

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34662

**COMMENTS OF THE SIERRA CLUB ON THE PETITION OF CSX
TRANSPORTATION, INC. FOR DECLARATORY ORDER**

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INTRODUCTION

The D.C. Council passed the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 (“Terrorism Prevention Act”) to address the grave threat of a terrorist strike on high-volume shipments of certain ultrahazardous materials in the area surrounding the U.S. Capitol. As the D.C. Council found after extensive study and legislative hearings, the U.S. Capitol is an extraordinarily high-threat terrorist target, and the consequences of an attack on a large ultrahazardous materials shipment near the Capitol would be truly catastrophic. Shipping the most lethal and volatile hazardous materials within blocks of the Capitol provides terrorists with an opportunity to engineer a release of ultrahazardous materials that could kill anywhere from 17,000 to 100,000 people in a matter of minutes. The federal agencies with jurisdiction over transportation security and terrorism have acknowledged this threat but to date have not effectively addressed it.

On February 7, 2005, CSX Transportation, Inc. filed a petition seeking an advisory opinion from the Board that the Terrorism Prevention Act is unlawful. Although the Act was passed on February 1 and signed by the Mayor of the District on February 15, there are not yet any implementing regulations in effect. Despite the fact that the Act has not been enforced, and

will not be enforced for at least another month, CSX has petitioned this Board to issue, on an expedited basis, an order declaring the Act preempted by § 10501 of the Interstate Commerce Commission Termination Act of 1995 (ICCTA). On February 8, 2005, this Board issued a decision inviting the District of Columbia and other interested persons to file comments in response to CSX's petition. *CSX Transportation, Inc.—Petition for Declaratory Order*, STB Fin. Docket No. 34662.

The Sierra Club submits these comments in opposition to CSX's petition.¹ This matter is not within the STB's jurisdiction under the ICCTA. As numerous courts and this Board have repeatedly held, ICCTA does not preempt state rail safety and security measures. Although CSX attempts to recharacterize the Terrorism Prevention Act as an economic regulation statute, the Act's incidental economic impact does not, as a matter of law, convert a rail security and anti-terrorism measure into a regulation of "commodities" or "overhead" within the STB's jurisdiction. To the extent that CSX wishes to argue that the Terrorism Prevention Act is inconsistent with other federal statutes, such as the Federal Rail Safety Act or the Hazardous Materials Transportation Act, CSX must address those arguments to the federal agencies charged with their enforcement or to a court of law—not to the STB. CSX's petition should be denied.

¹ As an organization with the mission of protecting communities from threats to their environment, the Sierra Club has a strong interest addressing the severe threat that is created by transporting ultrahazardous rail shipments through densely populated areas in the District where terrorists are likely to attack them. The Sierra Club thus presented testimony before the D.C. Council on the risks and likely consequences of an ultrahazardous materials release in the vicinity of the Capitol, and has strongly supported the D.C. Council's efforts to prevent such an incident from occurring.

I. BACKGROUND

The tragic attacks of September 11, 2001 dramatically demonstrated the need for federal and state governments to focus on identifying and addressing vulnerabilities that terrorists could exploit to kill or injure thousands of Americans. Addressing these vulnerabilities requires special attention to transportation security. As the Department of Transportation's Research and Special Programs Administration (RSPA) has stressed, government "cannot limit [its] actions on security to efforts to prevent terrorist attacks that have already occurred"; it must "proactively assess future terrorist threats and take actions to try to prevent future attacks." Department of Transportation-RSPA, Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials; Final Rule, March 25, 2003, 68 Fed. Reg. 14511 ("HM-232 rule").

