# APPENDIX

# APPENDIX

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# APPENDIX A

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

**No. 21-40445**

**[Filed: July 22, 2022]**

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|---|---|
| UNION PACIFIC RAILROAD COMPANY, | ) |
| | ) |
| *Plaintiff—Appellee*, | ) |
| | ) |
| *versus* | ) |
| | ) |
| CITY OF PALESTINE, TEXAS; | ) |
| COUNTY OF ANDERSON, TEXAS, | ) |
| | ) |
| *Defendants—Appellants*. | ) |

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:19-cv-574

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*. JAMES E. GRAVES, JR. *Circuit Judge*:

Union Pacific Railroad Company ("Union Pacific") seeks to end its operations in Palestine, Texas, but has been unable to do so because a 1954 Agreement between its predecessor and Defendants City of Palestine ("Palestine") and Anderson County, Texas ("Anderson County") has prevented it from leaving.

Because the 1954 Agreement is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), Union Pacific is free to leave. We affirm.

## I.

The background of this case spans 150 years, and we have discussed much of it in prior opinions. We nonetheless recount it here to illuminate the intersection between the parties' purported contractual agreements and increased federal regulation of the railroad system.

### A. The 1872 Original Agreement

In the 1870s, during the boom of westward railroad expansion, small towns bid for railroad depots and stops as essential parts of their continued economic power and survival. One of these towns was Palestine, Texas. Palestine was uniquely positioned to serve as the crossroads between the International Railroad, approaching Palestine from Hearne, Texas to the southwest, and the Houston and Great Northern Railroad Company ("HGNR"), approaching Palestine from Houston to the south. *See City of Palestine v. United States*, 559 F.2d 408, 410 (5th Cir. 1977). In 1872, Palestine and Anderson County orally agreed to raise $150,000 in bonds from their citizens to finance the railroad. *Id.* In turn, HGNR agreed to "run[] cars regularly" to Palestine, construct a depot, and "locate and establish and forever thereafter keep and maintain" its "general offices, machine shops and roundhouses" in Palestine. *Id.*

In 1873, HGNR merged with the International Railroad to create the International & Great Northern

Railroad ("IGNR"). *Id.* The Texas legislature approved the merger so long as IGNR assumed "all acts done in the name of either of the companies," including HGNR's obligations in the 1872 Agreement with Palestine. *Id.* Consideration included another $150,000 in bonds and Palestine's commitment to construct housing for the IGNR employees. *Id.*

### B. The 1892 and 1911 Foreclosure Sales and the 1914 Judgment Granting Injunctive Relief

In 1892, IGNR's assets were sold at a foreclosure sale, but because the purchasers were trustees for IGNR's stockholders, Texas courts ultimately classified this as a mortgage refinancing rather than a bona fide sale. *Int'l & Great N. Ry. Co. v. Anderson Cnty* ("*IGNR IV*"), 246 U.S. 424, 433 (1918). Thus, the 1872 Agreement remained in effect. *Int'l & Great N. Ry. Co. v. Anderson Cnty* ("*IGNR III*"), 174 S.W. 305, 316 (Tex. Civ. App. 1915), *aff'd*, 246 U.S. 424 (1918).

In 1911, IGNR again sold its assets at a foreclosure sale, this time to outside investors who kept the name of the company and listed Houston as the new corporate office. *City of Palestine*, 559 F.2d at 410-11. However, because IGNR planned to move its offices, Palestine and Anderson County successfully sued for an injunction under the 1872 Agreement to keep IGNR's "general offices, machine shops, and roundhouses" in Palestine "forever." *IGNR III*, 174 S.W. at 327. This 1914 Judgment was twice upheld by both the Texas Court of Civil Appeals and the Supreme Court. *See id.; see also, IGNR IV*, 246 U.S. at 434.

In addressing the impact of the foreclosure, Texas courts concluded that there was no "irregularity in the foreclosure proceedings or in the organization of the new company" that would impute the personal obligations of the prior company onto the purchaser. *Int'l & Great N. Ry. Co. Anderson Cnty* ("*IGNR I*"), 150 S.W. 239, 250 (Tex. Civ. App. 1912), *aff'd, Int'l & Great N. Ry. Co. v. Anderson Cnty* ("*IGNR II*"), 156 S.W. 499 (Tex. 1913). Instead, the courts used the general rule that "the purchaser of a railroad sold under" foreclosure would take ownership "free from all liability" for indebtedness and similar personal obligations. *IGNR I*, 150 S.W. at 250. The obligation to "maintain its offices, shops and roundhouses in Palestine" was a "personal obligation that would not have bound the new company." *City of Palestine*, 559 F.2d at 411; *see also IGNR I*, 150 S.W. at 250 (noting that the purchaser in a railroad foreclosure obtains property "free from all mere personal obligations of the former company," including a contract "for the establishment and permanent maintenance of a depot").

Even though personal contractual obligations typically do not transfer to the purchaser in a foreclosure sale, Texas state courts nonetheless concluded that the Texas Office Shops Act changed this calculus, and the purchaser was thus "liable to perform the public duties imposed by law upon the old corporation." *IGNR II*, 156 S.W. at 503 (internal quotations omitted). The Office Shops Act required a railroad such as IGNR to "keep and maintain its general offices at such place within this state where it shall have contracted or agreed" and "said location

shall not be changed" even during consolidation if the railroad was "aided . . . by an issue of bonds in consideration of such location." *City of Palestine*, 559 F.2d at 411 (quoting TEX. REV. CIV. STAT. art. 6423 (1911)).

In short, the Texas courts held that the Office Shops Act mandated the transfer of IGNR's personal obligation to remain in Palestine to the new purchaser. *IGNR I*, 150 S.W. at 251 (noting that the requirement was not "a mere personal obligation of that company, but was an obligation or duty imposed by law" that could not be disavowed in a foreclosure sale, even to a bona fide purchaser). The Texas Court of Civil Appeals stated that the 1914 Judgment was "entirely dependent upon the statute, and not the enforcement of a private contract as such, for its vitality."*IGNR III*, 174 S.W. at 316.

IGNR appealed to the Supreme Court, arguing that the Office Shops Act impermissibly burdened interstate commerce and contractual obligations. *IGNR IV*, 246 U.S. at 428. The Supreme Court disagreed and noted that the new IGNR "took out a charter under general laws that expressly subjected it to the limitations imposed by law." *Id.* at 432.

### C. The 1954 Agreement and 1955 Judgment Modifying the 1914 Judgment

Later, in the 1920s, Missouri Pacific ("MoPac") purchased IGNR. *City of Palestine*, 559 F.2d at 412. In the 1930s, MoPac filed for bankruptcy and requested reorganization under the Bankruptcy Act. *Id.* As part of its proposed reorganization, MoPac stated it would

consolidate with its subsidiaries, including IGNR. *Id.* But because the 1914 Judgment required IGNR to maintain its general offices in Palestine, and MoPac's offices were located elsewhere, this posed a serious problem. *Id.*

The Bankruptcy Act also included the following requirement, which, in essence, required continued enforcement of the 1914 Judgment:

> *No reorganization effected* under this title and no order of the court or Commission in connection therewith *shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929*, against such carrier or against one of its predecessors in title, *requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered* on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

*Id.* (citing 11 U.S.C. § 205(n) (1970) (emphasis added)).

Given these difficulties, the bankruptcy court requested that MoPac negotiate with Palestine and Anderson County to modify the 1914 Judgment before it would approve the reorganization. *Id.* As a result of these negotiations, MoPac "agreed to forever maintain in Palestine 4.5% of all of its employees in certain job classifications," but it did not have to "maintain its general offices, shops and roundhouses in Palestine." *Id.* (the "1954 Agreement"). MoPac agreed that as long as it or "any successor in interest or assign thereof shall remain in the railroad business," it would

maintain "Office and Shop Employees" in Palestine. A group of ten local citizens (the "Palestine Citizens Committee") signed the 1954 Agreement along with MoPac, Palestine, and Anderson County.

In 1955, the District Court of Cherokee County, Texas, entered a judgment (the "1955 Judgment") that modified the 1914 Judgment to align with the 1954 Agreement's terms, and the bankruptcy court approved the proposed reorganization. *City of Palestine*, 559 F.2d at 412.

### D. Union Pacific Acquires MoPac and Assumes Operations in Palestine; Texas Repeals the Office Shops Act

Approximately three decades passed, and in 1982, Union Pacific acquired MoPac. Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") which established the Surface Transportation Board ("STB") to regulate rail carriers and preempted various state and local laws that were within the STB's jurisdiction. 49 U.S.C. § 10501(b). In 1997, Union Pacific merged with MoPac. In 2007, Texas repealed its Office Shops Act after determining the ICCTA preempted it. *See* H.R. Rep. 80-3711, Reg. Sess. at 1 (Tex. 2007).

With automatic adjustments from subsequent mergers, Union Pacific must maintain 0.52% of its "Office and Shop" employees in Palestine. Under the 1954 Agreement, these employees can be "Executives, Officials and Staff Assistants; Professional, Clerical, and General; Maintenance of Equipment and Stores; Transportation (other than Train, Engine and Yard);

Transportation (Yardmasters, Switch Tenders, and Hostlers)." These employees fall into two categories: (1) "the freight claims department, which investigates and resolves claims arising out of shipments on Union Pacific's rail line," and (2) "the car shop, which repairs cars in Union Pacific's fleet."

### E. Procedural History and District Court Orders

In November 2019, Union Pacific filed suit seeking declaratory relief that the ICCTA preempts the 1954 Agreement. Union Pacific also sought an injunction preventing Palestine and Anderson County from enforcing the Agreement. *Id.*

Palestine and Anderson County filed a motion to dismiss and a motion for judgment on the pleadings. The motions were based on the Anti-Injunction Act and the failure to join the Palestine Citizens Committee—the ten local citizens who had signed the 1954 Agreement. The district court denied these motions.

Union Pacific filed a motion for summary judgment, which the district court granted, holding that the 1954 Agreement was expressly and impliedly preempted. It also concluded that the 1954 Agreement did not meet the voluntary contract exception to preemption. The district court enjoined Palestine and Anderson County from enforcing the 1954 Agreement against Union Pacific.

After the district court entered judgment, Palestine and Anderson County filed suit in Texas state court seeking to enforce the 1955 Judgment which had

approved the 1954 Agreement. The Texas court has enjoined Union Pacific from reducing its workforce and set the case for trial.

Defendants appeal the district court's grant of summary judgment for Union Pacific and the denials of their motion to dismiss for failure to join a necessary party, motion for judgment on the pleadings, and cross-motion for summary judgment.

**II.**

"We review the grant of summary judgment de novo, applying the same legal standards the district court applied to determine whether summary judgment was appropriate." *See Am. Intern. Specialty Lines Ins. Co. Canal Indem. Co.*, 352 F.3d 254, 259-60 (5th Cir. 2003). A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the record indicates that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "On cross-motions for summary judgment, we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010) (citation omitted). Because the district court granted summary judgment based on federal preemption, both directly and as applied, we must also review this determination. "The preemptive effect of a federal statute is a question of law that we review de novo." *Franks Inv. Co. LLC v. Union Pac R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010).

"We review de novo a district court's legal determination of the applicability of the Anti-Injunction Act." *See United States v. Billingsley*, 615 F.3d 404, 410 (5th Cir. 2010). And we review de novo a district court's grant of a Rule 12(c) motion for judgment on the pleadings. *See Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 439 (5th Cir. 2015). "The standard for dismissal under Rule 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

Lastly, we review "a district court's decision to dismiss for failure to join an indispensable party [under Rule 19] . . . under an abuse-of-discretion standard." *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003) (citation omitted). Similarly, we review a decision to deny a motion to dismiss for failure to join a necessary party under the same standard. *Id.*

## III.

The district court granted summary judgment for Union Pacific after determining that federal law preempts the statutorily mandated contractual agreements between the parties, both expressly and as applied. We agree.

### A.

Any state law that conflicts with either a federal law or the Constitution is "without effect." *Maryland v.*

*Louisiana*, 451 U.S. 725, 746 (1981). This framework, known as preemption, applies in the railroad context where a state law remedy "invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation." *Franks,* 593 F.3d at 411 (citation omitted). In determining whether a state law or regulation is preempted, Congress's intent is the "ultimate touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress can indicate its preemptive intent either expressly, through a statute's plain language, or impliedly, through its "structure and purpose." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

In 1995, Congress enacted key legislation known as the ICCTA which abolished the Interstate Commerce Commission and established the Surface Transportation Board to have broad jurisdiction over rail operations. *See* 49 U.S.C. § 10101, *et seq*.

The ICCTA essentially overhauled the railroad industry, which was already historically intertwined with the federal government: "[R]ailroad operations [have] long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). In response to the ICCTA, in 2007, the Texas legislature repealed the Office Shops Acts, concluding it was "preempted by federal law." H.R. 80-3711, Reg. Sess. at 1 (Tex. 2007).

Section 10501(b) of the ICCTA evinces the explicit preemptive intent of Congress, as it describes the STB's exclusive jurisdiction over a wide range of railroad operations:

> (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.

49 U.S.C. § 10501(b).

The Fifth Circuit has addressed preemption under the ICCTA, holding that section 10501(b) expressly preempts laws that seek to "manag[e] or govern[] rail transportation" and that "[t]o the extent remedies are provided under laws *that have the effect of regulating rail transportation*, they are [expressly] preempted."

*Franks*, 593 F.3d at 410 (emphasis in original). However, if a state law or regulation only has a "mere remote or incidental effect on rail transportation," it is not expressly preempted. *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 805 (5th Cir. 2011) (internal quotations omitted).

Rail "transportation" is broadly defined to include "facilit[ies]" and "services" that are "related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9). In short, because the 1954 Agreement manages and governs facilities or services related to the movement of passengers or property by rail, it is expressly preempted.

Turning to the specifics: The 1954 Agreement requires Union Pacific to employ a certain percentage of its "Office and Shop Employees" in Palestine. The car shop employees repair empty freight cars, and the freight claims office processes complaints and claims for freight damage. Both categories include employees who are engaged in "services related to" the "movement [of] . . . property" by rail. 49 U.S.C. § 10102(9).

Defendants try to minimize these facts by arguing that Union Pacific's 0.52% employee requirement has "no direct impact on the movement of freight" because the employees work on railcars that are out of service and the shipping claims employees deal with complaints involving items that were previously moved via rail. However, this argument asks us to read language into the ICCTA. There is no requirement for *contemporaneous* movement of property related to the rails for the regulation to be preempted. If the facilities or services—in any non-incidental way—relate to the

movement of property by rail, they are preempted by the ICCTA.

Here, the rail car repair shop employees work on cars that were involved in and may later be involved in the movement of items by rail. And the freight claims office employees deal with problems that arose while property traveled via rail. Thus, the 1954 Agreement—which was premised upon now-preempted Texas law and requires the continued employ of these individuals—regulates Union Pacific's use of railroad facilities and services.

Further, the 1954 Agreement's mandate that Union Pacific cannot leave Palestine interferes with the STB's exclusive jurisdiction over "routes, services, and facilities" and the "abandonment, or discontinuance of . . . facilities." 49 U.S.C. § 10501(b). The district court correctly concluded that the 1954 Agreement is expressly preempted.

**B.**

In addition to express preemption, Union Pacific argues that the 1954 Agreement is impliedly preempted. This test is more fact-specific than express preemption because we analyze whether state laws "have the effect of unreasonably burdening or interfering with rail transportation." *Franks*, 593 F.3d at 414. As the party asserting preemption, Union Pacific must present "evidence of the specific burdens imposed" and not just "general evidence or assertions" that the state law "somehow affect[s] rail transportation." *Guild v. Kan. City S. Ry. Co.*, 541 F. App'x 362, 368 (5th Cir. 2013). For example, this court

concluded that the ICCTA did not impliedly preempt a state action that sought to prevent the closure of four railroad crossings because the evidence presented about potential burdens, including drainage issues, increased maintenance costs, and slower train travel, was not tied to the four specific crossings. *Franks*, 593 F.3d at 415.

For illustration purposes, we note that other courts have held the following actions were preempted because they imposed unreasonable burdens on rail transportation: (1) requiring a railroad to engage in "considerable redesign and construction work"; (2) terminating an easement because it would "stop all use of the tracks" in that specific area; and (3) condemning an "actively used railroad property" because it would impact the railroad's "rights with respect to [a] massive stretch of railroad property." *See, e.g., Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, No. 15-CV-0074, 2018 WL 1750516, at *7–9 (W.D. La. Apr. 10, 2018); *Wedemeyer v. CSX Transp., Inc.*, No. 2:13-CV-00440-LJM, 2015 WL 6440295, at *5 (S.D. Ind. Oct. 20, 2015), *aff'd*, 850 F.3d 889 (7th Cir. 2017); *Union Pac. R.R. Co. Chicago Transit Auth.*, No. 07-CV-229, 2009 WL 448897, at *8–10 (N.D. Feb. 23, 2009), *aff'd*, 647 F.3d 675 (7th Cir. 2011).

Here, Union Pacific presents many undisputed facts to support its argument that the 1954 Agreement unreasonably burdens and interferes with rail transportation. Palestine and Anderson County do not dispute these facts but rather argue they are not persuasive or appropriate considerations.

Specifically, the 1954 Agreement's mandate to stay in Palestine imposes the following burdens on Union Pacific: (1) Union Pacific no longer has a business need for operations in Palestine, and it can conduct its work more efficiently in other locations; (2) Routing cars to Palestine for repair involves sending them thousands of miles out of the way through congested Houston railyards; and (3) The Palestine facilities are severely outdated and in need of multi-million-dollar improvements in the range of $67 to $93 million.

Our court has stated that economic burdens alone likely do not evince unreasonable interference. *See New Orleans & Gulf Coast Ry. C. v. Barrois*, 533 F.3d 321, 335 (5th Cir. 2008) ("We doubt whether increased operating costs are alone sufficient to establish 'unreasonable' interference with railroad operations."). However, here, the combination of the *economic burden* of spending tens of millions of dollars to renovate an inefficient and expensive facility, designed originally to repair steam locomotives, along with the *logistical burden* of routing cars thousands of miles through an urban bottleneck and providing facilities for the employees who work in Palestine substantially interferes with and burdens Union Pacific's facilities "related to the movement of passengers or property." 49 U.S.C. § 10102(9). We conclude that the 1954 Agreement is impliedly preempted.

