53040 SERVICE DATE – NOVEMBER 9, 2026
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 791

POLICY STATEMENT ON JURISDICTION AND PREEMPTION UNDER THE ICC TERMINATION ACT

Decided: November 2, 2026

AGENCY: Surface Transportation Board.

ACTION: Statement of Board Policy.

SUMMARY: The Surface Transportation Board (STB or Board) is issuing this policy statement on the scope of its jurisdiction over transportation by rail carriers and on preemption of conflicting state and federal laws under the ICC Termination Act of 1995 (ICCTA). The policy statement provides an overview of the Board's jurisdiction and preemption through a review of existing legal precedent, discussing many commonly occurring questions. The Board intends the policy statement to serve as a useful tool for the public to review, in one place, concise explanations from the Board about its jurisdiction and application of preemption, which the Board anticipates will reduce confusion and facilitate the efficient resolution of disputes.

DATES: This policy statement will be final on November 9, 2026.

FOR FURTHER INFORMATION CONTACT: Amanda Gorski at (202) 915-8453. If you require accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: Congress granted the Board exclusive jurisdiction over rail transportation and preempted conflicting federal or state laws in ICCTA. See generally 49 U.S.C. 10501. ICCTA embodies Congress's recognition of the need to regulate railroad operations at the federal level. Broadly, it provides that the Board has jurisdiction over rail transportation that is part of the interstate rail network. In ICCTA, Congress included an expansive preemption provision, the purpose of which is to ensure the free flow of interstate commerce, including by preventing patchwork regulation and eliminating unduly burdensome state laws, and by providing a nationally uniform, efficient national rail network to meet the needs of the public and national defense. On September 19, 2025, the Board received a letter from a coalition of six railroad and shipper organizations (Coalition)[1] requesting that the Board

[1] The Coalition consists of American Chemistry Council, American Short Line and Regional Railroad Association (ASLRRA), Association of American Railroads, Intermodal

issue guidance on the scope and application of federal preemption. Coalition Letter (Sept. 19, 2025), https://www.stb.gov/wp-content/uploads/Coalition-Letter-on-ICCTA-Preemption_FINAL.pdf. Board members issued a joint response letter on September 24, 2025, noting the Coalition's views and stating that the Board was considering issuing a policy statement on preemption. Letter from Board Members Fuchs, Hedlund, & Schultz (Sept. 24, 2025), https://www.stb.gov/wp-content/uploads/Preemption-Letter-Final.pdf.

Over the 30 years since ICCTA's enactment, the Board and the courts have issued many decisions addressing the scope of the Board's jurisdiction over transportation by rail carriers and the preemptive effect of ICCTA when presented with potentially conflicting state, local, or federal regulations. While those decisions are generally consistent, they are numerous, have not always used the same terminology or analytical approaches, and may contain technical language unfamiliar to the general public. The Board therefore views it as important to set forth its considered, longstanding view of its jurisdiction over rail transportation and the application of ICCTA preemption. This policy statement is non-exhaustive but explores a significant number of questions that are frequently presented to the Board and to courts interpreting and applying ICCTA. Although any future case that comes before the Board (or a court) will be evaluated on the specific facts, circumstances, and laws presented in that case, the Board anticipates that the policy statement will serve the public by summarizing for stakeholders existing precedent. The policy statement will promote collaboration by reducing uncertainty about the scope of the Board's jurisdiction and ICCTA preemption and describing how the Board has analyzed frequently occurring questions. The Board thus aims to proactively prevent disputes regarding the Board's jurisdiction and ICCTA preemption, and when disputes do arise, for the policy statement to serve as a useful tool for the public and courts in resolving such disputes, potentially lowering litigation costs for carriers, shippers, and state and local governments. In turn, this action would, as appropriate, potentially support economic growth by better facilitating the avoidance or removal of undue or inappropriate impediments to rail transportation serving domestic manufacturing, agriculture, and energy facilities, among other critical aspects of the economy.

By addressing key concepts and authorities in one consolidated, synthesized document, the policy statement provides benefits to stakeholders and the general public. The policy statement will lower costs by reducing the time and resources necessary to process and evaluate a breadth of topics relevant to the Board's jurisdiction and preemption. It will allow a wide array of users to quickly reference and read about their individual areas of interest. And it synthesizes precedents and provides guidance on the Board's jurisdiction and preemption—including processes for rail carrier licensing and the proper forum for adjudicating disputes—in a practical way that is not necessary, or possible, when resolving individual matters before the Board. By reducing these incremental costs, the policy statement is considered a deregulatory action under Executive Order 14192, Unleashing Prosperity Through Deregulation.

Association of North America, National Grain and Feed Association, and National Industrial Transportation League.

TABLE OF CONTENTS

I. Executive Summary 4
II. Historically Recognized Need for Uniform Federal Rail Regulation 6
III. The Jurisdiction and Preemption Provisions of 49 U.S.C. 10501(b). 7
A. Transportation by Rail Carrier or Related to Ancillary/Excepted Track or Facilities 8
1. Transportation 9
2. Rail Carrier 11
3. Classifications of Rail Track 14
B. Regulation of Rail Transportation and the Preemption of Remedies 16
C. Proper Forum for Disputes Concerning Board Jurisdiction and ICCTA Preemption 19
IV. ICCTA Preemption Analysis for State and Local Laws 20
A. Constitutional Framework for Preemption Analysis 20
B. ICCTA Preemption Framework 21
1. Categorical Preemption Analysis 22
2. As-Applied Preemption Analysis 23
3. Complete Takings – Refocused Categorical Approach 26
4. Shipper and Receiver Rights to Common Carrier Rail Service 30
C. Commonly Arising State and Local Preemption Issues 33
1. Abandonment of Rail Property Interests 33
2. Complete takings of rail carrier property. 34
3. Utilities and pipelines within the right-of-way. 35
4. Blocked Crossings. 36
5. Pedestrian or Road Crossings of Rail Lines 37
6. Locomotive Idling. 37
7. Environmental Permitting, Zoning Ordinances, and Land Use Laws. 38
8. Noise, Smoke, Appearance, and Other Nuisance-Related Claims 38
9. Design, construction, or maintenance of rail infrastructure 39
10. Breach of contract. 39
11. Routing of traffic. 40
V. ICCTA Harmonization Analysis for Federal Law 40

A. Constitutional Framework for Harmonization Analysis 41
B. Examples of Harmonization of ICCTA and other Federal Laws 42
1. Harmonization with FRSA 42
2. Harmonization with Federal Environmental Laws 45
VI. Conclusion 46

I. Executive Summary

This policy statement explains how the Board and state and federal courts have interpreted the Board's authority over rail transportation and the preemption of state and local laws under ICCTA.[2] Congress' framework, set forth in ICCTA, has been interpreted in ways that ensure the uniform federal regulation over interstate rail transportation, which is critical to the American economy. Individual cases must be decided based on the facts, circumstances, and applicable law in each case, and this policy statement supports that endeavor by setting forth the Board's general perspective on its jurisdiction and ICCTA preemption.

The policy statement begins with an explanation of the long-recognized need for uniform rail regulation at the federal level, including under the Commerce Clause of the U.S. Constitution, the passage of the Interstate Commerce Act in 1887, and subsequent federal legislation, culminating in the passage of ICCTA and the creation of the Board in the 1990s. In enacting the statutory provision most relevant to preemption—49 U.S.C. 10501(b)—Congress included two key, interrelated components: (1) broad, exclusive jurisdiction over transportation by rail carriers (including certain related activity), and (2) that the remedies provided under ICCTA expressly preempt the remedies provided under federal and state law. The policy statement explains and analyzes numerous elements of the statute.

Regarding jurisdiction, the Board discusses the definitions of "transportation" and "rail carrier" (with attention to both freight and passenger rail carriers), and provides an explanation of three categories of track that the Board has recognized (common carrier, ancillary, and private) and how each is viewed for jurisdictional purposes. In analyzing the preemption provision, the policy statement identifies the broad scope of "regulations" that may be preempted—including those from both state and local authorities and those that may take the form of less-direct methods of regulation. The policy statement also explains that preemption extends beyond economic regulation and may apply when ICCTA does not provide an alternative remedy. The Board and courts may both be proper forums for disputes regarding the Board's jurisdiction and ICCTA preemption, with courts often referring preemption issues to the Board, consistent with the Board's expertise on such matters.

The policy statement next explores the analytical preemption framework that the Board applies when considering state or local regulations. The policy statement explains that what

[2] For demonstrative purposes, the Board cites both binding and non-binding precedents in this policy statement without necessarily adopting such precedents.

courts often call express preemption is typically analyzed, under ICCTA, as "categorical" preemption, and what is often called implied preemption is typically analyzed as "as-applied" preemption. The policy statement then explains that the categorical analysis is employed where state or local laws attempt to regulate rail transportation matters or when regulations (such as permitting) can be used to prevent rail transportation. It further explains that the "as-applied" analysis is used when a regulation may unreasonably burden or interfere with rail transportation or discriminate against rail carriers. The policy statement then analyzes and synthesizes precedents on complete takings of rail property by state or local governments, as well as the indirect regulation of rail transportation through regulation of shippers in ways that may limit common carrier rail service. The policy statement then addresses a number of commonly occurring preemption questions, summarizing the preemption analysis applied and the results of Board and court decisions. The non-exhaustive list of preemption fact patterns includes: (1) abandonment of rail property interests, (2) complete taking of rail carrier property, (3) utilities and pipelines within the right-of-way, (4) blocked crossings, (5) pedestrian or road crossings of rail lines, (6) locomotive idling, (7) environmental permitting, zoning ordinances, and land use laws, (8) noise, smoke, appearance, and other nuisance-related claims, (9) design, construction, or maintenance of rail infrastructure, (10) breach of contract, and (11) routing of traffic.

The policy statement also discusses the analysis that applies in considering whether a federal law is preempted by ICCTA. The Board explains the harmonization analysis that applies to give effect to both federal laws where possible. The policy statement then discusses two illustrative federal law regimes that have been the subject of harmonization analysis in past decisions—federal rail safety laws (including the Federal Railroad Safety Act (FRSA)) and federal environmental laws (including the Clean Air Act (CAA) and Clean Water Act (CWA)).

The Board is not making any binding determinations in this policy statement. Indeed, this policy statement is not exhaustive and should not be interpreted to predetermine the outcome of any particular dispute that may come before the agency, in which the Board would consider the specific facts, circumstances, and arguments presented. Instead, it compiles principles from certain existing cases to help parties understand how the Board and courts have approached frequently occurring questions concerning the Board's jurisdiction and ICCTA preemption. Where this policy statement identifies areas in which the Board provides a refinement to its prior analysis, such as complete takings and regulations directed at rail customers, the discussion below explains the basis for the refinement. The Board intends that this policy statement will serve as a reference document that can be used to promote growth in the rail industry and collaboration between rail carriers, shippers, and communities to proactively develop solutions to rail-related concerns.

Nevertheless, railroads should not use ICCTA preemption as an excuse to be unresponsive to local public officials. Consistent with the rail transportation policy of the United States government (set forth at 49 U.S.C. 10101), railroads, as regulated entities, should seek to engage in good communication, information sharing and cooperation with the communities they serve and operate within. State and local governments may have legitimate interests in the development of, among other things, passenger rail and trails within rights of way where allowed, for the benefit of both rail carriers and local communities. Local government officials

who believe that a railroad has been unresponsive may seek assistance from the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) to facilitate improved communications.

II. Historically Recognized Need for Uniform Federal Rail Regulation

The Surface Transportation Board was created on January 1, 1996 by ICCTA, Pub. L. 104-88, 109 Stat. 803 (1995), as the successor to the Interstate Commerce Commission (ICC) (1887-1995). The Board is the federal agency that is responsible for the economic regulation of various modes of surface transportation, primarily freight rail. Its responsibilities include oversight of railroad rates, practices, and service issues, as well as rail restructuring transactions including mergers, line sales, line construction, and line abandonments. The Board also has jurisdiction over certain passenger rail matters, the intercity bus industry, household goods carriers' tariffs, rate regulation of non-contiguous domestic water transportation (marine freight shipping involving the mainland United States, Hawaii, Alaska, Puerto Rico, and other U.S. territories and possessions), and pipeline carriers transporting commodities other than water, gas, or oil. While questions can arise regarding the scope of the Board's authority over each of these other transportation modes, this policy statement discusses rail transportation, which is the primary focus of the Board's statutory obligations.

Congress and the courts long have recognized a need to uniformly regulate rail transportation at the federal level. As an inherently interstate mode of transportation, "[r]ailroads have been subject to comprehensive federal regulation for [more than] a century." United Transp. Union v. Long Island R.R., 455 U.S. 678, 687 (1982); see also Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). Even before Congress enacted the Interstate Commerce Act in 1887, the Supreme Court had established that a state's regulation of railroad rates unconstitutionally interfered with interstate commerce. See Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 577 (1886). In 1887, Congress created the ICC to oversee a "comprehensive regulatory regime over the rail industry." Paul Stephen Dempsey, The Rise & Fall of the Interstate Com. Comm'n, 95 Marq. L. Rev. 1151, 1161 (2012); see also Interstate Commerce Act Sec. 11, 24 Stat. 383. And since that time, the Supreme Court has "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the [ICC] or with congressional policy as reflected in the [Interstate Commerce Act]." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981) (citing Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907); Transit Comm'n v. United States, 289 U.S. 121, 129 (1933)). Indeed, the Interstate Commerce Act is "among the most pervasive and comprehensive federal regulatory schemes." Chi. & N.W. Transp. Co., 450 U.S. at 318.

In response to significant financial concerns experienced by the railroad industry in the 1970s, Congress substantially amended the Interstate Commerce Act by enacting "two major pieces of legislation of a generally deregulatory thrust": the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, and the Staggers Rail Act of 1980 (Staggers Act), Pub. L. 96-448. Balt. Gas & Elec. Co. v. United States, 817 F.2d 108, 112-13 (D.C. Cir. 1987). Together, these laws were intended to reduce unnecessary regulation and help restore the financial stability of the railroad industry.

Congress carried that deregulatory thrust forward in 1995, when it enacted ICCTA as a means of "extending exclusive Federal jurisdiction" over rail transportation. H.R. Rep. No. 104-311, at 82, 95 (1995), as reprinted in 1995 U.S.C.C.A.N. 793, 793-94, 807 ("There is a long history behind the termination of the [ICC] beginning with [the Staggers Act], which began the substantial economic deregulation of the surface transportation industry . . . ."). And through ICCTA, Congress further expanded federal uniformity by preempting certain areas of state authority over rail activity that previously existed. See Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1337-38 (11th Cir. 2001) (explaining that "[t]he pre-ICCTA statute expressly authorized regulation of certain railroad activities to be undertaken concurrently by the federal and state governments, while still other regulation would be the exclusive province of state law."). At the same time, in further deregulating the rail industry, Congress did not intend for states and local governments to replace federal regulation with a patchwork of differing state and local rail regulations. See S. Rep. No. 104-176, at 6 (1995) (noting that nothing in ICCTA "should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed . . . .").

Indeed, in ICCTA, Congress reaffirmed that "the direct and complete pre-emption of State economic regulation of railroads" was necessary to preserve "the uniformity of Federal standards" and prevent "the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 95-96. Subjecting the interstate rail network to varying state regulations "would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers," and would weaken the rail industry's "efficiency and competitive viability." S. Rep. No. 104-176, at 6. In this way, preemption is consistent with the national rail transportation policy to promote a "safe and efficient rail transportation system," 49 U.S.C. 10101(3), and "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense," 49 U.S.C. 10101(4).

III. The Jurisdiction and Preemption Provisions of 49 U.S.C. 10501(b).

The scope of the Board's exclusive jurisdiction over transportation by rail carriers is set forth in 49 U.S.C. 10501(b). The statute also contains an express preemption provision. Taken together, the statutory provisions governing jurisdiction and preemption establish the framework for the Board's analysis.

The statute provides that the "jurisdiction of the Board over (1) transportation by rail carriers, and the remedies provided in [Part A of Subtitle IV of Title 49] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive." 49 U.S.C. 10501(b). Furthermore, "[e]xcept as otherwise provided in [Part A of Subtitle IV of Title 49], the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Id.

