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In the
Indiana Supreme Court

No. _____-_____-_____

STATE OF INDIANA, Appellant-Defendant, v. NORFOLK SOUTHERN RAILWAY COMPANY, Appellee-Plaintiff.	On Petition to Transfer from the Indiana Court of Appeals, No. 02A03-1607-IF-1524 Appeal from the Allen Superior Court Trial Court Case Nos.: 02D05-1503-IF-002039; 02D05-1505-IF-002988; 02D05-1505-IF-003070; 02D05-1505-IF-003071; 02D05-1505-IF-003312; 02D05-1505-IF-003082; 02D05-1505-IF-003084; 02D05-1505-IF-003183; 02D05-1505-IF-003246; 02D05-1505-IF-003248; 02D05-1505-IF-003251; 02D05-1505-IF-003255; 02D05-1505-IF-003262; 02D05-1505-IF-003263; 02D05-1505-IF-003264; 02D05-1505-IF-003362; 02D05-1505-IF-003363; 02D06-1506-IF-006379; 02D06-1506-IF-006383; 02D06-1508-IF-009742; 02D04-1508-IF-009744; 02D04-1512-IF-015577; 02D06-1511-IF-013718 The Honorable Wendy Davis, Judge The Honorable David M. Zent, Magistrate

APPELLEE'S PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

I. In decisional law issued throughout the United States, state and federal courts reviewing state or local regulations similar to Indiana's Blocked-Crossing Statute under the federal ICC Termination Act ("ICCTA") have repeatedly held the regulations preempted. The Panel was provided with this decisional law, including decisions by this trial court and another in Wells County just last year, (Appellee's.App.Vol.II.pp.33-58), but disregarded it. Is transfer warranted to ensure that Indiana's federal preemption precedent is consistent with the federal courts and our neighboring states of Illinois, Wisconsin, Ohio, Kentucky, etc., *see* App.R.57(H)(3), in an important issue of "first impression" in the State of Indiana, as acknowledged by the Panel, *see* App.R.57(H)(4), so that Indiana is not an outlier as the only state interfering with interstate commerce and thus thwarting Congressional intent?

II. There is an equally impressive body of federal and state decisional law holding that the Federal Railroad Safety Act ("FRSA") likewise preempts state and local blocked crossing laws similar to Indiana's statute. Disappointingly, the Panel again disregarded this law and instead relied on a single case from Ohio issued 17 years ago that Ohio even no longer follows. Is transfer warranted to ensure that Indiana's FRSA preemption precedent is consistent with this large and consistent body of federal and state decisional law? *See* App.R.57 (H)(3),(4).

TABLE OF CONTENTS

Contents

QUESTIONS PRESENTED ON TRANSFER 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER 8

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. Transfer Is Warranted To Decide This Important Question Of Federal Law In A Manner Consistent With Widely Accepted Precedent. 11

II. Transfer Is Warranted Because The Panel Erred in Three Important Ways When it Departed from Well-Settled Precedent And Held That ICCTA Does Not Preempt The Indiana Blocked-Crossing Statute. 13

A. The Panel Applied The Wrong Body Of Law 14

B. The Panel Disregarded The Broad And Sweeping Preemption Language Used By Congress. 15

C. The Panel Incorrectly Relied Upon A Lack Of Federal Remedy To Find No ICCTA Preemption. 18

III. Transfer Is Warranted To Correct the Panel's Erroneous Conclusion That The Indiana Blocked-Crossing Statute Is Not Preempted by The Federal Railroad Safety Act 19

CONCLUSION 23

CERTIFICATE OF WORD COUNT 24

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Page

Cases

Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.,
622 F.3d 1094 (9th Cir. 2010) 16

Canadian Nat'l Ry. Co. v. City of Des Plaines,
No. 1-04-2479, 2006 WL 345095 (Ill.App.Ct. Feb. 10, 2006) 12

