented – with the
13 distinct issue of whether the final judicially approved STB decision would bind this Court.
14 In so doing, and citing various authorities, SFPP also fails to inform the Court that the Ninth
15 Circuit gives STB decision *Chevron* deference, meaning that the reviewing court merely
16 determines whether the agency’s decision is based on a permissible construction of the
17 statute at issue. (*Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622
18 F.3d 1094, 1097, citing *DHX, Inc. v. STB* (9th Cir. 2007) 501 F.3d 1080, 1086.) In the end,
19 SFPP cites no authority that would preclude the collateral estoppel effects of an STB
20 decision in this Court, or provide any basis to deny Union Pacific’s request to stay this action
21 until the STB can act.

22 C. **SFPP Articulates No Reason to Conclude that A Stay Would Impose an**
23 **Unreasonable Delay, and the Approach it Urges Would Increase Waste**
24 **and Inefficiency.**

25 Trial judges have inherent powers to manage and fashion procedures to control
26 litigation to insure the orderly administration of justice. (*Cottle v. Superior Court* (1992) 3
27 Cal.App.4th 1367, 1376 -79; see also *Freiberg v. City of Mission Viejo* (1995) 33

1 Cal.App.4th 1484, 1489 [“Trial courts generally have the inherent power to stay proceedings
2 in the interests of justice and to promote judicial efficiency.”].) SFPP has not articulated a
3 single reason why a stay constitutes an unreasonable delay or how a stay would cause
4 prejudice. In support of its opposition to the stay, SFPP submitted a declaration from its
5 attorney in the parallel STB proceeding, arguing that the STB might take more than a year to
6 decide Union Pacific’s Petition. SFPP and its advocate, however, failed to inform the Court
7 of numerous recent cases the STB has decided much more quickly. Notably, for example,
8 they omitted the STB’s most recent decision involving a declaratory order related to
9 California rail transportation, in which the STB issued its decision finding preemption in just
10 two months. (See *California High-Speed Rail Auth.—Petition for Declaratory Order* (STB
11 Docket No. FD 35861 Dec. 12, 2014) 2014 STB LEXIS 311; see also, e.g., *Sea-3, Inc.—*
12 *Petition for Declaratory Order* (STB Docket No. FD 35853, Mar. 17, 2015) 2015 STB
13 LEXIS 78 [decided within seven months]; *Soo Line R.R. Co.—Petition for Declaratory*
14 *Order* (STB Docket No. FD 35850 Dec. 23, 2014) 2014 STB LEXIS 321 [decided within
15 five months]; *14500 Limited LLC—Petition for Declaratory Order* (STB Docket No. FD
16 35788 June 5, 2014) 2014 STB LEXIS 136 [decided within six months]; *Boston & Maine*
17 *Corp. & Springfield Terminal R.R. Co.—Petition for Declaratory Order* (STB Docket No.
18 FD 35749 July 19, 2013) 2013 STB LEXIS 225 [decided with 19 days].)

19 Moreover, SFPP does not even suggest how a stay would prejudice anyone. In its
20 opposition papers filed at the STB, SFPP characterizes this case as largely about money.
21 (Opp. to Petition at 18.) If that were true – which Union Pacific denies – it certainly believ
22 any feigned sense of urgency by SFPP here.³ At SFPP’s request, the demurrer hearing
23 originally set for December now has been postponed until February 2016. What is more, the
24 parties have been operating under the status quo—which would continue to exist for the

25 ³ SFPP also seeks to support its urgency cry by arguing that this case was initiated to
26 “effectuate” the Court of Appeal’s decision in *Union Pac. R.R. Co. v. Santa Fe Pac.*
27 *Pipeline, Inc.* (2014) 231 Cal.App.4th 134. SFPP mischaracterizes the court’s opinion.
28 The court did not state or imply that the AREA is invalid, but remanded that case to
determine how much additional AREA rent SFPP owes. The place to “effectuate” that
decision is not here, but in the trial court where that case is on remand.

1 duration of the stay—since the 1990s, and their predecessors in one form or another since the
2 1950s. (SFPP’s Compl. at ¶ 9-10.) Issuing a stay would be prudent and would not cause
3 unreasonable delay. Moreover, the Court easily could establish periodic status conferences
4 to monitor progress at the STB.

