

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

213316
LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8198

WRITER'S E-MAIL ADDRESS
thynes@sidley.com

February 16, 2005

By Hand Delivery

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

ENTERED
Office of Proceedings

FEB 16 2005

Part of
Public Record

16
RECEIVED

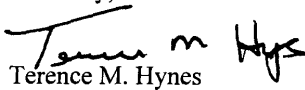
Re: Finance Docket No. 34662, Petition of CSX Transportation, Inc. for
Declaratory Order.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of the Comments of Norfolk Southern Railway Company in Support of the Petition of CSX Transportation, Inc. for Declaratory Order. A diskette containing an electronic version of the Petition is also enclosed.

Please acknowledge receipt of the Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

TMH:aat
Enclosures

213316

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34662

**COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY
IN SUPPORT OF PETITION OF CSX TRANSPORTATION, INC.
FOR DECLARATORY ORDER**

ENTERED
Office of Proceedings
FEB 16 2005
Part of
Public Record

James A. Squires
George A. Aspatore
A. Gayle Jordan
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
(757) 629-2657

G. Paul Moates
Terence M. Hynes
Matthew J. Warren
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Attorneys for Norfolk Southern Railway Company

Dated: February 16, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

↑
FEB 16 2005
RECEIVED

FINANCE DOCKET NO. 34662

**COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY
IN SUPPORT OF PETITION OF CSX TRANSPORTATION, INC.
FOR DECLARATORY ORDER**

INTRODUCTION

Norfolk Southern Railway Company ("NSR") submits these Comments in support of CSX Transportation, Inc.'s ("CSXT's") Petition (the "CSXT Petition") for an order declaring that an ordinance titled the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the "D.C. Ordinance"), which was promulgated by the District of Columbia City Council on February 1, 2005, is preempted by the ICC Termination Act of 1995 ("ICCTA") and that, subject to compliance with applicable federal safety and hazardous materials transportation statutes and regulations, CSXT and other railroads may continue to route cars to which the D.C. Ordinance applies via rail lines through, and in the vicinity of, the District of Columbia.

The D.C. Ordinance impermissibly seeks to restrict the commodities that carriers may handle in interstate commerce via rail lines that pass through the District of Columbia, and is clearly preempted by Section 10501(b) of ICCTA. Implementation of the D.C. Ordinance would adversely affect rail operations not only on CSXT (whose lines pass through the so-called "Capitol Exclusion Zone" established by the D.C. Ordinance), but would, in all likelihood, also impair the operations of NSR and other carriers that interchange traffic with CSXT. The D.C.

Ordinance sets a dangerous precedent that, if allowed to stand, could undermine the efficiency of the entire national rail network.

I. STATEMENT OF FACTS

The CSXT Petition sets forth in detail the facts relating to the provisions, and enactment, of the D.C. Ordinance. *See* CSXT Petition at 2-11. NSR incorporates that discussion by reference herein.

NSR is a Class I freight railroad that provides rail transportation via a 21,500-mile rail network in 22 states, the District of Columbia and the Province of Ontario. NSR serves most of the major metropolitan areas in the Eastern United States, including Atlanta, Buffalo, Charlotte, Chicago, Cincinnati, Cleveland, Detroit, Jacksonville, Memphis, New Orleans, New York, Norfolk, Philadelphia and St. Louis. NSR's network includes trackage rights over CSXT's north-south I-95 Corridor line, which passes through the Capitol Exclusion Zone.

As a common carrier, NSR has a statutory obligation to provide service upon request by a shipper. *See* 49 U.S.C. § 11101. Under current law, this common carrier obligation includes the duty to accept shipments of hazardous materials for movement over NSR's network. NSR transported approximately 366,000 carloads (including intermodal units) of hazardous materials during 2004, including many commodities that are covered by the D.C. Ordinance.¹ These cars generally move in merchandise trains that also carry non-hazardous commodities. NSR's handling of hazardous commodities shipments is governed by a comprehensive scheme of federal statutes and regulations.²

¹ NSR did not transport any of the covered commodities via its trackage rights on CSXT's I-95 Corridor line during 2004.