These provisions of section 10501 work together to ensure the free flow of interstate commerce by preventing a patchwork of different state and local regulations. E.g., Tenth Ave. Neighbors—Pet. for Declaratory Ord., FD 36654, slip op. at 3-4 (STB served May 8, 2024) (citing Tubbs—Pet. for Declaratory Ord., FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd sub nom. Tubbs v. STB, 812 F.3d 1141 (8th Cir. 2015)); see also Elam v. Kan. City S. Ry., 635 F.3d 796, 804 (5th Cir. 2011) (recognizing that a purpose of ICCTA was to create a "[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation"); Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010) (ICCTA reflected a Congressional effort to prevent the "balkanization" of railroad-related laws); U.S. Env't Prot. Agency—Pet. for Declaratory Ord. (EPA Declaratory Ord.), FD 35803, slip op. at 7 (STB served Dec. 30, 2014) ("The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting [section] 10501(b)."). Since ICCTA was enacted, it has been observed that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp. Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

From this established statutory structure, disputes have arisen about both the jurisdictional and preemption aspects of ICCTA. Two preliminary jurisdictional questions have guided the analysis of whether regulation under local, state, or another federal law may be subject to ICCTA preemption. First, is the activity at issue "transportation by rail carrier" as part of the interstate rail network or related to the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks (collectively, commonly referred to as "ancillary track" or "excepted track"), or facilities? And second, does the local, state, or federal action constitute regulation of such activity? If the answer to both questions is yes, then the Board and courts apply a preemption analysis to determine whether ICCTA preempts such regulation.[3]

Though the steps are straightforward, the case-specific analysis required to determine preemption is often fact-intensive and detailed. Questions can arise in each stage of the inquiry: what activities constitute "transportation"; is the actor a "rail carrier," or operating on behalf of a rail carrier; are the railroad tracks or facilities part of the interstate rail network or a shipper's private facilities; what types of actions by local and state governments (or other actors) are considered "regulation"; when does a state or local regulation "unreasonably interfere" with rail transportation; to what extent does preemption cover lawsuits for damages allegedly caused by rail carrier operations? The analysis below addresses these and other related questions and summarizes existing precedent on the Board's jurisdiction and ICCTA preemption.

A. Transportation by Rail Carrier or Related to Ancillary/Excepted Track or Facilities

The threshold question in any preemption analysis is whether the activity at issue falls within the Board's jurisdiction. As specified, under 49 U.S.C. 10501(b), the Board has jurisdiction over "transportation by rail carriers." Whether a particular activity constitutes

[3] As discussed below, the test applied varies depending on whether the regulation is based on state (or local) law or federal law, and the content of the regulation.

"transportation by rail carrier" is a case-by-case, fact-specific determination. E.g., Town of Smithtown—Pet. for Declaratory Ord., FD 36575 (Sub-No. 1), slip op. at 3 (STB served Feb. 23, 2024) (citing Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015); Town of Milford—Pet. for Declaratory Ord., FD 34444, slip op. at 2 (STB served Aug. 12, 2004)). The same is true for determining whether railroad tracks and facilities are subject to the Board's jurisdiction. See, e.g., Ne. La. Multimodal Dist.—Pet. for Declaratory Ord., FD 36809, slip op. at 5-6 (STB served Sept. 15, 2025) (describing factors considered in distinguishing between common carrier/mainline (10901) and ancillary/excepted (10906) track)); Tri-City R.R.—Pet. for Declaratory Ord., FD 36037, slip op. at 5 (STB served June 1, 2017) (describing hallmarks of private track).

To determine whether a particular activity is subject to the Board's jurisdiction and, potentially, preemption under 49 U.S.C. 10501, both the "transportation" and "by rail carrier" prongs of the standard must be satisfied. The Board has held that preemption does not apply to non-transportation activities by rail carriers. See, e.g., Grafton & Upton R.R.—Pet. for Declaratory Ord., FD 36696, slip op. at 10 (STB served Nov. 15, 2023) (stating that "the taking of the [rail carrier's property] via eminent domain would likely not be preempted if it is developed for purposes unrelated to rail transportation."). Likewise, transportation activities by non-rail carriers generally are not preempted. See, e.g., Smithtown, FD 36575 (Sub-No. 1), slip op. at 4-5 (holding that application of state and local regulations to transloading facility would not be preempted where the facility was owned by a non-carrier that was not affiliated with the carrier; not acting as the carrier's agent; and not subject to the carrier's exertion of control over operations).

1. Transportation

The Board has jurisdiction over transportation in the United States, including, but not limited to,[4] (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is "part of the interstate rail network." 49 U.S.C. 10501(a)(2). Rail carriers that operate exclusively in one state—as many short line railroads[5] often do—are thus generally subject to the Board's jurisdiction if they connect to the interstate rail network. See Great Redwood Trail Agency—

[4] In full, section 10501(a)(2) provides: Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in-

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

[5] Class II and III carriers are commonly referred to as "regional" or "short line" railroads. In this policy statement, the Board uses the term "short line railroads" to refer to these rail carriers.

Adverse Aban.—Mendocino Ry. in Mendocino Cnty., Cal., AB 1305 (Sub-No. 1), slip op. at 9-10 (STB served Feb. 19, 2026) (acknowledging that a rail carrier solely transporting shipments between points within the same state could be subject to the Board's jurisdiction). As used in ICCTA, "transportation" includes not just the act of moving freight or passengers by rail but also broadly encompasses equipment, facilities, and services related to that movement. Specifically, transportation "includes 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 services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. 10102(9). This list is non-exhaustive, as "use of the word 'include' indicates the list is illustrative rather than comprehensive." Del Grosso v. STB, 898 F.3d 139, 142 (1st Cir. 2018).

Proceedings before the Board and courts have made clear that the broad definition of "transportation" includes transloading and related operations when performed or operated by, or under the auspices of, a rail carrier. See, e.g., Smithtown, FD 36575 (Sub-No. 1), slip op. at 4-5 (stating that "the Board's jurisdiction extends to rail-related activities that take place at transload facilities if the activities are offered by a rail carrier, either directly or through its agent, or if a rail carrier exerts control over a third-party's operations"). Additionally, conducting activities such as making repairs to rail equipment and the construction and operation of excepted track constitute "transportation" because they involve facilities, instrumentalities, and equipment related to the movement of property (tracks and rail equipment) and services related to that movement (repairs and operation of tracks and rail equipment). See Grafton & Upton, FD 36696, slip op. at 10-11.

Though expansive, the definition of "transportation" has its limits. Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1129 (10th Cir. 2007); see also Del Grosso v. STB, 804 F.3d 110, 119 (1st Cir. 2015) (stating that courts and the Board have rejected interpretations of "transportation" that extend beyond activities relating to the movement of "passengers or property" by rail). As the courts have recognized, "regulation of activities that occur before or after 'transportation' and are incidental to such transportation may not be preempted." Delaware v. STB, 859 F.3d 16, 21-22 (D.C. Cir. 2017); see also Emerson, 503 F.3d at 1130-32 (holding that a railroad's disposal of railway ties into a wastewater drainage ditch adjacent to its tracks was not "transportation," and thus state tort claims related to the disposal were not preempted).

As one example, "manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term 'transportation.'" Del Grosso, 898 F.3d at 142 (quoting New England Transrail, LLC—Constr., Aquis. & Operation Exemption—in Wilmington & Woburn, Mass. (New England Transrail), FD 34797, slip op. at 10 (STB served July 10, 2007)); see also Fla. E. Coast Ry., 266 F.3d at 1327, 1336 (a third party's aggregate distribution business operating in a rail yard was not "transportation"); New England Transrail, FD 34797, slip op. at 14-15 (shredding of construction debris at a transloading facility before loading the material onto railcars was not "transportation"); Town of Milford, FD 34444, slip op. at 1-2 (cutting and welding steel in a rail yard after rail transportation had occurred but before the steel was loaded onto trucks was not "transportation").

2. Rail Carrier

Under ICCTA, a "rail carrier," is defined as "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." 49 U.S.C. 10102(5). The term "railroad" includes "a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad; the road used by a rail carrier and owned by it or operated under an agreement; and a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. 10102(6). The common carrier obligation requires that rail carriers "providing transportation or service subject to the jurisdiction of the Board under [Part A of Subtitle IV of Title 49] shall provide the transportation or service on reasonable request." 49 U.S.C. 11101(a). Thus, as the Supreme Court has recognized, rail carriers are required to provide transportation "to any person or commodity," and "cannot decline to provide [such] transport based on the product or commodity to be carried." Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 605 U.S. 168, 191 n.6 (2025). This includes products ranging from crude oil, id., to hazardous substances, Riffin v. STB, 733 F.3d 340, 346-47 (D.C. Cir. 2013), to agricultural products, construction materials, and retail goods.

The Board and courts have also interpreted the term "rail carrier" broadly, such that activities do not necessarily need to be conducted directly by the rail carrier in order for preemption to apply. Rather, the transportation must be performed "by, or under the auspices of, a rail carrier." Del Grosso—Pet. for Declaratory Ord., FD 35652, slip op. at 2 & n.4 (STB served July 31, 2017) (collecting cases); City of Alexandria—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Feb. 17, 2009). The Board has stated that, for example, at transload facilities, "the Board's jurisdiction extends to rail-related activities that take place at transload facilities if the activities are offered by a rail carrier, either directly or through its agent, or if a rail carrier exerts control over a third-party's operations." Smithtown, FD 36575 (Sub-No. 1), slip op. at 4. As discussed in more detail below, certain cases have held that indirect regulation that burdens common carrier rail service implicates preemption.

a. Freight Rail Carriers

The Board has jurisdiction over freight rail carriers engaged in interstate transportation, as well as intrastate transportation that is "part of the interstate rail network." 49 U.S.C. 10501(a)(2). The Board classifies freight rail carriers into three categories based on annual operating revenues, with Class I carriers being the largest, Class II in the middle, and Class III the smallest. See 49 CFR 1201. Class II and III carriers are commonly referred to as short line railroads. Short line railroads frequently operate within the Board's jurisdiction because, even when they operate only within one state, they often connect with Class I carriers and serve as part of the interstate rail network by handling the first or last segment (sometimes referred to as "first mile/last mile service") as part of a longer journey.

Whether a freight operator is considered a rail carrier within the Board's jurisdiction is not always immediately clear. The Board (as did the ICC before it) issues decisions authorizing transactions that, if consummated, confer rail carrier status. Typically, the Board-issued

document is a decision approving the potential rail carrier's authority for construction,[6] acquisition, and/or operation (under 49 U.S.C. 10901 or 10502), often in the form of a notice of exemption in the case of acquisition and operation transactions (under 49 CFR 1150.31).[7] Although these decisions are maintained in agency records, they may not be readily accessible, particularly when the agency's approval was issued decades ago. Moreover, the Board's licensing structure is permissive. Only when the entity consummates a Board-authorized acquisition or operation does it become a "rail carrier" under the Board's jurisdiction. See Mendocino Ry.—Pet. for Declaratory Ord., FD 36868, slip op. at 3-4 (STB served Sept. 26, 2025) (citing Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35412, slip op. at 4-5 (STB served Mar. 27, 2013)). And once the transaction is consummated, no separate notice of consummation is required to be filed with the Board. At this time, the Board does not maintain a registry, list, or website of licensed rail carriers, nor does it provide a physical or digital license document.[8]

Additionally, a rail carrier does not automatically lose its common carrier status by stopping its rail service over a line. By statute, Board authorization is needed to terminate the common carrier obligation generally through a line sale, abandonment, or discontinuance. See, e.g., Middletown, FD 35412, slip op. at 4; see also Strohmeyer—Acquis. & Operation Exemption—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527, slip op. at 2 & n.5 (STB served Oct. 20, 2011) (discussing the mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations) (citing Pejepscot Indus. Park, Inc.—Pet. for Declaratory Ord., 6 S.T.B. 886, 898 (2003)). Therefore, regardless of how much time has passed since a shipper last requested common carrier service, a rail carrier remains within the Board's jurisdiction until the Board, in its sole authority, authorizes its removal and that authorization is consummated.

---

[6] Construction authority, once consummated, confers on the constructing entity a common carrier obligation, even in cases where "fulfillment [of that obligation] may be undertaken by operating railroads under trackage rights, leases, or similar arrangements." Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—for Constr. in Will Cnty., Ill., FD 34060 et al., slip op. at 7 n.15 (STB served Mar. 21, 2002) (quoting Big Stone-Grant Ind. Dev. & Transp., L.L.C.—Constr. Exemption—Ortonville, Minn. & Big Stone City, S.D., FD 32645, slip op at 2 (ICC served Sept. 26, 1995)).

[7] As recently explained by the ASLRRA in a proceeding before the Board, "non-carrier companies often enter the rail transportation system, and become common carriers subject to [Board] jurisdiction, through the acquisition of either a part or of the entirety of a rail line segment that is currently within the jurisdiction of the Board or otherwise would be the entirety of the line of railroad to be operated by that soon-to-be carrier." ASLRRA Comment 6, July 7, 2025, Mendocino Ry.—Pet. for Declaratory Ord., FD 36868.

[8] Some of the Board's licensing provisions—for example, 49 U.S.C. 10901 and 10902—refer to the Board's issuance of a "certificate" authorizing the proposed activity. In practice, such certificates consist of a Board decision granting the authority or, in the case of class exemptions, a Board-issued notice of exemption served and published in the Federal Register.

When questions concerning a rail carrier's status cannot be resolved through the review of public decisions, parties often seek assistance from the Board.[9] The Board's Rail Customer and Public Assistance (RCPA) program can assist in resolving disputes, explain the Board's jurisdiction and procedures, and informally answer questions based on the Staff's knowledge and experience.[10] Additionally, the Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See, e.g., Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Procs., 5 I.C.C.2d 675 (1989). For example, the Board recently received a request from a rail carrier to confirm its status as a common carrier subject to the Board's jurisdiction, which was disputed during legal challenges by local municipalities and state agencies. See Mendocino Ry., FD 36868, slip op. at 1. The Board reviewed prior decisions related to the requesting rail carrier—including past Board decisions granting a common carrier obligation to the rail carrier's predecessor, and subsequently granting the rail carrier authority to purchase the line—and determined that the rail carrier was a common carrier subject to the Board's jurisdiction and therefore, if applicable, entitled to the benefits of federal preemption for its transportation activities under 49 U.S.C. 10501(b). See id. at 1-4.

b. Passenger Rail Carriers

The Board also has jurisdiction over certain passenger rail operations. While the Board generally has jurisdiction over "transportation"—including equipment or services related to the movement of passengers as well as property, see 49 U.S.C. 10102(9)—by a "rail carrier," not all passenger rail operations fall within the Board's jurisdiction. The definition of "rail carrier" specifically excludes "street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." 49 U.S.C. 10102(5). Additionally, except in limited circumstances,[11] the Board "does not have jurisdiction under this part over . . . public transportation provided by a local government authority." 49 U.S.C. 10501(c)(2)(A). This exclusion generally applies to "regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income," with certain exceptions, when provided by a local governmental authority.[12] 49 U.S.C. 5302(15). Additionally, the National Railroad Passenger Corporation (Amtrak) is treated separately under ICCTA. Although Amtrak is part of the interstate rail

[9] The Board is aware that other agencies or organizations, such as the U.S. Railroad Retirement Board, at times also make their own determinations about whether an entity is a rail carrier. The Board does not address those circumstances here and focuses solely on the Board's (and courts') determinations of the Board's jurisdiction for purposes of regulation under ICCTA.

[10] Additional information about RCPA, including contact information, can be found on the Board's website.

[11] These include the use of terminal facilities (49 U.S.C. 11102) and switch connections/tracks (49 U.S.C. 11103) in limited circumstances. See 49 U.S.C. 10501(c)(3)(B).

