

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 IOWA DISTRICT COURT FOR FLOYD
COUNTY
HONORABLE COLLEEN D. WEILAND

APPELLEE'S RESISTANCE TO APPLICATION FOR FURTHER
REVIEW

DATE OF FILING OF COURT OF APPEALS OPINION: JANUARY 9,
2025


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QUESTION PRESENTED FOR REVIEW.

Whether the Iowa of Appeals correctly affirmed the Iowa District Court's ruling holding that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501 (b), expressly preempts Iowa Code § 468.109 *et. seq.* because the JDD's proposed drainage project interferes with transportation by a railroad carrier due to the site-specific railway geography in this case.

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OPPOSITION TO FURTHER REVIEW.

The Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501 (b), will not preempt each and every future drainage district improvement project in Iowa that is controlled by Iowa Code §§ 468.109 – 468.113. Instead, ICCTA preemption applies only to the distinct railroad terrain involved in this case. Here, the JDD proposes to jack and bore a five and ½ feet steel pipe through Iowa Northern’s 20 feet high railroad embankment. The railroad tracks run across the top of this embankment. The JDD’s proposed steel pipe installation location could damage or collapse an existing box stone culvert located at the bottom of the embankment that already drains surface water through Iowa Northern’s right-of-way, in full compliance with existing state law.

The Iowa Court of Appeals (and the trial court) correctly analyzed and applied to the JDD’s intended project the ICCTA’s express statutory preemption provisions, following this Court’s ICCTA precedential decision in Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273 (Iowa 2018), *cert. denied*, 139 S. Ct. 1320 (2019). Under these legal authorities, the appellate ruling’s decision was correct. The JDD’s Application for Further Review should be denied.

BRIEF.

I. The Court of Appeals and the District Court Correctly Ruled that the ICCTA Preempts Iowa Code Sections §§ 483.109 - 483.113 Because the JDD'S Proposed Drainage Project Interferes With Rail Transportation by Iowa Northern.

The Floyd County Board of Supervisors and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56's (the "JDD") advance no new legitimate legal or factual argument supporting its contention that further review should be granted. As an initial matter, its Application for Further Review does not facially meet the stringent legal standards imposed for a grant of further review under Iowa R. App. Pro. 1.61103. While the rule itself acknowledges that they are not exhaustively rigid, the JDD does not comply with Iowa R. App. Pro. 1.61103 (c)(3). Its statement supporting further review contains no explanation, argument, or analysis of how any of Rule 1.61103's criteria is satisfied.

The JDD simply regurgitates each of its arguments which were rejected by the District Court and the Court of Appeals: First, that because of the appellate decision Iowa Code Sections 468.109 - 468.111 are somehow nullified. Second, the JDD jack and bore expert is a whiz and the project could never interfere with railroad structures, operations, or compromise safety. Third, Iowa Northern's decision to terminate its railroad operations during

construction is based on Murphy's Law and, in doing so, this does not really constitute ICCTA railroad operation interference. The fact that the parties have differing opinions over case facts do not support a further review grant.

In the early 1870's, the Iowa Northern railroad's predecessor-in-interest constructed a 20' embankment near the city limits of Nora Springs, Iowa, building its rail line over the top of the embankment. That railroad then built a rail bridge over what is now known as West Drive so that vehicular traffic could move under the railway line.

Likely in this same time frame, the predecessor railroad also built a four-foot by six-foot box stone culvert to channel the natural watercourse runoff through the embankment. This culvert remains functional and surface water drains through it in the direction of the Shell Rock River. When originally constructed, the top and sides of the stone culvert were covered in embankment fill (dirt and rocks), the inside of it was roughly finished, and the exterior walls of the stone culvert remained rough and jagged because the stones were not finished after quarrying. The exact dimensions and placement of the exterior stones which make up the culvert are unknown.

A. Iowa Northern's Embankment Does Not Obstruct the Free Flow of Water Through The Natural Watercourse and Iowa Code §§ 468.109 to 468.111 Are Not Abrogated.

The dispute in this case began on June of 2016 when the JDD notified Iowa Northern, pursuant to Iowa Code § 468.109, that its box stone culvert was in disrepair and that it was obligated to construct a new steel culvert at its own cost. (D0167, Exhibit I, Notice dated June 22, 2016). The JDD's solution was to construct an open ditch to channel water through a new 66" steel culvert. The JDD insisted a new steel culvert pipe would be jacked and bored through Iowa Northern's embankment during the railroad's active train operations.