The Terrorism Prevention Act addresses a massive and real threat. The FBI warned in 2002 that terrorists are specifically interested in "targeting hazardous material containers" in attacks on U.S. soil. The Department of Transportation (DOT) found that "hazardous materials transported in commerce potentially may be used as weapons of mass destruction or weapons of convenience." Department of Transportation, Research and Special Programs Administration, Notice of Proposed Rule Making, Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 67 Fed. Reg. 22028 (May 2, 2002) ("HM-232 NPRM"). In 2003 the Center for Strategic and International Studies similarly pointed out that, with respect to "rail transport of large quantities of highly toxic chemicals," "[t]error groups cannot help but have noted this extremely weak spot in the system." Center for Strategic and International Studies, *Silent Vector: Issues of Concern and Policy Recommendations*, September 2003, at 15.

Over the past few years, and as recently as the past three weeks, security experts have repeatedly expressed deep concern that this particular terrorist threat has not yet been effectively addressed by the federal government. On January 26, 2005, a former Department of Homeland Security (DHS) official warned that while DHS has now taken significant measures to improve aviation security, it has left other terrorist targets vulnerable. According to the official, one threat “stands out above the rest as uniquely dangerous and accurately vulnerable, and that’s hazardous chemicals, in particular toxic-by-inhalation chemicals”—“World War I era chemical weapons, which we move through our cities in extraordinarily large quantities and quite low security.” Testimony of Richard A. Falkenrath (formerly Deputy Homeland Security Advisor and Deputy Assistant to the President (2003-2004)), *The Department of Homeland Security: The Road Ahead*, Before the Senate Homeland Security and Governmental Affairs Committee, Jan. 26, 2005) available at <http://www.brookings.edu/dybdocroot/views/testimony/fellows/falkenrath20050126.pdf>. He stated that the federal government has not taken sufficient measures to respond to this threat, and has “made no material reduction in the inherent insecurity of our chemical sector.” *Id.* Similarly, the DHS Inspector General has stated recently that the DHS was still focusing virtually all of its resources on aviation and lacked a “forward-looking plan” to deal with other transportation threats. Toby Eckert, *Transportation Security Still Lagging, Some Experts Say*, *Logistics Management*, at <http://www.manufacturing.net/lm/index.asp?layout=articleXml&xmlId=256394970>. Another security expert, Daniel B. Prieto, former member of the House of Representatives Select Committee on Homeland Security, likewise pointed out that “all [security] resources are going into the last battle [i.e., defending against aviation terrorist threats of the kind used on September 11, 2001] even though

“it would [now] be easier for [terrorists] to use a large chemical shipment, to turn that into a weapon by detonating that in the confines of a large city.” *Id.*

The threat is extraordinarily acute in Washington, D.C., where the U.S. Capitol and the White House remain among the most prominent terrorist targets in the country. A widely-cited risk assessment model by the Insurance Services Office, recently classified the District as one of only four “tier 1” cities that is one hundred times as likely as the average American city to be targeted in a terrorist attack. *See* Kent Smetters, *Insuring Against Terrorism: The Policy Challenge*, Feb. 2, 2004, at 23; *see also* Consumer Federation of America, *The Terrorism Risk Insurance Act: Should it Be Renewed?*, April 19, 2004 (describing the Insurance Services Office study as “the most sophisticated analysis” it reviewed regarding terrorism risks).

The Terrorism Protection Act is a necessary, carefully considered, and appropriately tailored response to this threat. The Act focuses precisely on the area in which the threat is greatest: a 2.2-mile zone surrounding the Capitol (“the Capitol Exclusion Zone”) that has historically been subject to a number of terrorist attacks and that remains an extremely high-threat terrorist target. It focuses exclusively on large shipments of a select group of highly lethal and volatile materials that would pose the greatest threat to the safety and security of District residents in the case of an attack-related release. It provides carefully crafted exceptions for shipments that have no practical alternative to travel through the Capitol Exclusion Zone. And in the process of considering the Act, the D.C. Council took careful account of its likely effect on other jurisdictions. It noted that ultrahazardous rail shipments subject to the Act could be shipped on another rail line in the central part of Virginia, and that this line did not pass through any of the cities that have been classified as likely terrorist targets.