City of Auburn v. United States,
154 F.3d 1025 (9th Cir. 1998) 16

City of Lincoln v. Surface Transp. Bd.,
414 F.3d 858 (8th Cir. 2005) 16

City of Seattle v. Burlington N. R.R. Co.,
41 P.3d 1169 (Wash. 2002) 12

CSX Transp., Inc. v. City of Plymouth,
283 F.3d 812 (6th Cir.2002) 12, 20

CSX Transp., Inc. v. City of Plymouth,
92 F. Supp. 2d 643 (E.D. Mich.2000) 20

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 12, 19, 20

CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n,
944 F. Supp 1573 (N.D. Ga. 1996) 16

CSX Transp., Inc.—Pet. for Declaratory Order,
STB Finance Docket No. 34662, 2005 WL 584026 (S.T.B. Mar. 14, 2005) 15

Delaware v. Surface Transportation Bd.,
859 F.3d at 16 (D.C. Cir. 2017) 16

Duluth, Winnipeg and Pacific Ry. Co. v. City of Orr,
529 F.3d 794 (8th Cir. 2008) 22

Eagle Marine Indus., Inc. v. Union Pac. R.R. Co.,
882 N.E.2d 522 (Ill.2008) 12, 21

Elam v. Kan. City S. Ry. Co.,
635 F.3d 796 (5th Cir. 2011) 12, 18

Ezell v. Kan. City S. Ry. Co.,
866 F.3d 294 (5th Cir. 2017) 18

Fayus Enter. v. BNSF Ry. Co.,
602 F.3d 444 (D.C. Cir. 2010) 18

Franks Inv. Co. v. Union Pac. R.R. Co.,
593 F.3d 404 (5th Cir. 2010) 17, 18

Friberg v. Kan. City S. Ry. Co.,
267 F.3d 439 (5th Cir. 2001) 12, 17

Green Mountain R.R. Corp. v. Vt.,
404 F.3d 638 (2d Cir. 2005) 16

Herriman v. Conrail, Inc.,
883 F. Supp. 303 (N.D.Ind.1995) 22

Krentz v. Consolidated Rail Corp.,
910 A.2d 20 (Pa.2006) 12, 21

Norfolk & W. Ry. Co. v. Public Util. Comm'n of Ohio,
926 F.2d 567 (6th Cir. 1991) 22

Ohio v. Chessie Sys. R.R.,
No. 2494, 1990 WL 1209 (Ohio Ct. App. Jan. 3, 1990) 21, 22

Ohio v. Norfolk S. Ry. Co.,
No. CRB001405, etc., Perrysburg Municipal Court, Wood County,
State of Ohio (May 15, 2002) 21

Ohio v. Norfolk S. Ry. Co.,
No. CRB-04-01034, *et seq.*, Lucas County Municipal Court,
State of Ohio (Apr. 11, 2006) 21

Ohio v. Pate,
No. TRD 1404589 A, Ottawa County Municipal Court,
State of Ohio (Oct. 13, 2014) 21

Ohio v. Wheeling & Lake Erie Railway Company.
743 N.E.2d 513 (Ohio Ct. App. 9 Dist. 2000) 21

People v. Burlington N. Santa Fe R.R.,
209 Cal.App.4th 1513 (2012) 11

S. Pac. Co. v. Arizona,
325 U.S. 761 (1945) 12

State v. Norfolk S. Ry. Co.,
84 N.E.3d 1230 (Ind.Ct.App. 2017) 9

Thomas Tubbs, et al.—Pet. for Declaratory Order,
STB Finance Docket No. 35792, 2014 WL 5508153 (S.T.B. Oct. 29, 2014) 19

