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February 16, 2005

Via Hand Delivery

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

RE: Finance Docket No. 34662, *CSX Transportation, Inc. – Petition for Declaratory Order*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of The National Industrial Transportation League's Comments in the above referenced proceeding. Also enclosed is a diskette with a copy of the Comments in PDF format and Word format.

An extra copy of the Comments is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Nicholas J. DiMichael
*Counsel for The National Industrial
Transportation League*

Enclosures

213315

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34662

CSX Transportation, Inc.- Petition For Declaratory Order

COMMENTS

SUBMITTED BY

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: February 16, 2005

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FILED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34662

CSX Transportation, Inc.- Petition For Declaratory Order

COMMENTS

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

In a decision served on February 8, 2005, the Board established a deadline for the government of the District of Columbia “and other interested persons” to file comments regarding a Petition filed by CSX Transportation, Inc. (“CSX”) seeking an order declaring that an ordinance passed by the City Council of the District of Columbia that bans the transportation of certain hazardous materials moving by rail through that jurisdiction is preempted by 49 U.S.C. § 10501(b). These Comments are submitted by the National Industrial Transportation League (“League”) in response to the Board’s decision.

The League strongly supports the CSX’s Petition and joins in asking the Board for issuance of the requested order. The ICC Termination Act is clear that the Board has exclusive authority over transportation by rail carriers with respect to a railroad’s common carrier obligation, car service and routes. The stated purpose of the D.C. Ordinance, which the League understands was signed by the Mayor of the District of Columbia on February 15, 2005, is to make it illegal to transport certain hazardous commodities through what the ordinance terms a “Capitol Exclusion Zone” without obtaining a permit from the D.C. Department of

Transportation. The “Capitol Exclusion Zone” is defined as an area within 2.2 miles of the U.S. Capitol, and the Zone thus encompasses both the north-south and east-west lines of CSX that traverse the District of Columbia. The direct effect of the D.C. Ordinance is to prevent the movement of products through the District of Columbia that CSX is required to transport under its common carrier obligation. The indirect effect of the D.C. Ordinance is to cause increased safety and operational hazards not only for commodities covered by the ordinance that may currently pass through the District of Columbia, but also for other hazardous materials and commodities carried throughout CSX’s system, as the ripple effects of the D.C. Ordinance are potentially widespread. Finally, the precedential effect of the D.C. Ordinance could virtually cripple the transportation by rail of hazardous materials throughout the United States, to the severe detriment of the U.S. economy.

As the representative of the users of the nation’s rail system, the safety and security of rail transportation are a prime concern. After all, it is the goods of the League’s members that are carried by the nation’s railroads, through communities in which League members and their families reside. League members thus have a large interest in assuring that those goods are carried safely, and that they do not become an opportunity for terrorist activity. But the League strongly believes that safety and security must be determined by the national government, as matters of national concern. Indeed, the League strongly believes that the D.C. Ordinance, though it purports to advance safety and security, actually will compromise it.

I. IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and has approximately 600 company members. These company

members range from some of the largest users of the nation's transportation system, to smaller companies engaged in the shipment and receipt of goods.

The Board is very familiar with the League as an organization representing shippers and receivers of the nation's goods, and indeed, a substantial majority of the League's members are classic "shippers," that is, beneficial owners of the goods that are transported by the nation's carriers, including CSX. For many years, the membership of the League also included other parties who were involved in the shipping and receiving of goods but who were not beneficial owners, such as third party intermediaries, logistics companies and the like. Finally, in 2001, the League significantly altered its charter to permit "carriers" as members, in part to reflect the fact that the line between "shippers" and "carriers" had blurred, since "carriers" were often major "shippers" on other carriers (one of the largest shippers on the nation's railroads by any measure is UPS, a traditional "carrier"); and in part to reflect the desire of the League for a more collaborative relationship between shippers and carriers. Thus, the League's members now include shippers and receivers of goods as well as carriers, third party intermediaries, logistics companies, and similar entities.

Members of the League are involved in all forms of transportation. They are engaged in shipping large quantities of goods by rail, and therefore have a keen interest in the conduct of rail transportation. The members of the League are also engaged in shipping substantial quantities of hazardous materials by rail, including the hazardous materials covered by the D.C. statute. The League has long been on record as favoring strong federal regulation of rail safety and security, as the most effective way of promoting a safe, secure and efficient national transportation system.

