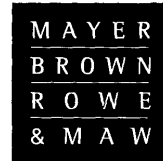


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February 16, 2005

BY HAND DELIVERY

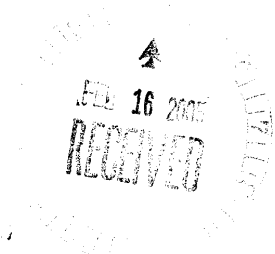
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34662
Petition of CSX Transportation, Inc.
for Declaratory Order

ENTERED
Office of Proceedings

FEB 16 2005

Part of
Public Record



Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the Comments of the Association of American Railroads. Also enclosed is a diskette containing the Comments. Please date stamp the enclosed extra copy and return it to our representative.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "RMJ".
Robert M. Jenkins III

RMJ/bs

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FEB 16 2005
RECEIVED

STB FINANCE DOCKET NO. 34662

**PETITION OF CSX TRANSPORTATION, INC.
FOR DECLARATORY ORDER**

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COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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FEBRUARY 16, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34662

**PETITION OF CSX TRANSPORTATION, INC.
FOR DECLARATORY ORDER**

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

In this proceeding CSX Transportation, Inc. ("CSXT") has petitioned the Board for an order "declaring that an ordinance recently passed by the City Council of the District of Columbia governing the transportation of hazardous materials moving by rail through that jurisdiction is preempted by 49 U.S.C. 10501(b)." *CSX Transportation, Inc.—Petition for Declaratory Order*, Decision at 1, STB Fin. Dkt. No. 34662 (served Feb. 8, 2005). On February 8, 2005, the Board invited all interested persons to file comments on CSXT's petition by February 16, 2005. *See id.* Pursuant to that invitation, the Association of American Railroads ("AAR") respectfully submits these comments on behalf of its member railroads. 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 federal preemption issues presented to the Board in this case.

INTRODUCTION

On February 1, 2005, by a vote of 12-1, the DC Council passed the so-called "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the "DC Ordinance"). Mayor Williams signed the DC Ordinance on February 16, 2005. The bill generally precludes the transportation of specified quantities of certain hazardous materials (or of cars ca-

pable of containing that hazardous material and so placarded) within 2.2 miles of the United States Capitol building. *See* DC Ordinance, §§ 3(1), 4. It is undisputed that the practical effect of this statute is to bar the transport of these hazardous materials on CSXT's primary East Coast north-south main line and on its east-west main line that runs from Washington, D.C. via Maryland and West Virginia to Chicago and St. Louis, both of which pass within 2.2 miles of the U.S. Capitol. The statute authorizes such shipments through the District only in case of emergency (*id.* §§ 3(2), 4), or if the DC Department of Transportation ("DC DOT") issues a permit based upon "a demonstration that there is no practical alternative route" (*id.* § 5(a)), which is defined as one "[w]hose use would not make shipment of the materials in question cost-prohibitive" (*id.* § 3(4)(B)). The ordinance calls for the promulgation of implementing regulations (*id.* § 7).

Although the DC Ordinance applies directly only to two rail lines owned and operated by CSXT, it is difficult to overstate the disruptive effects that the adoption of parochial statutes like this could have on this nation's safety, security, and economic well-being. The rail lines of the major freight railroads in this country were originally constructed to link together the country's largest communities and ports. The commercial and transportation opportunity presented by the rail network helped cause the rapid growth of towns and cities along those lines. Industry located in many of those same metropolitan areas, or in areas that could only be efficiently served by lines moving through those metropolitan areas. Many of these industries use or produce products that are classified as hazardous materials. Although these industries usually can also be reached by truck, rail transportation is by far the safest way of carrying hazardous materials. Rail lines, rail yards, and intermodal facilities cannot be picked up and moved from the communities that have grown up around them; the industries that rely on these rail facilities cannot be moved, either. Thus, it is no exaggeration to say that rail interstate commerce would grind to a

halt if local communities were permitted to determine when and where certain products could be carried.

