The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC ,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her office capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands,

Defendants.

NO. 3:18-cv-05005-RJB

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF BNSF RAILWAY'S OPPOSITION TO DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTIONS FOR PARTIAL DISMISSAL AND ABSTENTION

NOTED ON MOTION CALENDAR:

MAY 15, 2018

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INTEREST OF THE *AMICUS CURIAE*

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

AAR files this amicus brief in support of BNSF Railway Company's opposition to the Defendants' partial motion to dismiss and motion for abstention because of the importance to AAR's members of safeguarding the free flow of interstate and international commerce. Specifically, this brief provides additional context to BNSF's opposition to Defendants' contention that Plaintiffs have failed to state a claim for preemption under the ICC Termination Act of 1995 ("ICCTA").

INTRODUCTION

This case concerns the longstanding effort of Lighthouse Resources, Inc. and its subsidiaries ("Lighthouse") to expand a rail-served coal export facility in Longview, Washington. The State of Washington ("Washington") premised its decision to deny Lighthouse necessary permits in large part on its assessment that the resulting growth in rail traffic would generate adverse environmental effects. Washington concluded that even though it lacked regulatory authority to mitigate impacts from increased rail traffic as a condition of the permit, it was nonetheless free to deny the permit entirely to prevent the

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additional rail traffic in the first instance. But whether it is done directly or indirectly, regulation of rail transportation by Washington is not permitted.

Washington's regulatory actions effectively govern rail transportation by dictating the type and quantity of commodities that can be transported by rail, and thus regulate interstate and foreign commerce. Such state regulation is preempted by the ICCTA. AAR submits this amicus brief to assist the Court in appreciating how impermissible state regulation like the action at issue here impacts the national freight rail network, and thereby the national economy as well as the international flow of goods.

The rail operations at Longview are directly connected to a national circulatory system of interconnected railroads that moves commodities and goods into, out of, and around the country. Approximately 600 freight railroads operate in the United States. The largest seven "Class I" railroads account for around 69 percent of freight rail mileage, 90 percent of employees, and 94 percent of revenue. Each Class I railroad operates in multiple states over thousands of miles of track. The 590 or so non-Class I railroads (also known as short line and regional railroads) range in size from tiny operations handling a few carloads a month to multi-state operators not far from Class I size. Together, freight railroads operating in the United States form an integrated, nearly 140,000-mile system.

All freight railroads operating in the United States share common standards, including a standard track gauge, equipment, data protocols, and operating practices. This allows railroads to provide seamless service throughout the country. In fact, freight railroads are fully integrated throughout North America: the rail systems of the United States, Canada, and Mexico operate largely barrier-free except for customs and provide the world's most productive and lowest-cost freight rail service. This interconnectedness also

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means that disruptions to one part of the network can ripple out and quickly affect other areas as well.

Freight railroads serve nearly every industrial, wholesale, retail, and resource-based sector of the U.S. economy. The railroad industry also has a much broader economic impact: in 2014 alone, America's major freight railroads supported 1.5 million jobs, nearly $274 billion in output, and $88 billion in wages across the U.S. economy. In addition, millions of Americans work in industries that are more competitive thanks to the affordability and productivity of America's freight railroads.

Freight that is related directly or indirectly to energy accounts for close to half of all rail traffic volume in the United States. Coal has long dominated this energy-related traffic. In 2017, coal accounted for 32.2 percent of originated tonnage for U.S. Class I railroads, far more than any other commodity. In 2016, coal accounted for 14 percent of rail revenue, behind only intermodal (freight transported in containers) and chemicals. And according to the Energy Information Agency, 66 percent of U.S. coal shipments in 2016 were delivered to their final destinations by rail. Railroads also carry enormous amounts of grain, chemicals, forest products, motor vehicles and parts, food products, petroleum products, ores and minerals.

For the U.S. economy as a whole, exports and imports combined are equivalent to around 27 percent of GDP, up from around 17 percent 30 years ago. For U.S. freight railroads, international trade plays an even greater role: at least 42 percent of the carloads and intermodal units railroads carry, and more than 35 percent of rail revenue, are directly associated with international trade. Most of the coal that railroads transport is used to generate electricity in the United States, but coal exports are crucial to railroads, too. U.S.