[12] The term "local governmental authority" includes "(A) a political subdivision of a State; (B) an authority of at least 1 State or political subdivision of a State; (C) an Indian tribe; and (D) a public corporation, board, or commission established under the laws of a State." 49 U.S.C. 5302(11).

network, Congress limited the Board's jurisdiction over Amtrak to specific statutory provisions, including to address directed service (49 U.S.C. 11123), equipment trusts (id. 11301), pooling (id. 11322(a)), withholding taxes (id. 11502), and liability (id. 11706). See 49 U.S.C. 24301(c).[13]

Whether a passenger rail service solely within one state is part of the interstate rail network is a fact-specific determination based on the totality of the circumstances. Tex. Cent. R.R. & Infrastructure, Inc.—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex., FD 36025, slip op. at 7 (STB served July 16, 2020); Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal., FD 35724, slip op. at 11-15 (STB served June 13, 2013). It has also long been the agency's position that it does not have jurisdiction over purely intrastate passenger service, even if that service is performed by a licensed rail carrier. See, e.g., Napa Valley Wine Train, Inc.—Pet. for Declaratory Ord., 7 I.C.C.2d 954, 969 (1991). However, questions can arise when an intrastate passenger line connects to the interstate rail network, as such service may indeed be subject to the Board's jurisdiction. See, e.g., Tex. Cent. R.R., FD 36025, slip op. at 12 (finding that a proposed intrastate passenger rail line would be subject to the Board's jurisdiction because it was connected to the interstate rail system via through-ticketing arrangements and transfer service). The Board examines multiple factors in determining whether a particular passenger service is under its jurisdiction, such as whether the proposed service has a through-ticketing arrangement or whether it shares a station with an interstate carrier, although no single factor is dispositive. See, e.g., id., slip op. at 7; Cal. High-Speed Rail Auth., FD 35724, slip op. at 11-15.

3. Classifications of Rail Track

Whether an activity falls within the definition of "transportation by rail carrier" will sometimes depend, in whole or in part, on the legal status of the rail line or track on which service is being provided. Again, the Board recognizes three categories of track: common carrier (or mainline),[14] ancillary (or excepted),[15] and private. The first two (common carrier and ancillary) are subject to the Board's jurisdiction, whereas private track is not.

[13] The Board also has certain regulatory responsibilities relating to Amtrak under other statutes not relevant for purposes of this policy statement. The Board also notes that, under separate statutes, Amtrak itself may be able to invoke its own form of preemption in certain circumstances. See 49 U.S.C. 24902(j), 24301(g).

[14] The Board and courts regularly refer to these lines as "mainline" or "main line" track for purposes of the Board's jurisdiction under ICCTA, which is the focus of this policy statement. The Board is not herein equating, or taking any position on, these terms as they may pertain to FRA's definition of "main line" under 49 CFR 236.1003, or FRA's use of the term "general railroad system of transportation" as described in 49 CFR Part 209, Appendix A.

[15] The term "excepted track" derives from 49 U.S.C. 10906, titled "Exception". The use of the term "excepted track" as it pertains to ICCTA is not the same as FRA's definition of "excepted track" under 49 CFR 213.4.

a. Common carrier/mainline rail lines.

The Board has exclusive jurisdiction over rail lines over which a rail carrier provides "common carrier" service to shippers. 49 U.S.C. 10501(a)-(b); id. 11101; see Allied Erecting & Dismantling Co. v. STB, 835 F.3d 548, 550 (6th Cir. 2016). No one may build an extension to a common carrier rail line, build additional lines, provide transportation over an extended or additional line, or abandon a line without Board authorization. 49 U.S.C. 10901(a), 10903; see Allied Erecting & Dismantling Co., 835 F.3d at 550.[16]

b. Ancillary/excepted tracks.

The Board often refers to spur, industrial, team, switching, or side tracks, or facilities interchangeably as "ancillary" or "excepted" tracks. "Ancillary" because such tracks and facilities are used for loading cars, track switching, and other activities that are incidental, or *ancillary*, to the provision of common carrier service, see Nicholson v. ICC, 711 F.2d 365, 367-68 & n.11 (D.C. Cir. 1983); "excepted" because under 49 U.S.C. 10906, the construction, acquisition, operation, abandonment, or discontinuance of such tracks and related facilities is *excepted* from the Board's licensing authority. Thus, while spur, industrial, team, switching, or side tracks, or facilities, are within the Board's exclusive jurisdiction, they can be added to or removed from the interstate rail network without authorization from the Board. See N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Ord., FD 36467, slip op. at 5 (STB served June 11, 2021); Tri-City R.R., FD 36037, slip op. at 4. Even though the Board does not license ancillary track (as it does common carrier rail lines), such track is under the Board's exclusive jurisdiction and therefore is subject to federal preemption. See 49 U.S.C. 10501(b)(2). There is no bright-line test to distinguish between common carrier rail lines and ancillary tracks. Instead, the Board considers various indicia when determining whether a track is excepted under section 10906, including a track's relationship to the rail system, intended use, physical characteristics, and history. See, e.g., Oakland Glob. Rail Enter.—Pet. for Declaratory Ord., FD 36168, slip op. at 8 & n.8 (STB served Mar. 15, 2019).[17] A track segment that constitutes a carrier's entire rail system cannot be considered ancillary track (because it is not "ancillary" to other track of the carrier), and therefore is not excepted under 49 U.S.C. 10906. Effingham R.R.—Pet. for Declaratory Ord.—Constr. at Effingham, Ill., FD 33468, slip op. at 5 (STB served Sept. 18, 1998).

[16] When Board authorization is required for certain projects, the Board must consider, among other things, the potential environmental and historic impacts of the construction and operation of a proposed rail line pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370m-11, Section 106 of the National Historic Preservation Act, 54 U.S.C. 300101 et seq., the Board's environmental rules at 49 CFR Part 1105, and related environmental laws.

[17] Parties that are uncertain whether a particular track is considered a common carrier rail line or ancillary track (or private track) often request a determination from the Board. See, e.g., Ne. La. Multimodal Dist., FD 36809; N.Y.C. Econ. Dev. Corp., FD 36467.

c. Private track.

Private track is track typically built and maintained by a shipper (or for a shipper at the shipper's expense), and operated by the shipper or its contractor to serve its own operations and move its own goods. E.g., B. Willis, C.P.A., Inc.—Pet. for Declaratory Ord., 6 S.T.B. 280, 281 (2002), aff'd sub nom. B. Willis, C.P.A., Inc. v. STB, 51 Fed. App'x 321 (D.C. Cir. 2002). Where the shipper does not hold out to provide common carrier railroad service over the line to other shippers for compensation, neither the construction of the track nor the operations require Board approval. See B. Willis, C.P.A., Inc., 6 S.T.B. at 285; see also Devens Recycling Ctr.—Pet. for Declaratory Ord., FD 34952, slip op. at 3 (STB served Jan. 10, 2007) (finding no jurisdiction over operations conducted on private track used exclusively to serve the track owner pursuant to a contractual arrangement with the owner). When track is constructed and operated in a manner that does not constitute common carriage, the agency has held that it is not subject to the Board's jurisdiction. See B. Willis, C.P.A., Inc., 6 S.T.B. at 285. The agency has stated that private track need not serve only one shipper and can include private service to numerous shippers within a single location—such as an industrial park—as long as the carrier is not providing common carrier service. Cf. TGS Cedar Port R.R.—Operation Exemption—in Chambers Cnty., Tex., FD 36627, slip op. at 1 (STB served Apr. 1, 2024) (noting that carrier previously operated 1.28 miles of private track within an industrial park without needing Board authority until conversion to common carrier service). Because such track is not subject to the Board's jurisdiction, construction and removal of such track is not covered by federal preemption. However, as discussed in further detail below, the Board is providing in this policy statement clarification regarding instances where state or local regulation of construction of or operations over private track may be considered to interfere with "transportation by rail carrier" and thus could be subject to preemption.

B. Regulation of Rail Transportation and the Preemption of Remedies

ICCTA contains an express preemption provision, providing that "[e]xcept as otherwise provided in [Part A of Subtitle IV of Title 49], the remedies provided under this part 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). The plain meaning of "regulation" is "managing or governing," Fla. E. Coast Ry., 266 F.3d at 1331 (citing Black's Law Dictionary 1286 (6th ed. 1990)) (citation modified), or "controlling by rule or restriction," Union Pac. R.R. v. Chi. Transit Auth., 647 F.3d 675, 679 n.2 (7th Cir. 2011). ICCTA thus bars states from "exercising control . . . over rail transportation as it is defined in 49 U.S.C. 10102(9)." Id. (citation modified).

ICCTA's use of "State" encompasses both state and local law, and it is well established that ICCTA preempts local as well as state regulation. Padgett, 804 F.3d at 107 (citation modified). This can include, among other things, certain state or local building permits, zoning ordinances, and environmental and land use permitting requirements. See, e.g., Wash. & Idaho Ry.—Pet. for Declaratory Ord., FD 36017, slip op. at 4 (STB served Mar. 17, 2017) (noting that state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements may be subject to preemption).

"Regulation" does not simply mean laws passed by a legislature or rules enacted by a regulatory agency, and can, in appropriate circumstances, include common-law tort claims that similarly regulate rail transportation and certain related activity. Legal actions asserting eminent domain, adverse possession, easements, and other property rights have, as appropriate, been deemed "regulation" for purposes of analyzing ICCTA preemption. See, e.g., Tri-City R.R.—Pet. for Declaratory Ord., FD 35915, slip op. at 7 (STB served Sept. 14, 2016) (collecting cases); see also Edwards v. CSX Transp., Inc., 983 F.3d 112, 121 (4th Cir. 2020) (holding that "regulation" need not "be by way of public rule"). Tort actions may also be considered "regulation" for purposes of ICCTA in certain circumstances "because damages awarded under state tort laws can manage or regulate a railroad as effectively as the application of any other type of state statute or regulation." Tubbs, FD 35792, slip op. at 4. Thus, ICCTA's "preemptive reach can encompass common-law tort actions, in addition to statutes and ordinances." Edwards, 983 F.3d at 121-22 (collecting cases) (recognizing that ICCTA's preemption clause "in no way distinguishes between statutory prohibitions and common-law duties"). Indeed, the statute's "all-encompassing language" does not "permit the federal statute to be circumvented by allowing liability to accrue under state common law." Ezell v. Kan. City S. Ry., 866 F.3d 294, 299-300 (5th Cir. 2017). It has been noted that "[o]f course, not *all* common-law claims against railroads are preempted." Edwards, 983 F.3d at 122. Rather, common law claims are subject to the same preemption analyses as are other forms of "regulation," such as state and local laws.

While "the core of ICCTA preemption is 'economic regulation,'" Fayus Enters., 602 F.3d at 451, such as state laws governing the setting of rates and rules and practices related to rail transportation or service, "ICCTA 'does not preempt only explicit economic regulation.'" Id. (quoting N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)); accord City of Auburn, 154 F.3d at 1030. And as the Board has recognized, any such limitation would be "contrary to the statutory text and unworkable in practice." Friends of the Aquifer, 5 S.T.B. 880, 884 n.8 (2001). Additionally, given the broad language of section 10501(b)(2) (granting the Board exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines), the distinction between "economic" and "environmental" regulation begins to blur. See City of Auburn, 154 F.3d at 1031. "For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." City of Auburn, 154 F.3d at 1031.

The remedies that the Board may impose are set forth throughout the Board's governing statute, covering issues such as competition and access (49 U.S.C. 11102), rates (id. 10702(1)), licensing (id. 10901-10910), and the economic relationship between shippers and carriers (id. 10702(2)). Section 10501(b) expressly states that "the remedies provided under [49 U.S.C. 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." And so ICCTA preemption may apply even though a remedy may not exist under the Interstate Commerce Act for all instances where a state or local law is preempted. 14500 Ltd. LLC—Pet. for Declaratory Ord., FD 35788, slip op. at 5 (STB served June 5, 2014) ("Although [section] 10501(b) states that 'the remedies provided under this part with respect to rail transportation are exclusive,' that does not mean that a remedy must exist under the Interstate Commerce Act for all instances where a state or local

law is preempted under [section] 10501(b)".); Norfolk S. Ry.—Pet. for Declaratory Ord., FD 35701, slip op. at 6 (STB served Nov. 4, 2013).

A notable instance where the Board does not have regulatory authority (but still has jurisdiction) is with respect to ancillary or excepted track. As noted above, Congress provided the Board with exclusive jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks," 49 U.S.C. 10501(b)(2), while simultaneously stating that "[t]he Board does not have authority" over the licensing of these activities, 49 U.S.C. 10906. See also Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (finding state law claims relating to side track preempted even though Board does not actively regulate such track); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (stating that Congress intended to remove Board authority over the construction, operation, and abandonment of side tracks "while still preempting state jurisdiction over them"). Accordingly, even though the Board does not authorize construction or abandonment of ancillary track, state and local governments are prohibited from regulating such activities. See 49 U.S.C. 10906. For example, this means that states and localities are barred from requiring an environmental permit for construction of ancillary track, despite no environmental review being conducted by the Board.

The principle applies to other "transportation" activities that the Board does not directly regulate. See Del Grosso, 804 F.3d at 114 ("Whether or not the Board is exercising its regulatory authority over the transportation, state and local laws governing such transportation are generally preempted."). ICCTA preemption can apply "without regard to whether or not the Board actively regulates the particular activity involved." Tubbs, FD 35792, slip op. at 4 (holding that a state law damages claim alleging improper design, construction, and maintenance of a rail carrier's main line track was preempted even though the Board does not directly regulate these issues).[18] For example, although the Board does not regulate how long carriers may idle locomotives, a state or local law seeking to impose its own regulation on how long locomotives may idle would nonetheless be preempted. See Pet. of Norfolk S. Ry. for Expedited Declaratory Ord., FD 35949, slip op. at 4-5 (STB served Feb. 25, 2016), aff'd sub nom. Delaware, 859 F.3d at 21-22.

ICCTA preempts not only direct regulation but may also preempt indirect regulation that affects a rail carrier's ability to provide common carrier operations to its customers. See Smithtown, FD 36575 (Sub-No. 1), slip op. at 4 n.7 (collecting cases); City of Alexandria, FD 35157, slip op. at 2 (holding that ICCTA preempted local regulation of trucks serving a transloading facility operated by rail carrier's contractor). Such laws conflict with Congress's purpose in codifying the common carrier obligation because a rail carrier's ability to provide

[18] Although the Board's statute has a provision on "rights and remedies of persons injured by rail carriers," 49 U.S.C. 11704, this provision "only applies to claims for violations of the Interstate Commerce Act," and does not create a general cause of action. See City of N. Chi.—Pet. for Declaratory Ord., FD 36619, slip op. at 4 n.3 (STB served May 18, 2023); see also 14500 Ltd. LLC, FD 35788, slip op. at 5 (explaining that section 11704 and the Interstate Commerce Act do not address or provide any remedies for state law property issues).

service and a shipper's right to receive service on reasonable request are two sides of the same coin.

C. Proper Forum for Disputes Concerning Board Jurisdiction and ICCTA Preemption

The Board's exclusive "jurisdiction" should not be confused with traditional subject-matter jurisdiction to hear and resolve a dispute. The Board's "jurisdiction" essentially confers a broad and exclusive "authority to regulate" (except where specifically stated otherwise, e.g., ancillary track). But the Board does not have exclusive "subject-matter jurisdiction" to resolve disputes about whether a particular activity is preempted. It is well-established that the Board and courts have concurrent jurisdiction to resolve preemption questions. E.g., Ne. La. Multimodal Dist., FD 36809, slip op. at 4; see also Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 539 n.4 (6th Cir. 2008). Actions implicating ICCTA preemption therefore may be originated either at the Board or in court.[19] Because jurisdiction is concurrent, the Board often has exercised its discretion not to address questions that have already been litigated by the parties and decided by a court. See, e.g., City of N. Chi., FD 36619, slip op. at 4 n.3 (declining to issue declaratory order where "the preemption question posed by [the petition for declaratory order] has already been decided by the [referring] court").

