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240934

June 17, 2016

ENTERED  
Office of Proceedings  
June 20, 2016  
Part of  
Public Record

**ELECTRONICALLY FILED**

Ms. Cynthia T. Brown  
Chief, Section of Administrative  
Office of Proceedings  
Surface Transportation Board  
395 "E" Street S.W.  
Washington, D.C. 20423-0001

**Re: Docket No. FD 35915**  
*Tri-City Railroad Company, LLC v. City of Kennewick and City of Richland*  
June 17, 2016 Verified Statement filed by Cities re: Supplemental Authority

Dear Ms. Brown,

The Tri-City Railroad Company, LLC ("TCRY") is in receipt of a pleading filed on June 17, 2016, by the City of Kennewick and the City of Richland ("Cities") captioned "Notice of Supplemental Authority" and "Verified Statement and Affidavit of Stephen DiJulio Regarding Notice of Supplemental Authority." This filing appears to be contrary to the Board's August 31, 2015 Decision, which stated that "[t]he Cities shall file their reply by September 15, 2015, and TCRY shall file its rebuttal by September 30, 2015. The record in this matter shall be closed on September 30, 2015."

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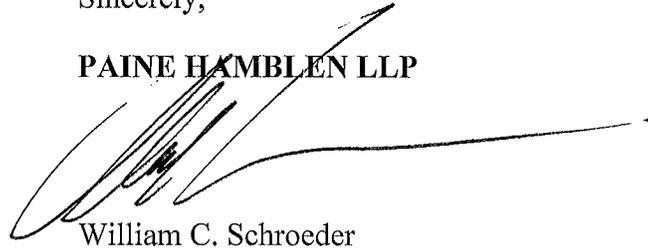
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Ms. Cynthia T. Brown  
June 17, 2016  
Page 2

If the Board is to consider this filing, TCRY's response is that this particular decision, like all decisions of a similar nature, are preempted. *See Wichita Terminal Association, BNSF Railway Company & Union Pacific Railroad Company – Petition For Declaratory Order*, FD 35765 (S.T.B. June 22, 2015). *See also TCRY's Rebuttal Brief*, pp. 9, 31 – 32. For convenience of reference for the Cities' counsel, a copy of *Wichita Terminal Association* is enclosed.

Sincerely,

**PAINE HAMBLEN LLP**

A handwritten signature in black ink, appearing to read 'William C. Schroeder', is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William C. Schroeder

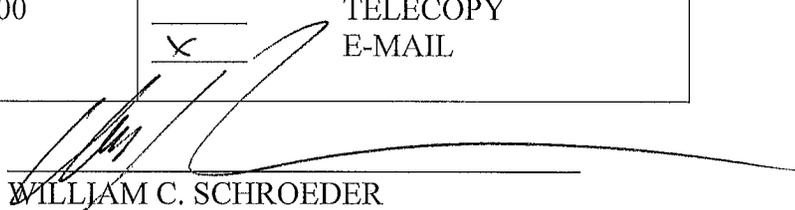
Enclosure -- WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY & UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER, FD 35765 (S.T.B. June 22, 2015).

cc: Heather Kintzley (w/encl.)  
Lisa Beaton (w/encl.)  
Steve Dijulio (w/encl.)  
Stephanie Weir (w/encl.)  
Christopher Emch (w/encl.)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20 day of June, 2016, I caused to be served a true and correct copy of the foregoing **TRI- CITY RAILROAD COMPANY, LLC'S RESPONSE** by the method indicated below and addressed to the following:

Heather Kintzley Richland City Attorney 975 George Washington Way PO Box 190 MS-07 Richland, WA 99352	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY E-MAIL
Lisa Beaton Kennewick City Attorney 210 West 6 <sup>th</sup> Avenue P.O. Box 6108 Kennewick, WA 99336	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY E-MAIL
P. Stephen DiJulio Stephanie Weir Christopher Emch Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. MAIL HAND DELIVERED OVERNIGHT MAIL TELECOPY E-MAIL

