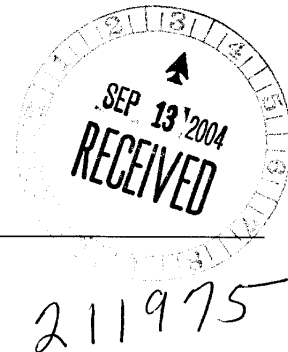


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB FINANCE DOCKET NO. 34376

**CITY OF CREEDE, COLORADO—
PETITION FOR DECLARATORY ORDER**

**BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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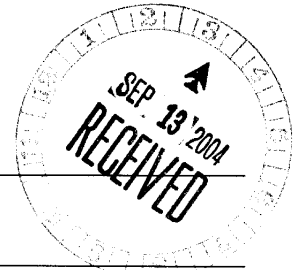
SEPTEMBER 13, 2004

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**CITY OF CREEDE, COLORADO—
PETITION FOR DECLARATORY ORDER**

**BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**



In this proceeding the Board has agreed to address three questions referred to it by the United States District Court for the District of Colorado. *See City of Creede—Co-Petition For Declaratory Order*, STB Fin. Dkt. No. 34376, 2004 WL 1387311 (served June 22, 2004) (accepting referral from District Court contained in Order, *City of Creede v. Denver & Rio Grande Ry. Historical Found.*, No. 01-RB-318 (D. Colo. May 9, 2003)). With the consent of the parties, and pursuant to its concurrently filed Petition to Intervene as *Amicus Curiae*, the Association of American Railroads (“AAR”) respectfully submits this *amicus* brief on behalf of its member railroads to address these questions.

INTEREST OF THE *AMICUS CURIAE*

The AAR is a non-profit trade association representing the major freight railroads in North America, as well as Amtrak. AAR’s members account for more than 96% of intercity rail freight service in this country. They operate in most rail-served communities in the United States, and they have a vital interest in the fed-

eral preemption issues presented to the Board in this case. Railroad rights-of-way are integrated and essential parts of rail transportation that have long been accorded the most protection from state and local regulation. Regardless of whether the entire width of a right-of-way is actually being used by a railroad at any given point in time, the presumption is that the entire width of a right-of-way is used and useful for railroad purposes.

There is good reason for that presumption, especially where a right-of-way as narrow as 100 feet is concerned. Railroads do not conduct their operations in 25-foot corridors. Even if they operate only one track, they need room to maintain the track, to repair equipment, to store materials, to build access roads, to minimize property damage and personal injury from derailments, to act as a buffer against trespassers and noise, and to maintain sight lines for safe operation. Of course, they may also need the full width of the right-of-way to build side tracks, to add additional main line tracks, to build switching and interchange tracks, and to add crew facilities, maintenance sheds, stations, parking facilities, and other rail-related projects.

Once a rail line is established, the railroad cannot just pick up and move elsewhere if its operations are restricted by state or local regulation. Restrictive zoning and land-use regulation in particular can strangle a railroad's operations, which is why the Board and the courts have uniformly held that local zoning ordi-

nances that are inconsistent with railroad operations are preempted. Plainly, a zoning ordinance that would restrict construction in a railroad right-of-way to residential housing is inconsistent with rail operations. It makes no difference whether the railroad is actively using the entire width of the right-of-way. It is extremely important to the industry that railroads not be required to jump through zoning variance hoops in order to build and operate transportation-related projects in their own rights-of-way. That is why the AAR is filing this *amicus* brief. The Board should make clear in responding to the District Court's questions that no distinction can or should be drawn, either for statutory preemption or Commerce Clause purposes, between the "inner" and "outer" portions of a railroad's right-of-way. Absent a decision by a railroad to sell or lease a portion of its property for non-transportation purposes, its entire right-of-way should be deemed used and useful for railroad purposes.

FACTUAL BACKGROUND

Although the parties to this proceeding plainly disagree about many facts, we believe that, for purposes of this proceeding, only a very few facts are relevant. In particular, the following facts seem to be undisputed, and to form a sufficient factual basis for the resolution of this proceeding:

- The Denver & Rio Grande Railway Historical Foundation ("D&RGHF") owns a 21.6-mile line of railroad known as the Creede Branch;

- A portion of the Creede Branch approximately 2000 feet long and 100 feet wide runs through South Creede, Colorado (the “South Creede ROW”);
- At the present time D&RGHF is not actively using the Creede Branch for rail transportation, but asserts that it plans to do so in the future;
- The Creede Branch has not been formally abandoned pursuant to 49 U.S.C. § 10903;
- The South Creede ROW traverses an area that is zoned “residential” under the City of Creede’s zoning ordinance.

