

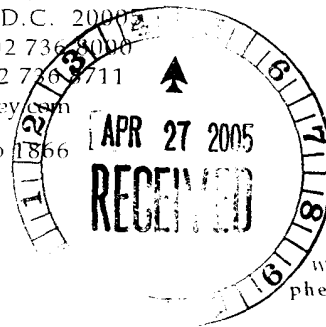
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April 27, 2005

BY HAND

ENTERED
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APR 27 2005

Part of
Public Record

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

Re: STB Fin. Docket No. 34662, CSX Transportation, Inc.—Petition for Declaratory Order

Dear Secretary Williams:

Enclosed for filing on behalf of Petitioner CSX Transportation Inc. ("CSXT") in the above-referenced proceeding are the original and 10 copies of CSXT's Reply to the Petition for Reconsideration of the Sierra Club. The Sierra Club first served a copy of its Reconsideration Petition on counsel for CSXT on April 25, 2005. Also enclosed is a computer diskette containing an electronic copy of CSXT's Reply. Please acknowledge receipt of these submissions for filing by date-stamping the enclosed duplicate paper copies and returning them with our messenger. If you have any questions concerning this filing, please contact the undersigned.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul A. Hemmersbaugh'.

G. Paul Moates
Terence M. Hynes
Paul A. Hemmersbaugh

Enclosures

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34662

REPLY OF CSX TRANSPORTATION, INC. TO
PETITION FOR RECONSIDERATION
OF THE SIERRA CLUB

ENTERED
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Dated: April 27, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34662

**REPLY OF CSX TRANSPORTATION, INC. TO
PETITION FOR RECONSIDERATION
OF THE SIERRA CLUB**

CSX Transportation, Inc. ("CSXT") requests leave to file this Reply Memorandum in Opposition to the Sierra Club's Petition for Reconsideration of the Board's March 14, 2005 Decision and Declaratory Order (the "Decision"), which CSXT first received notice of on April 25, 2005.

INTRODUCTION

CSXT learned on April 25, 2005 that, on or about April 4, 2005, the Sierra Club had filed a Petition seeking reconsideration of the Board's Decision. In response to CSXT's inquiry, the Sierra Club advised that it had filed its Reconsideration Petition with the Board on April 4, but had neglected to serve CSXT with a copy of the Petition, or to otherwise advise CSXT that the Sierra Club had filed such a petition. Because the petition was not posted on the STB's electronic docket on its internet web site, CSXT was not aware of its existence until April 25, and did not see a copy of the Sierra Club's petition until after the close of business that day.¹ Therefore, CSXT requests leave to file this short Reply more than twenty days after its filing date, but only two days after CSXT received notice of the Petition.

¹ As of the date of this filing, the Sierra Club has not yet provided to CSXT copies of the eleven (11) exhibits referenced in its Reconsideration Petition.

The Board should deny the Petition for Reconsideration because it does not satisfy the Sierra Club's heavy burden of demonstrating that the Board's Decision is materially erroneous. The Sierra Club's Petition alleges neither changed circumstances nor new evidence, so it may be granted only if it demonstrates that the Decision "involves material error." See 49 C.F.R. § 1115.3(b).² The Sierra Club's Petition -- which simply repeats arguments the Board has previously considered and rejected but provides no basis for a finding that the Decision was "materially erroneous" -- should be denied.³

ARGUMENT

The Decision's narrow holding -- that the DC Act is preempted by ICCTA as a matter of law -- is plainly correct. The arguments offered by the Sierra Club on reconsideration are both irrelevant and incorrect, and provide no justification for the Board to revisit its careful analysis and sound Decision.

I. THE DECISION CORRECTLY HELD THAT THE D.C. ACT IS AN ATTEMPT TO REGULATE *RAIL TRANSPORTATION ROUTES*, AND ICCTA VESTS IN THE BOARD THE EXCLUSIVE POWER TO REGULATE SUCH ROUTES.

The District of Columbia "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the "DC Act" or "Act"), by its express terms, purports to prohibit the routing of certain rail freight traffic and the movement of certain rail cars through the District of Columbia (the "District"), thereby requiring that such traffic be diverted to "alternative routes."

