

EMERGENCY PETITION – EXPEDITED HANDLING REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34662

**Comments of the
United States Department of Transportation**

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February 16, 2005

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On February 8, 2005, in response to a petition filed by CSX Transportation, Inc. (“CSX”), the Surface Transportation Board (“STB” or “Board”) issued a decision requesting comments from any interested party concerning whether an ordinance passed by the District of Columbia City Council on February 1 is preempted under provisions of the ICC Termination Act (“ICCTA”) set forth at 49 U.S.C. § 10501(b). The D.C. ordinance, entitled the “Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005,” was signed by Mayor Williams on February 15, 2005. The ordinance purports to ban any through rail or highway movements of certain hazardous materials within 2.2 miles of the United States Capitol, and would effectively preclude transportation of these materials within the District of Columbia. CSX’s petition seeks the issuance of an STB order declaring that the D.C. ordinance is preempted.

As discussed more fully below, the United States Department of Transportation (“DOT” or “Department”) urges the Board to grant the CSX petition. The D.C. ordinance is preempted under safety statutory provisions administered by the Department. We believe that there is also a sound basis for preemption under the ICCTA

preemption provision administered by the Board. If the D.C. ordinance is allowed to stand other local governments may be encouraged to enact similar restrictions on hazardous materials transportation, potentially blocking the safe and efficient movement of this cargo throughout the United States.

I. The District of Columbia Ordinance

The ordinance adopted by the District of Columbia City Council on February 1 would prevent transportation by rail or motor carriers of certain categories of hazardous materials, including explosives, flammable gasses, poisonous gasses and other poisonous materials, within a 2.2 mile radius of the United States Capitol. The ordinance also precludes the movement within that area of any rail car or motor vehicle that is capable of carrying such materials, thereby precluding the repositioning of empty hazardous materials rail cars or trucks through the District. Pursuant to the terms of the ordinance, the D.C. Department of Transportation may issue permits for rail or motor carrier transportation otherwise banned by the ordinance, but only upon a showing that there is no practical alternative route, and any permits may also require the adoption of safety measures, including time-of-day restrictions and the payment of fees in exchange for operating rights.

The ordinance will be effective for ninety days. However that ninety day period may be renewed by the City Council for successive ninety day periods.

II. Statutory and Regulatory Background

Consistent with the STB's jurisdiction, CSX's petition addresses only the rail aspects of the District of Columbia ordinance. The essentially Federal nature of rail transportation has been repeatedly recognized and addressed by Congress, which has

ceded national rail oversight to three Federal agencies – the Department of Transportation, for safety matters, the Department of Homeland Security, for national security matters, and the Surface Transportation Board, for all matters relating to interstate rail commerce. The D.C. ordinance is an impermissible regulatory intrusion into each of those spheres.

The Department's general rail safety jurisdiction derives from specific statutory provisions set forth in Title 49 and the general provisions of the Federal Rail Safety Act ("FRSA"). The FRSA was enacted "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents," 49 U.S.C. § 20101. The FRSA also mandates that throughout the United States "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. The FRSA therefore vests the Secretary of Transportation with broad authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a).

Congress has expressly declared that when DOT regulates in the area of rail safety, including the regulation of hazardous materials rail transportation, such regulation preempts State or local regulation. The FRSA clearly provides in section 20106 that once the Secretary has prescribed a regulation or issued an order "covering the subject matter of [a] State requirement," in the area of rail safety, State law must give way unless it falls within the narrow statutory exception allowing State regulation that is "necessary to eliminate or reduce an essentially local safety . . . hazard," that "is not incompatible with" Federal law, and that "does not unreasonably burden interstate commerce." *Id.* See CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993). FRSA preemption extends to

any rail safety regulation or order issued by the Secretary or by any DOT agency. See CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio, 901 F.2d 497 (6th Cir. 1990).