  
WILLIAM C. SCHROEDER

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## Debbie Miller

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**From:** Debbie Miller  
**Sent:** Friday, June 17, 2016 3:50 PM  
**To:** 'Kintzley, Heather'; 'lisa.beaton@cikennewick.wa.us'; 'steve.dijulio@foster.com'; 'stephanie.weir@foster.com'; Christopher Emch  
**Subject:** Tri-City Railroad Company LLC vs. City of Kennewick and City of Richland  
**Attachments:** TCRY's Response (01557864x7AC1D).pdf

All –

On behalf of Mr. William C. Schroeder, attached please find a copy TCRY's June 17, 2016 letter re: The Cities Verified Statement filed by Cities re: Supplemental Authority that as filed with the Surface Transportation board today.

Debbie

*Debbie Miller*

Assistant to William J. Schroeder and Gerry Kobluk

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**PAINE  HAMBLEN**

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SERVICE DATE – JUNE 23, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35765

WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY & UNION PACIFIC  
RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> In this decision, the Board finds that the Kansas courts' orders requiring a railroad crossing in Wichita from 25th Street across the Wichita Terminal Association's Interchange Tracks at the proposed Emporia Court location are preempted by federal law. The decision further explains that it would be reasonable for a state court, applying state or local law, to determine whether a permanent crossing at a location other than Emporia Court would unreasonably interfere with interstate rail operations and be preempted by federal law.

Decided: June 22, 2015

On October 18, 2013, Wichita Terminal Association, BNSF Railway Company (BNSF), and Union Pacific Railroad Company (UP) (collectively WTA) filed a petition for declaratory order requesting that the Board institute a proceeding to resolve a dispute between WTA, on the one hand, and on the other, F.Y.G. Investments, Inc., and Treatco, Inc. (collectively FYG), regarding a railroad crossing to FYG's property in Wichita, Kan. In its Petition, WTA asks the Board to find that FYG's request for a permanent public railroad crossing to access their property is preempted by 49 U.S.C § 10501(b), as amended in the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803.<sup>2</sup> In the alternative, WTA requests that the Board find the current temporary crossing location is acceptable for a permanent crossing rather than the Emporia Court location FYG proposes.<sup>3</sup> In response, FYG argues that this dispute is a question of state property law that has been decided by Kansas courts.<sup>4</sup> FYG argues that the Board should find that it does not have jurisdiction over the dispute and that it will not disturb the Kansas courts' rulings ordering the Emporia Court crossing to be built.<sup>5</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Pet. 1.

<sup>3</sup> Id. at 1, 25.

<sup>4</sup> Reply to Pet. 1.

<sup>5</sup> Id. at 2.

On May 20, 2014, the Board instituted a proceeding, and directed the parties to submit additional information. Wichita Terminal Ass'n—Pet. for Declaratory Order (May 2014 Decision), FD 35765, slip op. at 6-7 (STB served May 20, 2014). For the reasons discussed below, we conclude that a crossing at the proposed Emporia Court location would unreasonably burden interstate commerce and, therefore, state or local regulation, including the Kansas courts' orders, requiring construction of a crossing at that location is preempted by federal law.

## BACKGROUND

As described in more detail in the May 2014 Decision, slip op. at 1-6, this dispute involves approximately 1,000 feet of WTA's east-west running "interchange tracks" (IT),<sup>6</sup> FYG's real property, which is located south of the IT,<sup>7</sup> and a proposed rail crossing from 25th Street to FYG's property at Emporia Court, a proposed public road near the middle point of the IT and perpendicular to 25th Street.<sup>8</sup> The IT consist of a north track and a south track that run parallel to 25th Street and along the northern edge of FYG's property.<sup>9</sup>

WTA filed its petition for declaratory order with the Board following 11 years of state court proceedings, which included three appeals.<sup>10</sup> The early decisions held that, based on Kansas law and Wichita Ordinance 4536 (the 1916 Ordinance), FYG is entitled to access its property from 25th Street.<sup>11</sup> The preemption issues that WTA raises before the Board arise from an August 2008 decision, in which a Kansas trial court ordered WTA to construct the Emporia Court crossing.<sup>12</sup> Following that order, WTA moved for relief from judgment, claiming it would be impossible to properly construct a crossing at that location without placing required traffic

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<sup>6</sup> Pet. 2.

