

No. 08-30236

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**FRANKS INVESTMENT COMPANY, L.L.C.,
Plaintiff-Appellant**

V.

**UNION PACIFIC RAILROAD CO.,
Defendant-Appellee**

**On Appeal from the United States District Court
for the Western District of Louisiana**

**BRIEF OF AMICUS CURIAE TEXAS FARM BUREAU IN
SUPPORT OF APPELLANT AND REVERSAL**

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CERTIFICATE OF INTERESTED PARTIES

No. 08-30236

Franks Investment Company, L.L.C. v. Union Pacific Railroad Co.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST OF TEXAS FARM BUREAU

Texas Farm Bureau respectfully submits this *Amicus Curiae* brief on behalf of its members. Texas Farm Bureau will pay all attorneys' fees incurred in the preparation of this amicus brief. Both parties have consented to its filing.

Texas Farm Bureau is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. Texas Farm Bureau has over 422,159 members and is associated with independent county Farm Bureau corporations in 207 counties across the state. Texas Farm Bureau and its members – who are property owners – believe the protection of property rights generally, and the rights to use railroad crossings located on or adjacent to a property owner's land in particular, is of critical importance to the State of Texas, and to Texas Farm Bureau members.

This Court's holding in *Franks Inv. Co., L.L.C. v. Union Pacific R. Co.*, 524 F.3d 443 (5th Cir. 2008), that the Interstate Commerce Commission Termination Act ("ICCTA")¹ preempts Franks Investment's claim of a state-law property right to use four railroad crossings, contradicts established law regarding a state's traditional police power to regulate railroad crossings. Texas Farm Bureau is concerned that the Court's holding would substantially impair the ability of landowners to exercise their

¹ 49 U.S.C. § 10501 (West 2007).

state-created property rights to use railroad crossings to gain access to their properties.

Notices such as the one below are becoming common in Texas:



Texas Farm Bureau is keenly interested in the legal principles established in this case because many of the Farm Bureau's members use private railroad crossings to access their properties. In many cases, private crossings are the only or primary means of access to a landowner's property. A holding of preemption in this case will prevent these property owners from asserting their common-law rights and from obtaining the proper remedies in state court. For these reasons, Texas Farm Bureau files this brief.

CORPORATE DISCLOSURE STATEMENT

Texas Farm Bureau is a non-profit membership corporation that has no parent corporation. There is no publicly held corporation that owns 10% or more of Texas Farm Bureau's stock.

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STATEMENT OF ISSUES

Amicus Curiae Texas Farm Bureau will address only these issues:

1. Preemption Analysis Should Yield to Core State Property Interests
2. States Have Retained the Police Power to Regulate Railroad Crossings
3. Preemption in this Case Amounts to an Uncompensated Taking

SUMMARY OF ARGUMENT

The preemption analysis in this case should yield to core state property interests. This Court should seriously consider the real world consequences its holding in *Franks* will have on property owners such as Texas Farm Bureau members who rely on railroad crossings to access their properties on a daily basis. Because the issues at stake are state-created property interests, the presumption against preemption is particularly applicable.

Federal law is clear that the states have retained the police power reserved by the Constitution to regulate railroad crossings. The Texas Legislature, who recently repealed several of the civil statutes that regulated railroads because they were either outdated or preempted by federal law, also recognizes this police power and has allowed the State to maintain certain authority over railroad crossings.

Many members of the Texas Farm Bureau have already lost access to their properties as a result the closings of railroad crossings. A holding of preemption will prevent these farmers from seeking the compensation mandated under the Texas Constitution in state courts.

ARGUMENT

I. Preemption Analysis Should Yield to Core State Property Interests

A. General preemption principles.

In this case, the Court should conduct a full-blown balancing of state and federal interests in determining whether preemption should be applied under the ICCTA. The court should independently consider national interests and their putative conflict with state interests. *See, e.g., Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988). While preemption under a theory of express preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction. *See id.*

When determining whether an express preemption clause preempts state law, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). The purpose of such a presumption is to provide “assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.” *Jones v. The Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). This presumption against preemption particularly obtains when a landowner’s property

interests are involved, as this is historically a state law matter. *See New Orleans & Gulf Coast Railway Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008) (“The presumption against preemption applies with full force to . . . generally applicable state property law, even if applied to permit a private, at-grade railroad crossing.”); *In re Davis*, 170 F.3d 475, 481 (5th Cir. 1999) (“Deference to our federalism counsels a presumption that areas of law traditionally reserved to the states, like police powers or property law, are not to be disturbed absent the ‘clear and manifest purpose of Congress.’”); *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law.”).