No one—not the rail industry, not the industries all over the country that produce and use hazardous materials, and not the Federal Government—takes lightly safety concerns about the shipment of hazardous materials in interstate commerce. That is why those shipments have always been among the most heavily regulated by the Federal Government, and that is why the Federal Government and the rail industry have worked particularly closely together since September 11, 2001, to redouble efforts to maximize the safe transportation of those commodities and minimize any exposure to terrorism. But the continued transportation of these products is considered important to the nation's economy; indeed, railroads have been held in the past to have a common carrier obligation to carry hazardous materials in significant part because they have been deemed important to the economic health of the country.

Forced rerouting of hazardous materials by rail could foreclose transportation routes that are optimal in terms of overall safety, security, and efficiency. Rerouting could add hundreds of miles and several days to a hazardous-materials shipment, and those additional miles and days could be on rail infrastructure less suitable (for a variety of reasons) to handling hazardous materials. Emergency responders along alternate routes may lack requisite expertise in handling the most dangerous commodities. Additional switching and handling of cars could be needed, as could additional dwell time in yards. Costs of transport would certainly rise sharply, meaning that the costs of countless products and services involving hazardous materials would rise. These consequences of forcing traffic over alternate routes are likely to actually *increase* exposure—and therefore potentially *reduce* safety and security—as well as imposing added costs on our economy.

Moreover, even assuming substantial rerouting might reduce risk in one area, it would simply shift it to another. This would be a divisive and inappropriate result even if there were any reason to believe that other cities, states, and localities would not respond in kind. In fact, there is every reason to believe that if the DC Ordinance were allowed to stand, copycat legislation in other jurisdictions would not be far behind. The confusion and economic disruption for the railroads, for shippers, and for the public would be immense.

The stated rationale for the District's proposal is protection against terrorist attack in a perceived "high threat" area, but the District has no monopoly on security concerns or "high threat" status. The DC Ordinance may be well intended, but the end result of its enactment will likely be an increase in risk and severe, unjustifiable damage to the railroad industry. Accordingly, the AAR has a strong interest in the STB granting CSXT's petition and finding the DC Ordinance to be preempted by 49 U.S.C. § 10501(b).

At the same time, the AAR believes that all stakeholders in the production, transportation, and use of hazardous materials have an interest in a comprehensive and well-coordinated approach to the risks posed by these commodities. Such coordination, however, can only take place at the federal level—not only as a matter of law, but also as a matter of practicality and good public policy.

ARGUMENT

I. The DC Ordinance Is Preempted By The ICCTA

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, 318 (1981)).

It has long been understood that state and local regulation of the railroad system would, in many instances, undermine the federal regulatory scheme. Thus, because state and local 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).

Prior to 1980, although the Federal Government had the responsibility under the ICA to regulate the interstate railroad system, the states were heavily involved in *intrastate* rail regulation. In the Staggers Rail Act of 1980, Congress provided that, in general, state regulatory commissions could continue to regulate only if they applied federal standards. See *ICC v. Texas* (“*ICC*”), 479 U.S. 450, 452-54 (1987). The states, however, still at that time retained the right to regulate the “construction, acquisition, operation, abandonment, or discontinuance of [intrastate] spur, industrial, team, switching, or side tracks,” over which the Interstate Commerce Commission (“*ICC*”) had no licensing authority. 49 U.S.C. § 10907(b)(1) (1982); *Ill. Commerce Comm’n v. ICC*, 879 F.2d 917, 922-23 (D.C. Cir. 1989).

As part of the ICCTA, Congress terminated the regulatory authority of state and local governments over rail operations. As the Senate Report on the ICCTA explained,

[t]he railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficient and competitive viability.

S. REP. NO. 104-176, at 6 (1995).¹

Thus, former Section 10501(c), which had expressly reserved the power in the states to regulate intrastate transportation, was eliminated. Also eliminated was former Section 10103, which had stated that the federal remedies provided in the ICA were "in addition to remedies existing under another law or at common law." Finally, the express preemption provision of the Act, Section 10501(b), was strengthened. As amended by the ICCTA, it 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.

¹ The history of railroad regulation since the passage of the Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887), has been one of steady erosion of state regulatory authority. The original ICA gave the ICC significant powers that supplanted some state regulation. See *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920), further enlarged the ICC's powers and diminished the regulatory sphere of the states. With the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Act, Congress further limited the regulatory authority of the states, while also substantially reducing the amount of federal regulation. See *ICC*, 479 U.S. at 460-61. Thus, Congress's termination of state regulation, and additional reduction of federal regulation, in the ICCTA in 1995 was the culmination of a long and deliberate process.

