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UNITED STATES DISTRICT COURT
FOR THE 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

SUPPLEMENTAL REPLY BRIEF IN
SUPPORT OF WEC MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
PREEMPTION CLAIMS

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1 INTRODUCTION

2 Defendant-Intervenors Washington Environmental Council *et al.* (“WEC”) submit this
 3 supplemental reply to the supplemental opposition briefs of Lighthouse and BNSF. Despite the
 4 Court’s grant of almost three months to continue discovery and respond to the motions for partial
 5 summary judgment on federal preemption, neither Lighthouse nor BNSF produced any facts to
 6 dispute the fundamental assertions that (1) Lighthouse is not a rail carrier subject to the exclusive
 7 jurisdiction of the Surface Transportation Board (“STB”), and (2) BNSF is not a part of the
 8 proposed coal shipping terminal project – not an owner, operator, agent, employer, or employee –
 9 and it has no basis to invoke STB jurisdiction. Lighthouse and BNSF hope that by muddying the
 10 jurisdictional waters, they can cobble together a preemption claim under the Interstate Commerce
 11 Commission Termination Act (“ICCTA”). Yet while the expert reports submitted by Lighthouse
 12 and BNSF may show that the inability to build the proposed coal shipping terminal would cost
 13 Lighthouse and BNSF increased future revenue, the loss of hoped-for profits is not a factor in
 14 determining whether the Washington Department of Ecology’s denial of a water quality
 15 certification for a single project is preempted by federal railroad or maritime laws. WEC asks the
 16 Court to grant its motion for partial summary judgment on preemption issues.

17 ARGUMENT

18 I. ICCTA PREEMPTION CLAIMS (LIGHTHOUSE COUNT III; BNSF COUNT I)

19 *First*, Lighthouse failed to produce any evidence showing that it is a rail carrier or acting as
 20 an employee or agent of a rail carrier. Nothing in Lighthouse’s expert declaration shows that
 21 Lighthouse is a part of BNSF’s rail operations. This is fatal to Lighthouse’s claim of ICCTA
 22 preemption over Ecology’s water quality decision. The ICCTA contains an express preemption
 23 provision that provides:

1 The jurisdiction of the [Surface Transportation] Board over-

- 2 (1) transportation by rail carriers, and the remedies provided in this part with respect to
3 rates, classifications, rules (including car service, interchange, and other operating
4 rules), practices, routes, services, and facilities of such carriers; and
5 (2) the construction, acquisition, operation, abandonment, or discontinuance of spur,
6 industrial, team, switching, or side tracks, or facilities, even if the tracks are located,
7 or intended to be located, entirely in one State,

8 is exclusive. Except as otherwise provided in this part, the remedies provided under this part
9 with respect to regulation of rail transportation are exclusive and preempt the remedies
10 provided under Federal or State law.

11 49 U.S.C. § 10501(b) (emphasis added); *see also id.* § 10102(9) (defining “transportation,” in part,
12 as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property,
13 facility, instrumentality, or equipment of any kind related to the movement of passengers or
14 property, or both, by rail, regardless of ownership or an agreement concerning use”). In short,
15 unless Lighthouse is a rail carrier, the STB does not have jurisdiction, and there can be no federal
16 preemption.

17 The cases cited by Lighthouse itself establish this fundamental concept. In *Norfolk Southern*
18 *Railway Co. v. City of Alexandria*, the Fourth Circuit did not hold that rules for private trucking
19 companies were preempted simply because they burdened rail transportation. Instead, the facts of
20 that case were that Norfolk Southern itself – indisputably a rail carrier – operated the ethanol
21 transloading facility at issue.

22 In April 2008, Norfolk Southern began operating an ethanol transloading facility (the
23 “Facility”) in Alexandria, Virginia. The Facility enables Norfolk Southern to transfer bulk
24 shipments of ethanol from its railcars onto surface tank trucks that are operated by third
25 parties. Shippers contract with Norfolk Southern to have ethanol shipped to the Facility by
26 rail, and Norfolk Southern includes the expense of transloading in its overall price for
27 transporting ethanol. Norfolk Southern’s agent ... performs the transloading operations at
28 the Facility.

608 F.3d 150, 154 (4th Cir. 2010) (emphasis added). The City of Alexandria petitioned the STB for
a jurisdictional declaration and issued a haul permit to Norfolk Southern (which the railroad
ignored). *Id.* at 154-55. The STB concluded that Norfolk Southern’s operation of the transloading

1 facility “constitutes transportation by rail carrier,” explaining that “the Facility is part of [Norfolk
2 Southern]’s rail operations” and, as such, “the Facility qualifies for federal preemption.” *Id.* at 156.¹

3 Because a challenge to Ecology’s denial of a single water quality certification for a single
4 project not owned or operated by a railroad does not fall under exclusive STB jurisdiction, any
5 expert reports concerning alleged indirect railroad regulation are irrelevant to Lighthouse’s ICCTA
6 preemption claim. *See Valero Refining Comp.—Petition for Declaratory Order*, S.T.B. 36036,
7 2016 WL 5904757 (Sept. 20, 2016) (no STB jurisdiction and no preemption where regulated entity
8 was not a rail carrier, even where agency analyzed and considered rail-related impacts in its decision
9 to deny permit and rail carrier would have served project); *SEA-3, Inc.—Petition for Declaratory*
10 *Order*, S.T.B. 35853, 2015 WL 1215490 (March 16, 2015) (fuel terminal not a rail carrier, nor
11 acting under the auspices of a rail carrier).