II. THE D.C. ORDINANCE ACTS DIRECTLY TO BAR THE “TRANSPORTATION” OF GOODS, A MATTER WITHIN THE EXCLUSIVE JURISDICTION OF THE BOARD

The D.C. City Council passed the D.C. Ordinance on February 1, 2005. Unlike statutes that regulate safety, the D.C. Ordinance acts directly to bar certain rail transportation through the District of Columbia. The heading of Section 4 of the D.C. Ordinance forthrightly sets forth a “Prohibition on shipments of hazardous materials”, and makes it illegal to “transport” certain names classes of hazardous materials, or to “operate” a vehicle or “move” a rail car which is “capable” of containing certain quantities of the named hazardous materials and “has exterior placarding or other markings indicating that it contains such materials.” An Act in the Council of the District of Columbia, February 2005, entitled the “Terrorism Prevention In Hazardous Materials Transportation Emergency Act of 2005,” Section 4. The ordinance, then, completely bars not only the transportation of the named goods, but also rail cars that may be used in the transportation of those goods. The bar established by the ordinance extends, as noted above, to a “Capitol Exclusion Zone,” which encompasses both the north-south line (which CSX in its Petition terms its “I-95 Route”) and the east-west line of the carrier within the District of Columbia.

It is significant to note, from a practical standpoint, that the D.C. Ordinance thus covers both loaded and empty cars traversing the District of Columbia, despite the fact that the statute purports to bar the transportation of hazardous materials in light of the possibility of a terrorist attack “on a large-quantity hazardous material shipment near the United States Capitol. . . .”

III. THE BOARD HAS EXCLUSIVE AND PREEMPTIVE AUTHORITY OVER THE PRECISE SUBJECT MATTER THAT IS THE SUBJECT OF THE D.C. ORDINANCE

In a “Notice of Objection” filed February 8, 2005, the District of Columbia stated that recent case law is clear that the Board’s jurisdiction does not extend to matters of safety and

security, citing *Boston and Main Corp. v. Surface Transportation Board*, 364 F.3d 318, 321 (D.C. Cir. 2004). That proposition, which is unexceptional and in fact is a proposition which the STB expressly recognized in the case cited by the District of Columbia, is irrelevant here, since the D.C. Ordinance goes far beyond matters of safety and security, and acts directly in areas given to the exclusive authority of the Board. The bedrock of such an analysis is, as it should always be, the statute itself.

Section 10501 of Title 49 of the U.S. Code states that “the Board has jurisdiction over “transportation” by “rail carrier” that is by “by railroad,” as long as that “transportation” is in the United States between a place in a State and a place in the same or another State as part of the interstate rail network. Section 10102 of the same Title defines “United States” to include both the various states and “the District of Columbia.” Section 10501(a)(2) states that the jurisdiction of the Board over such “transportation by rail carriers” and “the remedies provided” in the Board’s authorizing statute with respect to certain named subjects, including rates, “routes, services and facilities of such carrier” is “exclusive.” See, 49 U.S.C. §10501(a)(2).

The statute carefully defines each of these terms.

“Transportation” is broadly defined to include “a locomotive, car, vehicle, vessel, warehouse . . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . .” as well as “services related to that movement” including the “handling, and interchange of passengers and property.” See 49 U.S.C. §10102(9). “Railroad” is similarly broadly defined, and includes “the road used by a rail carrier and owned by it or operated under an agreement.” 49 U.S.C. §10102(6). As noted above, the D.C. Ordinance regulates “transport[ation]” and “rail cars,” subjects that are within the Board’s regulatory ambit.

But more importantly, the D.C. Ordinance not only directly regulates entities, services and property that are within the jurisdiction of the Board, but also implicates obligations of rail carriers that are directly the subject of regulation by the Board. Specifically, Section 11101 of the ICC Termination Act, 49 U.S.C. §11101, states: “A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part *shall provide the transportation or service on reasonable request.*” [Emphasis added] This provision, which is commonly referred to as the common carrier obligation, requires rail carriers subject to the jurisdiction of the Board to provide transportation to any person who reasonably requests it. That obligation extends to every part of the “transportation” or “service” provided by that rail carrier. As noted above, the statute broadly defines “transportation” to include “*property, facility, instrumentality, or equipment of any kind* related to the movement of passengers or property”, and “services related to that movement” including the “handling, and interchange of passengers and property.” Thus, a rail carrier cannot arbitrarily refuse to provide service over part of its transportation system. See, GS Roofing Products Co. v. STB, 143 F.3d 387, 392 (8th Cir. 1998); Decatur County Com’rs v. STB, 308 F.3d 710, 715 (7th Cir. 2002); Ethan Allen, Inc. v. Maine C. R. Co., 431 F. Supp. 740, 743 (D. Vt. 1977); Montgomery Ward & Co. v. Northern Pacific Terminal Co., 128 F. Supp. 475, 490 (D. Or. 1953).