The JDD took the position that Iowa Northern must pay for a new culvert pipe pursuant to Iowa Code §486.111 because the rail embankment in place since 1871 constitutes an obstruction to the natural flow of water. The JDD ignored the fact that the existing box stone culvert already serves to channel natural surface water through the embankment.

Iowa Northern's expert bridge engineer testified at trial that the existing stone culvert, while approximately 150-years old, was in good repair and functioned adequately as designed, which is to pass the natural watercourse runoff through the embankment. The JDD submitted no trial evidence proving that the existing culvert was in disrepair, much less collapsing, or that it did not function.

The JDD now claims that the box stone culvert will not function in the future since the bottom of the existing culvert would be too high to continue

channeling water after the JDD artificially drops the upland watercourse elevation by deepening the drainage area which would lower the ground level below the floor of the stone culvert. This argument makes no logical sense. Only the construction project itself will alter the box stone culvert's drainage capabilities. If left alone, the natural watercourse will continue to flow through the stone culvert as it has for decades.

A railroad may bear the full costs of building or rebuilding a bridge or culvert but only when it is necessary to carry its roadbed over the natural watercourse. Chicago & N. W. Transp. Co. v. Webster County Bd. of Supervisors, 880 F. Supp. 1290, 1296 (N.D. Iowa 1995). Iowa Code § 468.111 and § 468.113. A functional culvert renders the proposed JDD improvement project unnecessary. Iowa Northern has and continues to comply with Iowa law - or its mandatory legal duty as framed by the JDD - permitting the free flow of water through its right-of-way just as required by Iowa Code §§ 468.109 - 468.111.

B. The JDD's Proposed Project Is Inherently Unsafe.

The continued viability of the stone culvert aside, the core case dispute at the trial court level and affirmed on appeal was ultimately predicated on ICCTA express preemption since Iowa Northern's additional legal positions

would generally not require adjudication if preemption applied.^{1/} The Iowa Northern’s “Number 1 Basic Principle” is “Put Safety first – always, in ALL ways”. (Emphasis in original).

^{1/} These arguments, in summary, were:

1. No engineering plans were included in the June 22, 2016 § 468.109 notice, violating the statute requiring service of plans detailing “...the full requirements for its complete construction [of an improvement] ...as shown by the plans, specifications, plat, and profile of the engineer appointed by the board.” The JDD did not even approve its engineer’s plans until August 23, 2016.
2. The JDD’s 2014 engineer report recommended a repair of the existing drainage structures, not an improvement with a culvert. The report stated that the drainage systems were adequate in their original state due to natural watershed surface relief and that repairs would restore the drainage. If JDD had chosen this recommendation, the cost of repair would have been born by the landowners, including the Iowa Northern. Instead, by disregarding the engineer’s recommendation, the JDD knowingly tried shifting all monetary costs to Iowa Northern. The JDD’s dissembled about its reasons for selecting an improvement project over a repair, which was ultimately rejected by the trial court. More importantly, the proposed repair did not require jacking and boring through the railway embankment or implicate ICCTA preemption.
3. The JDD’s plans are more than natural watercourse drainage improvement because it functionally replaces the existing drainage tile draining certain non-railroad lands by artificially channeling the flow of this groundwater, as well as surface water, via an open ditch through the new 66” steel culvert pipe. The drainage ditch is below grade, or lower than the existing natural waterway. This is *artificial* groundwater drainage. It is not *natural* groundwater drainage.

The trial evidence proved that a jack and bore could potentially dislodge the fill within the existing railroad embankment. In addition, since the existing culvert is not pinned with reinforced steel and the dimensions of the jagged exterior wall buried in fill are unknown, striking that culvert during the 'jack and bore' process could compromise the rail infrastructure integrity. The JDD's engineer agrees with Iowa Northern's engineer that jacking and boring near the culvert could damage or possibly destroy the existing culvert and railroad right of way structure. The JDD plans submitted prior to trial had a distance of around one foot between the south, exterior (buried) edge of the culvert and the proposed north edge of the 66" pipe, assuming that the existing culvert's interior edge is two feet thick. There are "unknowns," including possible irregularities with the culvert walls that could be hit during excavation, if the JDD engineering assumptions are incorrect.