Congress has also expressly declared that when DOT regulates in the area of hazardous materials transportation generally, such regulation preempts conflicting State or local regulation. The Hazardous Materials Transportation Act ("HMTA") provides in section 5125(a) and (b) that, in the absence of a waiver of preemption by the Department, State or local laws specifically relating to the transportation of hazardous materials are preempted wherever (1) complying with both the non-Federal requirement and a provision of the HMTA or regulations adopted pursuant thereto is impossible, or (2) if the non-Federal requirement, as applied or enforced, is an obstacle to accomplishing and carrying out the HMTA or a regulation prescribed thereunder. This statutory preemption provision applies equally to all transportation modes, including highway and rail transportation.

In 2002, following the terrorist attacks of September 11, the FRSA was amended to establish that Federal oversight and national uniformity in the context of national security matters is committed to oversight by the Secretary of Homeland Security. See Pub. L. 107-296, Title XVII, section 1710(c), November 25, 2002, 116 Stat. 2319 and provisions of 49 U.S.C. § 20160, as amended. Additionally, Congress amended the HMTA at that time to clarify that the Secretary of Transportation has the authority to issue hazardous materials safety regulations, including the authority to issue regulations relating to hazardous materials security matters. 49 U.S.C. § 5103(b).

In 1995 Congress enacted ICCTA, 49 U.S.C. §§ 10101, et seq., in an effort to limit the regulation of railroads as well as other modes of transportation. ICCTA eliminated the Interstate Commerce Commission and created the STB as an independent agency, located for administrative purposes within the Department of Transportation, to take over many of the functions previously performed by the ICC. 49 U.S.C. §§ 701-703. Section 10501(b) of the Act gives the STB exclusive jurisdiction over transportation by rail carriers, including the routes of such carriers, and “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.” 49 U.S.C. § 10501(b). It also provides that 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.

Maintaining national rail uniformity has thus been committed to the regulatory oversight of three agencies – the Department of Transportation, the Department of Homeland Security, and the Surface Transportation Board. Working individually within their respective jurisdictions each has the complete authority to preempt non-Federal laws that undermine national rail uniformity. See Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa, 385 F.3d 557 (8th Cir. 2004); Tyrrell v. Norfolk S. Ry., 248 F.3d 517 (6th Cir. 2001).

III. Preemption under DOT’s Safety Authority

The Department has concluded that, for a number of reasons, the D.C. ordinance is preempted under the FRSA and the HMTA. As explained more fully below, Federal regulation of the transportation of hazardous materials by rail is comprehensive and

extensive, and leaves no room for balkanized local bans such as that attempted by the District of Columbia. While the Department believes that the ordinance is already preempted since DOT in our view has, for purposes of section 20106 of the FRSA, already “cover[ed] the subject matter” addressed by the ordinance, if for any reason it were to be determined that the D.C. ordinance has not, as yet, been preempted by the Department, DOT would consider issuing an order or commencing a proceeding in order to determine whether to specifically preclude any enforcement of the ordinance.

A. DOT has Already Expansively Regulated the Safe Transportation of Hazardous Materials by Rail

The transportation of hazardous materials by rail is expansively and comprehensively regulated by two DOT agencies: the Federal Railroad Administration (“FRA”) and the Research and Special Programs Administration (“RSPA”).

FRA has adopted a comprehensive set of Federal regulations governing, among other things, the safety of rail carrier operations, including train speed, track and roadbed conditions, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices and drug and alcohol testing for railroad employees. See 49 C.F.R. Parts 200-268. FRA has also promulgated comprehensive track safety standards (49 C.F.R. Part 213) which prescribe, among other things, maintenance and inspection requirements and maximum speeds for each class of track, and which restrict the transportation of hazardous materials only on low speed excepted track.¹

¹/ FRA considered whether to ban the transportation of hazardous materials on excepted track – that is, track that has been determined to be “excepted” from otherwise applicable regulatory requirements under 49 C.F.R. § 213.5(b) – and declined to do so, concluding

RSPA has similarly adopted comprehensive Federal rules covering all transportation of hazardous materials, including transportation by rail or by highway. Pursuant to authority set forth in provisions of the HMTA codified in Chapter 51 of Title 49 of United States Code, RSPA has promulgated comprehensive Hazardous Materials Regulations (“HMRs”) in 49 C.F.R. Parts 171 to 180. The HMRs address all areas of hazardous material transportation, including operational requirements for each mode of transportation, comprehensive rail tank car standards and rail tank car specifications, and the specific requirement that railroads develop individual security plans covering their transportation of hazardous materials from origin to destination.

