

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants

and

WASHINGTON ENVIRONMENTAL
COUNCIL, *et al.*,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

BRIEF OF THE ASSOCIATION OF
AMERICAN RAILROADS AS AMICI
CURIAE IN SUPPORT OF BNSF
RAILWAY'S OPPOSITION TO
DEFENDANTS' AND DEFENDANT-
INTERVENORS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

SEPTEMBER 7, 2018

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

I. INTERESTS OF THE AMICUS CURIAE.....1

**II. ICCTA PREEMPTION APPLIES TO THE REGULATION OF
TRANSPORTATION BY RAIL CARRIER.....1**

**III. DEFENDANTS’ REGULATION OF RAIL TRAFFIC UNREASONABLY
BURDENS INTERSTATE COMMERCE4**

IV. CONCLUSION6

CERTIFICATE OF SERVICE.....7

TABLE OF AUTHORITIES

Cases

1

2

3 *Ass'n Am. Railroads v. S. Coast Air Quality*, 622 F.3d 1094 (9th Cir. 2010)2

4 *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998)2

5 *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996)

63

7 *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017).....2

8 *Friberg v. Kansas City S. Ry.*, 267 F.3d 439 (5th Cir. 2001).....3

9 *Green Mountain R.R. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).....2

10 *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238 (3d Cir. 2007)4

11 *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000)3

Statutes

12 49 U.S.C. § 101023

13 49 U.S.C. § 10501(b)3, 5

14 49 U.S.C. §101015

Other Authorities

15

16 *CSX Transp., Inc. – Petition for Declaratory Order*, FD No. 34662, slip op. (STB served

17 Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005).....4

18 H.R. Rep. No. 104-331 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802.....2

19

20

21

22

23

24

25

26

1 **I. INTERESTS OF THE AMICUS CURIAE**

2 The Association of American Railroads (“AAR”) is an incorporated, nonprofit
3 trade association whose membership includes freight railroads that operate 83 percent of
4 the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the
5 freight revenues of all railroads in the United States; and passenger railroads that operate
6 intercity passenger trains and provide commuter rail service. AAR’s member railroads
7 operate a rail system that spans North America and links to a globalized goods movement
8 network.

9 AAR files this amicus brief in support of the opposition of BNSF Railway
10 Company (“BNSF”) to the Defendants’ motion for summary judgment on preemption
11 issues, and the motion of Defendant-Intervenors Washington Environmental Council *et al.*
12 for partial summary judgment on preemption claims. AAR is filing this short brief to
13 stress the continuing importance to AAR’s members of federal preemption, including the
14 preemption provision of the ICC Termination Act (“ICCTA”), in safeguarding the free
15 flow of interstate and international commerce.¹ Because of the national importance of the
16 issues presented in this case, the broad scope of ICCTA preemption, and the unreasonable
17 burdens placed on interstate commerce by Defendants’ regulation of rail transportation,
18 summary judgement is not appropriate.

19 **II. ICCTA PREEMPTION APPLIES TO THE REGULATION OF**
20 **TRANSPORTATION BY RAIL CARRIER**

21 The fundamental legal premise underlying the pending motions is unsound and
22 does not support summary judgment. The basic logical syllogism that the motions and the
23 amicus brief filed by the states of California, Maryland, New Jersey, New York, Oregon,
24 and Massachusetts (“Coastal States”) attempt to establish is that: 1. ICCTA preempts state

25

26 ¹ AAR filed a more extensive *amicus curiae* brief on May 14, 2018, in support of BNSF’s
opposition to the partial motion to dismiss and motion for abstention filed by Defendants. Those
motions to dismiss raised preemption arguments similar to those made in the pending motions.

1 licensing of facilities operated by a rail carrier or under the auspices of a rail carrier; 2.
2 Lighthouse is not a rail carrier; and, therefore, 3. ICCTA preemption does not apply. *See*
3 Defendants' Motion at 7; Defendant-Intervenors' Motion at 6; Coastal States' Brief at 5.
4 That logic is flawed and the conclusion it supports is overbroad.

5 It is certainly true that ICCTA categorically preempts the application of state and
6 local preclearance requirements to activities expressly regulated by the STB, such as the
7 construction of rail lines. *See, e.g., City of Auburn v. STB*, 154 F.3d 1025, 1029–31 (9th
8 Cir. 1998); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). But it is
9 also well settled that ICCTA also preempts state or local regulatory actions that “have the
10 effect of ‘managing’ or ‘governing’ rail transportation.” *Delaware v. STB*, 859 F.3d 16, 18
11 (D.C. Cir. 2017); *see also Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir.
12 2010). Thus, preemption under ICCTA applies to regulatory actions of states and localities
13 affecting activities beyond those directly regulated by the STB.