² The Board may grant a Petition for Reconsideration only if the petitioner shows that: "(1) the prior action [here, the Decision granting CSXT's Petition for Declaratory Order] will be affected materially because of new evidence or changed circumstances" or "(2) The [Decision] involves material error." 49 C.F.R. § 1115.3(b).

³ The Sierra Club's Reconsideration Petition essentially repeats selected arguments made by the District of Columbia in its reconsideration petition, and makes no new or additional arguments. Therefore, CSXT hereby incorporates by reference to this Reply the "Reply of CSXT Transportation, Inc. to Petition for Reconsideration of the District of Columbia" (March 31, 2005), and all arguments made therein.

See D.C. Act at 1, 2. Such state or local regulation of rail traffic routing is precisely the type of regulation that is expressly preempted by ICCTA, which provides in relevant part:

The jurisdiction of the Board over –

(1) transportation by rail carriers . . . with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers . . .

is exclusive. . . . [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.⁴

49 U.S.C. § 10501(b) (emphasis added). As numerous courts have found, it is difficult to imagine a more clear congressional command of federal preemption than that expressly prescribed by Section 10501(b). See Decision at 7-8 and cases cited therein. Regulation of rail carrier routes and of the movement of rail cars and freight traveling in interstate commerce – the aim of the DC Act – is at the heart of the Board’s exclusive jurisdiction, and Congress has clearly and unequivocally mandated that all state and local legislation regarding this topic is preempted by federal law. See Decision at 8 (“By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad’s traffic should be routed.”).

This is a pure question of law, and no additional fact gathering or evidence, or weighing of the DC Act’s burden on commerce is necessary or appropriate. The express, unambiguous language of the statute admits only one conclusion: ICCTA preempts the DC Act, which is therefore null and void. See generally, *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724, 738 (1985); *Shaw v. Delta Airlines*, 463 U.S. 85, 95 (1983) (preemption of state law is compelled if Congress’ command is explicitly stated in the federal statute’s language).⁵

⁴ The District is considered a “State” for purposes of ICCTA. See 49 U.S.C. § 10102(8).

⁵ ICCTA expressly and unequivocally preempts all state laws that seek to regulate the routing or movement of rail cars or freight in interstate commerce. The D.C. Act is a “state” law that purports to regulate rail routes and the routing and movement of rail cars and freight in interstate

II. THE SIERRA CLUB'S TWO RECONSIDERATION ARGUMENTS MISAPPREHEND THE DECISION AND THE NARROW ISSUES THAT WERE BEFORE THE BOARD IN THIS DECLARATORY ORDER PROCEEDING.

In support of its request for reconsideration, the Sierra Club offers two arguments, both of which are based upon a fundamental misunderstanding of the Decision. *First*, the Sierra Club misconstrues the Decision when it asserts that it “implicitly repeals” FRSA. *See* Recon. Pet. at 1-4. To the contrary, the Board expressly limited its holding to ICCTA, stating:

[O]ur decision here addresses only the preemptive effect of section 10501(b). The preemptive effect of other statutes is more properly addressed by the agencies that administer those statutes, and by the federal district court.

Decision at 5 (emphasis added). The Decision could not be more clear in its refusal to make any finding or conclusion regarding FRSA or any other federal statute. The Board has no power to construe FRSA, and it has unequivocally disclaimed any intention to do so. The Sierra Club’s implicit repeal argument is an irrelevant distraction that has no effect on the Decision’s narrow holding, that the DC Act is preempted by ICCTA Section 10501(b).

