

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 24-0509
Floyd County No. EQCV031386**

**IOWA NORTHERN RAILWAY COMPANY,
Plaintiff-Appellee**

vs.

**FLOYD COUNTY BOARD OF SUPERVISORS, AND CERRO GORDO
COUNTY BOARD OF SUPERVISORS, Acting as Trustees for JOINT
DRAINAGE DISTRICT NOS. 6 AND 56,
Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF FLOYD COUNTY
HONORABLE JUDGE COLLEEN D. WEILAND**

APPELLANTS' APPLICATION FOR FURTHER REVIEW

**DATE OF FILING COURT OF APPEALS OPINION UNDER REVIEW:
JANUARY 9, 2025**

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APPLICATION FOR FURTHER REVIEW

The Defendants-Appellants (Appellant) hereby applies to the Court for further review of the Opinion of the Court of Appeals filed January 9, 2025, a copy of which is attached hereto.

In support of the application, Floyd County Board of Supervisors and Cerro Gordo County Board of Supervisors Acting as Trustees of Joint Drainage District Nos. 6 & 56 (JDD 6 & 56) state:

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly considered and applied preemption against Sections 468.109 – 468.113, Code of Iowa.

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STATEMENT SUPPORTING FURTHER REVIEW

1. The Court of Appeals Decision nullifies Sections 468.109 – 468.113, Code of Iowa.
2. The Court of Appeals failed to recognize that Iowa Common Law and Iowa Statutory Law prohibits any person, party, entity, or railroad or road authority, from blocking, impeding, or interfering with the free flow of water in its natural course.
3. The Court of Appeals failed to recognize that railroads have a mandatory duty under 49 C.F.R. § 213.33 to have drainage under their roadbeds to accommodate expected water flow in the area concerned, and that the case of Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1143 (8th Cir. 2015) holds that “10501(b) does not preempt the FRSA regulations on drainage under railroad tracks.”

Likewise, Section 468.109, Code of Iowa’s requirement for railroads to not block, impede, or interfere with the free flow of water in its natural course under railroad tracks should not be preempted by Section 10501(b).

4. The Court of Appeals failed to recognize that culverts can be installed in embankments without interrupting the use and operation of a rail line for

transportation. JDD 6 & 56's expert witness, Scott Dullard, whose engineering career began with the company Miller The Driller which pioneered the jack and bore method to have an auger, "bore", inside the culvert removing the dirt fill while the culvert is pushed, "jacked", through the embankment. The auger is kept inside the culvert so there is no subsidence of the embankment, and there is no interruption with the use of the rail line or roadway. The jack and bore operation itself is shut down as each train passes through the area to ensure it does not interfere with the use and operation of the rail line. There is a laser survey to monitor the tracks. The elevation of each track is made at the center of the track and three points each side of the center point every ten feet. The shots may be monitored every hour. D0191 Trans. Dullard, P. 112 ll. 12-22 (05-05-2024). If a rail permanently deflects ¼ inch, the jack and bore operation is shut down until the matter is resolved for the trains to continue to use the railroad line. The laser survey does not monitor the tracks when the trains pass through because the rails flex temporarily from the train passing over them. D0169 Exhibit K Measurement And Payment, P. 178 (3-15-2024). Mr. Dullard testified that his companies have used the jack and bore method approximately 6,500 times, all without

any interference or interruption with the use and operation of the rail line or the highway.

5. The Court of Appeals, on page 7 of its Decision, includes footnote 5 that INRC will not allow any trains to operate during a jack and bore operation.

Based on Murphy's law that something might go wrong, INRC, of its own volition and choice, intends to not have trains run on its rail line if there is a jack and bore installation of a culvert in its embankment at water level, ignoring and defying its statutory duty under Section 468.109, Code of Iowa, to not obstruct, impede, or interfere with the free flow of water in the natural watercourse that its track and embankment cross, in spite of the fact that the jack and bore method will not interfere with the use and operation of INRC's rail line transportation, as shown by Scott Dullard's companies having done approximately 6,500 jack and bore installations all of which did not interfere with the use or operation of the rail lines or highways involved. This is addressed on pages 21-23 of Appellants' Brief and page 10 of Appellants' Reply Brief.

The jack and bore operation does not seek to impose authority over the tracks themselves, nor does it have the effect of managing or governing rail

transportation. The jack and bore operations themselves are shut down while each train passes through the area.

