

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD35949

NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXPEDITED DECLARATORY RELIEF

**NORFOLK SOUTHERN'S RESPONSE TO
MOTION TO EXTEND TIME FOR REPLY**

Norfolk Southern Railway Company ("Norfolk Southern") consents to the requested extension. However, Norfolk Southern is compelled to respond to the State of Delaware's pending Motion to Extend Time for Reply ("Motion") to address the argument included within the Motion.

The State of Delaware, through its Deputy Attorney General, has requested a 60 day extension to respond to Norfolk Southern's pending Petition for Expedited Declaratory Order, filed on August 4, 2015 ("Petition"). Based on conversations with the Deputy Attorney General, Norfolk Southern understood the extension was intended to give the State of Delaware an opportunity to evaluate the Petition and to retain counsel to assist in preparing a response. Accordingly, Norfolk Southern consents to the extension.

However, Norfolk Southern disagrees with the State of Delaware's argument that the extension will give the State time to seek discovery in order to "allow Delaware to fully and properly address Norfolk Southern's claims." Motion at 3. The State of Delaware contends that "Norfolk Southern makes much of the Statute's impact on their operations" and suggests that Norfolk Southern's argument that the Anti-Idling Act is preempted "lack[s] merit" because

“most of the reasons for which [Norfolk Southern] suggests that it idles trains seem to fall within the exceptions specifically provided in the Statute.” Motion at 2-3.

The State of Delaware’s argument reflects a fundamental misunderstanding of preemption. As described in more detail in the Petition, the restrictions in the Anti-Idling Act are *categorically* preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), regardless of their impact on Norfolk Southern’s operations. See Petition at 6-9. A state law is categorically preempted if it (1) intrudes into matters that are directly regulated by the Surface Transportation Board (“STB”) or (2) imposes requirements that could be used to deny a railroad’s right to conduct rail operations. *E.g., CSX Transp., Inc.—Petition for Declaratory Order*, FD No. 35832, 2015 STB LEXIS 260, at *7 (STB served July 31, 2015). Categorical preemption should be distinguished from as-applied preemption, which exists when a state law would unreasonably burden rail transportation based on the specific circumstances of the case. *E.g., U.S. EPA—Petition for Declaratory Order*, FD No. 35803, 2014 STB LEXIS 335, at *18 (STB served Dec. 30, 2014) (“*EPA Petition*”).

The restrictions in the Anti-Idling Act are categorically preempted for two reasons. First, by limiting when a railroad can idle locomotives—a key part of rail operations—the restrictions intrude into matters that are directly and exclusively regulated by the STB. *See, e.g., Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (finding a state statute, which limited the time a train could block a crossing, to be categorically preempted because “it is beyond peradventure that regulation of KCS train operations . . . is under the exclusive jurisdiction of the STB”). Second, the restrictions provide the State of Delaware with the discretion to deny a railroad’s right to idle locomotives. *See, e.g., EPA Petition*, at *23 (preempting a state law which “appears to decide for the railroads what constitutes unnecessary

idling”). Thus, the “impact” of the Anti-Idling Act on Norfolk Southern’s operations is not relevant.¹

It is important to emphasize that categorical preemption applies regardless of the context or rationale for the state action. *E.g.*, *CSX Transp., Inc.—Petition for Declaratory Order*, slip op. at 3 (STB served May 3, 2005). The STB has *exclusive* jurisdiction over transportation by rail carriers, and states are categorically preempted from imposing rules or regulations on such transportation. It is wholly irrelevant whether the state statute regulating transportation by rail carriers is reasonable or burdensome. For example, consider if the State of Delaware passed a law limiting freight trains to speeds of 100 miles per hour. Such a state law would have no impact on rail operations, since freight trains do not approach speeds of 100 miles per hour. Nevertheless, the state law clearly would be categorically preempted because it impinges on the STB’s exclusive jurisdiction over rail transportation. *See, e.g., Friberg*, 267 F.3d at 443 (“Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad” such as “train speed . . .”). Similarly, nothing in ICCTA allows states to impose operating limitations on a railroad by prohibiting non-essential idling. Thus, it is the State of Delaware’s attempt to usurp the exclusive jurisdiction of the STB over rail transportation that justifies categorical preemption of the restrictions in the Anti-Idling Act.

In conclusion, Norfolk Southern does not oppose the requested extension. However, Norfolk Southern submits that the discovery referenced in the Motion is unnecessary. As the

¹ Although not relevant to the categorical preemption issue, Norfolk Southern maintains that the Anti-Idling Act, if enforced, would have a significant impact on Norfolk Southern’s operations. As noted in the Petition, allowing the State of Delaware to dictate when idling is essential or non-essential would necessarily interfere with rail transportation and could lead to further piecemeal state regulations. *See* Petition at 9-10.

Anti-Idling Act is categorically preempted on its face, the impact of the statute on Norfolk Southern's operations is totally irrelevant.

Dated: August 26, 2015.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of August, 2015, caused the foregoing RESPONSE TO MOTION TO EXTEND TIME FOR REPLY to be filed electronically with the Surface Transportation Board and to be served upon the following parties of record in this proceeding via electronic transmission and first-class, United States Mail:

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