The following analysis is based on this factual understanding.

ARGUMENT

In its Opening Statement the City of Creede seeks to redirect the focus of this proceeding. Instead of briefing the issues that the Board agreed to consider in accepting this referral, Creede argues that D&RGHF has abandoned the Creede Branch, and thus that no rail activity of any form is occurring within it. *See* Creede Opening Statement, at 1-5. But that is not the question before the Board in this proceeding.¹ The fundamental question here is whether the City of Creede may apply its zoning ordinance to rail transportation and facilities on D&RGHF’s right-of-way. As we demonstrate in Section I, the answer to that question under 49

¹ In any event, the Board has repeatedly addressed and rejected Creede’s contention. For example, the Board has twice considered requests by Creede to reopen the OFA pursuant to which D&RGHF acquired the Creede Branch, and has twice refused to do so. *See City of Creede*, 2004 WL 1387311, at *1. Moreover, the District Court has recognized that it “does not have jurisdiction to modify or set aside the [Board’s] approval of the [D&RGHF]’s OFA and [D&RGHF]’s acquisition of the rail line.” Order, *City of Creede*, No. 01-RB-318, at 3.

U.S.C. § 10501(b) is straightforward: It may not. In light of this settled law, in Section II we address the three specific issues raised by the District Court. We show that there is no distinction between the “inner” and “outer” portions of a railroad’s right-of-way that would permit local regulation of rail-related activities anywhere on that right-of-way. Section III then briefly discusses why the application of Creede’s zoning ordinance to transportation on the South Creede ROW would not only be preempted by federal statutory law but would also violate the dormant Commerce Clause.

I. The City Of Creede’s Zoning Regulations Are Preempted As Applied To Transportation Activity On D&RGHF’s Right-Of-Way.

1. Congress has extensively regulated the nation’s railroad system for over a century. *See City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (“Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress’ authority under the Commerce Clause to regulate the railroads is well established, and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area.”) (citations omitted). In fact, “[t]he Interstate Commerce Act, * * * which, as amended, still governs federal regulation of railroads, has been recognized as ‘among the most pervasive and comprehensive of federal regulatory schemes.’” *Id.* (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981)).

It has long been understood that *state* or *local* regulation of the railroad system would, in many instances, undermine the *federal* regulatory scheme. Thus, because state statutes and regulations often “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in regulating the railroad system, courts “have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the [federal regulators] or with congressional policy as reflected in the [ICA].” *Kalo Brick*, 450 U.S. at 318 (internal quotation marks and citations omitted).

As part of its effort to protect and improve the Nation’s railroad system, Congress has repeatedly expanded the scope of express federal preemption of state regulation of railroads. The express preemption provision in the Interstate Commerce Act, 49 U.S.C. § 10501(b), was last amended by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified in relevant part at* 49 U.S.C. §§ 10101-11908, and now provides:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part 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. Except as otherwise provided in this part, 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). Thus, Section 10501(b) makes the Board’s “jurisdiction” over *all* rail “transportation” “*exclusive.*” *Id.* (emphasis added). For purposes of Section 10501(b), “transportation” is defined broadly, and 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.” 49 U.S.C. § 10102(9) (emphasis added).

2. As courts have repeatedly observed, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than Section 10501(b). *City of Auburn*, 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n* (“*CSX*”), 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). *See also, e.g., Town of Milford, MA—Petition For Declaratory Order*, STB Fin. Dkt. No. 34444, 2004 WL 1802301, at *2 (served Aug. 12, 2004) (“The Federal preemption provision contained in 49 U.S.C. § 10501(b), as broadened by the [ICCTA], shields railroad operations that are subject to the

Board's jurisdiction from application of state and local laws and regulations that would prevent or unreasonably interfere with railroad operations.") (citing *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 458685 (served May 1, 2001)).