In addition to resolving disputes filed directly with the Board, the Board generally accepts referrals from courts grappling with questions regarding the extent of the Board's jurisdiction and preemption under ICCTA. Courts have sought the Board's input in a variety of ways, including dismissing a judicial proceeding without prejudice while the Board resolves an issue, e.g., Tri-City R.R., FD 35915, slip op. at 4 n.4; staying a judicial proceeding while the parties seek a determination from the Board, e.g., Tubbs, FD 35792, slip op. at 1; or referring a question to the Board for resolution, e.g., Grafton & Upton, FD 36696, slip op. at 5. And some courts have retained jurisdiction while referring a preemption determination to the Board, despite retaining concurrent jurisdiction to resolve the issue. See, e.g., Grafton & Upton, FD 36696, slip op. at 5. Particularly when the threshold question is whether the Board has jurisdiction at all—such as where the parties dispute whether an entity qualifies as a "rail carrier" under ICCTA, or whether a segment of track is excepted (jurisdictional) or private (non-jurisdictional), or whether a jurisdictional track has been abandoned and therefore is no longer subject to the Board's jurisdiction as a matter of federal law—the Board's expertise and unique responsibility for ensuring uniform national rail standards may be utilized. Cf. In re Metro. Transp. Auth., 32 A.D.3d 943, 946 (N.Y. App. Div. 2006) (When "questions exist with regard to whether the track at issue is a spur and, if so, whether its apparent nonuse is sufficient to result in an abandonment, . . . [s]uch matters are properly addressed to the [Board]"). For example, some courts have directed the parties, during litigation, to seek guidance from the Board on the jurisdictional status of track. See, e.g., Brookhaven Rail Terminal—Pet. for Declaratory Ord.,

[19] The Board takes no position regarding whether a preemption related claim may be initiated originally in state or federal court, or whether a claim can be removed to federal court. As the Board has acknowledged, "[t]he Board is not the proper forum for deciding the extent of a court's jurisdiction." Waneck—Pet. for Declaratory Ord., FD 36167, slip op. at 4 (STB served May 25, 2018) (citing Lopez-Elias v. Reno, 209 F.3d 788, 791 (5th Cir. 2000) (noting that the determination of a court's jurisdiction is exclusively for the court to decide)).

FD 35819, slip op. at 4 (STB served Aug. 30, 2016) (determining Board's jurisdiction over track subject to litigation); Pinelawn Cemetery—Pet. for Declaratory Ord., FD 35468, slip op. at 8 (STB served Apr. 21, 2015) (same).

IV. ICCTA Preemption Analysis for State and Local Laws

There is a well-settled framework, grounded in Supreme Court precedent, that guides the analysis of whether a federal law preempts state (or local) law. In relevant part, federal preemption of state law can either be express or implied.[20] Although courts (particularly the federal courts) regularly describe the Board's preemption framework using these established terms, the Board historically has not, electing instead to use the terms "categorical" and "as-applied." The Board takes this opportunity to clarify where these concepts overlap: Express preemption is generally analyzed as "categorical" ICCTA preemption,[21] and implied preemption is generally[22] analyzed as "as-applied" ICCTA preemption. As described in more detail below, "categorical" preemption addresses state or local action that, by its nature, manages or governs rail transportation, whereas "as-applied" preemption addresses action that does so in its particular operation or effect. Each term is defined in more depth below.

A. Constitutional Framework for Preemption Analysis

Under our constitutional structure, the federal government is responsible for regulating interstate commerce. See King Cnty.—Pet. for Declaratory Ord., 1 S.T.B. 731, 735 (1996) (citing Supreme Court precedent and stating that "under the Commerce and Supremacy Clauses of the United States Constitution, direct regulation of interstate commerce by the states is prohibited"); see also Mo. Pac. R.R. v. Stroud, 267 U.S. 404, 408 (1925) ("It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."). Federal preemption flows from the United States Constitution's Supremacy Clause, which makes federal law "the supreme Law of the Land." U.S. Const., art. VI, cl. 2. The Supremacy Clause empowers Congress to enact federal laws that supersede state law by means of an express provision in a federal statute or by

[20] The Board recognizes that federal preemption analysis involves many nuances beyond whether preemption is express or implied. For example, implied preemption can be broken down into "field preemption" and "conflict preemption." See Arizona v. United States, 567 U.S. 387, 399 (2012). For purposes of this policy statement, the Board believes it is sufficient to analogize "as-applied" preemption to implied preemption without further elaboration on whether field preemption, conflict preemption, or both are the basis for the analysis.

[21] Categorical preemption is also sometimes referred to as "per se" or "facial" preemption. See, e.g., Soo Line R.R. v. City of St. Paul, 827 F. Supp. 2d 1017, 1020 (D. Minn. 2010); CSX Transp., Inc.—Pet. for Declaratory Ord., FD 34662, slip op. at 4-5 (STB served May 3, 2005).

[22] It should be noted that at least one circuit court has determined that "as-applied" preemption is a form of express, rather than implied, preemption. See City of Ozark, v. Union Pac. R.R., 843 F.3d 1167, 1171 (8th Cir. 2016). Numerous other circuit court cases have interpreted the Board's "as-applied" analysis as a form of implied preemption. E.g., Edwards, 983 F.3d at 121; Ezell, 866 F.3d at 299.

implication. See id.; see also Arizona, 567 U.S. at 398-99. Congress can show preemptive intent either expressly through the statute's language or impliedly through its purpose and structure. Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 407 (5th Cir. 2010) (en banc). Congress established a uniform federal regulatory framework governing the regulation of rail transportation through ICCTA, which both expressly and impliedly preempts state regulation. E.g., Edwards, 983 F.3d at 121 (recognizing that ICCTA's provisions "produce both express and implied preemptive effects").

ICCTA contains an express preemption provision, stating that "[e]xcept as otherwise provided in [Part A of Subtitle IV of Title 49], the remedies provided under this part 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). When a "statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption," instead following the statute's "plain wording." See Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016) (citation modified); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); see also Arizona, 567 U.S. at 399 ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."). As relevant to interstate commerce, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Id. "A principal purpose of this express federal preemption is to prevent a patchwork of local and state regulations from unreasonably interfering with interstate commerce." Tenth Ave. Neighbors, FD 36654, slip op. at 3-4. In the Board's parlance, such state laws are categorically preempted. See, e.g., Wichita Terminal Ass'n—Pet. for Declaratory Ord., FD 35765, slip op. at 6 (STB served June 23, 2015) (stating that certain actions are "expressly or categorically preempted under [section] 10501(b)").

The breadth of this grant of exclusive jurisdiction, in conjunction with the preemption provision, also forms a basis for implied preemption. Congress stated its intent to "reflect the direct and complete pre-emption of State economic regulation of railroads," and "extend[] exclusive Federal jurisdiction" to areas where state jurisdiction was previously reserved. H.R. Rep. No. 104-311, at 95. And through ICCTA, Congress affirmed that "the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system" was "intended to address and encompass all such regulation and to be completely exclusive." Id. The Board considers contrary state law to be preempted on an as-applied basis. See, e.g., Franks Inv. Co., 593 F.3d at 414 ("We adopt the [Board's] as-applied preemption analysis as appropriate for implied preemption under the ICCTA."). This rule also follows longstanding precedent, predating ICCTA, holding that the Interstate Commerce Act "preempts state laws that could operate to unreasonably burden interstate commerce." Tex. Dep't of Transp.—Pet. for Declaratory Ord. Regarding Highway Constr. In Tarrant Cnty, Tex., FD 32589, slip op. at 4 (ICC served Feb. 7, 1995); see also Reguls. Governing Fees for Servs. Performed in Connection with Licensing & Related Servs., 1 I.C.C.2d 60, 81 (1984) (evaluating whether state regulatory actions were "an unreasonable burden on interstate commerce").

B. ICCTA Preemption Framework

When faced with a question about whether ICCTA preempts a state or local law, the Board and courts first determine whether to apply a categorical preemption analysis or an as-

applied preemption analysis based on the nature of the regulation. Whether preemption is categorical or as-applied does not turn merely on whether the potentially preempted regulation is directed at rail carrier transportation specifically (such as limiting railroad operating hours) or instead is of general applicability (like zoning ordinances). Both sorts of regulations may be preempted either categorically or as-applied, depending on whether the regulation intrudes on a matter directly regulated by the Board—for example, reasonable rail rates and practices—and not on the entity subject to the regulation.[23]

It is the Board's long-established policy to analyze preemption in a way that seeks to prevent a patchwork of state and local regulation from interfering with rail transportation within the Board's jurisdiction. See Tenth Ave. Neighbors, FD 36654, slip op. at 3-4 (recognizing that "[a] principal purpose of this express federal preemption is to prevent a patchwork of local and state regulations from unreasonably interfering with interstate commerce"); CSX Transp., Inc.—Pet. for Declaratory Ord., FD 34662, slip op. at 11 (STB served March 14, 2005) (stating that "[s]ection 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce," and that the regulation at issue "would unreasonably interfere with interstate commerce, and if permitted to exist, would likely lead to further piecemeal attempts by other localities to regulate rail shipments").

1. Categorical Preemption Analysis

State or local laws are preempted categorically if they may reasonably be understood to manage or govern transportation by a rail carrier or certain related activities, including by foreclosing or restricting the railroad's ability to conduct its own operations. See Delaware, 859 F.3d at 18 (ICCTA preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation."); Wichita Terminal Ass'n, FD 35765, slip op. at 6. Categorical preemption typically applies to: (1) laws that directly regulate transportation by rail carriers, and (2) generally applicable permitting or preclearance laws when imposed on rail transportation.

ICCTA "prevent[s] states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, and abandonment)." 14500 Ltd. LLC, FD 35788, slip op. at 3; see also Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., No. 06-CV-1416, 2007 WL 2439499, at *7 (C.D. Cal. Apr. 30, 2007) (holding that rules directly regulating rail operations, such as idling, are preempted regardless of whether they are considered undue or unreasonable), aff'd, 622 F.3d 1094 (9th Cir. 2010). Categorical preemption "also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail operations or proceed with activities that the Board has authorized, such as a construction or abandonment," or to maintain its facilities.

[23] Moreover, a Board or court holding that a state law of general applicability is preempted, either categorically or as-applied, does not invalidate the state law. Instead, the ICCTA preemption determination means that the law is preempted only in its application to activities within the Board's exclusive jurisdiction under 49 U.S.C. 10501(b). Thus, a zoning ordinance that is categorically preempted when used to manage jurisdictional rail carrier transportation may still be applied generally to other industries.

14500 Ltd. LLC, FD 35788, slip op. at 3-4 & n.5. Therefore, "state law preclearance or permitting requirements that could be used to deny or unreasonably delay a rail carrier's ability to conduct rail operations typically are categorically preempted." Grafton & Upton, FD 36696, slip op. at 7 (collecting cases). Some examples include building permits, zoning ordinances, and environmental and land use permitting requirements. E.g., Jie Ao—Pet. for Declaratory Ord., FD 35539, slip op. at 5 (STB served June 6, 2012). The Board and courts have long recognized that "[i]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." City of Auburn, 154 F.3d at 1031 (affirming Board finding of preemption of state and local environmental permitting laws as applied to rail construction project).

Additionally, categorical preemption applies regardless of the stated purpose of the law. See Borough of Riverdale—Pet. for Declaratory Ord.—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 388 n.16 (1999) (noting that "even health and safety regulation is preempted where Congress intended to preempt all state and local law"). Moreover, it "does not depend on whether the practical application of the statute or regulation is narrowly tailored." Delaware, 859 F.3d at 22. The categorical "preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself." CSX Transp., Inc., FD 34662, slip op. at 3 (STB served May 3, 2005); see also Green Mountain R.R. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) (stating that "the focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation") (citation modified). Some limited fact-finding may be needed to determine "whether the state or local action falls within a category subject to categorical preemption." CSX Transp., Inc., FD 35832, slip op. at 5. But if it does, a regulation that has the effect of managing or governing transportation by rail carrier is preempted "regardless of its practical effect." Delaware, 859 F.3d at 19. And state permitting or preclearance requirements are categorically preempted "without requiring a factual analysis of their effect on transportation." See, e.g., Grafton & Upton, FD 36696, slip op. at 7 (collecting cases); see also Green Mountain R.R., 404 F.3d at 644 ("[W]hat is preempted here is the permitting process itself, not the length or outcome of that process in particular cases.").

2. As-Applied Preemption Analysis

Even when a state or local law is not categorically preempted, it may be preempted under the "as-applied" analysis if it either: (1) unreasonably burdens or interferes with transportation by rail carriers, or (2) discriminates against rail carriers.

a. Unreasonable burden or interference.

State and local laws are preempted "as applied" if they unreasonably burden or interfere with current—or future—rail transportation. This is "a fact-specific determination based on the circumstances of each case." See, e.g., Wichita Terminal Ass'n, FD 35765, slip op. at 6 (citation omitted). An as-applied analysis includes a comprehensive analysis of the likely impact of the proposed law's application to current rail operations. See, e.g., Tri-City R.R., FD 35915, slip op. at 8 (analyzing length, location, and configuration of track, its uses, and potential alternative locations for operations). The Board and courts also consider interference with planned or potential future rail operations. Certain state actions may be preempted even when no current

rail operations exist on tracks within the Board's jurisdiction, based on potential future use (for example, when a line is railbanked or when a rail carrier intends to develop a property for rail use). See, e.g., id. (analyzing future operations and effects of increases in rail traffic); Jie Ao, FD 35539, slip op. at 5 (analyzing effects on future reactivation of railbanked line, even though "there are currently no specific plans to reactivate this property," including impacts on potential rail-related construction, track bed stabilization, drainage, and maintenance).

Because ICCTA was established to prevent a patchwork of differing state and local regulations, the unreasonable-burden analysis also requires consideration of ripple effects across the broader interstate rail network. Accordingly, the analysis considers not only the facts of a single case, but also the potential impact on the interstate rail network as a whole, guarding against a "patchwork" of "potentially differing standards" as trains travel across the network. See Wichita Terminal Ass'n, FD 35765, slip op. at 10; see also Norfolk S. Ry., FD 35701, slip op. at 4-6 (finding that state inverse condemnation claims based on dust, vibration, and noise were preempted and explaining that absent preemption "all railroads on the interstate rail network could be subject to inverse condemnation actions from adjacent landowners throughout the country based on the effects of normal railroad operations"). "The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for" rail operations, nor if state regulations could "interfer[e] with the railroad's ability to uniformly design, construct, maintain, and repair its railroad line." Tubbs, FD 35792, slip op. at 5.

Again, ICCTA preemption has its limits. Federal law does not preempt local and state application of laws having a "more remote or incidental effect on rail transportation." N.Y. Susquehanna & W. Ry., 500 F.3d at 252. Therefore, ICCTA's "preemption provision does not prevent state and local governments from imposing appropriate health and safety regulations and exercising their police powers" in appropriate circumstances. Smithtown, FD 36575 (Sub-No. 1), slip op. at 4. In addition, the Board has held that condemnations of railroad property, under generally applicable state eminent domain law for "routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks." Wichita Terminal Ass'n, FD 35765, slip op. at 6. Additionally, the enforcement of "generally applicable, non-discriminatory regulations" like "[e]lectrical, plumbing and fire codes" that have only an "incidental" effect on rail transportation may be permissible. See Green Mountain R.R., 404 F.3d at 643, 645; Smithtown, FD 36575 (Sub-No. 1), slip op. at 4. And again, ICCTA preemption reaches "transportation" by "rail carrier."

But states "cannot use their police powers to indirectly regulate matters reserved to the Board . . . ." Soo Line R.R.—Pet. for Declaratory Ord., FD 35850, slip op. at 5 (STB served Dec. 23, 2014). Although pre-ICCTA, the Interstate Commerce Act explicitly preserved the states' "police power" to impose "reasonable intrastate transportation" requirements, 49 U.S.C. 10501(c) (1994), this "disclaimer regarding residual State police powers [was] eliminated as unnecessary [in ICCTA], in view of the Federal policy of occupying the entire field," H.R. Rep. No. 104-311, at 95-96. "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive." Id. at 96. Thus, "states are not

free to impose any requirements they wish in the name of their police power." CSX Transp., Inc., FD 34662, slip op. at 4-5 (STB served May 3, 2005). Although certain decisions have referred to a "police power exception" to ICCTA preemption, see Grafton & Upton R.R.—Pet. for Declaratory Ord., FD 35752, slip op. at 9 (STB served Sept. 19, 2014), what matters is not that the state or locality is exercising "police powers" as such, but that it is enforcing "generally applicable, non-discriminatory regulations" like "[e]lectrical, plumbing and fire codes" that have only an "incidental" effect on rail transportation—and even then, such regulations "must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce," or they may be preempted. See Green Mountain R.R., 404 F.3d at 643, 645; Smithtown, FD 36575 (Sub-No. 1), slip op. at 4 (ICCTA "does not prevent state and local governments from . . . exercising their police powers so long as" they do not regulate, unreasonably burden, or discriminate against rail carriers).

b. Discrimination against rail transportation.