Moreover, the Sierra Club’s argument rests on the fallacious assumption that a state or local law must either be preempted by every applicable federal law, or not preempted by every applicable federal law. It is entirely possible and logically consistent, however, for a state law to be preempted by one federal law, but not preempted by another. The hypothetical possibility that one federal law may not preempt a given state law simply has no bearing on the question of whether a separate and distinct federal preempts the same state law. So long as the state law in question is preempted by one federal statute, the net effect on the state law is the same: that law is invalid, void, and unenforceable. In this case, whether or not the DC Act might otherwise fall

commerce. Therefore, ICCTA preempts the D.C. Act. This straightforward analysis ends the inquiry, and renders the Sierra Club’s reconsideration arguments immaterial and unavailing.

within the FRSA savings clause is immaterial, because the Decision correctly found the DC Act is preempted by ICCTA.⁶

Second, the Petition incorrectly claims that the Decision rested on an insufficient factual record. *See* Recon. Pet. at 4-6. Because the DC Act on its face purports to regulate directly both rail routes and the movement of rail cars and rail freight in interstate commerce, no detailed factual inquiry is necessary to determine the narrow question that was before the Board – whether, *as a matter of law*, the DC Act is preempted by ICCTA.

The Sierra Club argues that the Board did not develop a sufficient factual record to allow it to determine whether the DC Act would unreasonably burden interstate commerce. Here again, the Sierra Club is asking the wrong question. The Board was not required to make any finding of fact regarding the burden the DC Act would place on interstate commerce. *Congress*, in enacting ICCTA, has already made the overarching factual determination that all state and local efforts to regulate directly the routing and movement of rail cars and freight unduly burden commerce.⁷ Where, as here, the state law in question attempts to regulate directly core railroad functions expressly and exclusively governed by ICCTA – including the routing and movement

⁶ Thus, the extended arguments offered by the Sierra Club and the District for a presumption that state laws are not preempted by FRSA miss the point: the DC Act is preempted by ICCTA, a separate and distinct statute. An example may help to illustrate the infirmity of the Sierra Club's argument. The DC Act is likely not preempted by ERISA, but no one would argue that the Decision therefore works an implicit repeal of ERISA or its preemption "savings clause" for certain state laws.

⁷ The present case is thus distinguished from those raised by the District of Columbia in its reconsideration petition, which involved a state or local government's regulation of an activity that was only indirectly or tangentially related to subjects and activities governed by ICCTA. *See, e.g., FEC RR v. West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001); *see also* CSXT Reply to DC Reconsideration Petition at 5-7 (Mar. 31, 2005). While the Decision accurately notes that the DC Act would unreasonably burden interstate commerce, a finding of such an unreasonable burden is not necessary to the Decision's holding that ICCTA preempts the DC Act.

of rail cars in interstate commerce – no balancing of the burden of the local ordinance on interstate commerce is necessary or appropriate.

The narrow holding of the Decision was that ICCTA preempts the D.C. Act, nothing more and nothing less. The Decision did not purport to evaluate whether routing of certain types of freight on lines that traverse the District of Columbia was good, bad, or indifferent. Rather, the Decision simply enforced the policy judgment of Congress, codified in ICCTA, by holding that any regulation of such routing is exclusively a matter of federal law, and that state or local laws that attempt to effect such regulation are invalid and unenforceable. This is plainly correct as a matter of law, and the Sierra Club offers no basis whatever for the Board to reconsider the sound application of settled law embodied in the Decision.

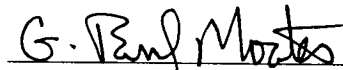
CONCLUSION

For all of the foregoing reasons, CSXT respectfully requests that the Board deny the Sierra Club's Petition for Reconsideration.

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Respectfully submitted,



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Dated: April 27, 2005

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Reply of CSX Transportation, Inc. to the Petition for Reconsideration of the Sierra Club to be served upon all Parties of Record to Finance Docket No. 34662, this 27th day of April 2005, as follows:

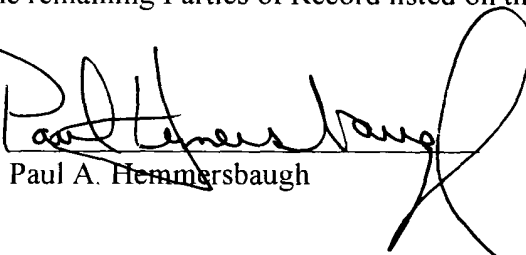
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and by first class mail, postage prepaid, to the remaining Parties of Record listed on the official Service List for this proceeding.



Paul A. Hemmersbaugh