Finally, under 49 U.S.C. §11121(a), a rail carrier providing transportation subject to the jurisdiction of the Board “shall furnish safe and adequate car service. . . .” The statute also broadly defines “car service” to include “(A) the *use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier.*” 49 U.S.C. §10102(2) [emphasis added]. The Board’s jurisdiction extends to “car

service” and provides that the Board may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service. 49 U.S.C. §11121(a)(1).

This detailed recitation of the Board’s jurisdiction, including the broad definitions set forth in the statute, is important, because the D.C. Ordinance tramples on virtually every one of these areas and powers given to the Board.

As noted in Section II of these Comments, the D.C. Ordinance establishes a “prohibition” on “shipments” of certain hazardous materials, and makes it illegal to “transport” the listed commodities or to “move” a “rail car” that is capable of containing such materials. The direct effect of the D.C. Ordinance will thus be to entirely prevent the transportation of such goods on part of CSX’s rail system, even though CSX is obligated, under Section 11101, to provide transportation over its system upon reasonable request. In other words, the D.C. Ordinance thus forbids transportation where the ICC Termination Act requires CSX to provide it. Moreover, the direct effect of the D.C. Ordinance will also be to entirely prevent CSX from providing safe and adequate car service (which is, as discussed above, defined as the “use” “control” and “movement” of cars on its system).

These matters fall directly within the jurisdiction of the Board under its statute. The federal statutory definitions in the ICC Termination Act of “transportation,” “railroad,” and “car service” extend to the subjects encompassed by the D.C. Ordinance. More importantly, the Board, and not the government of the District of Columbia, is given the power to determine the metes and bounds of the obligation to provide service on reasonable request under Section 11101. The Board, and not the government of the District of Columbia, is given the power to determine the extent and limitations of the carrier’s obligation to use, control and move cars on its system under Section 11121. Although the Board has jurisdiction over broadly-defined

“transportation” of rail carriers, the D.C. Ordinance makes it illegal to “transport” the commodities listed in the statute, even though the Board has not declared that such transportation is illegal or has excused CSX from its common carrier obligation. Moreover, the D.C. Ordinance forbids CSX to use, move, or distribute its rail cars over a certain route where the power to regulate that use, movement, and routing belongs to the Board. And, the statute makes it very clear that the Board’s jurisdiction is “exclusive.” 49 U.S.C. §10501(b)(1).

Indeed, the Board is given the authority under Section 11123 to issue orders to direct the “handling, routing, and movement of the traffic of a rail carrier” in certain circumstances. See, 49 U.S. C. §11123(a)(1). But these are matters that the D.C. Ordinance seeks to directly regulate, a fact that brings into clear focus the inconsistency between the D.C. Ordinance and the Board’s jurisdiction and authority.

IV. THE EFFECT OF THE D.C. ORDINANCE WILL BE TO COMPROMISE SAFETY AND SECURITY, NOT TO ENHANCE IT

From one, strictly legal, point of view, the issue in this proceeding is not the need for safety and security, because that need is unquestioned: there can be no compromise with the need for strictly-enforced rules that seek to ensure that goods are moved safely and securely on the nation’s transportation system.

But there is twofold aspect to this need: hazardous goods must be moved, and they must be moved safely and securely. Hazardous materials must be moved, in part because they themselves contribute to the safety and security of our country. Chlorine, for example, is used to make water safe to drink, and a significant portion of industrial and municipal wastewater is treated with chlorine or chlorine derivatives to kill water-borne pathogens. Ammonia is used in the production of fertilizer, to feed both our nation and other nations of the world. There are literally thousands of necessary and useful goods and services that require, for their production,

hazardous materials both that are covered by the specific terms of the D.C. Ordinance as well as others that are not now covered.

From this strictly legal perspective, then, the issue is: who decides on what constitutes the proper rules for moving hazardous goods safely and securely? The D.C. Ordinance answers this question by claiming that such a decision is the prerogative of local jurisdictions, which may decide unilaterally that the movement of certain goods constitutes a safety or security risk, and that this risk should be avoided by simply banning the transportation of such goods through their territory.