Union Pac. R.R. Co. v. Chi. Transit Auth.,
647 F.3d 675 (7th Cir.2011) 12, 16

Vill. of Mundelein v. Wis. Cent. R.R.,
882 N.E.2d 544 (Ill.2008) 12, 20, 21, 22

Statutes

49 C.F.R. §§213.9, 213.307, 213.57, 232, 234.105–.107 20

49 C.F.R. Part 232 20

49 U.S.C. § 10501(b) 15, 16, 18, 19

49 U.S.C. § 20106 19

49 U.S.C. § 20106(a)(2)(A) 22

Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 ..... *passim*

ICC Termination Act (ICCTA), 49 U.S.C. § 10101 ..... *passim*

Ind. Code § 8-6-7.5-1 ..... 8, 20

Rules

App.R.57(H)(3) 2, 13

App.R.57(H)(4) 2, 13

Other Authorities

FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, *Trains Blocking Highway-Rail Grade Crossings Fact Sheet* (May 2008), *available at* http://media.al.com/on-the-road/other/FRA%20fact%20sheet.pdf (last visited Jan. 15, 2018) 21

H.R. REP. NO. 104-311 (1995), *available at* 1995 WL 683028 17

S. REP. NO. 104-176 (1995), *available at* 1995 WL 701522 15

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

This case arises out of twenty-three State-issued citations to Norfolk Southern Railway ("NS") for violations of Indiana's blocked-crossing statute that provides as follows:

> It shall be unlawful for a railroad corporation to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of ten (10) minutes, except where such train, railroad car or engine cannot be moved by reason of circumstances over which the railroad corporation has no control.

Ind. Code § 8-6-7.5-1. NS challenged the citations on the ground that this statute is preempted by both ICCTA, 49 U.S.C. § 10101, *et seq.*, and FRSA, 49 U.S.C. § 20101, *et seq*.

NS submitted uncontested evidence on the complexity of railroad operations and the root causes of blocked crossings. NS operates over 19,500 route miles across 22 states and the District of Columbia. In Indiana alone, NS operates over 1,440 miles of track and crosses 2,670 grade crossings. Trains may block grade crossings during the performance of a variety of rail operations, including, for example, switching operations necessary to serve local industries, or while trains are seeking access to entry into the local yard. (Appellee's.App.Vol.II.p.3.) Trains may also experience mechanical defects, resulting in mandatory stoppages that can result in grade crossing blockages. (*Id.*) When these operations occur, trains occasionally stop in locations that block a public crossing. To limit blocked crossings would require NS to adjust, among other things, its operating procedures to either run trains at

higher speeds, to operate shorter (and, therefore, more numerous) trains, or to "cut" (*i.e.,* break apart) a train to clear a grade crossing to allow motor vehicle traffic to pass. (Appellee's.App.Vol.II.p.4.) States and local communities have tried frequently to regulate these rail operations, but state and federal courts alike have repeatedly held these regulations preempted by Federal law.

On June 8, 2016, the trial court granted summary judgment, finding that this blocked-crossing statute was an impermissible form of state regulation of railroad operations under both the ICCTA and the FRSA. (Appellant's.App.Vol.II.pp.7-9.) The State appealed. Oral argument occurred on August 29, 2017. The Association of American Railroads filed an *amicus* brief in support of the trial court's decision. A Court of Appeals panel ("Panel") reversed, holding that the statute is not preempted by either law. *See State v. Norfolk S. Ry. Co.*, 84 N.E.3d 1230, 1238 (Ind.Ct.App. 2017) ("Decision"). NS sought rehearing, noting (again) numerous decisions from other jurisdictions that disallowed local regulation of railroad crossings, making Indiana an outlier with the potential to significantly impact rail operations not only state-wide, but across the nation. The Panel denied rehearing. NS seeks transfer with support from state and national railroad *amici*, as well as former federal regulators from the federal Surface Transportation Board ("STB").

SUMMARY OF ARGUMENT

This case presents an important issue of first impression for Indiana. Thankfully, numerous other jurisdictions offer valuable guidance in grappling with the

same issue. The U.S. Supreme Court has declared that state and local authorities may not regulate train speeds or train lengths. The 9th Circuit and the D.C. Circuit have held that states may not regulate how long a train idles on the track. And the Supreme Courts of Pennsylvania and Illinois, as well as the 5th and 6th Circuits, among others, have specifically held that attempts to regulate rail operations via blocked-crossing statutes are preempted by federal law.