Taken together, these regulations are designed to be sufficient to allow for the safe transportation of all rail cargoes, hazardous and non-hazardous. There is no place in this comprehensive approach for local transportation bans such as that set forth in the District’s ordinance. The FRA explained the logic of a uniform and national approach in discussing the preemption of local speed laws in the preamble to the final rule on track safety standards:

there are significant safety reasons for facilitating the fastest transit of trains throughout the railroad system. For example, the risk of releases of hazardous materials is reduced by minimizing the time such shipments spend in transportation. It would be poor public policy to allow local governments to attempt to lower their risk by raising everyone’s risk and clogging the transportation system. Railroads have strong economic motives to minimize the time shipments spend in transportation, so public

that this would be unnecessary and impractical. 47 Fed. Reg. 39398, 39399 (September 7, 1982); 57 Fed. Reg. 54038, 54042 (November 16, 1992); 63 Fed. Reg. 33992, 34001 (June 22, 1998). None of the track over which CSX operates in DC is designated as excepted. However, this section of its regulations shows that FRA has restricted the transportation of hazardous materials where necessary for safety, and these circumstances do not apply to the track over which CSX operates in DC.

safety and employee safety are best served by setting and enforcing the standards railroads must meet to travel at particular speeds.

63 Fed. Reg. 33999 (June 22, 1998) (emphasis supplied).

It is clear that for precisely the reasons voiced by FRA in the preamble to its rule, the D.C. ordinance cannot be allowed to stand. The safe transportation of hazardous materials is addressed by the comprehensive regulatory approach embraced in RSPA and FRA regulations. Under that approach, the risk to the nation of transporting hazardous materials is minimized by permitting railroads to carry such cargo on routes where time in transit will be minimized. As a general matter, that is accomplished by using the shortest route having the best quality track (higher classes of track permit higher speeds). A local government that tries to lower the risk of releases of hazardous materials within its jurisdiction by barring the transportation of those materials through it, thereby shifting the risk to others, contravenes the national policy in the same manner: it raises everyone's risk and clogs the transportation system.

It is evident from CSX's petition to the STB that this would be the outcome here.

CSX explains the routing effects of the ordinance as follows:

The DC Ordinance effectively prevents CSXT from using either its I-95 Route or its East-West Route for the transportation of the covered commodities. With respect to north-south movements via the I-95 Route, the closest alternative available to CSXT would be its line running west of the Appalachian Mountains through Tennessee, Kentucky and Ohio. The closest alternative east-west route to the north is a line that runs from Albany, NY to Buffalo, NY and thence along Lake Erie through Cleveland, Ohio. The closest alternative east-west route to the south is CSXT's line from Richmond, VA to Charleston, WV and points west.

CSX Petition at 8. CSX then provides specific examples of the effects of utilizing such alternative routes: an additional “1,655 miles” for one route, “1,076 miles” for another. Id. at 8-9.

This is precisely the unacceptable effect of local routing bans that FRA addressed in its track safety standards rule. Echoing FRA’s earlier warning, it would be “poor public policy to allow local governments to attempt to lower their risk by raising everyone’s risk and clogging the transportation system.”

B. The District of Columbia Ordinance is in Any Event Specifically Preempted by the HMTA and FRSA

Not only is the District of Columbia ordinance preempted as a general matter as a result of the comprehensive regulation of hazardous materials rail transportation under the Department’s regulations, it is also specifically preempted under the FRSA and the HMTA.

1. FRSA Preemption

While the FRSA allows States to regulate in the area of rail safety, as described above, that general authority is preempted once the Department of Transportation has, through the issuance of an order or a regulation, covered the relevant subject matter.²

² / In fact, as a general matter municipal governments have no authority at all to regulate rail safety matters. As noted, State rail safety regulation is specifically contemplated under section 20106 of Title 49 in circumstances where the Department has not covered a specific rail safety subject matter, but the FRSA allows no such regulation by cities. See Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1974). While Congress in other contexts defined the term “State” to include the District of Columbia – see, e.g. provisions of the HMTA set forth at 49 U.S.C. § 5102(11) – for purposes of general State authority to act under the FRSA, it provided no such expansive definition. Rather, it chose not to extend that authority beyond the 50 States, that is, to any municipal government.

