

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BUDDY HATCHER AND HOLLEY HATCHER,)	
Complainants)	
v.	)	Finance Docket No.
RAILAMERICA, INC., RAILAMERICA OPERATIONS	)	35581
SHARED SERVICES, INC., RAILAMERICA OPERATIONS)	
SUPPORT GROUP, INC., SAN JOAQUIN VALLEY RAILROAD)	)	PETITION FOR
COMPANY, and UNION PACIFIC RAILROAD COMPANY.	)	DECLARATORY
Defendants	)	ORDER

**UNION PACIFIC RAILROAD REPLY TO
PETITION FOR DECLARATORY ORDER**

231604

J. MICHAEL HEMMER
LOUISE A. RINN
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179
402.544.3309

THOMAS A. CREGGER
Randolph, Cregger & Chalfant, LLP
1030 G Street
Sacramento, California 95814
916.443.4443

Attorneys for Union Pacific Railroad Company

Due: January 3, 2011

**ENTERED
Office of Proceedings**

JAN 03 2012

**Part of
Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BUDDY HATCHER AND HOLLEY HATCHER,)	
Complainants)	
v.	)	Finance Docket No.
RAILAMERICA, INC., RAILAMERICA OPERATIONS	)	35581
SHARED SERVICES, INC., RAILAMERICA OPERATIONS)	
SUPPORT GROUP, INC., SAN JOAQUIN VALLEY RAILROAD)	)	PETITION FOR
COMPANY, and UNION PACIFIC RAILROAD COMPANY.	)	DECLARATORY
Defendants	)	ORDER

**UNION PACIFIC RAILROAD REPLY TO
PETITION FOR DECLARATORY ORDER**

I. INTRODUCTION

Union Pacific Railroad Company (UPRR) submits this Reply to the Petition for Declaratory Order filed by Buddy and Holley Hatcher (Petitioners). The Board should deny the Petition and find that Petitioners' claims against UPRR arising from alleged obligations regarding abandonment of rail line imposed by state law are preempted by 49 U.S.C. 10501(b). Petitioners' allegations against UPRR arise directly from the abandonment of a rail line and the subsequent removal of track structures. Prior to the abandonment, UPRR's predecessor sold the track structures and leased the right-of-way to the San Joaquin Valley Railroad (SJVR), a subsidiary of RailAmerica. The sale to SJVR in 1993 that terminated UPRR's ownership of and common carrier obligations in the abandoned line, and the subsequent abandonment by SJVR

were both authorized by the Board¹. In the abandonment proceeding, the Board found that UPRR no longer had any common carrier responsibility for the rail line, its operations or its abandonment. Any state law claim for damages against UPRR based on the abandonment and removal of the track structures is contrary to the exclusive jurisdiction of the Board under ICCTA to authorize a rail carrier to operate, sell and discontinue service over a rail line and to transfer common carrier duties over that rail line to a different rail carrier.

II. BACKGROUND

a. History of the Lease and Sale

The rail line in question is located in Porterville, California, and part of the South Exeter Branch, running between Strathmore, Ca. (MP 268.60) and Jovista, Ca. (MP 299.17) in Tulare County. SJVR originally obtained trackage rights from UPRR's predecessor, Southern Pacific Transportation Company (SP), and the former Atchison, Topeka and Santa Fe Railway, over a number of rail lines, including the South Exeter Branch in 1992.² Subsequently, SJVR purchased the track and rail assets and leased the underlying right-of-way, for numerous lines including the South Exeter Branch³. The Board later determined that the 1993 sale relieved UPRR of any rail carrier obligations including the need to seek abandonment authority.⁴

¹ The line sale in 1993 was authorized by the Interstate Commerce Commission, the UPRR's predecessor. To simplify references, this Reply will use the terms STB or Board to include the Interstate Commerce Commission as well.

² San Joaquin Valley Railroad Co. Lease and Operation Exemption-Southern Pacific Transportation Company and Visalia Electric Railroad Company, ICC Finance Docket No. 31993 (ICC served 1/23/92) (San Joaquin I).