The relevant question is whether the jack and bore operation will have the effect of managing or governing rail transportation. It will not. INRC will still have full management of rail transportation on its rail line.

“To determine whether the ICCTA preempts Plaintiffs’ narrowed trespass claim, (in our case the narrow issue is the use of the jack and bore method to install a culvert in INRC’s embankment at water level)

...

(“The relevant question under the ICCTA is whether [the] dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation.”)

...

A trespass claim generally (a jack and bore operation) ‘does not seek to impose its authority over the track themselves[,]’ nor does it have ‘the effect of managing or governing rail transportation[.]’” Gordon v. New England Cent. R.R., Inc. (D. Vt. 2017), P. 11.

BRIEF

Issue I

The Court of Appeals Failed To Correctly Consider And Apply Preemption Against Sections 468.109 to 468.113, Code of Iowa

Duty To Not Obstruct Free Flow Of Water

The Burlington, Cedar Rapids & Northern Railway in 1871 constructed a railroad on an embankment over the natural watercourse with a 4-feet by 6-feet box culvert. DD0172 Exhibit M. Schierloh Deposition Ex. 3, PP. 8 and 9 (03-15-2024).

The existing box culvert is 2.66 feet above the new open ditch of JDD 6 & 56 on each side of the embankment.

It is Iowa Common Law and Iowa Statutory Law that no person, entity, party, road authority or railroad can obstruct, impede, or interfere with the free flow of water in its natural course. See Sections 468.149, 468.618, 314.7, 657.2(3), and Sojka v. Breck, 832 N.W.2d 384 (Iowa App. 2013), P. 3, Thome v. Retterath, 433 N.W.2d 51, 53 (Iowa App. 1988), Schneider v. State, 789 N.W.2d 138, 150 (Iowa 2010), and Moody v. Van Wechel, 402 N.W.2d 752, 757 (Iowa 1987).

Section 468.109, Code of Iowa, provides in pertinent parts as follows:

“Whenever the board of supervisors shall have established any levee, or drainage district, ... and the ... watercourse as surveyed and located crosses the right-of-way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company ... directing such company ... to build and construct or rebuild and reconstruct the necessary culvert, ... where ... watercourse crosses its right-of-way, so as not to obstruct, impede or interfere with the free flow of the water therein...”

49 C.F.R. § 213.33 also provides as follows:

“Each drainage or other water carrying facility under or immediately adjoined to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.” (Emphasis added.)

INRC has refused to install a new culvert in its embankment at the water level across the natural course of water to maintain the free flow of water. Section

468.112, Code of Iowa, provides that if the railroad does not build and construct, or rebuild and reconstruct, the culvert “the board shall provide for the construction.” (Emphasis added.) Therefore, the Joint Board of JDD 6 & 56 intends to have the culvert installed.

When the STB remanded this matter back to the Floyd County District Court on January 4, 2021, as guidance it cited Ingredion Inc – Pet. for Declaratory Order FD 36014, slip op. at 35 (STB served Sept. 30, 2016), which states sewer crossings and routine non-conflicting uses are not preempted as long as they would not impede rail operations or pose safety risks. D0043 Other Application Exhibit A (01-11-2021).

Section 468.109, Code of Iowa, requiring a culvert or bridge so as to not obstruct, impede, or interfere with the free flow of water in the natural watercourse (in accord with 49 C.F.R. § 213.33) does not regulate the railroad’s management or use of its rail line. The railroad is still able to construct its own rail line and embankment in accord with its own specifications, height, grade, side slopes, width for one line or multiple lines, and the railroad has full control over the operation of its rail line for rail transportation.

Jack and Bore

It is noted that our present case does not involve the construction of a rail line on the embankment across a natural waterway. Our present case involves an existing railroad line on an embankment across a natural waterway that has been in existence since 1871. The embankment has an existing 4-feet by 6-feet box culvert that is 2.66 feet above the flow line of the new open ditch of JDD 6 & 56. Therefore, a new 66-inch, 5.5-foot diameter smooth steel culvert pipe is needed to be installed in INRC's embankment at water level so as to not obstruct, impede, or interfere with the free flow of water in its natural course, using the jack and bore method which will not interfere with the use or operation of the rail line by INRC.

