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May 3, 2005

Mark J. Langer, Clerk
Office of the Clerk
United States Court of Appeals for the District of Columbia Circuit
Room 5423
333 Constitution Avenue, NW
Washington, DC 20001

Re: CSX Transportation, Inc. v. Williams, No. 05-5131

Dear Mr. Langer:

Pursuant to Federal Rule of Civil Procedure 28(j), I am writing to bring to the Court's attention the attached decision of the Surface Transportation Board ("Board"), which was issued on May 3, 2005 in *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (attached as Exhibit A).

In its decision of March 14, 2005, the Board issued a Declaratory Order that the Interstate Commerce Commission Termination Act preempted the District of Columbia's "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005." The District of Columbia and the Sierra Club petitioned the Board for reconsideration of its decision, and each argued to this Court that the Board's Declaratory Order was not final for enforcement purposes while those petitions were pending. See D.C. Opp. at 7; Sierra Club Opp. at 12 n.12.

In the attached decision the Board denied the District of Columbia's and the Sierra Club's petitions for reconsideration. See Ex. A at 1. In light of the Board's decision, appellees' arguments that their petitions for reconsideration affected the finality of the Declaratory Order are moot.

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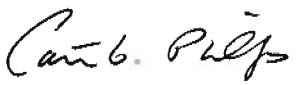

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SERVICE DATE – LATE RELEASE MAY 3, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Decided: May 3, 2005

In a declaratory order served March 14, 2005, we concluded that 49 U.S.C. 10501(b)[1] preempts an act of the District of Columbia (District or D.C.) that seeks to govern the transportation of hazardous materials moving by rail through the District. In this decision we deny requests for reconsideration and reopening of that decision.

BACKGROUND

In a petition filed February 7, 2005, CSX Transportation, Inc. (CSXT) requested a Board order declaring that the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the D.C. Act)—which would ban transportation of certain classes of hazardous commodities within a 2.2-mile radius of the United States Capitol Building without a permit from the D.C. Department of Transportation—is preempted by section 10501(b). We invited a response by the District, as well as comments from other interested persons. The District and the Sierra Club submitted replies opposing the petition. Comments supporting CSXT's petition were filed by the United States Department of Transportation (U.S. DOT), the Association of American Railroads, other railroad interests, shippers (including producers and users of hazardous materials), and Members of Congress.

After considering all of the submissions, we concluded that the D.C. Act is preempted by section 10501(b), based on the language of the statute and well-established precedent. We explained that, in enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed.

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[1] That provision is often referred to as the "ICCTA preemption," as it was broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995).

Exhibit A

On March 23, 2005, the District filed a petition under 49 CFR 1115.3 for administrative reconsideration, to which CSXT replied on March 31, 2005. On April 25, 2005, the Sierra Club filed an untimely petition for reconsideration, which we will treat as a petition to reopen under 49 CFR 1115.4. CSXT replied on April 27, 2005. The District and the Sierra Club base their petitions on claims of material error in our prior decision, but, as discussed below, they have not shown such error. Therefore, the petitions for reconsideration and reopening will be denied.

DISCUSSION AND CONCLUSIONS

The District makes three broad claims in its petition for reconsideration.[2] First, it alleges that in our decision we ignored its argument that the D.C. Act is an appropriate use of its police power, and it complains that we made factual findings without conducting an adequate factual inquiry. Second, the District maintains that in our decision we failed properly to take into account relevant precedent regarding the role of other federal statutes administered by other agencies, as well as the role of the courts in addressing preemption issues. Finally, the District argues that we failed to take into account the assertedly unique nature of the safety and security threats faced by the District. We will address each argument in turn.

1. The Types of Action at Issue Here are Categorically Preempted

The District and the Sierra Club first argue that we erred in assessing the reasonableness of the D.C. Act without conducting a full factual inquiry and without accommodating the District's police power to protect its citizens from the threat of terrorism. District Pet. at 1-3; Sierra Club Pet. at 4-6. But it was neither necessary nor appropriate to engage in either line of inquiry because the type of action precluded in the D.C. Act is wholly preempted regardless of the circumstances surrounding the action.

As discussed in our prior decision (at 7), Congress in 1995 broadened the express preemption provision of the Interstate Commerce Act to the point that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers," and the term "transportation" is defined by our statute, at 49 U.S.C. 10102(9), to embrace all of the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad's traffic should be routed is preempted.

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[2] The Sierra Club also makes the first two of these claims.

