

Testimony of W. Douglas Buttrey
Chairman of the Surface Transportation Board
House Committee on Transportation and Infrastructure
Subcommittee on Railroads
Hearing on Impacts of Railroad-Owned Waste Facilities
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Good morning Mr. Chairman. My name is Douglas Buttrey, and I am the Chairman of the Surface Transportation Board. I appreciate the opportunity to testify before you today about federal preemption for rail-related facilities. I would first like to provide the Subcommittee with an overview of the Board's role, and the role of state and local authorities with regard to such facilities. Next, I will discuss the state of the law on this complex issue which is still being fleshed out by the Board and the courts in individual cases that arise. Finally, because there has been a lot of concern lately about the potential for misuse of federal preemption in cases involving facilities on rail lines, I will outline how interested parties can raise concerns before the Board and in the courts regarding individual proposals that arise. I will not focus today on the individual cases that have addressed federal preemption for rail-related facilities, but I have included as part of my written testimony a summary of the relevant case law.

1. The Scope of the Federal Preemption

As all of you are aware, the Surface Transportation Board was created in the ICC Termination Act of 1995 (ICCTA). The express federal preemption contained in the Board's governing statute at 49 U.S.C. 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers." Congress has defined the term "transportation" broadly, at 49 U.S.C. 10102(9), to include all of the related facilities and activities that are part of rail transportation. The purpose of preemption is to prevent a patchwork of

otherwise well intentioned local regulation from interfering with the operation of the rail network to serve interstate commerce.

Both the Board and the courts have made clear, however, that, although the scope of the section 10501(b) preemption is broad, there are limits. While a literal reading of section 10501(b) would suggest that it preempts all other 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. This is true even for federal statutory schemes that are implemented in part by the states, such as the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act.

When states or localities are acting on their own, certain types of actions are categorically preempted, regardless of the context or basis of the action. This includes any form of permitting or preclearance requirement—such as building, zoning, and environmental and land use permitting—which could be used to deny or defeat a railroad’s ability to conduct its rail operations or to proceed with activities that the Board has authorized. Also, states or localities cannot regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines.

Otherwise, whether the preemption applies depends on whether the particular action would have the effect of preventing or unreasonably interfering with rail transportation. Types of state and local measures that have been found to be permissible, even in cases that qualify for the federal preemption, include requirements that railroads share their plans with the community when they are undertaking an activity for which a

non-railroad entity would require a permit, or that railroads comply with local electrical, fire, and plumbing codes.

In cases involving facilities that require a license from the Board and an environmental review under the National Environmental Policy Act (NEPA), the Board addresses both the transportation-related issues and any environmental issues that are raised. The environmental review is managed by the Board's Section of Environmental Analysis.

Even where no license is needed from the Board, there are several avenues of recourse for interested parties, communities, or state and local authorities concerned that the section 10501(b) preemption is being wrongly claimed to shield activities that do not rightly qualify for the federal preemption. Any interested party can ask the Board to issue a declaratory order addressing whether particular operations constitute "rail transportation" conducted by a "rail carrier." Alternatively, parties are free to go directly to court to have that issue resolved. Some courts have chosen to refer that issue to the Board; others have decided the matter themselves. It is worth noting, however, that the Board and court cases on the boundaries of the section 10501(b) preemption have been remarkably consistent, and that the Board and the courts have never reached a different conclusion regarding the availability of the preemption for particular activities and operations.

Finally, in some cases, environmental and safety concerns have been successfully resolved through consensual means, by the railroad and the community working together to address their respective interests.

2. Relevant Precedent on Facilities

Given the strength and breadth of the section 10501(b) preemption, the potential for misuse is a definite concern. Thus, both the Board and the courts have made clear that an entity is not entitled to federal preemption to the extent it is engaged in activities other than rail transportation. In some cases, solid waste and other businesses have located close to a railroad and claimed to be a rail facility exempted from state and local laws that would otherwise apply, but have been found by the Board or a court not to be entitled to the federal preemption because the operation did not actually constitute “rail transportation” by a “rail carrier.” In other cases, activities and operations at facilities have been found to qualify for the federal preemption, as part of the transportation conducted by a rail carrier.

Cases involving solid waste transfer, storage and /or processing facilities proposed to be located along rail lines are especially controversial and often raise concerns that the operations could cause environmental harm. In every case, however, interested parties, communities, and state and local authorities concerned about a proposal have recourse to the Board or the courts.

Rail carriers need approval to construct a new rail line under 49 U.S.C. 10901. During the Board’s licensing proceedings, parties concerned that all or part of the project is not entitled to preemption have the opportunity to present their views to the Board for consideration in the proceeding. In rail construction cases, the Board also routinely conducts a detailed NEPA review, allowing all interested parties the opportunity to raise any environmental concerns. The Board then takes the entire environmental record into account in deciding whether to grant the license. The Board can, and often does, impose

appropriate environmental conditions to address the environmental concerns that are raised. Thus, the Board's existing process has proven to be sufficient to allow the agency to address any issues related to proposed solid waste or other facilities along the line.

If the project involves the acquisition and operation of an existing rail line, or the acquisition of a rail carrier by another carrier or carrier-affiliate, authority from the Board also is required, and NEPA is applicable. Normally, however, a proposal to change the owner or the operator of a line will not have any significant effects on the environment. Therefore, the Board does not always conduct a case-specific environmental analysis. But where there is a potential for significant impacts, and that is brought to the Board's attention, the Board may decide to undertake a full environmental review.

Finally, some activities at facilities on or along rail lines may qualify for the preemption in section 10501(b) but not require Board approval and review, so that there is no occasion for the Board to conduct an environmental review. For example, under the statute, carriers may make improvements and add new facilities (including a solid waste facility) to an existing line without seeking Board approval. Even in these types of cases, however, parties concerned that section 10501(b) is being used to shield activities that do not qualify for the federal preemption under section 10501(b) can ask the Board to issue a declaratory order, or a stay, or go directly to court to address the status of the facility.

The inquiry into whether and to what extent the preemption applies in a particular situation is naturally a fact-bound question. There have been only a few cases that have come before the Board involving solid waste facilities. The Board and the courts will continue to explore where the boundary may lie between traditional solid waste activities

and what is properly considered to be part of “rail transportation,” and what kinds of state and local actions are federally preempted, in the individual cases that arise.

CONCLUSION

In conclusion, it is important to reiterate that, although both the Board and the courts have interpreted section 10501(b) preemption broadly, there are limits on the preemption, which is harmonized with other federal laws. The question of what constitutes “transportation by rail,” according to the statute and precedent addressing the rights of railroads and of state and local authorities under section 10501(b), is still being fleshed out by the Board and the courts in the individual cases that arise. However, it is clear that not all activities are entitled to preemption simply because the activities take place at a facility located on rail-owned property. Of course, cases involving preemption for railroad facilities are likely to remain controversial. But even in cases that do not require review and approval by the Board, parties concerned that the section 10501(b) preemption is being misused in a case involving a facility have ways to raise their concerns at the Board or in the courts.

I appreciate the opportunity to discuss these issues with you today, and would be happy to answer any questions you may have.