14 ICCTA was primarily a deregulatory statute that reflected Congress' intent to
15 ensure the railroad industry's economic viability by relying on market forces rather than
16 government intervention. *See Ass'n Am. Railroads v. S. Coast Air Quality*, 622 F.3d 1094,
17 1096 (9th Cir. 2010) (“AAR”) (the ICCTA is “a federal act that substantially deregulated
18 the railroad industry”). As Congress explained, over time “[t]he combination of * * *
19 onerous Federal regulations and stiff competition from the motor carrier industry proved
20 lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial
21 collapse.” H.R. Rep. No. 104-331, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802.
22 ICCTA was the culmination of several legislative initiatives that limited the regulatory
23 reach of the Interstate Commerce Commission and built “on the deregulatory policies that
24 have promoted growth and stability in the surface transportation sector. * * * The [Act]
25 keeps bureaucracy and regulatory costs at the lowest possible level, consistent with
26 affording remedies only where they are necessary and appropriate.” H.R. Rep. No. 104-

1 331, at 93, 1995 U.S.C.C.A.N. at 805. Thus, “freeing the railroads from state and federal
2 regulatory authority was the principal purpose of Congress.” *Wisconsin Central Ltd. v.*
3 *City of Marshfield*, 160 F. Supp. 2d 1009, 1015 (W.D. Wis. 2000).

4 Even as the federal framework evolved away from direct economic regulation of
5 railroads in favor of reliance on market forces, Congress also *broadened* the scope of
6 federal preemption. Congress abolished the Interstate Commerce Commission and created
7 the Surface Transportation Board with circumscribed regulatory authority at the same time
8 it enacted 49 U.S.C. § 10501(b) in its current form. ICCTA grants exclusive federal
9 regulatory jurisdiction to the STB over “transportation by rail carrier.” 49 U.S.C. §
10 10501(b). “Transportation” is defined broadly by 49 U.S.C. § 10102(9) to include:

- 11 (a) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard,
12 property, facility, instrumentality, or equipment of any kind related to
13 the movement of passengers or property, or both, by rail, regardless of
14 ownership or an agreement concerning use; and
15 (b) services related to that movement, including receipt, delivery,
16 elevation, transfer in transit, refrigeration, icing, ventilation, storage,
17 handling, and interchange of passengers and property;

18 Thus, it is clear that Congress’s simultaneous broad grant of jurisdiction to the STB over
19 transportation by rail carrier and its establishment of limited regulatory authority at the
20 agency was not intended to open the door to regulation of rail transportation to the states
21 simply because the STB does not regulate a particular activity.

22 The courts have concluded that “Congress intended the preemptive net of [ICCTA]
23 to be broad by extending exclusive jurisdiction to the STB over anything included within
24 the general and all-inclusive term ‘transportation by rail carriers.’” *CSX Transp., Inc. v.*
25 *Georgia Public Service Comm’n*, 944 F. Supp. 1573, 1582 (N.D. Ga. 1996). *See also*
26 *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) (“The language of the

1 statute could not be more precise, and it is beyond peradventure that regulation of KCS
2 train operations . . . is under the exclusive jurisdiction of the STB....”). The STB has
3 noted that “[r]egulating when and where particular products may be carried by rail . . .
4 would constitute direct regulation of railroad activities” that is prohibited by ICCTA. *CSX*
5 *Transp., Inc. – Petition for Declaratory Order*, FD No. 34662, slip op. at 10 (STB served
6 Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005).

7 In this case, the Defendants expressly used the powers of state government for the
8 purpose of limiting the amount and type of rail traffic. In its decision denying Lighthouse
9 the Clean Water Act Section 401 permit, Washington acknowledged that it lacks authority
10 to mitigate the environmental impacts of increased rail transportation of coal because of –
11 among other reasons – the preemption provision of ICCTA. The state nonetheless used the
12 powers of state government to prevent an increase in freight rail traffic authorized by
13 federal law. Such action is preempted by ICCTA.

