

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36511

WASTE MANAGEMENT OF WASHINGTON, INC. AND
WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC.—
VERIFIED PETITION FOR DECLARATORY ORDER

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

ENTERED
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Public Record

By a petition filed May 5, 2021, Waste Management of Washington, Inc., and Waste Management Disposal Services of Oregon, Inc. (“Petitioners”) request the Surface Transportation Board issue a declaratory order finding that: (1) Petitioners’ container on flat car (“COFC”) pickup and delivery of cardboard waste in intermodal service is subject to the STB’s exclusive jurisdiction, and (2) state regulation of Petitioners’ COFC pickup and delivery of cardboard waste is preempted by federal law.

The freight railroad members of the Association of American Railroads (“AAR”) account for the vast majority of North American freight railroad traffic, mileage, employees, and revenue. AAR has actively participated in prior proceedings before the Board and its predecessor, the Interstate Commerce Commission (“ICC”), regarding the intermodal transportation of numerous products in trailer on flat car (“TOFC”) and COFC service. As such, AAR and its members have a vital interest in ensuring that the Board’s jurisdiction regarding intermodal service is correctly defined and that the preemptive effects of ICCTA are appropriately recognized to prevent an unworkable patchwork of state and local regulation of

railroads. While AAR takes no position on the underlying merits of the petition, AAR offers these reply comments in the time available to provide principles that should guide the Board in its consideration of the matter. In deciding this matter, the Board should take no action that opens the door for states to regulate intermodal transportation.

I. TOFC/COFC SERVICE IS AN INTEGRAL PART OF MODERN-DAY RAILROADING.

Continuous intermodal service has long been subject to agency jurisdiction as transportation by rail carrier, though Congress has directed the agency to exempt such traffic from regulation.¹ This broad jurisdiction, but narrow regulatory authority, ensures that states and localities do not interfere with the flow of interstate commerce. TOFC and COFC services are “intermodal operations in which the various goods shipped are not handled individually. Rather, they are loaded into a trailer or container that then can be expeditiously transferred from one mode of transportation to another.”² Today, this service is an integral part of modern railroading, and indeed, the modern, integrated international economy. “Trailer-on-flatcar (TOFC or “piggyback”) service, a form of mixed train and truck transportation, enables a carrier to transport a trailer and its contents over rail on a flatcar and then to haul the trailer on the highway. The goods need not be unloaded and reloaded when they move from the rail mode to the truck mode; the shipment remains within the trailer or container during the entire

¹ See, e.g., *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 106 (1954) (TOFC transportation is transportation by railroad whether the trailers are owned or operated by railroads, shippers, or motor carriers.).

² *Am. Trucking Assns. v. ICC*, 656 F.2d 1115, 1117 (5th Cir. 1981) (“ATA”).

journey.”³ Various forms of such service have been offered by railroads, motor carriers, and freight forwarders since the 1930's.⁴

Railroads compete to participate in the movement of domestic and international container and trailer traffic along with motor carriers, barges, ocean shipping companies, ports, and third parties in fiercely competitive markets. These dynamic markets have fostered innovative transportation service offerings. The volume of intermodal shipments has exploded from approximately three million containers and trailers in 1980 to nearly 14 million units in 2019.⁵

The agency has correctly and succinctly noted that TOFC/COFC service “maximizes efficiency and minimizes the handling of individual goods and the transfer of individual items of lading when different transportation modes are involved[, which] facilitates intermodalism by allowing the shipper easily to take advantage of the attributes of all modes of transportation.”⁶ Simply put, intermodalism has enhanced the economic and global competitiveness of the country.⁷ By utilizing rail for at least part of the transportation, intermodal traffic also

³ *ICC v. Texas*, 479 U.S. 450, 451 (1987).