5 A case SFPP mischaracterizes demonstrates the waste and inefficiency produced by
6 the unwise approach SFPP urges here. SFPP claims the New Jersey Supreme Court held, in
7 *Ridgefield Park v. New York Susquehanna & W. Ry. Corp.*,⁴ that “the matter need **not**
8 proceed before the STB. (SFPP’s Opp. at 8 (SFPP’s emphasis).) On the contrary, because
9 the New Jersey Supreme Court was “uncertain about the character and scope of the ultimate
10 preemption issues” and “taking into account the STB’s ongoing effort to describe more
11 specifically the preemptive effect of ICCTA,” the Court “considered it premature to attempt
12 to resolve comprehensively the ICCTA’s preemptive effect.” (*Ridgefield Park, supra*, 750
13 A.2d. at p. 65.) The New Jersey Supreme Court actually modified the appellate court’s
14 interpretation of ICCTA preemption to follow an STB preliminary preemption decision
15 issued after the appellate court’s decision in a related dispute.⁵ (*Id.* at pp. 65-67.)

16 On the other hand, the *Ridgefield Park* case plainly demonstrates the waste and
17 inefficiency that ensue when a case proceeds without early guidance from the STB on
18 preemption. For seven years, that case dragged through a trial court, an appellate court, and
19 a supreme court,⁶ which ultimately deferred to the STB’s preemption analysis and remanded
20 the case for the lower court to apply the STB’s guidance. Had the trial court referred the
21 preemption question to the STB in the first instance, significant waste could have been
22 avoided. This Court should enter a stay and avoid that waste here.

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26 ⁴ (N.J. 2000) 750 A.2d 57.

27 ⁵ The New Jersey Supreme Court affirmed, without any modification, the appellate court’s
28 holding (cited in Union Pacific’s Motion at 6-7) that ICCTA preempted the plaintiff’s
nuisance claim. (*Id.* at p. 67.)

⁶ (*Id.* at pp. 60-63.)

1 **III. THE PRIMARY JURISDICTION DOCTRINE APPLIES AND ITS POLICIES**
2 **WOULD BE ADVANCED THROUGH A STAY.**

3 **A. The California Court of Appeal Has Recognized the STB as the**
4 **Appropriate Forum to Adjudicate ICCTA Preemption.**

5 The California Court of Appeal recognizes the STB as the appropriate forum to
6 adjudicate preemption under the ICCTA. The court recognizes that “as the agency
7 authorized by Congress to administer the ICCTA,” the STB is “uniquely qualified to
8 determine if state law is preempted.” (*Town of Atherton v. Cal. High-Speed Rail Authority*
9 (2014) 228 Cal.App.4th 314, 332, fn. 4.) Thus, “[a] request to the STB for a declaratory
10 order of preemption would be the remedy for [a party’s] claim of federal preemption”
11 (*Id.*) The Court of Appeal expressly describes a petition for declaratory order to the STB as
12 the first, and possibly conclusive, step in determining the preemption question under the
13 ICCTA. Indeed, it is “*the remedy* for . . . a claim of federal preemption.” (*Id.* (emphasis
14 added).)

15 **B. The STB Routinely Rules on Preemption Questions.**

16 The federal Administrative Procedure Act provides that an agency “in its sound
17 discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”
18 (5 U.S.C. § 554(e).) The STB routinely analyzes whether state actions are preempted by the
19 ICCTA, and issues declaratory orders to address the issue. (See *Pinelawn Cemetery—*
20 *Petition for Declaratory Order* (Docket No. FD 35485, Apr. 21, 2015) 2015 STB LEXIS
21 126, at *14–15 [“The Board has, on many occasions, used the declaratory order process to
22 address issues involving the federal preemption provision contained in 49 U.S.C.
23 § 10501(b).”].) Like the *Atherton* court, other courts have recognized that, as the agency
24 authorized by Congress to administer the ICCTA, the STB is “uniquely qualified” to address
25 whether 10501(b) preempts state law. (*Emerson v. Kansas City Southern Ry. Co.* (10th Cir.
26 2007) 503 F.3d 1126, 1130; *Green Mountain Railroad Corp. v. Vermont* (2d Cir. 2005) 404
27 F.3d 638, 642.)