**C.**

Defendants make one additional preemption attack by asserting that the district court's decision will allow railroads to skirt their contractual obligations. However, Union Pacific does not challenge the validity

of *voluntary* contractual agreements, but instead argues that the 1954 Agreement is *involuntary* because its confines were dictated by then-existing state law.

The relevant timeline indicates that the parties' predecessors, HGNR and International Railroad, entered into a voluntary agreement in 1872. *See City of Palestine*, 559 F.2d at 410. However, in the subsequent foreclosure sales, the personal responsibilities of the original contracting parties were transferred to the purchasers as mandated by the Texas Office Shops Act. And, but for this Act, the debtor's "obligation to maintain its offices, shops and roundhouses in Palestine" was a "personal obligation that would not have bound the new company" after foreclosure. *Id.* at 411. Thus, the 1914 Judgment entered after the foreclosure sales contained obligations that were "regulatory in nature, grounded in Texas statutory law, and involuntary" rather than those which result from the "the enforcement of a private contract." *IGNR III*, 174 S.W. at 316.

Then in 1954, when MoPac attempted to reorganize and merge with IGNR in bankruptcy proceedings, the district court refused to allow bankruptcy reorganization unless MoPac assumed IGNR's commitments under the 1914 Judgment to Palestine and Anderson County. *City of Palestine*, 559 F.2d at 412. Otherwise, MoPac would have been unable to proceed with the bankruptcy reorganization because the law at that time mandated that reorganization would not "relieve any carrier from the obligation of any final judgment . . . requiring the maintenance of offices, shops, and roundhouses at any place, where

such judgment was rendered . . . ." *Id.* (citing 11 U.S.C. § 205(n) (1970)).

In other words, MoPac did not voluntarily enter into the 1954 Agreement but was required to assume responsibilities and negotiate within the confines of federal and state laws regarding railroad operations that have since been repealed. Alternatively, MoPac could have (voluntarily) chosen financial ruin. These facts do not support a finding that MoPac voluntarily assumed the conditions of the 1914 Judgment in the 1954 Agreement.

There are further indications that the 1954 Agreement was a mere extension of the Texas Shop Acts. *See, e.g.,* TEX. REV. CIV. STAT. ANN. arts. 6275, 6277 (1926) (regulating the location of Texas-chartered railroads offices, machine shops, and roundhouses like the 1954 Agreement); H.R. Rep. 80-3711, Reg. Sess. at 1 (Tex. 2007) (repealing these laws). Importantly, the 1954 Agreement entitles Palestine and Anderson County to reinstate the 1914 Judgment in the event of a breach. We agree with the district court that this remedy "looks and feels more like the kind of state 'regulation' [or remedy] the ICCTA expressly preempts."

Our sister circuit has provided guidance that we find helpful for determining when a railroad contract is voluntary versus regulatory: "Voluntary agreements between private parties [] are not presumptively regulatory acts" where they are "not the sort of rail regulation contemplated by the statute and . . . do[] not unreasonably interfere with rail transportation." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 214,

218-19 (4th Cir. 2009) (citation omitted). Here, as discussed above, the 1954 Agreement does unreasonably interfere with rail transportation. *Id.* at 221 (citation omitted).

And given that the Texas Shops Act governs the location of offices, machine shops, and roundhouses—just like the 1954 Agreement—it is the "sort of rail regulation contemplated by the statute." *Id.* at 214. The voluntary contract exception does not apply because Union Pacific was prohibited from using its own "determination and admission." *Id.* at 221 (citation omitted). The 1954 Agreement was not voluntary.

**IV.**

Next, Defendants argue that the Anti-Injunction Act bars Union Pacific's case. The district court concluded that because there was no pending state court action, the Anti-Injunction Act did not apply. *See B & A Pipeline Co. v. Dorney*, 904 F.2d 996, 1001 n.15 (5th Cir. 1990) (noting that state court proceeding must be currently "pending" for purposes of the Anti-Injunction Act). While there was no pending state court action when the district court made its ruling, Defendants have since filed one and have received an injunction to prevent Union Pacific from reducing its workforce in Palestine. Regardless, these changed circumstances do not warrant reversal.

According to the Anti-Injunction Act, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its

judgments." 28 U.S.C. § 2283. Union Pacific merely seeks declaratory relief about the validity of the 1954 Agreement and an injunction preventing Defendants from enforcing the 1914 Judgment. It is uncontested that Union Pacific does not seek to enjoin any *pending* state court proceeding.

Further, this court has indicated that the Anti-Injunction Act does not apply where a plaintiff is seeking legal clarity or other legitimate relief instead of attempting to nullify relief to the party who first filed suit. *See Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776-77 (5th Cir. 1993). Here, Union Pacific filed first and sought declaratory relief to avoid a breach of contract. In contrast, it is Defendants who sought to block Union Pacific's case by filing a second suit in state court and seeking and obtaining injunctive relief.

And to the extent collateral estoppel[1] could impact future litigation, this is insufficient to trigger the Anti-Injunction Act's prohibitions, particularly since the purpose of the Declaratory Judgment Act—which Union Pacific seeks relief under—is "to provide a means to grant litigants judicial relief from legal uncertainty in situations" so that they "would no longer be put to the Hobson's choice of foregoing their rights or acting at their peril." *Tex. Emps.' Ins. Ass'n v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988) (en banc)

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[1] In their briefs, Defendants seemingly conflate the Anti-Injunction Act with the doctrine of collateral estoppel. We need not delve into the merits of whether this case has collateral estoppel value, but we do attempt to separate the two issues based on the legal issues raised by the parties.

(citation omitted). The district court properly determined that the Anti-Injunction Act does not bar Union Pacific from seeking declaratory relief.

**V.**

Finally, Defendants challenge the district court's denial of their motion to dismiss for failure to join the Palestine Citizens Committee as a necessary party. Under Rule 19, a party must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1).

Defendants have presented no evidence that the Palestine Citizens Committee still exists or that any of its members are still living. It is unclear who these individuals even are. There has been no showing that disposing of this case in the absence of the Citizens Committee would "impede the . . . ability to protect" its

interests or otherwise prevent a court from providing full relief. *Id.*

And, the Palestine Citizens Committee has no enforcement rights under the 1954 Agreement. The Agreement allows for Palestine and Anderson County to seek specific performance or reinstatement of the 1914 Judgment. As the district court correctly determined, without a protectable interest in the litigation, joinder is not required under Rule 19. *See HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003) (citing *Hilton v. Atlantic Refining Co.s*, 327 F.2d 217, 219 (5th Cir. 1964) (concluding that joinder is "not required unless the judgment 'effectively precludes [the nonparties] from enforcing their rights and they are injuriously affected by the judgment.'")).

Even assuming the Palestine Citizens Committee had enforcement rights, Defendants can adequately represent the interests of the citizens who signed the Agreement, as they have the shared interest of preventing Union Pacific from leaving Palestine. S*ee Staley v. Harris Cnty. Tex.*, 160 F. App'x 410, 413 (5th Cir. 2005) (stating that "a government entity is presumed to adequately represent the interests of . . . its citizens"). The district court did not abuse its discretion in denying relief for any alleged failure to join a necessary party.

**VI.**

For these reasons, we AFFIRM.

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

**No. 21-4 0445**

**[Filed July 22, 2022]**

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Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

[SEAL]

Certified as a true copy and issued
as the mandate on August 29, 2022

Attest: /s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals,
Fifth Circuit

## APPENDIX B

**UNITED STATES COURT OF APPEALS**
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**No. 21-40445**

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Appeal from the United States District Court
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USDC No. 6:19-CV-574

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

[*] Judge Gregg Costa, did not participate in the consideration of the rehearing en banc.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

## APPENDIX C

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

**No. 21-40445**

**[Filed: August 8, 2022]**

| | |
|---|---|
| Union Pacific Railroad Company,<br>*Plaintiff – Appellee* | ) |
| v. | ) |
| City of Palestine, Texas;<br>County of Anderson, Texas,<br>Defendants – Appellants | ) |

On Appeal from the United States District Court Eastern District of Texas, Tyler Division Civil Action No. 6:19-CV-0574 The Honorable Jeremy D. Kernodle, Judge Presiding

**PETITION FOR REHEARING EN BANC**

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## CERTIFICATE OF INTERESTED PERSONS

Appellants certify 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.

| **Parties** | **Counsel** |
|---|---|
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*Plaintiff - Appellee*

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**STATEMENT FOR EN BANC CONSIDERATION**

The Panel's decision would mark the end of the line for the bright expectations and commitments of a small Texas town that staked its fortune on the promises of a railroad. For over a century, the promises, agreements and the City, County, and citizens' vested contractual rights have weathered legal scrutiny in the highest courts in the land. Union Pacific voluntarily assumed the Palestine assets and obligations decades ago. Nevertheless, the Panel decision nullifies the agreement and a century of legal precedent.

This proceeding involves two questions of first impression in this Circuit and exceptional importance: First, whether Congress intended for an agreement entered decades before the enactment of the Interstate Commerce Commission Termination Act ("ICCTA") to be retroactively preempted. The retroactive application of the ICCTA to pre-existing contracts is a matter of first impression for this Circuit. However, other Circuits have considered and rejected the retroactive application of ICCTA to contracts executed before the enactment of the statute. With no evidence that Congress intended a retroactive application of ICCTA to contracts, the Panel decision will impermissibly obviate the substantial rights bargained for and agreed by the railroad and the City, County, and citizens decades prior to contemplation of the ICCTA.

Second, whether ICCTA may be applied to relieve a railroad of contractual obligations that it assumed knowingly and voluntarily through a merger and under which the parties thereto have substantially performed to the present. This Circuit has not applied federal

preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the panel in this case would allow railroads to freely assume and then avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities have developed. Such an extreme departure from the established precedent in other circuits merits the consideration of the full Court of Appeals.

The panel decision conflicts with decisions of the Eighth and Ninth Circuits[1] in regard to the retroactive application of the ICCTA and would establish precedent in conflict with those circuits. On the second point on voluntary assumptions, although the sole authority cited by the Panel decision is a Fourth Circuit case,[2] this panel reaches a contrary result. Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions and resolve a potential conflict with the decisions of other circuits.

*(Tables omitted in this appendix)*

TO THE HONORABLE COURT OF APPEALS:

Defendants – Appellants Anderson County and the City of Palestine file this Petition for Rehearing En

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[1] *See* discussions of *New Prime* (Eighth Cir.), and *Rivas* (Ninth Cir.), *infra,* Arg. 1.

[2] *See* discussion regarding *PSC Phosphate*, *infra,* Arg. 2

Banc and, in support thereof, respectfully show the following:

## WHY REHEARING EN BANC IS WARRANTED

The Panel erred when it improperly upheld the trial court's grant of the motion for summary judgment filed by Plaintiff-Appellee Union Pacific, granting their Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment and Motions to Dismiss. Unless revised and corrected, the Panel decision will erroneously establish precedent on two important issues of first impression and will contravene the precedents of other Circuits.

## STATEMENT OF THE COURSE OF PROCEEDINGS

In November 2019, Union Pacific filed suit seeking declaratory relief that the ICCTA preempts its assumed obligations under a 1954 Agreement between the International & Great Northern Railroad and the City of Palestine, Anderson County, and a citizens committee. Union Pacific also sought an injunction preventing Palestine and Anderson County from enforcing the Agreement. *Id.*

Palestine and Anderson County filed a motion to dismiss and a motion for judgment on the pleadings. The district court denied these motions.

Union Pacific and Palestine and Anderson County filed motions for summary judgment. The district court granted the Union Pacific motion, holding that the 1954 Agreement was expressly and impliedly preempted. It also concluded that the 1954 Agreement did not meet the voluntary contract exception to

preemption. The district court enjoined Palestine and Anderson County from enforcing the 1954 Agreement against Union Pacific.

Palestine and Anderson County appealed the district court's grant of summary judgment for Union Pacific and the denials of their motion to dismiss, motion for judgment on the pleadings, and cross-motion for summary judgment. Upon appeal, this Honorable Court conducts a *de novo* review of the decision below.

On July 22, 2022, in a published opinion, a panel of this Honorable Court denied relief on Appellants' issues, affirming the decision of the U.S. District Court for the Eastern District of Texas.

On August 2nd, this Honorable Court granted an extension of time to file this petition for consideration en banc until August 15, 2022. Thus, Appellants timely request that this matter be reheard *en banc*.

## STATEMENT OF ANY FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

For the purposes of this Petition, Appellants rely particularly on facts established in the appellate record as follows:

> "UP acquired MoPac [Missouri Pacific] in the early 1980s and formally merged with MoPac on January 1, 1997. Docket Entry No. 1 p. 12 ¶ 30. UP absorbed the obligations of the 1954 Agreement, as well as the assets at Palestine, when it merged with MoPac. Exhibit 9, Deposition of Cynthia Sanborn p. 16 ln. 2-5, p. 43 ln. 18 – p. 44 ln. 3, p. 45 ln. 21 – p. 46 ln. 10,

> p. 136 ln. 9-14. UP has no other obligations to the City or the County. Id. p. 19 ln. 8-19. At the time of the merger, both railroads had the same right before the STB as MoPac had before the ICC in 1977, that if the 1954 Agreement interfered with the merger either carrier could have requested an exemption from its legal obligations under the 1954 Agreement. 49 U.S.C. 11321. UP, as the successor in the merger, voluntarily took MoPac's obligations to third parties including its obligations to the City, County and the citizens. See Exhibit 3 D-000007."

ROA. 753-754.

## SUMMARY OF THE ARGUMENTS MERITING EN BANC CONSIDERATION

**ISSUE 1:** IN UPHOLDING THE U.S. DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, THE PANEL ERRED IN APPLYING THE ICCTA TO RETROACTIVELY PREEMPT AGREEMENTS EXECUTED PRIOR TO ITS ENACTMENT.

**ISSUE 2:** THE PANEL ERRED IN ITS ANALYSIS OF THE VOLUNTARY DECISION BY UNION PACIFIC TO ASSUME THE OBLIGATIONS CONTAINED IN THE 1954 AGREEMENT.

## ARGUMENT

### Issue 1: In upholding the District Court's grant of summary judgment, the Panel erred in applying the ICCTA to retroactively preempt agreements executed prior to its enactment.

The Panel decision holds that the ICCTA retroactively preempted a pre-existing contract. This holding is fundamental to federal jurisdiction in this matter. The Court has an independent obligation to examine its own jurisdiction and the district court's jurisdiction. *See* Fed.R.Civ.P. 12(h)(3); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks omitted). Courts of Appeal review questions of standing *de novo. NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 236 (5th Cir.2010).

The decisions by the Court below and the Panel now seek to divest the Appellants and the citizens of vested contractual rights by imposing a retroactive application of ICCTA which is unsupported by Fifth Circuit precedent. Absent the retroactive application of ICCTA, the Plaintiff-Appellee Union Pacific has no federal cause of action and therefore lacks standing. Because standing is an essential component of federal subject-matter jurisdiction, the lack of standing can be raised at any time by a party or by the court. *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) (citing *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989)).

When reviewing a claim of federal preemption, a court begins with the plain language of the Interstate Commerce Commission Termination Act, "which necessarily contains the best evidence of Congress'

pre-emptive intent." *Franks,* 593 F.3d at 408 (*citing CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). There is a presumption against pre-emption in "areas of law traditionally reserved to the states, like police powers and property law…" *Id.* (*quoting Altria Group, Inc. v. Good,* 555 U.S. 70, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008)).

This issue of the Act's retroactive effect was explicitly decided soon after its enactment in both the Eighth and Ninth Circuits, which specifically held that there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, and that this lack of standing deprived the district courts of jurisdiction. First, the Eight Circuit ruled against retroactive application to pre-existing contracts in *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, holding that:

> [A] presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (citation omitted). The rationale for this presumption is that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* As such, the Supreme Court has provided a framework for determining when a federal statute applies to conduct predating the statute's enactment. First, a court must determine if Congress has expressly prescribed the statute's proper reach. *Id.* at 280,

114 S.Ct. 1483. If Congress has prescribed the reach, "there is no need to resort to judicial default rules." *Id.* If not, a court must examine whether the statute would have a retroactive effect; i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute would do any of these things, the presumption is that the statute does not govern, absent clear congressional intent otherwise. *Id.*

With regard to the ICCTA, Congress has not expressly prescribed the statute's reach. Therefore, we must proceed to the second step: whether application of the statute in this case would have a retroactive effect. We agree with the district court that private rights of action for damages based on the ICCTA are limited to actions involving agreements executed after the ICCTA's effective date; otherwise, the statute has a retroactive effect.

Prior to the ICCTA, only the ICC could bring claims against motor carriers for failure to comply with the applicable regulations. The ICCTA shifts this power and permits individual Owner–Operators to bring defendants directly into court. We find that this creates an impermissible retroactive effect.

This issue is analogous to the issue presented in *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), in

> which the Supreme Court held that when a statute expanded the class of plaintiffs who could bring claims, the statute altered the defendant's substantive rights and therefore had a retroactive effect. *Id.* at 950, 117 S.Ct. 1871 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the [new statute] essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.") (citation omitted). Here, by permitting Owner–Operators to bring their own actions against motor carriers, the ICCTA expands the class of plaintiffs who could bring claims, thereby altering the motor carriers' substantive rights. *But see Owner–Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.,* No. 97–CV–750, 2003 WL 21645754 (S.D.Ohio July 11, 2003).

339 F.3d 1001, 1006–07 (8th Cir. 2003). The *New Prime* Plaintiffs' Petition for writ of certiorari to the United States Supreme Court was denied. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 541 U.S. 973, 124 S. Ct. 1878, 158 L. Ed. 2d 467 (2004).

The Ninth Circuit then quickly followed this precedent, also holding that the ICCTA could only preempt contracts executed *after* its enactment, reasoning that,

> We find persuasive *New Prime's* conclusion that in this case, as in *Hughes,* retroactively expanding the universe of potential plaintiffs would have an impermissible retroactive effect. Because

> application of the ICCTA to pre–1996 agreements would increase Defendants' potential liability, the statute has a retroactive effect. *See New Prime,* 339 F.3d at 1007. In the absence of evidence of congressional intent to create such an effect, we apply a presumption that the statute does not operate retroactively. *See Landgraf,* 511 U.S. at 280, 114 S.Ct. Because there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, we hold that ICCTA's private right of action for damages applies only to contracts executed after its enactment.

*Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079, 1084–85 (9th Cir. 2005).

This Circuit has held that, "[t]he standard for finding a statute expressly retroactive is demanding ... The Supreme Court has suggested that retroactivity has only been found in "statutory language that was so clear that it could sustain only one interpretation." (Internal citations omitted). *Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 (5th Cir. 2007). Thus, the dispositive question is whether Congress has expressed its clear intent that the ICCTA apply retroactively to contracts formed before its enactment.