Indeed, the courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. City of Auburn v. United States, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (City of Auburn) (environmental and land use permitting categorically preempted); Green Mountain R.R. v. State of Vermont, No. 04-0366, slip op. at 13-20 (2d Cir. Apr. 14, 2005) (Green Mountain I) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)).

Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. 11321-11328); and railroad rates and service (see 49 U.S.C. 10501(b), 10701-10747, 11101-11124). Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts state law claims).[3] See also Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001) (Friberg) (state statute imposing operating limitations on a railroad expressly preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted).[4]

Both types of categorically preempted actions by a state or local body would directly conflict with exclusive federal regulation of railroads. City of Auburn, 154 F.3d at 1030-31. Accordingly, for those categories of actions, the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.

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[3] See also N. San Diego County Transit Dev. Bd.—Pet. for Decl. Order, STB Finance Docket No. 34111 (STB served Aug. 21, 2002) (California Coastal Commission regulation of rail siding preempted); Union Pac. R.R.—Petition for Declar. Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment).

[4] Accord Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (local zoning and land use regulations preempted); Flynn v. BNSF Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000) (state and local permitting requirements for railroad refueling facility preempted); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (state may not require that railroad obtain permits); Soo Line R.R. v. City of Minneapolis, 38 F. Supp.2d 1096 (D. Minn. 1998) (local permitting requirement for the demolition of railroad buildings expressly preempted).

Green Mountain I, slip op. at 16 ("what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases"); City of Auburn, 154 F.3d at 1031, citing Shaw v. Delta Airlines, 463 U.S. 85, 95 (1983) (preemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language).[5] In other words, state and local laws that fall within one of the precluded categories are a per se unreasonable interference with interstate commerce. For such cases, once the parties have presented enough evidence to determine that an action falls within one of those categories, no further factual inquiry is needed. Green Mountain I, slip op. at 20.

For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation. Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads). Thus, in Borough of Riverdale—Petition for Declar. Order—The New York Susquehanna & W. Ry., STB Finance Docket No. 33466, slip op. at 7-8 (STB served Sept. 10, 1999), cited by the District (Pet. at 3), the Board noted that whether the section 10501(b) preemption precluded application of a local requirement for a 25-foot landscaped buffer between residential zones and a transportation facility presented a fact-bound question. Similarly, in Joint Pet. for Decl. Order—Boston & Maine Corp. & Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9-13 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp.2d 128 (D. Mass. 2002), rev'd solely on attys' fee issue, 330 F.3d 12 (1st Cir. 2003) (Dist. Pet. at 3), the Board explained the types of measures that might be permissible—i.e., conditions requiring railroads to share their plans with the community, when they are undertaking an activity for which a non-railroad entity would require a permit, or to comply with local codes for electrical, building, fire, and plumbing.

In sum, as explained in our prior decision (at 9-10), while the states' police powers are not entirely preempted by section 10501(b)—for example, railroads can be required to comply with some health and safety rules, such as fire and electric codes if they are applied without discrimination—states are not free to impose any requirements they wish in the name of their

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[5] Accord Chamber of Commerce of the U.S. v. Lockyer, 364 F.3d 1154, 1169 (9th Cir. 2004) (no need to look at effect of state regulation addressing the financing of union elections because Congress intended in the National Labor Relations Act that such elections be entirely unregulated).

police power. Rather, it is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce. See, e.g., Friberg; Green Mountain I.

Here, the D.C. Act seeks to regulate when and where particular commodities can be carried by rail. In doing so, it plainly falls within the two broad types of actions that are categorically preempted by section 10501(b). To the extent that the D.C. Act would require a permit to move certain rail traffic through protected parts of the City, it is directly covered by the categorical preemption against state and local permitting processes. And to the extent that the D.C. Act would otherwise ban the specified movements, it would directly conflict with the Board's regulatory authority over rail operations, including matters such as routing over which any state action is expressly preempted by section 10501(b). Thus, once we had enough information to determine that the D.C. Act fell within a category of action that is per se preempted, no further factual inquiry was necessary.[6] Accordingly, the record that we had before us provided all of the information needed for us to conclude that the D.C. Act is preempted by 49 U.S.C. 10501(b).

Notwithstanding that the subject matter of the D.C. Act is clearly preempted, the District and the Sierra Club continue to argue that the ban is needed to protect safety, that CSXT could cope with the ban if it were allowed to go into effect, and that the Board should have addressed these arguments. But the issue before this Board was not whether additional safety or security measures may be needed or whether the railroad could cope with the ban. Rather, the issue was whether the District may take the actions that would occur under the D.C. Act on its own. As discussed further below, such actions can only be taken by the appropriate federal agencies.

