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A Forceful Railroad Regulation Policy Statement on Preemption Serves the Public Interest

by Glenn G. Lammi

The Surface Transportation Board (STB or Board) is considering issuing a policy statement that confirms its approach to federal preemption under the ICC Termination Act of 1995 (ICCTA). An STB statement on preemption would be a welcome development at a time when States and municipalities feel compelled to "fill the void" from perceived federal deregulation with additional or different controls over the railroad industry. A fractured regulatory framework would compromise the national free flow of goods and increase costs for consumers.

Unified Call for Statement & STB Response

At times, companies that ship goods by rail and the railroad companies strongly disagree over rail regulatory policy. But they recently spoke with one voice on ICCTA preemption. A coalition of rail carriers and shippers wrote to the STB on September 19, 2025, urging the Board to provide "essential and authoritative guidance . . . on the scope and application of ICCTA preemption." The STB responded to the coalition five days later, acknowledging the significant "consensus of your views" and agreeing on the need for that "greater consistency and clarity in preemption."

ICCTA Preemption Is Essential

ICCTA reflects Congress's understanding that the railroad industry could not efficiently function without uniform rules. Railroads span the entire continent, connecting the East Coast, West Coast, Gulf, and Great Lakes, with over 140,000 miles of rail moving all kinds of commodities. Congress made clear that the STB's jurisdiction over rail transportation and the remedies provided under the law is exclusive, expressly preempting other remedies under federal or state law. 49 U.S.C. § 10501(b).

Without broad ICCTA preemption, States could step in and regulate transportation by rail—a purposefully broad phrase—in 50 different and inconsistent ways. Such intrusions are a reality, the railroad-shipper coalition letter told the STB: "[T]he national uniformity Congress intended is being eroded across the country every day when local authorities misunderstand or misapply ICCTA in various scenarios."

Some of what local authorities or private plaintiffs pursue, such as condemnation or quiet title actions or lawsuits for property damage, may fairly be misapplications or misunderstandings of ICCTA. But other policies, such as city ordinances that prohibit transportation of certain hazardous materials, state laws or regulations that limit train idling or intersection blocking, or a stage agency's ban on locomotives more than 23 years old, are brazen attempts at seizing oversight authority.

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STB's Authoritative Voice on Preemption

The STB speaks with considerable authority on the breadth of ICCTA preemption. After all, Congress specifically created the STB as the successor agency to the ICC when it adopted ICCTA. Congress granted the agency authority to issue declaratory orders to "terminate a controversy or remove uncertainty." The STB regularly issues orders that reflect its interpretation of ICCTA's preemption provision. Courts "rely on the [STB's] interpretation of [ICCTA § 10501(b)]." *PCS Phosphate Co. v. Norfolk S. Corp.* (4th Cir. 2009). The Ninth Circuit has similarly stated, "We find further guidance on the scope of ICCTA preemption from the decisions of the Surface Transportation Board." *Association of American Railroads, et al. v. South Coast Air Quality Management District* (9th Cir. 2010).

Suggestions for an STB Preemption Policy

An STB preemption policy statement should strongly reiterate the Board's approach to state and local actions that are per se preempted under ICCTA. In those instances, "the preemption analysis is addressed not to the reasonableness of the particular state or local action, but to the *act of regulation itself*." *CSX Transportation Inc. – Petition for Declaratory Order*, Docket No. 34662 (May 3, 2005), slip op. at 3 (emphasis added). One category courts and the STB have found per se preempted is "permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations." *Id.* A second category includes matters the Board directly regulates, such as "construction, operation, and abandonment of rail lines." *Id.*

The STB should also consider adopting a new approach to preemption of state and local use of eminent domain authority. The Board and courts have generally utilized an "as applied" form of preemption analysis when adjudicating rail transportation entities' challenges of condemnation actions. The ownership interest taken, the land's existing and future uses, and the safety concerns condemnation may cause are factors courts and the Board weigh. As two commentators noted, such "fact-specific inquiry is rife with speculation and, as a result, operates to undermine" regulatory uniformity. A better approach, as taken by one federal district court, would be to consider application of state or local eminent domain to rail transportation property a categorical intrusion of federal authority and thus preempted.

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With ICCTA, Congress "intended to standardize all economic regulation . . . of rail transportation under Federal law." (H. Rpt. 104-311, p. 95). The railroad industry is quintessentially an interstate industry and is an essential engine of interstate commerce. With a forceful federal preemption policy statement, the STB can send a clear message to state legislatures and regulatory agencies, as well as courts, that broadly interpreting ICCTA § 10501(b) is in the public interest.