Though it fails to identify *any* statutory language suggesting Congress' intent, the Panel *de novo* decision grants preemption of a 1954 Agreement executed over 40 years prior to the existence of the ICCTA. The 1954 Agreement was valid and enforceable at the time of its execution and upheld by this Court in *City of Palestine, Tex. v. United States*. 559 F.2d at 415 (1977). For many years, the parties have relied upon the terms of the

agreement and had the full opportunity to know the law and conform their conduct accordingly. A retroactive application of ICCTA to the 1954 Agreement will alter Appellants' substantive rights, relieve the railroad of its assumed obligations, and create a new cause of action that did not exist prior to enactment. The Panel's decision in this case to retroactively apply the preemption provisions of ICCTA to preempt the 1954 Agreement, if affirmed by the full Court, would undoubtedly create a split of authority between the circuits. Thus, Appellants ask that en banc consideration be given to this important issue.

**Issue 2: The Panel erred in its analysis of Union Pacific's voluntary decision to assume of the obligations contained in the 1954 agreement.**

The Panel's analysis of Union Pacific's voluntary decision[3] to assume the 1954 Agreement erroneously focused solely on the decisions of Union Pacific's many predecessors[4] in the years preceding its 1954 execution, rather than on Union Pacific's decision—much later—to assume these obligations from Missouri Pacific. In holding that the Agreement was not voluntary, the Panel briefly summarized a timeline pertaining to these predecessor companies with little mention of Union Pacific's wholly voluntary assumption of these contractual obligations, as follows,

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[3] *See* Memorandum Opinion, III.(C), pp. 14-16.

[4] Movant's interpretation differs greatly as reflected in its earlier briefing, but will not be rehashed here.

> Approximately three decades passed, and in 1982, Union Pacific acquired MoPac. Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") which established the Surface Transportation Board ("STB") to regulate rail carriers and preempted various state and local laws that were within the STB's jurisdiction. 49 U.S.C. § 10501(b). In 1997, Union Pacific merged with MoPac.

Memorandum Opinion, at 6. Like the trial court, the Panel relies on the Texas Office Shops Act as being the state regulation meriting preemption, holding that, "[t]he voluntary contract exception does not apply because Union Pacific was prohibited from using its own "determination and admission." *Id*, p.16.

First, this reasoning is flawed because Union Pacific admits that the Texas Office Shops Act was unenforceable at the time it assumed the obligations of the 1954 Agreement.[5] Docket Entry No. 1 p. 12. But more importantly, any regulatory scheme in place when its predecessor International & Great Northern (I&GN) signed this agreement and it was assumed by Missouri Pacific has no bearing on Union Pacific's later voluntary decision to assume it. In other words, though state law may have influenced its predecessors' business decisions to continue Palestine operations through the decades, Union Pacific cannot escape the fact that it freely and voluntarily merged with MoPac,

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[5] And thus in 2007, Texas repealed its Office Shops Act after determining the ICCTA preempted it. *See* H.R. Rep. 80-3711, Reg. Sess. at 1 (Tex. 2007).

knowingly acquiring the assets at Palestine and the obligations of the 1954 Agreement in the process.

Union Pacific cites no regulation or statute compelling this acquisition and its assumption of the assets and obligations of MoPac. The merger took place over several years between large, sophisticated corporations acutely aware of the Palestine obligations, the issue having been litigated multiple times at various forums.[6] Nevertheless, Union Pacific elected to consummate the merger, assume the obligations of the 1954 Agreement and substantially comply with the agreement until the present litigation. Thus, there is no evidence that state law thrust these obligations upon Union Pacific.[7]

In fact, at the time of their merger in 1997, both railroads had the same right before the Surface Transportation Board as MoPac had before the ICC in 1977, which was that if the 1954 Agreement interfered with the merger, either could have requested an exemption from its legal obligations under the 1954 Agreement. *See* 49 U.S.C. 11321. Instead, Union Pacific, as the successor in the merger, elected *not* to

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[6] *See City of Palestine, Tex. v. United States,* 559 F.2d at 415 (1977), FN 1. (Overturning ICC's ruling that the contractual obligations in Palestine were preempted, finding that the "[a]greement provides for a downward adjustment of the percentage of people employed in Palestine in the case of merger").

[7] Significantly, the impetus for the negotiation of the 1954 Agreement was a provision in the federal bankruptcy statute, not the Texas Shops Act. *Id.*

seek relief from the STB[8] and voluntarily assumed MoPac's obligations to third parties including its obligations to the City, County and the citizens. It is undisputed that Union Pacific freely and voluntarily accepted the obligations of the 1954 Agreement to obtain the benefit of the assets held by MoPac, including the lucrative line through Palestine.

While the City and County disagree with the Panel's finding regarding the voluntariness of International & Great Northern's decision to modify and vacate the 1914 Judgment and enter into the 1954 Agreement allowing I&GN to move its headquarters from Palestine and relieved it of all obligations to maintain any facilities in Palestine, this finding is ultimately not controlling. The gravamen of the analysis lies in Union Pacific's later decision to voluntarily consummate the merger with MoPac (the successor to I&GN) and their subsequent election not to request relief from the STB. In failing to consider the voluntary nature of Union Pacific's 1997 assumption of the obligations in the 1954 Agreement, the Panel erred and deviated from the proper determination of a voluntary agreement.

Union Pacific's assumption of the agreement and later course of performance undoubtedly reflects the carrier's "own determination and admission that the agreement would not unreasonably interfere with interstate commerce", as even the STB *itself* has

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[8] Presumably due to UP's calculation that a favorable ruling from the STB would be similarly struck down by the Fifth Circuit based on its then-recent precedent in *City of Palestine*.

recognized on similar facts. *See PCS Phosphate Co. v. Norfolk S. Corp.* 559 F.3d 212, 221 (4th Cir. 2009). In upholding the STB's ruling, the Fourth Court of Appeals held that,

> [t]his is not to say that a voluntary agreement could never constitute an "unreasonable interference" with rail transportation, but the facts of this case indicate that any interference is not unreasonable—the parties contemplated delayed enforcement of the agreements, Norfolk Southern received the benefit of the agreements for over 40 years, and the agreements explicitly stated that the "relocation will not affect the ability of [Old NS] to comply with its legal obligation to serve any existing customer then on its line." In this instance, therefore, Norfolk Southern cannot use the ICCTA to "shield[] it from its own commitments." *See Township of Woodbridge*, 2000 WL 1771044, at *3.

*Id.* at 221-22. It is difficult to imagine a clearer representation of a carrier's "determination and admission" than Union Pacific's pattern of unilateral voluntary decisions before *and* after its acquisition of the assets and obligations at Palestine.

Thus, it appears the Panel has misapplied its only cited authority, *PSC Phosphate* (involving a perpetual covenant of easement that, so long as "used for railroad purposes…shall not be abandoned". *Id.*). In finding against preemption, the Fourth Circuit Court provided the proper analysis:

> Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of "regulation" expressly preempted by the statute. If contracts were by definition "regulation," then enforcement of every contract with "rail transportation" as its subject would be preempted as a state law remedy "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Given the statutory definition of "transportation," this would include all voluntary agreements about "equipment of any kind related to the movement of passengers or property, or both, by rail." *See* 49 U.S.C. § 10102(9) (defining "transportation"). If enforcement of these agreements were preempted, the contracting parties' only recourse would be the "exclusive" ICCTA remedies. But the ICCTA does not include a general contract remedy [footnote omitted]. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word "regulation," if it intended that result.

*Id.* 218–19. Here, because Union Pacific voluntarily assumed the obligations of the 1954 Agreement, the above facts weigh even stronger against preemption.

Preemption under the ICCTA is designed to provide a shield from local interference with railroad transportation. Congress did not intend for preemption to act as a sword to release carriers from their own

voluntarily-acquired contractual obligations, especially in economic development agreements. The Fifth Circuit has not applied federal preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the Panel in this case would establish a precedent to allow railroads to assume and then freely avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities have developed.

At least for purposes of summary judgment, uncontradicted evidence of the voluntary nature of the assumption of such obligations by Union Pacific presents an issue of material fact and warrants a full evidentiary hearing. The Panel decision affirming summary judgment on the issue of the voluntary assumption of the obligations of the 1954 Agreement is a significant error in the proper construction of ICCTA and merits the consideration of the full Court of Appeals

## PRAYER

Defendants – Appellants Anderson County and the City of Palestine request that the Court grant rehearing *en banc* and reverse the district court's grant of summary judgment for Union Pacific on its claims of ICCTA preemption and enter a judgment of dismissal.

Respectfully submitted,

*/s/ James P. Allison*
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*(Certificates omitted in this appendix)*

## APPENDIX D

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

**No. 21-40445**

**[Filed: August 8, 2022]**

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| Union Pacific Railroad Company,<br>*Plaintiff – Appellee*<br><br>v.<br><br>City of Palestine, Texas;<br>County of Anderson, Texas,<br>*Defendants – Appellants* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) |

On Appeal from the United States District
Court Eastern District of Texas, Tyler
Division Civil Action No. 6:19-CV-0574
The Honorable Jeremy D. Kernodle, Judge Presiding

**PETITION FOR PANEL REHEARING**

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## CERTIFICATE OF INTERESTED PERSONS

Appellants certify 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.

| **Parties** | **Counsel** |
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*/s/ James. P. Allison*
James P. Allison

## STATEMENT REGARDING ORAL ARGUMENT

Because the questions presented deal with issue s of first impression in this Circuit and significant importance that have not been fully considered, counsel requests oral argument if rehearing is granted.

## STATEMENT FOR PANEL REHEARING

This Panel's decision would mark the end of the line for the bright expectations and commitments of a small Texas town that staked its fortune on the promises of a railroad. For over a century, the promises, agreements and the City, County, and citizens' vested contractual rights have weathered legal scrutiny in the highest courts in the land. Union Pacific voluntarily assumed the Palestine assets and obligations decades ago. Nevertheless, the Panel decision nullifies the agreement and a century of legal precedent.

The Panel decision in this proceeding involves two questions of first impression in this Circuit and exceptional importance that deserve full consideration: First, whether Congress intended for an agreement entered decades before the enactment of the Interstate Commerce Commission Termination Act ("ICCTA") to be retroactively preempted. The retroactive application of the ICCTA to pre-existing contracts is a matter of first impression for this Circuit. However, other Circuits have considered and rejected the retroactive application of ICCTA to contracts executed before the enactment of the statute. With no evidence that Congress intended a retroactive application of ICCTA to contracts, the Panel decision will impermissibly obviate the substantial rights bargained for and agreed

by the railroad and the City, County, and citizens decades prior to contemplation of the ICCTA.

Second, whether ICCTA may be applied to relieve a railroad of contractual obligations that it assumed knowingly and voluntarily through a merger and under which the parties thereto have substantially performed to the present. This Circuit has not applied federal preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the panel in this case would allow railroads to freely assume and then avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities have developed. Such an extreme departure from the established precedent in other circuits merits the Panel's reconsideration

The panel decision conflicts with decisions of the Eighth and Ninth Circuits[1] in regard to the retroactive application of the ICCTA and would establish precedent in conflict with those circuits. On the second point on voluntary assumptions, although the sole authority cited by the Panel decision is a Fourth Circuit case,[2] this panel reaches a contrary result. Reconsideration is therefore necessary to secure and maintain uniformity of the Court's decisions and resolve a potential conflict with the decisions of other circuits.

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[1] *See* discussions of *New Prime* (Eighth Cir.), and *Rivas* (Ninth Cir.), *infra,* Arg. 1.

[2] *See* discussion regarding *PSC Phosphate*, *infra,* Arg. 2

*(Tables omitted in this appendix)*

TO THE HONORABLE COURT OF APPEALS:

Defendants – Appellants Anderson County and the City of Palestine file this Petition for Panel Rehearing and, in support thereof, respectfully show the following:

## WHY PANEL REHEARING IS WARRANTED

The Panel erred when it improperly upheld the trial court's grant of the motion for summary judgment filed by Plaintiff-Appellee Union Pacific, granting their Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment and Motions to Dismiss. Unless revised and corrected, the Panel decision will erroneously establish precedent on two important issues of first impression and will contravene the precedents of other Circuits.

## STATEMENT OF THE COURSE OF PROCEEDINGS

In November 2019, Union Pacific filed suit seeking declaratory relief that the ICCTA preempts its assumed obligations under a 1954 Agreement between the International & Great Northern Railroad and the City of Palestine, Anderson County, and a citizens committee. Union Pacific also sought an injunction preventing Palestine and Anderson County from enforcing the Agreement. *Id.*

Palestine and Anderson County filed a motion to dismiss and a motion for judgment on the pleadings. The district court denied these motions.

Union Pacific and Palestine and Anderson County filed motions for summary judgment. The district court

granted the Union Pacific motion, holding that the 1954 Agreement was expressly and impliedly preempted. It also concluded that the 1954 Agreement did not meet the voluntary contract exception to preemption. The district court enjoined Palestine and Anderson County from enforcing the 1954 Agreement against Union Pacific.

Palestine and Anderson County appealed the district court's grant of summary judgment for Union Pacific and the denials of their motion to dismiss, motion for judgment on the pleadings, and cross-motion for summary judgment. Upon appeal, this Honorable Court conducts a *de novo* review of the decision below.

On July 22, 2022, in a published opinion, the panel opinion of this Honorable Court denied relief on Appellants' issues, affirming the decision of the U.S. District Court for the Eastern District of Texas.

On August 2nd, this Honorable Court granted an extension of time to file this petition for panel rehearing until August 15, 2022. Thus, Appellants timely request that this matter be reheard.

## STATEMENT OF ANY FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

For the purposes of this Petition, Appellants rely particularly on facts established in the appellate record as follows:

> "UP acquired MoPac [Missouri Pacific] in the early 1980s and formally merged with MoPac on January 1, 1997. Docket Entry No. 1 p. 12 ¶ 30. UP absorbed the obligations of the 1954

> Agreement, as well as the assets at Palestine, when it merged with MoPac. Exhibit 9, Deposition of Cynthia Sanborn p. 16 ln. 2-5, p. 43 ln. 18 – p. 44 ln. 3, p. 45 ln. 21 – p. 46 ln. 10, p. 136 ln. 9-14. UP has no other obligations to the City or the County. Id. p. 19 ln. 8-19. At the time of the merger, both railroads had the same right before the STB as MoPac had before the ICC in 1977, that if the 1954 Agreement interfered with the merger either carrier could have requested an exemption from its legal obligations under the 1954 Agreement. 49 U.S.C. 11321. UP, as the successor in the merger, voluntarily took MoPac's obligations to third parties including its obligations to the City, County and the citizens. See Exhibit 3 D-000007."

ROA. 753-754.

## SUMMARY OF THE ARGUMENTS MERITING PANEL REHEARING

**ISSUE 1:** IN UPHOLDING THE U.S. DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, THE PANEL ERRED IN APPLYING THE ICCTA TO RETROACTIVELY PREEMPT AGREEMENTS EXECUTED PRIOR TO ITS ENACTMENT.

**ISSUE 2:** THE PANEL ERRED IN ITS ANALYSIS OF THE VOLUNTARY DECISION BY UNION PACIFIC TO ASSUME THE OBLIGATIONS CONTAINED IN THE 1954 AGREEMENT.

## ARGUMENT

### Issue 1: In upholding the District Court's grant of summary judgment, the Panel erred in applying

**the ICCTA to retroactively preempt agreements executed prior to its enactment.**

The Panel decision holds that the ICCTA retroactively preempted a pre-existing contract. This holding is fundamental to federal jurisdiction in this matter. The Court has an independent obligation to examine its own jurisdiction and the district court's jurisdiction. *See* Fed.R.Civ.P. 12(h)(3); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks omitted). Courts of Appeal review questions of standing *de novo. NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 236 (5th Cir.2010).

The decisions by the Court below and the Panel now seek to divest the Appellants and the citizens of vested contractual rights by imposing a retroactive application of ICCTA which is unsupported by Fifth Circuit precedent. Absent the retroactive application of ICCTA, the Plaintiff-Appellee Union Pacific has no federal cause of action and therefore lacks standing. Because standing is an essential component of federal subject-matter jurisdiction, the lack of standing can be raised at any time by a party or by the court. *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) (citing *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989)).

When reviewing a claim of federal preemption, a court begins with the plain language of the Interstate

Commerce Commission Termination Act, "which necessarily contains the best evidence of Congress' pre-emptive intent." *Franks,* 593 F.3d at 408 (*citing CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). There is a presumption against pre-emption in "areas of law traditionally reserved to the states, like police powers and property law…" *Id.* (*quoting Altria Group, Inc. v. Good,* 555 U.S. 70, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008)).

This issue of the Act's retroactive effect was explicitly decided soon after its enactment in both the Eighth and Ninth Circuits, which specifically held that there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, and that this lack of standing deprived the district courts of jurisdiction. First, the Eight Circuit ruled against retroactive application to pre-existing contracts in *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, holding that:

> [A] presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (citation omitted). The rationale for this presumption is that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* As such, the Supreme Court has provided a framework for determining when a federal statute applies to conduct predating the statute's enactment. First, a court

must determine if Congress has expressly prescribed the statute's proper reach. *Id.* at 280, 114 S.Ct. 1483. If Congress has prescribed the reach, "there is no need to resort to judicial default rules." *Id.* If not, a court must examine whether the statute would have a retroactive effect; i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute would do any of these things, the presumption is that the statute does not govern, absent clear congressional intent otherwise. *Id.*

With regard to the ICCTA, Congress has not expressly prescribed the statute's reach. Therefore, we must proceed to the second step: whether application of the statute in this case would have a retroactive effect. We agree with the district court that private rights of action for damages based on the ICCTA are limited to actions involving agreements executed after the ICCTA's effective date; otherwise, the statute has a retroactive effect.

Prior to the ICCTA, only the ICC could bring claims against motor carriers for failure to comply with the applicable regulations. The ICCTA shifts this power and permits individual Owner–Operators to bring defendants directly into court. We find that this creates an impermissible retroactive effect.

> This issue is analogous to the issue presented in *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), in which the Supreme Court held that when a statute expanded the class of plaintiffs who could bring claims, the statute altered the defendant's substantive rights and therefore had a retroactive effect. *Id.* at 950, 117 S.Ct. 1871 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the [new statute] essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.") (citation omitted). Here, by permitting Owner–Operators to bring their own actions against motor carriers, the ICCTA expands the class of plaintiffs who could bring claims, thereby altering the motor carriers' substantive rights. *But see Owner–Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.,* No. 97–CV–750, 2003 WL 21645754 (S.D.Ohio July 11, 2003).