49 U.S.C. § 10501(b). Thus, Section 10501(b) makes the STB’s “jurisdiction” over *all* rail transportation facilities—including entirely intrastate facilities over which the states formerly had regulatory authority—“*exclusive*.” *Id.* (emphasis added).

2. As the 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)).² That has not stopped some states and localities from invoking their inherent “police powers” to attempt to impose their own regulatory permitting requirements on railroad operations and facilities, or to seek to enforce state or local nuisance laws, “anti-blocking” laws, and eminent domain laws against railroad operations under the banner of “public health and safety.” Where such state and local regulatory efforts would interfere with a railroad’s operations, the courts have uniformly struck them down under Section 10501(b). *See, e.g., Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state criminal anti-blocking statute and derivative negligence actions preempted); *City of Auburn*, 154 F.3d 1025 (state and local environmental and land use regulation preempted); *Flynn v. BNSF Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (local permitting requirements for construction and operation of locomotive fueling facility preempted, even if STB does not regulate such construction or operations); *Wisc. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000) (state attempt to use condemnation law to condemn active railroad passing track preempted); *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local demolition permitting and historical preservation requirements preempted); *Norfolk S. Ry.*

² For purposes of Section 10501(b), a “State” is defined to include the District of Columbia. *See* 49 U.S.C. §10102(8).

Co. v. City of Austell, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997) (local zoning and land use regulations preempted); *Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local “nuisance” law preempted).

The STB, too, has read Section 10501(b) broadly to preempt any kind of local permitting or regulatory requirement that could stymie a railroad’s construction or operating plans. *See, e.g., N. San Diego County Transit Dev. Bd.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002) (California Coastal Commission regulation of construction and operation of rail siding preempted); *Joint Petition for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 1174385 (served Oct. 5, 2001) (state and local permitting and environmental review of construction and operation of railroad intermodal facility preempted); *Borough of Riverdale—Petition for Declaratory Order—The New York, Susquehanna, & W. Ry. Corp.*, 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).

3. In this case, there can be no doubt under the ICCTA that the STB has jurisdiction over rail operations on (1) the CSXT rail lines that traverse the District of Columbia, (2) the “alternative” rail lines, yards, and interchange facilities that the District argues should handle hazardous materials traffic that would otherwise move through the District, and (3) the rail lines, yards, and interchange facilities of railroads nationwide that would be affected if other localities, too, were permitted to adopt the kind of parochial ordinance that DC has enacted. The STB’s jurisdiction under Section 10501(b) extends to all “transportation” over any track that is part of the interstate rail network. 49 U.S.C. § 10501(a)(2). “[T]ransportation” is defined broadly to include “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility,

instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” and “services relating to that movement.” 49 U.S.C. § 10102(9)(A)-(B).

There also can be no doubt that the STB’s jurisdiction is just as applicable to transportation of hazardous materials by rail as it is to transportation of every other commodity that the railroads carry in interstate commerce. Indeed, the STB and its predecessor, the Interstate Commerce Commission (“ICC”), have a long history of dealing with issues concerning the railroads’ obligation to carry hazardous materials, efforts to impose special handling and routing conditions, embargoes of “ultra-hazardous” materials, and the reasonableness of the rates, rules, and practices applied by the railroads to the movement of such commodities. *See, e.g., Classification Ratings of Chemicals, Conrail, April 30, 1986*, 3 I.C.C.2d 331 (1986) (railroads have common carrier obligation to carry “ultra-hazardous” materials and cannot embargo service or impose special contractual routing or other conditions concerning the movement of such materials); *Trainload Rates on Radioactive Material, Eastern Railroads*, 362 I.C.C. 756 (1980) (railroads may not impose “special train service” handling and routing restrictions on their transportation of hazardous radioactive materials), *aff’d sub nom. Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981); *U.S. Energy Research & Development Admin. v. Akron C. & Y. R.R.*, 359 I.C.C. 639 (1978) (railroads may not “flag out” of publishing reasonable tariffs for the transportation of hazardous radioactive materials or impose special contractual handling or routing conditions on movements of such commodities), *aff’d sub nom. Akron C. & Y. R.R. v. ICC*, 611 F.2d 1162 (6th Cir. 1979).

