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August 20, 2015

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**By Hand-Delivery**

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

**ENTERED**  
**Office of Proceedings**  
**August 20, 2015**  
**Part of**  
**Public Record**

Re: CSX Transportation, Inc. – Petition for Declaratory Order  
STB Finance Document No. 35832

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is an original and ten copies of CSX Transportation, Inc.’s (“CSXT’s”) Petition for Reconsideration and/or Clarification along with three disks containing the Petition in pdf searchable format. Our check for \$300.00 for the cost of filing is also enclosed.

Please date-stamp the extra copy and return it to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

Sincerely,

Marc A. Korman

Enclosures

**FILED**  
**August 20, 2015**  
**Surface Transportation Board**

**FEE RECEIVED**  
**August 20, 2015**  
**Surface Transportation Board**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35832

AUG 20 2015

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CSX TRANSPORTATION, INC.  
– PETITION FOR DECLARATORY ORDER

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CSX TRANSPORTATION, INC.'S PETITION FOR  
RECONSIDERATION AND/OR CLARIFICATION

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Dated: August 20, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 35832**

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CSX TRANSPORTATION, INC.'S PETITION FOR  
RECONSIDERATION AND/OR CLARIFICATION

I. INTRODUCTION

CSX Transportation, Inc. (“CSXT”) hereby requests that the Surface Transportation Board (“STB” or “Board”) reconsider, or clarify, its July 31, 2015 Decision (“Decision”) denying CSXT’s Petition for a Declaratory Order.

In its Decision, the Board correctly stated that “there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance.” *Id.* at 3. Indeed, after CSXT filed its Petition, the Board issued its well-reasoned and directly applicable decision in *Thomas Tubbs, et al. – Petition for Declaratory Order*, Docket No. 35792 (served Oct. 31, 2014) (“*Tubbs*”). Addressing nearly identical claims, the Board declared those state claims categorically preempted by the ICC Termination Act (“ICCTA”), 49 U.S.C. § 10501(b). CSXT respectfully submits that it is unquestionably clear that under *Tubbs*, HAMP’s state law claims for negligence, trespass, nuisance, and inverse condemnation are also categorically preempted because,

just as in *Tubbs*, they constitute impermissible state law regulation aimed directly at the construction, design, and maintenance of a railroad culvert<sup>1</sup> that met the railroad's needs but was unable to handle an extraordinary and unprecedented rainfall event.

Yet the Board's Decision in this case has unnecessarily and inexplicably muddied the waters and the controlling *Tubbs* decision by suggesting that whether HAMP's claims are preempted "will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above." Decision at 5. With the utmost respect, this statement is neither helpful nor correct. It could be read to suggest that the question of whether HAMP's claims are preempted should be determined by an "as applied" analysis rather than a "categorically preempted" analysis. Under settled Board precedent this is plainly incorrect and CSXT respectfully requests that the Board clarify that its decision in *Tubbs* controls here.

As noted, the *Tubbs* decision found identical state claims categorically preempted at the initial pleadings stage of the case during a court-ordered stay.<sup>2</sup> The Board apparently and mistakenly believed that, unlike *Tubbs*, the proceeding here before the Virginia state court had progressed further along such that the Board should not interfere with those state court proceedings. In fact, the Virginia proceedings have been in a voluntary abeyance. There is no principled distinction between this case and *Tubbs*

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<sup>1</sup> Although the parties have referred to the structure at issue as a "culvert" based on HAMP's characterization in its State Court Complaint, the culvert is more accurately a bridge under the relevant Federal Railroad Administration regulations based on its size.

<sup>2</sup> "In this case, Petitioners' state law claims are federally preempted, whether they are viewed as 'categorical' or 'as applied,' because they have the effect of regulating and interfering with rail transportation." *Tubbs* at 4.

that justifies the Board's reluctance to issue a decision confirming the holding in *Tubbs* that state law claims involving railroad design, construction, and maintenance are categorically preempted. While courts are indeed capable of deciding issues of ICCTA preemption, the Virginia state court's decision may potentially cause confusion and inconsistency if the state court, despite CSXT's arguments to the contrary, interprets the Decision to require an "as applied" analysis as opposed to following the Board's legal framework in *Tubbs*.