If JDD 6 & 56's plan was to install a new box culvert or dig an open trench in INRC's embankment, that would require temporarily removing the rail lines and excavating a space down to the water level, which would clearly interfere with the operation and use of the railroad line. However, the jack and bore method was developed to avoid any interference with the operation and use of the railroad line. Again, all of Scott Dullard's companies' approximately 6,500 jack and bore installations have been without interference with the use and operation of the railroad line or the highway that was involved.

INRC has its own “Iowa Northern Railway Company Standard Specifications For Boring And Jacking And Casing Pipe.” D0175 Exhibit P (03-15-2024). JDD 6 & 56’s Project Manual incorporated “Iowa Northern Railway Company Standard Specification For Boring And Jacking And Casing Pipe” as a part of said Project Manual. D0169 Exhibit K Appendix B, P. 185 (03-15-2024). With the jack and bore method, an auger is placed inside the culvert to auger out, “bore” out, the fill in the embankment. The culvert is pushed, “jacked”, through the embankment with the auger remaining inside the culvert, which avoids any subsidence of the material in the embankment. The size of the culvert makes no difference, the process is the same regardless of the size of the culvert. D0191 Trans. Dullard, P. 105 l. 12 to P. 116.1 l. 1; P. 117 l. 1 to P. 118 l. 12 (05-05-2024).

The jack and bore method was previously explained on page 8 above.

Scott Dullard, the President and Owner of The Driller, LLC, testified that his companies have used the jack and bore method to install culverts in railroad and highway embankments approximately 6,500 times, all without interfering with the operation of the rail line or the highway. Mr. Dullard is confident that the new 66-inch, 5.5-foot diameter smooth steel pipe can be installed in INRC’s embankment without interfering with the use of the rail line.

To ensure that there will be no interference with INRC's rail line from the jack and bore operation, the specifications require that the rail line will be monitored by laser survey, and if a rail line would permanently deflect ¼ of an inch, the jack and bore operation would be stopped until the matter is resolved which allows the trains to continue to use the rail line. The line is not monitored during the passing of a train because the line will temporarily deflect from the train passing over it.

Existing Case Law

The case of Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273 (Iowa 2018) considered preemption in regard to a tort claim damage action. The Griffioen case with a tort claim is distinguishable from our present case which involves a railroad's statutory duty under Section 468.109, Code of Iowa, to not obstruct, impede, or interfere with the free flow of water in its natural course, and not a tort claim action.

“But state tort claims like the ones alleged here that involve second-guessing of decisions made by railroads to keep their rail lines open are expressly preempted by Title 49 § 10501(b) of the ICCTA. See Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1144-46 (8th Cir. 2015).” (Emphasis added.) Id., 914 N.W.2d 277.

“If a state-law tort claim requires second-guessing of a railroad's operation and management of its own rail lines as opposed to other activities, and the claim does not pertain to rail safety, it is preempted by the ICCTA.” (Emphasis added.) Id., 914 N.W.2d 278.

The Griffioen case was concerned with:

“second-guessing of decisions made by railroads to keep their rail lines open.” (Emphasis added.) Id., 914 N.W.2d 277.

The Griffioen case cites the case of Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015). The Tubbs case holds as follows:

“Finally, the Board concluded that section ‘10501(b) does not preempt the FRSA regulations on drainage under railroad tracks. [The Tubbses’] tort claims based on alleged violations by BNSF of these regulations are therefore also not preempted by § 10501(b).” (Emphasis added.) Id., 812 F.3d 1143.

Likewise, Section 10501(b) should not preempt Section 468.109, Code of Iowa, on drainage under railroad tracks so as to not obstruct, impede, or interfere with the free flow of water in its natural course.

Furthermore, having drainage under the railroad tracks through the embankment is a safety measure for the integrity of the railroad embankment to not be weakened by erosion, as noted in the Griffioen case. Id., 914 N.W.2d 278.

Not Second-Guess Management Decision

The issue of second-guessing management decisions of the railroad that is noted in the Griffioen case is not pertinent in our present case regarding the mandatory duty of railroads under Section 468.109, Code of Iowa, to not obstruct, impede, or interfere with the free flow of the water in its natural course.

