

Voting Conference, May 3, 2005

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CSX Transportation, Inc. – Petition for Declaratory Order
STB Finance Docket No. 34662

Good morning Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

In a declaratory order served on March 14 of this year, the Board concluded that section 10501(b) of the Interstate Commerce Act preempts a District of Columbia law that seeks to govern the movement of hazardous materials by rail through the District. The District timely requested reconsideration of the Board's March 14 decision. The Sierra Club filed an untimely petition for reconsideration, which the draft decision before you treats as a petition to reopen. The petitioners both allege material error and make similar broad claims. First, the petitioners argue that the Board should have conducted a full factual inquiry and should have acted to accommodate the District's police power. Second, they maintain that the Board failed properly to take into account relevant precedent, in particular precedent regarding the role of other federal statutes related to railroad safety and security that are administered by other agencies. In addition, the District argues that the Board failed to take into account the assertedly unique nature of the safety and security threats claimed by the District.

The draft decision before you would deny the petitions for reconsideration and reopening. The draft explains that the courts have found two broad types of state and local actions to be

categorically preempted by section 10501(b) regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. The second is any state or local regulation of matters directly regulated by the Board, such as, for example, the construction, operation, or abandonment of rail lines. The draft finds that, by seeking to regulate when and where particular commodities can be transported by rail and by using a permitting process, the D.C. Act plainly falls within both types of actions that are categorically preempted by section 10501(b). Accordingly, the draft concludes that the D.C. Act is a per se unreasonable interference with interstate commerce, and that, therefore, no further factual inquiry was needed.

The draft points out that the issue before the Board in this case was not, as the District and the Sierra Club allege, whether additional safety and security measures may be desirable, or whether the railroad could cope with the ban. Rather, the draft finds that the issue is whether the District may unilaterally determine where the railroad may operate. The draft explains that such determinations can only be made by the appropriate federal agencies.

The District and the Sierra Club argue that the prior decision improperly elevated section 10501(b) over the statutes administered by other federal agencies. But the draft before you points out that the section 10501(b) preemption would not preclude either the U.S. Department of Transportation or the Department of Homeland Security from prescribing enhanced safety and security measures for the rail routes that pass through the District under the federal statutes they

administer. Thus, the draft concludes that the Board's prior decision did not usurp, ignore, or interfere with the role of other federal agencies in regulating railroad safety and security and hazardous materials transportation, and that it also did not shield the railroad from federal actions taken under those other federal statutes. Accordingly, the draft finds meritless petitioners' claim that the Board has assessed the D.C. Act in a legal or factual vacuum. The draft further acknowledges that there can be a role for the states under federal safety laws, but it defers to the U.S. Department of Transportation, which has concluded that the D.C. Act is preempted by the federal safety regime that the Department administers.

Finally, the draft explains that the District's claim of uniqueness does not alter the preemption analysis because any permitting or regulatory process like the D.C. Act is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action.

We would be happy to address any questions you might have.