The League does not believe that the answer to the question of “who decides,” is “the local jurisdiction.” This decision is, under current law, a federal responsibility. As the CSX Petition points out, the movement of hazardous materials, including those covered by the D.C. Ordinance, is covered by comprehensive regulations prescribed by the U.S. Department of Transportation under the Hazardous Materials Transportation Act, which cover the packaging, identification, handling and security requirements of transporting these goods. See, CSX Petition, pp. 5-6, and 49 C.F.R. Parts 171-180. Shippers are directly subject to these regulations, and are required to comply closely with these comprehensive mandates.

Of course, these DOT regulations regarding safety and security of the movement of hazardous materials are not the responsibility of the Board to enforce. However, the Board’s affirmation of its own exclusive jurisdiction to regulate the matters that the D.C. Ordinance would regulate, would also be consistent with the larger federal responsibility to regulate the transportation of hazardous materials at the national rather than at the local level. Thus, the Board’s responsibility to exclusively determine and regulate the common carrier obligation is part of a larger federal mandate to regulate the movement of goods by rail.

However, from an even broader perspective, there are safety and security issues implicated in the passage of the D.C. Ordinance. But instead of advancing safety and security, the D.C. Ordinance will actually compromise the safe and secure movement of hazardous goods.

The ban on the transportation of the hazardous materials listed in the D.C Ordinance will require such materials to be rerouted over other parts of the CSX system.¹ Such reroutings will clearly be longer, sometimes substantially so. League members have reported that a rerouting of goods around the District of Columbia would sometimes add hundreds of miles to the route of movement of their goods.

Such a result would mean that shippers and/or railroads would have to provide more railcars carrying hazardous materials on the nation's railroads in order to meet the need for the use of these goods, thus increasing the potential for an accident as well as the number of potential terrorist targets. Each rail car carrying these hazardous goods would be in movement for a longer period of time (thus increasing their exposure); would move over unfamiliar and less efficient routings; and would involve more local fire, police and safety departments that must be trained in the handling of the hazardous materials. Indeed, as a result of the District of Columbia's action, it is quite possible that the total population of the United States exposed to the movement of hazardous goods would in fact increase, compared to transportation over the most direct route of movement.

Moreover, these effects would not be confined to the covered goods moving through the District of Columbia. As such hazardous materials are rerouted, they will adversely affect the

¹ In its Notice of Objection, the District of Columbia states that, if the D.C. Ordinance were to become effective, CSX would be able to temporarily reroute is affected traffic to other carriers, since under 49 C.F.R. §1034.1(a), CSX has the right to diver traffic to other carriers if it is "unable due to circumstances beyond its control promptly to transport traffic over a portion of its lines." However, the District of Columbia fails to mention that the right under Section 1034.1 is subject to the agreement of the other carrier, and there is no indication that any other carrier would so agree. See, 49 C.F.R. §1034.1(b).

movement of all types of hazardous and non-hazardous goods on the CSX system, and likely other rail systems that interchange with CSX. Safety and efficiency everywhere are likely to be compromised.

Finally, the Board should be mindful of the precedential effect of the D.C. Ordinance. There is nothing to limit the D.C. government from adding still other hazardous commodities to the list of banned movements. Moreover, the U.S. Capitol is not the only high-risk site in the United States today. If the D.C. Ordinance is allowed to stand, it is likely that other cities will follow suit, making the transportation of hazardous commodities virtually impossible. Indeed, the likelihood of ever-shifting transportation routings in the face of ever-shifting local requirements would substantially add to safety and security concerns.

V. Conclusion

The League supports the request of CSX Transportation, Inc. that the Board issue and order declaring that the D.C. Ordinance is preempted by Section 10501 of the ICC Termination Act and that, subject to compliance with applicable federal safety and hazardous materials transportation statutes and regulations, CSX may continue to route cars covered by the D.C. Ordinance via its lines through and in the vicinity of, the District of Columbia; and independently asks that the Board issue the requested order.

Respectfully submitted,

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By Its Attorneys

A handwritten signature in black ink, appearing to read "Nicholas J. DiMichael".

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Dated: February 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this day, February 16, 2005, I have served a copy of the foregoing
Comments of The National Industrial Transportation League by first class mail postage prepaid
upon the following:

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