State laws and regulations that discriminate against rail transportation may also be preempted on an as-applied basis. The ICC long held that, "in areas not governed by [f]ederal legislation, [s]tates and their subdivisions may make reasonable regulations affecting commerce under our jurisdiction so long as they are uniformly applied and do not discriminate against or constitute an undue burden on or an obstruction of commerce, in accordance with standard preemption principles." Appls. for Operating Auth.—Motor Passenger Carriers, 133 M.C.C. 62, 86-87 (I.C.C. 1982) (discussing motor carriers); see also City of Auburn, 154 F.3d at 1029 n.6 ("Before 1980, the ICC was empowered to preempt state regulation of intrastate lines only when an intrastate rate set by the state unjustly discriminated against or imposed an undue burden on interstate commerce."). Thus "state and local entities can enforce in a non-discriminatory manner" local laws passed under their police powers. Riverdale, 4 S.T.B. at 389; see also Green Mountain R.R., 404 F.3d at 643 (noting that certain "non-discriminatory regulations" would not be preempted); Delaware, 859 F.3d at 18-19 (same, after conducting extensive survey of precedent); City of Milwaukie—Pet. for Declaratory Ord., FD 35625, slip op. at 4 (STB served Mar. 25, 2013) (noting that such regulations can apply to rail carrier transportation "if they are applied without discrimination").

Courts have recognized that "[t]he non-discriminatory prong is particularly useful in determining whether a state is regulating principally to discriminate against a specific industry." N.Y. Susquehanna & W. Ry., 500 F.3d at 254. "[F]or a state regulation to pass muster, it must address state concerns generally, without targeting the railroad industry." Id.; see also BNSF Ry. v. Cal. Dep't of Tax & Fee Admin., 904 F.3d 755, 761, 768 (9th Cir. 2018) (concluding that ICCTA would preempt use of traditional state police powers to impose a fee on shipment of hazardous materials in California, where the fee would apply only to shipments "by rail"). But even so, a regulation addressing state concerns generally—which may include a fee or other charge on rail carriers or transportation by rail—cannot be used "as pretext for interfering with or curtailing rail service." N.Y. Susquehanna & W. Ry., 500 F.3d at 254; see also BNSF Ry. v. Town of Cicero, Ill., 592 F. Supp. 3d 716, 729 (N.D. Ill. 2022) (finding that the rail carrier adequately showed that a local sewer ordinance regulated railroad transportation because it singled out and targeted railroads for a rate higher than the rate paid by other commercial and

industrial properties).[24] To assess preemption in this context, the Board and courts look to whether the law "is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity." Joint Pet. for Declaratory Ord.—Bos. & Me. Corp., 5 S.T.B. 500, 509 (2001). Though not all state regulations that apply specifically to railroads are impermissibly discriminatory, such regulations may be preempted in at least two circumstances: (1) when the regulation requires something of the railroad that it does not require of other modes of transportation or similarly situated entities, or (2) when the regulation could be used to target railroads in order to cause indefinite delays to railroad operations. See Adrian & Blissfield R.R., 550 F.3d at 541-42.

As in other forms of preemption analysis, laws can be discriminatory whether or not they specifically mention rail carriers. For example, a law of general applicability passed to protect health and safety by imposing quantity, duration, and location restrictions on the storage of certain substances was found discriminatory as applied to a rail carrier's transloading facility. See Vt. Ry. v. Town of Shelburne, 287 F. Supp. 3d 493, 494 (D. Vt. 2017), aff'd, 918 F.3d 82 (2d Cir. 2019). In that instance, the court held that the timing of the passage of the ordinance (during litigation between the town and rail carrier), threshold limits, and commodities affected would, in practice, uniquely apply to the transload facility and not others who may be similarly situated, and as such, "these provisions clearly target and discriminate against the [rail carrier]'s facility." Id. at 500-01. For these reasons (as well as unreasonable burden), the ordinance was preempted. Id. at 505. Conversely, in Adrian & Blissfield R.R., an ordinance requiring rail carriers to construct, or pay for the construction of sidewalk crossings over their tracks was found non-discriminatory. See Adrian & Blissfield R.R., 550 F.3d at 539. In that case, the court first held that the ordinance did not regulate rail transportation. See id. at 540 & n.6. It went on to "apply the as-applied-preemption analysis," including the prohibition on laws that "discriminate against railroads." Id. at 541 (citation omitted). The court deemed the ordinance was non-discriminatory because (1) it "addresse[d] a general state concern"; (2) there was "no evidence" that the ordinance could be used pretextually to interfere with rail operations; and (3) the state was not "requir[ing] something of the Railroad that it does not require of similarly situated entities." Id. at 541-42.

3. Complete Takings – Refocused Categorical Approach

When state or local law is used in an attempt to entirely dispossess a rail carrier of its property rights—such as through a private claim for adverse possession, or a state's use of eminent domain—the Board and court precedents have been unclear about whether categorical

[24] In general, a fee is discriminatory if it treats railroads differently than other modes without sufficient justification. Cf. Ala. Dept. of Revenue v. CSX Transp., Inc., 575 U.S. 21, 27, 30 (2015) (discussing discriminatory taxes under the Railroad Revitalization and Regulation Reform Act of 1976 (4R Act), 49 U.S.C. 11501(b)(4)); Union Pac. R.R. v. Wis. Dep't. of Revenue, 940 F.3d 336, 337 (7th Cir. 2019) (finding a tax "singl[ing] out railroads as part of an isolated and targeted group" unlawful under the 4R Act).

or as-applied analysis should govern.[25] See, e.g., Jie Ao, FD 35539, slip op. at 1 (holding that "state law adverse possession claim is federally preempted, regardless of whether this case is analyzed as 'categorical' preemption [or] as 'as applied' preemption"). And as courts have recognized, "[t]he more a property action excludes a rail carrier and takes a property for a conflicting use, the more likely the action will be preempted." Norfolk S. Ry. v. Dille Rd. Recycling, LLC, 94 F.4th 517, 524, 527 (6th Cir. 2024) (discussing a "spectrum" of easement claims where "routine, nonexclusive easements . . . are generally not preempted," but those "that are exclusive or deemed adverse possession by another name are often preempted"). While this policy statement is not adopting a definitive approach that resolves all cases, there are strong policy arguments that state and local law claims seeking to take exclusive possession of any portion of a validly held railroad right-of-way, or to take rail carrier property that the rail carrier uses—or plans to use—to support rail transportation (i.e., property falling within the definition of "transportation" under 49 U.S.C. 10102(9)) would be better reviewed under the categorical preemption analysis.[26] And there are also strong policy arguments that claims involving more routine, non-conflicting uses—such as non-exclusive easements for at-grade road crossings, subterranean water or sewer lines, and related claims—are best assessed using an as-applied analysis as the Board does currently.

State or local regulation that seeks to take exclusive control of rail carrier rights-of-way or other property can take many different forms, including but not limited to claims for eminent domain, condemnation, or adverse possession, among others. "The agency's broad and exclusive jurisdiction over railroad operations and activities prevents application of state law claims that would take rail property for another, conflicting use, including adverse possession claims that

---

[25] State laws governing the acquisition of property by a rail carrier generally are not preempted. See, e.g., Grafton & Upton R.R. v. STB, 177 F.4th 1234, 1240 (D.C. Cir. 2026) ("ICCTA does not preempt generally applicable state property laws that 'do not unreasonably interfere with railroad operations or the Board's regulatory programs.'") (quoting CSX Transp., FD 35832, slip op. at 4); Great Walton R.R.—Pet. for Declaratory Ord., AB 1242 (Sub-No. 1), slip op. at 7, 11 (STB served June 9, 2020) (leaving it to rail carrier to establish its interest in the underlying real property under state law); see also Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore, FD 35388, slip op. at 4 & n.4 (STB served Apr. 25, 2011) (explaining that disputes over the "size, location, and nature of property rights" are most appropriately decided by courts applying state law and that "[p]roof of ownership . . . cannot be inferred from our approval to acquire and operate the rail line"); Tongue River R.R.—Constr.& Operation—W. Alignment, FD 30186 (Sub-No. 3) et al., slip op at 16 n.50 (STB served Oct 9, 2007) ("The applicant [in rail construction cases] is responsible for acquiring the land necessary to build the line."). Relatedly, the Board's jurisdiction generally does not preempt rail carrier efforts to acquire property under state eminent domain law, including where a state denies a carrier condemnation request. See Great Walton R.R., AB 1242 (Sub-No. 1), slip op. at 7 (STB served June 9, 2020); see also Great Redwood Trail Agency, AB 1305 (Sub-No. 1), slip op. at 14 ("[R]ail carriers are generally responsible for acquiring the land necessary to support their operations, including to the extent permitted by condemnation.").

[26] As noted above, limited fact-finding may be needed to determine "whether the state or local action falls within a category subject to categorical preemption." CSX Transp., Inc., FD 35832, slip op. at 5.

would interfere with rail use, present or future." 14500 Ltd. LLC, FD 35788, slip op. at 4. Using state law for these purposes "is exercising control—the most extreme type of control—over rail transportation as it is defined in section 10102(9)." Wis. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000). This type of taking "is a permanent action, and 'it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.'" City of Lincoln v. STB, 414 F.3d 858, 862 (8th Cir. 2005) (quoting Midland Valley R.R. v. Jarvis, 29 F.2d 539, 541 (8th Cir. 1928)). Further, such actions "would foreclose [the rail carrier]'s development of the property for rail 'transportation' purposes." Grafton & Upton, FD 36696, slip op. at 11.

For rail carrier property within the Board's jurisdiction, only upon abandonment does the underlying property become "ordinary property" subject to the application of state law. See, e.g., Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984). Rail lines under the Board's jurisdiction remain available for common carrier service upon reasonable request. 49 U.S.C. 11101(a). Even where the Board has authorized discontinuance of service over a rail line, such that there is no extant common carrier obligation, the line remains available for the reinstitution of service in the future. See, e.g., Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990) (stating that "discontinuance" authority allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future). The common carrier obligation is not permanently extinguished until the line has been removed from Board jurisdiction via Board-authorized abandonment. See id.

Permitting the use of state law for acquiring exclusive control of rail carrier property would contravene this statutory scheme. As the Board has explained, it would allow for the taking of "railroad [right-of-way] all over the country for non-rail use, even though the Board has not authorized the [right-of-way] to be permanently removed from the nation's rail system under Title 49." Jie Ao, FD 35539, slip op. at 7. This is an "untenable result [that] would undermine interstate commerce and the strong federal policy in favor of retaining rail property in the national rail network, where possible." Id. (citing 49 U.S.C. 10904, 10907 & 16 U.S.C. 1247(d)). Subjecting Board-jurisdictional rail line or excepted track to adverse possession, eminent domain, or condemnation claims under state law would thus "have the effect of managing or governing rail transportation," Skidmore v. Norfolk S. Ry., 1 F.4th 206, 215 (4th Cir. 2021), and "would amount to regulation of rail transportation because [they] would confer exclusive control to [someone other than the rail carrier] over property that is part of the national rail network." Jie Ao, FD 35539, slip op. at 3. With this backdrop, the Board has previously observed that "[n]either the Board nor the courts . . . have found that cities can entirely take from a railroad land the railroad has slated for present or future rail use." Norfolk S. Ry.—Pet. for Declaratory Ord. (Ala. Great S.), FD 35196, slip op. at 5 (STB served Mar. 1, 2010).[27] And the Board has held that ICCTA "preempts state law eminent domain and adverse possession claims for exclusive possession of part of a railroad right-of-way or other railroad property that could affect present or future rail transportation." Ohio Rail Dev. Comm'n—Pet. for Declaratory Ord., FD 36822, slip op. at 7 (STB served Mar. 30, 2026). As summarized by the Fourth Circuit:

[27] But see Girard v. Youngstown Belt Ry., 979 N.E.2d 1273, 1287 (Ohio 2012) (subsequently holding that eminent domain claim was not preempted).

> Indeed, allowing an individual landowner to wrest exclusive control of land within the national rail corridor away from a railroad could expose a rail carrier to death by a thousand cuts. Rail carriers would either have to be hyper-vigilant about fending off adverse possession claims along countless miles of tracks, or risk losing ownership interests in land that is (or might be) necessary to conduct business and comply with federal regulations. Because maintaining a unified federal mechanism for governing the national rail network is an issue of overwhelming national importance, federal law must preempt [state or local] quiet title claims.

Skidmore, 1 F.4th at 217.

One critical aspect of the Board's categorical preemption analysis is that such regulations are preempted without requiring a factual analysis of their effect on transportation and whether any interference may be unreasonable. With respect to claims for possession of rights-of-way subject to the Board's jurisdiction, once the threshold determination is made that the scope of the sought-after property right would exclude rail use, there are strong arguments that the analysis should be at its end. Such claims may be categorically preempted without a detailed inquiry into their effect on present or future operations and whether interference is unreasonable. Cf. Green Mountain R.R., 404 F.3d at 644 (applying categorical preemption to permitting of transloading construction and stating that "what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases"); see also Wis. Cent. Ltd., 160 F. Supp. at 1013-14 (holding that condemnation was preempted without an inquiry as to interference). The Board recognizes that condemnation claims, including those involving non-exclusive easements, have often been analyzed under the as-applied framework. See e.g., City of Lincoln, 414 F.3d at 860. In the Board's view, there are compelling policy considerations that the as-applied framework is ill-suited to address condemnation or similar claims that would foreclose rail use of rail property and rights-of-way (or portions thereof) that are subject to the Board's jurisdiction and must remain available for common carrier service. These types of takings are arguably more severe incursions on activities within the Board's exclusive jurisdiction than others that have been long recognized as categorically preempted. If a state entity is categorically prohibited from enforcing a zoning law or other preclearance requirement to prevent the construction of a rail carrier's facility on its property, it makes little sense to find that the state entity would be subject to a less rigorous as-applied framework if it were instead to seek to take the property outright through condemnation. Moreover, consideration of such exclusive takings under the as-applied preemption framework may result in patchwork regulation of standards concerning present and future rail service, contrary to the uniform licensing framework established in ICCTA. Parties contending that such rights-of-way no longer serve any bona fide rail purpose have historically directed that contention to the Board through an adverse abandonment proceeding.[28] In prior cases, rail carriers defending against actions to take their

[28] Although the Board has granted adverse abandonment of rail carrier property in certain limited circumstances, applicants bear a heavy burden. See Colo. Landowners—Adverse Aban.—Great W. Ry. of Colo. in Weld Cnty, Colo., AB 857 (Sub-No. 2), slip op. at 5 (STB

property have been required to set forth extensive analysis of the current and potential future uses of the property for rail operations. See, e.g., Grafton & Upton, FD 36696 (STB served Nov. 15, 2023); 14500 Ltd. LLC, FD 35788 (STB served June 5, 2014); Ala. Great S., FD 35196 (STB served Mar. 1, 2010). Where an action to take rail property would exclude rail use on a portion of the rail property or rights-of-way subject to the Board's jurisdiction, that consequence is ascertainable at the outset and therefore may warrant categorical treatment without further inquiry. See Jie Ao, FD 35539, slip op. at 5-7; see also Wis. Cent. Ltd., 160 F. Supp. 2d at 1013-14 (categorically preempting condemnation of rail property and stating that "the nature of the preempted state regulation is irrelevant"); Soo Line R.R., 827 F. Supp. 2d at 1022 (same and noting that "factual 'as applied' arguments concerning whether the proposed easement would unreasonably interfere with [the rail carrier]'s activities are not relevant").

It may be reasonable to conclude that certain other takings claims would not be appropriate for a categorical analysis. As noted above, there are strong arguments that non-exclusive easements, such as for crossings, warrant an as-applied preemption analysis that looks to the degree of interference with rail operations. Similarly, claims to take land under a right-of-way or under other rail property, such as for laying subterranean utility or broadband lines or similar facilities, may be analyzed under the as-applied framework. Subject to the facts and circumstances in particular cases, such non-exclusive uses may be permissible, or may unreasonably interfere with interstate rail transportation if, for example, they are placed in locations that undermine the integrity of the rail right-of-way, or are installed in a manner, or for a duration, that prevents or materially interferes with rail operations.