<sup>7</sup> Id. at Exs. C, G.

<sup>8</sup> Id. at 3. There is currently a temporary timber crossing at the west end of the IT. Id. at 6; FYG Reply to Pet. Ex. 6, at 4. The proposed public road at Emporia Court has been approved by the city but has not been built. Reply to Opening 2.

<sup>9</sup> In 1996, FYG acquired approximately 27 acres of land that includes the railroad right-of-way along the northern edge of the property adjacent to 25th Street. See Reply to Pet. 5.

<sup>10</sup> Pet. 5 (WTA filed its initial district court petition in November 2002 and its Board petition in October 2013.).

<sup>11</sup> Reply to Pet. 6.

<sup>12</sup> Wichita Terminal Ass'n v. F.Y.G. Investments, Inc., Case No. 02 C 3688, slip op. at 4 (Kan. Dist. Ct. Aug. 1, 2008).

signals in the middle of 25th Street.<sup>13</sup> The trial court then ordered removal of the north track and its relocation to the south of the existing south track “if that is the only means to construct the crossing without impeding upon 25th Street.”<sup>14</sup>

WTA appealed, arguing in part that the Board has jurisdiction to review the matter because the Emporia Court crossing would adversely affect interstate commerce. The appellate court remanded the case to the trial court to address the feasibility of removing the north track and to consider viable options for constructing the crossing; the court mentioned, but did not reach, the preemption issue. Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., Case No. 103,015, slip op. at 18 (Kan. App. 2011). On remand, the trial court found that the most viable option for a crossing would be the removal of the north track in conjunction with the laying of a new track to the south of the existing tracks:

[R]emoval of the north track would allow the Emporia Court location to be built in compliance with the MUTCD. . . . [I]f the new, southern track is installed prior to removal of the north track, [WTA’s] concern over losing car-parking space will be alleviated to a great degree.

Wichita Terminal Ass’n v. F.Y.G Investments, Case No. 02 C 3688, slip op. at 4 (Kan. Dist. Ct. Jan. 25, 2012). Without addressing federal preemption, the trial court then ordered WTA to install a crossing at Emporia Court in “compliance with all federal, state, and local laws, regulations, and ordinances.” Id.

WTA again appealed and reiterated its claim that § 10501(b) preempts the trial court’s remedies, because (1) the construction and removal of the IT are under the Board’s exclusive jurisdiction and (2) the trial court’s remedies unreasonably burden interstate commerce. The Kansas appellate court found that the trial court’s remedies could only be enforced if the Board “either relinquish[ed] its jurisdiction to the [trial] court or approve[d] of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.” Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., 305 P.3d 13, 22-23 (Kan. App. 2013). The appellate court concluded that the Board “has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks.” Id. at 22. The appellate court also concluded that it is within the Board’s exclusive jurisdiction “to determine whether constructing a permanent railroad crossing

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<sup>13</sup> The Manual on Uniform Traffic Control Devices (MUTCD) sets clearance requirements for crossings and establishes standards for warning devices; Kansas and Wichita have adopted the MUTCD as law. Pet. 4.

<sup>14</sup> Transcript of Judge’s Ruling at 7:21-7:23, Wichita Terminal Ass’n v. F.Y.G. Investments, Inc., Case No. 02 C 3688 (Kan. Dist. Ct. June 8, 2009); see also Reply to Pet. 10-11.

at Emporia Court is impossible or would unreasonably burden interstate commerce—even with the relocation of the north track—as the WTA contends.” Id. The appellate court remanded the case to the trial court, with instructions to direct WTA to “file an application with the STB to resolve any issues concerning the STB’s jurisdiction.”<sup>15</sup> WTA’s petition for declaratory order followed in October 2013.