In these earlier cases, the ICC and the courts observed that the ICC was not the only federal agency with a role to play in determining what restrictions may be placed on the movement of hazardous materials by rail. They emphasized that the Department of Transportation also

plays a vital role—as does the Nuclear Regulatory Commission in the case of radioactive materials—which is to set the fundamental safety standards for the transportation of hazardous materials. See *Consolidated Rail Corp.*, 646 F.2d at 648-50; *Akron*, 611 F.2d at 1169-70; *Classification Ratings*, 3 I.C.C.2d at 334-36. They held that there was no conflict between the roles of DOT/NRC, on the one hand, and the ICC, on the other. All agreed that the ICC must defer to DOT/NRC's judgment about what materials could be transported and the minimum safe conditions for transporting them. However, these authorities concluded that the ICC could approve more restrictive safety conditions if it was presented with sufficient probative evidence that such conditions are necessary and reasonable. See *Consolidated Rail Corp.*, 646 F.2d at 651; *Akron*, 611 F.2d at 1169-70; *Classification Ratings*, 3 I.C.C.2d at 336-38.

There was not then, nor is there now, any doubt about why the ICC, and now the STB, has a necessary role to play in assessing demands made by any party that special operating conditions, including special routing conditions, be placed on the movement of particular commodities. In the first place, the STB has responsibility for the economic condition of the industry and the reasonableness of the railroads' rates, rules, and practices. See 49 U.S.C. §§ 10701-10705. As the D.C. Circuit observed in *Consolidated Rail Corp.*, “[l]ong ago the Supreme Court made it clear that no party has a right to insist upon a wasteful or excessive service for which the consumer must ultimately pay.” 646 F.2d at 647 (citations and internal alterations omitted). Furthermore, the STB is required to promote “a *safe* and efficient rail transportation system” and the operation of “transportation facilities and equipment without detriment to the public health and *safety*.” 49 U.S.C. § 10101(3), (8) (emphasis added). See also *Consolidated Rail Corp.*, 646 F.2d at 648 (“promoting safe rail transportation is one of the Commission’s statutory responsibilities”). Finally, “[i]t is not only ‘common carriage’, but *transportation* which is subject to the

Act and to the Commission's statutory powers." *Akron*, 611 F.2d at 1168 (emphasis added). The STB under Section 10501(b) has *exclusive* jurisdiction over rail transportation. No party that seeks to impose special operating conditions on a railroad, with significant economic as well as safety ramifications, can bypass the STB and other federal agencies that exclusively occupy that regulatory arena.³

4. The DC Ordinance at issue in this case runs afoul of every tenet of the STB's exclusive jurisdiction. At the threshold, it is predicated on the assumption that the District of Columbia can determine whether a railroad "needs" to use two of its main lines to move hazardous

³ Oddly, in its "Notice of Objection of the District of Columbia to the Board's Decision of February 8, 2005," filed February 9, 2005, the District cites *Boston & Maine Corp. v. Surface Transportation Board*, 364 F.3d 318, 321 (D.C. Cir. 2004), for the proposition that "the Board's jurisdiction does not extend to matters of safety and security." Notice at 2. That in fact was a case in which the STB and the FRA worked *together* on a matter involving both their regulatory spheres. While it is certainly true that the D.C. Circuit there stated that "primary jurisdiction over railroad safety belongs to the FRA, not the STB," 364 F.3d at 321, it does not follow that the STB does not also have jurisdiction over safety matters, and over rail transportation generally. As the D.C. Circuit in *Consolidated Rail Corp.* and the 6th Circuit in *Akron* both explained, these agencies (and now the Department of Homeland Security as well) have overlapping jurisdictions. Contrary to the suggestion in the District's "Notice," there is no bright line between "safety and security" on the one hand and interstate commerce and the economics of rail transportation on the other. The STB should reject the notion that it must ignore "manifold disruptions to [CSXT's] service" (Notice at 2) because the stated purpose of the DC Ordinance is improved safety. *Tyrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001), is not to the contrary. The issue there was whether the ICCTA preempted a tort recovery by an injured crewman for a railroad's failure to maintain 14 feet between track centers, as required by state law. The court held that the FRSA preemption provision controlled, and that it did not preempt the state law. There was no issue in that case of any interference with the railroad's operations.