The District's attempt to ban hazardous materials transportation is impermissible under that statutory approach since any regulatory authority of the District has been preempted under the FRSA by specific regulations issued by RSPA that cover the subject matter of hazardous materials transportation security.

On March 25, 2003 RSPA adopted a final rule establishing new hazardous materials transportation requirements, including a requirement that shippers and carriers, such as CSX, must develop and implement security plans for the transportation of hazardous materials transported in commerce.³ 68 Fed. Reg. 14509 (March 25, 2003), 49 C.F.R. § 172.802. Those regulations were adopted pursuant to the Homeland Security Act of 2002, which authorized the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” In promulgating the Rule, RSPA stated that “[o]ur goal . . . is to implement security requirements that will be effective in preventing hazardous materials from being used as tools of destruction and terror while permitting continued transportation of these essential products.” 68 Fed. Reg. at 14510. The HMTA provides, at 49 U.S.C. § 5103, that RSPA's hazardous materials regulations “shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate.”

³/ As noted in its emergency petition to the Board, CSX has adopted such a security plan and it has been reviewed by FRA and by the Transportation Security Administration (“TSA”), an agency within the Department of Homeland Security. The plan has been found to comply with the RSPA regulation. Moreover, CSX and TSA have undertaken a specific assessment of security needs for the District of Columbia in the D.C. Rail Corridor Project. That assessment includes implementation of certain enhanced security measures recommended by TSA. See CSX Emergency Petition at 6 and n. 3.

RSPA's regulations clearly address and cover, in the context of security plans, the routing of hazardous materials cargo. Specifically, section 172.802(a)(3) provides that approved security plans must contain "measures to address the assessed security risks of shipments of hazardous materials . . . en route from origin to destination" And it is equally clear that RSPA left no room for conflicting routing determinations or outright transportation bans by the District of Columbia. Thus, in the preamble to the regulation, RSPA stated:

In the NPRM, we invited comments on whether, and to what extent, State or local governments or Indian tribes should be permitted to impose similar additional requirements to those proposed in the NPRM. Commenters who addressed this issue unanimously agree that State, local or tribal governments should not be permitted to impose hazardous materials transportation security requirements that differ from, or are in addition to, those adopted in this final rule. We agree. Therefore, in the absence of a waiver of preemption by the Secretary under 49 U.S.C. 5125(e), or unless it is authorized by another Federal law, a hazardous materials transportation security requirement of a State, political subdivision of a State, or Indian tribe is explicitly preempted if : (1) complying with a requirement of the State, political subdivision or Indian tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or (2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

68 Fed. Reg. at 14519 (emphasis supplied). RSPA's 2003 regulation therefore has clearly covered the subject matter of the D.C. ordinance for purposes of FRSA preemption.

2. HMTA Preemption

The District of Columbia ordinance is also preempted under the conflict preemption provisions of the HMTA. Under those provisions, set forth at 49 U.S.C. § 5125, a requirement of a State (which, for purposes of the HMTA would include the

District of Columbia), political subdivision of a State, or an Indian tribe, is preempted if (1) complying with the requirement of the State, political subdivision, or the tribe, and a provision of the HMTA or regulations adopted pursuant thereto is impossible, or (2) if such a requirement, as applied or enforced, is an obstacle to accomplishing and carrying out the HMTA or a regulation prescribed thereunder. This applies equally to highway and rail transportation.⁴

In promulgating its hazardous materials security plan regulation, RSPA stressed repeatedly the importance of the fact that the rule provides companies the flexibility to tailor their plans to their individual circumstances. 68 Fed. Reg. 14513-15, 14517. Indeed, RSPA stated that the effectiveness of the rule depends on such flexibility. 68 Fed. Reg. 14515. Moreover, RSPA expressly rejected a regulatory scheme that adopted specification standards – specific requirements for achieving regulatory goals – in favor of adopting a rule that established a more general performance standard to “permit a regulated entity to determine the specific measures necessary to achieve compliance with the established performance goal.” 68 Fed. Reg. 14511. Thus, RSPA made a deliberate