4. Shipper and Receiver Rights to Common Carrier Rail Service

The Board recognizes that private investment in rail infrastructure—by carriers and customers alike—is critical to maintaining and improving the expansive interstate rail network for existing customers, extending its reach to new customers, and ensuring its competitiveness with other modes of transportation. Rail transportation—unlike modes such as trucking and water carriage, which rely heavily on public infrastructure maintained by public entities (such as roads, waterways, and ports)—operates almost exclusively on privately owned and developed infrastructure. Such projects are time and labor intensive, and require high levels of coordination—and, frequently, co-investment—between rail carriers and potential customers seeking common carrier rail service.

Although the Board's jurisdiction extends only to "transportation" by, or under the auspices of, a "rail carrier," the application of state and local regulations nominally to rail customers implicates ICCTA in certain situations.

---

served July 30, 2025). The Board considers matters such as whether active shippers would lose service, whether there is any potential for continued rail service, whether the carrier has taken reasonable steps to attract traffic or rehabilitate or utilize an inoperable line, and the carrier's judgment about the need for, and usefulness of, the line. See id. at 6-7 (summarizing the state of the Board's precedent on adverse abandonments).

It has been long recognized that "ICCTA preempts both direct and indirect regulation that affects a railroad's ability to conduct common carrier operations." Smithtown, FD 36575 (Sub-No. 1), slip op. at 4 n.7 (collecting cases). Thus, for example, a local ordinance and permit restricting truck transportation "regulate[d] 'transportation by a rail carrier,' as defined by the ICCTA," because they "directly impact[ed] [the rail carrier]'s ability to move goods shipped by rail." Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158-59 (4th Cir. 2010). Preemption applied even though the ordinance and permit "regulate[d] only the trucks leaving the [railroad's transloading] Facility, not the trans-loading process itself," and did not directly "regulate any aspect of the movement of trains [or] the unloading or transloading of trains." Id. at 159. Likewise, ICCTA does not permit "regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network," which would "create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act." Bos. & Me. Corp.—Pet. for Declaratory Ord., FD 35749, slip op. at 5 (STB served July 19, 2013). Shippers have "rights provided by federal law to ask for and receive common carrier rail service from" rail carriers under the Board's jurisdiction, and so even regulations "directed solely at" a shipper would create a "fundamental conflict between" the shipper's right to request, and a rail carrier's right to provide, common carrier rail service under ICCTA. Id. at 4. Such state and local regulations conflict with Congress's purpose in codifying the common carrier obligation, because rail carriers' ability to provide service and shippers' right to receive service on reasonable request are two sides of the same coin. Cf. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004) ("[T]reating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense," because the "right to sell . . . is meaningless in the absence of a purchaser's right to buy . . . .").

The point at which activities no longer constitute "transportation by rail carrier" and certain related activities, and thus fall outside the Board's jurisdiction, can be difficult to discern in some situations—particularly for activities involving the loading and unloading of rail cars on shipper-owned track—and the Board's precedents in this area have not always been entirely consistent. In Boston & Maine, FD 35749, slip op. at 4-5, the Board suggested that state regulation of a customer's private, non-jurisdictional track would be preempted if it impacted common carrier service. On the other hand, in SEA-3, Inc.—Petition for Declaratory Order (SEA-3), FD 35853, slip op. at 6-7 (STB served Mar. 17, 2015), the Board determined that a city's challenge to a zoning decision allowing an existing rail customer to increase its use of rail common carrier service by constructing additional rail berths at its transloading facility was not preempted. And, in Valero Refining Co.—Petition for Declaratory Order (Valero), FD 36036, slip op. at 2, 6 (STB served Sept. 20, 2016), the Board held that it did not have jurisdiction over an existing rail customer's construction of an off-loading facility designed to receive common carrier unit train service. In Valero, state and local authorities denied a permit for construction of the project, based at least in part on the impacts of increased common carrier service, as well as impacts of the commodity likely to be carried in that service. See id. at 2.[29]

[29] The Board has been made aware that Valero abandoned the rail transload terminal project following the Board's decision and announced its intent to cease refining operations at the facility in 2026, see Valero, Valero Announces Notice to the California Energy Commission

Thus, the Board provides here a modified analytical framework that, subject to the arguments and facts presented in particular proceedings, may inform an evaluation of whether regulations nominally directed at rail customers are, in practice and in legal effect, regulations of transportation by rail carriers that are preempted by ICCTA. The potential framework begins with a fact-specific threshold inquiry consisting of two questions. First, is the facility or project at issue developed or used to receive or tender common carrier rail service—a transload, off-loading, or similar facility whose function is the interchange of traffic with a rail carrier? Second, does the state or local action restrict, condition, or dictate common carrier service to that facility, such as the volume, frequency, timing, configuration, or commodity mix of common carrier service? Where the answer to both is yes, the action may regulate transportation by rail carrier in practical effect, and the categorical or as-applied framework, as appropriate, would apply depending on the nature of the regulation. A regulation that, for example, caps the rail traffic a facility may receive binds the carrier as surely as one addressed to the carrier by name: the carrier cannot lawfully tender the service, the shipper cannot lawfully receive it, and the common carrier obligation of 49 U.S.C. 11101(a)—and the shipper's correlative right to service on reasonable request—is displaced by local command. See Boston & Maine, FD 35749, slip op. at 4-5; cf. Engine Mfrs. Ass'n, 541 U.S. at 255. Where either answer is no—such as where the object of the regulation is the facility's non-rail activities, not the receipt or tender of rail service—section 10501(b) is not implicated (unless the action discriminates against rail transportation, which is an independent basis for analyzing preemption).

This potential framework would refine the principle recognized in Boston & Maine—state or local action directed at a rail customer implicates section 10501(b) where it operates, in practical effect, on the common carrier service the customer receives. See Bos. & Me., FD 35749, slip op. at 4-5. The threshold inquiry clarifies the limit and scope of this principle, and its rationale is evident from the examples of SEA-3 and Valero. In SEA-3, a city sought to use state and local regulations to prevent an already rail-served customer from increasing its facility from three to eight rail berths. If the construction was not allowed to occur, the result from the local regulation would be no different than a locality limiting or directing a rail carrier's execution of its common carrier obligations. In practice, it would dictate that only three, and not

---

Regarding its Benicia, California, Refinery (Apr. 16, 2025), https://investorvalero.com/news/news-details/2025/Valero-Announces-Notice-to-the-California-Energy-Commission-Regarding-its-Benicia-California-Refinery/default.aspx, and Valero's website indicates that full idling of all processing units at this facility was completed in April 2026, see Valero, Benicia Refinery, https://www.valero.com/about/locations/benicia-refinery (last visited Sept. 30, 2026). Additionally, although the Board has not revisited Valero in the decade since its issuance, the Board is aware that state and local restrictions on rail-served facilities have been promulgated and upheld as beyond the Board's jurisdiction in numerous circumstances. See, e.g., Montana v. City of Portland, No. 3:23-cc-00219-YY, 2024 WL 1007865, at *1, 12 (D. Or. Feb. 26, 2024) (finding local ordinance restricting the construction of bulk fossil fuel terminals was, among other things, not preempted because plaintiffs did not allege they were rail carriers or performing activities on behalf of or under the auspices of a rail carrier), rep. & recommendation adopted in part, rejected in part, No. 3:23-CV-00219-YY, 2024 WL 3326230 (D. Or. July 5, 2024).

eight, cars could be sent to the customer at any given time. And to provide the same amount of product, the common carrier must make three trips, rather than one, to the customer facility, and must also change its operational schedule, yard storage, and any number of other operational decisions accordingly. Similarly, in Valero, the refusal by state and local officials to grant permission for construction not only dictated the number of cars and type of service (unit train vs. manifest) that the carrier could provide, but also imposed restrictions on the types of commodities that the rail carrier could tender to its customer, thus preventing the rail carrier from being able to fulfill its common carrier obligation. These types of decisions are ordinarily within the decision-making control of rail carriers in providing service to their customers, but were implicated by local regulation of rail customers in both cases. SEA-3 and Valero read "transportation by rail carrier" to ask what is the stated object of the regulation, whereas a better reading might ask what was regulated in effect. The Board recognizes that rail service provided by a common carrier remains transportation by rail carrier even when the restriction on such service is addressed to the customer and takes this opportunity to reemphasize that principle.

To be sure, rail customers are not directly under the Board's jurisdiction. And the Board expects that much regulation of rail customers' facilities is, and should remain, beyond the Board's jurisdiction. For example, a zoning ordinance would likely be preempted if it prevented a rail carrier from developing a transload facility. By contrast, ICCTA would not prevent enforcement of that same ordinance against a private business developing a manufacturing facility with an incidental rail component, or against the portions of the facility unrelated to the receipt or tender of common carrier rail service, unless there was evidence that the ordinance was being applied in a discriminatory manner against rail transportation. Likewise, if the construction projects in SEA-3 and Valero implicated local zoning or environmental ordinances, the ordinances' application to these customers would not implicate ICCTA to the extent that they apply to portions of the project unrelated to receiving common carrier rail service. And, in any event, many local ordinances—such as electrical, fire, plumbing, and others—would still apply, just as they do to rail carrier facilities.

C. Commonly Arising State and Local Preemption Issues

There are numerous types of state laws or regulations that frequently result in litigation about preemption. Below is a list of common situations, and a summary of how such issues have been analyzed for preemption purposes. It should be noted that the list is not exhaustive, and that there are additional precedents on many of the issues discussed below, that at times come to differing conclusions based on the facts of the particular case. Moreover, the Board here does not take a position on how any potential future case that may come to the Board (or a court analyzing preemption) will, or should be, resolved. Rather, this list is meant to inform the public about relevant existing precedents on certain topics, in the hopes that this information will help parties proactively resolve disputes at an early stage.

1. Abandonment of Rail Property Interests.

As long as the Board retains jurisdiction over rail rights-of-way, only the Board can grant abandonment authority, and state law abandonment claims are preempted. Grantwood Vill. v. Mo. Pac. R.R., 95 F.3d 654, 658 (8th Cir. 1996). For example, state laws providing that an easement used for rail purposes can be abandoned simply through non-use, or where the rail

carrier has removed track and ties, have been found to be federally preempted. Great Walton R.R., AB 1242 (Sub-No. 1), slip op. at 6-8, 13 (STB served Feb. 27, 2026) (finding that ancillary track was not abandoned and remained subject to the Board's jurisdiction and that, therefore, a prior state court ruling that the easement for the track had been abandoned under state law was preempted); see also Ala. R.R.—Aban. Exemption—in Escambia, Conecuh, & Monroe Cntys., Ala., AB 1324X, slip op. at 2 n.4 (STB served Oct. 24, 2022) (stating that a state court's "assertion of jurisdiction" to find that railroad abandoned a rail line right-of-way as a matter of "state law" is "flatly inconsistent with the Board's exclusive and plenary authority over the abandonment of rail lines"); Jackson Cnty.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982, slip op. at 5, 7 (STB served July 31, 2019) (rejecting argument that rail line was "abandoned under Missouri law when the tracks and ties were removed" because it is "well settled" that the Board has exclusive jurisdiction over abandonment). Federal preemption of state abandonment laws applies both to common carrier/mainline track and ancillary/excepted track. Great Walton R.R., AB 1242 (Sub-No. 1), slip op. at 6-7 (STB served Feb. 27, 2026).[30] It should be noted that preemption may apply to forestall eviction or removal of the rail carrier from rail property even in situations where a rail carrier voluntarily agreed to a time-limited property interest. See Fillmore & W. Freight Serv., LLC—Emergency Pet. for Declaratory Ord., FD 35813, slip op. at 3 (STB served Mar. 12, 2015) ("It is well settled that, without abandonment or discontinuance authority from the Board, the enforcement of a state or local order that would prevent operation over a railroad line is precluded."); see also Pinelawn Cemetery, FD 35468, slip op. at 9-11 ("[E]ven if the state court were to find that the 1904 Lease was not renewed, Pinelawn could not use that ruling to evict the Railroads from the property.").

2. Complete takings of rail carrier property.

Takings of rail property can come in many different forms, including but not limited to claims for eminent domain, condemnation, adverse possession, prescriptive easement, or quiet title, among others. The Board and courts have recognized that state law actions which "would remove the land at issue from the national railway system and deprive [a common carrier] of the ability to use the land to support its rail transportation operations" are typically preempted. Skidmore, 1 F.4th at 214-15 (holding that state actions for quiet title and an exclusive prescriptive easement were preempted); see also City of Lincoln, 414 F.3d at 862 (same for eminent domain claim); Grafton & Upton, FD 36696, slip op. at 1 (same for eminent domain claim); 14500 Ltd. LLC, FD 35788, slip op. at 4-5 (same for claims of adverse possession and exclusive prescriptive easement); Jie Ao, FD 35539, slip op. at 6-7 (same for adverse possession claim). But see Girard, 979 N.E.2d at 1287 (holding that an eminent domain claim was not preempted where the carrier claimed a speculative future need for rail service, but the railroad property had remained vacant for 15 years, and the carrier appeared to undermine its own claim

[30] A Board determination that a state court ruling finding a rail line has been abandoned under state law is preempted does not affect the state court's ruling on who has title to the property. The Board has acknowledged that it is "well settled that the interpretation of deeds and the determination of who owns good title to property are issues of state law" that are most appropriately decided by state courts. Great Walton R.R., AB 1242 (Sub-No. 1), slip op. at 6 n.8 (STB served Feb. 27, 2026) (citing Cent. Kan. Ry.—Aban. Exemption—in Marion & McPherson Cntys., Kan., AB 406 (Sub-No. 6X), slip op. at 2 (STB served May 8, 2001)).

by entering into an agreement to sell the property for purposes unrelated to rail transportation).[31] Although Board and court decisions have at times reviewed such exclusive takings under the "as-applied" standard, others have found preemption "regardless of whether th[e] case is analyzed as 'categorical' preemption [or] as 'as applied' preemption . . . ." Jie Ao, FD 35539, slip op. at 1. Synthesizing these analyses, takings of exclusive control of rail property and rights-of-way are best understood as categorically preempted, whereas non-exclusive takings may be reviewed under an as-applied approach.

The Board and courts have recognized that removal of part of the right-of-way or a railroad's property, including of currently unused property, could foreclose or unduly restrict present or future transportation by the rail carrier. E.g., Grafton & Upton, FD 36696, slip op. at 7. Rail carriers defending such cases have elaborated on the operational issues that may be raised by the removal of rail property, even when it is not being used directly. For example, rail carriers have expressed the importance of the property and rail yard to their overall network (14500 Ltd. LLC); the necessity to conduct maintenance or handle derailments (City of Lincoln); maintenance of retaining walls; and the placement of signal towers (Ala. Great S.). Carriers have also highlighted the potential of future use, such as for the planned construction of a transload facility (Grafton & Upton, Docket No. FD 36696); available capacity to accommodate future traffic growth (14500 Ltd. LLC, Ala. Great S.); and the ability to conduct maintenance including slope stabilization (Jie Ao). Accordingly, a broad array of present or future transportation-related uses could support a finding that attempts to take rail property are categorically preempted.

Such cases can sometimes present complex policy issues. For example, in Wisconsin Central Ltd., a city and state department of transportation sought to condemn rail property in order to realign a highway in an effort to reduce traffic accidents. 160 F. Supp. 2d at 1011. And in City of Lincoln, the town sought to take a strip of rail property to improve its storm drainage system and complete a commuter trail for pedestrians and bicyclists that would connect campuses at a state university. 414 F.3d at 859; see also Ala. Great S., FD 35196, slip op. at 4 (condemnation for creation of a public park with amphitheater, children's playground, and other features). Notwithstanding these worthy public purposes, both actions were held to be preempted by ICCTA.