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coal exports were 97.0 million tons in 2017, the most since 2014 and up 60.9 percent from 2016's 60.3 million tons. A large portion of U.S. coal exports travels by rail. In 2017, three of the top five markets for U.S. coal exports were in Asia.

Precisely because of the railroad industry's national scope, interconnectedness, and enormous importance to the national economy, the Constitutional balance of power between the states and the federal government has long dictated that the federal interests in promoting interstate and international commerce must outweigh state powers to regulate matters relating to rail transportation. State actions like those at issue here, if replicated across the country, would have a direct and substantial negative effect on the U.S. economy, as a national, privately-owned freight rail network could not be sustained. As discussed below, Congress has expressly determined that rail transportation is to be exclusively regulated at the federal level to prevent such an outcome.

ARGUMENT

I. ICCTA Preempts Regulation of Rail Operations Under Other State and Federal Statutes.

A. Federal Regulation of Railroads and ICCTA Preemption

Article 1, Section 8 of the U.S. Constitution endows Congress with the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Reflecting the railroads' importance to interstate commerce, regulation of railroads by the federal government stretches back to the Interstate Commerce Act of 1887 ("ICA") and the creation of the Interstate Commerce Commission ("ICC"). "Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress's authority under the Commerce Clause to regulate the railroads is well

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established, and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area." *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998 (internal citations omitted). Congress's regulation of interstate rail transportation under federal law has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

In 1995, Congress enacted ICCTA, which created the Surface Transportation Board ("STB"), the successor agency to the ICC. ICCTA expanded federal preemption and granted exclusive federal regulatory jurisdiction to the STB over "transportation by rail carrier," and "the construction, operation of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). Section 10501(b) concludes with an express preemption clause, stating: "[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." An essential purpose of § 10501(b), as stated by Congress, is to prevent a patchwork of local regulation from interfering with interstate commerce. *See* H.R. Rep. No. 104-311, at 95-96 (1995) (noting the need for "uniformity" of federal standards for railroads and the risk of "balkanization" from state and local regulation).

The broad language of § 10501(b) makes ICCTA unique among federal statutes, because it not only preempts state regulation, but it also precludes the application of other federal laws that would regulate rail transportation. *Ass'n of American R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010). For example, the STB has concluded that some applications of federal environmental laws would be precluded if "federal

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environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads." *Grafton & Upton R.R.—Petition for Declaratory Order*, STB Docket No. FD 35779, slip op. at 6 (STB served Jan. 27, 2014). *See also U.S. EPA—Petition for Declaratory Order*, FD 35803, slip op. at 8-9 (STB served Dec. 30, 2014) ("*EPA*"). Notably, where federal environmental laws have been applied to railroads, the courts have only approved such application where it is clear that the laws were not being applied in a way that regulated or obstructed rail operations. *See United States v. St. Mary's Ry. W. LLC*, 989 F. Supp. 2d 1357, 1362 (S.D. Ga. 2013) (concluding that EPA's action against a railroad for discharges into wetlands during construction of a side track was not preempted by ICCTA, noting that it was "in no way a direct regulation on Defendant's activities.").

B. Washington's Use of Pre-Clearance Requirements to Explicitly Regulate the Volume of Freight Rail Traffic Is Categorically Preempted by ICCTA.

It is well settled that section 10501(b) categorically preempts the application of state and local preclearance requirements to activities expressly regulated by the STB such as the construction of rail lines. *See, e.g., City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). It is equally well settled that ICCTA also categorically preempts state or local regulatory actions that "have the effect of 'managing' or 'governing' rail transportation." *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017); *see also Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010). Thus, the categorical preemption question presented to this Court regarding the application of ICCTA preemption is not the narrow question of

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whether Lighthouse is a rail carrier within the meaning of ICCTA, but rather whether the state's action here is effectively managing and governing rail transportation.

Defendants rely on *Valero Refining Company – Petition for Declaratory Order*, FD 36036 (STB served Sept. 20, 2016) to frame only the narrow question, contending that that STB guidance stands for the proposition that ICCTA preemption cannot extend to any state actions related to facilities not owned or operated by or under the auspices of a rail carrier. The agency's advisory opinion in *Valero* does not bear such weight. In that case, a non-carrier refiner was denied a permit to expand its operations to add a rail offloading facility that would permit deliveries of crude oil by rail. There was no existing rail service to the facility, and therefore there was no ongoing common carrier rail operation to limit or otherwise interfere with.[1] The STB declined to issue a declaratory order finding the challenged state action preempted, but provided guidance that ICCTA's preemption does not apply to protect the operations of non-carriers. Importantly, in response to the question "whether 10501(b) preempts [the city] from imposing mitigation measures or conditions of approval of the use permit that would directly regulate the activities of [the proposed rail carrier]," the Board stated that "*if the offloading facility were eventually to be constructed* but the EIR or the land use permit, or both, included mitigation conditions unreasonably interfering with [the rail carrier's] future operations to the facility, any attempt to enforce such mitigation measures would be preempted." *Valero* at 6. In other words, if and when rail service *was* authorized to the facility (and thus the rail carrier had a common carrier obligation under federal law to provide service), permit conditions that would

[1] Under 49 U.S.C. § 11101, "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service upon reasonable request."

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unreasonably interfere with that rail service *would* be preempted. This observation focuses on the impact of the state regulation on rail operations, without regard to the ownership or status of the entity seeking state action.

And that is the scenario presented in this case. BNSF currently provides rail service to the Longview complex. It is under a common carrier obligation imposed by federal law to provide such service. The denial of a permit to add a coal export operation in order to restrict coal-by-rail volumes is indistinguishable from a mitigation condition that rail service not increase – the very type of condition that the STB indicated would be preempted in *Valero*. Both actions impermissibly seek to govern and regulate rail transportation authorized by the federal government. ICCTA preempts any "state or local law that permits a non-federal entity to restrict . . . the operations of a rail carrier." *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010). The STB has noted that "[r]egulating when and where particular products may be carried by rail . . . would constitute direct regulation of railroad activities" that is prohibited by ICCTA. *CSX Transp., Inc. – Petition for Declaratory Order*, FD No. 34662, slip op. at 10 (STB served Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005).

Here, the state has admitted that it is doing indirectly what it also acknowledges it cannot do directly. In its decision denying Lighthouse the Clean Water Act Section 401 permit, Washington acknowledged that it lacks authority to mitigate the environmental impacts of increased rail transportation of coal because of – among other reasons – the federal laws protecting interstate commerce from state regulation. That is, Washington recognized that the exercise of state regulatory authority to regulate railroad operations is categorically preempted by ICCTA. *See City of Auburn*, 154 F.3d at 1029. Nonetheless,

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the state took regulatory action expressly to prevent an increase in freight rail traffic already authorized by federal law: it denied the permit. Because it could not grant the permits *on the condition* that rail traffic be limited, it denied the permits to achieve the same result. Federal preemption is not so easily circumvented.

Broad language in the *Valero* decision – arising out of the facts of that case, in which there were no existing rail operations to regulate – must be read together with the STB's other clear statements of the law. The STB has explained that state or local attempts to "prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service." *Boston & Maine Corp.—Petition for Declaratory Order*, FD 35749, slip op. at 4 (STB served July 19, 2013) *reconsideration denied* (STB served Oct. 31, 2013). The federal courts have also made clear that ICCTA does not allow a state or locality to regulate railroad operations and interstate commerce by indirectly regulating other entities – even if they are not rail carriers. *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010) (holding the ICCTA preempts any "state or local law that permits a non-federal entity to restrict ... the operations of a rail carrier").

Limiting the amount of coal that can be transported to and from Longview is directly regulating "transportation" by a "rail carrier" "as part of the interstate rail network"— activities rightly subject to the exclusive jurisdiction of the STB. *See Or. Coast Scenic R.R. v. Dep't of State Lands*, 841 F.3d 1069 (9th Cir. 2016). Washington's action in denying permits to Lighthouse to prevent an increase in the transportation of coal by rail through the state to that facility imposes requirements that, by their nature, are

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being used to prevent a rail carrier from carrying out common carrier services authorized by the STB. *See, e.g., Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). As such, they are categorically preempted by ICCTA.[2]

C. Washington's Regulation of Rail Operations Would Unreasonably Burden Interstate Commerce and Is Preempted by ICCTA as Applied.

In seeking to dismiss Plaintiffs' ICCTA claims, Defendants ask this court to rule that Washington may forbid the expansion of a rail-served facility based on the environmental impacts of increased rail traffic, without engaging in the factual analysis necessary to consider whether such actions burden interstate commerce. ICCTA prevents states or localities from taking actions that would have the effect, when applied, of unreasonably burdening or interfering with rail transportation. *See, e.g., N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *Union Pac. R.R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 679-80 (7th Cir. 2011); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 862 (8th Cir. 2005). In this case, not only was the state regulatory action done for the express *purpose* of regulating rail traffic, but the state action would also have the *effect* of unreasonably burdening railroad operations by targeting the transportation of fossil fuel commodities.[3]

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[2] That is not to say that all actions by states in permitting rail-served facilities would be preempted by ICCTA. Instead, only those actions that seek to regulate rail transportation, including for example the amount or type of railroad traffic that moves in interstate commerce as part of the interstate rail network, would be categorically preempted. The cases cited by Defendants are inapposite as they simply do not consider state actions expressly targeting the rail transportation of federally-authorized rail carriers. *See* Defendants' Motion for Partial Dismissal at 12 and cases cited therein.

[3] Indeed, even if the court ultimately was to conclude based on all relevant facts that ICCTA preemption does not apply, the burdens that Washington is placing on railroad operations and interstate commerce would still violate the Commerce Clause. The Supreme Court has long recognized railroads as instruments of interstate commerce that the states may not unreasonably burden by regulatory action, even absent specific legislative action. *See S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (finding state regulation of train length violated the Commerce Clause even absent Congressional action in the ICA).

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Shippers of all commodities in this country, including coal, rely on the availability of a national rail network. A fundamental purpose of the STB's exclusive jurisdiction over rail transportation is to ensure the availability of rail transportation to meet the needs of rail shippers and the U.S. economy. 49 U.S.C. §10101. If states were free to regulate the amount of coal that may be transported by rail, even indirectly by regulating rail customers, the disruption to railroads and the national economy would be significant. As noted above, the coal that is produced in a relatively small number of U.S. states is consumed all over the country and the world because the United States has the world's most efficient and comprehensive coal transportation system, led by railroads. And as also noted above, coal remains a crucial commodity for U.S. freight railroads. The obvious economic and financial implications of state regulatory actions aimed at freezing freight traffic levels and disadvantaging certain fossil fuel commodities would undermine national transportation policy designed to ensure an adequate freight network.

Moreover, as noted above, a major objective of ICCTA's grant of exclusive authority over railroad operations to the agency is to prevent a patchwork of local regulation from interfering with interstate commerce, including the application of federal environmental law to railroads through different administrative requirements regulating rail traffic in different parts of the country. *See, e.g., EPA*, slip op. at 8-9. Here, Washington seeks to regulate what commodities may move by rail based on the purported environmental effects of increased rail traffic. A robust national freight rail network could not be sustained if each and every state were free to limit the type and amounts of commodities that are transported through its territory. The free flow of interstate and international commerce relies on a freight rail industry consistently regulated at the federal

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level. As such, the states are not free to regulate how commodities are moved by rail through their territory by creating exactly the patchwork of regulation that ICCTA was enacted to prevent.

CONCLUSION

AAR and its member railroads ensure the free flow of commodities in interstate commerce. ICCTA preempts the insertion of local preclearance requirements that interfere with transportation by rail carriers and that unreasonably burden interstate commerce.

This Court should deny Defendants' motion to dismiss and find that Washington's exercise of regulatory authority is impermissible under ICCTA.

DATED this 14th day of May, 2018, at Tacoma, Washington.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 14 day of May, 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

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