⁴/ Further, section 5125 provides that a requirement of a State, political subdivision, or an Indian tribe that is not substantively the same as a provision of the HMTA or a regulation thereunder is preempted if it falls within one of five enumerated areas. As set forth at 49 U.S.C. § 5125(b), these five areas are (1) “the designation, description, and classification of hazardous material,” (2) “the packing, repacking, handling, labeling, marking, and placarding of hazardous material,” (3) “the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents,” (4) “the written notification, recording, and reporting of the unintentional release in transportation of hazardous material,” and (5) “the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.”

and express decision to leave the specifics of hazardous materials security plans, including, as noted above, routing matters, to the entities it regulates.

Here, pursuant to RSPA's regulations, CSX has adopted an approved safety plan that envisions unhindered access to its rail routes running through the District of Columbia. Because RSPA deliberately afforded CSX the flexibility to make such en route security choices in its security plan, and because complying with the requirements of the CSX plan and the requirements of the District of Columbia's ordinance would be impossible, the ordinance is preempted under the HMTA. Moreover, even if CSX's plan were silent on the issue of routing through the District of Columbia, because the District's ordinance would pose an obstacle to the exercise of the routing discretion that RSPA's regulation contemplates, the ordinance would still be preempted.

C. The D.C. Ordinance May Be Procedurally Preempted Under FMCSA Statutory and Regulatory Provisions

Although the CSX petition, and the STB's jurisdiction, extend only to the rail aspects of the District of Columbia ordinance, the ordinance itself covers highway as well as rail shipments of hazardous materials. The Board should therefore be aware that the ordinance, in any event, may well also be preempted as a procedural matter since the District of Columbia City Council did not comply with applicable requirements of another DOT agency, the Federal Motor Carrier Safety Administration ("FMCSA"), when it enacted the highway aspects of the ordinance. 49 U.S.C. § 5125 provides that a State may establish highway routings for hazardous materials cargo only if the jurisdiction has complied with specific regulations prescribed by FMCSA at 49 C.F.R. 397, Subparts C and D. The District of Columbia, which is a State for purposes of the

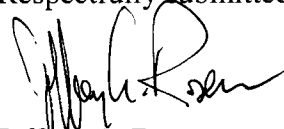
FMCSA statutory provisions, appears to have followed none of the relevant procedures. The Administrator of FMCSA may, on her own initiative, or in response to an application, issue a preemption determination regarding highway routing designations. 49 C.F.R. § 397.211.

IV. The STB Should Preempt the D.C. Ordinance Under ICCTA

As noted at the outset of these comments, the exercise of preemption authority in the context of interstate rail transportation requires a coordinated analysis of authority held by the Department of Transportation, the Department of Homeland Security, and the Surface Transportation Board. As explained above, DOT is firmly of the view that the hazardous materials transportation ban set forth in the District's ordinance is at odds with Federal safety law and regulation. While the economic effects of the ordinance are committed largely to the Board for consideration, we believe that CSX has compellingly shown that the effects on its operation if the ordinance stands are unacceptable. The negative effect of the ban on routing decisions of CSX constitutes an impermissible burden on interstate commerce under ICCTA and under the Commerce Clause. And, as explained above, these same commercial effects result in unacceptable impacts on DOT safety regulation as well.

Accordingly, the Department urges the Board to declare the ordinance preempted pursuant to the preemption provisions of ICCTA set forth at 49 U.S.C. § 10501(b).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey A. Rosen", is written over a horizontal line.

Jeffrey A. Rosen
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February 16, 2005

CERTIFICATE OF SERVICE

I certify that copies of the foregoing comments were served today electronically
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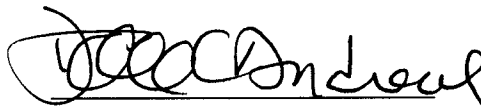
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