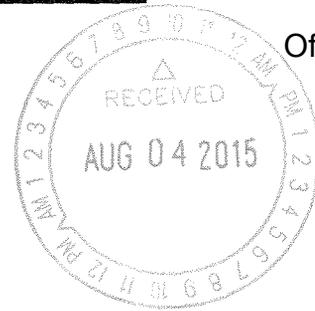


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65848.068

August 3, 2015

**Via FedEx**

Chief, Section of Administration  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re: Petition of Norfolk Southern Railway Company for Expedited Declaratory Order  
FD No. 35949

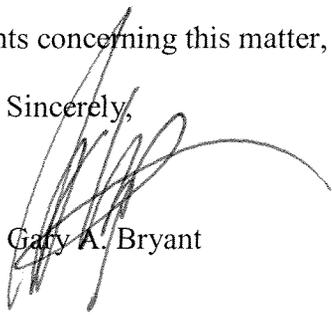
Dear Sir/Madam:

Enclosed please find for filing an original and ten copies of the Petition of Norfolk Southern Railway Company for Expedited Declaratory Order, along with our firm's check in the amount of \$1,400 to cover the filing fee.

As the certification states, we have provided a copy of this Petition to the Attorney General of Delaware. Also, please note that we are requesting expedited consideration of this Petition for the reasons stated therein.

If you have any questions or comments concerning this matter, please feel free to call.

Sincerely,

  
Gary A. Bryant

GAB:ceb  
Enclosures  
cc: Matthew Denn, Attorney General

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Reply to Norfolk Office

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**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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Finance Docket No. 35949

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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY  
FOR EXPEDITED DECLARATORY ORDER**

Dated: August 3, 2015

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*ATTORNEYS FOR NORFOLK  
SOUTHERN RAILWAY COMPANY*

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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Finance Docket No. 35949

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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY  
FOR EXPEDITED DECLARATORY ORDER**

Norfolk Southern Railway Company (“Norfolk Southern” or “the Railroad”), by counsel, hereby petitions the Surface Transportation Board (“STB” or “Board”) for a declaratory order finding that the locomotive idling restrictions set forth in Delaware Senate Bill 135 are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501(b).

Preliminary Statement

The issue before the Board is not difficult, as it has been addressed both by this Board and by the federal courts. The Delaware General Assembly has passed legislation designed to control the circumstances under which railroads may idle their locomotives. ICCTA specifically preempts such laws, both categorically and as applied. The laws are categorically preempted because they amount to a preclearance or permitting requirement whereby a railroad must get permission from the state to idle its locomotives as it sees fit, a critical element of transportation by rail. *See City of Auburn v. U.S. Gov’t*, 154 F.3d 1025 (9th Cir. 1998).

The laws are preempted as applied, as they “may reasonably be said to have the effect of managing or governing rail transportation...” *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). Without question, the laws impose restrictions which “interfere with rail transportation.” *Id.*; *City of Milwaukee--Pet. for Declaratory Order*, 2013 STB Lexis 100, at \*5-8 (STB served Mar. 20, 2013).

Both the federal courts and the STB have ruled on this very issue, concluding that state or local laws governing the manner by which railroads may idle their locomotives are preempted by ICCTA. *See Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010); *U.S. EPA--Pet. for Declaratory Order*, FD No. 35803 (STB served Dec. 30, 2014).

### Factual Background

Norfolk Southern Railway Company (“Norfolk Southern”) is a “rail carrier,” as defined in ICCTA, and is engaged in interstate commerce. Norfolk Southern operates and maintains 157 miles of mainline track in the State of Delaware, including 3 main terminals in Edgemoor / Wilmington, Newark, and Harrington as well as 4 satellite yards in Dover, Seaford, Delmar, and Porter / Delpro. *See* Verified Statement of Baron K. Emery, attached as **Exhibit A**. Norfolk Southern’s operations in the Delmarva District include 6 freight trains per day, between 3 and 15 unit trains per day, and 24 local trains per day, serving 85 active customers in Delaware. *Id.* In sum, Norfolk Southern has between 34 and 66 locomotives in use in Delaware on any given day.