Indeed, another suggestion in the District's "Notice"—that CSXT could mitigate the disruption of its service by "temporarily rerout[ing] its affected traffic to other carriers" (Notice at 1)—underscores the fallacy of drawing a bright-line distinction between safety matters and other transportation matters where the proposed solution to the safety matter manifestly interferes with a railroad's operations. The "emergency service" regulatory provision cited by the District—49 C.F.R. § 1034.1(a)—is administered by the STB. If there is a dispute about such rerouting, it is the STB that determines whether an "emergency situation" exists necessitating rerouting (49 U.S.C. § 11123(a)), that determines whether rerouting would impair the ability of a railroad to fulfill its common carrier obligation (§ 11123(c)(2)(B)), and that sets the terms for any rerouting if the railroads cannot agree (§ 11123(b)(2)).

materials traffic most efficiently and safely between the origins, destinations, and interchanges that it serves. DC Ordinance § 2(4). Neither the DC Council nor the DC DOT can determine that. The STB itself has long recognized that the railroads themselves have every incentive to choose the routes for their traffic that are the safest and most efficient, since “[r]outing inefficiency harms carriers as well as shippers and harms the public interest generally.” *Consolidated Rail Corp.—Exemption—Abandonment of the Weirton Secondary Track*, STB Dkt. No. AB-167, 1989 WL 238745, at *4 (served June 7, 1989). It is only where a petitioning state or local party demonstrates *to the STB* that its regulatory action will have virtually no impact on the railroad’s use of its line that the *STB* may find that that action is not preempted. *See, e.g., Maumee & W. R.R. & RMW Ventures, LLC—Petition for Declaratory Order*, STB Fin. Dkt. No. 34354, 2004 WL 395835 (served March 3, 2004) (local condemnation proceedings to acquire an easement for a road crossing and subsurface utilities across a rail line not preempted by ICCTA where there is no significant interference with railroad operations).

Nor can the “threat of terrorism” (DC Ordinance § 2(2)) or the “ultra-hazardous” nature of the commodities covered by the DC Ordinance justify an exception to the exclusive jurisdiction of the STB and the other federal agencies that have regulatory authority in this area. No one discounts the threat of “sabotage” or “terrorism” (*Consolidated Rail Corp.*, 646 F.2d at 643) or the danger of “ultra-hazardous” materials (*Classification Ratings*, 3 I.C.C.2d at 332), but the answer is not for individual municipalities and states to adopt parochial legislation that attempts to push the problem “somewhere else.” As a matter of law, the answer lies with coordinated action by the federal agencies that have rail safety, security, and efficiency as their mandate. As we discuss in Part II below, that does not mean that states, municipalities, and other stakeholders

should be denied a voice in that process. But it does mean that the process must be coordinated and controlled at the federal level.

The DC Ordinance also suggests that “[r]equiring permits for ultra-hazardous shipments . . . would impose no significant burden on interstate commerce” (DC Ordinance § 2(5)), but this only underscores the frontal clash between the STB’s jurisdiction over interstate commerce under Section 10501(b) and the economic regulatory nature of the Act. The Act would authorize the DC DOT to issue permits “upon a demonstration that there is no practical alternative route” (DC Ordinance § 5(a)). A “practical alternative route” is defined as one outside the Capitol Exclusion Zone “[w]hose use would not make shipment of the materials in question cost-prohibitive” (*id.* § 3(4)(B)). In effect, the District would set itself up as a regulatory gatekeeper to determine which routes were economic and which were uneconomic. Presumably the DC DOT’s evaluation would include determinations not only of the costs of moving over alternative routes, but also of the charges of other carriers, the economic impact on CSXT, the economic impact on the shipper, and the possibility that the traffic might move by truck instead of rail. But as the Board well knows, these are *precisely* the kinds of operational and economic determinations that, in passing the ICCTA, Congress expressly barred states and localities from making. As discussed earlier, the STB and the courts have consistently read the STB’s exclusive jurisdiction under Section 10501(b) to preempt any kind of state or local permitting process that could directly interfere with a railroad’s operations or facilities, regardless of the “health and safety” rationale proffered by the local government or by local citizens’ groups. *See, e.g., Flynn*, 98 F. Supp. 2d 1186.