Thus far, the federal agencies responsible for rail safety and security have not responded to this threat. Neither DOT nor DHS has addressed the issue of whether or how ultrahazardous materials rail shipments should be directed to avoid prominent terrorism targets.² The D.C. Council has responded to this threat by taking the commonsense approach recently recommended by the Agency for Toxic Substances and Disease Registry, U.S. Department of Health, to address the deadly risk posed by “large-scale, acute releases [of hazardous materials] during rail transit”—namely, to “[r]oute hazardous material away from densely-populated areas,” and in this case, high-profile terrorist targets, “where feasible.” Agency for Toxic Substances and Disease Registry, Public Health Consequences from Hazardous Substances Acutely Released During Rail Transit, South Carolina - 2005; Selected States 1999-2004 (Jan. 28, 2005), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5403a2.htm>.

² The HM-232 rule promulgated by the DOT in March 25, 2003 entirely avoids this issue. It requires rail companies to institute security plans and institute security training, but neither of these requirements imposes any obligations on rail companies to direct ultrahazardous materials away from prominent terrorism targets, and the Department’s Order does not contain any consideration or analysis of whether such measures might be justifiable. Under the FRSA, a security-related order or regulation does not preempt a state security regulation on a different subject. 49 U.S.C. § 20106; *see also United Transp. Union v. Foster*, 205 F.3d at 860 (“When applying FRSA preemption, the Court eschews broad categories such as ‘railroad safety,’ focusing instead on the specific subject matter contained in the federal regulation.”). Federal hazmat regulations like HM-232 do not preempt specific security measures like the D.C. Terrorism Prevention Act simply because the regulations deal broadly with the issue of issue of “security.”

II. ARGUMENT

The Terrorism Prevention Act is a security measure designed to protect D.C. workers and residents from the potentially catastrophic effects of a terrorist attack on the highest-threat target in the United States. The D.C. Council’s decision to take action in the face of a genuine, documented, and severe terrorist threat is unquestionably an exercise of its historic power to “protect the health and safety of [its] citizens”—matters that are “primarily, and historically, . . . matter[s] of local concern.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks and citation omitted). It is also, despite CSX’s suggestions to the contrary, a decision that federal law unequivocally entitles the D.C. Council to make. Federal rail safety and hazardous materials transportation statutes expressly authorize states to regulate in these areas to protect the health and safety of their citizens. CSX’s argument that the ICCTA somehow preempts state rail safety security regulation ignores the plain text of these statutes, which were enacted before the ICCTA, left intact by the ICCTA, and administered by agencies other than the STB. For precisely that reason, CSX’s argument has been uniformly rejected by federal courts and by this STB itself, and should be rejected again in this proceeding.

A. Federal Law Expressly Permits States to Regulate Rail Safety and Security

Congress has for many decades forged a carefully calibrated federal-state partnership to deal with rail safety and security issues. The cornerstone of that partnership is the Federal Rail Safety Act of 1970 (FRSA). Designed “to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons,” *CSX Transp. v. Easterwood*, 507 U.S. 658, 661 (1993), the FRSA gives the Secretary of Transportation the power to “prescribe regulations and issue orders for every area of railroad safety,” 49 U.S.C. § 20103, which the Secretary has delegated to the DOT’s Federal Railroad Administration (FRA),

49 C.F.R. §1.49. As amended by the Homeland Security Act of 2002, the FRSA vests the Secretary of Homeland Security with the authority to regulate rail security in consultation with the Secretary of Transportation, §§ 20103, 20106. But as the Supreme Court has recognized, the FRSA also “displays considerable solicitude for state law” in rail safety matters. *Easterwood*, 507 U.S. at 665. Where the federal government has not enacted regulations “covering” a particular rail safety or security issue, the FRSA expressly authorizes the states to fill the void. 49 U.S.C. § 20106. And even where federal government has promulgated relevant regulations, the FRSA permits states to adopt more stringent regulations when “necessary to eliminate or reduce an essentially local safety or security hazard.” *Id.*