As part of its transportation objective, Norfolk Southern idles locomotives for a variety of reasons. For example, Norfolk Southern idles locomotives that are parked with attached train cars in order to maintain the air line throughout the train, which is necessary for the braking system to function properly. If the air line is not maintained for 4 hours, a complete air test, which can be a time-consuming and complex process, is required by law. *Id.* As another example, Norfolk Southern often idles locomotives due to unforeseen circumstances, such as train crew shortages or scarce rail capacity. Under these circumstances, fully shutting down and restarting the train would consume significant time, only adding to network congestion and delays. *Id.* And as a third example, Norfolk Southern idles locomotives when the temperature

drops below, or is projected to drop below, 35 degrees Fahrenheit, in order to prevent damage to the train from the automatic dumping or freezing of the locomotive cooling system. The decision to and practice of idling locomotives is critical to the day-to-day operation of Norfolk Southern, and any other rail carrier. One of the most important aspects of managing a railroad, and one of the core decisions of rail transportation, involves managing and operating locomotives. *Id.*

The Delaware General Assembly has passed Senate Bill 135 to amend Title 21 of the Delaware Code relating to locomotive idling. S. B. 135, 148th Gen. Assemb. (Del. 2015) (“Anti-Idling Act”), a copy of which is attached as **Exhibit B**. As the Anti-Idling Act has been passed by the Delaware Senate and House, it now awaits approval by the Governor of Delaware. *See* <http://legis.delaware.gov/> (SB 135 legislative history printout attached as **Exhibit C**). Once the Anti-Idling Act is signed by the Governor, it immediately becomes law.

Specifically, and most importantly for purposes of this petition, the Anti-Idling Act purports to set forth the circumstances under which a railroad is permitted to idle its locomotives:

§ 8503. Non-essential idling prohibited; defined.

- (a) No person may permit the non-essential idling of the locomotive under its control or on its property between 8 pm and 7 am.
- (b) Idling is non-essential if it is not a result of one or more the following circumstances:
  - (1) traffic conditions.
  - (2) the direction of a law-enforcement officer.
  - (3) the operation of defrosting, heating or cooling equipment to ensure the health or safety of the driver or passenger.
  - (4) the operation of primary propulsion engine procedure work-related mechanical or electrical operations other than propulsion.

- (5) required maintenance, servicing, repairing, diagnostic, or inspections.

S. B. 135 § 8503. Notably, the section does not apply “within the boundaries of properties zoned for industrial activity by the county or municipality having jurisdiction over the property.” *Id.* at § 8503(c). In essence, the idling restrictions do not apply within rail yards, which are all located on property zoned industrial. For the most part, any locomotive which is not located on industrial property is in route. Thus, these idling restrictions are directed at trains in route.

The Anti-Idling Act provides for enforcement, and allows “any law enforcement officer in whose jurisdiction the locomotive... is located” to enforce the chapter presumably by issuing a citation for a violation. S. B. 135 § 8504(a). Appeals are to the Delaware Superior Court. *Id.* at § 8504(b). The penalties include fines of between \$5,000 and \$10,000 for the first offense and \$10,000 to \$20,000 for each subsequent offense. *Id.* at § 8505.

#### Argument

As the STB has noted on many occasions, ICCTA is “among the most pervasive and comprehensive of federal regulatory schemes.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). ICCTA contains an express preemption provision which states that the jurisdiction of the STB over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). The statute defines “transportation” expansively to encompass “a locomotive, car, ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of... property... by rail” as well as “services related to that movement.” 49 U.S.C. § 10102(9) (emphasis added). Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) further provides that “the remedies provided under [49 U.S.C. §§10101-11908] with respect to regulation of rail transportation are

exclusive and preempt the remedies provided under federal or state law.”

The result of this regulatory scheme is that Section 10501(b) is intended to prevent “a patchwork of local regulations from unreasonably interfering with interstate commerce.” *See Norfolk S. Ry.--Pet. for Declaratory Order*, FD No. 35701, slip op. at 6 & n. 14 (STB served Nov. 4, 2013); H. R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808 (“[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all regulation and to be completely exclusive. Any other construction would undermine the uniformity of federal standards and risk the balkanization and subversion of the federal scheme of minimum regulation for this intrinsically interstate form of transportation.”).

Federal courts also have interpreted ICCTA to achieve uniformity of laws governing rail transportation. *See, e.g., Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (finding that application of state antitrust laws to rail transportation would “subject [shipments] to fluctuating rules as they cross state lines” and therefore “directly interfere” with the purpose of §10501(b)); *CSX Transp., Inc.--Pet. for Declaratory Order*, FD No. 34662, slip op at 11 (STB served Mar. 14, 2005), recon. denied (STB served May 3, 2005) (finding local regulation regarding routes for rail transportation of hazardous materials through the District of Columbia preempted because such regulation would interfere with interstate commerce and lead to piecemeal regulation, subverting the purpose of §10501(b)).