⁴ Originally, “piggybacking” or “circus style” movement of goods on trains, was pioneered by P.T. Barnum’s circus in 1872. Barnum developed a crossover plate that allowed horses to pull circus wagons onto and off of trains via a single ramp. Once onboard, circus wagons were rolled from train car to train car, a streamlined process that saved time, effort, and money. See Ass’n Am. RRs, *Six Milestones of Intermodal Growth*, found here: <https://www.aar.org/article/6-milestones-intermodal-growth/>

⁵ *Railroad Facts* (2020 edition), at 29.

⁶ *Improvement of TOFC/COFC Regulations (Railroad Affiliated Motor Carriers and Other Motor Carriers) (Motor Carriers)*, 3 I.C.C.2d 869, 1987 ICC LEXIS 259 *4 (June 11, 1987).

⁷ The floor speech regarding the provision now codified at 10502(f) “extoll[ed] the virtues of intermodal freight transportation: greater use of TOFC/COFC service...would conserve fuel, reduce highway maintenance and railway operating costs, increase productivity, and help maintain American competitiveness in the world economy.” *Central States Motor Freight Bureau, Inc. v. ICC (Central States)*, 924 F.2d 1099, 1107 (D.C. Cir. 1991) (citing 126 Cong. Rec. 19397 (1981)).

generates significant environmental benefits, taking trucks off the highways and reducing greenhouse gas emissions.

II. THE HISTORY OF THE AGENCY’S ROLE IN ENSURING THE FREE FLOW OF TOFC/COFC TRAFFIC.

A. The Agency’s Exemption Authority is an “Important Cornerstone” of Deregulation.

Through Congress’ direction, the Board and its predecessor, the ICC, have played a significant role in the development of the intermodal business. Modern, dynamic transportation markets and innovative service offerings for customers are the result of public policy decisions that allowed competitive markets to function and prevented piecemeal, parochial regulation at the state and local level. Historically, the ICC treated intermodal service “as an adjunct of transportation by railroad— as a facility essentially of, by and for the railroads.”⁸ In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (4R Act) to assist the poor financial health and competitive conditions of the railroad industry and directed the ICC to exempt rail services from regulation when certain conditions were met.⁹ Continuing the deregulatory trend, Congress passed the Staggers Rail Act in 1980 and modified the agency’s exemption authority to language that is substantially similar to current section 10502(a).¹⁰ The authority to exempt rail transportation was an “important cornerstone’ of the

⁸ *American Trucking Assoc. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 401 (1967)(citing *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (1954)).

⁹ Pub. L. No. 94-210, 90 Stat. 31; S.Rep. No. 94-499, 94th Cong., 2d Sess. 2 (1976).

¹⁰ Section 213 of the Staggers Act codified in then 49 U.S.C. § 10505, read:

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

Staggers Act and that, under it, ‘the Commission is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards.’”¹¹

Significantly, Congress expressly indicated that intermodal movements would be an appropriate area to explore when exercising the agency’s exemption authority. In then-section 10505(f), now section 10502(f), Congress added the agency “may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.” In adding section 10505(f), specific concern was expressed in the House of Representatives that TOFC/COFC service was “woefully underutilized,” due to the isolating regulatory structure that walled-off one mode from the other, inhibiting growth.”¹² Clear congressional direction was to not only utilize the exemption authority “to the maximum extent” but to do so for intermodal specifically.¹³ Calling it an “important aspect” of the legislation, Congress also gave the “Commission considerable flexibility to try innovative, experimental programs to determine exactly what kind of less stringent regulation may work. A great deal of economic theory has been propounded concerning what may occur if regulatory

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

¹¹ ATA, at 1119 (citing H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980)).

¹² *Central States*, at 1107.