1 SFPP cites factually inapposite STB decisions in support of its argument that
2 interference with Union Pacific’s railroad operations threatened in this action is more
3 properly decided in state court. Unlike the cases SFPP cites, this action is not a discrete
4 “crossing case[.]” involving a small condemnation action to construct a public at-grade
5 crossing for a two-lane public street to over a rail line. (See *Maumee & W. R.R. Corp. &*
6 *RMW Ventures, LLC—Petition for Declaratory Order* (STB Finance Docket No. 34354
7 March 2, 2004) 2004 STB LEXIS 140.) Nor is this a dispute over using a railroad’s right-of-
8 way for a small storm sewer. (See *Lincoln Lumber Co.—Petition for Declaratory Order*
9 (STB Finance Docket No. 34915 Aug. 10, 2007) 2007 STB LEXIS 467.) Nor is this the
10 matter of a couple’s small prescriptive ingress/egress easement over railroad property to
11 access their waterfront property. (See *Jie Ao & Xin Zhou—Petition for Declaratory Order*
12 (STB Docket No. FD 35539 June 6, 2012) 2012 STB LEXIS 206.) The remedies SFPP
13 seeks here would interfere with operations over hundreds of miles of railroad on which SFPP
14 seeks to indefinitely maintain its pipeline. SFPP seeks to deprive the Court of the valuable
15 guidance the STB can provide in this case, which the primary jurisdiction doctrine is
16 designed to employ.

17 **C. The Primary Jurisdiction Doctrine Applies Because the As-Applied**
18 **Preemption Analysis Requires a Fact-Specific Determination.**

19 The primary jurisdiction doctrine should be applied here because Union Pacific seeks,
20 from the STB, a determination that SFPP’s cause of action is preempted “as applied.” The
21 “as-applied” preemption analysis requires a fact-finding inquiry. “[S]tate actions may be
22 preempted as applied—that is, only if they would have the effect of unreasonably burdening
23 or interfering with rail transportation, which is a fact-specific determination based on the
24 circumstances of each case.” (*California High-Speed Rail Authority, supra*, 2014 STB
25 LEXIS 311, at *20.) “For state or local actions that are not facially preempted, the section
26 10501(b) preemption analysis requires a factual assessment of whether that action would
27 have the effect of preventing or unreasonably interfering with railroad transportation.”
28

1 (*Adrian & Blissfield R.R. Co. v. Blissfield* (6th Cir. 2008) 550 F.3d 533, 540.) Here, Union
2 Pacific asks the STB to consider the degree to which SFPP’s requested remedies interfere
3 with rail transportation. There is a “paramount need for specialized agency fact-finding
4 expertise,” and the primary jurisdiction doctrine is properly invoked. (*Farmers Ins.*
5 *Exchange v. Superior Court* (1992) 2 Cal.4th 377, 398.)

6 “[T]he primary jurisdiction doctrine advances two related policies: it enhances court
7 decisionmaking and efficiency by allowing courts to take advantage of administrative
8 expertise, and it helps assure uniform application of regulatory laws.” (*Id.* at p. 390.) In the
9 “as-applied” preemption analysis required here, the STB is best suited to consider how
10 SFPP’s requested remedies will interfere with Union Pacific’s rail transportation, affect
11 interstate commerce, and affect the specific interest of other stakeholders who have urged the
12 STB to resolve Union Pacific’s Petition. The STB’s resolution of the Petition will be useful
13 for the Court and will assure the remedies SFPP seeks will not disrupt uniform application of
14 rail transportation regulation.

15 **IV. CONCLUSION**

16 For these reasons and the reasons discussed in Union Pacific’s Motion to Stay, Union
17 Pacific respectfully requests the Court stay all proceedings and activity in this case until the
18 STB issues the requested declaratory order.

19
20 Dated: November 23, 2015

SHOOK, HARDY & BACON L.L.P.

21
22 By: 

23 Douglas W. Robinson
24 Brian P. Ziska
25 Attorneys for Defendant
26 Union Pacific Railroad Company
27
28

EXHIBIT B

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24 Attorneys for Defendant and Counterclaimant
25 UNION PACIFIC RAILROAD COMPANY

26 **UNITED STATES DISTRICT COURT**
27 **CENTRAL DISTRICT OF CALIFORNIA**
28 **WESTERN DIVISION**

SFPP, L.P.,

Plaintiff,

vs.

