



ASSOCIATION OF AMERICAN RAILROADS  
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November 13, 2015

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

Re: FD 35960, *Petition of Union Pacific Railroad Company for Declaratory Order*

Dear Ms. Brown:

Pursuant to the decision served on October 6, 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

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STB Finance Docket No. 35960

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PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR DECLARATORY ORDER

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REPLY OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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On September 24, 2015, Union Pacific Railroad Company (“UP”) filed a petition for declaratory order (“UP Petition”) seeking a finding by the Surface Transportation Board (“Board”) that a state court action brought by SFPP, L.P. (“SFPP”) is preempted by the ICC Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10501(b). Pursuant to the Board’s decision served in this proceeding on October 6, 2015, the Association of American Railroads (“AAR”) hereby replies in support of the UP Petition.

The AAR and its members have 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. This Reply will explain why UP’s Petition presents an important issue regarding the application of 10501(b), and why the Board should grapple with it now.

**ARGUMENT**

While the courts and the Board have outlined the scope of ICCTA preemption many times, this case presents the Board with a situation which has not yet been directly addressed. As set forth more fully below, it is beyond dispute that actions by private parties in state courts that

impede railroad operations constitute regulation of transportation by rail carrier that is preempted by section 10501(b). This Petition presents the question of whether the use of state law to strip a railroad of contractual protections securing the railroad's control over third-party activities allowed on active railroad rights-of-way interferes with railroad operations.

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). In 1996, ICCTA broadened federal preemption to ensure that states and localities do not burden interstate commerce by creating a patchwork of overlapping and conflicting regulation. Section 10501(b) expressly preempts state and local action to regulate railroads and 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.").

Reflecting the need for uniform nationwide regulation of railroads, Congress has vested the Board with exclusive jurisdiction over transportation by rail carrier. 49 U.S.C. § 10501(b). "Transportation" is defined broadly in the statute as including:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or

both, by rail, *regardless of ownership or an agreement concerning use*; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

49 U.S.C. § 10102(9) (emphasis added). As this definition makes clear, the Board’s jurisdiction and the preemptive effect of section § 10501 does not depend on a railroad’s contractual or property interests, but rather on its operation as a common carrier in the interstate rail system.

Where a common carrier operates a railroad line in the interstate rail network, state law must give way to federal law regulating railroad operations. The Board’s exclusive and plenary jurisdiction over railroad abandonment and discontinuance of rail service under 49 U.S.C. § 10903, *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U. S. 311, 450 U. S. 321 (1981), creates “a statutory duty to preserve and promote continued rail service.” *N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1187 (D.C. Cir. 2004). While state law generally governs the disposition of reversionary interests in a railroad right of way *post-abandonment*, the Board’s continuing jurisdiction preserves railroad rights of way for current and future rail transportation purposes for active and railbanked lines. *Preseault v. ICC*, 494 U.S. 1, 5-6 (1990).

State and local government actions seeking condemnation of parts of an active railroad right of way have been found to be state regulation and thus preempted under 49 U.S.C. § 10501(b). *Dakota, Minn., & E. R.R. v. South Dakota*, 236 F.Supp.2d 989, 1005-08 (D.S.D. 2002), *aff’d in part, vacated in part on other grounds*, 362 F.3d 512 (8th Cir. 2004); *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *see also Norfolk S. Ry. & Ala. Great S. R.R.—Pet. for Declaratory Order*, FD 35196, slip op. at 3 (STB served Mar. 1, 2010). In considering whether condemnation would unreasonably burden interstate commerce, the Board need not focus solely on existing operations and “can consider the railway’s future

plans as well as its current uses.” *City of Lincoln v. Surface Trans. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005). “[I]t can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.” *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th cir. 1928).

The fact that the threat to ongoing railroad operations may be posed by private parties asserting contractual or property rights under state law does not change the preemptive effect of section 10501(b). *Pinelawn Cemetery—Petition for Declaratory Order*, FD 35468, slip op. at 10 (STB served Apr. 21, 2015). For example, a landlord property owner cannot use state law to evict a federally licensed rail carrier from an active rail line absent Board abandonment authority. *See Thompson v. Tex Mexican Ry.*, 328 U.S. 134, 144 (1946). Doing so would “give the landowner the right to completely cut off shippers and prevent the common carrier from carrying out its obligations to serve them.” *Pinelawn Cemetery—Petition for Declaratory Order*, FD 35468, slip op. at 10 (STB served Apr. 21, 2015). Similarly, the agency has found that a state court action seeking adverse possession of a railbanked right of way was preempted by ICCTA. *Jie Ao & Xin Zhou – Petition for Declaratory Order*, FD 35539, slip op. at 7 (STB served June 6, 2012). Other common law claims such as actions by private parties in state courts for damages over nuisance have likewise been preempted. *See, e.g., Pace v. CSX Transp., Inc.*, 613 F.3d 1066 (11th Cir. 2010).

In short, there is no real dispute that the Board’s continuing jurisdiction over transportation by rail carrier preempts state actions that have the effect of unreasonably burdening interstate commerce by impeding railroad operations. Here, UP is operating a common carrier railroad on right-of-way where – for historic reasons that are irrelevant for present purposes – SFPP is also operating pipelines. Until now, UP’s ability to conduct its

railroad operations without interference from SFPP has been protected by negotiated contract provisions, through which SFPP gained access to UP's right-of-way in the first place. SFPP has asked a state court to strip UP of those protections, and to declare that SFPP has no obligation to abide by its promise to take actions to allow UP to expand its operations. Such a declaration, if issued, would undermine UP's ability to control or defend its right-of-way. To the extent UP's right to control its right-of-way is subject to challenge, that is a matter for the Board and state court action is preempted.

Even though the requested state court declaration has yet been issued, the Board should exercise its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 now, to issue a declaratory order in this proceeding. The AAR takes no position on the legal merits of any related disputes between UP and SFPP. However, allowing a state court to devote time and resources to a matter, on the chance that the court may deny the relief requested and leave the railroad's operations intact, is not appropriate. The Board should remove any uncertainty as to the appropriate forum and body of law for resolution of disputes where interference with common carrier operations is sought.

Railroads, and those who contract with them, need that clarity as they contemplate investment in railroad infrastructure to meet customer demand for transportation. The Board has been charged by Congress to "ensure the development and continuation of a sound rail transportation system," 49 U.S.C. § 10101(4). As America's economy grows, the need to move more freight will likewise grow. Recent forecasts from the Federal Highway Administration found that total U.S. freight shipments will increase by roughly 45 per cent from an estimated 19.7 billion tons in 2012 to 28.5 billion tons in 2040. In order to meet this demand, railroads will

need to continue to massively invest in capacity enhancement. Actions by a patchwork of state courts that undermine that ability are contrary to ICCTA and the public interest.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Kathryn D. Kirmayer'.

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*Counsel for the Association of  
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November 13, 2015

## CERTIFICATE OF SERVICE

I, Alyssa M. Johnson, hereby certify that on this 13th day of November 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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