Accordingly, CSXT respectfully urges the Board to reconsider its reluctance to apply the controlling *Tubbs* decision to this case, to grant CSXT's Petition for Declaratory Order, and to rule on the merits accordingly. As the Board has noted, the agency is uniquely well qualified to rule upon issues of federal preemption of railroad construction and maintenance matters.<sup>3</sup> Passing the responsibility to interpret the *Tubbs* decision to the state court, when the issue has been fully briefed before the STB, seems imprudent and inefficient. Moreover, the Board should be aware that CSXT did not update the agency on the status of the state case because the case has effectively been in abeyance while the parties awaited a determination from the Board whether the state claims are federally preempted.

In the alternative, if the Board for whatever reason declines to grant CSXT's request for a Declaratory Order and thereby avoid ruling on the question of federal

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<sup>3</sup> *California High-Speed Rail Authority – Petition for Declaratory Order*, Docket No. FD 35861at 5 (served Dec. 12, 2014) (acknowledging that the Board is 'uniquely qualified' to address issues of federal preemption under § 10501(b)).

preemption, then CSXT urges the Board to clarify its July 31 Decision by providing unequivocal guidance to the state court that there is strong and clear authority that the claims are all categorically preempted, and that the statement about the “facts and circumstances” was not intended to undermine or change in any fashion the validity of those controlling legal authorities. Such clarifying guidance would assist the state court in its rulings upon the issues of ICCTA preemption CSXT has raised there.

## II. ARGUMENT

The Board should reconsider, or in the alternative clarify, its Decision in this proceeding for three reasons. First, the Board’s decision in *Tubbs* is directly on point and requires a holding that HAMP’s state law claims are categorically preempted. Second, rather than simply applying the *Tubbs* precedent, the Board proclaimed that federal preemption “will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above.” Decision at 5. The Board, however, provided no guidance or explanation concerning how the state court is supposed to reconcile that statement with the clear holding in *Tubbs*. In the alternative, if the Board is unwilling to grant CSXT’s Petition for Declaratory Order and to apply its *Tubbs* precedent to this dispute, it should clarify how the question of federal preemption will likely depend on the facts and circumstances of this case, if at all (which CSXT respectfully submits is not necessary given the undisputed fact that the railroad culvert at issue is part of the interstate rail network). Finally, the Board is uniquely qualified to judge issues of federal preemption arising in the railroad industry.

The Board should not shy away from issuing clear and decisive decisions in this area, particularly in a case like this, in which an unfavorable decision in the state court proceeding could well result in widespread negative impacts across the rail industry. The state court proceeding has been effectively in abeyance pending a decision from the Board regarding the preemption issues raised by CSXT. It is in the best interests of everyone involved to have the Board issue a definitive ruling on this important issue.

*A. The Board should reconsider its decision and find HAMP's state law claims to be preempted by ICCTA.*

CSXT filed its Petition in June, 2014. At that time, the Board had not yet issued its controlling decision in *Tubbs*. CSXT filed its Petition because it believed that there were genuine and important preemption issues raised in the complainant's State Court Complaint that would be best decided by the federal agency having the most expertise in the area of federal railroad preemption—the Board.

After CSXT filed its initial Petition, the Board issued the *Tubbs* decision which clarified the law, finding that petitioners' state law tort claims alleging that flooding and property damage were caused by the improper design, construction, and maintenance of BNSF Railway Company ("BNSF") tracks, were categorically preempted. *Tubbs* at 4. Yet despite strikingly similar claims and factual allegations, the Board declined in its Decision to clearly state that *Tubbs* governs the issues raised in CSXT's Petition. CSXT urges the Board to revisit the issue and hold that HAMP's state law claims are similarly preempted.

The claims and allegations giving rise to the *Tubbs* matter are legally and factually indistinguishable from those in this case. The *Tubbs* Petitioners brought suit against BNSF for flooding and property damage allegedly caused by improper design, construction, and maintenance of mainline track situated along an embankment, which served as a dam for occasional floodwaters from the Missouri River. *Tubbs* at 1-2. Petitioners in that case claimed that BNSF's actions – raising the embankment and fortifying the track structure in preparation for anticipated flooding – damaged their property and rendered it almost worthless. *Id.* at 2. As a result, Petitioners sought damages for trespass, nuisance, negligence, inverse condemnation, and statutory trespass under Missouri State law. *Id.* The Board, at the initial pleadings stage during a stay in the case, determined that Petitioners' claims had "the effect of regulating and interfering with rail transportation" and as a result, the claims were preempted under Section 10501(b). *Id.* at 4.