State action affecting rail transportation may be categorically preempted, or preempted “as applied.” *U.S. EPA--Pet. for Declaratory Order*, FD No. 35803 (STB served Dec. 30, 2014); *Grafton & Upton R. R.--Pet. for Declaratory Order*, FD No. 35779, slip op. at 4-5 (STB served Jan. 27, 2014). A law or regulation is categorically preempted “regardless of the context or rationale for the action.” *CSX Transp., Inc.--Pet. for Declaratory Order*, slip op. at 3 (STB

served May 3, 2005). State laws or regulations are categorically preempted if they impose requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. Such categorically preempted laws or regulations include *any* permitting or preclearance requirement, including zoning ordinances and environmental or land-use permitting requirements. *See Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). For the reasons stated in Section I below, the restrictions found in Delaware's Anti-Idling Act are categorically preempted by ICCTA.

Even if a rule or regulation is not categorically preempted, it may be preempted "as applied" if the law or regulation has the effect of unreasonably burdening or interfering with rail transportation. *See N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007) (federal law preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation"). Thus, even assuming *arguendo* that Delaware's restrictions on locomotive idling found in the Anti-Idling Act are not categorically preempted (which they are), they still are preempted as applied because they have the effect of interfering with and managing rail transportation, as discussed more fully in Section II below.

Finally, as discussed more fully in Section III below, both the federal courts and the STB have decided this issue and held that state law restrictions on "unnecessary" idling are preempted by ICCTA.

Thus, the Anti-Idling Act's restrictions on "non-essential idling" clearly are preempted by ICCTA.

#### I. THE RESTRICTIONS OF THE ANTI-IDLING ACT ARE CATEGORICALLY PREEMPTED BY ICCTA

The restrictions of the Anti-Idling Act are categorically preempted. Unlike regulations

that *may* burden rail transportation, these restrictions specifically *prohibit* rail transportation as defined under ICCTA. S. B. 135 § 8503 (“Non-essential idling prohibited”). The Anti-Idling Act specifically *prohibits* railroads from idling locomotives at certain times and in certain locations. This sort of *direct* regulation, specifically targeting *railroads* has never survived a preemption challenge.<sup>1</sup>

These blatant restrictions are just the type of “preclearance” or “permitting” requirements that are categorically preempted by ICCTA. *See City of Auburn v. U.S. Gov’t*, 154 F.3d 1025 (9th Cir. 1998). If the regulations have the effect of *prohibiting* transportation, then they are worse than the preclearance or permitting requirements. After all, a railroad theoretically could meet preclearance or permitting requirements, and yet they still are preempted by ICCTA. The restrictions in the Anti-Idling Act are absolute, prohibiting a railroad from operating its locomotives except under conditions dictated by the state.

The enforcement mechanism of the Anti-Idling Act demonstrates why the restrictions therein are categorically preempted under ICCTA. The Act prohibits “non-essential” locomotive idling, and then sets forth those specific circumstances under which railroads may idle locomotives, including traffic conditions, the direction of law enforcement officers, the operation of equipment to ensure the health and safety of passengers, or required maintenance. S. B. 135 § 8503(b). And who would determine whether those circumstances are met? Under the Anti-

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<sup>1</sup> There are two exceptions to preemption, but neither apply in the instant case. The first exception is when laws and regulations restrict conduct that is *not* related to rail transportation. *See, e.g., Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1060 (2000) (challenging locomotive idling for the sole purpose of harassment). The second exception is when railroads voluntarily agree with a state or locality to restrict idling operations. *See Township of Woodbridge, N.J. v. Consol. Rail Corp.*, STB Dkt. No. 42053, 2000 WL 1771044 (STB served Dec. 1, 2000) (voluntary agreement to restrict idling on specific tracks behind homes in a community). Here, the restrictions are directed toward idling for rail transportation purposes, and there is no voluntary agreement to restrict idling.

Idling Act, it would be “any law enforcement officer in whose jurisdiction a locomotive... is located...” S. B. 135 § 8504. Under the terms of the Anti-Idling Act, police officers enforce the Act. Police officers will determine, in their sole discretion, whether it is necessary, and acceptable under the Act, for a railroad to idle its locomotives. If the police officer concludes that the idling violates the Act, the railroad is subject to a fine of between \$5,000 and \$20,000, and must appear in the Superior Court of Delaware to answer for the violation. S. B. 135 § 8505.

“Preclearance” or “permitting” requirements are categorically preempted under ICCTA because they give state or local governments the discretion to allow or disallow rail transportation as defined by ICCTA. *See Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 158-60 (4th Cir. 2010) (restrictions in city ordinance preempted as they gave city unfettered discretion and thus unlimited control over transportation facility); *U.S. EPA--Pet. for Declaratory Order*, FD No. 35803 (STB served Dec. 30, 2014) (anti-idling rules preempted as allowing the district to decide for the railroad what constitutes unnecessary idling) (see discussion in Section III.B *infra*). Under the Anti-Idling Act, police officers will have the same discretion to allow or disallow a railroad to idle its locomotive, a quintessential part of rail transportation. Simply put, the Anti-Idling Act turns the interstate rail system into a local highway, controlled by the state that imposes conditions on the operation of locomotives. If railroads run afoul of these conditions as determined by state or local law enforcement officials, in their sole discretion, a railroad must appear in state court to answer for alleged violations.