Congress has created a similar federal-state partnership to govern hazardous materials transportation. Enacted in 1975, the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101-5127, authorizes the Secretary of Transportation to prescribe regulations “for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce,” by all modes of transport, including rail. *Id.* § 5103. But the HMTA’s preemption provision, 49 U.S.C. § 5125, makes amply clear that Congress did not intend for the Department of Transportation (DOT) to occupy the field of hazardous materials transportation regulation exclusively. *See, e.g., Massachusetts v. U.S. Dep’t of Transp.*, 93 F.3d 890, 891-92 (D.C. Cir. 1996); *N.H. Motor Transp. Ass’n v. Flynn*, 751 F.2d 43, 46 (1st Cir. 1984). Instead, § 5125 expressly authorizes states, political subdivisions, and tribes to enact and enforce hazardous materials transportation measures, so long as those requirements are consonant with the HMTA and its implementing regulations.

B. The ICCTA Did Not Impliedly Repeal Federal Law Authorizing States to Regulate Rail Safety and Security

In its submission to this Board, CSX proposes nothing less than the obliteration of the regulatory partnership Congress created to ensure the safety and security of the rail system. Ignoring the plain text of the FRSA and the HMTA, controlling decisions of federal courts and this Board, and several decades' worth of agency practice, CSX contends that Congress has "placed authority over rail transportation," including authority to address the terrorism risk associated with rail shipments of ultrahazardous materials, "exclusively" in the hands of federal regulators.

CSX hinges its argument on the preemption provision of the ICCTA, the statute that abolished the Interstate Commerce Commission (ICC) and transferred several of its economic regulatory functions to the Board. CSX argues that § 10501(b), which states that "transportation by rail carriers" is subject to the STB's "exclusive jurisdiction," precludes all state regulation affecting rail transportation, including those state safety and security measures expressly authorized by the FRSA and the HMTA. In other words, CSX argues that the ICCTA impliedly repealed these comprehensive regulatory schemes, thereby substituting the judgment of the Surface Transportation Board on rail safety and hazardous materials transportation issues for that of the federal and state authorities charged with protecting rail safety and security. That conclusion is flatly inconsistent with the ICCTA's history and purpose, current regulatory structure and practice, and well-established presumption that Congress does not repeal its prior enactments by implication. For precisely those reasons, this argument has been roundly and repeatedly rejected by federal courts and this Board alike. *See, e.g., Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517 (6th Cir. 2001); *Green Mtn. R.R. Corp.—Petition for Declaratory Order*, STB Fin. Docket No. 34052, at n.8 (May 28, 2002).

By the time Congress passed the ICCTA in 1995, the DOT had long been the federal agency responsible for regulating rail safety; the ICC's role in rail regulation was largely limited to overseeing economic aspects of rail transportation. In enacting the ICCTA and transferring the ICC's functions to the STB, Congress demonstrated no intent to alter this division of labor. Indeed, Congress specifically stated that the STB was to be responsible for regulating the "field of economic regulation of the interstate rail transportation system." H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08.

Consistent with that statement of purpose, the STB describes itself as an "economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers." *See* <http://www.stb.dot.gov/stb/about/overview.htm>. It has "jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission." *Id.* Rail security concerns—including the concern that terrorists may engage in a deadly chemical terrorist attack on a rail line within blocks of the U.S. Capitol—do not fall within this regulatory domain.³

³ Nor can the STB's authority be extended to displace that of entities authorized to deal with rail safety on the basis of the provision in 49 U.S.C. 10501 that gives it to exclusive authority, in its economic regulation of railroad service, to issue "remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." This does not mean that federal and state entities authorized to promulgate safety regulation under the FRSA or HMTA cannot enact

The STB has thus consistently affirmed that it lacks authority under the ICCTA to preempt state rail safety and security regulations. It has repeatedly acknowledged that “§ 10501(b) does not preempt valid safety regulation under the Federal Rail Safety Act.” *Green Mtn. R.R. Corp.—Petition for Declaratory Order*, STB Fin. Docket No. 34052, at n.8 (May 28, 2002); *see also, e.g., Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna & Western Ry. Corp.*, STB Fin. Docket No. 33466, at 2 n.4 (Feb. 27, 2001); *Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, R.R. and Clearcuts Campaign*, STB Fin. Docket No. 33966, at n.11 (Aug. 10, 2001); Surface Transportation Board and Department of Transportation, *Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control*, 67 Fed. Reg. 11582, 11585 (Mar. 15, 2002) (“Under Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad Administrator.”) (internal quotation marks and citation omitted).