WTA asks the Board to find that FYG’s demand for any permanent public railroad crossing is preempted by federal law.<sup>16</sup> Alternatively, WTA requests that the Board declare that the existing temporary crossing should be made permanent and that a crossing at Emporia Court would unduly interfere with interstate commerce.<sup>17</sup> WTA argues that any abandonment, removal, or relocation of the IT to accommodate a crossing at Emporia Court is regulated by the Board and within our exclusive jurisdiction.<sup>18</sup> It asserts that the Emporia Court crossing would unreasonably burden interstate commerce by rendering the IT “useless” for the handling of interstate rail traffic, slashing the IT’s capacity, and substantially slowing interchange.<sup>19</sup> WTA also submitted evidence from BNSF and UP stating that the IT is an integral part of interstate commerce.<sup>20</sup>

In its reply, FYG requests that the Board not disturb the Kansas court rulings regarding what it views as a simple property dispute.<sup>21</sup> It asserts that the Board has no jurisdiction over the relocation of the north track, because it is excepted switching track and track used for railcar storage within the meaning of 49 U.S.C. § 10906.<sup>22</sup> FYG also argues that WTA is primarily concerned with the loss of the IT as a rail car parking lot, not about the movement of railcars in interstate commerce.<sup>23</sup> It claims that the 1916 Ordinance and Kansas property law require WTA to provide a crossing from 25th Street to its property.<sup>24</sup>

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<sup>15</sup> Pet. Ex. B, at 2-3.

<sup>16</sup> Id. at 1-2, 15, 23.

<sup>17</sup> Id. at 1-2, 23, 25.

<sup>18</sup> Id. at 2, 7, 10, 12-14.

<sup>19</sup> Id. at 15-18.

<sup>20</sup> Opening Exs. B, J, K, L.

<sup>21</sup> Reply to Pet. 1, 2, 29-30.

<sup>22</sup> Id. at 15-18, 25-27, 31, 32-33.

<sup>23</sup> Id. at 9 n.4.

<sup>24</sup> Id. at 2, 19.

On May 20, 2014, the Board instituted a proceeding, set a procedural schedule, and requested specific additional information from the parties in order to assist it in determining: (1) the impact on interstate commerce of the proposed Emporia Court crossing, with and without the removal and/or relocation of the north track; (2) how WTA, BNSF, and UP use the IT; and (3) the current status and applicability of the 1916 Ordinance. May 2014 Order, slip op. at 6.

In responding to the Board's information requests, WTA again argues that the Emporia Court crossing would be an unreasonable burden on interstate commerce,<sup>25</sup> and that state and local regulation requiring a crossing there is preempted because it attempts to manage and govern interstate rail transportation.<sup>26</sup> FYG counters that the crossing would not unreasonably interfere with interstate commerce because it would not prohibit movement of trains across the IT, the daily volume of trains moving over the IT is low, and WTA's primary interchange operations would be unaffected.<sup>27</sup>

#### DISCUSSION

The Board has discretionary authority 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. As indicated, the Board instituted a proceeding in this matter and received evidence and arguments from the parties regarding the extent of the Board's jurisdiction over this dispute and whether state and local regulation of the crossing issues is preempted by 49 U.S.C. § 10501(b). We find it appropriate for the Board to issue a declaratory order addressing the crossing controversy presented here. As discussed below, we conclude that the Board has jurisdiction over the IT, that a crossing at Emporia Court would unreasonably burden interstate commerce regardless of whether the track is moved, and that any court order or state or local regulation requiring a crossing at Emporia Court is preempted under § 10501(b) because it would have the effect of managing or governing property that is part of the national rail network. However, if state law requires a crossing, a permanent crossing at a location that would not unreasonably interfere with railroad operations would not be preempted by federal law.

The Interstate Commerce Act, as amended by ICCTA, provides that the Board's jurisdiction over "transportation by rail carriers" is "exclusive" and 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." 49 U.S.C. § 10501(b). The statute defines "transportation" expansively to encompass a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail,

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<sup>25</sup> Opening 22, 24.

<sup>26</sup> Id. at 27.

<sup>27</sup> Reply to Opening 3-7.

regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include track, terminal facility, ground, etc. used or necessary for transportation. 49 U.S.C. § 10102(6). The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce. See U.S. Env. Protection Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); Norfolk S. Ry. Co.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995) (noting the need for “uniformity” of federal standards for railroads and the risk of “balkanization” from state and local regulation).