The Panel disregarded this significant body of decisional law, so that Indiana is now an outlier in this area of federal preemption. In conducting its ICCTA analysis, the Panel relied upon the wrong body of law, failed to address voluminous contrary precedent identified by NS, and made erroneous conclusions about the need for a federal remedy to find ICCTA preemption. The FRSA analysis is equally erroneous. The Panel relied on a Ohio case issued 17 years ago that Ohio no longer even follows and disregarded a large body of applicable law, including the holdings of the Supreme Courts of Illinois and Pennsylvania. Transfer is warranted to ensure that Indiana's federal preemption precedent is consistent with that of the federal courts and its sister states.

The Decision below is also of national significance. Indiana stands at the heart of the Nation's freight rail network. As *amici* Association of American Railroads and Short Line Railroads both observe, Indiana is a key state for railroads operating throughout the United States. Forty-one railroads operate over 4,200 miles of track. And there are more than 5,600 public grade crossings in Indiana, the

fifth most among all the states. Whether state blocked-crossing statutes conflict with federal law is an important question, not just for Indiana's local railroads, but for the fluidity of rail operations nationwide. As an integrated network, regulation of rail operations in one state will ripple into neighboring states. And if the local communities at the 5,600 grade crossings in Indiana are permitted to regulate rail operations using this blocked-crossing statute, the rail industry will be burdened by a patchwork of state and local regulations of the very sort Congress sought to avoid when it passed comprehensive federal preemption legislation through the ICCTA and the FRSA. Because the Panel's Decision implicates important questions of federal law and has a state-wide if not nationwide impact, transfer is particularly appropriate.

ARGUMENT

I. Transfer Is Warranted to Decide This Important Question of Federal Preemption Law in a Manner Consistent with Widely Accepted Precedent

The Panel's Decision holding that the Indiana blocked-crossing statute is not preempted by either the ICCTA or the FRSA is at odds with a significant body of state and federal decisional law. In fact, in 2012 one state court recognized that "[t]he people have not cited, and we have not discovered through our independent research, a single case in which a court considered ICCTA preemption and concluded that an antiblocking regulation was not preempted." *People v. Burlington N. Santa Fe R.R.*, 209 Cal.App.4th 1513, 1529 (2012).

Were the Indiana Supreme Court to deny transfer, the state would find itself at odds with the many states and federal courts who have overwhelmingly found that state and local blocked crossing regulations cannot withstand federal preemption challenges. For example, the Fifth Circuit has considered the issue and found blocked-crossing statutes preempted by the ICCTA. *See, e.g., Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 807 (5th Cir. 2011); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001).[1] Similarly, the Sixth Circuit, along with the State Supreme Courts of Illinois and Pennsylvania have found blocked-crossing statutes preempted by the FRSA. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir.2002); *Vill. of Mundelein v. Wis. Cent. R.R.*, 882 N.E.2d 544, 556 (Ill.2008); *Eagle Marine Industries, Inc. v. Union Pacific R. Co.*, 882 N.E.2d 522, 524 (Ill.2008); *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 31-36 (Pa.2006). The Panel's ruling also impacts rail operations, including train size and speed, as well as switching operations—interference which has been repeatedly found preempted by Federal and State courts, including the Supreme Court. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993)(states may not regulate train speed); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 783-784 (1945)(invalidating state regulation of train length); *see also Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675, 679 (7th Cir.2011)

[1] *See also, e.g., City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169, 1172 (Wash. 2002) (municipal ordinances regulating blocked crossings preempted by the ICCTA); *Canadian Nat'l Ry. Co. v. City of Des Plaines*, No. 1-04-2479, 2006 WL 345095, at *3 (Ill.App.Ct. Feb. 10, 2006) (ICCTA preempts blocked crossing ordinance).