12 *Second*, while no one disputes that BNSF is a rail carrier, all parties agree that BNSF is
13 neither the owner nor the operator nor an agent nor in an employee relationship with Lighthouse.
14 This distinction always matters for ICCTA preemption claims, but perhaps is sometimes glossed
15 over in court decisions because almost all reported decisions involve a challenge to an overarching
16 state or local regulation. In a broader regulatory challenge, assessing indirect impacts to a rail
17 carrier would necessarily involve an analysis of “the degree to which the challenged regulation
18 burdens rail transportation.” BNSF Supp. Br. at 3. That is simply not the case here – the only
19 challenged decision, Ecology’s denial of a single water quality certification for a proposed project
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22 ¹ In *Boston & Marine Corp. & Springfield Terminal R.R. Co.—Petition for Declaratory Order*,
23 S.T.B. 34662, 2013 WL 3788140 (July 19, 2013), where a railroad challenged a zoning permit
24 that outright prohibited rail traffic to a warehouse, the STB unsurprisingly found an ICCTA
25 preemption problem: “[s]uch an attempt to prohibit common carrier rail transportation directly
26 conflicts with the most fundamental common carrier rights and obligations provided by federal
27 law and the Board’s exclusive jurisdiction over that service.” *Id.* at *3. Those are not remotely
28 the facts here, where the only challenged action is a single water quality certification denial for a
proposed project that is not a rail carrier.

1 over which BNSF has no ownership, operation, agency, or employer/employee relationship as a
2 factual matter does not directly or indirectly regulate rail.

3 Tellingly, all the cases relied upon by BNSF involve specific attempts at railroad regulation.
4 *See Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010)
5 (railroads challenged local agency rules that limited air pollution from idling trains); *CSX Transp.*
6 *Inc.—Petition for Declaratory Order*, S.T.B. 34662, 2005 WL 1024490 (May 3, 2005) (rail carrier
7 challenged District of Columbia statute that banned rail transportation of certain hazardous
8 commodities); *Or. Coast Scenic R.R. LLC v. Or. Dep't of State Lands*, 841 F.3d 1069 (9th Cir.
9 2016) (rail carrier challenged application of state law to railroad track repair work). These factual
10 scenarios differ significantly from those before the Court.

11 *Third*, as in Lighthouse's supplemental brief, BNSF relies upon expert reports that allegedly
12 show an impact to the railroad's bottom-line should the proposed coal terminal not be built. Yet if
13 BNSF's argument were valid, if a denial of one permit for an unrelated company's project that
14 would pay BNSF for its common carrier service falls under STB jurisdiction, then any project that
15 received goods by rail -- a Walmart, an automobile export terminal, a grain shipping terminal --
16 would also be subject to STB jurisdiction and state/local permitting for those projects would be
17 invalid. Such an expansive reading of STB jurisdiction is unsupportable. While Congress intended
18 to ensure that railroad operations were uniform across various states and jurisdictions, Congress
19 surely did not intend to remove ordinary land-use permitting and Clean Water Act certification
20 decisions from state and local authorities for any project or building served by rail and give it to the
21 STB. A proposed coal shipping terminal unrelated to BNSF's operations is not "railway critical
22 infrastructure," BNSF Supp. Br. at 2, it is a potential future customer with permitting requirements
23 wholly separate from the railroad. *See Town of Milford, Mass.—Petition for Declaratory Order*,
24 S.T.B. 34444, 2004 WL 1802301 at *3 (Aug. 11, 2004) (where rail carrier merely delivered loaded
25

1 cars to facility, the facility’s “planned activities would not be considered integrally related to ... rail
2 carrier service.”).

3 Additionally, when BNSF points to Ecology’s water quality certification denial, it only
4 discusses one prong of that denial, the substantive review under Washington’s State Environmental
5 Policy Act (“SEPA”). This discussion purposefully omits the fact that Ecology denied the
6 terminal’s water quality certification on two different grounds – unmitigable harms found in the
7 unchallenged Final Environmental Impact Statement (“FEIS”) and the project’s failure to supply
8 evidence of “reasonable assurance” that water quality standards would be met. Indeed, in the
9 ongoing state proceedings challenging the same water quality certification denial, Lighthouse
10 admitted that it did not provide such reasonable assurances. *See* MBTL’s Opp. to Ecology’s Motion
11 for Summary Judgment on Issue No. 2 at 5 n.1 (April 20, 2018), filed in *Millennium Bulk*
12 *Terminals-Longview, LLC v. Washington State Dep’t of Ecology*, P17-090 (Washington Pollution
13 Control Hearings Board) (“Millennium would have a hard time disputing that Ecology may still
14 need some of the information it claims is missing” and therefore it “does not intend to separately
15 pursue any claim that Ecology actually had ‘reasonable assurance.’”) (excerpt of brief attached as
16 Exh. A to Declaration of Kristen L. Boyles, filed concurrently). It is incorrect to aver, as BNSF
17 does (BNSF Supp. Br. at 1-2) that the water quality certification denial was an attempt to regulate
18 the railroad.

19 II. PORTS AND WATERWAYS SAFETY ACT (LIGHTHOUSE COUNT IV)

20 *Finally*, Lighthouse fundamentally misrepresents the preemption framework under the Ports
21 and Waterways Safety Act. By denying a single certification for a single project, Ecology did not
22 regulate marine traffic in any way. Because a water quality certification is not a regulation
23 governing vessel traffic, Ecology was not required to identify “peculiarities of local waters.”
24 Lighthouse Supp. Br. at 4. As fully explained in prior briefing, the Ports and Waterways Safety Act
25 is simply inapplicable here. *See* WEC Preemption Reply at 10-12; *Portland Pipe Line Co. v. City of*

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 30th of November, 2018.

s/ Kristen L. Boyles
Kristen L. Boyles, WSBA #23806
EARTHJUSTICE