³ San Joaquin Valley Railroad Co.-Acquisition and Lease Exemption-Southern Pacific Transportation Company, ICC Finance Docket No. 31993 (Sub-No. 1) (ICC served 10/4/93) (San Joaquin II).

⁴ In the course of a prior abandonment involving another line sold to SMR in the same transaction, the STB determined that when SP sold the lines to SMR that the SMR assumed the accompanying common carrier obligations. Accordingly, SP had no need to obtain abandonment authority for itself. Southern Pacific Transportation Co. Abandonment Exemption In Fresno County, CA, ICC Docket No. AB-12 (Sub-No. 179X) (ICC Served 5/08/95), at p.3. (Fresno Abandonment Exemption).

b. Abandonment of the Line

In 2008, SJVR sought an exemption to abandon a portion of the South Exeter branch pursuant to 49 U.S.C. 10903 and 10502. The Board granted the exemption that same year.⁵ In the *Abandonment Exemption*, the Board found that UPRR, as of 1993, no longer had a common carrier obligation with respect to the South Exeter branch:

We note that a decision of the Board's predecessor, the Interstate Commerce Commission (ICC), in Southern Pacific Transportation Company-Abandonment Exemption-In Fresno County, Docket No AB-12 (Sub-No. 179X), et al. (ICC served May 8, 1995), involving another line that SJVR acquired from SPT in the transaction that was authorized by the ICC in Finance Docket 31933 (Sub-No. 1), see supra note 6, determined that SPT did not retain a common carrier obligation over the line. The ICC's reasoning in that decision would appear to apply equally here. At p. 7, fn. 20.

Accordingly, UPRR had no need to seek abandonment authority as it had no duty to operate and maintain the line pursuant to the previously authorized line sale transaction. See *Fresno Abandonment Exemption*, at p. 3.

c. The Hatchers' Civil Action

On, October 27, 2011, Petitioners filed a civil action in the Superior Court of the State of California, County of Tulare, alleging that the abandonment and subsequent removal of the track structures caused flooding of Petitioners' property, located in Porterville and adjacent to the abandoned line. Included as defendants were UPRR, RailAmerica (the several RailAmerica entities named are referred to collectively) and SJVR⁶

The Complaint defines "Railroad Defendants" as including UPRR. At ¶ 9. The Complaint alleges that "the Railroad Defendants abandoned and removed the rail tracks" and the removal of the track led to flooding. At ¶¶ 11-13, 17, 19, 20-21, 26, 28, 29. In short, "Railroad

⁵ San Joaquin Valley Railroad Company-Abandonment Exemption-In Tulare County, Ca STB Docket No. AB-398 (Sub.- No. 7X) (Decided 6/6/08) (Abandonment Exemption)

⁶ The Complaint in the civil action, Answers by UPRR, SMR and {WV} Notice Of Removal are attached to the Petition as Exhibits 1-4 respectively.

Defendants (sic) removal of the railroad tracks unreasonably modified surface water drainage.” At ¶ 48. On December 6, 2011, SJVR and RailAmerica, asserting preemption under ICCTA, removed the civil action to the United States District Court for the Eastern District of California. See Notice of Removal. In its answer to the Complaint, UPRR asserted the affirmative defense of preemption under ICCTA, 49 U.S.C. 10101 et seq. See UPRR Answer.

d. The Petition for Declaratory Order

On December 12, 2011, Petitioners asked the STB to exercise its discretion and issue a declaratory order stating that the California state law causes of action alleged in their Complaint are not preempted by 49 U.S.C. 10101 et seq. Petition, at ¶ 6. Petitioners characterize all of their causes of action “as a result of all Defendants (sic) failure to comply with California State Law in removing tracks along an abandoned rail-line.” *Id.* at ¶ 2. The Petition, at ¶8, re-alleges the content of the Complaint. At ¶ 7, Petitioners assert that their state law claims arise from the “... [STB] authorized removal of railroad tracks.” Given the incorporation of the allegations of their civil action and as specifically stated in the Petition, Petitioners’ claims arise from the abandonment of the line and subsequent Board-authorized removal of the track structures. Petitioners claim that state law imposes a duty on UPRR in connection with the abandonment and removal of tracks in 2010 despite a Board order finding that UPRR was relieved of any obligations regarding the operation and abandonment of the rail line as a result of its 1993 order authorizing UPRR to sell the track structure to SJVR. *Abandonment Exemption*, at p. 7, fn. 20; *Fresno Abandonment Exemption*, at p. 3.