(state action preempted where it "would have the effect of preventing or unreasonably interfering with railroad transportation")(internal quotations omitted). Because the Panel's ruling puts Indiana at odds with both sister states and federal courts alike, this case is a proper candidate for transfer.

Furthermore, this case involves an important question of law that has not been, but should be, decided by this Court. While blocked-crossing statutes have been found preempted by federal law in numerous other states, this is a matter of first impression in Indiana.

In short, the Panel's decision has decided an important federal question—whether federal law preempts a state statute that regulates railroad operations—in a way that directly conflicts with decisions of the United States Courts of Appeals. Transfer is therefore warranted. Ind.App.R.57 (H)(3). Furthermore, as this case involves important federal questions, with a state-wide impact that has never been addressed by this Court, this case is an ideal candidate for transfer. *See* Ind.App.R. 57(H)(4).

II. Transfer Is Warranted Because the Panel Erred in Three Important Ways When It Departed from Well-Settled Precedent and Held that ICCTA Does Not Preempt Indiana's Blocked-Crossing Statute

The Panel made three errors in its conclusion that the ICCTA does not preempt the Indiana blocked-crossing statute. First, it confused case law addressing routine crossing regulations with those regulating railroad operations via blocked-crossing regulations. While courts have found that routine crossing disputes (such

as those involving the construction and maintenance of grade crossings) are not preempted by the ICCTA, blocked-crossing statutes are treated far differently. Second, it required language in the ICCTA to specifically preempt blocked-crossing laws, ignoring the "broad and sweeping" language used by Congress to preempt state regulation of railroad operations. Finally, the Decision rested on the perceived absence of a federal remedy under the ICCTA, an irrelevant inquiry that conflicts with five federal court of appeals decisions and the views of the STB.

A. The Panel Applied the Wrong Body of Law

In its Decision, the Panel agreed that the STB's position "with respect to these routine crossing cases is consistent with the historical, pre-ICCTA rule governing these crossing disputes." (Decision at 1236)(internal quotation omitted). However, as discussed by former STB members, Dr. Mulvey and Mr. Nottingham, in their *amicus* brief, that holding is untethered from any blocked-crossing precedent and is inconsistent with the STB's intent in defining "routine crossing cases." *See* MULVEY/NOTTINGHAM BRIEF at 9-12. "Routine crossing dispute" cases do not involve the same analysis as blocked-crossing cases. *See id.* By relying upon precedent involving "routine crossing disputes," the Panel applied the wrong body of law, and as a result, deviated from the substantial body of state and federal precedent offered by NS illustrating that courts passing on blocked-crossing statutes have routinely found those statutes preempted by the ICCTA. *See, e.g., (*Appellee's Br.19-22.)

B. The Panel Ignored the Broad and Sweeping Preemption Language Used By Congress

Relying on "routine crossing dispute" cases, the Panel's Decision then demanded specific language in the ICCTA to preempt blocked-crossing statutes. (Decision at 1235-1236.) There is indeed no such language. But there are an infinite number of ways a state or local authority can seek to manage or regulate railroad operations. Congress did not attempt to list each such regulation it intended to preempt with the ICCTA. *It preempted them all*. Congress used broad and sweeping language to "prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp., Inc.—Pet. for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 584026, at *9 (S.T.B. Mar. 14, 2005); *see also* S. REP. NO. 104-176, at 6 (1995) ("Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would w[e]aken the industry's efficiency and competitive viability."), *available at* 1995 WL 701522.

Congress granted the STB *exclusive* jurisdiction over the regulation of rail transportation under the ICCTA, and included a broad preemption provision in the Act. *See* 49 U.S.C. § 10501(b). The statute provides that:

> (b) The jurisdiction of the Board over –
>
> > (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Id. (emphasis added).