² The myriad federal laws and regulations addressing the transportation of hazardous commodities by railroads are described in the CSXT Petition (at pp. 5-7).

A substantial volume of NSR traffic, including hazardous materials, is interchanged with other railroads, including CSXT. NSR interchanged approximately 1.5 million loaded and empty rail cars and intermodal units with CSXT during 2004. This NSR/CSXT interchange traffic included approximately 21,000 carloads (including intermodal units) containing hazardous commodities.

The need to interchange freight in order to move it from origin to destination makes the fluidity of operations on the lines of its interchange partners a matter of concern for NSR. The nation's rail system is an interdependent network. Service disruptions on one railroad's lines can quickly affect operations on the lines of other carriers as well. The CSXT Petition demonstrates that enforcement of the D.C. Ordinance would have an immediate and seriously detrimental impact on CSXT's network. Such a result would adversely affect the efficiency and competitiveness of NSR-CSXT interline rail service.

The District suggests that CSXT can "mitigat[e]" the adverse effects of the D.C. Ordinance by rerouting its hazardous commodity traffic to the lines of "other carriers" pursuant to 49 C.F.R. § 1034.1(a). *See* Notice of Objection of the District of Columbia to the Board's Decision of February 8, 2005, served February 9, 2005 ("DC Notice of Objection") at 1. As far as NSR is aware, NSR's lines would be the only feasible alternative routing for most, if not all, of this traffic. The District's proposed "solution" to the service problems that would be caused by the D.C. Ordinance is illusory. Under the cited regulation, a carrier may divert its traffic to the lines of another railroad only if it has obtained the concurrence of that carrier to reroute the subject traffic. *See* 49 C.F.R. § 1034(b). NSR would not consent to any proposal to divert CSXT's hazardous materials traffic to NSR's lines, as such action would serve only to transfer the risk inherent in the movement of those shipments from the District to the communities

through which NSR operates. Indeed, NSR would elect not to handle certain hazardous products at all absent a common carrier obligation, given the inherent risks. To the extent public policy, embodied in the common carrier obligation, continues to dictate transportation of such products by rail, the accompanying risks and benefits should be allocated appropriately among all stakeholders.

II. ARGUMENT

The D.C. Ordinance purports to restrict the commodities that may be transported in trains that traverse rail lines in the Capitol Exclusion Zone. Such a restriction constitutes impermissible local regulation of interstate rail transportation. ICCTA states unequivocally that the STB's jurisdiction over "transportation by rail carriers" is "exclusive," and the statute "preempt[s] the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). The D.C. Ordinance is unquestionably "regulation of rail transportation" and is therefore preempted by Section 10501(b).

"It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that set forth in Section 10501(b). *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). The Board has repeatedly held that "local regulations cannot be used to veto or unreasonably restrict [a] railroad from conducting its operations or unreasonably burden interstate commerce." Docket No. AB-433X, *Idaho No. & Pac. R.R. Co. – Abandonment Exemption – In Wallowa & Union Ctys., OR*, (Dec. 12, 2001). *See also* Finance Docket No. 34364, *Vermont Ry., Inc. – Petition for Declaratory Order*, (Jan. 3, 2005); Finance Docket No. 33971, *Joint Petition for a Declaratory Order – Boston & Maine Corp. & Town of Ayer, MA*, (Apr. 30, 2001); Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Ry. Corp.*, (Sept. 9, 1999); Finance Docket No. 32974, *King County,*

WA—Petition for Declaratory Order – Burlington Northern R.R. Co. – Stampede Pass Line,
(September 25, 1996).