CSX not only fails to mention these directly relevant STB decisions, which are squarely inconsistent with the central argument in its petition—it also avoids mention of the fact that every recent court case squarely addressing the issue has held that 49 U.S.C. § 10501 does not displace state safety or security regulations. In *Tyrrell v. Norfolk Southern Railway*, 248 F.3d

measures with an impact in rail carriers’ “practices,” “routes,” and “facilities,” when exercising their power under these other railroad laws. On the contrary, federal rail safety laws regulations clearly impact matters such as railroad “rules, practices, routes, services, and facilities.”

517 (6th Cir. 2001), for example, the Sixth Circuit—adopting the position urged by this Board and the United States as *amici*—rejected the argument CSX here advances.⁴ The Court examined the history of the ICCTA statute, current regulatory structure and practice, as well as the well-established presumption that Congress does not impliedly repeal its prior enactments. Drawing on these sources, the court squarely rejected Norfolk Southern’s argument that the ICCTA grants the Board plenary authority over all aspects of rail transportation, including rail safety and security matters. Instead of viewing the ICCTA’s grant of control over “railroad operations” as wholly displacing states’ role under the FRSA, the court held that the ICCTA and the FRSA must rather be construed *in pari materia*; that it is the DOT, acting through the FRA, and *not the Board*, that exercises primary authority over rail safety; and that it is therefore the FRSA, not the ICCTA, that determines whether a state rail safety measure is preempted—even if that state rail safety law happens to “touch[] upon” an economic area that is regulated under the ICCTA. *Id.* at 522.

Federal courts that have addressed the issue since have uniformly agreed with *Tyrrell* that the ICCTA does not preempt state rail safety and security measures. *See Boston & Maine Corp.*

⁴ Notably, all of the court decisions cited by CSX in its Petition at 12 were decided before *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (2001), and none of these cases analyzed the effect of the ICCTA on the preemption clause of the FRSA. On the contrary, each of them dealt with regulations that were starkly different from the anti-terrorism legislation at issue here and within areas that Board routinely addresses in regulating the economic aspects of railroad service and operation. *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (railroad agency closing); *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (D. Mon. 1997) (railroad agency closing); *City of Auburn v. United States*, 154 F. Supp. 1025 (9th Cir. 1988) (proposed reopening and upgrades to a railroad track); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (condemnation of railroad track).

v. STB, 364 F.3d 318, 321 (D.C. Cir. 2004) (“[P]rimary jurisdiction over railroad safety belongs to the FRA, not the STB.”); *Iowa, Chi. & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 559-60 (8th Cir. 2004) (citing *Tyrrell* with approval and finding that the railroad’s argument for ICCTA preemption ignored relevant federal statutes, such as the FRSA, “that were enacted before ICCTA, that are administered by one or more agencies other than the ICC and the STB, and that Congress left intact in enacting ICCTA”); *Allende v. Soo Line R.R. Co.*, No. 03-3093, 2004 U.S. Dist. LEXIS 26918, at *43-*51 (D. Minn. Jan. 29, 2004) (the legislative history of the ICCTA, rules of statutory construction, and the STB’s own interpretation of its jurisdiction under the ICCTA all indicate that the ICCTA does not preempt rail safety regulations).