Courts and the STB alike have repeatedly acknowledged the breadth of the ICCTA's preemptive scope: "'It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" *City of Auburn v. United States,* 154 F.3d 1025, 1030 (9th Cir. 1998)(quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n,* 944 F. Supp 1573, 1581 (N.D. Ga. 1996)); *see* MULVEY/NOTTINGHAM BRIEF at 13 (same).

Courts have consistently recognized the broad and sweeping language of the ICCTA and have acknowledged that specific language targeting particular state regulatory activity is not required. *See, e.g.*, *Delaware v. Surface Transportation Bd.*, 859 F.3d 16, 22 (D.C. Cir. 2017)(state and local regulation of idling locomotives preempted despite lack of express statutory language); *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (same); *see also Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 645 (2d Cir. 2005) (state and local permitting preempted); *Union Pac. R.R. Co.*, 647 F.3d at 678-679; *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 860-863 (8th Cir. 2005) (state's right to exercise

eminent domain over railroad property preempted). Instead, any state and local regulations that seek to "manage or govern rail transportation" are preempted by the ICCTA. *See Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010).

If this Court applies the widely accepted legal standard for ICCTA preemption, then it will inevitably reach the same result of the other courts. The Indiana blocked-crossing statute plainly seeks to "manage or govern rail transportation." To avoid violating the state law, railroads would need to change operating protocols, train speeds, train sizes, or switching procedures and services. Congress preempted precisely that kind of state and local interference to avoid the "balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. REP. NO. 104-311, at 96 (1995), *available at* 1995 WL 683028. As the Fifth Circuit observed,

> Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad like those imposed by the Texas Anti-Blocking Statute, nor does the all-encompassing language of the ICCTA's preemption clause permit the federal statute to be circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions such as those pertaining to train length, speed or scheduling. We thus hold that the Texas Anti-Blocking Statute, as well as the Fribergs' common law claim of negligence, are preempted by the ICCTA.

Friberg, 267 F.3d at 444.

C. The Panel Incorrectly Relied Upon a Lack of Federal Remedy To Find No ICCTA Preemption

Finally, the Panel rejected ICCTA preemption on the basis that the ICCTA does not provide "remedies for obstruction of traffic." (Decision at 1235.) Yet the Decision cited no case where another court agreed with this interpretation of Section 10501(b). That is because this interpretation is inaccurate.

It is a bedrock principle that a remedy before the STB is not required to preempt state regulations under the ICCTA. At least five federal Circuit Courts have recognized that the lack of a remedy does not permit states to regulate where preemption would otherwise apply. *See, e.g., Fayus Enter. v. BNSF Ry. Co.*, 602 F.3d 444, 450 (D.C. Cir. 2010)(ICCTA was a "*de* regulatory move—not, as plaintiffs would have us believe, an invitation to states to fill the regulatory void created by federal deregulation."). NS detailed the basis for this holding—as explained by the D.C. Circuit in *Fayus Enterprises*—in its Petition for Rehearing. *(*Rehg.Pet.14-15.)

The Fifth Circuit has made clear that these principles apply in the context of challenges to anti-blocking statutes. *See, e.g., Elam*, 635 F.3d at 805 (finding anti-blocking statute preempted by the ICCTA and noting "'[t]o the extent remedies are provided under laws that have the effect of regulating [i.e., managing or governing] rail transportation,' they too are expressly preempted.") (quoting *Franks Inv. Co.*, 593 F.3d at 410 (original alterations)); *see also Ezell v. Kan. City S. Ry. Co.*, 866 F.3d 294, 298-299 (5th Cir. 2017)(same).

The availability of a federal remedy before the STB is therefore irrelevant. As the STB itself has observed, Section 10501(b) of the ICCTA "preempts other attempts to regulate that would unreasonably interfere with railroad operations that come within the Board's jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved." *Thomas Tubbs, et al.—Pet. for Declaratory Order*, STB Finance Docket No. 35792, 2014 WL 5508153, at *3-4 (S.T.B. Oct. 29, 2014)(finding claims for damage caused by flooding allegedly caused by improper design, construction and maintenance of rail line preempted by the ICCTA); *see also* MULVEY/NOTTINGHAM BRIEF at 17-20 (agreeing that federal remedy availability is irrelevant but discussing available federal remedies).