3. Utilities and pipelines within the right-of-way.

The Board and courts typically view actions seeking condemnation for the purposes of constructing overhead or underground utilities, such as water or sewer lines or wire crossings, under the as-applied framework. The Board has determined that "routine, non-conflicting uses such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." Maumee & W. R.R.—Pet. for Declaratory Ord., FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also City of Lincoln, 414 F.3d at 863 (addressing storm sewer project and noting that "it is well established that nonconflicting, nonexclusive easements across railroad

[31] In Grafton & Upton, FD 36696, the Board analyzed Girard, distinguished it on the facts presented, and for that reason, determined that "[t]he Board need not decide whether to endorse the court's analysis in Girard." Grafton & Upton, FD 36696, slip op.at 8.

property are not preempted if they do not hinder rail operations or pose safety risks"). Relevant considerations include whether the facility will be placed in a location that would impair the railroad's use of the right-of-way (such as by undermining the integrity of underlying real property) or whether the timing and duration of the activity would hinder the rail carrier's operations. The Board has also focused on whether the crossings would be on the surface level or underground, and the amount of access to the right-of-way that would be conferred. See, e.g., City of N. Chi., FD 36619, slip op. at 3-4 (acknowledging that a state court had already determined that a condemnation action for a water main easement crossing under rail property was preempted but providing guidance explaining that in cases where preemption is found the state court may be able to craft a remedy that avoids unreasonable interference with rail operations and would thus not be preempted); E. Ala. Ry.—Pet. for Declaratory Ord., FD 35583, slip op. at 6-7 (STB served Mar. 9, 2012) (holding that condemnation for construction of underground water and sewage lines was not preempted).

4. Blocked Crossings.

State and local laws that limit a rail carrier's ability to block at-grade road crossings have been found to be preempted in the courts, regardless of whether the regulations apply to moving or stationary trains. These laws generally attempt to regulate the amount of time that a train may block a road crossing and contain a variety of terms related to the amount of time the train may block a crossing; whether the train is moving or stopped; the permissible reasons for doing so; and various penalties. Although the Board itself has not had occasion to rule on any blocked crossings law outside of the permitting process—and thus has never resolved the issue of whether ICCTA preemption or FRSA preemption should apply as it pertains to blocked crossings—courts that have applied ICCTA preemption have regularly found such laws preempted. Anti-blocking laws have been found to be preempted by ICCTA because they "purport[] to regulate rail transportation by dictating how railroads conduct their operations at crossings," CSX Transp., Inc. v. Williams, No. 3:16CV2242, 2017 WL 1544958, at *2 (N.D. Ohio Apr. 28, 2017), including train speed and length, scheduling, the performance of federally mandated air brake tests, the coupling and uncoupling of cars, switching, repairs, safety checks, and waiting for tracks to clear. See BNSF Ry. v. Hiett, 22 F.4th 1190, 1194 (10th Cir. 2022) ("[M]any factors determine the time that a train will block a grade crossing, including the train's speed and length, whether the side track intersects the grade crossing, when a railroad schedules a train to pass, and the time required to comply with federally mandated tests and procedures."), cert. denied sub nom. City of Edmond v. BNSF Ry., 142 S. Ct. 2835 (2022); Elam, 635 F.3d at 807. Because such regulations dictate rail operations directly, courts have uniformly found them preempted, and their reasoning aligns with the Board's categorical framework. See, e.g., Hiett, 22 F.4th at 1194 (finding a blocked crossing statute preempted, explaining that "it too effectively regulates rail operations—a task the ICCTA reserves for the STB"); Elam, 635 F.3d at 807 (finding a blocked crossing statute completely preempted because the statute directly attempted to manage the carrier's switching operations, including the carrier's decisions as to train speed, length, and scheduling); Williams, 2017 WL 1544958, at *2 (finding a blocked crossing statute categorically preempted because it purported "to regulate rail transportation by dictating how railroads conduct their operations at crossings").

In 2022, and again in 2024, the United States Supreme Court declined to review, respectively, a federal circuit court and a state supreme court decision invalidating state blocked-

crossing laws as federally preempted, leaving those decisions in place. See City of Edmond, 142 S. Ct. 2835 (2022); Ohio v. CSX Transp., Inc., 144 S. Ct. 545 (2024).

5. Pedestrian or Road Crossings of Rail Lines

State or local laws that dictate where track crossings must be constructed or closed are evaluated for preemption on an as-applied basis. Non-exclusive easements for at-grade road crossings may be considered routine, non-conflicting uses of rail carrier property. See Wichita Terminal Ass'n, FD 35765, slip op. at 6 (citation omitted). State actions related to such crossings are therefore permissible if the actions do not unreasonably burden or interfere with rail transportation. Id. at 7. Because the Board utilizes an as-applied preemption analysis, such cases require a factual analysis of the specific crossing at issue. E.g., Franks Inv. Co., 593 F.3d at 415 (requiring evidence about specific crossings at issue, rather than general evidence about crossings, in denying as-applied preemption challenge to crossing case). Such evidence can include the location of the crossing, present or future operational impacts on the rail carrier, and potential alternatives. See, e.g., Wichita Terminal Ass'n, FD 35765, slip op. at 9 (analyzing proposed crossing's potential impacts on traffic, capacity, and operations); Tri-City R.R., FD 35915, slip op. at 8-9 (same, including switching and storage operations, as well as present and future impacts). For example, in Wichita Terminal Association, FD 35765, the Board found that a state court order requiring construction of a road crossing over tracks at a specific location was preempted. At the same time, however, the Board noted that it did "not conclude that any crossing . . . necessarily would be preempted," suggesting that an alternative location for a crossing may not impose the same burden or interference with rail transportation. Id. at 10-11; see also City of Ozark—Pet. for Declaratory Ord., FD 36104, slip op. at 5-6 (STB served July 28, 2017) (holding that, based on facts presented, the city's effort to force reinstallation of a removed at-grade crossing would unreasonably interfere with present and future railroad operations and cause undue safety risks under an as-applied preemption analysis). And a court has found that a state statute requiring pedestrian crossings over rail tracks was not preempted where operational impacts were limited by giving the railroads discretion as to the manner of construction. See Adrian & Blissfield R.R., 550 F.3d at 542.

6. Locomotive Idling.

State or local laws that regulate idling trains have been found to be categorically preempted. These regulations may include restrictions on the amount of time, hours, reasons for, or location of idling, including record-keeping requirements. Unlike generally applicable building codes, such regulations specifically target railroads and directly regulate rail operations. E.g., Ass'n of Am. R.Rs., 2007 WL 2439499, at *7 (holding that rules related to railroad idling were categorically preempted). These laws place the state or local regulator, rather than the railroad, in the position to "mak[e] operational decisions about when, where, and how long locomotives could idle." Delaware, 859 F.3d at 22. Therefore, regardless of the purpose of the state or local law, and regardless of whether the state or locality has attempted to narrowly tailor the law or provide exceptions, idling-related laws have been found to be categorically preempted. For example, in Delaware, a state statute generally prohibiting idling in residential neighborhoods at night was categorically preempted, even though the statute only prohibited "non-essential" idling and contained exemptions for certain enumerated purposes, because the statute directly managed railroad operations regardless of its practical effect. See id.

7. Environmental Permitting, Zoning Ordinances, and Land Use Laws.

State or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, have been found to be categorically preempted as to rail carrier transportation and related infrastructure because ICCTA "prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier the ability to conduct rail operations." Soo Line R.R.—Pet. for Declaratory Ord., FD 35850, slip op. at 4 (STB served Dec. 23, 2014). Otherwise, states or localities could interfere with interstate commerce by denying, or indefinitely delaying, approval of rail projects or operations approved by the Board and subject to its exclusive jurisdiction. See Green Mountain R.R., 404 F.3d at 643; Grafton & Upton, FD 36696, slip op. at 7 (collecting cases); CSX Transp., Inc., FD 35832, slip op. at 4 (recognizing that state or local authority to "deny or unreasonably delay" construction and maintenance "would irreconcilably conflict with the Board's authorization of those facilities and operations"). For example, the Board has held that a local conservation commission's order seeking to impose environmental permitting requirements on the construction of a rail carrier's transload facility was categorically preempted. Grafton & Upton, FD 36696, slip op. at 12. However, state and local regulations that have a "more remote or incidental effect on rail transportation," have been found not to be preempted. N.Y. Susquehanna & W. Ry., 500 F.3d at 252 (internal citation omitted). Resolution of issues regarding such remote or incidental effects may require discussion and cooperation between communities and rail carriers. See Joint Pet. for Declaratory Ord., 5 S.T.B. at 508 (noting that some environmental requirements, such as requiring carriers to share their plans with the community or to submit environmental monitoring or testing information for an appropriate period of time after operations begin, may not be preempted).

8. Noise, Smoke, Appearance, and Other Nuisance-Related Claims.

State or local regulation of nuisance-related issues, such as noise caused by rail operations,[32] smoke, appearance of rail property, and other related matters have been found to be categorically preempted when related to activities under the Board's jurisdiction. These issues may also arise in litigation raising state or common law claims for nuisances caused by rail operations. See, e.g., Pace, 613 F.3d at 1068-69 (holding that a lawsuit alleging that construction and operation of side track caused an increase in noise and smoke that made land unusable was preempted). Such state or local actions can directly regulate, and potentially provide remedies for, rail carrier operations under the Board's exclusive jurisdiction and thus may be preempted by ICCTA, even though ICCTA provides no remedy. See, e.g., Friberg v. Kan. City S. Ry., 267 F.3d 439, 443 (5th Cir. 2001) (holding that state tort claims related to trains on a railroad's side tracks blocking access to plaintiff's property were preempted, explaining that "it is beyond peradventure that regulation of [the railroad's] train operations, as well as the construction and operation of the [railroad's] side tracks, is under the exclusive jurisdiction of the STB . . . ."); Lange—Pet. for Declaratory Ord., FD 35037, slip op. at 4 (STB served Jan. 28, 2008) (stating that remedies for nuisance claims are preempted); Joint Pet. for Declaratory Ord. 5 S.T.B. at 510

[32] Although not enforced by the Board, the Board notes that under the Noise Control Act of 1972, other federal agencies have established and enforce standards related to railroad noise which preempt state or local standards. See 42 U.S.C. 4916; 40 CFR Part 201; 49 CFR Part 210.

(holding that a local ordinance declaring an automobile unloading facility to be a "noisome trade" was preempted) However, such claims may not be preempted if they do not directly implicate subject matter within the Board's jurisdiction. See Emerson, 503 F.3d at 1130-32 (holding that a railroad's disposal of railway ties into a wastewater drainage ditch adjacent to its tracks was not "transportation" under ICCTA and thus state tort claims related to flooding of adjoining property were not preempted).

9. Design, construction, or maintenance of rail infrastructure

State law regulations, including tort claims, that dictate the design, construction or maintenance of rail lines and rail transportation facilities under the Board's jurisdiction have been found to be categorically preempted. See CSX Transp. Inc., FD 35832, slip op. at 4-5 (collecting cases). Common cases include claims for damages caused by flooding or other events that claimants assert were caused by rail carrier infrastructure decisions, such as the design of bridges or embankments, materials used in construction, maintenance of culverts, and related operational decisions. E.g., Edwards, 983 F.3d at 122 (preempting flooding damage claims). But see Emerson, 503 F.3d at 1130-32 (holding that state tort claim related to flooding on plaintiffs' property allegedly caused by a railroad's disposal of railway ties into a wastewater drainage ditch adjacent to its tracks was not preempted because the railroad's disposal did not qualify as "transportation" under ICCTA); Hatcher—Pet. for Declaratory Ord., FD 35581, slip op. at 5-8 (STB served Sept. 21, 2012) (holding that state tort claims related to flooding and damage to plaintiffs' property allegedly caused by defendant railroads' blocking drainage infrastructure near the rail line during salvage operations following Board-authorized abandonment of the rail line were not preempted). As the Board has recognized, such claims can "unduly burden interstate commerce and amount to impermissible state regulation of [a rail carrier]'s operations by interfering with the railroad's ability to uniformly design, construct, maintain, and repair its railroad line. The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for these important activities, which are an integral part of, and directly affect, rail transportation." Tubbs—Pet. for Declaratory Ord., FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd, 812 F.3d 1141 (8th Cir. 2015).[33] However, claims based on violation of FRA's regulations and standards would be subject to the federal harmonization analysis. See Tubbs, FD 35792, slip op. at 7 (declining to preempt, under ICCTA, claims based on uniform federal regulations under the FRSA).

10. Breach of contract.

Under 49 U.S.C. 10709, Congress has expressly provided that contracts between rail carriers and purchasers of rail services to provide such services are not subject to the rail provisions of 49 U.S.C. subtitle IV (Part A). Because Part A of subtitle IV includes the preemption provision at 49 U.S.C. 10501(b), enforcement of such contracts in court is not preempted. Additionally, actions under state law for breach of a contract between a rail carrier

[33] The Board determined in Tubbs that the state law claims were preempted regardless of whether they were analyzed as "categorical" or "as-applied," Tubbs, FD 35792, slip op. at 4, though on appeal, the Eighth Circuit utilized the as-applied framework, see generally Tubbs, 812 F.3d. 1141.

and other parties are generally not preempted. As the Fourth Circuit has explained, "[v]oluntary agreements between private parties," and the "enforcement" of such contracts, "are not presumptively regulatory acts." PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 218-19 (4th Cir. 2009) (explaining how the "history and purpose of ICCTA . . . suggest that such agreements do not fall into the core of economic regulation that the ICCTA was intended to preempt."). The Board has stated that "voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." Twp. of Woodbridge, N.J. v. Consol. Rail Corp., 5 S.T.B. 336, 340 (2000); see also Joint Pet. for Declaratory Ord., 5 S.T.B. at 508 ("[P]reemption provisions should not be used to shield a carrier from its own commitments . . . ."). However, depending on the facts and circumstances of a specific case and the degree to which a voluntary agreement unreasonably interferes with interstate rail operations, certain agreements may be subject to an as-applied preemption analysis. See Woodbridge, 5 S.T.B. at 340 (declining to find enforceable agreement preempted where, among other things, there was not evidence that enforcement of the agreement would unreasonably interfere with the railroad's operations); see also PCS Phosphate, 559 F.3d at 221 ("This is not to say that a voluntary agreement could never constitute an 'unreasonable interference' with rail transportation, but the facts of this case indicate that any interference is not unreasonable . . . .").

11. Routing of traffic.

The Board and courts have found that ICCTA categorically preempts state and local laws that seek to regulate when and where particular commodities can be carried by rail. See, e.g., CSX Transp., Inc., FD 34662, slip op. at 5 (STB served May 3, 2005). In one example, the District of Columbia passed a law banning transportation of certain classes of hazardous commodities within an area of the District without a permit from the D.C. Department of Transportation. CSX Transp., Inc.—Pet. for Declaratory Ord., FD 34662, slip op. at 2 (STB served Mar. 14, 2005). The Board found that such regulation "plainly" fell within the types of actions categorically preempted under section 10501(b), explaining that to the extent the D.C. law "would require a permit to move certain rail traffic through protected parts of the City, it is directly covered by the categorical preemption against state and local permitting processes." CSX Transp., Inc., FD 34662, slip op. at 5 (STB served May 3, 2005). "And to the extent that the D.C. Act would otherwise ban the specified movements, it would directly conflict with the Board's authority over rail operations, including matters such as routing over which any state action is expressly preempted by section 10501(b)." Id. (noting that other federal regulatory regimes may also apply in a complementary fashion).

V. ICCTA Harmonization Analysis for Federal Law

By its terms, ICCTA's express preemption provision applies to federal, as well as state, law. 49 U.S.C. 10501(b). When, however, the question presented is the interaction between ICCTA and another federal law, the express or implied preemption framework flowing from the Supremacy Clause is inapplicable. The Board therefore does not utilize its categorical/as-applied framework in such cases, and instead follows the tests set forth in the federal courts to analyze whether the laws can be harmonized and, if not, whether the later-enacted law repealed the other by implication. These federal-federal conflicts have mostly arisen in the realms of rail safety and

environmental regulation, but the Board would apply similar principles to other potentially conflicting federal laws.

A. Constitutional Framework for Harmonization Analysis

"When confronted with two Acts of Congress allegedly touching on the same topic," the Board[34] and courts are "not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (citation modified). When there is an apparent conflict between ICCTA and another federal law, the Board or a court "must strive to harmonize the two laws, giving effect to both laws if possible." Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir. 2010). However, if there is a "positive repugnancy" or an "irreconcilable conflict" between the laws, the question becomes whether the later-enacted statute repealed the earlier-enacted statute to the extent of the conflict. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976); see also Joint Pet. for Declaratory Ord., 5 S.T.B. at 509 n.28. Whether one law "displaces the other" requires "a clearly expressed congressional intention." Epic Sys. Corp., 584 U.S. at 510. And where "there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (citation modified). Thus, the statutes are harmonized by giving effect to the more specific statute. See generally Patten v. District of Columbia, 9 F. 4th 921, 926 (D.C. Cir. 2021) ("In seeking to harmonize [disparate] statutes . . . [w]e are guided by the 'old and familiar rule' that 'the specific governs the general,' which is 'particularly true' where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'") (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645-46 (2012)).