C. That a Security Regulation Has Indirect Economic Consequences Does Not Transform It into an Economic Regulation Within This Board’s Jurisdiction

Perhaps implicitly recognizing these well-established limitations on the STB’s authority, CSX unconvincingly portrays the regulation of ultrahazardous rail shipments as regulation of a garden-variety shipments of “commodities” (Petition for Declaratory Order, at 2, 13), “rail traffic,” (*id.* at 12), “overhead shipments” (*id.* at 13-14), or “freight” (*id.* at 14) encroaching on the STB’s economic regulatory jurisdiction. This is a profoundly misleading characterization of a terrorism prevention law regulating the transportation near prominent terrorist targets, of chemicals that the DOT has described as equivalent to “weapons of mass destruction.” May 2002 NPRM, at 22029.⁵

⁵ CSX’s insistence that the Terrorism Prevention Act is nothing more than an attempt to shift the “inherent risks” associated with transporting hazardous materials plainly ignores the Act’s focus on a *specific security* threat (a terrorist attack in or near the Capitol region) to a *specific region* (the Capitol area) that has historically been subject to an extraordinarily high risk of future

The mere fact that the Terrorism Prevention Act may have incidental effects on rail operations or economics does not convert the law into an operational or economic law of the kind to which the ICCTA is addressed. Any meaningful rail terrorism prevention measure will almost certainly have some operational and economic consequences for railroads, as will virtually any rail safety measure. That does not automatically transform such a safety or security regulation into a “railroad rate and service issue” or a “rail restructuring transaction” of the kind regulated by the STB. If that were the case, *no* rail safety regulation—neither those passed by states in reliance on the express language of the FRSA or HMTA preemption provisions, nor even those promulgated by the DOT—would ever escape preemption under 47 U.S.C. § 10501. As explained above, the ICCTA does not authorize that result. *See Tyrrell*, 248 F.3d at 522-23 (a safety regulation does not become an economic regulation subject to ICCTA preemption simply because it “touches upon an economic area regulated under the ICCTA”).

Likewise, even though security-related hazardous materials regulations necessarily “impose new costs of doing business on both hazardous materials shippers and carriers,” Department of Transportation, HM-232 Final Rule Order, at 14510, the recognition that such regulations have economic consequences has not led the DOT to take the position that such regulations are therefore within the STB’s regulatory domain under 49 U.S.C. § 10501. On the

terrorism, and that independent groups have classified as subject to a singularly high risk of terrorism. Apart from addressing this risk by regulating the routing of only a few especially lethal and volatile hazardous chemicals, the Act places no restrictions whatsoever on how CSX may operate its business or where it routes any of the numerous hazardous materials not covered by the Act. Nor does it cover any of the subjects of hazardous materials transportation (e.g., packing, handling, labelling) that have already been addressed in federal regulations.

contrary, the DOT has clearly rejected the argument that the jurisdiction of the STB is exclusive as to matters within its statutory authority, such as the safe transportation of hazardous materials. In a proceeding before this Board, the DOT argued—and this Board agreed—that “the jurisdiction, specialized expertise, and jurisprudence to address questions of preemption arising under the HMTA in fact reside in the Department [of Transportation].” Comments of the United States Department of Transportation, *Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ*, STB Fin. Dkt. 34192, June 7, 2002; *Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ*, STB Fin. Docket No. 34192 (Nov. 19, 2002) (HMTA preemption arguments are properly addressed to either the DOT or a federal court).

This proposition is in no way inconsistent with the consideration that the STB has given to environmental impact of new rail construction or changes in services. *See, e.g., City of Auburn v. United States Gov’t*, 154 F.3d 1025 (9th Cir. 1998) (allowing STB to exercise its jurisdiction to determine matters related to acquisition of a rail line even though decision raised questions about environmental impacts). While the STB can conceivably take account of environmental or even safety issues when judging matters related to rail construction and service, this cannot and does not give it authority to *undo* the authority to enact rail security measures that has been expressly granted to the DOT by the FRSA and HMTA. *See* Surface Transportation Board and Department of Transportation, *Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control*, 67 Fed. Reg. at 11587 (*City of Auburn* “stand[s] for the proposition that the STB . . . ha[s] exclusive authority to examine, condition, and approve mergers, consolidations, or acquisitions of control,” and not the proposition that the STB displaces the FRA’s “plenary authority” over railroad safety); *Tyrrell*, 248 F.3d at 523 (noting that under existing federal rail regulations, “FRA exercised primary

authority over rail safety matters under 49 U.S.C. §20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment”) (citation omitted).