The federal courts have likewise found it “beyond peradventure” that local regulation of “train operations” is proscribed by ICCTA. In striking down a state law purporting to restrict the times at which trains could occupy side tracks, the Fifth Circuit squarely held that “[n]othing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad.” *Friberg v. Kansas City So. R.R. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (emphasis added). See also *Gluckenberg v. Wisc. Cent. Ltd.*, 178 F. Supp. 2d 954, 958-59 (E.D. Wisc. 2001) (nuisance action based on activities on railroad side track was preempted); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013-14 (W.D. Wisc. 2000) (city was preempted from condemning a railroad’s passing track).

In the instant case, there is no question that the D.C. Ordinance constitutes impermissible regulation of rail transportation. The D.C. Ordinance places a direct restriction on “train operations” (*Friberg, supra*) through the City of Washington, by dictating what commodities railroads may, and may not, carry over lines traversing the Capitol Exclusion Zone. Such an attempt to shut down rail lines within the District to the interstate transportation of specified commodities is prohibited by ICCTA. Indeed, it is difficult to imagine a local regulation that would more directly regulate interstate rail transportation.

The D.C. Ordinance also infringes on the longstanding federal policy to leave decisions regarding the routing of overhead shipments to the “managerial discretion” of the participating rail carriers, once the shipper has selected the rail carrier(s) to transport the shipments. See, e.g., Finance Docket No. 31936, *Brotherhood of Locomotive Eng’rs v. Consolidated Rail Corp.*, (June 29, 1992) (“[A] railroad has the managerial discretion to move traffic via any internal

routing that it decides will produce the most cost efficient, or otherwise beneficial, operation.”);

Docket No. AB-167, *Consolidated Rail Corp. – Exemption – Abandonment of the Weirton Secondary Track in Harrison & Tuscarawas Counties, OH*, (June 7, 1989) (“Carriers have considerable managerial discretion to route overhead traffic”).

The fact that the D.C. Ordinance might (theoretically) permit a railroad to carry the covered commodities through the Capitol Exclusion Zone by obtaining a permit to do so does not warrant a different conclusion.

[The Board has]repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce.

Finance Docket No. 34111, *North San Diego Cty. Trans. Dev. Bd. – Pet. for Declaratory Order*, (Aug. 19, 2002). *See also* Finance Docket No. 34020, *Fletcher Granite Co., LLC – Pet. for Declaratory Order*, (June 29, 2001) (local permitting requirements preempted because “by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations”).

The District asserts that the D.C. Ordinance is not preempted by ICCTA because the purpose of the Ordinance is to “reduce the risk of attacks by terrorists,” and the STB’s jurisdiction does not extend to such safety and security matters. DC Notice of Objection at 1. These assertions are beside the point. ICCTA prohibits state and local governments from regulating interstate train operations, regardless of the purported objective of such regulation. *See Friberg, supra*. The District’s claimed interest in “safety” and “security,” however genuine, does not provide a basis for ignoring the plain language of Section 10501(b).

In any event, the D.C. Ordinance would not enhance overall public safety, but rather would simply transfer the safety and security concerns associated with the shipment of hazardous commodities by rail from the District to other communities. Indeed, by exposing hazardous materials shipments to more circuitous routings, additional interchanges and car handlings, and added dwell times at intermediate points, the D.C. Ordinance would unnecessarily increase the risks associated with such traffic, including the risk to railroad employees handling the cars in switching yards. The purpose of the federal policy of preemption reflected in Section 10501(b) is to prevent regulation based upon parochial concerns from interfering with the national interest in safe and efficient interstate rail transportation.

As CSXT's Petition (at 8-11) demonstrates, implementation of the D.C. Ordinance would not only thwart the efficient handling of hazardous commodities, it would impair the movement of all rail traffic on the affected rail lines. The merchandise traffic that moves in trains traversing CSXT's North-South I-95 Route and East-West Route includes cars that are interchanged to/from NSR. Any delay or service disruption affecting such traffic would result in poorer service to NSR's customers (as well as CSXT's). Moreover, as the Board knows from past experience, congestion in CSXT yard facilities, or on CSXT main lines, could quickly cascade onto the lines of NSR and other rail carriers. The D.C. Ordinance threatens the regional (and national) interest in rail network fluidity, for the sake of the District's protectionist objectives.