Thus, it is well established that no state or local law may be applied to thwart rail transportation. In particular, there is no question that any attempt to apply zoning or land-use regulations to rail transportation is preempted. *See, e.g., Norfolk S. Ry. Co. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997) (local zoning and land-use regulations preempted); *Borough of Riverdale—Petition for Declaratory Order—The New York, Susquehanna, & W. Ry.*, STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999) (local zoning and land-use constraints concerning railroad's construction and operation of transload facility preempted). Furthermore, a locality cannot require a railroad to participate in a pre-clearance permitting process—through a zoning ordinance or otherwise—before undertaking transportation activity. Preclearance requirements are preempted because they necessarily interfere with a rail carrier's ability to construct facilities and conduct transportation operations. *See Borough of Riverdale*, 1999 WL 715372, at *6 ("state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the

federal regulation of interstate commerce”); *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 656 (E.D. Mich. 2000), *aff’d*, 283 F.3d 812 (6th Cir. 2002).

3. Section 10501(b) does not preclude all state regulation of any activity, of course. Rather, the relevant issues for purposes of a preemption analysis under Section 10501 are whether a “*rail carrier*” is engaged in “*transportation*.” *See, e.g., Town of Milford*, 2004 WL 1802301, at *2 (“To come within the Board’s jurisdiction and the scope of Federal preemption, an activity must be both ‘transportation’ and ‘by rail carrier’ under section 10501.”).

As the Board recently noted, the question “[w]hether a particular activity counts as transportation by rail carrier under section 10501 is * * * fact specific.” *Id.* Thus, for example, the Board has held that “steel fabrication facilities fall outside the definition of railroad transportation,” and may be regulated by states or localities even if such a facility is constructed in a rail yard. *Id.* (citation omitted). But even though not all forms of state regulation are preempted—and not all activity by rail carriers counts as “transportation”—the burden is plainly on the state to demonstrate either that a specific type of regulation is authorized, or—the issue with zoning ordinances—that a specific activity undertaken by a railroad is *not*

protected by Section 10501. *See City of Lincoln—Petition For Declaratory Order*, STB Fin. Dkt. No. 34425, 2004 WL 1802302, at *4 (served Aug. 12, 2004).²

4. Given the uncontroverted facts in this proceeding, the preemption analysis here is quite straightforward: D&RGHF is a rail carrier subject to the Board’s jurisdiction, and the South Creede ROW is part of its right-of-way. Therefore, any activity D&RGHF seeks to undertake on the South Creede ROW will presumptively be transportation-related under Section 10102(9), and the City of Creede may not use its zoning ordinance or a pre-clearance proceeding to block such activity. However, if the railroad seeks to engage in *specific* activity on the South Creede ROW in the future that the city believes is *not* transportation-related (and therefore not exempted from the city’s zoning ordinance as a result of Section 10501(b)), at that time the City can seek to challenge that specific activity as violative of an enforceable zoning ordinance.³ *Ex ante* and in the abstract, however, all

² There is no presumption *against* preemption of state or local regulation of rail operations. As the Supreme Court has explained, “an assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence” (*United States v. Locke*, 529 U.S. 89, 108 (2000)), such as the lengthy history of federal regulation of the railroad system.

³ This is what happened in *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the primary case on which the City of Creede relies. *See id.* at 1327 (“West Palm Beach issued Cease and Desist Orders to [the defendants] for operating a business that did not conform to the City’s pre-existing zoning ordinance”).

the Board can say is that the City of Creede cannot use its zoning rules to block transportation-related activities anywhere in D&RGHF's right-of-way.

II. For Federal Preemption Purposes, There Is No Distinction Between The “Inner” And “Outer” Portions Of A Railroad’s Right-Of-Way.

In the preceding section we laid out our view of how the Board—and the United States District Court for the District of Colorado—should approach this proceeding. The three questions posed by the District Court revolve around an implied, but artificial, distinction between the inner 25 feet of D&RGHF's right-of-way and the outer 75 feet. The primary question posed by the District Court is whether “the land in the outer portions of [D&RGHF's] * * * railroad right-of-way * * * [is] necessary for the safe and convenient use of the central portion of the right-of-way.” Order, *City of Creede*, No. 01-RB-318, at 5. While that may have been the question that the District Court was asked to put to the Board, it is not the right legal question. The relevant inquiry is whether any specific activity, *anywhere within the right-of-way*, counts as “transportation” as that term is broadly defined in 49 U.S.C. § 10102(9).