UNION PACIFIC RAILROAD
COMPANY, and DOES 1-10, inclusive,

Defendants.

Case No.: 2:15-cv-01954-JAK-PLA

Assigned to: Judge John A. Kronstadt
Referred to: Magistrate Judge Paul L.
Abrams

**DEFENDANT UNION PACIFIC
RAILROAD COMPANY'S FIRST
AMENDED COUNTERCLAIM**

~~Filed concurrently with Answer per the
Court's Standing Order~~

Complaint Filed: February 23, 2015

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Trial Date: None set

UNION PACIFIC RAILROAD
COMPANY,

Counterclaimant,

vs.

SFPP, L.P.,

Counterclaim Defendant.

1 For its Counterclaim against Plaintiff SFPP, L.P. (“SFPP”), Defendant Union
2 Pacific Railroad Company (“Union Pacific” or the “Railroad”) alleges as follows:

3 **JURISDICTION AND VENUE**

4 1. The Court has jurisdiction over this action under 28 U.S.C. § 1331, as
5 it arises under federal law, and 28 U.S.C. § 1367(a). A portion of the property at
6 issue originally was granted to Union Pacific or its predecessors under certain Acts
7 of Congress. SFPP claims in its Complaint that the pre-1871 Acts and 1875 Act
8 (“Congressional Acts”), as a matter of federal law, do not provide Union Pacific
9 sufficient title to enforce certain rights against SFPP. Pursuant to Local Rule
10 11-3.9.1, Union Pacific is informed and believes SFPP is referring to the Act of July
11 1, 1862 (37 Cong. Ch. 120, §§ 1-20, July 1, 1862, 12 Stat. 489), the Act of July 2,
12 1864 (38 Cong. Ch. 215, July 2, 1864, 13 Stat. 356, *as amended* 38 Cong. Ch. 216,
13 §§ 1-22, July 2, 1864, 13 Stat. 356), the Act of March 3, 1871 (41 Cong. Ch. 122,
14 §§ 1-23, March 3, 1871, 16 Stat. 573), and the Act of March 3, 1875 (43 Cong. Ch.
15 152, §§ 1-6, March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934, *et seq.*).

16 2. Resolution of this action will depend primarily on construction of the
17 rights conveyed by one or more federal statutes. Union Pacific contends that it
18 possesses sufficient right and title in its railroad right of way, specifically including
19 property granted under the Congressional Acts, to enforce its rights to require
20 relocation of SFPP’s pipeline which is located and operates in Union Pacific’s right
21 of way. Union Pacific is informed and believes that SFPP contends Union Pacific’s
22 rights under the Congressional Acts do not extend to the relocation of SFPP’s
23 pipeline in the Union Pacific right of way.

24 3. The claim for relief in this Counterclaim is closely related to SFPP’s
25 claim in its Complaint and forms part of the same case or controversy for purposes
26 of 28 U.S.C. § 1367(a).

27 4. Venue is proper because the property at issue is located in this District.
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PARTIES

5. Union Pacific is, and at all relevant times was, a Delaware corporation, with its principal place of business in Omaha, Nebraska. Union Pacific conducts business within the State of California, and is the successor entity to Southern Pacific Transportation Company and Southern Pacific Rail Corporation.

6. SFPP is a Delaware Limited Partnership registered to do business in the State of California, with its principal place of business in Orange, California. SFPP is the successor entity to Santa Fe Pacific Pipeline, Inc. and Southern Pacific Pipelines, Inc. SFPP owns and operates petroleum product pipelines and appurtenances that run through approximately 1,500 miles of Union Pacific’s right of way (the “Pipeline”) in six states.

THE AMENDED EASEMENT

7. Union Pacific is the owner of property or has an interest in property that is subject to an Amended and Restated Easement Agreement, dated July 29, 1994, entered into by Union Pacific’s and SFPP’s predecessors (the “Amended Easement”). A true and correct copy of the Amended Easement is attached as **Exhibit A** and incorporated by reference.

8. Pursuant to Paragraph 1(a) of the Amended Easement, SFPP is granted a “perpetual and non-exclusive easement and right to construct, reconstruct, renew, maintain and operate a pipe line and appurtenances . . . in, upon, along and across [certain] property of [Union Pacific].”