2. Our Prior Decision Did Not Impinge On or Ignore Other Federal Statutes or Other Forums

The District and the Sierra Club argue that, in our analysis of the section 10501(b) preemption, we wrongly ignored precedent regarding the role of other relevant federal statutes and forums. Dist. Pet. at 4-7; Sierra Club Pet. at 1-4. To the contrary, our decision expressly addressed (at 9-10) the overlapping nature of the various federal statutes addressing matters of rail safety and security and the need for the various federal bodies charged with administering those statutes to coordinate and cooperate with each other as appropriate. It also discussed (at 10) the relationship between the various preemption clauses in those statutes.

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[6] Thus, New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1181 (D.C. Cir. 2004), relied on by the District (Pet. at 1-2) and the Sierra Club (Pet. at 1), is not relevant to this case.

As we explained (at 9), while a literal reading of section 10501(b) would suggest that it preempts all other federal law, neither the Board nor the courts have interpreted the statute in that manner. Rather, where there are overlapping federal statutes, they are to be harmonized, with each statute given effect to the extent possible. See, e.g., Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001) (Tyrrell) (there is no "positive repugnancy" between the Interstate Commerce Act and the Federal Rail Safety Act (FRSA)).[7] Multiple statutes can be applied in complementary fashion, including, for example, regulation of railroad safety under FRSA and the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5013 et seq. See, e.g., Tyrrell, 248 F.3d at 523 (both the Board and the Federal Railroad Administration (FRA) have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted). In Tyrrell, the court agreed with the Board's conclusion that the section 10501(b) preemption did not apply to the state action involved in that case—an Ohio track clearance regulation adopted under FRSA. But the court's decision does not suggest that particular state regulations cannot be preempted under more than one applicable federal statutory scheme.

As acknowledged in our prior decision (at 10), Congress has vested aspects of federal rail oversight in three different bodies: U.S. DOT, which includes the Research and Special Programs Administration,[8] with regulations imposing specific requirements for hazardous materials transportation, and FRA, with primary responsibility for matters involving safety of railroad operations; the Department of Homeland Security (DHS), for transportation security matters; and this Board, with broad general jurisdiction over railroad activities conducted over the interstate rail network. And as the comments submitted by U.S. DOT in this proceeding

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[7] See also Friends of the Aquifer et al., STB Finance Docket No. 33966, slip op. at 5-6 (STB served Aug. 15, 2001) (Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act, even when those statutory schemes are implemented in part by the states); Holland v. Delray Connecting R.R., 311 F. Supp.2d 744, 757 (N.D. Ind. 2004) (finding no support for the proposition that a federal law of general applicability is preempted by the ICCTA solely because it has an economic impact on a railroad's operations).

[8] The responsibilities that had been vested in DOT's Research and Special Programs Administration were split between the newly created Pipeline and Hazardous Materials Safety Administration and the Research and Innovative Technology Administration, effective February 20, 2005.

reflect, Congress expects each of these bodies to recognize the others' roles and expertise, and to work together, as necessary, to carry out their respective statutory responsibilities.[9]

Significantly, the section 10501(b) preemption would not preclude either U.S. DOT or DHS from prescribing enhanced safety and security measures for specific rail routes (including the two CSXT lines that pass through the District) under the statutes they administer. Thus, contrary to the District's and the Sierra Club's suggestions (Dist. Pet. at 4-5, 7-8; Sierra Club Pet. at 1-4), our declaratory order does not usurp or interfere with the role of other federal agencies in regulating railroad safety and security and hazardous materials transportation under other federal regulatory statutes; nor does it shield CSXT from federal actions taken under those other federal statutes. Accordingly, the Sierra Club's claim (Pet. at 1, 4) that we have assessed the D.C. Act in a vacuum, or implicitly repealed FRSA, is meritless.

None of the cases cited by the District and the Sierra Club is inconsistent with our preemption analysis here. In Florida East Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001), for example, application of local zoning and licensing ordinances to an aggregate distribution plant operated by a non-railroad entity was found not to be preempted because the plant, although located on railroad property, was not railroad-owned or operated and thus was not part of railroad transportation. Here, in contrast, the rail provisions of the D.C. Act are without question directed to the operations of a railroad (CSXT). And in Iowa, Chicago & E.R.R. v. Washington County, IA, 384 F.3d 557, 561-62 (8th Cir. 2004), the court simply found that a state's traditional authority over the safety of roads and bridges at grade-separated rail/highway crossings pursuant to other statutory schemes is not preempted by section 10501(b) so long as no unreasonable burden is imposed on a railroad. The Sierra Club notes that, in CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), the Supreme Court made it clear that, under FRSA, where the federal government has failed to act, the FRSA savings clause preserves state authority to issue rail safety laws. See 49 U.S.C. 20106. But, as we stated in our prior decision