339 F.3d 1001, 1006–07 (8th Cir. 2003). The *New Prime* Plaintiffs' Petition for writ of certiorari to the United States Supreme Court was denied. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 541 U.S. 973, 124 S. Ct. 1878, 158 L. Ed. 2d 467 (2004).

The Ninth Circuit then quickly followed this precedent, also holding that the ICCTA could only preempt contracts executed *after* its enactment, reasoning that,

> We find persuasive *New Prime's* conclusion that in this case, as in *Hughes,* retroactively expanding the universe of potential plaintiffs would have an impermissible retroactive effect. Because application of the ICCTA to pre–1996 agreements would increase Defendants' potential liability, the statute has a retroactive effect. *See New Prime,* 339 F.3d at 1007. In the absence of evidence of congressional intent to create such an effect, we apply a presumption that the statute does not operate retroactively. *See Landgraf,* 511 U.S. at 280, 114 S.Ct. 1483 Because there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, we hold that ICCTA's private right of action for damages applies only to contracts executed after its enactment.

*Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079, 1084–85 (9th Cir. 2005).

This Circuit has held that, "[t]he standard for finding a statute expressly retroactive is demanding ... The Supreme Court has suggested that retroactivity has only been found in "statutory language that was so clear that it could sustain only one interpretation." (Internal citations omitted). *Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 (5th Cir. 2007). Thus, the dispositive question is whether Congress has expressed its clear intent that the ICCTA apply retroactively to contracts formed before its enactment.

Though it fails to identify *any* statutory language suggesting Congress' intent, the Panel *de novo* decision grants preemption of a 1954 Agreement executed over

40 years prior to the existence of the ICCTA. The 1954 Agreement was valid and enforceable at the time of its execution and upheld by this Court in *City of Palestine, Tex. v. United States*. 559 F.2d at 415 (1977). For many years, the parties have relied upon the terms of the agreement and had the full opportunity to know the law and conform their conduct accordingly. A retroactive application of ICCTA to the 1954 Agreement will alter Appellants' substantive rights, relieve the railroad of its assumed obligations, and create a new cause of action that did not exist prior to enactment. The Panel's decision in this case to retroactively apply the preemption provisions of ICCTA to preempt the 1954 Agreement, if affirmed by the full Court, would undoubtedly create a split of authority between the circuits. Thus, Appellants ask that the Panel reconsider this important issue.

**Issue 2: The Panel erred in its analysis of Union Pacific's voluntary decision to assume of the obligations contained in the 1954 agreement.**

The Panel's analysis of Union Pacific's voluntary decision[3] to assume the 1954 Agreement erroneously focused solely on the decisions of Union Pacific's many predecessors[4] in the years preceding its 1954 execution, rather than on Union Pacific's decision—much later—to assume these obligations from Missouri Pacific. In holding that the Agreement was not

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[3] *See* Memorandum Opinion, III.(C), pp. 14-16.

[4] Movant's interpretation differs greatly as reflected in its earlier briefing, but will not be rehashed here.

voluntary, the Panel briefly summarized a timeline pertaining to these predecessor companies with little mention of Union Pacific's wholly voluntary assumption of these contractual obligations, as follows,

> Approximately three decades passed, and in 1982, Union Pacific acquired MoPac. Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") which established the Surface Transportation Board ("STB") to regulate rail carriers and preempted various state and local laws that were within the STB's jurisdiction. 49 U.S.C. § 10501(b). In 1997, Union Pacific merged with MoPac.

Memorandum Opinion, at 6. Like the trial court, the Panel relies on the Texas Office Shops Act as being the state regulation meriting preemption, holding that, "[t]he voluntary contract exception does not apply because Union Pacific was prohibited from using its own "determination and admission." *Id*, p.16.

First, this reasoning is flawed because Union Pacific admits that the Texas Office Shops Act was unenforceable at the time it assumed the obligations of the 1954 Agreement.[5] Docket Entry No. 1 p. 12. But more importantly, any regulatory scheme in place when its predecessor International & Great Northern (I&GN) signed this agreement and it was assumed by Missouri Pacific has no bearing on Union Pacific's later voluntary decision to assume it. In other words, though

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[5] And thus in 2007, Texas repealed its Office Shops Act after determining the ICCTA preempted it. *See* H.R. Rep. 80-3711, Reg. Sess. at 1 (Tex. 2007).

state law may have influenced its predecessors' business decisions to continue Palestine operations through the decades, Union Pacific cannot escape the fact that it freely and voluntarily merged with MoPac, knowingly acquiring the assets at Palestine and the obligations of the 1954 Agreement in the process.

Union Pacific cites no regulation or statute compelling this acquisition and its assumption of the assets and obligations of MoPac. The merger took place over several years between large, sophisticated corporations acutely aware of the Palestine obligations, the issue having been litigated multiple times at various forums.[6] Nevertheless, Union Pacific elected to consummate the merger, assume the obligations of the 1954 Agreement and substantially comply with the agreement until the present litigation. Thus, there is no evidence that state law thrust these obligations upon Union Pacific.[7]

In fact, at the time of their merger in 1997, both railroads had the same right before the Surface Transportation Board as MoPac had before the ICC in 1977, which was that if the 1954 Agreement interfered with the merger, either could have requested an

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[6] *See City of Palestine, Tex. v. United States,* 559 F.2d at 415 (1977), FN 1. (Overturning ICC's ruling that the contractual obligations in Palestine were preempted, finding that the "[a]greement provides for a downward adjustment of the percentage of people employed in Palestine in the case of merger").

[7] Significantly, the impetus for the negotiation of the 1954 Agreement was a provision in the federal bankruptcy statute, not the Texas Shops Act. *Id.*

exemption from its legal obligations under the 1954 Agreement. *See* 49 U.S.C. 11321. Instead, Union Pacific, as the successor in the merger, elected *not* to seek relief from the STB[8] and voluntarily assumed MoPac's obligations to third parties including its obligations to the City, County and the citizens. It is undisputed that Union Pacific freely and voluntarily accepted the obligations of the 1954 Agreement to obtain the benefit of the assets held by MoPac, including the lucrative line through Palestine.

While the City and County disagree with the Panel's finding regarding the voluntariness of International & Great Northern's decision to modify and vacate the 1914 Judgment and enter into the 1954 Agreement allowing I&GN to move its headquarters from Palestine and relieved it of all obligations to maintain any facilities in Palestine, this finding is ultimately not controlling. The gravamen of the analysis lies in Union Pacific's later decision to voluntarily consummate the merger with MoPac (the successor to I&GN) and their subsequent election not to request relief from the STB. In failing to consider the voluntary nature of Union Pacific's 1997 assumption of the obligations in the 1954 Agreement, the Panel erred and deviated from the proper determination of a voluntary agreement.

Union Pacific's assumption of the agreement and later course of performance undoubtedly reflects the

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[8] Presumably due to UP's calculation that a favorable ruling from the STB would be similarly struck down by the Fifth Circuit based on its then-recent precedent in *City of Palestine*.

carrier's "own determination and admission that the agreement would not unreasonably interfere with interstate commerce", as even the STB *itself* has recognized on similar facts. *See PCS Phosphate Co. v. Norfolk S. Corp.* 559 F.3d 212, 221 (4th Cir. 2009). In upholding the STB's ruling, the Fourth Court of Appeals held that,

> [t]his is not to say that a voluntary agreement could never constitute an "unreasonable interference" with rail transportation, but the facts of this case indicate that any interference is not unreasonable—the parties contemplated delayed enforcement of the agreements, Norfolk Southern received the benefit of the agreements for over 40 years, and the agreements explicitly stated that the "relocation will not affect the ability of [Old NS] to comply with its legal obligation to serve any existing customer then on its line." In this instance, therefore, Norfolk Southern cannot use the ICCTA to "shield[] it from its own commitments." *See Township of Woodbridge*, 2000 WL 1771044, at *3.

*Id*. at 221-22. It is difficult to imagine a clearer representation of a carrier's "determination and admission" than Union Pacific's pattern of unilateral voluntary decisions before *and* after its acquisition of the assets and obligations at Palestine.

Thus, it appears the Panel has misapplied its only cited authority, *PSC Phosphate* (involving a perpetual covenant of easement that, so long as "used for railroad purposes…shall not be abandoned". *Id.*). In finding

against preemption, the Fourth Circuit Court provided the proper analysis:

> Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of "regulation" expressly preempted by the statute. If contracts were by definition "regulation," then enforcement of every contract with "rail transportation" as its subject would be preempted as a state law remedy "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Given the statutory definition of "transportation," this would include all voluntary agreements about "equipment of any kind related to the movement of passengers or property, or both, by rail." *See* 49 U.S.C. § 10102(9) (defining "transportation"). If enforcement of these agreements were preempted, the contracting parties' only recourse would be the "exclusive" ICCTA remedies. But the ICCTA does not include a general contract remedy [footnote omitted]. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word "regulation," if it intended that result.

*Id.* 218–19. Here, because Union Pacific voluntarily assumed the obligations of the 1954 Agreement, the above facts weigh even stronger against preemption.

Preemption under the ICCTA is designed to provide a shield from local interference with railroad

transportation. Congress did not intend for preemption to act as a sword to release carriers from their own voluntarily-acquired contractual obligations, especially in economic development agreements. The Fifth Circuit has not applied federal preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the Panel in this case would establish a precedent to allow railroads to assume and then freely avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities have developed.

At least for purposes of summary judgment, uncontradicted evidence of the voluntary nature of the assumption of such obligations by Union Pacific presents an issue of material fact and warrants a full evidentiary hearing. The Panel decision affirming summary judgment on the issue of the voluntary assumption of the obligations of the 1954 Agreement is a significant error in the proper construction of ICCTA and merits reconsideration by the Panel.

## PRAYER

Defendants – Appellants Anderson County and the City of Palestine request that the Court grant a rehearing before the panel and reverse the district court's grant of summary judgment for Union Pacific on its claims of ICCTA preemption and enter a judgment of dismissal.

Respectfully submitted,

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*(Certificates omitted in this appendix)*

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION**

**Case No. 6:19-cv-574-JDK**

**[Filed May 27, 2021]**

| | |
|---|---|
| UNION PACIFIC RAILROAD COMPANY, | ) |
| Plaintiff, | ) |
| v. | ) |
| CITY OF PALESTINE, *et al.*, | ) |
| Defendants. | ) |

### ORDER

On February 3, 2021, the Court granted Union Pacific's Motion for Summary Judgment (Docket No. 39) and denied the City of Palestine and Anderson County's Motion for Summary Judgment (Docket No. 42) and Motions to Dismiss (Docket Nos. 40, 41). Docket No. 65. The Court also issued a Memorandum Opinion (Docket No. 69), explaining that the Court's Opinion and Order Granting Union Pacific's Motion for Summary Judgment (Docket No. 65) warrants an

award of declaratory and injunctive relief. Having resolved all claims, the Court entered Final Judgment (Docket No. 70) on March 25, 2021.

Now before the Court is Defendants' Motion for New Trial or [to] Alter or Amend Court's Order and Final Judgment. Docket No. 74. For the reasons discussed below, the Court **DENIES** the motion.

## I. Background

Union Pacific sued the City and County seeking declaratory and injunctive relief regarding the parties' long-standing relationship. Docket No. 1 at 16–17. In cross motions for summary judgment, Union Pacific argued that the Interstate Commerce Commission Termination Act (ICCTA) preempted the parties' 1954 Agreement, while Defendants maintained that the ICCTA did not preempt the Agreement. Docket Nos. 39 at 15–21; 42 at 17–22. The Court, with the benefit of the parties' extensive briefing, concluded that the ICCTA preempts the 1954 Agreement, both expressly and impliedly (as applied). Docket No. 65 at 21, 31–32.

The Court then considered and awarded the appropriate relief. In its Complaint, Union Pacific had requested declaratory and injunctive relief related to the 1954 Agreement, as well as declaratory and injunctive relief related to a second document, the 1914 Decree. Docket No. 1 at 16–17. In express preemption cases, "a finding with regard to likelihood of success fulfills the remaining requirements" of injunctive relief. *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010). Having found that the ICCTA expressly preempts the 1954

Agreement, Docket No. 65 at 21, the Court granted both declaratory and injunctive relief as to the 1954 Agreement. Docket No. 69 at 1. However, the Court denied declaratory and injunctive relief as to the 1914 Decree because the Court found that "Union Pacific did not plead, prove, or even argue (until its supplemental brief) that the ICCTA preempts the 1914 Decree." *Id.* at 4. Thereafter, the Court entered Final Judgment. Docket No. 70.

Defendants' motion followed. Defendants ask the Court to (1) amend the Final Judgment under Federal Rule of Civil Procedure 59(e) and (2) vacate or revise the permanent injunction. *Id.* at 2–3.

## II. Rule 59(e) Motion

### A. Legal Standard

Rule 59(e) provides for a "motion to alter or amend a judgment." Alteration or amendment is appropriate "(1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact." *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 181 (5th Cir. 2012); *accord Berezowsky v. Rendon Ojeda*, 652 F. App'x 249, 251 (5th Cir. 2016) (per curiam). "'Manifest error' is one that 'is plain and indisputable, and that amounts to a complete disregard of the controlling law.'" *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (quoting *Venegas–Hernandez v. Sonolux Rec.*, 370 F.3d 183, 195 (1st Cir. 2004)); *accord Wease v. Ocwen Loan Servicing, L.L.C.*, No. 20-10476, 2021

WL 1604694, at *2 (5th Cir. Apr. 23, 2021) (unpublished).

Parties may not utilize a Rule 59(e) motion as a "vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). The "extraordinary remedy" of amending a final judgment should be used "sparingly." *Id.* (citing *Clancy v. Emp. Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000)).

**B. Analysis**

Defendants argue that the Court committed a "manifest error of law" by holding that the ICCTA expressly and impliedly preempts the 1954 Agreement. Docket No. 75 at 3. But, as Plaintiff argues, Defendants' motion improperly rehashes arguments the Court previously considered and rejected. Docket No. 76 at 3–6.

First, Defendants assert that there is a material question of fact as to whether the 1954 Agreement manages or governs rail transportation, precluding summary judgment on Union Pacific's express preemption claim. Docket No. 74 at 4–6. They argue that, even if the 1954 Agreement regulates Union Pacific's operations and imposes a financial burden, such a finding does not support the conclusion that the Agreement regulates rail transportation. *Id.* at 6–7. The Court previously rejected this argument, as stated in its February 3 opinion:

> [T]he Agreement's requirement to maintain employees in Palestine necessarily requires Union Pacific to provide facilities there. And Union Pacific presents evidence that maintaining its Palestine facilities disrupts the railroad's operations, undermines the company's business objective to maximize efficiency, and requires an enormous financial outlay in the coming years. Docket No. 39, Ex. 11 at 1 ¶ 3; Ex. 4 at 85:1–86:6; Ex. 14 at 1 ¶ 3. Defendants introduce no evidence to the contrary. The Court thus finds that the 1954 Agreement unreasonably burdens and interferes with Union Pacific's railroad facilities.

Docket No. 65 at 30. By controlling the location, number, and function of Union Pacific's employees, the 1954 Agreement "necessarily regulates 'facilities' and 'services' related to the movement of people and property by rail." *Id*. at 24. Accordingly, the ICCTA expressly preempts the 1954 Agreement. The Court will not revisit this conclusion on the basis of Defendants' now-stale arguments. *See Helena Labs. Corp. v. Alpha Sci. Corp.*, 483 F. Supp. 2d 538, 540 (E.D. Tex. 2007), *aff'd*, 274 F. App'x 900 (Fed. Cir. 2008) (denying Rule 59(e) motion where the court had previously "addressed this precise argument").

Second, and similarly, Defendants argue that there is no evidence of implied preemption. Defendants characterize Union Pacific's evidence as showing only the 1954 Agreement's prospective financial impact, not any interference with interstate commerce. Docket No. 74 at 7–9. Again, this is a rerun of Defendants'

argument, in which they previously stated: "as the 1954 Agreement has been applied to Union Pacific's current operations, it has had no effect on the transportation of goods or people in interstate commerce." Docket No. 51 at 18. In considering Defendants' argument, the Court applied the Fifth Circuit's "fact-based test" for implied preemption. Docket No. 65 at 26–32. Under this test, a regulation is impliedly preempted if it has "the effect of unreasonably burdening or interfering with rail transportation." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010). The Court detailed the operational inefficiencies imposed by the 1954 Agreement, Docket No. 65 at 27–29, and found they unreasonably burden Union Pacific's rail-transportation services. *Id.* at 30. In undertaking this analysis, the Court recognized that the 1954 Agreement imposed a considerable financial burden on Union Pacific *and* hindered Union Pacific's cross-country railroad operations. *Id.* So, having already heard and rejected Defendants' arguments against implied preemption, the Court will not reconsider the matter on a Rule 59(e) motion.

Third, Defendants resurrect their argument that the 1954 Agreement is a contractual obligation that cannot be preempted. Docket No. 74 at 9–10. Again, the Court thoroughly rejected this argument in its February 3 opinion:

> [T]he 1954 Agreement is not a voluntary contract between private parties. The Agreement is with the City and County—both acting in their roles as government entities to

> secure benefits for their citizens, not as market participants. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 768-70 (4th Cir. 2018) ("[W]hen the state acts as a market participant, it is treated like a private party in the same market; when the state acts as a regulator, it is subject to the unique limits placed on states by our federal system."). And the 1954 Agreement was not voluntary, but rather the product of a federal bankruptcy proceeding in which state and federal law constrained the railroad's negotiating power. Docket Nos. 39 at 6–8 ¶¶ 7–10; 51 at 3 ¶ 3.

Docket No. 65 at 33. The Court sees no reason to revisit the matter now.

In their Rule 59(e) motion, Defendants have not presented any evidence, identified any legal theory, or cited any authority that was not already analyzed by the parties and the Court. "[D]istrict court opinions 'are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" *eTool Dev., Inc. v. Nat'l Semiconductor Corp.*, 881 F. Supp. 2d 745, 749 (E.D. Tex. 2012) (quoting *Verdin v. Fed. Nat'l Mortg. Ass'n,* No. 4:10–cv–590, 2012 WL 2803751, at *1 (E.D. Tex. July 10, 2012)). Defendants' Rule 59(e) motion is thus nothing more than a second bite at the apple—and it fails on that basis alone.