14 III. DEFENDANTS’ REGULATION OF RAIL TRAFFIC UNREASONABLY 15 BURDENS INTERSTATE COMMERCE

16 For the second time, Defendants are asking this court to rule that Washington may
17 forbid the expansion of a rail-served facility on the basis of the environmental impacts of
18 increased rail traffic, without engaging in the factual analysis necessary to consider
19 whether such actions burden interstate commerce. In addition to the required analysis of
20 whether regulation has the effect of managing or governing rail transportation described
21 above, ICCTA also prevents states or localities from taking actions that would have the
22 effect, when applied, of unreasonably burdening or interfering with rail transportation.
23 *See, e.g., N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *Union*
24 *Pac. R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 679–80 (7th Cir. 2011); *City of*
25 *Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005). Allowing states or

1 localities to deny permits to rail customers in order to regulate the amount or type of rail
2 traffic would unreasonably burden interstate commerce.

3 BNSF is the only railroad currently licensed to serve the Lighthouse facilities, but
4 BNSF operates as part of a nationwide network of interconnected rail carriers and
5 integrated global transportation system. A fundamental purpose of the STB's exclusive
6 jurisdiction over rail transportation is to ensure the availability of rail transportation to
7 meet the needs of rail shippers and the U.S. economy. 49 U.S.C. §10101. If states were
8 free to regulate the amount of coal that may be transported by rail, even indirectly by
9 regulating rail customers, the disruption to railroads and the national economy would be
10 significant. Moreover, the coal that is produced in a relatively small number of U.S. states
11 is consumed all over the country and the world because the United States has the world's
12 most efficient and comprehensive coal transportation system, led by railroads. The fact
13 that Defendants' motions are supported by a coalition of exclusively coastal states should
14 give the Court pause regarding the proper roles of state government in dictating national
15 energy and transportation policy.

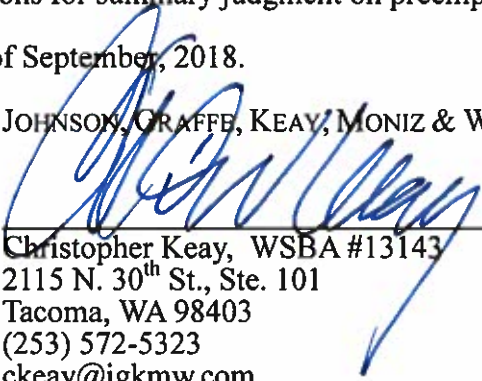
16 The rail operations at Longview are directly connected to a national system of
17 interconnected railroads that moves commodities and goods into, out of, and around the
18 country. Precisely because of the railroad industry's national scope, interconnectedness,
19 and enormous importance to the national economy, the Constitutional balance of power
20 between the states and the federal government has long dictated that the federal interests in
21 promoting interstate and international commerce must outweigh state powers to regulate
22 matters relating to rail transportation. State actions like those at issue here, if replicated
23 across the country, would have a direct and substantial negative effect on the U.S.
24 economy and a national, privately-owned freight rail network could not be sustained.
25 Congress has expressly determined that rail transportation is to be exclusively regulated at
26 the federal level to prevent such an outcome.

IV. CONCLUSION

1 AAR and its member railroads operate an integrated transportation network that
2 serves nearly every industrial, wholesale, retail, and resource-based sector. Congress,
3 through ICCTA, acted to ensure the free flow of commodities in interstate commerce by
4 establishing a regulatory paradigm of limited, but exclusive, federal regulation of
5 transportation by rail carrier. ICCTA preempts the regulatory actions of state and local
6 government that have the effect of managing or governing rail transportation, and that
7 unreasonably burden interstate commerce like those at issue here. As such, the Court
8 should deny the pending motions for summary judgment on preemption issues.
9

10 DATED this 6th day of September, 2018.

11 JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

12 
13 Christopher Keay, WSBA #13143
14 2115 N. 30th St., Ste. 101
15 Tacoma, WA 98403
16 (253) 572-5323
17 ckeay@jgkmw.com

18 ASSOCIATION OF AMERICAN RAILROADS

19 Kathryn D. Kirmayer, Pro Hac Vice, Bar # 424699
20 Timothy J. Strafford, Pro Hac Vice, Bar #1011957
21 Alice Koethe, Pro Hac Vice, Bar # 1510879
22 425 3rd Street, SW
23 Washington, DC 20024
24 (202) 639-2506
25
26

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.



Kimberly Blackwood, Paralegal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26