



ASSOCIATION OF AMERICAN RAILROADS
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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
October 23, 2015
Part of
Public Record

Re: FD 35949, *Petition of Norfolk Southern Railway Company for Expedited
Declaratory Order*

Dear Ms. Brown:

Pursuant to the decision served on August 24, 2015, the Association of American
Railroads hereby files the attached reply in the above docketed proceeding.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35949

PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR EXPEDITED DECLARATORY ORDER

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

On August 3, 2015, Norfolk Southern Railway Company (“NS”) filed a petition for declaratory order (“NS Petition”) seeking a finding by the Surface Transportation Board (“Board”) that the locomotive idling restrictions set forth in Delaware Senate Bill 135 (“Anti-Idling Statute”) are preempted by the ICC Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10501 (b). On August 14, 2015, Delaware’s Governor signed the Anti-Idling Statute into law. 21 Del. C. §§ 8501-8505. Pursuant to the Board’s decision served in this proceeding on August 24, 2015, the Association of American Railroads (“AAR”) hereby replies in support of the NS Petition.

The AAR has a strong interest in the proper application of Section 10501(b) to ensure the uniform regulation of the railroad industry in the United States and to prevent a patchwork of local and state regulation from impeding railroad operations. As described more fully in the NS Petition, Delaware has enacted a law under which any police officer may determine that a railroad must shut down its locomotives or face fines of up to \$20,000 per alleged violation for locomotive idling between 8:00 p.m. and 7:00 a.m. if the police officer deems the idling to be non-essential under terms of the statute. The Board should find the Delaware statute preempted

because it is settled law that state and local laws and regulations governing the operations of railroads are categorically preempted by ICCTA.

ARGUMENT

Congress has vested the Board with exclusive jurisdiction over transportation by rail carrier. Section 10501(b) provides that:

(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) (emphasis added).

This express preemption provision has been repeatedly recognized by the courts as preempting state and local laws regulating transportation operations. *See, e.g., City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1979) (describing language of § 10501(b)(2) as “broad” and giving the Board “exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines”); *CSX Transp., Inc. v. Ga. Public Service Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (“[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority.”).

Congress’s assertion of federal authority over the railroad industry has historically been recognized as “among the most pervasive and comprehensive of federal regulatory schemes.” *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) (“Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts [plaintiff’s] state law claims”) (internal citations omitted). In 1996, Congress *broadened* this federal authority and scope of that federal preemption by enacting Section 10501(b) in its current form. The federal courts have since observed that “[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [] train operations . . . is under the exclusive jurisdiction of the STB” *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001).

The Board has explained that Section 10501(b) “is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *CSX Transp., Inc. – Petition for Declaratory Order*, FD 34662, slip op. at 11 (STB served Mar. 14, 2005). It has further observed that “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations.” *Id.* at 7.¹ Congress has concluded that the national freight rail network cannot function properly if state and local authorities are allowed to regulate railroad

¹ See also *Friberg*, 267 F.3d at 443 (state statute restricting a train from blocking an intersection preempted); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R.*, 265 F. Supp. 2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); *Wichita Terminal Assoc., BNSF Ry. Co. & Union Pacific R.R. Co. – Petition for Declaratory Order*, FD 35765 (STB served June 23, 2015) (holding that any court order or state or local regulation managing or governing property that is part of the national rail network is preempted).

operations. *See, e.g., Boston & Maine Corp. – Petition for Declaratory Order*, FD 35749 (STB served July 19, 2013).

The issue presented in this proceeding, whether a state may adopt rules addressing railroad locomotive idling, has already been squarely addressed by the federal courts. Such regulations of railroad operations are clearly preempted by Section 10501(b) because they “are exactly the type of local regulation Congress intended to preempt by enacting the ICCTA in order to prevent a ‘patchwork’ of such local regulation from interfering with interstate commerce.” *Ass’n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 U.S. Dist. LEXIS 65685, at *8 (C.D. Cal. Apr. 30, 2007). The Board has also recently noted that it must not only consider the direct impacts of idling rules like the one adopted in Delaware, but also “the fact that other states and local districts throughout the country could follow suit.” *United States Environmental Protection Agency – Petition for Declaratory Order*, FD 35803, slip op. at 8 (STB served Dec. 30, 2014). “Such a variety of localized regulations would likely have a ‘practical and cumulative impact’ on rail operations on the national rail network.” *Id.* at 9 (citing *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005)).

In this proceeding, the Board need not assess the impact of the Anti-Idling Statute on rail operations. The statute at issue here would directly regulate rail operations and is therefore categorically preempted. *See, e.g., Ass’n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 U.S. Dist. LEXIS 65685, at *7 (C.D. Cal. Apr. 30, 2007) (“Because the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable.”); *CSX Transp., Inc. – Petition for Declaratory Order*, FD 34662, slip op. at 3-4 (STB served May 3, 2005) (“[T]he preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation

itself.”). The Anti-Idling Statute is preempted by ICCTA because it “would directly conflict with the Board’s regulatory authority over rail operations.” *Ass’n of American Railroads*, at *7. As such, the AAR fails to see any need for discovery in this proceeding, as suggested by the State of Delaware. *See, e.g., Brazos River Bottom Alliance – Petition for Declaratory Order*, FD 35781 (STB served Feb. 19, 2014) (denying a request for discovery when there was no legal uncertainty under the statute and well-established precedent).

CONCLUSION

The Anti-Idling Statute would force a railroad to justify upon police demand why any locomotive idling is “essential” under the statute, and to defend its position in court if the officer does not agree. The Anti-Idling Statute thus constitutes an extreme interference with daily railroad operations, in direct contravention of Section 10501(b). For the reasons discussed above, the Board should find that the provisions of the Delaware Anti-Idling Statute are categorically preempted by ICCTA.

Respectfully Submitted,



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October 23, 2015

CERTIFICATE OF SERVICE

I, Alyssa M. Johnson, hereby certify that on this 23rd day of October 2015, I caused a copy of the Association of American Railroads' reply comments to be served by first-class mail on the parties of record at the addresses below:

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A handwritten signature in black ink, appearing to read 'Alyssa M. Johnson', is written above a horizontal line.

Alyssa M. Johnson