It is well settled that the provisions of § 10501(b) preempt permitting or other laws and legal processes that try to regulate rail transportation directly or that could be used to deny a railroad’s ability to conduct rail operations. See Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015) (citing several Board decisions and court cases). Courts and the Board have found that state or local actions that “have the effect of managing or governing,” and not merely incidentally affecting, rail transportation, are expressly or categorically preempted under § 10501(b). Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc) (“[L]aws that have the effect of managing or governing rail transportation will be expressly preempted.”); CSX Transp., Inc.—Pet. for Declaratory Order (CSXT), FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the “exclusive federal regulation of railroads” are categorically preempted). State or local actions that are not categorically preempted may still be preempted “as applied” if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. Franks Inv. Co., 593 F.3d at 414; CSXT, slip op. at 4; see also N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts “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”). Federal preemption applies without regard to whether or not the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (finding state law claims preempted even though Board does not actively regulate side track); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (Congress intended to occupy the field and preempt state jurisdiction over excepted track, even though Congress allowed rail carriers to construct, operate, and abandon such track without Board approval).

The Board has explained that state courts typically can resolve disputes involving preemption of railroad/private road or sewer crossings and that “routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks.” Maumee & W. R.R. Corp.—Pet. for Declaratory Order (Maumee), FD 34354, slip op. at 2 (STB served March 3, 2004) (stating that preemption may shield a railroad from state eminent domain laws where the effect

of those laws is unreasonable interference with railroad operations); see also E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012) (finding that an easement across a railroad’s property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state property law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad’s preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation) with Jie Ao & Xin Zhou—Pet. for Declaratory Order (Ao-Zhou), FD 35539 (STB served June 6, 2012) (finding state property law ownership claims preempted where such claims would directly affect the amount and type of maintenance that could be performed on a railroad right-of-way and limit future options for reactivation).

WTA asks the Board to find that the demand for a crossing at Emporia Court (or any crossing) is preempted by federal law. WTA argues that it would be impossible to legally construct a crossing at Emporia Court without removing the north track,<sup>28</sup> and that removing the north track would have catastrophic effects on WTA’s interstate commerce operations.<sup>29</sup> WTA states that even without relocating the north track, the proposed crossing would create an unreasonable burden on interstate commerce<sup>30</sup> because it “would functionally cut the IT in two, dramatically limiting the WTA’s ability to interchange railcars between these vital BNSF and UP arteries, and . . . would reduce the interchange capacity of the IT by nearly two-thirds causing severe interference with interstate commerce . . . .”<sup>31</sup> According to WTA, a bisected IT would cause detrimental effects throughout the BNSF and UP networks:

This decreased capacity of the IT would increase the number of overall moves needed to interchange these railcars[,] . . . backup traffic onto BNSF’s main line to the west, and the WTA’s main line to the east. This railcar backup, combined with the railroad gymnastics needed to comply with these onerous additional switching moves caused by the crossing installation, would substantially hinder traffic on the adjoining BNSF and UP arteries.<sup>32</sup>

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<sup>28</sup> Both Kansas courts recognized that the proposed crossing at Emporia Court could not be legally or practicably installed given applicable MUTCD requirements and the current track configuration of the IT. Opening 5.

<sup>29</sup> Id. at 22.

<sup>30</sup> Id. at 23-24.

<sup>31</sup> Opening Ex. A, at 6-7.

<sup>32</sup> Id. at Ex. A, at 7.

WTA submitted evidence from BNSF and UP indicating that the IT is an integral part of interstate commerce.<sup>33</sup> BNSF and UP both explain that they rely heavily on WTA's operations for interstate rail operations, including WTA's interchange and bridging over the IT.<sup>34</sup> BNSF states "that from January 3, 2012 to May 20, 2014, 28,613 BNSF cars were interchanged over the IT."<sup>35</sup> UP states that over nearly the same period "WTA bridge moved 4,804 cars across the IT between UP and BNSF."<sup>36</sup>