The analysis of this legislation is not complicated. It is worse than those preclearance or permitting requirements which are categorically preempted, as this legislation contains an absolute prohibition. As such, the restrictions are categorically preempted under the express provision of ICCTA, which prohibits any state from regulating transportation by rail carrier. The

regulation (here, the prohibition) on idling locomotives is the regulation (prohibition) of “transportation by a rail carrier” as defined in ICCTA. *See* 49 U.S.C. § 10102(9) (“transportation” includes “a locomotive”). Preemption could not be more obvious.

## II. THE RESTRICTIONS OF THE ANTI-IDLING ACT INTERFERE WITH RAIL TRANSPORTATION

The restrictions contained in the Anti-Idling Act are preempted under the expansive interpretation of ICCTA’s express preemption provision as they interfere with rail transportation. As noted above, the practice of idling locomotives goes to the very core of rail transportation, and there are various operational reasons underlying Norfolk Southern’s decision to idle locomotives. *See* Verified Statement of Baron K. Emery, attached as **Exhibit A**. Thus, allowing police officers and the State of Delaware to dictate when idling is essential or non-essential would necessarily interfere with rail transportation, and the day-to-day operations of Norfolk Southern, and any other rail carrier.

In addition, Norfolk Southern and other interstate rail carriers have a strong transportation purpose in managing their operations uniformly throughout Delaware and, indeed, throughout their interstate transportation systems without being subject to many different and often conflicting state regulations. In no case have the courts or the STB upheld a state’s effort to impose rules on railroads (whether environmental or otherwise) that are neither incidental nor remote, but are specifically designed to require railroads to change their operations, and relinquish control over their locomotives to local law enforcement officers.

Allowing the State of Delaware to effectively control when and under what circumstances railroads may idle their locomotives “would likely lead to further piecemeal attempts by other localities to regulate rail shipments.” *CSX Trans., Inc.--Pet. for Declaratory Order*, STB Fin. Dkt. No. 34662, 2005 WL 584026, at \*9 (STB served Mar. 14, 2005). These

rules would undermine the very purpose of ICCTA, as revealed in its legislative history. Such rules undoubtedly create the risk of “balkanization and subversion of the federal scheme of minimum regulation for this intrinsically interstate form of transportation.” H.R. Rep. No. 104-311, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808.

III. BOTH THE FEDERAL COURTS AND THIS BOARD HAVE RULED THAT STATE LAW ANTI-IDLING RESTRICTIONS ARE PREEMPTED

Both the federal courts and this Board have ruled that state or local laws aimed at restricting railroads from idling locomotives are preempted by ICCTA.

A. Federal Court Litigation

The United States District Court for the Central District of California addressed a preemption challenge to rules adopted by the South Coast Air Quality Management District (“the District”) in an attempt to reduce air pollution. *See Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No. CV06-01416-JFW (PLAx), 2007 WL 2439499 (C.D. Cal. April 30, 2007) (“*AAR v. SCAQMD*”). The rules were aimed at railroads, and restricted what it termed “unnecessary idling.”<sup>2</sup> The district court concluded that the rules were preempted by ICCTA because they were an attempt by the District, a local government entity, to directly regulate rail operations and therefore were “exactly the type of local regulation Congress intended to preempt... to prevent a ‘patchwork’ of local regulations from interfering with interstate commerce.” *Id.* at \*8.

The District appealed to the Ninth Circuit arguing that, if an apparent conflict exists between the challenged rules and ICCTA, then the courts must strive to harmonize the two laws,

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<sup>2</sup> The District enacted three rules which were reviewed by the court, including a rule limiting the permissible amount of emissions from idling trains and two other rules imposing various reporting requirements, backed by the threat of penalties, on rail yard operators. *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th Cir. 2010).

giving effect to both if possible. *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). The Court of Appeals rejected the argument, noting that the harmonization requirement applied *only* if the court were addressing a conflict between ICCTA and a *federal* law. *Id.* “If an apparent conflict exists between ICCTA and a *state or local* law, however, different rules apply.” *Id.* (emphasis in original). The Ninth Circuit noted that ICCTA would not preempt state or local laws if they were laws of general applicability that do not unreasonably interfere with interstate commerce. *Id.* (citing *Bos. & Me. Corp.*, 2001 WL 458685, at \*\*4-6). However, to the extent that state laws “may reasonably be said to have the effect of managing or governing rail transportation” they are preempted. *Id.* at 1097-98. Based on these principles, the Ninth Circuit found the restrictions to be preempted by ICCTA:

Because the District’s rules have the force and effect of *state* law, ICCTA preempts those rules unless they are rules of general applicability that do not unreasonably burden railroad activity. The District rules plainly cannot meet that test. The rules apply exclusively and directly to railroad activity, requiring railroads to reduce emissions and to provide, under threat of penalties, specific reports on their emissions and inventory. Because ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation,” *N.Y. Susquehanna*, 500 F.3d at 252 (internal quotation marks omitted), ICCTA preempts the District’s rules here.