¹³ See ATA, at 1126 (“[I]n section 10505(f) Congress specifically authorized the Commission to exempt TOFC/COFC rail service. While section 10505(f) does not absolve the Commission from the need to make the section 10505(a) findings, it does indicate plainly that Congress felt that TOFC/COFC service was an appropriate subject for the exercise of the Commission's section 10505(a) exemption authority. In this regard, we note that, by enacting the Staggers Act, of which what is now section 10505 was a part, Congress explicitly found that ‘today, most transportation within the United States is competitive (and that) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads.’”).

requirements are eased, but there is no empirical information available on what the results of such changes may be.”¹⁴

B. The Agency has Properly Utilized Its Exemption Authority Regarding TOFC/COFC Service.

Through a series of deregulatory decisions in the 1980s and 1990s, the agency moved to exempt a broad range of TOFC/COFC services, in accord with the statutory direction to exempt transportation and services “related to a rail carrier providing transportation...to the maximum extent consistent” with the law.¹⁵ In 1981, the ICC first exempted TOFC/COFC services provided by railroads on flatcars or in rail-owned or rail-leased trucks, stating “railroad operations involving TOFC and COFC are exempt, whether they are conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself (rather than by a separately incorporated railroad affiliate).”¹⁶ The ICC reasoned that the “traffic was highly competitive with motor carrier service, that intramodal rail competition was active, that service problems were an impediment to successful marketing of TOFC/COFC service, the regulatory restraints had impeded the development of intermodal service, and the exemption from regulation would likely stimulate improvements in service without threatening any harm to individual shippers.”¹⁷ Ultimately, the Supreme Court upheld the ICC’s authority to exempt, explaining “[t]he ICC’s statutory authority includes jurisdiction to grant exemptions from regulation as well as to regulate. In 1980, Congress enacted the Staggers Rail Act..., which *authorizes the ICC to exempt from state regulation* ‘transportation that is provided by a rail carrier as a part of a

¹⁴ H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 243 (1975).

¹⁵ 49 U.S.C. § 10502(a).

¹⁶ *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 732 (Feb. 19, 1981).

¹⁷ *Id.* at 732.

continuous intermodal movement.”¹⁸ Importantly, the ICC’s authority to exempt was not just from ICC regulation but state regulation as well.¹⁹

Building upon this exemption, in 1987, the ICC exempted “the over-the-road segment of TOFC/COFC operations performed by motor carriers — *whether or not they are affiliated with a railroad* — as agents of a railroad or as part of a joint rail/motor holding out.”²⁰ In exempting the services of motor carrier portions of the TOFC/COFC service, the agency recognized:

Although [1981 TOFC/COFC exemption] has provided many benefits to the railroads and the shipping public, its major shortcoming is that it does not exempt service in trucks that are not rail-owned. It appears that railroads and motor carriers have to a large degree been able to work around the anomalous regulatory environment resulting from [1981] TOFC/COFC Exemption. But by establishing different regulatory regimes for similarly situated carrier groups that action has not fully promoted a completely integrated transportation system among the different modes. The intent of this decision is to remedy that shortcoming, and to enhance services to the public, by providing for more equal treatment of motor carriers.²¹

The ICC was specifically going beyond the rail carriers, or even rail-carrier-affiliated motor carriers, to incorporate other motor carriers and their portion of the movement. In justifying this extension of its exemption authority, the agency explained that “the source of our exemption authority is the ‘related to a rail carrier’ language of section 10505(a), while the ‘transportation provided by rail carrier’ language of section 10505(f) illustrates a type of service

¹⁸ *ICC v. Tex.*, 479 U.S. at 452 (emphasis added).

¹⁹ *Id.* at 460-61 (rejecting partial state regulation of TOFC/COFC service, explaining the Staggers Act “was a response to the concern that differing state and federal standards applying to the industry and excessive governmental regulation by both federal and state authorities had contributed to the financial difficulties of major railroads.”).

²⁰ *Motor Carriers* at *4 (explaining that the agency had “decided not to exempt at this time ‘Plan I’ service, which is primarily a holding out to provide transportation by motor carrier.”) (emphasis added).