III. ARGUMENT

UPRR's Answer to the Hatchers' Complaint properly invoked ICCTA preemption. Such preemption applies whether their legal theory is that California law imposes some duty on UPRR arising from either its prior operation of the rail line sold to another rail carrier or the subsequent abandonment of that same line by SJVR. UPRR obtained STB authority to sell the line in question and thereby was released from all of its obligations (including the obligation obtain authority to abandon the line) which were assumed by the purchasing rail carrier. Jurisdiction of the STB over the construction, acquisition, operation, abandonment or discontinuance of tracks (even if the tracks are located in one State) is exclusive. In addition, remedies provided under ICCTA with respect to such regulation are exclusive and preempt the remedies provided under State law, 49 U.S.C. 10501(b). Consequently, the Petitioners' claims against UPRR are preempted.

a. The Sale by and Transfer of UPRR's Obligations as a Rail Carrier for the Line Terminated Any UPRR Responsibility for Subsequent Abandonment. The Sale and Transfer Are Subject to the Exclusive Jurisdiction of the Board.

Petitioners state that all of their legal claims asserted in court are "as a result of all Defendants (sic) failure to comply with California State Law in removing tracks along an abandoned rail-line." Petition at ¶ 2. Such a legal theory, if applied to UPRR, would override prior STB decisions that determined UPRR no longer had responsibility for the operations over or for abandonment of the rail line in question. The Board, in the *Abandonment Exemption*, determined that UPRR no longer had a common carrier responsibility for the line. At p. 7, fn. 20. This finding was correct since the STB previously authorized UPRR to sell the track structure,

discontinue its operations over, and transfer the obligation to operate the line to SJVR.⁷ *San Joaquin II*, at p. 2; *Fresno Abandonment Exemption*, at p. 1, 3. Under ICCTA and by STB decision, UPRR responsibility for the track ended in 1993.

Yet, as framed by the allegations of the Complaint and the Petition, Petitioners would hold UPRR liable for the abandonment of the line and removal of track structures after the STB authorized UPRR to discontinue operation over and to transfer the duties for the line to SJVR. Determination of which rail carrier must operate and can abandon a line and the termination of another rail carrier's duties for that same line falls squarely within the jurisdiction of the Board. 49 U.S.C. §§ 10102(6) and (9), 10902 and 10903; see also, *Chicago and N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-322 (decided under the former Interstate Commerce Act, noting the plenary and exclusive jurisdiction of the Commission over abandonments); *CSX Transportation, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34662 (decided 5/3/05) (holding that there can be no state or local action that regulates “matters directly regulated by the Board—such as the construction, operation and abandonment of rail lines...”); *Port City Properties v. UPRR*, 518 F.3d 1186, 1188-1189 (10th Cir. 2008) (abandonment of a spur line).

That the Complaint and Petition seek damages as opposed to some exercise of control over the abandonment process does not remove the matter from the Board's jurisdiction. 49 USC 10501(b) (The remedies provided under ICCTA are exclusive and preempt the remedies provided under State law.) The courts have consistently held that imposition of tort liability constitutes regulation subject to preemption under ICCTA. *City of Auburn v. U.S. Gov't.*, 154 F.3d 1025, 1030 (9th Cir. 1998); *Assoc. of Amer. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 2010

⁷ Ut wyl Reply addresses only the claims directed at UPRR and why they are preempted by ICCTA. None of the positions taken in this Reply should be taken as a concession that SMR or its affiliates owed any duty to the Petitioners or breached such any duty.

WL 3565261. at *2 (9th Cir. 2010); *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 443-444 (5th Cir. 2001); *A&W Prop., Inc. v. Kan City S. Ry.*, 200 S.W.3d 342, 349 (Tx. Ct. App. 2006)

b. ICCTA Also Preempts Recovery of Damages from UPRR Arising From the Construction and Maintenance of Track Structures Prior to the 1993 Sale.