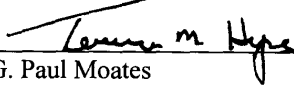
Perhaps the most dangerous effect of the D.C. Ordinance is the precedent that it would set. If the District were permitted to ban the movement of hazardous commodities within its borders, other localities might promulgate similar laws. Indeed, the Council Member who sponsored the D.C. Ordinance has openly encouraged other communities to do so. *See John Gallagher, Rail's Pandora's Box*, Traffic World (Nov. 1, 2004) at 11. Subjecting the interstate

transportation of hazardous commodities to such balkanized regulation would impose enormous costs on carriers and their customers, and could threaten the ability of NSR and other railroads to fulfill their common carrier obligation.

CONCLUSION

For all of the foregoing reasons, NSR respectfully requests that the Board grant CSXT's Petition for an order declaring that the D.C. Ordinance is preempted by Section 10501 of ICCTA and that, subject to compliance with applicable federal safety and hazardous materials transportation statutes and regulations, CSXT (and other carriers) may continue to route cars covered by to the D.C. Ordinance via its lines through, and in the vicinity of, the District of Columbia.

Respectfully submitted,



G. Paul Moates
Terence M. Hynes
Matthew J. Warren
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

James A. Squires
George A. Aspatore
A. Gayle Jordan
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
(757) 629-2657

Attorneys for Norfolk Southern Railway Company

Dated: February 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of Norfolk Southern Railway Company in Support of Petition of CSX Transportation, Inc. for Declaratory Order were delivered by hand, this 16th day of February 2005, to:

Leonard Becker
Office of General Counsel to the Mayor
1350 Pennsylvania Avenue, N.W., Suite 327
Washington, D.C. 20004

Mayor Anthony A. Williams
District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 600
Washington, D.C. 20004

George Valentine, Esq.
Deputy, Civil Litigation Division
Office of the Attorney General
District of Columbia Government
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001

Robert Utiger, Esq., Senior Counsel to
Deputy for Civil Litigation Division
Office of the Attorney General
District of Columbia Government
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001

Richard S. Love
Chief, Equity I
Office of the Attorney General-DC
Government
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001

Andrew J. Saindon
Assistant Attorney General – Equity 1
Office of the Attorney General-DC
Government
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001

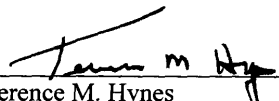
Office of the General Counsel
Department of Transportation
400 7th Street, NW., Room 10428
Washington, DC 20598

S. Mark Lindsey, Chief Counsel
Federal Railroad Administration
1120 Vermont Avenue, N.W., Mail Stop 10
Washington, D.C. 20590

Chris Clark, Deputy Chief of Staff
Border and Transportation Security
Department of Homeland Security
3801 Nebraska Avenue, N.W.
Washington, D.C. 20528

Chief Counsel,
TSA-2
Transportation Security Administration
601 South 12th Street
Arlington, VA 22202-4220

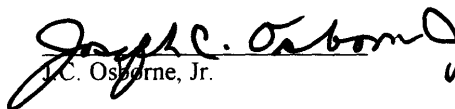
Joseph Solomey, Assistant Chief Counsel
Research & Special Programs Administration
400 7th Street, N.W., Room 8417
Washington, D.C. 20590


Terence M. Hynes

VERIFICATION

My name is J.C. Osborne, Jr. I am Group Vice President – Chemicals for Norfolk Southern Railway Company (“NSRC”). I declare under the penalty of perjury that the facts set forth in the foregoing Comments of Norfolk Southern Railway Company In Support Of Petition Of CSX Transportation, Inc. For Declaratory Order are true and correct. Further, I certify that I am qualified and authorized to file this testimony.

Executed on this 15th day of February 2005.


J.C. Osborne, Jr.

Signed before me on 2/15/05 in the City of Roanoke, Virginia.

Brenda N. Poff, Notary
2/15/05
Expiration 3/31/05