**III. Permanent Injunction**

Defendants also argue that the Court's injunction is vague because they are unable to determine its effect on a related state court judgment—specifically,

whether Defendants are "enjoined from seeking enforcement of the 1955 state court judgment." Docket No. 74 at 10–11. In response, Union Pacific concedes that it "did not seek an injunction to bar the City and County from filing any action they believe they might have with respect to the 1955 Judgment in state court, and this Court did not enter one." Docket No. 75 at 8. There is therefore no dispute on this point, and the Court need not address it further. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)); *accord Gonzalez v. CoreCivic, Inc.*, 986 F.3d 536, 540 (5th Cir. 2021) (Ho, J., concurring).

**IV. Conclusion**

Based on the foregoing, the Court **DENIES** Defendants' Motion for New Trial or [to] Alter or Amend the Court's Order and Opinion (Docket No. 65), Memorandum Opinion (Docket No. 69), and Final Judgment (Docket No. 70). Docket No. 74.

So **ORDERED** and **SIGNED** this **27th** day of **May, 2021.**

s/_____
JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

## APPENDIX F

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION**

**Case No. 6:19-cv-574-JDK**

**[Filed March 25, 2021]**

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|---|---|
| UNION PACIFIC RAILROAD COMPANY, | ) |
| Plaintiff, | ) |
| v. | ) |
| CITY OF PALESTINE, *et al.*, | ) |
| Defendants. | ) |

### MEMORANDUM OPINION

Before the Court is the question of what relief to award Plaintiff Union Pacific in light of the Court's February 3, 2021 Order granting Union Pacific's Motion for Summary Judgment and denying Defendants City of Palestine and Anderson County's Motion for Summary Judgment. Docket No. 65. In its Complaint, Union Pacific seeks declaratory and injunctive relief related to the 1954 Agreement, as well as declaratory and injunctive relief related to the 1914

Decree. Docket No. 1 at 16–17. The Court will grant relief as to the 1954 Agreement because, in express preemption cases, "a finding with regard to likelihood of success fulfills the remaining requirements" of injunctive and declaratory relief *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010). But, for the reasons articulated below, the Court will deny Union Pacific's other requested relief.

## I. BACKGROUND

Union Pacific's Motion for Summary Judgment identified two dispositive issues: "Whether ICCTA preempts the 1954 Agreement both categorically and as applied" and "[w]hether Palestine's defenses . . . fail as a matter of law." Docket No. 39 at 4. Likewise, the City and County presented three issues related to the ICCTA's preemption of the 1954 Agreement, namely: whether the 1954 Agreement is a voluntary contract, is enforceable by a state law or regulation, or is an unreasonable burden on or interference with interstate commerce. Docket No. 42 at 10. Both parties presented evidence and argument concerning the scope of the ICCTA's preemption as to the 1954 Agreement. Docket Nos. 39, 42, 48, 51. Finding that the ICCTA explicitly and impliedly preempts the 1954 Agreement, the Court granted summary judgment in Union Pacific's favor. Docket No. 65 at 25, 31–32, 40–41.

The Parties did not argue—and the Court did not consider—whether the ICCTA preempts the 1914 Decree. Even so, Union Pacific seeks declaratory and injunctive relief as to the 1914 Decree. Docket Nos. 1 at 16–17, 39 at 30. The Court requested supplemental

briefing, asking the parties to explain whether and how the 1914 Decree's preemption was argued as a part of this case. With the benefit of the Parties' supplemental briefing (Docket Nos. 67–68) and for the reasons explained below, the Court declines to award relief as to the 1914 Decree.

## II. LEGAL STANDARD

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *ODonnell v. Harris Cnty.*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The Court must "narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818–19 (5th Cir. 2004) (citing *Valley v. Rapides Parish Sch. Bd.*, 646 F.2d 925, 942 (5th Cir.1981)); *accord Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016). By contrast, an injunction is overbroad when "it exceeds the extent of the violation established." *Id.* (citing *Califano*, 442 U.S. at 702); *accord Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 478 n. 39 (5th Cir. 2020). An overbroad injunction is subject to vacatur. *ODonnell*, 892 F.3d at 163 (citing *John Doe #1*, 380 F.3d at 818).

Likewise, a declaratory judgment is available only where the underlying dispute gives rise to the remedy. A declaratory judgment must both "serve a useful purpose in clarifying and settling the legal relations in issue" and "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 523 (5th Cir. 2016) (quoting *Concise Oil & Gas P'ship v. La. Intrastate Gas*

*Corp.*, 986 F.2d 1463, 1471 (5th Cir.1993)). Prayers for declaratory relief "depend on an otherwise justiciable case or controversy for their vitality." *Lawry v. Bank of New York Mellon Tr. Co., N.A.*, 797 F. App'x 152, 156 (5th Cir. 2019) (per curiam) (citing *Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003)).

## III. ANALYSIS

Union Pacific characterizes its Complaint and briefing as having "always treated the 1954 Agreement and the 1914 Decree as two sides of the same coin." Docket No. 67 at 1. Union Pacific asserts that both its Complaint and summary judgment motion emphasized that, because the 1914 Decree was a precursor to the 1954 Agreement, the ICCTA preempts the 1914 Decree for the same reasons that it preempts the 1954 Agreement. *Id.* at 2–3. Defendants respond that Union Pacific has not offered any evidence that the ICCTA preempts the 1914 Decree and that, under the *Rooker-Feldman* Doctrine and the Anti-Injunction Act, only Texas state courts may amend the 1914 Decree. Docket No. 68 at 2–4.

After carefully reviewing the record, the Court finds that Union Pacific did not plead, prove, or even argue (until its supplemental brief) that the ICCTA preempts the 1914 Decree. Accordingly, the Court denies declaratory and injunctive relief as to the 1914 Decree.

The Court must "narrowly tailor an injunction to remedy the specific action which gives rise to the order." *Veneman*, 380 F.3d at 818. Here, Union Pacific's "specific action" consisted of one count: the ICCTA expressly and impliedly preempts the 1954 Agreement.

Docket No. 1 at ¶¶ 40–41. To resolve this action, Union Pacific's Motion for Summary Judgment argued two dispositive issues: the ICCTA preempted the 1954 Agreement as a matter of law and the City and County's affirmative defenses regarding the Agreement failed as a matter of law. Docket No. 39 at 4. The Court considered the parties' arguments and held that the ICCTA expressly and impliedly preempted the Agreement. Docket No. 65 at 21–32.

To be sure, as Union Pacific now argues, the Court's reasoning in analyzing the 1954 Agreement *may* also apply to the 1914 Decree, Docket No. 67 at 3–4, but the preemption of the 1914 Decree was not before the Court. The Court has no discretion to award injunctive relief "beyond the scope of the contract" in dispute—the 1954 Agreement. *See U-Save Auto Rental of Am., Inc. v. Moses*, 80 F. App'x 929, 930 (5th Cir. 2003) (per curiam). Because the ICCTA's effect on the 1914 Decree is a separate question not at issue in this case, the Court declines to award injunctive relief as to the 1914 Decree.[1] *See ODonnell*, 892 F.3d at 163–64.

For many of the same reasons, the Court declines to award declaratory relief as to the 1914 Decree. Union Pacific requests a declaration that the 1914 Decree is "null and void." Docket Nos. 1 at 16, 39 at 30. As explained above, however, the dispositive issue in this case is whether the ICCTA preempted the 1954 Agreement. Accordingly, a declaration regarding the

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[1] Having declined to award injunctive relief as to the 1914 Decree, the Court need not reach Defendants' arguments as to the availability of the disputed relief. *See* Docket No. 68 at 2–4.

1914 Decree would not aid in "clarifying and settling the legal relations in issue," much less "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *See Env't Tex. Citizen Lobby*, 824 F.3d at 523. Because declaratory relief would not clarify the parties' legal relationship, the Court declines to award such relief here. *See, e.g.*, *Sanchez v. Bank of Am., N.A.*, No. 3:14-cv-2571-B, 2015 WL 418084, at *8 (N.D. Tex. Jan. 30, 2015).

## IV. CONCLUSION

In sum, the Court will grant Union Pacific's requested relief as to the 1954 Agreement but will deny Union Pacific's remaining requested relief. The Court will separately enter Final Judgment in accordance with this Opinion.

So **ORDERED** and **SIGNED** this **25th** day of **March, 2021.**

s/_____
JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION**

**Case No. 6:19-cv-574-JDK**

**[Filed March 25, 2021]**

| | |
|---|---|
| UNION PACIFIC RAILROAD COMPANY, | ) |
| Plaintiff, | ) |
| v. | ) |
| CITY OF PALESTINE, *et al.*, | ) |
| Defendants. | ) |

**FINAL JUDGMENT**

Pursuant to the Court's Order Granting Summary Judgment for Plaintiff Union Pacific (Docket No. 65), entered on February 3, 2021, the Court hereby enters **FINAL JUDGMENT**.

**IT IS ORDERED** that:

1. The 1954 Agreement is preempted by the ICCTA and so is null and void;

2. Union Pacific is under no obligation to honor any of the 1954 Agreement's terms, including any requirement that the railroad station any

portion of its workforce or operations at Palestine;

3. Neither Union Pacific or any of its successors and assigns are required to maintain employees or facilities in Palestine, Texas or Anderson County, Texas;

4. City of Palestine and Anderson County are enjoined from enforcing the 1954 Agreement against Union Pacific nor any of its successors and assigns.

All pending motions are **DENIED** as **MOOT**. All expenses, costs, and attorneys' fees are to be borne by the party that incurred them. The Clerk of the Court is instructed to close this case.

So **ORDERED** and **SIGNED** this **25th** day of **March, 2021.**

s/_____
JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

## APPENDIX G

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION**

**Case No. 6:19-cv-574-JDK**

**[Filed February 3, 2021]**

| | |
|---|---|
| UNION PACIFIC RAILROAD COMPANY, | ) |
| Plaintiff, | ) |
| v. | ) |
| CITY OF PALESTINE, *et al.*, | ) |
| Defendants. | ) |

## ORDER AND OPINION

This case has its origins in a nineteenth-century relic—a "shop agreement" in which a railroad promised to maintain shops and offices in a particular municipality in exchange for government subsidies to expand the rail line. Plaintiff Union Pacific Railroad Company alleges that its agreement with the City of Palestine and Anderson County, Texas, is preempted by a federal statute, the Interstate Commerce Commission Termination Act (ICCTA). Union Pacific

seeks a declaration voiding the agreement and an injunction prohibiting the City and County from enforcing it.

Pending before the Court are two motions to dismiss filed by the City and County and the Parties' cross-motions for summary judgment. For the reasons discussed below, the Court **DENIES** Defendants' motions to dismiss (Docket Nos. 40 & 41), **GRANTS** Plaintiff's motion for summary judgment (Docket No. 39), and **DENIES** Defendants' motion for summary judgment (Docket No. 42).

## I. BACKGROUND

Union Pacific's contractual relationship with the City of Palestine and Anderson County originated nearly 150 years ago. In 1872, Union Pacific's predecessor in interest contracted with the City and County to run its rail line to and through Palestine. *City of Palestine v. United States*, 559 F.2d 408, 410 (5th Cir. 1977).[1] At that time, the railroad promised to "locate and establish and forever thereafter keep and maintain" its "general offices, machine shops and roundhouses" in Palestine. *Id.* And Palestine promised to raise $150,000 in bonds for the railroad from the citizens of Anderson County. *Id.*

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[1] The key facts in this case are undisputed. The Fifth Circuit stated the relevant facts in a 1977 opinion, which adjudicated a different dispute involving the same 1954 Agreement. *See City of Palestine*, 559 F.2d at 408. That opinion construed and applied the ICCTA's predecessor statute, the Interstate Commerce Act (ICA). *Id.*

In 1873, the railroad company merged with a second line. The Texas Legislature approved the merger on the condition that the merged company assume "all acts done in the name of either of the companies." *Id.* The new railroad therefore agreed to establish its "general offices, machine shops and roundhouses" in Palestine. *Id.* In 1875, the citizens paid an additional $150,000 in bonds and agreed to "construct, at their own cost and expense, housing for the officers and employees of the company." *Id.*

In 1911, the railroad's creditors reorganized the business into the new International & Great Northern Railroad (I&GN), subject to all the predecessor railroad's rights and liabilities. *Id.* at 410–11. I&GN's corporate charter located the railroad's offices in Houston, Texas. *Id.* at 411. The City and County sued I&GN, seeking an injunction to enforce the railroad's obligation to locate its "general offices, machine shops and roundhouses" in Palestine. *Id.* The City and County won, and the Cherokee County District Court issued a decree (the 1914 Decree) forever binding I&GN to maintain its general offices, machine shops, and roundhouses in Palestine.[2] *Id.* at 412.

The 1914 Decree complied with Texas's "Shop Act," which statutorily required "a railroad company chartered by the state without charter-designated office location" to:

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[2] On appeal, the U.S. Supreme Court affirmed the decision. *Int'l & Great N. Ry. Cnty. v. Anderson County*, 246 U.S. 424, 432–34 (1918) ("The [office and shops] requirement is perpetual until the law is changed. When and how it may be changed is not before us now.").

> keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration. . . . And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.

*Id.* (quoting TEX. REV. CIV. STAT. art. 6423 (1911)).

Missouri Pacific (MoPac) subsequently acquired I&GN as a subsidiary. *Id.* During the Great Depression, MoPac filed for bankruptcy and requested reorganization under Bankruptcy Act § 77. *Id.* In its request, MoPac proposed to consolidate with its subsidiaries, including I&GN. *Id.* But the 1914 Decree required I&GN to maintain its offices in Palestine, and MoPac's offices were located elsewhere. *Id.* The Bankruptcy Act, moreover, expressly required enforcement of the 1914 Decree. Section 77(n) stated:

> No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier

> from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

*Id.* (quoting 11 U.S.C. § 205(n) (1970)).

At the request of the bankruptcy court, MoPac negotiated with the City and County in 1954 to modify the 1914 Decree. *Id.* Pursuant to the agreement (the 1954 Agreement), "MoPac agreed to forever maintain in Palestine 4.5% of all of its employees in certain job classifications" and was no longer required to "maintain its general offices, shops and roundhouses in Palestine." *Id.* The percentage was subject to fractionation if the railroad subsequently merged, combined, or consolidated. Docket No. 39, Ex. 1 at 23–24. In 1955, the District Court of Cherokee County, Texas, entered a judgment to modify the 1914 Decree according to the 1954 Agreement. *Id.*, Ex. 3. The bankruptcy court approved the reorganization. *City of Palestine*, 559 F.2d at 412.

Nearly thirty years passed, and then several key events occurred. In 1982, Union Pacific acquired MoPac. *Id.*, Ex. 10 at 1 ¶ 4. In 1995, Congress passed the ICCTA, establishing the Surface Transportation Board to regulate rail carriers and preempting state and local laws that come within the Board's jurisdiction. Pub. L. No. 104-88, 109 Stat. 803 (1995); *Tex. Cent. Bus. Lines Corp. v. Midlothian*, 669 F.3d

525, 530 (5th Cir. 2012). In 1997, Union Pacific merged into MoPac. Docket No. 39, Ex. 10 at 1 ¶ 4. And in 2007, Texas repealed its Shop Act, concluding that it was preempted by the ICCTA. H.R. 80-3711, Reg. Sess. at 1 (Tex. 2007).

At present, Union Pacific must employ 0.52% of its "Office and Shop Employees" in Palestine, Texas. Docket No. 39, Ex. 4 at 31:7–17. The 1954 Agreement defines "Office and Shop Employees" to include the following classifications: Executives, Officials, and Staff Assistants; Professional, Clerical, and General; Maintenance of Equipment and Stores; Transportation (other than Train, Engine and Yard); Transportation (Yardmasters, Switch Tenders, and Hostlers). Docket 1, Ex. 1 at 3. In this lawsuit, Defendants do not assert that Union Pacific has breached the 1954 Agreement. *See* Docket No. 51 at 8 ¶ 17. Instead, Union Pacific alleges that the ICCTA preempts the 1954 Agreement and seeks a declaratory judgment and injunctive relief to void its obligations under the Agreement.

## II. DEFENDANTS' MOTIONS TO DISMISS

The City and County have filed two motions to dismiss. The first argues that Federal Rule of Civil Procedure 12(b)(7) requires dismissal because a class of Palestine and Anderson County citizens is necessary to the suit under Federal Rule of Civil Procedure 19. Docket No. 40. The second motion seeks dismissal under Federal Rule of Civil Procedure Rule 12(c) on three grounds: (1) the Court lacks subject matter jurisdiction, (2) the Anti-Injunction Act bars this suit, and (3) the limitations period has expired. The Court **DENIES** both motions.

### A. DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(B)(7) AND RULE 19

Under Rule 12(b)(7), a party may seek dismissal for "failure to join a party under Rule 19." Rule 19(a)(1) provides that a party must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

A Rule 19(a) analysis is subject to a burden-shifting framework. The movant bears the "the initial burden of demonstrating that a missing party is necessary." *Hood ex rel. Miss. v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009). If "an initial appraisal of the facts indicates that a possibly necessary party is absent," then the burden shifts to the opposing party to show that the missing party is not necessary. *Id.* (quoting *Pulitzer–Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 2006)). In making Rule 19 determinations, "'pragmatic concerns, especially the effect on the parties and on the litigation,' will control." *Tetra Techs., Inc. v. La. Fruit Co.*, No. 06- CV-3736, 2007 WL

54814, at *2 (E.D. La. Jan. 5, 2007), *aff'd*, 252 F. App'x 639 (5th Cir. 2007) (quoting *Smith v. State Farm Fire & Cas. Co.*, 633 F.2d 401, 405 (5th Cir. 1980)).[3]

Here, the City and County argue that the historic Citizens Committee is a necessary party under Rule 19(a)(1)(A) and (B). The Citizens Committee was a group of ten local citizens who signed the 1954 Agreement, along with representatives from the railroad, the City of Palestine, and Anderson County. Docket No. 39, Ex. 1 at 13. The Committee's history is unclear, but the entity is undisputedly inactive today, and no member has sought to be a party in this case. Docket No. 44 at 1. As explained below, Union Pacific has demonstrated that the Court can accord complete relief without the Committee and that the Committee has no interest in the action. Accordingly, the Court finds that the Citizens Committee is not a necessary party under Rule 19(a) and denies the motion to dismiss. *See Nat'l Cas. Co.*, 637 F. App'x at 815.

