

213367
FEB 22 2005
RECEIVED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34662

RESPONSE OF CSX TRANSPORTATION, INC. TO "PRAECIPE" OF
THE DISTRICT OF COLUMBIA

ENTERED
Office of Proceedings
FEB 22 2005
Part of
Public Record

Irvin B. Nathan
Mary Gabrielle Sprague
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1205
(202) 942-5000
(202) 942-5999 (fax)

Ellen M. Fitzsimmons
Peter J. Shudtz
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

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)

Counsel for CSX Transportation, Inc.

Dated: February 22, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34662

4.
FEB 22 2005
RECEIVED

**RESPONSE OF CSX TRANSPORTATION, INC. TO "PRAECIPE" OF
THE DISTRICT OF COLUMBIA**

CSX Transportation, Inc. ("CSXT") respectfully submits this response to the "Praecipe" filed by the District of Columbia ("the District") on February 18, 2005. This pleading is not permitted by the Board's rules and should be rejected. In addition, the District's suggestion that CSXT's district court challenge to the ordinance at issue in this proceeding makes a declaratory order inappropriate is wrong. The Board should act expeditiously on CSXT's Petition and declare that the District's ordinance is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").

On February 7, 2005, CSXT filed a petition for an order declaring that a D.C. ordinance entitled the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" is preempted by Section 10501 of ICCTA and that CSXT may continue to route cars through the area affected by the ordinance subject to all applicable federal safety and hazardous materials transportation statutes and regulations. The Board ordered interested parties to submit comments by Wednesday, February 16, 2005. The District and several other interested parties submitted comments on February 16 in accordance with the Board's schedule. Two days after filing its comments, however, the District submitted another pleading to the Board, which the District styled as a "praecipe." The Board's rules do not provide for "praecipies." But regardless of what the District calls it, it is apparent what the District's filing is: a reply to a reply, which is prohibited by the Board's rules. *See* 49 C.F.R. § 1104.13(c).

The District's "praecipe" notes that CSXT has filed an action for injunctive relief in the United States District Court for the District of Columbia, and implies that this pending action makes a declaratory order inappropriate.¹ The District's implication is wrong. Action by the Board remains both appropriate and necessary. In the first place, a declaratory order that set forth the Board's views on whether ICCTA preempts the D.C. Ordinance would inform the district court of the Board's judgment of this issue. If the Board decides CSXT's Petition before the district court rules on CSXT's motion for a preliminary injunction (a ruling that is scheduled for March 9), CSXT would lodge the Board's decision with the court. Federal courts routinely appreciate the guidance of the expert agency charged by Congress with enforcing ICCTA.

Second, the D.C. Council is currently considering a "temporary" bill that would extend the ban on the transportation of the specified hazardous materials for 225 days. The D.C. Council has scheduled a second reading on the temporary bill for its March 1, 2005 legislative session. A ruling by the Board that ICCTA preempts the legislation it is considering would be of benefit to the Council and the Mayor. Moreover, even if the Council were to pass, and the Mayor were to approve, the temporary bill in the face of a declaratory order by the Board that such legislation is preempted, Congress has 30 days to review the legislation before it becomes

¹ The District cites to *Green Mountain Railroad Corporation — Petition for Declaratory Order*, STB Fin. Docket No. 34052 (May 24, 2002), but fails to acknowledge that *Green Mountain* was not at all similar to this case. In *Green Mountain* the petitioner railroad asked the Board to issue an order declaring that a state permitting statute was entirely preempted by ICCTA after a federal district court had rejected that same argument and had ordered discovery into whether the particular permit conditions were preempted as applied to Green Mountain Railroad. *See id.* at 3 & n.3. Moreover, the district court had denied a motion to stay proceedings in order to refer the matter to the Board. *See id.* at 3. Under these circumstances, where a district court had already opined on the issue and had "made clear its desire to resolve the issues raised without referring the matter to the Board," the Board declined to grant a declaratory order. *Id.* at 4. In the present case, however, the district court has not ruled on ICCTA preemption, and the views of the Board would aid the court's consideration of this issue.

effective and would no doubt be extremely interested in the view of the expert agency with jurisdiction to implement ICCTA.

Third, a declaratory order would have a precedential effect that would extend beyond the District and caution other jurisdictions considering similar legislation. As demonstrated by the numerous comments submitted to the Board, there is tremendous concern and uncertainty among carriers, shippers and receivers about this ordinance and anticipated copycat legislation. Not only do other jurisdictions need the Board's guidance on the preemptive effect of ICCTA, in light of the District's submissions to the Board, they might be laboring under the misimpression that traffic can simply be routed over another carrier's line. It would be well for the Board to clarify that traffic cannot be rerouted on another carrier's lines without that carrier's consent, or an order of the Board. In any event, rerouting is not an action that a local jurisdiction may require. The district court may well not address this level of detail in ruling on the motion for preliminary injunction, as CSXT has challenged the District ordinance on five separate grounds and the court need only discuss the merits enough to conclude that there is a likelihood of success on the merits (and/or that the balance of harms weighs in favor of an injunction). And while the court has said that it will rule on March 9 as to a preliminary injunction, it could well be some time after that before the court issues a final decision on the merits. The Board should not allow this uncertainty to plague the rail transportation community for that length of time.

For the reasons set forth in CSXT's Petition, the Board should issue an order declaring that ICCTA preempts the D.C. Ordinance.

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)

Irvin B. Nathan
Mary Gabrielle Sprague
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1205
(202)-942-5000
(202) 942-5999 (fax)

Ellen M. Fitzsimmons
Peter J. Shudtz
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

Counsel for CSX Transportation, Inc.

Dated: February 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of CSX Transportation, Inc. to "Praecepte" of the District of Columbia were delivered by hand, this 22nd 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

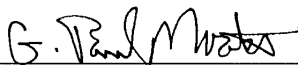
Office of the General Counsel
Department of Transportation
400 7th Street, S.W., Room 10428
Washington, DC 20598

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
Department of Transportation
400 7th Street, S.W., Room 8417
Washington, D.C. 20590



G. Paul Moates