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[9] The Board and FRA have long worked together in a complementary fashion. See National R.R. Pass. Corp.—Petition for Decl. Order—Weight of Rail, STB Finance Docket No. 33697 (STB served June 29, 2001, Jan. 31, 2003, Mar. 25, 2003), aff'd Boston & Maine Corp. v. STB, 364 F.3d 318 (D.C. Cir. 2004) (Board sought FRA assistance and relied on FRA track safety standards governing the speed at which railroads can operate); 49 CFR 1106 (procedures established through a joint FRA/STB rulemaking, to ensure adequate and coordinated consideration, by both the Board and FRA, of safety integration issues in certain railroad consolidation cases).

(at 5), U.S. DOT has concluded that the D.C. Act is preempted by its federal safety regime under FRSA (as well as the HMTA). U.S. DOT comments at 14. Therefore, we defer to U.S. DOT's interpretation of the statutes it administers.

Finally, it was an appropriate exercise of the Board's discretion to issue a declaratory order here, but not in Green Mountain R.R.—Petition for Decl. Order, STB Finance Docket No. 34052 (STB served May 28, 2002) (Green Mountain II). See Central Freight Lines v. ICC, 899 F.2d 413, 418-19 (5th Cir. 1990) (Central Freight) (recognizing the Board's discretion to determine when to issue a declaratory order). In short, the Board has discretion under 5 U.S.C. 554(e) as to whether to grant a request for a declaratory order, and several of its rulings in declaratory order cases have noted that preemption issues involving section 10501(b) can be decided either by the Board or the courts in the first instance.[10] In Green Mountain II, the Board chose not to issue a declaratory order, in deference to a federal District Court before which the same matter was pending and which had made clear its desire to resolve its case without referral to the Board. Under those circumstances, the Board chose to assist the court by summarizing existing law with regard to the section 10501(b) preemption without expressing a view on the application of the law to that case.[11] Here, while CSXT has also instituted a federal court action with respect to the D.C. Act,[12] its court action is not limited to the issue of the section 10501(b) preemption, and the federal District Court in the case had expressed an interest in receiving the Board's views on the application of the section 10501(b) preemption to the D.C. Act.

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[10] When the Board issues a declaratory order settling rights and removing uncertainty, it is reviewable in an appropriate court. Central Freight, 899 F.3d at 417-18; City of Auburn.

[11] But, in any event, the Circuit Court that affirmed the District Court's ruling in that case recognized that, as the agency authorized by Congress to administer the Interstate Commerce Act, the Board is "uniquely qualified" to determine whether state law is preempted by section 10501(b). Green Mountain I, slip op. at 12-13.

[12] CSX Transp. Inc. v. Williams, No. 1:05CV00338 (D.D.C. filed Feb. 16, 2005).

3. The District's Claim of Uniqueness Does Not Alter the Preemption Analysis

Finally, the District argues that it was wrong for us to suggest in our prior decision (at 11) that the D.C. Act, if allowed to stand, would likely lead to further piecemeal attempts by other localities to regulate rail shipments. The District argues that its situation is unique and that there would thus be no basis for other localities to claim that they are similarly situated. Pet. at 7-8. See also Sierra Club Pet. at 6 and Exhibit Nos. 1-11.

Although it is widely known through press reports that various other cities and states are considering such measures,[13] our preemption analysis did not turn on whether or not the District's situation is unique or whether or not other states or municipalities might try to adopt similar measures. Rather, as explained above and in our prior decision, any permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

For all of these reasons, the District and the Sierra Club have failed to show that there was a material error in our prior decision, and we stand by our prior conclusion that the D.C. Act is preempted by section 10501(b). Accordingly, the District's petition for reconsideration and the Sierra Club's petition to reopen will be denied.

It is ordered:

1. The petitions for reconsideration and reopening are denied.

2. This decision is effective on its date of service.

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[13] See, e.g., "Pittsburgh Eyes Hazmat Ban," Traffic World at 29 (March 7, 2005) (reporting that Pittsburgh is considering adopting an ordinance similar to the D.C. Act should the D.C. Act be held lawful); "Baltimore Wants Hazmat Law," Traffic World at 29 (April 4, 2005) (reporting that Baltimore plans to press on with its own rerouting plan); "Timeout Proposed in Hazmat Rail Fight," Washington Post at B-1 (April 6, 2005).

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams

Secretary