**1. Joinder is not required under Rule 19(a)(1)(A).**

The City and County first argue that joinder is required under Rule 19(a)(1)(A) because the Citizens

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[3] If a party is required to be joined under Rule 19(a), but joinder is not feasible, Rule 19(b) provides that the Court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" based on a variety of factors. If joinder is not required under Rule 19(a), "no inquiry under Rule 19(b) is necessary." *Nat'l Cas. Co. v. Gonzalez*, 637 F. App'x 812, 815 (5th Cir. 2016) (per curiam) (quoting *Temple v. Synthes Corp.*, 498 U.S. 5, 8 (1990)). Because the Court finds that joinder is not required here, it will not address Rule 19(b).

Committee was a party to the 1954 Agreement (and an active participant in antecedent agreements) and that the Court therefore "cannot accord complete relief" without the Committee. Docket No. 40 at 2. Union Pacific responds that the Committee does not have a legally protectable interest in the 1954 Agreement, so the Court can accord complete relief without the Committee's involvement. Docket No. 44 at 4. Reviewing the 1954 Agreement, the Court agrees that the Citizens Committee lacks a legal interest in its enforcement, and thus the Court can accord complete relief without joining the Committee.

To determine whether complete relief is available without the absent party, "the Court looks to the relief prayed for by the claimant." *Cain v. City of New Orleans*, 184 F. Supp. 3d 349, 358 (E.D. La. 2016). Here, Union Pacific seeks declaratory and injunctive relief against the City of Palestine and Anderson County. Docket No. 1 at 16–17. The requested declaratory relief would render null and unenforceable the 1954 Agreement and its predicate, the 1914 Decree. The Citizens Committee was a signatory to the 1954 Agreement, and a representative class of citizens was a party to the litigation resulting in the 1914 Decree. Docket No. 1, Ex. 1 at 13; Docket No. 40, Ex. 1 at 7. "Generally, when interpretation of a contract is necessary, the parties to the contract must be joined." *Optimum Content Prot., LLC v. Microsoft Corp.*, No. 6:13-CV-741, 2014 WL 12452439, at *3 (E.D. Tex. Aug. 25, 2014), *R. & R. adopted*, No. 6:13-CV-741, 2014 WL 12324277 (E.D. Tex. Oct. 7, 2014).

But here, the Citizens Committee has no right to enforce the 1954 Agreement. Rather, the Agreement assigns enforcement rights exclusively to the City and County, providing that in the event of breach, only the City and County may:

> (a) Require specific performance by the RAILROAD of its obligations hereunder; or
>
> (b) Notify the RAILROAD in writing of the intention of the City and County to rescind this new agreement . . . . the City and County may apply to the proper court for a hearing to determine whether any of said defaults exist as claimed and constitute unexcused breach of this Agreement and the new judgment based thereon . . . .

Docket No. 1, Ex. 1 at 9–10. Further, the City and County may exercise or enforce any "right or remedy" available to the citizens. As the Agreement provides: "the City and County may either concurrently, independently, or cumulative of the foregoing, exercise or enforce any other right or remedy which may be available to the City and County and their citizens under the then existing circumstances." *Id.* 1 at 10–11. The Citizens Committee, then, has no contractual interest in the 1954 Agreement's enforcement.[4]

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[4] This determination moots the Parties' dispute as to whether Defendants' Exhibits 2 & 3, Docket No. 40, constitute hearsay. *See* Docket Nos. 44 at 4; 49 at 2.

Though the Citizens Committee paid separate consideration for the 1954 Agreement's antecedent contracts, the Committee does not have an enforcement right in the 1954 Agreement. Like a predecessor in interest, the Citizens Committee has "no remaining rights in the subject properties or interest in the outcome of this case." *Samson Contour Energy E & P, LLC v. Fred Bowman, Inc.*, No. 11-CV-0247, 2011 WL 6157481, at *3 (W.D. La. May 11, 2011), *R. & R. adopted*, No. 11-CV-0247, 2011 WL 2295022 (W.D. La. June 9, 2011). Absent a "protectable interest that is the subject of the case," the nonparty's joinder is not required. *Pearson's Inc. v. Ackerman,* No. 7:18-CV-00013-BP, 2018 WL 5886608, at *3 (N.D. Tex. Nov. 9, 2018). While the citizens of Palestine and Anderson County may have a general interest in the outcome of the case, the 1954 Agreement renders that interest non-protectable such that the Citizens Committee or an equivalent group is not a required party. *Cf. BroadStar Wind Sys. Grp. Ltd. Liab. Co. v. Stephens*, 459 Fed. Appx. 351, 357 (5th Cir. 2012) (per curiam) ("While [the absent party] certainly had interests in the outcome of the suit, as a non-party to the contract which was the sole basis for the declaratory judgment suit, [it] was neither necessary nor indispensable.").

**2. Joinder is not required under Rule 19(a)(1)(B)(i).**

Defendants next argue that joinder is required under Rule 19(a)(1)(B)(i) because resolving this case without the Citizens Committee would prejudice the Committee's rights under the 1954 Agreement. Union Pacific contends that the Committee has no rights

under the Agreement, and, even if it did, the joined parties adequately represent the Committee's interest in the litigation, so joinder is not necessary. The Court agrees with Union Pacific.

Rule 19(a)(1)(B)(i) requires joinder if a person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: as a practical matter impair or impede the person's ability to protect the interest." This rule does not require joinder of the Citizens Committee for at least three reasons.

*First*, no Committee member (or successor in interest) has claimed a legal interest in this dispute. "[T]he fact that an absent party does not seek joinder by its own volition indicates that it lacks an interest relating to the subject matter of the action." *Canal Ins. Co. v. Xmex Transp. LLC*, No. EP-13-CV-156-KC, 2013 WL 5740223, at *4 (W.D. Tex. Oct. 22, 2013).

*Second*, as discussed above, the Citizens Committee's interest in this litigation is not legally protectable. Consequently, non-joinder of the Committee does not "impair or impede" its ability to protect a legal interest.

*Third*, in this case, the absent Committee has the same interests as the joined parties such that its "interests are protected by [the joined parties'] vigorous litigation in the [] dispute." *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 201 (5th Cir. 2017). Defendants argue that their interest may differ from the Citizen Committee, *e.g.*, the Citizens Committee may desire amendment of the 1954 Agreement. Docket

No. 49 at 3. But this case does not—and could not—contemplate amendment. Here, the ICCTA either preempts the 1954 Agreement or it does not. Both sides of this issue are represented by the present parties, so any potential interest of the Citizens Committee is protected by the existing parties' "vigorous litigation." *Singing River Health*, 850 F.3d at 201.

**3. Joinder is not required under Rule 19(a)(1)(B)(ii).**

Finally, the City and County contend that joinder of the Committee is required by Rule 19(a)(1)(B)(ii) because the Committee may sue to enforce the 1954 Agreement even if an injunction bars the City and County from enforcing it. Union Pacific argues that this is a non-issue because the Committee has no enforcement rights under the Agreement. Again, the Court agrees with Union Pacific.

Joinder is required under Rule 19(a)(1)(B)(ii) if a person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Here, the Citizens Committee does not have the power to enforce the 1954 Agreement, *see supra* Part II.A.1., and thus has no legal "interest relating to" it. In other words, because the Citizens Committee lacks a mechanism to unilaterally enforce the 1954 Agreement, there is no risk of inconsistent obligations here.

* * *

Because non-joinder of the Citizens Committee does not preclude complete relief, "impair or impede" the Committee's ability to protect a legal interest, or risk inconsistent obligations, the Citizens Committee is not a required party under Rule 19(a). The Court therefore **DENIES** Defendants' Motion to Dismiss under Rule 12(b)(7) (Docket No. 40).

### B. DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(C)

Defendants next move for dismissal under Federal Rule of Civil Procedure 12(c), arguing that the Court lacks subject matter jurisdiction, that the Anti-Injunction Act bars Union Pacific's claim, and that the governing limitations period has run. For the reasons discussed below, the Court **DENIES** Defendants' motion.

#### 1. Legal Standard

Rule 12(c) permits a party to move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. The rule is designed to "dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Garza v. Escobar*, 972 F.3d 721, 727 (5th Cir. 2020) (quoting *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002)). "The standard for dismissal under Rule 12(c) is the same as that under Rule 12(b)(6)." *Id.* (quoting *Hale v. Metrex Research Corp.*, 963 F.3d 424, 427 (5th Cir. 2020)).

Under Rule 12(b)(6), a party may seek dismissal for failure to state a claim upon which relief can be granted. "Thus, claims may be dismissed under Rule 12(b)(6) 'on the basis of a dispositive issue of law.'" *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019) (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). In evaluating a Rule 12(b)(6) motion, the Court must "accept as true all well pleaded facts in the complaint." *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th. Cir. 1986). "All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001).

**2. The Court has subject matter jurisdiction.**

The parties do not dispute that diversity jurisdiction exists under 28 U.S.C. § 1332. Docket Nos. 45 at 1–2; 50 at 1. Indeed, Union Pacific is a citizen of Delaware and Nebraska, and Defendants are citizens of Texas. Docket No. 45 at 2. The City and County appear to argue, however, that diversity jurisdiction is insufficient to award the declaratory and injunctive relief sought by Union Pacific based on its claim of preemption. Docket No. 50 at 1–3.

The City and County are incorrect. A federal court sitting in diversity may decide a declaratory judgment action. *E.g.*, *Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 293 (5th Cir. 2019); *Farkas*, 737 F.3d at 341. And in this posture, the Court may resolve a plaintiff's preemption claim. *Pharmacia LLC v. Grupo De Inversiones Suramericana S.A.*, No. 2:15-CV-920-RWS-RSP, 2016 WL 3460767, at *1 (E.D. Tex. Apr. 11, 2016),

*R. & R. adopted*, No. 2:15-CV-920-RWS-RSP, 2016 WL 5387776, at *1 (E.D. Tex. Sept. 27, 2016). Further, as the Fifth Circuit has observed: "We have reviewed several cases in which diversity was alleged as the jurisdictional ground for colorable state claims preempted by federal law. In these cases, the courts, rather than dismiss, have applied federal substantive law." *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 975–76 (5th Cir. 1981).

**3. The Anti-Injunction Act does not bar this suit.**

The City and County also argue that the Anti-Injunction Act, codified at 28 U.S.C. § 2283, bars Union Pacific's case because a federal court cannot enjoin the City or County from enforcing the 1954 Agreement or the state court 1914 Decree. Docket No. 41 at 14. Union Pacific contends that the Act is inapplicable here because there is no pending state court proceeding. Docket No. 45 at 4. With no state action pending, the Court agrees that the Anti-Injunction Act does not apply.

The Anti-Injunction Act prohibits "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act may also bar a declaratory judgment action that would interfere with a state lawsuit. *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993). Further, "[i]t is well established that the Act applies only to *pending* state court proceedings; the Act 'does not preclude injunctions against a lawyer's filing of

*prospective* state court actions.'" *SEC v. Kaleta*, 530 F. App'x 360, 363 n.4 (5th Cir. 2013) (per curiam) (quoting *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002)) (emphasis original). In the simplest terms, "the Act 'applies only to pending state court actions.'" *Fed. Ins. Co. v. Northfield Ins. Co.*, No. CV 4:14-00262, 2019 WL 1302295, at *4 (S.D. Tex. Mar. 21, 2019) (quoting *B&A Pipeline Co. v. Dorney*, 904 F.2d 996, 1001 n.15 (5th Cir. 1990)).

Here, the City and County do not identify any pending proceeding in a state court. The Anti-Injunction Act therefore does not apply, and Defendants' argument for dismissal on this ground fails.

**4. The statute of limitations does not bar this suit.**

Finally, Defendants argue that Union Pacific's claim is untimely. Citing Texas's four-year statute of limitations governing contract claims, Defendants argue that Union Pacific's claim accrued when the ICCTA became law in 1995 or, at the latest, when Texas repealed the Shop Act in 2007. Docket No. 41 at 14–15 (citing TEX. CIV. PRAC. & REM. CODE § 16.004(1)). Union Pacific argues that the substantive claim underlying its request for declaratory relief is one for breach of the 1954 Agreement, which has not occurred. Docket No. 45 at 7–8.

In a declaratory judgment action, "[a] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *Mock v. St. David's Healthcare P'ship, LP,*

*LLP*, No. A-19-CV-611-RP, 2020 WL 4434929, at *9 (W.D. Tex. July 31, 2020), *R. & R. adopted*, No. 1:19-CV-611-RP, 2020 WL 5250641 (W.D. Tex. Sept. 2, 2020) (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 668 (6th Cir. 1997)); *see, e.g.*, *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 409 (5th Cir. 2004). Here, the substantive claim underlying Union Pacific's declaratory judgment action is a hypothetical claim for breach of the 1954 Agreement. Docket No. 45 at 8. But Defendants have not alleged any breach by Union Pacific, and thus the underlying substantive claim is not untimely. *See Cosgrove v. Cade*, 468 S.W.3d 32, 39 (Tex. 2015) (A "claim for breach of contract accrues when the contract is breached."); *accord Western-Southern Life Assurance Co. v. Kaleh*, 879 F.3d 653, 663 (5th Cir. 2018).

The Court therefore holds that Union Pacific's declaratory judgment action is not barred by the statute of limitations.

* * *

Having determined that the Court has subject matter jurisdiction, that the Anti-Injunction Act does not apply, and that the statute of limitations does not bar Union Pacific's claim, the Court **DENIES** Defendants' Motion to Dismiss under Rule 12(c).

## III. UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT

Union Pacific moves for summary judgment on its claim of preemption (Docket No. 1 at 16 ¶¶ 39–41) and on the City and County's affirmative defenses (Docket No. 24 at 8–12 ¶¶ 43–50). Docket No. 39 at 4. Union

Pacific argues that the ICCTA expressly and impliedly preempts the 1954 Agreement and that each of the City and County's affirmative defenses fails as a matter of law. *Id.* at 15–29.

### A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A fact is material only if will affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine only if the evidence could lead a reasonable jury to find for the nonmoving party. *See id.* In determining whether a genuine issue of material fact exists, the Court views all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Id.* at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

After the moving party has made an initial showing that there is no evidence to support the nonmoving party's claim, the nonmoving party must assert competent summary judgment evidence to create a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996);

*Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). The nonmoving party must identify evidence in the record and articulate how that evidence supports its claim. *Ragas*, 136 F.3d at 458. Summary judgment must be granted if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322–23.

## B. LEGAL FRAMEWORK

### 1. The Constitution's Supremacy Clause

The preemption doctrine is rooted in the United States' federalist design. Under this system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause [of the U.S. Constitution]." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. VI, cl. 2. Thus, any state law that conflicts with the Constitution or a federal law is preempted, or "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "This is an extraordinary power in a federalist system." *Gregory v. Ashcroft*, 501

U.S. 452, 460 (1991). "It is a power that we must assume Congress does not exercise lightly." *Id*.

**2. The ICCTA**

In 1995, Congress overhauled the regulation of the railroad industry by enacting the ICCTA. The statute repealed the Interstate Commerce Act, abolished the Interstate Commerce Commission, and established the Surface Transportation Board (STB). 49 U.S.C. § 10101, *et seq*.; *see also Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). The Fifth Circuit later explained that "[t]he regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." *Friberg*, 267 F.3d at 443.

The ICCTA grants the STB exclusive jurisdiction over a wide range of railroad operations. *See* 49 U.S.C. § 10501. Section 10501 states in relevant part:

> (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.

49 U.S.C. § 10501(b). This text guides the Court's preemption analysis because it "necessarily contains the best evidence of Congress' pre-emptive intent." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 408 (5th Cir. 2010) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

**3. Framework for Preemption Analysis**

"In determining the existence and reach of preemption, Congress's purpose is 'the ultimate touchstone' to use." *Franks*, 593 F.3d at 407 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Congress may show its preemptive purpose in two ways. First, the statute may contain "express language." *Id.* (quoting *Altria Grp., Inc. v. Good,* 555 U.S. 70, 76 (2008)). In addressing preemption under the ICCTA, the Fifth Circuit has held that section 10501(b) expressly preempts laws attempting to "manag[e] or govern[] rail transportation." *Id*. at 410. Further, "[t]o the extent remedies are provided under laws that have the effect of regulating rail transportation, they are [expressly] preempted." *Id*. Generally applicable state laws with a "mere 'remote or incidental effect on rail transportation'" are not expressly preempted. *Elam v. Kan. City S. Ry. Co.*, 635

F.3d 796, 805 (5th Cir. 2011) (quoting *Franks*, 593 F.3d at 410).

Second, a federal statute may impliedly preempt state laws "if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Franks*, 593 F.3d at 407 (quoting *Altria Grp.,* 555 U.S. at 76–77). In the context of the ICCTA, preemption by implication is sometimes equated with "as-applied" preemption. *See id.* at 414. In addressing implied preemption under the ICCTA, the Fifth Circuit has held that "state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation." *Id.* This is a "fact-based test" requiring proof that the specific state action at issue unreasonably burdened rail transportation. *Id.*

### C. EXPRESS PREEMPTION

Union Pacific first argues that the ICCTA expressly preempts the 1954 Agreement because the Agreement "implements a state law obligation that directly targets 'the operations of rail transportation.'" Docket No. 39 at 17. The City and County contend that the Agreement is a limited personnel requirement that does not regulate "transportation."[5] Docket No. 51 at 15. Based on the plain language of the ICCTA, the Court finds that the 1954 Agreement is expressly preempted.

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[5] The City and County also argue that the 1954 Agreement is "not subject to express preemption because it is not a state regulation," but instead a voluntary contract. The Court addresses this argument *infra* Part III.E.

The ICCTA's preemption provision states: "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." 49 U.S.C. § 10501(b).[6] As noted above, the Fifth Circuit has construed this provision to mean that laws having "the effect of managing or governing rail transportation will be expressly preempted" and that, "[t]o the extent remedies are provided under laws *that have the effect of regulating rail transportation,* they are preempted." *Franks*, 593 F.3d at 410 (emphasis original). Thus, "[f]or a state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations of rail transportation." *Id.* at 413.