In reply, FYG argues that the Kansas courts' applications of the 1916 Ordinance and Kansas property law are not preempted. It states that WTA is primarily concerned with storing cars, not moving cars in interstate commerce<sup>37</sup> and that constructing a crossing over a line that handles fewer than 100 cars per day is not an unreasonable burden on interstate commerce.<sup>38</sup> FYG asserts that WTA's practice of storing or interchanging small cuts of cars will not be affected by the Emporia Court crossing.<sup>39</sup> It claims that "the volume of rail cars that traverse the IT on a daily basis is both consistent and small," with a daily average of less than 40 cars per day and generally fewer than 100 cars per day during peak use.<sup>40</sup> FYG states that WTA occasionally handles much larger cuts of cars by coordinating with UP and BNSF, but that these larger cuts traverse the IT without stopping and demonstrate that WTA could overcome reduced storage capacity on the IT.<sup>41</sup>

FYG argues that because WTA only moves very few cuts per year that contain enough cars to be impacted by a crossing at Emporia Court, the crossing "should have little impact on the WTA's daily operations"<sup>42</sup> and would not place an unreasonable burden on WTA's operations. It also suggests that WTA could pursue alternatives that would permit rail operations to proceed unimpeded.<sup>43</sup> FYG's suggested alternatives include shifting operations to nearby

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<sup>33</sup> Id. at Ex. B at 1, Ex. L, at 1.

<sup>34</sup> Id. at Ex. B, at 1-2, Ex. L, at 1.

<sup>35</sup> Id. at Ex. B, at 1

<sup>36</sup> Opening Ex. L, at 1.

<sup>37</sup> Reply to Pet. 28.

<sup>38</sup> Reply to Opening 5; Reply to Pet. 31-32.

<sup>39</sup> Reply to Opening 6.

<sup>40</sup> Id. at 5, 8 (WTA's evidence demonstrates that it also handles larger cuts of cars, primarily during harvest).

<sup>41</sup> Id. at 8-9.

<sup>42</sup> Reply to Opening 6.

<sup>43</sup> Id. at 23.

facilities, such as BNSF track or an “effectively abandoned” BNSF yard, constructing a second track parallel to nearby BNSF track; connecting nearby existing rail yards to the IT, or procuring/using/leasing existing, active BNSF or UP yards.<sup>44</sup> FYG also suggests that the clearance from the Emporia Court crossing that WTA states it requires is excessive and could be reduced to minimize loss of capacity.<sup>45</sup>

We conclude that the cars being interchanged on the IT are part of rail transportation and any Kansas court order requiring a crossing at Emporia Court is federally preempted because it would unreasonably burden or interfere with interstate commerce. WTA, BNSF, and UP have demonstrated that a significant number of cars operate on the IT on an annual basis and that, although some cars may sit on the IT for several hours or overnight, all or most of the cars are in active interchange and active transit and are part of interstate commerce. Moreover, the record shows that installation of a crossing at Emporia Court would reduce capacity on the IT, thereby impeding rail operations that are part of the national rail network and unduly interfering with the Board’s “exclusive” jurisdiction over “transportation by rail carrier.” State and local actions that have the effect of foreclosing, or unduly restricting a rail carrier’s ability to conduct its operations over property that is part of the national rail network are preempted. *See e.g., Friberg v. Kan. City S. R.R.*, 267 F.3d 439, 443 (5th Cir. 2001) (“Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad” such as “train speed, length, and scheduling.”); *City of Lincoln v. STB*, 414 F.3d 858(8th Cir. 2005) (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); *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675 (7th Cir. 2011) (proposed state condemnation establishing perpetual easement over railroad right-of-way preempted by § 10501(b) even if City’s proposed use of the property would have been coextensive with prior lease). *Accord CSXT*, slip op. at 1 (finding that Congress foreclosed state or local power to determine how a railroad’s traffic should be routed); *Ao-Zhou*, slip op. at 2 (finding that loss of railroad land to state adverse possession laws would limit the capacity of the line of railroad should it be needed for potential future active rail service).