In contrast, notwithstanding the remarkably similar facts in this matter, the Board Decision confusingly stated that the outcome "will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above." Decision at 5. This statement is inconsistent with *Tubbs*, which presented a nearly identical fact pattern:

Petitioners seek to recover damages from BNSF through state law tort claims, alleging that flooding and property damage were caused by the improper design, construction, and maintenance of BNSF's tracks. These claims are based on alleged harms stemming directly from the actions of a rail carrier, BNSF, in designing, constructing, and maintaining an active rail line – actions that are clearly part of

‘transportation by rail carriers’ and are therefore subject to the Board’s exclusive jurisdiction under § 10501(b). If these claims were allowed to proceed, they would have the effect of managing or governing rail transportation.

*Tubbs* at 4.<sup>4</sup> The claims at issue in CSXT’s Petition are virtually identical – claims regarding flooding and property damage allegedly caused by the improper design, construction, and maintenance, of CSXT’s railroad culvert and track structures. There is no material difference between the underlying facts, claims, or procedural posture of the two cases, and yet the Board here finds that the outcome of this case is dependent upon how the facts fit into the case law. The Board should not allow its decision in *HAMP*, which is in clear conflict with *Tubbs*, to stand.

A decision granting CSXT’s Petition and applying *Tubbs* to these facts is all the more important because at least one federal court has already followed and endorsed the *Tubbs* decision and its proper interpretation of ICCTA.<sup>5</sup> The Decision in this matter erroneously suggests that state courts should undertake complicated factual analyses in such matters, a suggestion that CSXT respectfully submits is erroneous. *Tubbs* correctly states that issues of maintenance and construction of rail lines are categorically preempted, rendering such a complicated factual analysis unnecessary.

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<sup>4</sup> In this case, Petitioners’ state law claims are federally preempted, whether they are viewed as ‘categorical’ or ‘as applied,’ because they have the effect of regulating and interfering with rail transportation.” *Tubbs* at 4.

<sup>5</sup> See, e.g., *Jones Creek Investors, LLC & Savannah Riverkeeper, Inc. v. Columbia Cnty., Georgia & CSX Transportation, Inc.*, CV 111-174 (S.D. Georgia) (March 31, 2015) at 33 (relying upon *Tubbs* in determining that “State law claims against CSXT stemming from the failure, construction, design and operation of the culverts are preempted by the ICCTA.”).

***B. The Board should exercise its expertise in this area to provide clear guidance to the State court.***

One of the roles of the Board is to provide guidance to state courts regarding issues of federal preemption that arise in the railroad industry. The Board, as an expert in the industry, has itself acknowledged that it is particularly well suited to resolve such disputes.<sup>6</sup> This Petition raises the very sort of issues that would “unduly burden interstate commerce and amount to impermissible state regulation of [CSXT’s] operations by interfering with the railroad’s ability to uniformly design, construct, maintain, and repair its railroad line,” issues that the Board is well-versed in tackling. *Tubbs* at 5. The Board’s expertise is even more appropriate here as the state case has remained in de facto abeyance, and any concern by the Board about interfering with ongoing proceedings is unwarranted.

The Board should use its broad authority to make it clear that this is precisely the sort of case in which ICCTA preemption applies. To do otherwise would put the railroads at the mercy of the whim of local state legislators and judges in every jurisdiction in which they operate. *Id.* (“The interstate rail network could not function properly if states and localities could impose their own potentially differing standards

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<sup>6</sup> *California High-Speed Rail Authority – Petition for Declaratory Order*, Docket No. FD 35861at 5 (served Dec. 12, 2014) (acknowledging that the Board is ‘uniquely qualified’ to address issues of federal preemption under § 10501(b)).

for these important activities, which are an integral part of, and directly affect, rail transportation.”).<sup>7</sup>

Indeed, this sort of federal issue is best resolved by the Board and, if necessary, reviewed by Federal appellate courts. If preemption matters are left entirely to the states, inconsistent and conflicting decisions could create patchwork regulation for the railroads. This is precisely what the preemption authority is designed to avoid.<sup>8</sup> The Board should seek to resolve these issues wherever possible in order to avoid the risk of conflicting state court decisions that would be, for all intents and purposes, unreviewable by any federal court.