9. Paragraph 1(f) of the Amended Easement provides in part, “This grant is subject to and subordinate to the prior and continuing right and obligation of [Union Pacific] and its respective successors or assigns to use and maintain the entire railroad right of way and property in performance of its public duty as a common carrier and is also subject to the right and power of [Union Pacific], its successor or assigns in interest or ownership of the said railroad right of way and property, to construct, maintain, use and operate on the present or other grade,

1 existing or additional railroad tracks . . . along or across any or all parts of said land
2 . . . all or any of which may be freely done at all time or times by [Union Pacific], or
3 its successors or assigns, without liability for compensation or damages.”

4 10. Paragraph 3 of the Amended Easement also provides in part, “[SFPP]
5 agrees that said pipe line shall be constructed, reconstructed, renewed, maintained
6 and operated and all work thereon or in connection therewith shall be performed in
7 a careful, safe and workmanlike manner in accordance with all laws and regulations
8 governing the same and in such manner as not to interfere with or endanger railroad
9 property or operations. *In the event that [Union Pacific] shall at any time deem it
10 necessary, [SFPP] shall, upon receipt of written notice so to do, at [SFPP’s] sole
11 cost and expense, change the location of said pipe line, its adjuncts or
12 appurtenances, on railroad property to such point or points thereon as [Union
13 Pacific] shall designate and reconstruct or reinforce the same.”* (Emphasis added.)

14 11. Paragraph 5 of the Amended Easement further provides in part,
15 “[SFPP] agrees to reimburse Railroad for all cost and expense incurred by Railroad
16 in connection with the construction, reconstruction, maintenance, relocation and
17 removal of said pipe line, including, but not limited to, the installation and removal
18 of falsework and other protection beneath or along Railroad’s tracks, the removal
19 and restoration of any structures of Railroad, the furnishing of such watchmen,
20 flagmen, inspectors and representatives as Railroad deems necessary for the
21 protection of railroad property and operations.”

22 **PRIOR LAWSUITS**

23 12. Union Pacific and SFPP have been engaged in prior litigation over
24 Union Pacific’s right to require SFPP to relocate the Pipeline as designated by
25 Union Pacific at SFPP’s sole cost and expense at other locations.

26 13. By Judgment entered April 17, 2007, Judge David L. Minning of the
27 Los Angeles Superior Court, in the case of *Union Pacific Railroad Company v.*
28 *SFPP, L.P., et al.* (Case No. BC236852), affirmed on appeal, *Union Pac. R. Co. v.*

1 SFPP, L.P., No. B199403, 2008 WL 5392421 (Cal. Ct. App. Dec. 29, 2008), as
2 modified on denial of reh'g (Jan. 28, 2009) (the "Los Angeles Action"), determined
3 under Paragraph 3 of the Amended Easement, "Union Pacific Railroad Company
4 may require defendant SFPP, L.P., at said defendant's expense, to relocate said
5 defendant's facilities within the plaintiff's right of way to another location within
6 the plaintiff's right of way whenever the plaintiff believes it is in the plaintiff's
7 legitimate business interests."

8 14. By Judgment entered July 15, 2014, Judge Harold W. Hopp of the
9 Riverside Superior Court, in the case of *Union Pacific Railroad Company v. SFPP,*
10 *L.P., et al.* (Case No. INC05539), held that "[t]he language of the [Amended
11 Easement] is broad and does not appear to limit [Union Pacific's] discretion in any
12 way. First, the [Amended Easement] gives to [Union Pacific] the power to decide if
13 it is necessary to relocate the pipeline ("In the event that [Union Pacific] shall . . .
14 deem it necessary . . .")." The Court further concluded, "that the agreement cannot
15 be construed to limit [Union Pacific's] discretion as to where the pipeline must be
16 relocated to those locations required by DOT regulations or other state or federal
17 laws." This decision is on appeal before the California Court of Appeal (Fourth
18 District, Division Two, Case No. E062255).

19 15. Union Pacific and SFPP also have been engaged in separate litigation,
20 unrelated to pipeline relocation issues, over the amount of rent due from SFPP to
21 Union Pacific under the Amended Easement. In an Opinion dated November 5,
22 2014, the California Court of Appeal (Second District, Division Eight) affirmed in
23 part and reversed and remanded in part a Judgment entered in favor of Union
24 Pacific against SFPP for unpaid rent under the Amended Easement. *Union Pac.*
25 *R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 231 Cal. App. 4th 134 (2014), *reh'g*
26 *denied* (Dec. 5, 2014), *review denied* (Jan. 21, 2015) (the "Rent Decision").