III. Transfer Is Warranted to Correct the Panel's Erroneous Conclusion That Indiana's Blocked-Crossing Statute Is Not Preempted by the Federal Railroad Safety Act

The Panel also erred in concluding that Indiana's blocked-crossing statute is not preempted by the FRSA. The FRSA contains an express preemption provision allowing the Secretary of Transportation to occupy any area of the railroad industry related to safety. 49 U.S.C. § 20106. When the Secretary promulgates regulations "covering the subject matter" of an area of railroad safety, state regulation of the same subject matter, whether contradictory or merely supplemental, is prohibited. *Id.*; *Easterwood*, 507 U.S. at 664. The question is not, as the Panel implied, whether the Secretary has issued a regulation regarding the precise issue in the state statute. (Decision at 1238: "[T]here is no language in the FRSA which explicitly pre-

empts Indiana's Blocked-crossing statute"). "Rather, preemption may be found by examining related safety regulations and the overall structure of the regulations." *Vill. of Mundelein*, 882 N.E.2d at 553; *see also Easterwood*, 507 U.S. at 674 (considering FRSA preemption "in the context of the overall structure of the regulations").

Here, the Secretary of Transportation has issued regulations "covering the subject matter" of blocked-crossing statutes—*i.e.*, the movement and operation of trains at grade crossings. *See Vill. of Mundelein*, 882 N.E.2d at 552-553; *accord* 49 C.F.R. §§213.9, 213.307, 213.57, 232, 234.105–.107 and 49 C.F.R. Part 232 (regulating train speed, train length, and the performance of air brake tests, all of which directly affect the amount of time a train will block a crossing). For NS to comply with the blocked-crossing statute, it would have to reduce train speed, reduce the number of cars on their trains, or fail to comply with federally mandated air brake tests by moving trains before a federally mandated air brake test was completed. *See CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 657 (E.D. Mich.2000) (a blocked-crossing statute "has the effect of actually regulating speed, length, and the performance of air brake testing"), *aff'd by* 283 F.3d 812 (6th Cir. 2002).[2] Therefore, the FRSA expressly preempts Indiana Code § 8-6-7.5-1.

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[2] The Federal Railroad Administration, which regulates railroad safety, has stated that it "does not regulate the length of time a train may block a grade crossing" because such a federal regulation "could have the undesirable effect of causing a railroad to violate other federal safety rules." FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, *Trains Blocking Highway-Rail Grade Crossings Fact Sheet*, at 1 (May 2008), *available at* http://media.al.com/on-the-road/other/

The Panel's holding to the contrary is erroneous. It did not conduct its own analysis of the FRSA express preemption clause; instead, it "adopt[ed] the holding" of *Ohio v. Wheeling & Lake Erie Railway Company* "because of the similarity between the state statutes in question." (Decision at 1236-1238) (citing 743 N.E.2d 513 (Ohio Ct. App. 2000)). *Wheeling* is a thin reed to support a departure from the multitude of cases finding substantially similar blocked-crossing statutes preempted by the FRSA. *Wheeling* also contradicts the decisions of several state Supreme Courts and the Sixth Circuit.[3] The Panel erred by ignoring this body of consistent case law and relying solely on a case (*Wheeling*) that other Ohio courts have not followed in the past fifteen years.[4] The *Wheeling* court's opinion is based on conclusory statements and a single earlier unpublished opinion in *Ohio v. Chessie Sys. R.R.*, No. 2494, 1990 WL 1209 (Ohio Ct. App. Jan. 3, 1990)(unpublished). *Chessie*'s rea-

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FRA%20fact%20sheet.pdf (last visited Jan. 15, 2018). A patchwork of state blocked crossing regulation would only exacerbate the problem.