Rail "transportation," in turn, is defined broadly by statute to include, among other things, "facilities" and "services" "related to the movement of passengers or property by rail." 49 U.S.C. § 10102(9). Section 10102(9) states:

> (9) "transportation" includes—
>
> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or

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[6] The Fifth Circuit held in *Franks* that "the relevant part of Section 10501(b) [for preemption purposes] is its second sentence." 595 F.3d at 410. The first sentence of section 10501(b) "is defining the authority of the STB in dealing with the fundamental aspects of railroad regulation, and barring others from interfering with those decisions by making the jurisdiction exclusive." *Id.*

> property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; []

49 U.S.C. § 10102(9).

Applying these provisions, the Fifth Circuit has held that the ICCTA expressly preempted a state law negligence action attempting to "mandate when trains can use tracks and stop on them [because the action] is attempting to manage or govern rail transportation in a direct way." *Franks*, 593 F.3d 411 (discussing *Friberg*, 267 F.3d at 443). The ICCTA did not, however, preempt a state law possessory action attempting to "preserve a long-existing crossing over railroad tracks" because the action was governed by "property laws and rules of civil procedure that have nothing to do with railroad crossings" and only incidentally regulated rail transportation. *Id.* at 406, 411–13.

Turning to the 1954 Agreement, the Court finds that it manages rail transportation in a direct way and is therefore expressly preempted by the ICCTA. The Agreement by its terms requires Union Pacific to employ in Palestine a specific percentage of its "Office and Shop Employees"—defined to include five classes of executive, clerical, maintenance, and transportation personnel. Docket 1, Ex. 1 at 3. To comply with this requirement, Union Pacific maintains two departments in Palestine: the car shop, which repairs cars in Union

Pacific's fleet, and the freight claims department, which investigates and resolves claims arising out of shipments on Union Pacific's rail line. Docket No. 39, Ex. 4 at 42:3–19, 115:6–9; Docket No. 42, Ex. 16 at 14:17–15:1.

Absent the Agreement, moreover, Union Pacific would *not* maintain these facilities or services in Palestine. Indeed, Union Pacific submitted uncontroverted evidence that it would prefer to close its car shop in Palestine in favor of more central locations to maximize efficiencies, but the 1954 Agreement stands in the way. Docket No. 39, Ex. 14 at 2 ¶ 7 (testifying that the car shops in Missouri and Illinois "are more modern" and are "more conveniently located on Union Pacific's rail network"). And, although Union Pacific would prefer to consolidate its freight claims department at its main headquarters for a variety of business reasons, the 1954 Agreement forecloses that more cost-effective option. Docket No. 39, Ex. 4, 83:13–21. The 1954 Agreement thus compels Union Pacific to keep a "facility . . . related to the movement of passengers or property . . . by rail" in Palestine and dictates where Union Pacific may provide certain "services related to that movement"—easily satisfying the definition of regulating rail transportation. 49 U.S.C. § 10102(9); *see Franks*, 593 F.3d at 410; *Friberg*, 267 F.3d at 443–44.

The City and County argue that the 1954 Agreement merely imposes a personnel requirement, which is not a regulation of Union Pacific's facilities and services—and thus does not regulate rail "transportation." Docket No. 51 at 12. Defendants also

repeatedly assert that Union Pacific's operations in Palestine "do not have any relation to the movement of goods or people in interstate commerce." Docket No. 51 at 14–15. But, as Union Pacific observes, the company is a "one-trick pony" involved only in the business of moving passengers and property by rail. Thus, any requirement that Union Pacific maintain a certain number of "Office and Shop" employees in a particular location necessarily regulates "facilities" and "services" related to the movement of people and property by rail. 49 U.S.C. § 10102(9); *see, e.g., Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1296 (D. Mont. 1997) (holding that the ICCTA preempts a regulation regarding "the closure, consolidation or centralization of [ticketing] agencies" because the regulation "has a direct and substantial effect on the field of economic regulation of railroad transportation"); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1582–85 (N.D. Ga. 1996) (holding that the ICCTA preempts "state regulatory authority over railroad agency closings" because "the function of railroad agencies overlaps substantially with the definition of 'transportation by rail carriers' . . . as including 'storage, handling and interchange of passengers and property'" and "[r]ailroad agencies also seem to fit within any common understanding of 'services' of railroads, over which the STB is given exclusive jurisdiction"); *see also Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012) (holding that "transloading" constituted "transportation" because "it concerns the 'elevation' and also the 'storage, handling, and interchange of . . . property' involving the movement of a locomotive").

To be sure, the term "transportation" does not encompass "everything touching on railroads." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). But the 1954 Agreement does not merely touch on railroads. It directly regulates rail transportation by prohibiting Union Pacific from abandoning or discontinuing services and facilities in Palestine, requiring the company to utilize facilities inefficiently, preventing the consolidation of rail operations in more cost-effective locations, and increasing the cost of Union Pacific's rail business. Docket No. 39, Ex. 4 at 83:13–21, 109:6–25; 118:14–19; Ex. 6 at 30:4–15; Ex. 11 at 1 ¶ 3; Ex. 14 at 2 ¶ 7. The 1954 Agreement thus has the effect of managing or governing rail transportation as acutely as the property action in *Friberg*, in which a landowner sought to regulate the time a train could occupy a rail crossing in a negligence action against the railroad. 267 F.3d at 443–44. As the Fifth Circuit held in that case, "the all-encompassing language of the ICCTA's preemption clause" plainly prohibits such regulation. *Id.* at 444. So too here.

### D. IMPLIED PREEMPTION

Union Pacific alternatively argues that the ICCTA impliedly preempts the 1954 Agreement because the Agreement has the effect of unreasonably burdening or interfering with rail transportation. Docket No. 39 at 18. The City and County contend that the Agreement at most creates additional costs on Union Pacific, which the railroad could minimize, and does not impose any requirements on the design, construction, maintenance, or repair of rail lines. Docket No. 51 at 15. Having concluded that the ICCTA expressly preempts the 1954

Agreement, the Court need not reach this issue. Nevertheless, based on the uncontroverted evidence submitted by Union Pacific, the Court finds in the alternative that the ICCTA impliedly preempts the 1954 Agreement as a matter of law.

The Fifth Circuit has adopted a test for determining whether the ICCTA impliedly preempts state action. *See Franks*, 593 F.3d at 414. "Under this fact-based test, state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation." *Id*. The party arguing preemption bears the burden of proof and must "come forward with evidence of the specific burdens imposed." *Elam*, 635 F.3d at 813. This burden cannot be satisfied with "general evidence or assertions" that the state action would "somehow affect rail transportation." *Guild v. Kan. City S. Ry. Co.*, 541 F. App'x 362, 368 (5th Cir. 2013). In *Franks*, the Fifth Circuit held that the ICCTA did not impliedly preempt a state law possessory action seeking to keep open four railroad crossings because the railroad failed to present evidence that the four crossings at issue affected rail transportation. *See id*. at 415. Although the railroad presented evidence that "private crossings like the ones at issue here can affect drainage, increase track maintenance costs, and cause trains to move at slower speeds," the railroad "did not tie any of these specific problems to these four crossings." *Id*.

Applying similar tests, other courts have held as a matter of law that the ICCTA impliedly preempts a variety of state action when the railroad presents

undisputed evidence that the action unreasonably burdens rail transportation. Preempted actions include:

- A state tort claim alleging that a railroad was negligent in "constructing, repairing, or maintaining the Crossing" because, if plaintiff prevailed, the railroad would be required to undertake "considerable redesign and construction work," amounting to approximately $2 million. *Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, No. 15- CV-0074, 2018 WL 1750516, at *7–9 (W.D. La. Apr. 10, 2018).

- A state law used to "to regulate (terminate) [the railroad's] use of the easement over [landowners'] property" because there was no question that an attempt "to stop all use of the tracks on the relevant stretch" would effectively prevent or unreasonably interfere with railroad transportation. *Wedemeyer v. CSX Transp., Inc.*, No. 2:13-CV-00440-LJM, 2015 WL 6440295, at *5 (S.D. Ind. Oct. 20, 2015), *aff'd*, 850 F.3d 889 (7th Cir. 2017).

- A state condemnation action that would affect "actively used railroad property" because the taking constituted an unreasonable interference with the railroad's "rights with respect to [a] massive stretch of railroad property." *Union Pac. R.R. Co. v. Chicago Transit Auth.*, No. 07-CV-229, 2009 WL 448897, at *8–10 (N.D. Ill. Feb. 23, 2009), *aff'd*, 647 F.3d 675 (7th Cir. 2011).

Here, Union Pacific has presented substantial, undisputed evidence that the 1954 Agreement

unreasonably burdens rail transportation.[7] By requiring the railroad perpetually to maintain Office and Shop employees in Palestine—despite the railroad's need to adapt in a competitive and rapidly changing market—the Agreement substantially interferes with and burdens Union Pacific's facilities related to the movement of passengers or property.[8] *See* 49 U.S.C. § 10102(9) (defining "transportation" as a "facility . . . related to the movement of passengers or property"). Indeed, almost fifty years ago, the ICC ruled that the 1954 Agreement "impose[d] undue burdens and obligations" on the railroad and was "contrary to the public interest and the national transportation policy." *Mo. Pac. R.R. Co.*, 348 I.C.C. 414, 430 (1976).[9]

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[7] The City and County object to certain of Union Pacific's evidence as not relevant and thus inadmissible. Docket No. 51 at 8–10 ¶¶ 1–7. But the Fifth Circuit has held that a railroad asserting implied preemption under the ICCTA must present specific evidence regarding the particular action at issue—which is exactly what Union Pacific has presented here. *See Franks*, 593 F.3d at 414–15. Union Pacific's evidence therefore has a "tendency to make a fact more or less probable than it would be without the evidence" and is "of consequence in determining the action." FED. R. CIV. EVID. 401. Accordingly, the City and County's objections are overruled.

[8] Union Pacific does not argue that the 1954 Agreement unreasonably burdens its services. *See* Docket No. 39 at 25; Docket No. 54 at 6–7.

[9] In the mid-twentieth century, MoPac—Union Pacific's predecessor-in-interest—sought to merge with seven of its subsidiaries, including I&GN. I&GN was subject to the 1954 Agreement. The ICCTA was not yet enacted, and the ICC still approved voluntary mergers. In its merger request, MoPac

And a lot has changed in the last fifty years, rendering the Palestine facilities even more inefficient, expensive, and burdensome. As Union Pacific demonstrates, the declining demand for coal in favor of natural gas dramatically reduced one of the most important revenue streams for railroads: the transportation of coal by rail. Docket No. 39, Ex. 4 at 105:7–14. The loss of this high-margin business forced railroads like Union Pacific to focus on other business segments and become more efficient in their operations. *Id.* at 105:15–106:2. As a result, in 2018, Union Pacific adopted a new business model called Precision Scheduled Railroading (PSR). Docket No. 39, Ex. 23 at 5. A key PSR principle is "[b]alancing train movements to improve the utilization of crews and rail assets." *Id.* The requirement to maintain facilities in Palestine, however, prevents Union Pacific from achieving that balance. As Union Pacific's corporate representative testified, Union Pacific has "more efficient locations" that could "absorb the work and reduce costs per car produced just based on the

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petitioned the ICC for relief from the 1954 Agreement. An administrative law judge granted the request and made findings of fact, which the ICC adopted, including that: "the [1954] Agreement . . . and the laws of the State of Texas currently impose undue burdens and obligations on MOPAC and they will impose unduly burdensome, inefficient, injuriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce." *Mo. Pac. R.R. Co.*, 348 I.C.C. at 416. On appeal, the Fifth Circuit did not review the merits of this finding, holding instead that the ICC had exceeded the scope of its authority "when it voids contracts that are not germane to the success of the approved section 5(2) transaction." *City of Palestine*, 559 F.2d at 414.

efficiency of the facility." Docket No. 39, Ex. 4, at 80:2–5. The car shops in Desoto, Missouri, and Dupo, Illinois, for example, are "more modern and have had recent updates completed." Docket No. 39, Ex. 14 at 2, ¶ 7; Docket No. 51, Ex. 8 at 9 ¶¶ 4–5. But because of the 1954 Agreement, Union Pacific continues to send cars to Palestine for repair.

The Palestine facilities are particularly inefficient because they were originally designed to repair steam locomotives. Docket No. 39, Ex. 14 at 1 ¶ 2. Union Pacific no longer has a business purpose for repairing steam locomotives, and it now uses the facilities to repair boxcars and open-top hoppers. Docket No. 39, Ex. 4 at 102:7–11. These cars, however, are also being phased out. *Id.* Union Pacific would therefore like to reduce or eliminate the Palestine repair facility altogether but is prevented from doing so by the 1954 Agreement's personnel quota. *Id.* at 85:21–86:1.

Further, the Palestine facilities require repair. Updating the facilities comes at the undisputed estimated price of $67 million to $93 million. Docket No. 39, Ex. 14 at 1 ¶ 3. This is a considerable economic burden, and other courts have held that even lesser amounts create an "unreasonable" burden on rail transportation under the ICCTA. *See, e.g.*, *Taylor Truck Line*, 2018 WL 1750516 at *8–9 (holding the ICCTA preempted a comparative negligence defense where invocation of such defense would cost the railroad an estimated $2 million and compromise the uniform operation of the interstate rail network). Indeed, as the ICC stated some eighty years ago, perpetual shop and office agreements hinder economy

and efficiency in operation and service to the public. *St. Louis Sw. Ry. Co. of Tex. Lease*, 290 I.C.C. 205, 213 (1953); *accord Kan. City S. Ry. Co. Merger*, 254 I.C.C., 259, 535–38 (1943).

The City and County argue that the 1954 Agreement simply requires Union Pacific to maintain only half of one percent of its employees in Palestine and that any increased costs associated with that requirement is not an unreasonable burden on the railroad. Docket No. 51 at 16. To be sure, the Fifth Circuit has expressed doubt that "increased operating costs are alone sufficient to establish 'unreasonable' interference with railroad operations." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 335 (5th Cir. 2008). But the Agreement's requirement to maintain employees in Palestine necessarily requires Union Pacific to provide facilities there. And Union Pacific presents evidence that maintaining its Palestine facilities disrupts the railroad's operations, undermines the company's business objective to maximize efficiency, and requires an enormous financial outlay in the coming years. Docket No. 39, Ex. 11 at 1 ¶ 3; Ex. 4 at 85:1–86:6; Ex. 14 at 1 ¶ 3. Defendants introduce no evidence to the contrary. The Court thus finds that the 1954 Agreement unreasonably burdens and interferes with Union Pacific's railroad facilities.

Defendants also argue that finding preemption here would mean that the ICCTA impliedly preempts "any lease, easement or other agreement requiring an allocation of resources." Docket No. 51 at 17. But the implied preemption analysis turns on the

*reasonableness* of the burden. Here, Union Pacific has conclusively demonstrated that the *perpetual* 1954 Agreement, formed in a regulatory context no longer in place, is unreasonable. Indeed, under Texas law, "contracts which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 842 (Tex. 2010) (quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 841 (Tex. 2000)); *see also Trient Partners I Ltd. v. Blockbuster Entm't Corp.*, 83 F.3d 704, 709 (5th Cir. 1996) (emphasis original) ("We will not hold that a contract is definite in duration when it (1) expressly states that it will 'continue indefinitely,' *and* (2) is confined in time only by 'termination provisions' which contain conditions that are likely never to transpire."). The 1954 Agreement contemplates continuous and inescapable performance. Its terms constitute economic regulation and unreasonably burden Union Pacific's railroad-transportation operations and facilities. And its formation was subject to a level of state and federal regulation that is no longer permissible under the ICCTA. *See* H.R. Rep. No. 80-3711 at 1 (2007) (supporting repeal of the 1889 Shop Act because it was an "obsolete statute[] regulating railroads" and "preempted by federal law"); 2007 Tex. Sess. Law Serv. ch. 1115, § 5(2).

As Union Pacific notes, the relevant question is not whether a given regulation is "survivable" but whether it is unreasonable. Docket No. 48 at 10. Perpetual maintenance of the inefficient Palestine facilities, a direct consequence of the 1954 Agreement, is

unreasonable. Absent any evidence to the contrary, the Court finds the Agreement unreasonably burdens rail transportation and is thereby impliedly preempted by the ICCTA. *See Franks*, 593 F.3d at 414.

### E. THE VOLUNTARY CONTRACT EXCEPTION

The City and County also argue that the 1954 Agreement is a voluntary contract that cannot be preempted by a federal statute. Docket No. 51 at 18–19. Union Pacific counters that the Agreement is "not a true contract" but a regulatory act deriving its power from Texas statutes. Docket No. 39 at 20–22. As explained below, the Court holds that the voluntary contract exception does not apply here.

The voluntary contract exception prevents railroads from using the ICCTA to "shield the carrier from its own commitments." *Twp. of Woodbridge v. Consol. Rail Corp.*, 2001 WL 283507 at *2 (S.T.B. Mar. 22, 2001). The Fourth Circuit explained further: "Voluntary agreements between private parties [] are not presumptively regulatory acts," and thus most private contracts are not "the sort of 'regulation' expressly preempted by [the ICCTA]." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218–19 (4th Cir. 2009). Voluntary agreements, moreover, are unlikely to be impliedly preempted because they generally reflect "the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." *Id.* at 221 (quoting *Twp. of Woodbridge*, 2001 WL 283507 at *3). Applying this reasoning, the Fourth Circuit held in *PCS Phosphate* that an agreement requiring a railroad to pay for the relocation of a rail line servicing a mine was not

preempted by the ICCTA. The agreement—between the railroad and mine owner—"is not the sort of rail 'regulation' contemplated by the statute and, as a voluntary agreement, does not 'unreasonably interfere with rail transportation.'" *Id*. at 214; s*ee also Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("[A] rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot use the preemptive effect of section 10501(b) to shield it from its own commitments, provided that the agreement does not unreasonably interfere with interstate commerce."); *Traction Tire, LLC v. Total Quality Logistics, LLC.*, No. 19- CV-5150, 2020 WL 6044179, at *8 (E.D. Pa. Oct. 13, 2020) ("[B]ecause Plaintiff's claims are for breach of contract, the provisions of the ICCTA . . . do not preempt these claims against Defendant.").

As Union Pacific argues, however, the 1954 Agreement is not a voluntary contract between private parties. The Agreement is with the City and County—both acting in their roles as government entities to secure benefits for their citizens, not as market participants. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 768-70 (4th Cir. 2018) ("[W]hen the state acts as a market participant, it is treated like a private party in the same market; when the state acts as a regulator, it is subject to the unique limits placed on states by our federal system."). And the 1954 Agreement was not voluntary, but rather the product of a federal bankruptcy proceeding in which state and federal law constrained the railroad's negotiating power. Docket Nos. 39 at 6–8 ¶¶ 7–10; 51 at 3 ¶ 3. Recall that Union Pacific's predecessor,

MoPac, sought to merge with I&GN in the 1950s and close the facilities in Palestine as part of a reorganization, but the bankruptcy court advised that MoPac "secure a modification of the 1914 decree so that the planned unification could be complete." *City of Palestine*, 559 F.2d at 412; 11 U.S.C. § 205(n); Docket Nos. 39 at 7 ¶ 10; 51 at 3 ¶ 3.