Another panel of this Court has already recognized that the Surface Transportation Board (“STB”) has delineated a test to apply in determining whether preemption under the ICCTA should be applied to crossing disputes. *See New Orleans & Gulf Coast Railway Co.*, 533 F.3d at 332-33. This Court has already endorsed and applied this test in a case with facts similar to the one at issue. *See id.* This test accomplishes the general principles of a preemption analysis by giving deference to a state’s police power to regulate railroad crossings. Thus, as urged by Franks Investment Company, the Texas Farm Bureau agrees that the STB’s test should be applied in this case.

B. Property owners in Texas have the common-law right to enforce railroad crossing easements.

The Court's decision in this case will affect landowners in all of the states in this Circuit, not just in Louisiana. Many of the Farm Bureau's Texas members also use private railroad crossings to access their properties. In many cases, private crossings are the only means of access to a landowner's property. Most of the Farm Bureau's members acquired the rights to cross railroads at a particular location on or near their properties by prescription. *See State v. Beeson*, 232 S.W.3d 265, 274-75 (Tex. App. – Eastland 2007, pet. abated); *Phillips v. Texas & P. Ry. Co.*, 296 S.W. 877, 879-80 (Tex. Comm'n App. 1927, holding approved). Where the prescriptive right is established, the railroad company may be compelled to keep the crossing open and be held liable in damages for having fenced or closed the way across the tracks. *See Missouri-Kansas-Texas Ry. Co., of Texas v. Cunningham*, 273 S.W. 697, 700 (Tex. Civ. App. – Amarillo 1925, no writ).

The right to cross tracks and to have a crossing maintained by the railroad company may also exist by virtue of a contract between the owner of the land and the company. *See Gulf, C. & S.F. Ry. Co. v. Clay*, 28 Tex. Civ. App. 176, 66 S.W. 1115 (1902). Claims for breach of contract and breach of easement covenants do not have the effect of preventing or unreasonably interfering with railroad operations, and are thus not preempted under the ICCTA. *See PCS Phosphate Co.*,

Inc. v. Norfolk Southern Corp., 520 F.Supp.2d 705 (E.D. N.C. 2007), *aff'd*, 559 F.3d 212 (4th Cir. 2009).

There also exists a common-law rule entitling the owner of land over which a railway is constructed to a way of necessity over the railroad to access his property. *Clay*, 66 S.W. at 1119; *see also Beeson*, 232 S.W.3d at 273-74. If the railroad company fails to provide such a way, it may be liable for damages. *Clay*, 66 S.W. at 1119.

Texas property owners may assert causes of action against servient estate holders, such as railroads, who interfere with their access to and usage of easements. When the owner of the servient estate has interfered with the use of a railway crossing easement and prevented the easement holder from using the easement for the purpose for which it was granted or sought, the servient estate owner may be liable in damages for the losses sustained by the easement holder due to the servient holder's interference. *See Taylor Foundry Co. v. Wichita Falls Grain Co., n/k/a Attebury Grain, Inc.*, 51 S.W.3d 766, 769, 770-71 (Tex. App. – Fort Worth 2001, no pet.). A property owner may also seek an injunction to prevent the railroad company from interfering with his easement. *See Carleton v. Dierks*, 203 S.W.2d 552, 555-56 (Tex. Civ. App. – Austin 1944, writ ref'd n.r.e.).

A person claiming the right to use another person's property pursuant to an easement may ask the court for a declaratory judgment confirming the existence of

the easement and the rights of the parties embodied within. Under the Declaratory Judgments Act, courts may declare the rights and legal relations of the parties to settle uncertainties. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.002-37.004 (Vernon 2008).

As these authorities show, a landowner's right to access and use private railroad crossings remains a significant issue, and it should be dealt with and resolved on a state level. A holding of preemption in this case will result in the landowners being permanently prevented from gaining access to their properties without a proper remedy. If this Court truly seeks to accomplish congressional intent, the Court should give deference to the STB's test by applying it to the facts of this case as it did in *New Orleans & Gulf Coast Railway Co.*

II. States Have Retained the Police Power to Regulate Railroad Crossings

A. Federal law recognizes that states have retained the police power to regulate the creation, maintenance, and safety of crossings.