Second-guessing of management decisions does not exist because there is a mandatory duty of the railroads under Section 468.109, Code of Iowa, and 49 C.F.R. § 213.33, to not obstruct, impede, or interfere with the natural flow of water. INRC does not have a discretionary, voluntary, management decision or choice of whether or not to comply with Section 468.109, Code of Iowa, to provide for drainage of the natural flow of water. It is a mandatory duty. It is not a discretionary business decision or choice whether or not to comply with the law to provide drainage “to accommodate expected water flow for the area concerned” under 49 C.F.R. § 213.33, or whether or not to “obstruct, impede, or interfere with the free flow of water” in its natural course under Section 468.109, Code of Iowa.

The fact that 49 C.F.R. § 213.33 requires railroads to have drainage under the railbed to accommodate expected water flow for the area concerned shows that Section 468.109 Code of Iowa’s similar requirement for the railroad embankment to not obstruct, impede, or interfere with the free flow of water:

- (a) is not a business decision whether or not to comply with the mandatory statutory duty;
- (b) is not an unreasonable interference with rail transportation;
- (c) is not an unreasonable burden on the railroads;

- (d) it does not impose authority over the tracks themselves; and
- (e) does not have the effect of managing or governing the rail transportation on the tracks.

Not Control Operation of Rail Transportation

Section 468.109, Code of Iowa, and 49 C.F.R. § 213.33, allow railroads to design, construct, and operate its railroad facility, including to not obstruct, impede, or interfere with the natural flow of water in its natural course, which does not impose authority over the tracks nor does it affect the management or government of rail transportation.

The Griffioen case cited the Guild case.

“As we previously have explained in cases analogous to this one, ‘only laws that have the effect of managing or governing rail transportation will be expressly preempted.’ Franks, 593 F.3d at 410; see also Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (“Congress narrowly tailored the ICCTA preemption to displace only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation, ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation.’ (alterations in original)).” (Emphasis added.) Guild v. Kan. City S. Ry. Co., No. 12.60731 (5th Cir. Sep. 09, 2013).

Under Section 468.109, Code of Iowa, the railroads still have full control of the design, construction, and operation of the railroad transportation with only the

incidental effect of not obstructing, impeding, or interfering with the natural flow of water in its natural course.

The use of the jack and bore method to install the 66-inch, 5.5-foot diameter smooth steel pipe culvert in INRC's embankment will not manage nor control the operation of railroad transportation. The railroad use of its rail line for rail transportation is able to continue, uninterrupted, with the jack and bore method.

Cases Cited By Court of Appeals

The Iowa Court of Appeals cites cases that are not germane to the issues in our present case. The Court of Appeals cites the following cases involving the railroad needing to apply for and be granted a permit before proceeding with the action it wants to take.

“Our decision on this question is controlled by City of Auburn.” Or. Coast Scenic R.R., LLC v. Or. Dept. of State Lands, 841 F.3d 1069, 1076 (9th Cir. 2016).

“Here, the State’s removal-fill law requires that Oregon Coast apply for and be granted a permit before removing ‘any amount of material within waters designated Essential Salmonid habitat.’ Because ‘the ability to impose “environmental” permitting regulations on the railroad’ can in fact give local authorities the power to ‘prevent [a carrier] from constructing, acquiring, operating, abandoning, or discontinuing a line,’ City of Auburn, 154 F.2d at 1031, such a permitting scheme would ‘have the effect of managing or governing rail transportation,’” (Emphasis added.) Id., 841 F.3d 1077.

“mandates a pre-construction permit. ... giving the local body the ability to deny the carrier the right to construct facilities or conduct operations.” Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2nd Cir. 2005).

“Burlington initially submitted certain permit applications for these projects to local authorities. However, during the permit-review process, Burlington contended that local environmental review was precluded by federal regulation.” City of Auburn v. U.S. Government, 154 F.3d 1025, 1028 (9th Cir. 1998).

“For if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” (Emphasis added.) Id., 154 F.3d 1031.

“Finally, in City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) the Ninth Circuit affirmed the STB’s opinion that the ICCTA preempted a county’s ability to review the environmental impact of proposed operations on the formerly inoperable Stampede Pass line

...

The court recognized that in the case before it, the form of environmental regulation asserted by the state was essentially an economic regulation: “[I]f local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” (Emphasis added.) CSX Transp. Inc. v. City of Plymouth, 92 F.Supp.2d 643, 659 (E.D. Mich. 2009).