D. The STB’s Emergency Power over Railroad Rate and Service Issues Does Not Give It Emergency Authority to Evaluate, or Establish Rules Regarding, Anti-Terrorism Measures

The STB’s emergency authority under 49 U.S.C. § 11123 does not displace the police power that states have to protect their citizens from terrorism—and that is expressly preserved under federal rail legislation. Indeed, the STB’s emergency authority deals not with all emergency situations, but only with those that result from “a shortage of equipment, congestion of traffic, unauthorized cessation of operations, or other failure of traffic movement” or from other situations where “a rail carrier providing transportation subject to the jurisdiction of the Board under this part cannot transport traffic offered to it in a manner that properly serves the public.” In other words, it addresses situations that threaten the economic functions of railroad carriers as service providers. By contrast, the emergency provision in the FRSA in 49 U.S.C. § 20104 gives the Secretary of Transportation power to address “an unsafe condition or practice, or a combination of unsafe conditions and practices” which create “an emergency situation involving *a hazard of death or personal injury*.” (Emphasis added). Thus, if the federal government *were* to take emergency action to address the risk of a terrorist attack on ultrahazardous rail shipments, this would not be the responsibility of the STB, but of the FRA or the Transportation Security Administration. Just as it falls specifically to these agencies to regulate in response to threats of this nature, it falls specifically to them to render judgments regarding the extent to which any non-federal security measure interferes impermissibly with federal measures.

E. The STB Does Not Have Jurisdiction to Address CSX’s Commerce Clause or FRSA and HMTA Preemption Arguments

In an attempt to shore up its fragile, oft-rejected argument for ICCTA preemption, CSX makes a series of unsupported and inaccurate statements concerning the Terrorism Prevention Act’s impact on rail safety regulation, hazardous materials transportation regulation, and interstate commerce. *See* Petition for Declaratory Order at 14-15. To the extent these comments are designed as invitations to the Board declare the Act invalid on some basis other than the ICCTA, such as the FRSA, the HMTA, or the Commerce Clause, these arguments are properly addressed elsewhere—either to the agency that administers the federal statutes in question or to a federal district court. This Board has no authority to interpret, apply, or enforce federal statutes other than the ICCTA, much less the Constitution of the United States. *See Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ*, STB Fin. Docket No. 34192 (Nov. 19, 2002) (HMTA preemption arguments are properly addressed to either the DOT or a federal court, not the STB, and Commerce Clause arguments “must be brought in an appropriate court”).

However, should this Board decide—contrary to the case law and statutory language cited above—it has the authority to evaluate the validity of the Terrorism Prevention Act under the FRSA, the HMTA, and the Commerce Clause, it will need to recognize that many of the key claims made by CSX in its petition regarding rail safety and security law are inaccurate:

First, contrary to CSX’s apparent claim that it is bound only by federal safety and security regulations, Petition at 1 and 7, the FRSA and HMTA make clear that rail carriers are also bound by valid *state* regulations and orders regarding safety and security. *See* 49 U.S.C. §§ 5125, 20106. Thus, any Board order allowing CSX to continue routing hazardous materials shipments through the Capitol Exclusion Zone must allow it to do so not only “subject to

compliance” with applicable federal safety and hazardous materials transportations statutes and regulations, but also subject to compliance with all applicable *state* safety and security laws.

Second, CSX’s “statutory duty to provide common carrier service upon request by a shipper,” Petition at 5, does not excuse it from complying with applicable state safety and security regulations any more than such a duty permits CSX to flout applicable federal safety and security regulations.