It bears emphasizing as well that the DC Ordinance appears to assume that, if the District’s regulatory scheme were allowed to stand, other rail routes running from, to, and through

other metropolitan areas in this country would not be foreclosed by the same kind of parochial legislation that the DC Council has passed. As discussed earlier in these comments, while the ordinance suggests that the risk of terrorism in the District is unique (DC Ordinance § 2(2)), it is folly to assume that the knee-jerk reaction in other areas will not be the same kind of legislation designed to push hazardous materials “anywhere but here.” In fact, when Councilmember Patterson introduced the Act on January 26, 2005, her Statement referred favorably to the Testimony of Theodore S. Glickman (attached as Exhibit A), suggesting that opportunities existed for rerouting traffic all over the country to avoid “high threat” cities like Washington, DC, New York, Chicago, Houston, Los Angeles, and Seattle. Aside from the fact that Professor Glickman’s “sample” included only 6 movements nationwide, and even in those few instances the “savings” in route miles and “population exposure” was marginal,⁴ there is nothing in the parochial regulatory approach taken by the District here that would prevent any of the localities through which Professor Glickman proposes “re-rout[ing]” the hazardous materials traffic in his examples from blocking such rerouting with their own copycat enactments.

It is difficult to conceive of a more obvious example of the kind of balkanized approach to transportation regulation that led Congress in the ICCTA to make it absolutely clear that the STB’s jurisdiction over rail transportation is *exclusive*. The AAR and its member railroads in no way intend to minimize the safety and security issues raised by hazardous materials transportation, or the specific concerns of a wide range of stakeholders in that process, including state and local governments. But, as we discuss next, the answer is a coordinated federal effort to address

⁴ When the full mileages and population densities are extrapolated from the data in Professor Glickman’s chart, even his extremely small “sample” shows an average increase in distance on these six movements of 6.2%, and an average reduction in “population exposure” for these six movements of only 6.99%.

those issues, with all parties invited to participate. The answer is *not* the kind of unlawful and counterproductive local action represented by the District's present foray into economic and safety regulation.

II. A Comprehensive and Coordinated Federal Effort is the Better Approach to Enhancing Transportation Security

The need to respond to public concerns about the safety and security of hazardous materials in the post 9-11 era raises many issues that must be addressed on a national scale. Promoting commerce and enhancing the safety and security of citizens across the country are national interests that affect our economy and well-being in many significant ways, and call for federal direction and coordination. The AAR believes that, rather than a patchwork of local actions, good hazardous-materials security policy, including transportation security, dictates a comprehensive federal initiative.

In order to address the issue of hazardous materials security in a comprehensive way, policymakers from the various relevant federal agencies must examine not only the transportation of the materials but also their production and usage. The stakeholders involved in any review that should be undertaken must reflect the breadth of the issue. Stakeholders would include individuals representing the relevant federal agencies, railroads and other transportation modes, the shipping community, producers, users, employees, emergency response personnel, tank car builders and owners, states and localities, as well as independent experts that could contribute to the dialogue.

This comprehensive and coordinated approach reflects the need to balance the national interest in the free flow of commerce with the national interest in enhanced security, and the fact that the appropriate balance cannot be struck if the issue is left to a patchwork of isolated and

disconnected local actions that frustrate commerce to the detriment of the national economy and have the net effect of eroding homeland security.

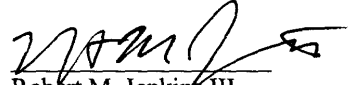
In recommending this comprehensive and coordinated approach, the AAR recognizes the security concerns that occasioned the DC Ordinance at issue in this proceeding, but strongly believes, both as a matter of law and as a matter of good public policy, that a federal effort is the only effective way to enhance hazardous-materials security of our nation. The AAR supports the identification of the appropriate agency or agencies to lead that effort, stands ready to participate fully in the initiative, and urges other stakeholders to do the same. The national concern about hazardous materials security and the national interest in the free flow of commerce demand no less.