Courts have consistently held that the states have the traditional police power reserved by the Constitution to regulate the safety of railroad crossings and allocate the costs of constructing, maintaining, and improving such crossings. *See Wheeling & Lake Erie Railway Co. v. Pennsylvania Pub. Util. Comm'n*, 778 A.2d 785, 791 (Pa. Commw. Ct. 2001).² Section 10501(b) of the ICCTA does not

² For this proposition, *Wheeling* cites the following authorities:

expressly preempt this police power. *See id.* at 792. The legislative history of the

ICCTA reveals Congress's intent:

Conforming changes are made to reflect the direct and complete preemption of *State economic regulation of railroads*. *The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or sidetracks formerly reserved for State jurisdiction under former section 10907*. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of *economic regulation of the interstate rail transportation system*. Although *States retain the police powers reserved by the Constitution*, the Federal scheme of *economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive.

Id. (emphasis in original) (quoting H.R.Rep. No. 104-31, 104th Cong. 1st. Sess. 95-96 (1995)). Thus, Congress intended to preempt only the states' previous authority to economically regulate the rail transportation within their borders. *See id.*

Atchison, T. & S.F. Ry. Co. v. Public Utilities Commission of California, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953); *Lehigh Valley R. Co. v. Board of Public Utility Commissioners*, 278 U.S. 24, 49 S.Ct. 69, 73 L.Ed. 161 (1928); *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322 (1921); *Chicago, B. & Q.R. Co. v. State of Nebraska*, 170 U.S. 57, 18 S.Ct. 513, 42 L.Ed. 948 (1898); *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Southern Ry. Co. v. City of Morristown*, 448 F.2d 288 (6th Cir.1971), *cert. denied*, 405 U.S. 922, 92 S.Ct. 958, 30 L.Ed.2d 792 (1972); *American Trucking Ass'n v. United States*, 242 F.Supp. 597 (D.D.C.1965), *aff'd*, 382 U.S. 373, 86 S.Ct. 543, 15 L.Ed.2d 422 (1966); *CSX Transportation, Inc. v. Pennsylvania Public Utility Commission*, 125 Pa.Cmwlth. 528, 558 A.2d 902 (1989), *appeal denied*, 523 Pa. 651, 567 A.2d 654 (1989).

There is no conflict between the exclusive jurisdiction of the STB to economically regulate the rail carriers under the ICCTA and the states' authority to open and close crossings and regulate their maintenance and safety. *See, e.g., Island Park, L.L.C. v. CSX Transportation*, Nos. 07-3125-CV(L), 07-3288-CV(CON), 07-3281-CV(XAP), 07-3283(CON), 2009 WL 585649, at * 5-8 (2d Cir. Mar. 4, 2009) (State of New York's closure of a private railroad crossing was not preempted under the ICCTA because closure did not burden railroad operations); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (ICCTA does not pre-empt state regulation where the regulation does not unreasonably burden rail operations or where there is only a remote or incidental effect on rail transportation); *CSX Transportation, Inc. v. City of Plymouth*, 92 F.Supp.2d 643 (E.D. Mich. 2000) (a state has the authority to regulate the railroads on the local, as opposed to national, safety issues, so long as the regulation is not in conflict with the federal statute and does not unduly burden the interstate commerce).

B. The Texas Legislature recognizes the State's traditional police power to regulate railroad crossings.

Effective September 1, 2007, the Texas Legislature repealed several of the civil statutes that regulated railroads because they were either outdated or preempted by federal law. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1115, §§ 1-5, 2007 Tex. Gen. Laws 3771, 3772; *see also* House Comm. on Transportation,

Bill Analysis, Tex. C.S.H.B. 3711, 80th Leg., R.S. (2007). In recognition of the State's general police power to regulate railroad crossings, however, the Texas Legislature allowed the State to maintain certain authority over railroad crossings. Under the Texas Revised Statutes, the State can still require railroad companies to provide proper crossings at the intersections of all roads and streets, and to place and keep that portion of its roadbed and right of way, over or across which any public road may run, in proper condition for the use of the traveling public. *See* TEX. REV. CIV. STAT. ANN. arts. 6326, 6327 (Vernon 1926 & Supp. 2008). Under Chapter 471 of the Texas Transportation Code, a railway company is required to maintain the part of its roadbed and right of way that is crossed by a public street of a particular type of municipality. *See* TEX. TRANSP. CODE ANN. § 471.001 (Vernon 2007).

Under Texas law, a railroad has a duty to keep a crossing in proper condition for the use of the traveling public, and during the time it repairs a crossing, it is the railroad's duty to provide a reasonably safe detour or temporary way, or to direct travelers to cross by another way. *See James v. Missouri-Kansas-Texas R. Co. of Texas*, 182 S.W.2d 921, 923 (Tex. Civ. App. – Waco 1944, writ ref'd). A railroad's duty to keep a crossing in proper condition for the use of the traveling public is the same as its common-law duty to use ordinary care in the maintenance of a crossing. *See Kansas City Southern Ry. Co. v. Leatherwood*, 519 S.W.2d 533,

535 (Tex. Civ. App. - Beaumont 1975, writ ref'd n.r.e.). In the case of a conflict of interest between the public using the street and the railroad, the interest of the public is paramount. *See City of Fort Worth v. Southwest Magazine*, 358 S.W.2d 139, 141-42 (Tex. Civ. App. – Fort Worth 1962, writ ref'd n.r.e.).