Third, CSX’s compliance with one security requirement—for example, the federal government’s requirement that it submit a “security plan,” *see* Petition at 6—does not excuse it from complying with *other* requirements that federal agencies or states have passed, under the HMTA or FRSA, to address the threat of terrorism. Thus, the fact that the FRA and TSA “have reviewed CSXT’s security plan,” *id.*, does not give CSX a license henceforth to ignore other applicable security measures that federal agencies or states have taken to protect citizens from terrorist attacks.

Fourth, as noted above, the language of 47 U.S.C. § 20106 does not bar states from enacting safety or security measures addressing a certain subject until and unless the Secretary of Transportation or Secretary of Homeland Security issue regulations or orders covering that same discrete subject. CSX has not identified any such federal regulation covering the subject matter of the Terrorism Prevention Act.

Fifth, while the D.C. Council has, contrary to CSX’s representations, considered the effects that its actions will have on interstate commerce and on other jurisdictions, before the STB can rely upon any assertions by CSX regarding the alleged disruptions to its business that would result from the D.C. Council’s enforcement of its anti-terrorism protection, it must first permit the D.C. Council and other interested parties extensive opportunity for discovery—

especially since CSX nowhere mentions in its petition any possibility of routing its lines over Norfolk Southern's nearby rail lines. If CSX is assuming that its reluctance to use another carrier's line constitutes a justifiable reason to nullify anti-terrorism measures that might save the tens of thousands of lives, the D.C. Council and other interested parties should have the opportunity to test this questionable assertion very carefully. They must similarly have the opportunity to test any claims that CSX is making about the economic harm it alleges will result from implementation of the Terrorism Prevention Act.

Finally, the D.C. Council and other parties should similarly be given ample opportunity to gather evidence necessary to test CSX's strange claim that safety and security will suffer because the D.C. government has followed the Agency for Toxic Substances and Disease Registry's recommendation that governments "[r]oute hazardous material away from densely-populated areas," and in this case, high-profile terrorist targets, "where feasible." Agency for Toxic Substances and Disease Registry, January 28, 2005 report. Such an analysis is especially necessary given CSX's refusal to acknowledge the distinction emphasized by the D.C. Council between risks attending to hazardous materials *accidents*, which may occur anywhere on a rail line, and releases of hazardous materials *caused by terrorism*, which are far more likely to occur (by design) in places where such a release would cause thousands of casualties and near targets, such as the Capitol, that have political significance. The distinction is crucial, since measures effective in protecting safety—such as the "specially designed and constructed cars" that CSX mentions in its Petition—would be of little aid in preventing terrorists from releasing a ultrahazardous materials shipment with a bomb, grenade, or high-caliber rifle.

CONCLUSION

In summary, the Board has no authority to decide whether the District's Terrorism Prevention Act is preempted under the Constitution or federal law. The Board does not have jurisdiction under the ICCTA to rule on security and anti-terrorism measures. Under the FRSA and HMTA, this rail security measure would only be preempted if the subject it regulates were adequately covered by federal security rules or orders issued by the Department of Transportation or Department of Homeland. This is not a question for an agency such as the Board, which has stressed on numerous occasions that it does not have primary authority for rail safety and that its authority under 49 U.S.C. § 10501 does not preempt federal safety laws. Nor is it for the STB to decide any claims made about the implication of the Commerce Clause of the United States Constitution. Such claims regarding constitutional law are claims that should be addressed to a court of law (as are claims about whether agency actions regarding preemption are consistent with the language and intent of the authorizing statute). In any event, the Board could not issue the declaratory order requested by CSX, even if it deems itself to have primary authority over safety and for interpreting the Commerce Clause, since any judgments about the impacts of D.C.'s Terrorism Prevention Act on interstate commerce—and whether these costs to commerce are justified given the grave terrorism risk it addresses—cannot be made in the absence of extensive evidentiary proceedings that would allow interested parties to test CSX's highly questionable claims about these issues.

For the foregoing reasons, the Sierra Club urges the Board to deny CSX's Petition for Declaratory Order.

Respectfully submitted,

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