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January 10, 2024

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

ENTERED
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January 10, 2024
Part of
Public Record

Re: STB Finance Docket No. 36734: *Soo Line Railroad Company a/k/a CPKC – Petition for Declaratory Order*

Dear Ms. Brown:

By this letter, the Association of American Railroads (“AAR”) replies in support of the Petition for Declaratory Order of Soo Line Railroad Company a/k/a CPKC in the above-referenced proceeding. Pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Surface Transportation Board (“STB” or “Board”) should issue a declaratory order clarifying that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et seq*, (“ICCTA”) preempts states from asserting permitting authority over the emergency repair and maintenance of facilities necessary for the continued and safe operation of railroads.

Congress has long exercised “broad regulatory authority over rail transportation.” *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 102 (2d. Cir. 2009). Indeed, federal regulation over the railroad industry has been recognized as “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).

With ICCTA, Congress vested the STB with “exclusive” jurisdiction over “transportation by rail carriers between places in the United States as well as between a place in the United States and a place in a foreign country.” *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 97 (2010); *see also Island Park, LLC*, 559 F.3d at 102 (“The STB is vested with broad jurisdiction over ‘transportation by rail carriers.’”) (quoting 49 U.S.C. § 10501(b)(1)). ICCTA also contains an express preemption clause: “the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). Rail transportation is defined to include wharfs, piers, docks, yards, properties, facilities, instrumentalities, and equipment “‘of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership of agreement concerning use.’” *Island Park*, 559 F.3d at 102 (emphasis in original) (quoting 49 U.S.C. § 10102(9)); *see also* 49 U.S.C. § 10102(6) (defining a “railroad” to include “a bridge . . . used by or in connection with a railroad”).

Stated simply, ICCTA “preempts all ‘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.’” *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)).

AAR’s members have a strong interest in the proper application of ICCTA to prevent railroad operations from being impeded by a disorderly patchwork of state and local regulations and to ensure the uniform regulation of the railroad industry. In this proceeding, Wisconsin’s preconstruction permitting process interferes with rail transportation by preventing and unduly burdening appropriate and timely—and, here, urgent—repair of rail infrastructure facilities necessary for the safe movement of rail. Both the STB and Federal courts have determined that, where a state or local permitting process “could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted.” *Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Co.—Stampede Pass Line*, FD 33200 (STB served July 2, 1997), at 10; *N.Y. Susquehanna & W. Ry.*, 500 F.3d 238 at 253 (same); see also *Borough of Riverdale—Petition for Declaratory Order—N.Y. Susquehanna & W. Ry. Corp.*, FD 33466 (STB served Sept. 10, 1999), at 8 (“[P]recedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.”).

Specifically, it is well established that section 10501(b) preempts the application of state and local preconstruction permitting requirements when applied to railroad transportation, as is the case here. See, e.g. *City of Auburn v. United States*, 154 F.3d 1025, 1027-28, 1030-31 (9th Cir. 1998) (affirming the Board’s finding that ICCTA preempted a local preconstruction permitting process as applied to repairs and improvements to track lines); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (finding that an environmental preconstruction permitting requirement was preempted by ICCTA). Preconstruction requirements—such as Wisconsin’s Chapter 30 and NR 299—“unduly interfere[] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations,” and these laws “can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.” *Green Mountain R.R.*, 404 F.3d at 642 (internal citations omitted). Moreover, “what is preempted [] is the permitting process itself, not the length or outcome of that process in particular cases.” *Id.* at 644. That Wisconsin’s Chapter 30 law is based on the public trust doctrine does not save it from preemption under ICCTA as the law’s form, function, and application is a preclearance permitting requirement.



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For the foregoing reasons, AAR urges the Board to issue a declaratory order in FD 36734, confirming that ICCTA preempts states from asserting permitting authority over the emergency repair and maintenance of facilities necessary for the continued and safe operation of railroads.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "K. Kirmayer".

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