If D&RGHF builds a side track and operates trains in the “outer” portion of its right-of-way, that operation is obviously no less “transportation” there than it would be in the inner portion of the right-of-way. By the same token, if D&RGHF builds a station or a crew facility or a maintenance shed that it uses in its railroad business, that facility would be no more or less “transportation” if it were located

in the center of the right-of-way than if it were located on the edges. Similarly, if D&RGHF were to decide to branch out and build a hat factory on its right-of-way, it is irrelevant to the question of preemption where in its right-of-way D&RGHF chose to build that obviously non-transportation-related facility.

That said—as D&RGHF demonstrates at greater length in its Reply Statement—there can be no serious question that the land in the outer portion of a one-hundred foot right-of-way must presumptively be “necessary for the safe and convenient use of the central portion of the right-of-way,” or that D&RGHF in particular needs to have the right to use the entire South Creede ROW unimpeded by the city’s zoning ordinance. Indeed, as D&RGHF shows, it already has indisputably transportation-related facilities, in the form of yard tracks and a station, in the “outer” portion of the right-of-way to which the City seeks to apply its “residential-only” zoning rule.

Railroads have wide rights-of-way for good reasons.⁴ Even if a railroad operates only one track in the center of a 100-foot right-of-way, it may need substan-

⁴ 100-foot rights-of-way are common. *See, e.g., Union Pac. R.R. Co.—Abandonment Exemption—in Dallas Cty., IA*, STB Dkt. No. AB-33 (Sub-No. 213X), 2004 WL 1955412, at *1 (served Sept. 3, 2004) (abandonment proceeding where “[t]he line is generally 100 feet in width”); *Union Pac. R.R. Co.—Abandonment Exemption—in Weld Cty., CO*, STB Dkt. No. AB-33 (Sub-No. 216X), 2004 WL 1803881, at *1 (served Aug. 13, 2004) (abandonment proceeding where “[t]he width of the right-of-way * * * varies from 100 to 200 feet”); *Burlington N. & Santa Fe Ry. Co.—Abandonment Exemption—in Crow Wing Cty.,*

tial room to maintain that track, to repair equipment, to store materials, to build access roads, to minimize property damage and personal injury from derailments, to act as a buffer against trespassers and noise, and to maintain sight lines for safe operation. It may also at some point in time need the full width of a right-of-way to build side tracks, to add additional main line tracks, to build switching and interchange tracks, and to add crew facilities, maintenance sheds, stations, parking facilities, and other rail-related projects—all of which fall within the definition of “transportation” in 49 U.S.C. § 10102(9).

Thus, numerous cases have held that rail carriers are entitled to a presumption that their entire right-of-way is necessary for safe and effective transportation. *See, e.g., Midland Valley R.R. Co. v. Sutter*, 28 F.2d 163, 167-68 (8th Cir. 1928); *N. Pacific R.R. Co. v. Smith*, 171 U.S. 260, 275-76 (1898); *New Mexico v. U.S. Trust Co*, 172 U.S. 171, 184 (1898). *See also Michigan S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1154-55 (7th Cir. 2001) (no distinction for federal preemption purposes between municipal efforts to regulate outer portions of railroad right-of-way and central portion of that right-of-way).

In fact, less than two months ago the Board rejected the argument that a railroad was not presumptively entitled to the use of the full width of its right-of-way.

MN, STB Dkt. No. AB-6 (Sub-No. 421X), 2004 WL 1803880, at *1 (served Aug. 13, 2004) (abandonment proceeding where “the width of the right-of-way is 100 feet”).

See City of Lincoln, 2004 WL 1802302. In that proceeding the city sought to condemn 20 feet of the railroad's right of way. In response, the railroad "state[d]" that it was "using the full width of its right-of-way" (a) for the movement of freight and (b) because "it *may* rebuild a spur and construct a rail-related terminal building on a portion of the right of way." *Id.* at *4 (emphasis added). This assertion of current or future rail use, the Board held, was enough to preclude the city's attempted condemnation. *See id.* ("[The city] has not adequately refuted [the railroad's] contentions that it uses all of its right-of-way * * * for rail transportation purposes.").