622 F.3d at 1098 (emphasis in original).

The Anti-Idling Act is a state law. It *is not* a rule of general applicability. It is aimed exclusively and directly at railroad activity, prohibiting railroads from idling locomotives except as dictated by the State of Delaware. Thus, the Act has “the effect of managing or governing rail transportation” as it allows the state to determine when and under what circumstances railroads are allowed to idle locomotives. The federal courts already have addressed this issue. The Anti-Idling Act’s restrictions on idling locomotives are preempted by ICCTA.

#### B. STB Litigation

The STB also has addressed this issue in *United States Environmental Protection*

*Agency--Pet. for Declaratory Order*, FD No. 35803 (STB served Dec. 30, 2014) in which the Board discussed the issues raised in *AAR v. SCAQMD*. The Environmental Protection Agency (“EPA”) filed a petition for declaratory order asking the Board to opine on whether the District rules imposing restrictions and conditions on locomotive idling would survive preemption if those rules became federal law. In the petition, the EPA explained that the rules could be submitted for approval to EPA as part of California’s state implementation plan (“SIP”) developed for the purpose of reducing criteria pollutants as defined under the Clean Air Act. The EPA explained that its approval of rules into a SIP gives the rules “the force and effect of federal law.” *Id.* at 3 (citations omitted).

The Board concluded that the petition was premature because the District’s rules had not yet been approved into the California SIP. *Id.* at 6. The Board, however, addressed the *AAR v. SCAQMD* litigation, noting that the Ninth Circuit had upheld the federal district court in finding the District rules preempted as *state* rules:

The District Court held that the Rules were preempted by § 10501(b) because they were an attempt by the District, a local government entity, to directly regulate rail operations and therefore were “exactly the type of local regulation Congress intended to preempt [with the enactment of § 10501( B)] to prevent a ‘patchwork’ of such local regulation from interfering with interstate commerce.”

*Id.* at 4. The STB noted that the Ninth Circuit affirmed because the rules applied “exclusively and directly to railroad activity [and] ... have the effect of managing or governing rail transportation.” *Id.* at 4 (quoting *AAR v. SCAQMD*, 622 F.3d at 1098). The STB cited the Ninth Circuit’s conclusion that, because the District rules *did not* have the force and effect of federal law, the courts need not try to “harmonize” those rules with ICCTA. *Id.*

The issues before both the Ninth Circuit and the STB are virtually identical to those before the STB in this petition. Again, the Anti-Idling Act is a *state law*. Accordingly, the

restrictions in the Act are preempted, as they are directed exclusively at railroads, and have the effect of managing or governing rail transportation.

Notably, the Board discussed the “harmonization” test which hypothetically would apply should the District’s rules be added to California’s SIP and thereafter approved by EPA such that the District’s rules had the “force and effect of federal law.” Based on the record, the STB concluded that the rules “likely cannot be harmonized with the purposes of Section 10501(b).” *Id.* at 8. In an extensive discussion of idling rules vis-à-vis the purpose of ICCTA, the STB noted that “it is likely that the rules would be preempted because of the potential patchwork of regulations that could result, contravening Congress’s purpose in enacting Section 10501(b).” *Id.* The STB noted that, if the rules were adopted, locomotives would be subject to fluctuating rules as they crossed state lines and concluded that the rules would therefore “directly interfere with the purpose of ICCTA.” *Id.*

In response to the District’s contention that a “patchwork of regulations” was unlikely, the Board disagreed:

Approval of the rules here would likely signal to other localities that they also could propose their own rules on locomotive operations to meet localized concerns through the SIP process, thereby leading to the lack of uniformity of regulations that Congress intended to preclude in Section 10501(b). Such a variety of localized regulations would likely have a “practical and cumulative impact” on rail operations on the national rail network. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

*Id.* at 9. To the extent that the General Assembly of Delaware contends that its rules do not relate to transportation by rail because they only prohibit “non-essential idling,” the STB addressed that argument as well:

The District claims that Rule 3502 addresses unnecessary idling that has no transportation purpose. Here too though, adoption of Rule 3502 would likely affect the railroad’s ability to conduct their operations, as it appears to decide for the railroad what constitutes unnecessary idling and also to influence the railroad’s choice of equipment and how to configure that equipment. Allowing

potentially 100 different localities to adopt their own idling rules also would likely disrupt uniformity in rail operations by opening the door to varying regulatory operational and/or equipment requirements for locomotives across the country.