Even if Petitioners were to allege that the construction and maintenance of the track structures by UPRR's predecessor before SJVR took possession contributed in some manner to the flooding in 2010, claims against UPRR would be preempted. The Board has exclusive jurisdiction over transportation by rail carriers and remedies provided in respect to their facilities and the construction and operation of track. ICCTA preempts other remedies provided under Federal or State law. 49 U.S. C. 10501(b).

In several recently decided cases involving flooding and resulting state law claims against railroads, alleging negligence in the design, construction, and maintenance of railroad track and property, the courts found the claims subject to express preemption under ICCTA. In *Pere Marquette Hotel Partners, L.L.C. v. U.S.*, 2010 WL 925297 (E.D. La. 2010), plaintiffs alleged that the "negligent design and construction of the roadbed and other areas of the track" contributed to flooding of their properties. *Id.* at *4. The court stated, "the relevant issue is whether a state law claim challenging the design and construction of a railroad crossing, railroad tracks, or roadbed involves a state law remedy 'with respect to regulation of rail transportation.'" *Id.* The court methodically worked its way through the pertinent provisions of ICCTA. First, it found that railroad crossing, track, and roadbed constitute "property" within the statutory definition of "transportation." *Id.*; see also 49 U.S.C. §10102(9). In addition, the court found that "the application of state negligence principles to assess...the design and construction of railroad crossing, tracks, and roadbed qualifies as state law 'regulation' in respect to rail transportation." *Id.* at *5. Finally, the court found that the claims involved a matter, the construction of railroad

tracks that is directly regulated by the STB. *Id.* The court ultimately held that the plaintiffs' claims were expressly preempted by ICCTA. *Id.* See also, *Maynard v. CSX Transportation, Inc.*, 360 F.Supp.2d 836, 841-842 (E.D. Ky. 2004) (holding that a negligence claim alleging challenging that track structures caused flooding on adjacent property was preempted by ICCTA); *A&W Properties, Inc.*, 200 S.W.3d at 343, 346 fn. 5, 349 (holding that an action by an adjacent property owner for damages for flooding and injunctive relief to require a carrier to enlarge a culvert under its tracks was preempted by ICCTA). Accordingly, even if Petitioners were to claim they plan to pursue a legal theory under California law that would impose liability on UPRR for how its predecessor operated and maintained the rail line and structures before the line was sold to SJVR in 1993, ICCTA preemption would bar such pursuit of such a remedy.

IV. CONCLUSION

Petitioners' claims against UPRR must fail because STB decisions authorized UPRR to sell the track structures and the transfer of UPRR obligations for that track to another carrier and recognized that UPRR no longer retained responsibilities for the line when the Board authorized abandonment. For these reasons, UPRR requests that the Board deny the petition and issue a finding that Petitioners' claims in the civil action against UPRR are preempted by 49 U.S.C. 10501(b).

Dated: January 3, 2012

J. MICHAEL HEMMER
LOUISE A. RINN
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street. Stop 1580
Omaha, Nebraska 68179
402.544.3309

By /s/ Thomas A. Cregger
THOMAS A. CREGGER
Randolph, Cregger & Chalfant. LLP
1030 G Street
Sacramento, California 95814
916.443.4443

CERTIFICATE OF SERVICE

I, Carolyn A. Apodaca, certify that I this day served the foregoing UNION PACIFIC RAILROAD'S REPLY TO PETITION FOR DECLARATORY ORDER on counsel for Buddy and Holley Hatcher by facsimile transmission and prepaid first-class US mail to Robert Krause of Law Offices of Robert Krause, 132 East Morton Avenue. Porterville, CA 93257, fax number (559) 784-2463, and Counsel for RailAmerica Operations Shared Services, Inc., RailAmerica Operations Support Group, Inc., San Joaquin Railroad Company and Rail America, Inc., by facsimile transmission and prepaid first-class US mail to William T. McLaughlin II, Esq. Of Lang, Richert & Patch, P.O. Box 40012. Fresno, CA 93755, fax number (229) 228-6727.

Dated: January 3, 2012

/s/ Carolyn A. Apodaca
CAROLYN A. APODACA