The resulting 1954 Agreement thus differs from the voluntary agreements in *PCS Phosphate* and the other cases cited by Defendants. *See* 559 F.3d at 214; Docket No. 51 at 18–19. Rather than negotiating freely and "enter[ing] into efficient arrangements" as the railroad did in *PCS Phosphate*, *id*. at 221, MoPac was forced to choose between the 1954 Agreement and a financially unsustainable path that led the parties to bankruptcy court. The 1954 Agreement, moreover, does not impose typical contractual obligations on Union Pacific, but instead perpetuates state "Shop Acts" that have long been repealed. TEX. REV. CIV. STAT. arts. 6275, 6277 (1926) (regulating the location of Texas-chartered railroads' general offices, machine shops, and roundhouses); 2007 Tex. Sess. Law Serv. ch. 1115, § 5(2) (repealing the office and shop laws). Nor does the 1954 Agreement provide a typical remedy in the case of breach. It instead entitles the City and County to reinstate the original—and more onerous—1914 Decree if Union Pacific breaches. Docket No. 39, Ex. 1 at 9–10. The 1954 Agreement thus looks and feels more like the kind of state "regulation" the ICCTA expressly preempts. *See* TEX. REV. CIV. STAT. arts. 6275, 6277; *Friberg*, 267 F.3d at 443–44 (holding state cause of action expressly preempted).

In any event, the changed circumstances since 1954 demonstrate that, to the extent the Agreement was voluntary, it nonetheless unreasonably interferes with rail transportation today. To be sure, "contracts that were freely negotiated between sophisticated business parties should not be easily set aside, as they reflect a market calculation that the benefits of the agreement outweigh the costs." *CSX Transp., Inc. v. City of Sebree*, 924 F.3d 276, 286 (6th Cir. 2019) (quotations omitted). But a once-voluntary contract may nevertheless unreasonably interfere with rail transportation where "circumstances have materially changed since the agreement was voluntarily entered into by its predecessor." *Id*. For example, the Sixth Circuit held in *CSX Transportation* that the ICCTA impliedly preempted a fifteen-year-old contract that was executed when train loads were lighter, trains were slower, and rails were "jointed," not "welded." *See id*. So too here. Union Pacific has presented evidence that the circumstances here have materially changed since the 1954 Agreement was executed, including the passage of the ICCTA, the decline of coal-related revenues, the inefficiencies of the Palestine facilities, and the cost for necessary repairs, among others. Pub. L. No. 104-88, 109 Stat. 803 (1995); Docket No. 39, Ex. 4 at 80:2–5, 105:7–14; Ex. 11 at 1 ¶ 3; Ex. 14 at 1 ¶¶ 2–3.

While it may often be appropriate to require "the performance of obligations under contracts voluntarily negotiated by the parties' predecessors in interest," that is not the case here, where requiring performance would perpetuate a repealed regulatory structure. *See PCS Phosphate Co. v. Norfolk S. Corp.*, 520 F. Supp. 2d

705, 716 (E.D.N.C. 2007), *aff'd*, 559 F.3d 212 (4th Cir. 2009). Indeed, if this kind of contract were permitted, the ICCTA would be virtually without effect as state and local governments could simply force railroads to enter into agreements as substitutes for the local regulations the ICCTA displaced. *See* Surface Transportation Board, 60 Fed. Reg. 14849 (April 3, 1996).

### F. DEFENDANTS' AFFIRMATIVE DEFENSES

In their Amended Answer to Union Pacific's Complaint, the City and County raise six affirmative defenses: laches, equitable estoppel, ratification, subject matter jurisdiction, res judicata, and the Contract Clause. Docket No. 24 at 8–12 ¶¶ 43–50. A plaintiff may move for summary judgment to "test a defense's sufficiency." 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2734 (4th ed. 2020). Union Pacific moves for summary judgment on all six defenses, arguing that Defendants cannot establish them as a matter of law. Docket No. 39 at 4, 22, 30.[10] For the reasons discussed below, the Court agrees.

#### 1. Laches

Union Pacific argues that the laches defense fails because the City and County have not shown "undue

[10] Union Pacific further argues that Defendants' equitable defenses—laches, equitable estoppel, and ratification—are "concepts from state private law" that should not override federal policy. Docket No. 39 at 28. The Court declines to address this issue and instead holds that the defenses fail as a matter of law as explained in the text above.

prejudice." Docket No. 39 at 22. Defendants identify their prejudice as stale evidence. Docket No. 51 at 20. Viewing the facts in the light most favorable to Defendants, the Court concludes that the laches defense fails as a matter of law.

The affirmative defense of laches has three elements: "(1) a delay on the part of the plaintiff in instituting suit; (2) that is not excused; and (3) that results in undue prejudice to the defendant's ability to present an adequate defense." *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 708 (5th Cir. 1994). The City and County assert that Union Pacific's inexcusable delay in challenging the 1954 Agreement unduly prejudices them because the evidence "regarding any unreasonable interference based on the 1954 Agreement" is unavailable. Docket No. 51 at 20. They cite the deposition testimony of Union Pacific's corporate representative, Cynthia Sanborn, who testified that she was unable to identify how the 1954 Agreement affected Union Pacific's operations since passage of the ICCTA and repeal of the Texas Shop Act. Docket No. 51, Ex. 1 at 91:18–24, 92:3–8.

Sanborn's inability to answer these narrow questions does not create a disadvantage for Defendants "in asserting and establishing a claimed right or defense." *Nat'l Ass'n of Gov't Employees*, 40 F.3d at 710 (quoting *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984)). The relevant question for purposes of analyzing implied preemption is whether the 1954 Agreement *currently* unduly burdens rail transportation—not if-and-how it has burdened rail

transportation in the past. *See Franks*, 593 F.3d at 414. Accordingly, the City and County have failed to show undue prejudice, and the laches defense is unavailable as a matter of law.

**2. Equitable Estoppel**

Union Pacific argues that Defendants cannot establish the elements of the equitable estoppel defense because they have not shown that Union Pacific made a false representation on which they detrimentally relied. Docket No. 39 at 26–27. Defendants cite a newspaper article in which a Union Pacific spokesperson was reported to have said that "the company would continue to meet contractual obligations." Docket No. 51, Ex. 11 at 41 ¶7.

Under Texas law, equitable estoppel requires a five-part showing, with the first being a "false representation or concealment of material facts." *Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 341 F.3d 415, 422 (5th Cir. 2003) (quoting *Johnson & Higgins v. Kenneco Energy*, 962 S.W.2d 507, 515–16 (Tex. 1998)). The Court finds no evidence of a false representation. The alleged statement in the newspaper article is impermissible hearsay. *See James v. Tex. Collin Cnty.*, 535 F.3d 365, 374 (5th Cir. 2008) ("Newspaper articles, however, are not proper summary judgment evidence to prove the truth of the facts that they report because they are inadmissible hearsay."). Further, the spokesperson's full quote makes clear that she was not promising continued compliance, but rather that Union Pacific "remains in compliance." Docket No. 51, Ex. 11 at 41 ¶7. With no

evidence of a false statement, Defendants' affirmative defense of equitable estoppel fails as a matter of law.

**3. Ratification**

Union Pacific contends that Defendants' ratification defense fails because the 1954 Agreement is void as preempted and cannot be ratified. Docket No. 39 at 27–29. Defendants argue that the contract was *voidable* and capable of ratification. Docket No. 51 at 22–24. As discussed above, the Court has determined that the ICCTA preempts the 1954 Agreement. Where "the requirements of the law are not met, the contract is void." *United States v. Walker*, No. 1:11-CR-67, 2011 WL 6181468, at *2 (E.D. Tex. Dec. 13, 2011). "Promises that are void cannot be ratified." *Wamsley v. Champlin Refining & Chems., Inc.*, 11 F.3d 534, 538 (5th Cir. 1993) (citing RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a.); *accord id.* Defendants' ratification argument thus fails as a matter of law.

**4. Subject Matter Jurisdiction**

The Court rejected Defendants' jurisdiction argument above in Part II.B. Docket No. 24 at 8 ¶ 43. Further, lack of subject matter jurisdiction is not an affirmative defense. *See, e.g.*, *SEC v. BIH Corp.,* No. 2:10-CV-577-FTM-29, 2013 WL 1212769, at *6 (M.D. Fla. Mar. 25, 2013).

**5. Res Judicata**

Union Pacific argues that Defendants' res judicata defense—based on the Fifth Circuit's decision in *City of Palestine*, 559 F.2d at 415—fails as a matter of law because both the laws and facts have materially

changed since that opinion issued. Docket No. 39 at 29. Defendants contend that *City of Palestine* conclusively determined that the 1954 Agreement is a voluntary contract. Docket No. 51 at 24–25.

Res judicata has four elements, but only the fourth element is at issue here: whether *City of Palestine* and the instant suit involve "the same claim or cause of action." *Hous. Prof'l Towing Ass'n v. Hous.*, 812 F.3d 443, 447 (5th Cir. 2016) (quoting *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 466–67 (5th Cir. 2013)). A claim is the same when it has "the same nucleus of operative facts." *Id.* (quoting *United States v. Davenport*, 484 F.3d 321, 326 (5th Cir. 2007)). The Fifth Circuit recognizes that changes of law and fact may preclude res judicata's application when those changes are "significant." *Id.* at 449.

Both the law and facts have significantly changed here. At the time of *City of Palestine*, the governing law was the Interstate Commerce Act (ICA). *See* 559 F.2d at 413. But in 1995, the ICCTA repealed and replaced the ICA, diminishing state regulatory power. *See Friberg*, 267 F.3d at 443. And the facts giving rise to Union Pacific's preemption claim have likewise changed, including significant differences in the market for rail transportation, inefficiencies in the Palestine facilities, and the costs of repair. Docket No. 39, Ex. 4 at 80:2–5, 105:7–14; Ex. 11 at 1 ¶ 3; Ex. 14 at 1 ¶¶ 2–3. Complying with the 1954 Agreement is thus more burdensome today than it was when *City of Palestine* was decided, and Defendants have failed to show otherwise.

### 6. Contract Clause

Union Pacific argues that the Contract Clause is inapplicable because it applies only to the states and the ICCTA is a federal statute. Docket No. 39 at 30. Defendants do not respond to this argument.

The Contract Clause of the U.S. Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Because the ICCTA was enacted by Congress, not a State, the Contract Clause does not apply here. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 n.9 (1984) ("It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. . . the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause[.]").

## IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The City and County also move for summary judgment, arguing that the ICCTA does not preempt the 1954 Agreement as a matter of law because the Agreement was voluntary and, in any event, the ICCTA does not expressly or impliedly preempt the Agreement. Docket No. 42 at 10. Defendants' motion presents the same undisputed facts regarding the formation of the 1954 Agreement, Docket No. 42 at 6–10, along with the same arguments discussed above regarding Union Pacific's motion, *id.* at 12–22. For the reasons stated above, the Court holds that the

voluntary contract exception does not apply here and the ICCTA expressly preempts, and alternatively impliedly preempts, the 1954 Agreement. As a result, the Court **DENIES** the City and County's Motion for Summary Judgment (Docket No. 42).

## V. EVIDENTIARY MOTIONS AND OBJECTIONS

Union Pacific has filed several evidentiary objections and motions, including: Objections to Defendant's Summary Judgment Evidence (Docket No. 48, Ex. 1), Opposed Motion to Exclude Defendants' Expert Daniel Elliott (Docket No. 38), and Motion for Leave to File Supplemental Summary Judgment Evidence (Docket No. 53). In deciding the Motions for Summary Judgment addressed above, the Court did not rely on any of these disputed materials. The Court nevertheless addresses each in turn.

### A. PLAINTIFF'S OBJECTIONS TO DEFENDANT'S SUMMARY JUDGMENT EVIDENCE

Union Pacific objects to three exhibits introduced as evidence in the City and County's Motion for Summary Judgment. Docket No. 48, Ex. 1.[11]

First, Union Pacific objects to Daniel Elliott's testimony (Docket No. 42, Ex. 3). Docket No. 48, Ex. 1 at 1. The objection duplicates Plaintiff's Opposed Motion to Exclude Defendants' Expert, Daniel Elliott (Docket No. 38). Having resolved the motion in Union

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[11] Defendants objected to some of Union Pacific's summary judgment evidence. The Court addressed those objections *supra* note 7.

Pacific's favor, *infra* Part V.B, the Court overrules as moot this first objection.

Second, Union Pacific objects to certain statements in Palestine Mayor Steven Presley's affidavit (Docket No. 42, Ex. 10). Docket No. 48, Ex. 1 at 1–2. Union Pacific argues that descriptions of nineteenth-century events constitute impermissible hearsay because Mayor Presley has no personal knowledge of the events. *Id.* The City and County argue that these statements are admissible under the historical document exception to hearsay. Docket No. 57 at 2–3. The City and County misread the exception. Under the Federal Rules of Evidence, a party may admit a "statement in a document that was prepared before January 1, 1998, and whose authenticity is established." FED. R. EVID. 803(16). No such document is before the Court. *See* Docket No. 42, Ex. 10. Mayor Presley's testimony takes the form of an *affidavit*, not an *ancient document*. Accordingly, the Court sustains Union Pacific's objection to Mayor Presley's testimony on historical events.

Finally, Union Pacific objects to a statement in Judge Robert Johnston's affidavit (Docket No. 42, Ex. 11). Docket No. 48, Ex. 1 at 2. Union Pacific argues that Judge Johnston has no personal knowledge that "Union Pacific has accepted the benefits of the assets and operations that it assumed by its acquisition of MoPac in 1997." *Id.* (quoting Docket No. 42, Ex. 11 at 2). The City and County argue that this fact is generally known by all persons in Palestine and does not require "personal knowledge of Union Pacific's operations." Docket No. 57 at 3. The Court disagrees.

The phrase "accepted the benefits of the assets and operations" suggests an understanding of Union Pacific's corporate affairs. Judge Johnston does not assert any qualification to testify on such affairs. Accordingly, the Court sustains Union Pacific's objection to Judge Johnston's testimony on the matter.

### B. PLAINTIFF'S OPPOSED MOTION TO EXCLUDE DEFENDANTS' EXPERT DANIEL ELLIOTT

Union Pacific moves to exclude Daniel Elliott's expert report, arguing that Mr. Elliott's testimony impermissibly consists of legal analysis. Docket No. 38 at 3–5. The City and County, however, do not rely on this testimony in their summary judgment motion or in their opposition to Union Pacific's motion. The Court thus **DENIES** this motion as moot. *Morris v. Trans Union LLC*, 420 F. Supp. 2d 733, 741 (S.D. Tex. 2006), *aff'd*, 224 F. App'x 415 (5th Cir. 2007) (granting motion for summary judgment and summarily denying all outstanding motions as moot).

### C. PLAINTIFF'S OPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL SUMMARY JUDGMENT EVIDENCE

Union Pacific identifies two new factual arguments in the City and County's Response to Motion for Summary Judgment (Docket No. 48) and moves to file three exhibits as supplemental summary judgment evidence. Docket No. 53 at 1–2 ¶¶ 2–5. The new arguments are factual issues pertaining to (1) Union Pacific's train traffic flow and (2) recent negotiations between the Parties. Docket No. 53 at 1–2 ¶ 2. The City and County oppose the motion, arguing that the

Response does not raise new arguments. Docket No. 58 at 1. Further, the City and County argue that they would suffer prejudice if Exhibit 29 (Declaration from John Turner) is admitted because it includes testimony by a previously undisclosed witness. *Id.* at 2. The Court does not rely on any of the three exhibits in granting Union Pacific's Motion for Summary Judgment. But the Court agrees with Union Pacific: the exhibits are admissible because they respond to arguments the City and County raised in responsive briefing without prejudicing the City and County. *See Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004).

First, Defendants' Response plainly presents two new factual assertions. As to the train flow patterns, the Response expressly "disputes the factual allegations contained in paragraph no. 24," arguing that "[r]ail cars come into Palestine for repair from Hearne on the Austin-San Antonio line as well as from Houston." Docket No. 51 at 6 ¶ 11. And, as to the Parties' recent negotiations, the Response asserts that "Union Pacific completely fails to address that it recently requested that the County assume permanent maintenance of a road and bridge on Union Pacific property for its benefit." *Id.* at 22. Both assertions introduce new facts, and the City and County's denials do not persuade the Court otherwise. Supplemental summary judgment evidence may be filed in response to a new factual assertion. *E.g.*, *Metzler v. XPO Logistics, Inc.*, No. 4:13-CV-278, 2014 WL 4792984, at *6 (E.D. Tex. Sept. 25, 2014). So, the City and County's first argument to exclude fails.

Second, admitting Exhibit 29 (Declaration from John Turner) would not prejudice the City and County. Prejudice may arise when a party does not have an adequate opportunity to respond to the new evidence. *See Vais Arms*, 383 F.3d at 292. But here, the City and County had seven days to file a sur-reply. *See* Local Rule 7-f. While the City and County had not previously deposed Mr. Turner, they did depose Union Pacific's now-departed corporate representative, Cynthia Sanborn, for whom Mr. Turner was a substitute. Docket No. 62 at 2. The City and County do not identify any deficiencies in their deposition of Cynthia Sanborn, nor do they request the opportunity to depose Mr. Turner. Accordingly, the Court finds no prejudice, and the City and County's second argument fails.

Although the Court does not rely on this evidence to dispose of Union Pacific's Motion for Summary Judgment, the Court nevertheless finds that Union Pacific is entitled to have these exhibits admitted.

## VI. CONCLUSION

To summarize and based on the foregoing, the Court hereby **DENIES** Defendants' Motion to Dismiss Under Rule 12(b)(7) (Docket No. 40); **DENIES** Defendants' Motion to Dismiss Under Rule 12(c) (Docket No. 41); **GRANTS** Plaintiff's Motion for Summary Judgment (Docket No. 39); **DENIES** Defendants' Motion for Summary Judgment (Docket No. 42); **DENIES AS MOOT** Plaintiff's Motion to Exclude Defendants' Expert (Docket No. 38); and **GRANTS** Plaintiff's Motion for Leave to File Supplemental Summary Judgment Evidence (Docket No. 53).

So **ORDERED** and **SIGNED** this **3rd** day of **February, 2021.**

s/_____
JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE