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February 16, 2005

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

FEB 16 2005

Part of
Public Record

RE: STB Finance Docket No. 34662
CSX Transportation, Inc. – Petition for Declaratory Order
Comments of Paducah & Louisville Railway, Inc.

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of the Comments of Paducah & Louisville Railway, Inc., supporting the petition of CSX Transportation, Inc., filed in the above-captioned proceeding. Please time stamp the extra copy of the filing and return to the courier for delivery to me.

As can be seen from the certificate of service, a copy of this filing has been served on all parties on the Board's service list posted today. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Paducah & Louisville Railway, Inc.

cc: All Known Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

**COMMENTS OF
PADUCAH & LOUISVILLE RAILWAY, INC.**

**ENTERED
Office of Proceedings**

FEB 16 2005

**Part of
Public Record**

**J. Thomas Garrett
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General Counsel
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**Attorneys for Paducah & Louisville
Railway, Inc.**

February 16, 2005

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Paducah & Louisville Railway, Inc. ("P&L") files these comments in support of the request by CSX Transportation, Inc. ("CSX") that the Board issue an order declaring that an ordinance entitled "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the "DC Ordinance") is incompatible with interstate commerce and is preempted by Section 10501 of the ICC Termination Act of 1995 ("ICCTA"). Because the ordinance is preempted by ICCTA, it is invalid. Therefore, subject to applicable federal safety and hazardous materials statutes and regulations, CSX should be able to continue to route cars via its lines through, and in the vicinity of, the District of Columbia without compliance with the DC Ordinance.

P&L is a Class II regional railroad which operates over approximately 223 miles of main line track between Paducah and Louisville, Kentucky. P&L was formed in 1986 through purchasing its lines from the then Illinois Central Railroad, which, at the time, was seeking to downgrade and abandon portions of what is now P&L. P&L is somewhat unique among regional railroads in that it currently interchanges with five Class I carriers, including CSX. P&L maintains a 7-day-a-week, 24-hour-a-day service. It also maintains switching yards, branch lines,

and a substantial amount of equipment. Its employees are represented by eight labor organizations.

Many of P&L's shipments are similar in size and type of commodity to those shipped on CSX. Indeed, CSX is a major interchange partner of the P&L, and it is likely that P&L's customers will depend upon CSX routings through D.C. for the movement of their products, both inbound and outbound, sometime in the near future. As a result, P&L shares the concerns expressed in the February 7, 2005, CSX Petition for Declaratory Order ("CSX Petition").

While P&L fully supports the goals of ensuring public safety, especially when it comes to the transportation of hazardous materials, P&L agrees with the CSX Petition that the DC Ordinance is simply preempted by the ICCTA. 49 U.S.C. §10501(b) gives the Board "exclusive" jurisdiction over "transportation by rail carriers" and the "routes, services and facilities of such carriers." 49 U.S.C. §10501(b)(1). The courts have clearly stated that the preemptive effect of Section 10501(b) is very broad. *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573, 1581 (1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.") Because the DC Ordinance is a direct regulation of the "routes" and "services" offered by CSX, the DC Ordinance is clearly preempted by the explicit terms and broad preemptive effect of ICCTA.¹

Moreover, the DC Ordinance is likely unconstitutional as well. While it is not necessary for the Board to reach the pure constitutional issue, the DC Ordinance places an undue burden on interstate commerce without a substantial corresponding benefit. As such, it is prohibited by the Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution. *See generally Bibb v.*

¹ 49 U.S.C. §5125 would appear to have similar preemptive effect over portions of the DC Ordinance that impact matters other than the routing and service provided by CSX.

Navajo Freight Lines, 359 U.S. 520 (1959) (holding that a local measure that places too heavy a burden on interstate commerce is unconstitutional).

As set out in the CSX Petition, the DC Ordinance will cause substantial increased costs through imposition of artificial routing restrictions and inefficient routing changes. These increased costs will likely have a disproportionate impact on the smaller carriers, such as P&L, as CSX seeks to pass these costs on through an increase in its division of the overall rate at the expense of the divisions given to the smaller connecting carriers and/or raises the overall through rate in attempt to recover the costs from the shipping public. Either of these actions has the potential of jeopardizing profits of shortlines, who oftentimes operate on thin margins anyway, or raising overall transportation costs to the shippers, and thereby possibly pricing some of P&L's smaller customers out of the market.

It is also clear that if the DC Ordinance stands, it will set a precedent for many other communities throughout the country. The overall effect on interstate commerce of multiple ordinances mimicking the DC Ordinance could be devastating to interstate transportation, particularly to transportation of chemicals critical for basic industrial processes throughout our economy. Indeed, for a carrier such as P&L, enactment of DC Ordinance-type provisions at certain points along its lines could effectively prohibit origination or delivery of chemicals over whole sections of its lines. This could mean a significant loss of traffic and revenue to smaller carriers, as well as tremendous damage to the shippers they serve. The economic damage to the U.S. economy from such ordinances could be significant.

Finally, while admirable in its goal of protecting public safety, the DC Ordinance may actually decrease public safety rather than increase it. As noted in the CSX Petition, the DC Ordinance would require circuitous routings and prolonged dwell time for many hazardous

materials shipments. *See CSX Petition at 8-11.* The further a railcar of hazardous materials must move or the longer it must remain stationary in a rail yard, the greater its exposure to terrorist action through track tampering or attack. Because the DC Ordinance will increase the length of shipment and the dwell time of hazmat shipments, the ordinance will likely increase the threat to public safety rather than reduce it, and simply shift those risks to other communities such as Richmond, Philadelphia, and Baltimore, as CSX and other carriers change their routing and service patterns to accommodate the DC Ordinance. *See CSX Petition at 8-11.*

While the DC Ordinance's goal of protecting D.C. citizens from the dangers inherent in the transportation of hazardous materials is laudable, that goal can be achieved in a less burdensome manner than that proposed in the DC Ordinance. Working with the Federal Railroad Administration and the Transportation Security Administration, including ensuring compliance with the Hazardous Materials Transportation Act, is the best way to ensure rail safety. Indeed, working with the federal government, the rail industry has already developed, and has begun to implement, a plan to upgrade the security of the nation's rail network, and to do so in a manner that does not unduly discriminate against smaller carriers. It is these processes that should be allowed to proceed. The DC Ordinance appears to short circuit these goals and to frustrate the plans that have already been developed.

In conclusion, the DC Ordinance attempts to directly control the routing and service which the Board has authorized CSX to provide. As a result, the DC Ordinance is preempted by the clear language of Section 10501. The DC Ordinance also places an unreasonable burden on interstate commerce, which is disallowed under the Commerce Clause of the U.S. Constitution. While P&L appreciates the need of citizens of the District of Columbia, like citizens elsewhere, to be as safe as possible from potential terrorist activity, P&L submits that the U.S. Constitution

and the laws of the United States, including the preemption provisions under ICCTA, place responsibility for safety of interstate rail operations in the hands of the federal, not local, government. Working with the rail industry, the federal government has already taken steps to ensure the safe transportation of hazardous materials. As such, that process should be allowed to continue without interference from the District of Columbia or other communities who may be tempted to enact similar ordinances.

Respectfully submitted, this 16th day of February, 2005.

J. Thomas Garrett
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Attorneys For Paducah & Louisville
Railway, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Comments Of Paducah & Louisville Railway, Inc." was served this 16th day of February, 2005, by hand delivery to Terence M. Hynes, Sidley Austin Brown & Wood LLP, 1501 K Street, N.W., Washington, D.C. 20005 and upon the following persons:

- (a) Department of Transportation
Office of the General Counsel
Room 10428
400 7th Street, N.W.
Washington, DC 20598
- (b) Federal Railroad Administration
S. Mark Lindsey, Chief Counsel
Mail Stop 10, 7th Floor
1120 Vermont Avenue, N.W.
Washington, DC 20590
- (c) Research and Special Programs Administration
Attn: Joseph Solomey, Assistant Chief Counsel
Room 8417
400 7th Street, S.W.
Washington, DC 20590
- (d) Department of Homeland Security
Border and Transportation Security
Attn: Deputy Chief of Staff Chris Clark
3801 Nebraska Avenue, N.W.
Washington, DC 20528
- (e) Transportation Security Administration
Chief Counsel TSA-2
601 South 12th Street
Arlington, VA 22202-4220
- (f) Richard Love
District of Columbia
441 Fourth Street, N.W., 6th Floor South
Washington, DC 20001

All other parties of record were mailed a copy of these comments via first class mail.


William A. Mullins
Attorney for Paducah & Louisville
Railway, Inc.