*Id.* at 9. In short, the Board has spoken. The Anti-Idling Act's restrictions on idling locomotives are preempted by ICCTA.

#### REQUEST FOR EXPEDITED CONSIDERATION

Norfolk Southern requests expedited consideration of this Petition, as the Anti-Idling Act has been approved by the General Assembly and will immediately become the law in Delaware once signed by the Governor. Absent relief, Norfolk Southern faces citation from Delaware state law enforcement officers in whose jurisdiction the locomotive is located (S. B. 135 § 8504(a)) and "shall be punished" by fines of up to \$20,000 per offense (S. B. 135 § 8505), and may be hauled into the Delaware Superior Court to answer for these alleged offenses. S. B. 135 § 8504(b). Thus, until the restrictions in the Anti-Idling Act are found preempted, Norfolk Southern cannot effectively or efficiently manage its rail operations in Delaware, or achieve its interstate rail transportation purpose.

#### CONCLUSION

Because this state law is directed exclusively at railroads and has the effect of managing rail operations, the restrictions are preempted by ICCTA. Moreover, this is not an unsettled question. The Ninth Circuit and this Board have concluded that state law restrictions on "unnecessary idling" are preempted by ICCTA. Even if the Anti-Idling Act had the force and effect of federal law (which it does not), this Board already has indicated that restrictions on "unnecessary idling" *still* would be preempted because it would be impossible to harmonize those restrictions with the underlying purpose of ICCTA, namely, to allow rail carriers to manage operations uniformly throughout the interstate network without being subject to a

patchwork of local and state regulations. For the foregoing reasons, Norfolk Southern Railway Company respectfully requests that the Board grant this Petition, and award Norfolk Southern the relief requested.

VERIFICATION

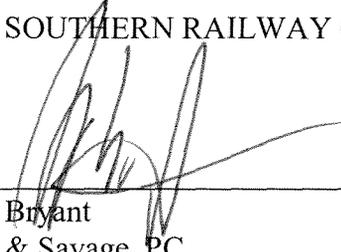
I, Gary A. Bryant, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on August 3, 2015.

NORFOLK SOUTHERN RAILWAY COMPANY

By



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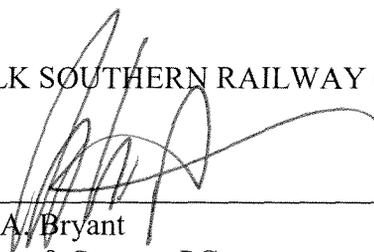
CERTIFICATE OF SERVICE

I hereby certify that I have served the following parties of record in this proceeding and all interested parties with this document by first-class, United States Mail:

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(302) 577-8400 Telephone  
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Attorney.General@State.DE.US

Dated: August 3, 2015

NORFOLK SOUTHERN RAILWAY COMPANY

By  \_\_\_\_\_

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. \_\_\_\_\_

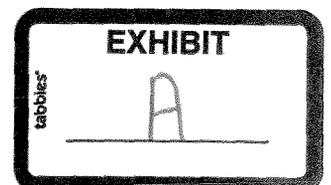
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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY  
FOR EXPEDITED DECLARATORY ORDER**

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**VERIFIED STATEMENT OF BARON K. EMERY**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
Finance Docket No. \_\_\_\_\_  
\_\_\_\_\_

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY  
FOR EXPEDITED DECLARATORY ORDER**

\_\_\_\_\_  
**VERIFIED STATEMENT OF BARON K. EMERY**  
\_\_\_\_\_

My name is Baron K. Emery. I am currently employed by Norfolk Southern Corporation (“NS”) in the capacity of Superintendent for the Delmarva / Baltimore District, which includes all NS rail operations in the state of Delaware. My office is in Newark, Delaware. I have been employed by NS since 2003 and have served in my current position since July 2014. As Superintendent, I oversee the transportation operation of the Delmarva District and Baltimore Terminal. Prior to assuming this position, I served in a variety of roles with NS, including Conductor, Remote Control Operator, and Yardmaster in Decatur, Illinois; Terminal Trainmaster in Bellevue, Ohio; Assistant Trainmaster in Harrisburg, Pennsylvania; and Trainmaster in Baltimore, Maryland. As such, I have personal knowledge of NS’s rail network in Delaware and NS’s operating practices, including the idling of locomotives.

