

June 22, 2011

VIA E-FILE

Attention: Docket No. EP 684

Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

To Whom It May Concern:

By decision dated March 14, 2011 (Service Date March 24, 2011), the Surface Transportation Board ("Board") issued a Revised Notice of Proposed Rulemaking ("RNPR") amending interim rules noticed in its January 14, 2009 Notice of Proposed Rule Making ("NPR") intended to implement the provisions of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("CRA"). The proposed rules in the RNPR are effective immediately as interim rules until the Board issues a final rule. The RNPR indicated that comments could be submitted to the Board on this revision until May 23, 2011, and that reply comments were due by June 22, 2011.

By letter dated May 23, 2011, the National Solid Wastes Management Association, Solid Waste Association of North America, Construction Materials Recycling Association, Energy Recovery Council, and the U.S. Conference of Mayors submitted joint comments on the RNPR to the Board. In addition, the Rhode Island Resource Recovery Corporation, Township of Bensalem, and Atlantic County Utilities Authority explicitly adopted and supported these comments, and the Connecticut Department of Environmental Protection reiterated two points made in the comment letter.

In a comment letter submitted by the Association of American Railroads ("AAR") dated May 23, 2011, AAR argued that the Board misinterpreted the CRA in determining that an applicant for a land-use exemption must prove that a law unreasonably burdens interstate commerce or discriminates against rail carriers if that law is adopted under a state's traditional police power pursuant to 49 U.S.C. § 10910. This letter is a brief reply to AAR's comment on behalf of NSWMA, SWANA, CMRA, and ERC, all of which disagree with AAR's position: the CRA in fact compels an applicant to make such a showing to obtain a land-use exemption.

AAR's lengthy comment letter distills to a single fundamental claim: if a state law is adopted under a state's traditional police powers and if it "affects the siting" of a transfer station,

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AAR asserts that the Board cannot impose a regulatory requirement that an applicant for a land-use exemption prove that the law unreasonably burdens interstate commerce or discriminates against rail carriers. Instead, AAR argues that, at most, 49 U.S.C. § 10909 allows the Board to consider these facts among the other factors it may consider under §10909(d) when it evaluates the land-use exemption application.

AAR frames its criticism in the terms of statutory interpretation, seeking to convince the Board that its interpretation and implementation of the statutory requirements of 49 U.S.C. §§ 10909 and 10910 are contrary to the language of the statute and the intent of Congress in passing the CRA. AAR's position, however, is not supported by the law and in fact would result in an impermissibly stretched application of preemption under the Interstate Commerce Commission Termination Act ("ICCTA").

AAR's argument is inconsistent with a fundamental precept of statutory interpretation: it requires rendering the provisions of 49 U.S.C. § 10910 superfluous. "A reading that renders a statutory provision surplusage is disfavored." *Pejepscot Indus. Park v. Me. Cent. R.R. Co.*, 215 F.3d 195, 202 (1st Cir. 2000), citing *Massachusetts Ass'n of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous."), quoting *United States v. Ven-Fuel*, 758 F.2d 741, 751-52 (1st Cir. 1985) (internal quotation marks omitted).

Indeed, AAR admits as much, stating that as a result of its interpretation of Section 10910:

[t]he provisions of Section 10910 thus *essentially restate and preserve general preemption principles applicable to a state's traditional police powers* to require a rail carrier to comply with environmental, public health and public safety laws under those circumstances where the state law, although relating to interstate rail transportation under the jurisdiction of the Board, is *not* otherwise expressly (or impliedly) preempted by federal law (as under the express preemption provisions of section 10909 of the CRA)(i.e., where the state law as it relates to rail transportation activities is not "unreasonably burdensome to interstate commerce" and "does not discriminate against rail carriers."

See AAR's May 23, 2011 Comments, p. 11 (emphasis added; citations omitted).

As the legislative history makes clear, Congress enacted the CRA to address a specific problem: the broad scope of preemption under ICCTA was being abused to circumvent state and local environmental and public safety laws most often derived from the traditional police powers. In Section 10910, Congress resolved the tension between ICCTA's broad preemption provisions

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and those state and local laws promulgated under the traditional police powers by explicitly stating that Sections 10908 and 10909 are not "intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers." These words only have meaning if an applicant must prove that state laws under traditional police powers would be displaced by a land-use exemption only upon a showing that such laws are unreasonably burdensome to interstate commerce or discriminate against rail carriers.

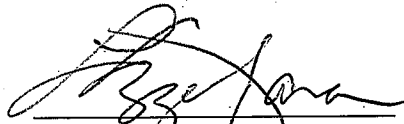
For this reason, we ask that the Board decline to adopt the argument made by AAR and instead retain the balanced approach to addressing state police powers as currently exists in the Board's rule.

Thank you for the opportunity to submit these reply comments.

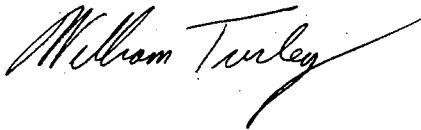
Very truly yours,



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