27 THE ALHAMBRA RELOCATION

1 ~~21. Union Pacific contends it has determined the Alhambra Relocation is~~
2 ~~necessary and requires that SFPP perform the Alhambra Relocation in accordance~~
3 ~~with Union Pacific’s standards and specifications at SFPP’s sole cost and expense.~~

4 21. ~~22.~~ Upon information and belief, SFPP contends, based on its
5 interpretation of federal law, that Union Pacific does not possess sufficient title
6 under the Congressional Acts to require SFPP to relocate the Pipeline to
7 accommodate the Alhambra Project. Union Pacific disagrees with SFPP’s
8 contention.

9 22. ~~23.~~ SFPP’s contention that it is not required to perform the Alhambra
10 Relocation rests on an incorrect interpretation of several 19th Century
11 Congressional statutes granting property to Union Pacific, and this case therefore
12 presents federal questions within the Court’s jurisdiction.

13 23. ~~24.~~ The parties are at an impasse, and it is within this Court’s authority
14 to resolve the controversy pursuant to the Declaratory Judgment Act, 28 U.S.C. §§
15 2201-2202 and federal question jurisdiction under 28 U.S.C. § 1331.

16 24. ~~25.~~ A proper and uniform interpretation of the Congressional Acts is
17 critically important for railroad operations and interstate commerce. Railroad rights
18 of way granted by the Congressional Acts cover tens of thousands of miles,
19 criss-crossing public and private lands throughout the western United States. The
20 Supreme Court recently stressed the “special need for certainty and predictability
21 where land titles are concerned.” *Marvin M. Brandt Revocable Trust v. United*
22 *States*, 134 S. Ct. 1257, 1268 (2014) (quoting *Leo Sheep Co. v. United States*, 440
23 U.S. 668, 687 (1979)).

24 25. ~~26.~~ Union Pacific desires a judicial determination of its rights under
25 the Congressional Acts and the parties’ respective rights and duties under the
26 Amended Easement, specifically that i) Union Pacific has sufficient title and
27 interest in the rights of way granted by the Congressional Acts to enforce its right to
28 require SFPP to perform the Alhambra Relocation; and ii) Union Pacific owns any

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property granted under the pre-1871 Congressional Acts in “limited fee” and can authorize any activities, in the subsurface and on the surface, that are not inconsistent with railroad operations; ~~and iii) SFPP is obligated to perform the Alhambra Relocation as designated by Union Pacific at SFPP’s sole cost and expense.~~

26. ~~27.~~ A judicial declaration is necessary and appropriate at this time for the parties to ascertain Union Pacific’s rights and SFPP’s obligations with respect to the Alhambra Relocation.

WHEREFORE, Union Pacific prays for Judgment as follows:

27. ~~28.~~ For a declaration that,

A. Union Pacific has sufficient title and interest in the rights of way granted by the Congressional Acts to enforce its right to require SFPP to perform the Alhambra Relocation; and

B. Union Pacific owns any property granted under the pre-1871 Congressional Acts in “limited fee” and can authorize any activities, in the subsurface and on the surface, that are not inconsistent with railroad operations; and

~~C. SFPP is obligated to perform the Alhambra Relocation as designated by Union Pacific at SFPP’s sole cost and expense; and~~

~~D. SFPP must compensate Union Pacific for any and all costs and expenses incurred by Union Pacific in connection with the Alhambra Relocation and any damages, including compensatory damages, suffered by Union Pacific as a result of SFPP’s refusal to perform the Alhambra Relocation at SFPP’s sole cost and expense;~~

~~29.~~ 28. For costs of suit incurred herein, including reasonable attorneys’ fees and expenses, ~~pursuant to Paragraph 11 of the Amended Easement;~~ and

~~30.~~ 29. For any further or other relief as the Court deems just and proper.

Dated: ~~March 24,~~ April 14, 2015

Respectfully submitted,

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Attorneys for Defendant and Counterclaim:
UNION PACIFIC RAILROAD COMPANY

BRYAN CAVE LLP

By: /s/ John R. Shiner