[3] *See, e.g., Vill. Of Mundelein*, 882 N.E.2d at 556; *Eagle Marine*, 882 N.E.2d at 524; *Krentz*, 910 A.2d at 37; *City of Seattle,* 41 P.3d at 1174; *City of Plymouth*, 283 F.3d at 817; *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 630 (6th Cir. 1996)(all holding that a state or local blocked crossing regulation is preempted by the FRSA); *see also* (Appellee's Br.31–32).

[4] *See, e.g.*, *Ohio v. Pate*, No. TRD 1404589 A, Ottawa County Municipal Court, State of Ohio (Oct. 13, 2014); *Ohio v. Norfolk S. Ry. Co.*, No. CRB-04-01034, *et seq.*, Lucas County Municipal Court, State of Ohio (Apr. 11, 2006); *Ohio v. Norfolk S. Ry. Co.*, No. CRB001405, etc., Perrysburg Municipal Court, Wood County, State of Ohio (May 15, 2002). [**Note**: orders found in Appellant's.App.Vol.II.pp.164-172 and all holding that FRSA preempts state and municipal blocked-crossing regulations]

soning is likewise shallow. *See Vill. of Mundelein*, 882 N.E.2d at 554 ("[In *Chessie*], the Ohio Appellate Court stated without analysis that ...there is no explicit or implicit preemption of the subject matter of [the Ohio blocked-crossing statute].") (internal quotations omitted).

More troubling, *Chessie* is wrong in stating, without analysis or support, that Ohio's blocked-crossing statute was not preempted because the FRSA "expressly allows the states to regulate essentially local safety hazards." *Chessie*, 1990 WL 1209, at *2. While the FRSA does allow states to continue to regulate essentially local safety hazards, such local concerns must be unique to a specific locality.[5] The safety concerns cited by proponents of blocked-crossing statutes are antithetical to "essentially local hazards" because they are the same at every crossing in every town and state that attempts to regulate the amount of time a train can block a crossing. *See Norfolk & W. Ry. Co. v. Public Util. Comm'n of Ohio*, 926 F.2d 567, 571–572 (6th Cir. 1991) (finding that rules of "state wide application" are "not within the second exception" to FRSA preemption because they are "explicitly inconsistent with the definition of a local safety hazard"); *Herriman v. Conrail, Inc.*, 883 F. Supp. 303, 307 (N.D.Ind.1995)(holding that state law cannot respond to a local safety hazard when the condition exists at numerous crossings throughout the state). Because these

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[5] S*ee* 49 U.S.C. § 20106(a)(2)(A); *Duluth, Winnipeg and Pacific Ry. Co. v. City of Orr*, 529 F.3d 794, 798 (8th Cir. 2008)(defining "local safety hazards as local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards")(internal quotations omitted).

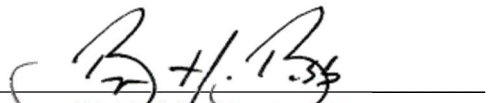
commonplace safety concerns are not "essentially local," blocked-crossing statutes are not exempt from FRSA preemption.

Congress designed an express preemption scheme in the FRSA to ensure nationally uniform safety standards while at the same time enabling unique localities to protect themselves from "essentially local" hazards. The Panel disregarded the statute Congress passed and failed to consider the express conditions required to avoid preemption under the FRSA. A full and proper analysis of the FRSA preemption clause will lead Indiana to join the tremendous weight of authority that has declared blocked-crossing statutes preempted by the FRSA.

CONCLUSION

Transfer is warranted.

Respectfully submitted,



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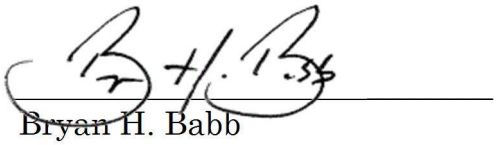

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CERTIFICATE OF SERVICE

I certify that on January 16, 2018, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date, the foregoing document was served upon the following person(s) via IEFS:

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