In a bizarre turn of engineering events, the JDD's engineer invalidated the results of a geotechnical survey conducted to try to determine where the buried exterior culvert rock edge was located. The JDD conducted this testing to address the Iowa Northern engineer's subsidence concerns about the location of the culvert exterior south wall. Iowa Northern's engineer provided explicit boring location instructions, but without permission the JDD engineer intentionally moved the location of a boring so the exterior stone culvert wall at

that point could not be determined. The geotechnical project manager acknowledged this altered the viability of the study at that location.

When confronted about his actions at trial, the JDD's engineer testified - without any notice or supplementation of the JDD's discovery responses -- that he now intended to move the proposed steel pipe culvert some several feet away from the existing box stone culvert to avoid damaging it or destroying it, even though no engineering drawings or reports existed at the time of trial. This gave Iowa Northern no possible time to either contemplate or counter this new engineering scheme. Iowa Northern's engineer was left "speechless" when he learned of it during the JDD's opening statement. In addition, the JDD engineer's 'hail Mary' at trial means the JDD (through the offices of the County Auditor) must serve a new notice upon Iowa Northern stating "the nature of the improvement to be constructed, the place where it will cross the right-of-way of such company, and the full requirements for its complete construction across such right-of-way as shown by the plans, specifications, plat, and profile of the engineer appointed by the board". Iowa Code § 468.109. The JDD has failed to do so post-trial.

The JDD -- in every single post-trial written submission -- excruciatingly details jack and bore methodology and its expert's experience.^{2/} Despite this recitation, Iowa Northern's engineer testified that monitoring for track movement of a quarter of an inch is not an acceptable safety standard as it could indicate a void under the tracks, such as the movement of a stone in the box culvert with fill draining from it. Likewise, the JDD engineer similarly conceded that a quarter-of-an-inch track movement would terminate the project at least temporarily. More importantly, he agrees such movement could damage the railroad.

Iowa Northern's prior jack and bore operations and procedures are inapplicable to the proposed project. It has used the jack and bore method of installation six times in the past, including situation involving fiberoptic cable the size of a finger up to a 24" sanitary storm water sewer in a two-foot embankment. There has never been a jack and bore of a 66" steel pipe through a 20' embankment. Iowa Northern acknowledges that it has jack and bore operating procedures, but they are not applicable to a 66" pipe.

^{2/} The reader knows that Mr. Dullard has conducted 6,500 jack and bores as the JDD recites this fact 15 times in its appellate filings. (JDD Brief at pp. 7, 9, 23, 36, 41, 44, and 46; JDD Reply Brief, pp. 9, 11, 18, 19; and Application for Further Review, pp. 7, 12, 13, and 22).

If the JDD is permitted to jack and bore a 5 and ½ feet steel pipe into the 20 feet embankment under the railroad track structure, Iowa Northern will have no choice but to shut down railroad operations due to overwhelming safety concerns. This will disrupt both Iowa Northern trains and Canadian Pacific trains which operate over the right of way embankment.

Iowa Northern's decision not to operate its railroad if the 66" steel pipe is jack and bored through its embankment is not capricious or based on "Murphy's Law." Iowa Northern's former general counsel did testify about Murphy's Law, but in the context of discussing a jack and bore accident causing at least \$10 million in damages to railroad property and rail shippers near Plainfield, Illinois in 2017. That incident and resulting damages were solely attributable to the negligence of a jack and bore contractor attempting to install a 42" diameter pipe under an elevated railroad right of way. Former Iowa Northern general counsel's testimony was also centered on the fact that at the time of trial, the JDD had not retained any jack and bore contractor. Without the ability to evaluate the credentials of a chosen contractor, Iowa Northern had no future guarantee of competence.

The decision to prohibit either Iowa Northern or any other railway from running trains over the embankment during construction is premised only on safety concerns. Installing the 66" steel pipe through the embankment is

inherently unsafe. No one, including the JDD or its jack and bore expert, can guarantee the project's safety.

C. The Proposed Project is Preempted Under the ICCTA.

The Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501(b), confers “exclusive” jurisdiction on the U.S. Surface Transportation Board over “transportation by rail carriers,” negating all state and federal remedies “with respect to rail transportation”. Id. Culverts relate to railroad management and transportation. Jones Creek Investors, LLC v. Columbia County, 98 F. Supp. 3d 1279 (S.D. Ga. 2015)(Culvert rebuilding causing flooding inextricably linked to railroad transportation); Waubay Lake Farmers, Ass'n v. BNSF Ry. Co., 2014 U.S. Dist. LEXIS 120160, * 16 (S.D. 2014)(Requiring railroad to re-construct a culvert “in a sufficient capacity to carry off surface waters,” implicates construction and operations of a railroad.)