CONCLUSION

For the foregoing reasons, the Board should grant CSXT's petition and find the DC Ordinance to be preempted by 49 U.S.C. § 10501(b).

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FEBRUARY 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2005, a copy of the foregoing Comments of the Association of American Railroads was served by hand or overnight delivery on the following:

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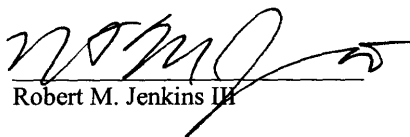
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Estimated Costs and Benefits of Rerouting Trains with Hazardous Materials
To Avoid The Highest-Threat Target Cities

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Testimony Before the Washington D.C. City Council's
Committee on Public Works and the Environment

November 22, 2004

Good afternoon. My name is Ted Glickman. I am a faculty member of the business school at George Washington University. For the past 25 years I have been performing research studies in freight systems safety at the U.S. Department of Transportation and the Association of American Railroads and as a consultant to government and industry. I am the author of a number of peer-reviewed publications on the risks of hazardous materials transportation and the re-routing of truck and train shipments of hazardous materials. I also designed the PC*HazRoute software package produced by ALK Associates of Princeton, which was used to generate the maps of train routes that have been shown to the Council before.

Throughout my research career I have been an advocate of risk-based decision making for safety issues in general and homeland security issues in particular. As a researcher in this subject area and as a resident of one of the highest threat locations in the U.S., I am very interested in the issue that has come before the City Council regarding the advisability of re-routing certain tank car shipments around the city of Washington, D.C. In my professional opinion, there are ample opportunities here and elsewhere for re-routing hazardous material tank car traffic to avoid locations with dense population concentrations in ways that yield high benefits and low costs.

The principal *benefit* of re-routing tank cars containing hazardous materials is a reduction in the number of people who could be exposed to the deadly impact of a release due to a train accident or a deliberate attack. The principal *cost* of re-routing tank cars is the additional operating expense associated with an increase in the length of haul for all the affected freight cars. Conceivably, some re-routing decisions could also require

changes in train schedules, shifts in revenues from one carrier to another, and increases in shipping costs, but the magnitude of such impacts will vary from one situation to another.

I have with me today examples of alternative routes around six of the nation's highest-threat cities generated using PC*HazRoute.¹ In each case the existing route from the selected origin to the selected destination goes through the city of concern. The results are presented in the summary table below, which shows that the greatest reduction in population exposure is 27% for Los Angeles and the greatest increase in route length is 19% for Chicago.² Note that in some cases—including Washington, DC—the new route actually turned out to be slightly shorter than the original routes.

New Orleans LA	Mobile AL	Baltimore MD	New Orleans LA	Oxnard CA	Portland OR
New York NY	Boston MA	Cedar Rapids IA	El Paso TX	Phoenix AZ	Bellingham WA
Hagerstown MD	Buffalo NY	Streator IL	Navasota TX	Palmdale CA	Kirkland WA
-17 (-1%)	-18 (-1%)	+191 (+19%)	+174 (+15%)	+65 (+13%)	+2 (-1%)
-383K (-10%)	-253K (-8%)	-299K (-15%)	-228K (-2%)	-346K (-27%)	-43K (-8%)

Collectively, the nation's railroads have achieved an admirable safety record in transporting tank cars carrying hazardous materials. For example, according to the AAR there was only one accidental release for every 48,000 tank cars shipped in the year 2000. Yet this record does not contradict the fact that moving tank cars carrying extremely hazardous materials through highly populated areas is an unnecessary gamble. A major release accident or a terrorist attack occurring in the midst of a densely populated area will have much graver consequences than if the same attack were to occur in a less populated area. In fact, it can be argued that re-routing tank cars to avoid a high-visibility location like Washington, D.C. would eliminate one of the major incentives for a terrorist attack.

¹ San Francisco, which is the seventh highest threat city identified by the Department of Homeland Security, was not included in this analysis because it is not situated on any route between other major cities.

² Population exposure is measured by the total population residing within one-mile on either side of the route. If the objective of re-routing is to reduce the impact of the worst-case scenario then population exposure should also be calculated separately on the most densely populated segment of the route.