In the
United States Court of Appeals
For the Seventh Circuit

No. 26-1946

ERNEST PAYTON, *et al.*,

Plaintiffs-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 24 C 153 — **Jorge L. Alonso**, *Judge*.

ARGUED SEPTEMBER 23, 2026 — DECIDED SEPTEMBER 30, 2026

Before EASTERBROOK, SCUDDER, and PRYOR, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Union Pacific Railroad operates intermodal facilities where freight moves between trains and trucks. Between 2013 and 2021 it used fingerprint scans to verify the identity of truck drivers who sought to enter these facilities in Illinois. Twelve truck drivers contend in this suit that this practice violated the state's Biometric Information Privacy Act (BIPA or the Act), 740 ILCS 14/1 to 14/99.

The Railroad contends that its conduct falls within an exemption: "Nothing in this Act shall be construed to apply to a

contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." 740 ILCS 14/25(e). It points to two kinds of contracts with the State of Illinois or one of its subdivisions. First, it operated commuter trains on behalf of Metra, a commuter railroad in northern Illinois. Second, it performed design work on overpasses and grade crossings in multiple locations. The plaintiffs reply that these contracts had nothing to do with intermodal freight.

The statutory exemption applies to a contractor "*when working* for that State agency or local unit of government" (emphasis added). Union Pacific reads "when working" to mean "during the time" it has any contract with a unit of state or local government. By that standard, it is exempt from the Act. Plaintiffs read "when working" to mean "in the course of" fulfilling any contract with a unit of state or local government. By that standard, Union Pacific was subject to the Act at its intermodal terminals when the plaintiffs accessed them. The district court sided with plaintiffs and denied Union Pacific's motion for summary judgment. 2025 U.S. Dist. LEXIS 164817 (N.D. Ill. Aug. 25, 2025). Later it certified the decision for interlocutory appeal under 28 U.S.C. §1292(b). 2025 U.S. Dist. LEXIS 212267 (N.D. Ill. Oct. 28, 2025). We accepted the appeal, in large measure because the stakes appeared to be substantial yet by late 2025 the state's judiciary had not chosen between the two approaches.

Before the district court denied Union Pacific's motion, only one appellate decision had said anything about 14/25(e). *Enriquez v. Navy Pier, Inc.*, 2022 IL App (1st) 211414-U, supported the plaintiffs' perspective, but that language is dictum (the court ruled for the defendant anyway). After we accepted the appeal several legal developments occurred. First, we held in *Clay v. Union Pacific R.R.*, 171 F.4th 975 (7th Cir. 2026),

that a recent amendment to the Act applies to pending cases in a way that greatly reduces the maximum recovery for claims such as those plaintiffs present. Second, two more state appellate courts construed 14/25(e). *Thomas v. Cornerstone Services, Inc.*, 2026 IL App (3d) 240568 ¶4, agrees with the approach taken in *Enriquez*, but this time as a holding. *Jones v. Help at Home, LLC*, 2026 IL App (1st) 250452-U ¶¶ 24–25, then agrees with *Thomas*. Like *Enriquez*, the statement in *Jones* is dictum—but *Thomas* is not. All three decisions understand the statutory language to mean "in the course of."

Our task when dealing with an issue of state law is to read it the way that we think that the state's highest court would read it. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940); *Murphy v. Smith*, 844 F.3d 653, 658 (7th Cir. 2016), affirmed on other grounds, 583 U.S. 220 (2018). The Supreme Court of Illinois has yet to consider the meaning of 14/25(e). But we do not see a good reason to think that it would disagree with *Enriquez*, *Thomas*, and *Jones*.

The Railroad observes that the state's highest court interprets statutes to mean what they say, but that principle does not help much: both "during the time" and "in the course of" are linguistically plausible understandings of "when working". The statute has a temporal connotation ("when"), but the word "working" could point to a contract covering the work in which biometric information was collected (plaintiffs' reading) or any work under any contract (the Railroad's reading). Invocation of "plain meaning" does not disambiguate language that leaves a vital question unresolved.

Union Pacific observes that the Supreme Court of Illinois often follows the lead of the Supreme Court of the United States when dealing with statutes, and to this major premise the Railroad adds the minor premise that *United States v.*

Ressam, 553 U.S. 272 (2008), reads the phrase "during the commission of any felony" in 18 U.S.C. §844(h)(2) to mean contemporaneous with the felony. If 14/25(e) contained the word "during" rather than the phrase "while working", this would be a strong point. But a judge cannot sensibly choose between "during the time" and "in the course of" by pretending that "while working" *already* says "during"; that would beg the question. A court must construe the statute's actual words rather than a substitute for those words.

The district judge thought it important that the Supreme Court of Illinois usually reads statutes so that all of their words have meaning, and the judge (seconded by plaintiffs) stated that, if the Railroad is right, then the entire phrase "when working for that State agency or local unit of government" would be deprived of effect. Instead of asking whether an entity collected biometric data "when working" as a contractor, the court would just ask whether the defendant had a contract, and stop. There's something to this perspective, though it is possible to imagine *some* situations in which the phrase would matter even on the Railroad's understanding. Consider, for example, how the Act applies if a firm collects biometric data under a contract that ends before a plaintiff sues. The plaintiff might contend that the defendant is not a contractor *now* (that is, when the case is before the court), to which the ex-contractor could respond that it held a contract *then* and that the information was collected "when working" under that contract, producing an exemption. Conversely, a business might lack a governmental contract when it collects biometric data but acquire one by the time of suit; then the plaintiff could defeat the claimed exemption by relying on the "when working" clause. These situations may be uncommon, but they show that the language can have some work to do on the Railroad's understanding of 14/25(e).

Plaintiffs argued in the district court that, even if Union Pacific had a contract with Illinois that concerned intermodal terminals, application of the exemption would depend on the relation or nexus between that contract and the collection of biometric information. Perhaps, plaintiffs suggested, exemption would depend on whether the contract countenanced (maybe even compelled) the collection of biometric information. Union Pacific argues that any such approach would be tough to implement.

We do not get into such issues, because the Railroad's contracts with Illinois and Metra had nothing to do with intermodal freight. Whether to add a "nexus" requirement to the statutory language, and if so what that requirement would entail, are subjects for the state judiciary in a case where they are presented. If they *were* presented in this case, we would be inclined to certify an issue to the Supreme Court of Illinois, so that it could provide a definitive resolution. But they are not presented. All we have is a binary choice between "during the time" and "in the course of" as possible understandings of "when working". On that subject members of the state's appellate judiciary have unanimously favored "in the course of." Because we think it unlikely that the Supreme Court of Illinois would disagree, the decision subject to our interlocutory review is

AFFIRMED.