“The Ordinance is a form of local permitting or preclearance process requiring BNSF to conduct a hydrological and hydraulic study, provide the results to the Village, and obtain a permit from the Village before constructing a line within the southern border of the Village. Section 389.660 requiring suitable openings, ditches, and drains through and along roadbeds involves the construction of a railroad bed over which the STB has exclusive jurisdiction pursuant to section 10501(b) of the ICCTA. ‘[T]he congressional intent to preempt this kind of state and local regulation is explicit in the plain language

of the ICCTA and the statutory framework surrounding it.’ *City of Auburn*, 154 F.3d at 1031.” (Emphasis added.) *Vill. of LaKe v. BNSF Ry. Co.*, 382 S.W.2d 125, 130 (Me. App. 2012).

In our present case, we do not have a pre-construction permit requirement which could be used to prevent the railroad with proceeding with construction. Instead, in our present case, we have a mandatory statutory duty under Section 468.109 to not obstruct, impede, or interfere with the free flow of water in its natural course. The railroad that has been in existing since 1871, and is presently in operation, has a mandatory duty to not have its existing track and embankment across the natural waterway obstruct, impede, or interfere with the natural flow of water. The jack and bore installation of the 66-inch, 5.5-foot diameter smooth steel pipe culvert at water level will not interfere with the use and operation of INRC’s rail line transportation.

The Court of Appeals cites the case of *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012). The Court ruled that the city’s ordinance had “the effect of managing the economic decisions of” the railroad. *Id.*, 669 F.3d 534.

In our present case, there is no discretionary management decision or choice under Section 468.109, Code of Iowa, of whether or not to obstruct, impede, or

interfere with the free flow of water in its natural course. Also under 43 C.F.R. § 213.33, the railroads don't have the option or choice of whether or not to maintain each drainage or other water carrying facility under the roadbed of its railroad to accommodate expected water flow for the area concerned.

The Court of Appeals cites the case of CSX Transp. V. City of Plymouth, 283 F.3d 812, 816 (6th Cir. 2022) which involves FRSA, the Federal Railway Safety Act.

“Because the Secretary of Transportation has already prescribed regulations covering the subject matter of the state statute, the first savings clause of the FRSA’s express preemption provision does not apply to the Michigan statute. We therefore affirm the district court’s holding that the Michigan statute is preempted by the FRSA.” Id., 283 F.3d 817.

It is to be recalled that the Tubbs’ cases involved the FRSA regulation under 49 C.F.R. § 213.33 and holds that the railroad’s duty to accommodate expected water flow for the area concerned is not preempted.

CONCLUSION

The issue is whether Section 468.109, Code of Iowa, will necessarily burden the movement of passengers or property by rail. Gordon v. New England Cent. R.R., Inc., (D. Vt. 2017), P. 12. The issue is whether Section 468.109, Code of Iowa, will necessarily have the effect of preventing or unreasonably interfering with railroad transportation. Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404, 414 (5th

Cir., 2010), New York Susquehanna v. Jackson, 500 F.3d 238, 253 (3rd Cir. 2007), Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008), New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 333 (5th Cir. 2008).

The evidence in our present case shows from the 6,500 jack and bore successful operations that the installation of the 5.5-foot diameter smooth steel pipe culvert through INRC's railroad embankment will not necessarily prevent or interfere with INRC's rail transportation.

The installation of a culvert by the jack and bore method in INRC's embankment at water level under Section 468.109, Code of Iowa, is not preempted because (1) it is not an unreasonable burden on INRC; (2) it is not an unreasonable interference with rail transportation; (3) it does not effect the management or governing of rail transportation because it requires what is already required of all railroads under 49 C.F.R. § 213.33 to accommodate the expected water flow in the area under the roadbed.

The January 9, 2025 Decision of the Iowa Court of Appeals in this case should be overruled and reversed with a ruling allowing the Joint Board for JDD 6 & 56 to proceed with the jack and bore installation of the new 66-inch, 5.5-foot diameter smooth steel pipe culvert in INRC's embankment.

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Attachments:

Opinion of the Court of Appeals filed January 9, 2025.

The Trial Court's Trial Ruling (Writ to Issue) filed March 13, 2024.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Appellants' Application For Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Appellants' Application For Further Review contains 4,959 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Appellants' Application For Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Appellants' Application For Further Review has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 23rd day of January, 2025.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Defendants' Application For Further Review with the Clerk of the Iowa Supreme Court, on January 23, 2025.

I, Robert W. Goodwin, hereby further certify that on January 23, 2025, I served the foregoing Defendants' Application For Further Review, by the electronic filing system, to the following attorneys of record:

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