This Court held in Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273 (Iowa 2018), *cert. denied*, 139 S. Ct. 1320 (2019), that ICCTA preemption is express. This express preemption impacts state regulations or claims (either statutory or common law based) that pertain to matters of “the construction, operation or abandonment of rail lines” or “facilities.” This includes remedies related to these activities. Griffioen, *id.* at 280. ICCTA federal preemption test is whether the JDD seeks to regulate -- manage or

govern -- Iowa Northern “with respect to [its] rail transportation” or “transportation by rail carriers” and/or manage or govern Iowa Northern’s “construction” or “operation” of its “facilities” at this specific Nora Springs, Iowa location. It does. The JDD has no right, ability, or authority to instruct Iowa Northern on how to conduct its railroad operations. During oral argument before the Iowa Court of Appeals, counsel for the JDD was asked why the project did not second-guess Iowa Northern’s railroad operations. He could not and never did answer the question.

The JDD claims that drainage claims are not preempted, Tubbs v. Surface Transportation Board, 812 F.3 1141, 1143 (8th Cir. 2015), due to affirmation of the STB’s conclusion that certain Federal Railroad Authority regulations were not preempted. In the underlying STB ruling in Tubbs, STB Fin. Docket No. 35792, 2014 WL 5508253 (S.T.B. October 29, 2014), the Tubbs litigants claimed drainage damages which were derived from FRA regulatory violations drafted under the Federal Railroad Safety Administration Act, 49 U.S. C. § 20101, *et. seq.* The STB simply found that ICCTA preemption did not apply to these federal statutory drainage claims, not that all ICCTA drainage disputes were preempted. 2014 WL 5508253, * 7. Without any proper Blue Book citation, the JDD also purports to quote Gordon v. New England Central Railroad, Inc., 2019 WL 4069389 (D. Vt. 2017)(Unpub. Op.)

regarding managing railroads in connection with jack and bore operations. This case involved the admissibility of expert testimony and there was no mention of jack and bore operations. It certainly provides no authority for the JDD's legal proposition.

The Court of Appeals correctly concluded that while the Griffioen decision, id., involved state law tort claims this Court's preemption holding is not limited simply because this mandamus action involves drainage district statutes. It cited several ICCTA preemption cases throughout the country. Attempts to factually distinguish them from the present case are ineffective. The point is that these cases cover a broad array of circumstances and are cited in support of the wide-ranging breadth of ICCTA preemption.

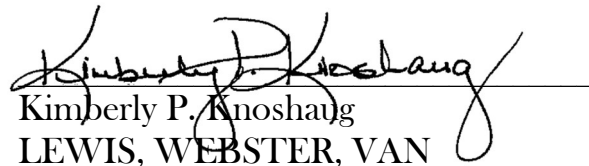
It is certainly correct that ICCTA preemption does not apply to all culvert installations, much less all §§ 468.109 - 468.111 culvert installations in Iowa. But the Iowa Court of Appeals recognized that the JDD's plan "Because the planned improvement affects railroad transportation under the unique facts of this case [the geography], the ICCTA expressly preempts the joint drainage district from undertaking it." Iowa Northern v. JDD 6/56, 2025 WL 52733 (Iowa Ct. App. 2025)(Unpub. Op.) (emphasis supplied). A project threatening the structural integrity of Iowa Northern's property and the unreasonable safety risks that exist because of the specific geography of the railroad right of way,

leads Iowa Northern to conclude it must suspend railroad operations during a jack and bore construction project That is a railroad operating decision which is expressly preempted.

CONCLUSION

In conclusion, Iowa Northern Railway Company requests that this Court deny the Application for Further Review.

Respectfully submitted,



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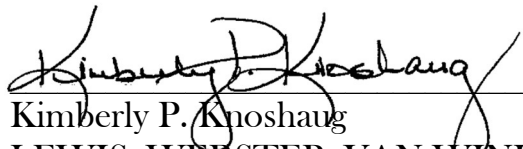
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Kimberly P. Knoshaug

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I, Kimberly P. Knoshaug, hereby certify that I electronically filed the foregoing document with Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below on the 3rd day of January, 2025.

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