Finally, FYG’s suggestion that WTA could reduce the impacts of a crossing at Emporia Court by pursuing alternative locations for operations and its argument that WTA could remove

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<sup>44</sup> *Id.* Without conceding that the crossing may create an unreasonable burden, FYG seems to argue that the existence of these alternatives makes a crossing at Emporia Court reasonable. FYG includes no evidence supporting how its proposed alternatives are reasonable, nor does it explain how requiring the railroad to make such changes would not be governing the railroad’s operations. FYG also does not support its claim that WTA “has many other ready options that will allow its operations to proceed uninterrupted once the Emporia Court crossing is built.” *Id.* at 9-11.

<sup>45</sup> *Id.* at 7, Ex. 13 at 8.

the north track to adhere to the MUCTD's standards for crossings and warning devices without blocking 25th Street would each have the effect of managing or governing rail transportation.<sup>46</sup> The circumstances presented here demonstrate that, if allowed to occur, these modifications would unreasonably interfere with railroad operations. Therefore, federal preemption under § 10501(b) applies. See Franks Inv. Co., 593 F.3d at 410; Ao-Zhou, slip op. at 2. As noted, the purpose of federal preemption of state law under § 10501(b) "is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce." Norfolk S. Ry. Co.—Pet. for Declaratory Order, FD 35701, slip op. at 4, 6 n.14; H.R. Rep. No. 104-311, at 95-96. The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for the design, construction, maintenance, and repair of rail lines—activities that are an integral part of, and directly affect, rail transportation. Any court order or local ordinance that would require WTA to construct a crossing at Emporia Court or require WTA to make the types of operational changes FYG suggests is preempted by federal law.

It is not necessary for the Board to determine whether the 1916 Ordinance is a voluntary agreement or whether the IT is industrial, switching track used for storage, because a ruling on those issues would have no bearing on our conclusion that a mandated crossing at Emporia Court is preempted. At the outset, it appears that the 1916 Ordinance is a local law, passed by the city council, and not a private agreement between the railroad and the city.<sup>47</sup> Even if the ordinance can be viewed as a voluntary agreement, voluntary agreements between rail carriers and state or local entities are not enforceable under § 10501(b) where, as here, the railroad later demonstrates that enforcement of its agreement would unreasonably interfere with the railroad's operations. Twp. of Woodbridge v. Consol. Rail Corp., NOR 42053, slip op. at 4-5 (Dec. 1, 2000) (clarified in decision served March 23, 2001).

Similarly, whether or not the IT is § 10906 excepted track, as FYG argues, or main line track, as WTA argues, is not relevant to a determination of whether a mandated crossing at Emporia Court is preempted. The Board and courts have consistently found that because the Board's jurisdiction over transportation by rail carrier is "exclusive," § 10501(b) preempts state law remedies without regard to whether or not the Board actively regulates the particular activity involved. See Pace, 613 F.3d at 1068-69; Port City Props., 518 F.3d at 1188. As long as the railroad activity is within the Board's jurisdiction, preemption under § 10501(b) applies.

However, we do not conclude that any crossing over the IT necessarily would be preempted. The state courts concluded that FYG has a right to access its property and, as

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<sup>46</sup> Further, removal of the north track and construction of a new south track would not affect the impact on interstate commerce of a crossing at Emporia Court.

<sup>47</sup> Reply to Opening 14. The parties have little additional information about the ordinance. See Opening 8; Reply to Opening 15.

explained above, crossing disputes are generally subject to state and local law as long as the crossing location will not unreasonably interfere with railroad operations. Based on the current record, it does not appear that a court-ordered crossing at the location of the temporary crossing, at the west end of the IT, would have that same effect on interstate railroad operations. It would be reasonable for a state court, applying state law, to address those issues in light of the preemption standards discussed in this decision. See Maumee, slip op. at 2; E. Ala. Ry., slip op. at 4.

It is ordered:

1. WTA's petition for a declaratory order is granted to the extent discussed above.
2. A court ordered crossing from 25th Street over the IT at the proposed Emporia Court location is preempted by federal law.
3. This proceeding is discontinued.
4. This decision is effective on its service date.
5. A copy of this decision will be served on:

The Honorable Joseph Bribiesca  
18<sup>th</sup> Judicial District Court, Sedgwick County  
525 North Main Street  
Wichita, KS 67203

By the Board, Acting Chairman Miller and Vice Chairman Begeman.