**NS’s Rail Network in Delaware**

NS has an extensive rail network in the state of Delaware. NS operates and maintains 157 miles of mainline track in Delaware: 14 miles on the New Castle Secondary, a branchline connecting the Shellpot Secondary with the Delmarva Secondary; 6 miles on the Shellpot

Secondary in the Wilmington area; 98 miles on the Delmarva Secondary from Newark to Delmar; and 39 miles on the Indian River Secondary from Harrington to the Georgetown area. In addition, NS operates and maintains 3 main terminals in Delaware at Edgemoor / Wilmington, Newark, and Harrington. NS also operates and maintains 4 satellite yards in Delaware at Dover, Seaford, Delmar, and Porter / Delpro.

Using this network, NS provides rail service to various customers throughout the state of Delaware. NS operates 24 local trains per day, which serve 85 active customers in Delaware. 39 of these customers are served from Harrington, where NS maintains 6 assigned local locomotives; and, 46 of these customers are served from the Newark / Wilmington area, where NS maintains 8 assigned local locomotives. NS also operates 6 freight trains per day on the Delmarva District in Delaware, using approximately 12 locomotives. In addition, NS operates between 3 and 15 unit trains (trainloads carrying stone, coal, feed grain, crude oil, automobiles, etc.) per day, using anywhere from 8 to 40 locomotives. The number of unit trains largely depends upon the operations of the Delaware City Refinery.

In sum, NS has between 34 and 66 locomotives in use on any given day in Delaware.

### **NS's Locomotive Idling Practices**

One of the most important aspects of NS's rail operations involves managing and operating locomotives. This is especially true in Delaware, given the number of locomotives in use per day. In order to promote its transportation objective, NS idles locomotives for a variety of reasons.

For example, NS idles locomotives that are parked with attached train cars in order to maintain the air line throughout the train. Maintaining the air line is necessary for the braking system to function properly. If the air line is not maintained for 4 hours, federal law requires a

complete air test. An air test is a time-consuming and complicated process, requiring train crews to walk the entire length of the train and back. Assuming a 100-car train approximately 1 mile long and assuming ideal conditions, a complete air test would take the average time it takes an individual to walk 2 miles. Of course, railroad right-of-ways are not designed for ideal walking conditions, so an air test consumes significantly more time—approximately 2 hours, on average. Thus, idling locomotives to maintain the air line preserves the braking system and avoids network congestion and delays that would result from conducting a complete air test.

As another example, NS idles locomotives due to unforeseen conditions, such as train crew shortages or scarce rail capacity. Under such conditions, the only alternative would be to fully shut down the train and then restart it once train crews become available or rail capacity frees up. However, fully shutting down and restarting a train consumes a significant amount of time. Train crews need to walk the entire length of the train and back, under less-than-ideal walking conditions, in order to restart a train with distributed power. And if the train is shut down for more than 4 hours, restarting the train also requires a complete air test as if the train were removed from the air line. Thus, idling locomotives to deal with labor or network conditions also avoids network congestion and delays that would result from fully shutting down and restarting the train.

And as another example, NS idles locomotives when the temperature drops below, or is expected to drop below, 35 degrees Fahrenheit. Locomotive engines typically do not use anti-freeze in their cooling systems. Thus, idling locomotives is necessary to prevent freezing or automatic dumping of the locomotive cooling system, which could result in damage to the train and thus impair rail service and network operations.

These locomotive idling practices are presented by way of example only, as NS may idle locomotives for any number of reasons and under a variety of circumstances in order to further its transportation objective.

As described above, idling locomotives is critical to NS's daily operations. As a Superintendent, I understand that NS train crews are best-equipped to leverage their operational experience and situational awareness to determine when to idle a locomotive on a case-by-case basis. Stripping train crews of this flexibility would compromise NS's locomotives as well as NS's network operations. In sum, I believe that the Anti-Idling Act would seriously interfere with the ability of NS, and other carriers, to conduct rail transportation.

**VERIFICATION**

I, Baron K. Emery, declare under penalty of perjury that I am authorized to make this verification on behalf of Norfolk Southern Railway Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Baron K. Emery  
Superintendent, Delmarva / Baltimore  
Norfolk Southern Corporation

Dated: July 30, 2015

SPONSOR: Sen. McBride & Rep. Longhurst & Rep. M. Smith  
Sens. Hall-Long, Poore, Townsend; Reps. Viola,  
Baumbach, Jaques, J. Johnson, Mulrooney, Osienski

DELAWARE STATE SENATE  
148th GENERAL ASSEMBLY

SENATE BILL NO. 135

AN ACT TO AMEND TITLE 21 OF THE DELAWARE CODE RELATING TO LOCOMOTIVE IDLING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Part IV, Title 21 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 85. Locomotive Idling.

§ 8501. Purpose.

The General Assembly finds and determines that the people of this State are entitled to and should be ensured an environment free from the effects of non-essential idling of locomotives between 8 p.m. and 7 a.m., as such non-essential idling degrades the quality of their life, property, and environment.