A holding that the ICCTA broadly preempts state law as it relates to railroad transportation would circumvent establish law regarding a state's police power to regulate railroad crossings, and would prevent states from regulating both private and public crossings. The Texas Legislature has a clear interest in maintaining its police powers to open and close crossings and regulate their safety and maintenance. The Court's decision in this case should follow the lead of the well-established authority regarding this issue.

III. Preemption in this Case May Take Property Owners' Rights Without Just Compensation

The Fifth Circuit Panel's holding that preemption applies to a landowner's state-created property right to use railroad crossings to access his property amounts to an uncompensated taking in violation of the Constitution. *See Preseault v. United States*, 100 F.3d 1525, 1537, 1550-52 (Fed. Cir. 1996). To recover on an inverse condemnation claim, a property owner must establish that (1) the State or other governmental entity intentionally performed certain acts (2) that resulted in the taking, damaging, or destruction of the owner's property (3) for public use. *See Steele v. City of Houston*, 603 S.W.2d 786, 788-92 (Tex. 1980); *Watson, Inc. v.*

City of Houston & DeVillier, 998 S.W.2d 637, 640 (Tex. App.-Houston [1st Dist.] 1999, pet. denied). This protection comes from Article I, Section 17 of the Texas Constitution which states, “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made. . . .” TEX. CONST. art. I, § 17. The United States Constitution similarly provides “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

An abutting landowner possesses an easement of access which, as mentioned previously, is a property right. *State v. Heal*, 917 S.W.2d 6, 9-10 (Tex. 1996). This easement is not limited to a right of access to the system of public roads. *See id.* When an easement of access is the property right involved in an inverse condemnation claim, a landowner is entitled to compensation for damages resulting from a material and substantial impairment of access. *Id.* at 10; *City of Waco v. Texland Corp.*, 446 S.W.2d 1, 2 (Tex. 1969). This includes compensation for the diminution in value of the property resulting from the loss of access. *Heal*, 917 S.W.2d at 10.

In her concurring opinion in *Preseault*, Justice O'Connor similarly made the point that:

Although the Commission's actions [in approving a rails-to-trails conversion] may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. The Commission’s actions may delay property owners’ enjoyment of their reversionary interests, but that

delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.

Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) (O'Connor, J., concurring) (citations omitted).

The members of the Texas Farm Bureau have the established, state-created property rights to use railroad crossings to access their properties. Several members have permanently lost access to their properties due to the removal of private railroad crossings. These members have lost income and business opportunities, and their property values have decreased. Many have not been compensated for such removals. By preempting these property owners' common-law property rights to enforce their easements, these members will not only be unable to prevent railroad companies from denying them access to their properties, but their property rights may also be taken without just compensation in violation of the Federal and Texas Constitutions.

IV. Conclusion

The Court's preemption analysis should give strong consideration to a Texas landowner's right to enforce his common-law property rights in state courts. Many of the Farm Bureau's members have lost access to their properties as a result of railroad companies' closures of private railroad crossings. Many of these farmers

have not received any compensation and a holding of preemption will result in the uncompensated taking of their properties. The Fifth Circuit should follow the well-established federal and state laws that recognize that the states have retained the police power reserved by the Constitution to regulate railroad crossings. For these reasons, the Texas Farm Bureau respectfully requests that this Court hold that preemption does not apply in this case.

Respectfully submitted,

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Texas Farm Bureau

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2009, I served two copies of the foregoing Brief of Amicus Curiae Texas Farm Bureau in Support of Appellant and Reversal and one copy on an electronic computer-readable compact disc in Portable Document Format, by Federal Express, on counsel for Appellant and Appellee addressed as follows:

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In addition, on April 14, 2009, I sent this Brief of Amicus Curiae Texas Farm Bureau in paper and electronic form to the Clerk of the Fifth Circuit by Federal Express.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and the 5TH CIR. R. 32.2 because it consists of 3,240 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and 5TH CIR. R. 32.2. This brief also complies with FED. R. APP. P. 32(a)(5)-(6) and 5TH CIR. R. 32.1 because it has been prepared in Word 2003 in proportionally spaced typeface, using Times New Roman font in 14-point size for text and footnotes.

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