Failure to find HAMP’s claims preempted by ICCTA would result in sweeping negative impacts for CSXT and other railroads. It would be extremely expensive for CSXT to redesign its culverts to accommodate a “once-in-a-millennium event” like Tropical Storm Lee, if such a redesign were even feasible from an economic or engineering perspective. CSXT estimates that costs would likely exceed \$1 million to

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<sup>7</sup> See also *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 12 (S.C. 2011) (“The need for uniformity is readily apparent based on the number of bridges throughout the United States and the diversity of ownership.”).

<sup>8</sup> *Tubbs* at 5 (“The purpose of the § 10501(b) preemption is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce.”), citing *Norfolk S. Ry. Co. – Pet. for Declaratory Order*, Docket No. 35701, at 4, 6, n.14 (served Nov. 4, 2013), citing H.R. Rep. No. 104-311, at 95-96 (1995).

redesign or expand just the single culvert at issue, a significant sum that would impose an economic burden on the railroad.<sup>9</sup>

Furthermore, any such order could well have a cascading effect across CSXT and other railroad systems. CSXT's system has tens of thousands of bridges and culverts. If even a fraction of the landowners adjacent to those structures sought similar relief, the costs and burdens imposed on CSXT would be very significant. Even the complainants acknowledge that "living below a 100 year base flood level is not unusual in Virginia or in the United States." Compl. ¶ 25. If a court were to set a precedent entitling anyone living below a 100-year base flood level to seek damages from a railroad operating nearby, the results would be entirely predictable – and hugely negative – for the rail industry. Railroads would be subject to suits across the country from nearby landowners and the resulting patchwork of local regulation would impose undue burdens on the industry. This is precisely the outcome Congress designed ICCTA preemption to prevent, and is precisely the outcome the Board should seek to avoid. A clarifying ruling in this matter would prevent such an undesirable outcome.

***C. CSXT did not update the Board about the Virginia State Court Action because it has been effectively in abeyance.***

The Board suggests that part of the reason it declined to issue a declaratory order in this proceeding was because the parties did not file an update with it regarding the status of CSXT's request for a stay or the status of the state court proceeding in

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<sup>9</sup> See *Anderson v. BNSF Ry. Co.*, 291 S.W.3d 586, 582 (Ark. 2009) (holding that jurisdiction of ICCTA was exclusive over state action that impacts transportation by rail and has an economic impact on the railroad).

general.<sup>10</sup> CSXT did not provide any update because its request for a stay and its plea in bar asserting its ICCTA preemption defense remain pending. In October, 2014, the state court sustained CSXT's demurrer as to the state statutory claims pursuant to the Virginia Dam Safety Act, recognizing that the culvert is not a "dam" governed by the Act, and granted HAMP leave to amend the complaint accordingly. HAMP filed an amended complaint with nearly identical assertions and claims except for the state statutory claims, including allegations of negligence, trespass, nuisance, and inverse condemnation related to CSXT's design, construction, and maintenance of its culvert.

To date, the court has not acted upon CSXT's request for a stay. In effect, the state court proceeding has been in abeyance pending the outcome of CSXT's Petition to the Board.

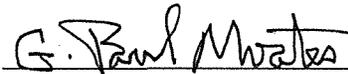
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<sup>10</sup> See Decision at 1, n.2; 3.

### III. CONCLUSION

The Board is uniquely qualified to decide issues of federal preemption. This case is squarely in line with those in the well-reasoned *Tubbs* decision, and federal cases that have followed that decision. CSXT urges the Board to reconsider its July 31 Decision, to grant CSXT's Petition for Declaratory Order, and to rule upon the merits accordingly. Alternatively, if the Board is unwilling to grant CSXT's Petition, CSXT requests that the Board clarify that nothing in its July 31 Decision was intended to undermine in any fashion CSXT's argument that the state claims are categorically preempted under the Board's well-reasoned analysis in *Tubbs*.

Respectfully submitted,



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*Counsel to CSX Transportation, Inc.*

Dated: August 20, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of August, 2015, I served a copy of the foregoing CSX Transportation, Inc.'s Petition for Reconsideration and/or Clarification by U.S. Mail or more expeditious method of delivery upon:

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Marc Korman