§ 8502. Definitions.

(1) "Idling" means the operation of the locomotive while it is stationary.

(2) "Law-enforcement officer" means a sworn member of a police force or other law-enforcement agency of this State, or of any county or municipality within this State, who is responsible for the prevention and detection of crime and the enforcement of the laws of this State, or the laws of any county or municipality within this State.

(3) "Person" means a company, corporation, association, firm, partnership, joint venture, or other legal entity. "Person" does not include individuals.

§ 8503. Non-essential idling prohibited; defined.

(a) No person may permit the non-essential idling of a locomotive under its control or on its property between 8 p.m. and 7 a.m.

(b) Idling is non-essential if it is not a result of one or more of the following circumstances:

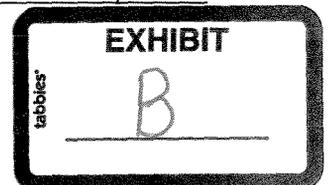
(1) Traffic conditions.

(2) The direction of a law-enforcement officer.

(3) The operation of defrosting, heating, or cooling equipment to ensure the health or safety of the driver or passenger.

(4) The operation of the primary propulsion engine for essential work-related mechanical or electrical operations other than propulsion.

(5) Required maintenance, servicing, repairing, diagnostics, or inspections.



(c) This section does not apply within the boundaries of property zoned for industrial activity by the county or municipality having jurisdiction over the property.

§ 8504. Enforcement.

(a) Any law-enforcement officer in whose jurisdiction the locomotive, or any car attached to a locomotive, is located may enforce this chapter.

(b) The Superior Court shall have exclusive jurisdiction over offenses under this chapter.

§ 8505. Penalties.

Any person who violates this chapter shall be punished by a fine of not less than \$5,000 nor more than \$10,000 for the first offense and not less than \$10,000 nor more than \$20,000 for each subsequent offense.

SYNOPSIS

This Act prohibits non-essential idling of locomotives between 8 p.m. and 7 a.m.

Author: Senator McBride

# LEGISLATION

## 148TH GENERAL ASSEMBLY Senate Bill 135

**Primary Sponsor(s):** McBride                      **Additional Sponsor(s):** & Rep. Longhurst & Rep. M. Smith

**Co-Sponsors:** Sens. Hall-Long, Poore, Townsend; Reps. Viola, Baumbach, Jaques, J. Johnson, Mulrooney, Osienski

**Introduced On:** 06/11/2015

**Long Title:** AN ACT TO AMEND TITLE 21 OF THE DELAWARE CODE RELATING TO LOCOMOTIVE IDLING.

**Synopsis of Bill:** This Act prohibits non-essential idling of locomotives between 8 p.m. and 7 a.m.

**Current Status:** House Passed   **On** 06/30/2015 09:21:29 PM

**Date Governor Acted:**                                      **Effective Date:**

**Volume Chapter:**

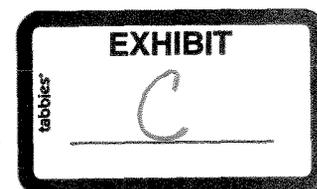
**Full Text of Legislation: (HTML format)**      Legis.html      **Email this Bill to a friend**

**Full Text of Legislation: (PDF format)**

**Full Text of Legislation: (MS Word format)**      Legis.Docx

**Fiscal Notes/Fee Impact:**                      Not Required

**Amendments:**



**Substituted  
Legislation for  
Bill :**

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**Committee Reports:** Senate Committee report 06/17/15 F=0 M=4 U=0----->   
House Committee Report 06/25/15 F=0 M=6 U=0-----> 

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**Voting Reports:** Senate vote: () Passed 6/18/2015 3:13:13 PM----->   
House vote: () Passed 6/30/2015 9:21:29 PM-----> 

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**Fiscal  
Notes/Fee  
Impact:**

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**Engrossed  
Version:**

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**Actions History:** Jun 30, 2015 - Passed by House of Representatives. Votes: Passed 33 YES 4 NO 0 NOT VOTING 4 ABSENT 0 VACANT  
Jun 25, 2015 - Reported Out of Committee (PUBLIC SAFETY & HOMELAND SECURITY) in House with 6 On Its Merits  
Jun 19, 2015 - Introduced and Assigned to Public Safety & Homeland Security Committee in House  
Jun 18, 2015 - Passed by Senate. Votes: Passed 13 YES 7 NO 0 NOT VOTING 1 ABSENT 0 VACANT  
Jun 17, 2015 - Reported Out of Committee (HIGHWAYS & TRANSPORTATION) in Senate with 4 On Its Merits  
Jun 11, 2015 - Assigned to Highways & Transportation Committee in Senate