The Board conducts this analysis against the backdrop of the expansive, exclusive, and specific jurisdiction that ICCTA grants over transportation by rail carriers, which is the manifestation of Congress's intent to ensure uniform federal regulation. Ass'n of Am. R.R.s, FD 36369, slip op. at 14 ("Congress clearly intended that [section] 10501(b) preempt laws that create an irreconcilable conflict with the free flow of interstate commerce by imposing a patchwork of regulation on interstate rail transportation."). ICCTA will often be the more specific statute insofar as it applies specifically to the rail industry, although there are numerous other federal laws related to the rail industry, and the Board would accord appropriate weight to the specificity of those laws in any harmonization analysis.[35] See Pittsburgh & Lake Erie R.R. v.

[34] The Board has previously affirmed that it, as well as the courts, can engage in this federal-federal harmonization and implied repeal analysis. Ass'n of Am. R.R.s—Pet. for Declaratory Ord. (AAR Declaratory Ord.), FD 36369, slip op. at 9, 12 (STB served Dec. 30, 2020). This is because "[t]he statute requires, in certain circumstances, the preemption of other federal laws and does not prohibit the Board from opining on its interpretation of the other federal laws to determine where ICCTA preemption applies." Id. at 9.

[35] At the time of this writing, these include, but are not limited to, the Railroad Retirement Act of 1974 (45 U.S.C. 231 et seq.); the Railway Labor Act (45 U.S.C. 151 et seq.);

Ry. Lab. Executives' Ass'n, 491 U.S. 490, 511 (1989) (discussing harmonization of the Railway Labor Act and Interstate Commerce Act).

B. Examples of Harmonization of ICCTA and other Federal Laws

The analytical framework for harmonization described above would apply in any Board analysis of another federal law for a determination of ICCTA preemption. There are two illustrative examples of federal laws that the Board has previously addressed—related to rail safety and environmental laws—that are discussed in more detail below. The Board could apply a similar analysis when presented with questions about the preemptive effect of ICCTA when harmonization with another federal law is required.

1. Harmonization with FRSA

Congress enacted the FRSA in 1970 "to promote safety in every area of railroad operations." 49 U.S.C. 20101. FRSA instructed the Secretary of Transportation, who has delegated this power to the FRA, to "prescribe regulations and issue orders for every area of railroad safety." Id. 20103(a); 49 CFR 1.89(a). Under the FRSA preemption provision, Congress provided that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. 20106(a)(1). To ensure "[n]ational uniformity of regulation" in this area, FRSA preempts state law obligations aimed at a "subject matter" addressed in regulations issued thereunder. Id. 20106(a)(2); see also Duluth, Winnipeg & Pac. Ry. v. City of Orr, 529 F.3d 794, 796 (8th Cir. 2008) (FRSA "generally preempt[s] state laws covering the same subject matter" as Department of Transportation (DOT) or Department of Homeland Security (DHS) standards).

Nonetheless, in some limited situations, FRSA might lead to the patchwork of rail regulations that ICCTA is designed to avoid, because FRSA contains a narrow savings clause permitting states to regulate where FRA has not yet issued rail safety[36] regulations covering "the subject matter of the State requirement." 49 U.S.C. 20106(a)(2); Duluth, Winnipeg & Pac. Ry., 529 F.3d at 796 (stating that FRSA "creates a narrow exception to preemption through its savings clause"). FRSA also allows states to "adopt or continue in force an additional or more stringent" rail safety law or regulation, but only if it "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce."

---

the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.); and the Federal Employers' Liability Act (45 U.S.C. 51 et seq.).

[36] Certain state and local regulations that impact rail carriers may in reality be related to public safety, rather than rail safety, which could impact the Board's analysis of its jurisdiction and harmonization with FRSA. See Br. for United States as Amicus Curiae, Ohio v. CSX Transp., Inc., No. 22-459, OSG Amicus Brief, 2023 WL 8112708, at *14 (U.S. Nov. 21, 2023) [hereinafter OSG Amicus Brief] ("It is debatable whether a blocked-crossing statute . . . is 'related to *railroad* safety,' 49 U.S.C. 20106(a)(1) (emphasis added), given that [the] safety-related concerns principally involve the safety of emergency-services users and other members of the public—not the safety of railroads and railroad operations.").

49 U.S.C. 20106(a)(2). Courts have interpreted the "essentially local" safety hazard requirement narrowly to address "local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards." Nat'l Ass'n of Regul. Util. Comm'rs v. Coleman, 542 F.2d 11, 14-15 (3d Cir. 1976); see also Duluth, Winnipeg & Pac. Ry., 529 F.3d at 798 (collecting cases). And notably, the exception directly requires that such regulations must be "not incompatible" with federal laws.

In 2007, Congress enacted an amendment clarifying the savings clause in section 20106. See 49 U.S.C. 20106(b); see also Bates v. Mo. & N. Ark. R.R., 548 F.3d 634, 637 (8th Cir. 2008). The amendment specifically provided that nothing within section 20106 "shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage" alleging that a party: (A) failed to comply with an applicable Federal standard of care established by DOT or DHS; (B) failed to comply with its own plan, rule, or standard that it created pursuant to an applicable DOT or DHS regulation or order; or (C) failed to comply with a State law, regulation, or order that is not incompatible with the provisions of section 20106(a)(2) described above. 49 U.S.C. 20106(b).

By contrast, ICCTA expressly overrides "remedies provided under [other] Federal . . . law[s]" to the extent of a conflict. 49 U.S.C. 10501(b). ICCTA was enacted more recently (1995) than the authority at section 20103 and the savings clause at section 20106(a)(2). See In re Fed.-Mogul Global Inc., 684 F.3d 355, 374 (3d Cir. 2012) (citation omitted) (declining "to limit the preemptive scope" of a statute based on the existence of an older, narrower provision covering a closely related topic). And if there is a potential conflict with the tort law clarification to the FRSA savings clause, enacted in 2007 at section 20106(b), the Board could take note of the timing. See Lundeen v. Can. Pac. R.R., 532 F.3d 682, 688 (8th Cir. 2008) ("This 'clarifying' amendment reflected Congress's disagreement with the manner in which the courts . . . had interpreted [section] 20106 to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state court lawsuit.").

The Board has said that ICCTA and FRSA should be harmonized to give effect to both. See, e.g., Tubbs, FD 35792, slip op. at 7. ICCTA primarily applies to rail transportation and operations, and FRSA primarily applies to rail safety. Although "the ICCTA preemption provision can be read to cover virtually everything related to rail transportation and . . . rail safety-related claims will almost always touch on rail transportation and operations," Waneck—Pet. for Declaratory Ord., FD 36167, slip op. at 5 (STB served Oct. 31, 2018),[37] the Board has long recognized that ICCTA "does not preempt valid safety regulation under [FRSA]." Green Mountain R.R.—Pet. for Declaratory Ord., FD 34052, slip op. at 6 n.8 (STB served May 28, 2002). The agencies have exercised their authority in complementary fashion, and when their responsibilities overlap, they have "coordinate[d] and cooperate[d] with each other as appropriate." CSX Transp., Inc., FD 34662, slip op. at 10 (STB served Mar. 14, 2005); see also Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001) (stating that the Board's and FRA's "complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia*"). And the Board "does not usurp or interfere

[37] Note, however, that the Waneck opinion described itself as "purely advisory guidance." Id. at 4.

with the role of other federal agencies in regulating railroad safety and security and hazardous materials transportation under other federal regulatory statutes." CSXT Transp., Inc., FD 34662, slip op. at 7 (STB served May 3, 2005).

Applying these principles, the Board has determined that ICCTA applies to operation and construction-related claims, including state-law tort claims alleging that a rail line was designed, constructed, and maintained in a way that caused flooding-related property damage. See Tubbs, FD 35792, slip op. at 6-7. Conversely, FRSA applies to primarily safety-related claims, including state-law tort claims related to a collision between a train and a tour bus at a railroad crossing, see Waneck, FD 36167, slip op. at 4 (STB served May 25, 2018), and state regulation of the clearance distance between tracks, see Tyrrell, 248 F.3d at 522-24. The Board has stated that "the states' ability to act with respect to railroad/highway crossings (including grade separations) remains undisturbed so long as their action does not unreasonably interfere with railroad operations or interstate commerce, and does not constitute regulation of the railroad's operations." Br. of Surface Transp. Bd. as Amicus Curiae, Iowa, Chi. & E. R.R. v. Wash. Cnty., 384 F.3d 557 (8th Cir. 2004) (No. 03-3136), 2004 WL 6395939, at *21-23 (discussing whether law about redesign and replacement of bridges at crossing for safety reasons was subject to ICCTA preemption). And, as discussed above, the Board found that both ICCTA and FRSA applied to a local safety-related regulation limiting the shipment of hazardous materials because it affected both safety and the railroad's ability to carry certain commodities. CSX Transp., Inc., FD 34662, slip op. at 5-7 (STB served May 3, 2005).

Thus, ICCTA and FRSA can typically be harmonized. However, issues may arise when a state or local safety-related law which may not be preempted under FRSA may still be preempted under ICCTA because such laws effectively manage or govern rail transportation and thus directly conflict with the Board's exclusive jurisdiction. Some courts have suggested that only FRSA preemption can apply to at least some safety-related issues. See, e.g., Island Park, LLC v. CSX Transp., 559 F.3d 96, 107 (2d Cir. 2009) (stating that the "federal statutory scheme places principal federal regulatory authority for rail safety with the FRA, not the [Board]," and so "FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law"); Tyrrell, 248 F.3d at 522-23. And the Board has partially endorsed the same view in non-binding guidance. See Waneck, FD 36167, slip op. at 5 (STB served Oct. 31, 2018). However, as the Office of the Solicitor General recently argued to the Supreme Court in a case about whether states could regulate blocked crossings, "FRSA cannot be read to create a loophole in the ICCTA that would permit a patchwork of state and local regulation over rail transportation simply because the regulations also happen to touch on 'safety-related' matters." OSG Amicus Brief, 2023 WL 8112708, at *13; see also Ohio v. CSX Transp., Inc., 144 S. Ct. 545 (2024) (denying Ohio's certiorari petition). This is also consistent with the savings clause's requirement that state regulations that are in addition to or more stringent than DOT or DHS rules governing the same subject matter must relate to an "essentially local" hazard, be "not incompatible with" other federal laws, and "not unreasonably burden interstate commerce." See 49 U.S.C. 20106(a)(2)(B). Thus, even if FRSA alone does not preempt a state or local railroad safety regulation, ICCTA preemption may still apply if upholding the state or local regulation addresses a generally-applicable concern, would be inconsistent with ICCTA, or would otherwise unreasonably burden rail transportation.

2. Harmonization with Federal Environmental Laws

The Board has stated that ICCTA preemption is implicated when the relevant state activity was undertaken pursuant to regulations passed under the auspices of federal environmental statutes. This dynamic has arisen in two situations. First, ICCTA preemption may apply to the extent the state regulations would cause a "patchwork of regulations" burdening interstate commerce. See EPA Declaratory Ord., FD 35803, slip op. at 8. In EPA Declaratory Ord., the Board concluded that ICCTA would likely preempt a California air quality district's rules related to railroad locomotive idling and recordkeeping—even if those rules were approved by EPA under the CAA as part of California's state implementation plan "because of the potential patchwork of regulations that could result." Id. The Board noted that it must consider "not only the impact of the District's rules . . . but the fact that other states and local districts throughout the country could follow suit and adopt their own emission rules . . . leading to the lack of uniformity of regulation that Congress intended to preclude in [section] 10501(b)." EPA Declaratory Ord., FD 35803, slip op. at 8; see also id. at 10 ("[A]llowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation.").

The Board applied the same principle in AAR Declaratory Order to conclude that the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program and discharge prohibition "would likely be preempted by [ICCTA] if applied to discharges incidental to the operation of rail cars in transit." AAR Declaratory Ord., FD 36369, slip op. at 1. Because the program was "based on state-specific permitting requirements" and "individual permit writers . . . have discretion to impose [standards] more stringent than EPA guidelines," applying the program would be "likely to result in a patchwork of differing regulations" that would "be incompatible with [ICCTA's] purpose of ensuring uniform regulation of rail transportation." Id. at 11-12; see also id. at 13-14 (stating that ICCTA was "arguably the more specific statutory provision," and that, to the extent the NPDES permitting program was "incompatible with the purpose" of ICCTA, the later-enacted statute (ICCTA) should "be given effect").

Thus, similar to the unreasonable-burden prong of as-applied preemption, the analysis is cumulative: if applying another federal law or allowing claims thereunder would, in the aggregate, interfere with Congress's uniform regulatory scheme, ICCTA preemption is implicated. This suggests two important distinctions: between federal laws with one uniform federal standard and those that permit a patchwork of state-promulgated requirements; and between state laws passed under color of federal law that apply to instrumentalities of interstate commerce in motion[38] versus those applying to stationary structures. In AAR Declaratory Order, the Board asserted that "[t]o the extent that EPA could issue a nationwide general permit for

[38] The Board notes that a significant percentage of rail cars are owned by separate leasing companies or directly by shippers, rather than the rail carriers themselves. See Pet. 5-7, July 26, 2021, Pet. for Rulemaking to Adopt Rules Governing Priv. Railcar Use by R.Rs., EP 768. This disparate ownership structure may amplify the effects of patchwork regulation as compliance costs are imposed on many different entities, ranging from large rail carriers and manufacturers to small shippers that own their own small fleets.

incidental discharges from rail cars in transit that includes uniform requirements for the states, such a nationwide general permit would not create a patchwork of differing regulations and could therefore potentially be harmonized with [section] 10501(b)." AAR Declaratory Ord., FD 36369, slip op. at 16. The Board also focused on the fact that "rail cars in transit are inherently instrumentalities of interstate commerce." Id. at 15. Although "subjecting them to differing regulatory requirements as they pass from one state to the next is likely to be incompatible with the free flow of interstate commerce that Congress envisioned when enacting [section] 10501(b)[,] . . . non-discriminatory application to . . . stationary facilities owned or operated by railroads" may not be. Id. Instead, such stationary facility applications under the color of federal law "are generally not preempted because, although they may differ from state to state, they do not typically conflict with [section] 10501(b)'s goal of preventing differing regulations from interfering with the free flow of interstate commerce." Id.

Additionally, ICCTA preemption is implicated if a federal "statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity." Joint Pet. for Declaratory Ord., 5 S.T.B. at 509. In Joint Petition for Declaratory Order, the Board concluded that the local governments were "simply using [federal environmental law] as a pretext to do what Congress expressly precluded: interfere with interstate commerce by imposing a local permitting or environmental process as a prerequisite to the railroad's ability to conduct its operations." Id. The local concerns appeared unfounded because neither EPA nor the state environmental regulator had expressed any concerns, and the record showed that substantial pollution was "unlikely." Id. at 509-10.

This is necessarily a "fact-bound" analysis in which the regulator's stated concerns "need to be reviewed individually" to determine whether they have a reasonable basis. Id. at 508-09. As in the preemption context, this aspect of the analysis furthers the congressional scheme by ensuring that seemingly neutral regulatory measures are not being used to target or obstruct rail operations.

VI. Conclusion

This policy statement sets forth the Board's perspective on the state of the law as of the time of its issuance, acknowledging that new precedents from the Board and courts will further develop the law on STB jurisdiction and preemption. Although forthcoming cases will be evaluated based on their facts, circumstances, and proffered arguments, the Board intends for this policy statement to be beneficial and informative to the public about the Board's jurisdiction and ICCTA preemption, and to encourage the smooth flow of interstate commerce via the nation's rail network.

EXECUTIVE ORDER 12866 (REGULATORY PLANNING AND REVIEW) AND EXECUTIVE ORDER 14192 (UNLEASHING PROSPERITY THROUGH DEREGULATION)

Executive Order 12866, as modified by Executive Order 14215, provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant regulatory actions. OIRA has determined that this policy statement is significant under section 3(f) of Executive Order 12866. For the reasons discussed above, this policy statement is considered an Executive Order 14192 deregulatory action.

By the Board, Board Members Fuchs, Hedlund, Kloster, and Schultz.