Hence, the best answer to Question A posed by the District Court is that a railroad is presumptively entitled to the full use of its entire right-of-way. Any transportation activity anywhere in that right-of-way cannot be regulated by a state or local zoning ordinance. And the answers to Questions B & C posed by the District Court are the same: assuming any specific activity undertaken by D&RGHF now or in the future is "transportation" as defined in Section 10102(9), the City of Creede's zoning ordinance is preempted as to that activity. D&RGHF cannot be required to seek any kind of variance or otherwise to contend with Creede's efforts to control D&RGHF's transportation activities with "residential" restrictions.

III. Applying The City Of Creede's Zoning Ordinance To Transportation Activity On D&RGHF's Right-Of-Way Would Violate The Dormant Commerce Clause.

Questions B and C posted by the District Court ask not only whether the City of Creede's zoning ordinance is preempted by Section 10501(b), but also whether it conflicts with the Commerce Clause of the U.S. Constitution. The answer is that any attempt to apply the City of Creede's zoning rules to transportation activity undertaken by D&RGHF anywhere in its right-of-way would not only be preempted by statute but would also violate the dormant Commerce Clause.

The Commerce Clause of the U.S. Constitution gives Congress the power "to regulate Commerce * * * among the several States." U.S. CONST., art. I, § 8, cl. 3. The Supreme Court has held that this power contains a negative implication, usually termed the "dormant Commerce Clause," that restricts states' power to regulate interstate commerce even in the absence of Congressional legislation in a particular area. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87-89 (1987). Even if a state or local law does not *overtly* discriminate against interstate commerce, it may be overturned if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

It is well established that state laws can violate the dormant Commerce Clause even if they are not expressly preempted by 49 U.S.C. § 10501(b). *See, e.g.,*

Dakota, Minn. & Eastern R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1014-20 (D.S.D. 2002) (striking down state condemnation laws applicable to railroads as violating the dormant Commerce Clause), *aff'd in relevant part*, 362 F.3d 512, 516 (8th Cir. 2004).

More directly on point, in *Borough of Riverdale* the Board strongly suggested that local zoning regulations would violate the dormant Commerce Clause as applied to transportation activities. *See Borough of Riverdale*, 1999 WL 715272, at *6 (noting that “state or local laws that would impose a local permitting * * * process * * * would, of necessity, impinge upon the federal regulation of interstate commerce”); *id.* at *6 n.15 (“Railroads are required to provide adequate facilities for their traffic. * * * [I]nterfering with [the right to construct operate, and maintain a line] could interfere with a railroad’s right to operate its lines.”) (citations omitted).

Nevertheless, given the straightforward application of 49 U.S.C. § 10501(b) to this dispute, the Board may feel it unnecessary to address the question whether the dormant Commerce Clause independently precludes the City of Creede from applying its zoning ordinance to transportation on D&RGHF’s right-of-way.⁵

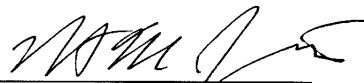
⁵ The Board may also feel constrained by the scope of its jurisdiction not to reach this issue. *See Hi Tech Trans, LLC—Petition For Declaratory Order—Hudson County, NJ*, STB Fin. Dkt. No. 34192, 2002 WL 31595417, at *3 n.8 (served Nov. 20, 2002) (“Hi Tech appears to be making a claim under the com-

CONCLUSION

For the foregoing reasons, the Board should clarify that the City of Creede may not use its zoning ordinance to prevent D&RGHF from undertaking transportation-related activities on the Creede Branch right-of-way or to impose any kind of preclearance requirement on such use.

merce clause of the United States Constitution, art. I, § 8, cl. 3, which contains broad, overarching protection of interstate commerce from state or local interference and discrimination. The 'dormant commerce clause,' as it is referred to, protects against state barriers to interstate commerce when Congress has not affirmatively acted to authorize or forbid the challenged state activity. Such a claim must be brought in an appropriate court.").

Respectfully submitted,



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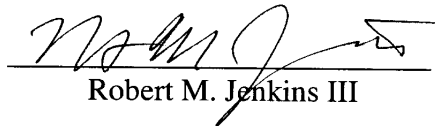
SEPTEMBER 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2004, a copy of the foregoing "Brief of the Association of American Railroads as *Amicus Curiae* in Support of Respondent" was served by first-class mail on the following

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