²¹ *Id.* at *7-8.

as to which Congress suggested the exemption authority be exercised.”²² As such, the agency found “the inherent, well recognized bimodal nature [of] TOFC/COFC service, and the basic purpose of TOFC/COFC — to provide more efficient service through substitution of one mode for another — we cannot conceive of how we could conclude that motor carrier TOFC/COFC services performed under agency or joint rate arrangements are not matters related to rail carriers that are appropriate subjects for the exemption.”²³ The agency found that it was not just a choice, but a requirement to make such a decision, noting “if we can facilitate intermodalism further it is *our obligation to do so*.”²⁴

In 1989, the agency took the “logical and modest...next step” in the deregulation of TOFC/COFC service, exempting from regulation the motor carrier pickup and delivery portion of TOFC/COFC services performed as part of continuous intermodal movement.²⁵ The ICC reiterated, once more, that “motor service that is part of a continuous intermodal movement is, by definition, related to rail” and should be exempt.²⁶ The ICC specifically rejected claims of the motor carriers that its actions would be inconsistent with the Motor Carrier Act (MCA), explaining the “legislative history of the MCA indicates to us that Congress recognized the intimate relationship between the motor and rail legs of a through movement, and that it expected that motor carrier piggyback service might be exempted after further study.”²⁷ The agency recognized the “the anomaly of having ‘freight movements [that] are half-regulated,

²² *Id.* at *10.

²³ *Id.* at *12-13.

²⁴ *Id.* at *24 (emphasis added).

²⁵ *Improvement of TOFC/COFC Regulation (Pickup and Delivery)*, 6 I.C.C.2d 208, 1989 ICC LEXIS 354 *15 (Nov. 27, 1989) (*Pickup & Delivery*).

²⁶ *Id.* at *10.

²⁷ *Id.* at *12.

half-unregulated’”, going on to opine that “we think that, if the MCA had been enacted after some experience with the TOFC/COFC exemption established in [1981], Congress might well have been more direct in supporting this type of exemption.”²⁸ In granting the exemption, the ICC noted doing so should have “clear benefits for the shipping public: more efficient coordinated service; more flexibility with respect to rates and services; better and more equal opportunities for shippers’ associations to compete with parties able to take advantage of exempt joint rate or agency arrangements; more competition among truckers for ex-rail traffic; and greater freedom from unnecessary and unproductive economic regulatory constraints.”²⁹ It further found that the “purpose of this and the prior piggyback exemptions is to free carriers from unnecessary economic regulation so that they are better able to compete in the marketplace.”³⁰ On appeal, the D.C. Circuit upheld the ICC, stating that the congressional debate regarding the MCA bolstered the ICC’s finding.³¹ Further, on the exemption itself, the court found that the agency “reasonably concluded that the exempted motor carrier operations are closely related to TOFC/COFC rail transportation, even though the rail and motor carrier segments are contracted for and billed separately.”³²

The wisdom of these deregulatory decisions has been evidenced by the continued growth of intermodal traffic. Any action in this proceeding should preserve the current TOFC/COFC regulatory balance, which has met Congress’s intent that the agency foster intermodal transportation to “conserve fuel, reduce highway maintenance and railway

²⁸ *Id.* at *15 (citing 126 Cong. Rec. at 7825)

²⁹ *Id.* at *16.

³⁰ *Id.*

³¹ *See Central States*, at 1103-04.

³² *Id.* at 1103.

operating costs, increase productivity, and help maintain American competitiveness in the world economy.”³³

III. THE BOARD’S JURISDICTION EXTENDS BEYOND ITS EXERCISE OF REGULATORY AUTHORITY OVER SPECIFIC TRAFFIC.

Pursuant to 49 U.S.C. § 10501(b), the Board’s jurisdiction over “transportation by rail carriers” is “exclusive”, and expressly preempts other remedies under Federal or State law.³⁴

Congress defined “transportation” in this context broadly to include:

(A) A locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit,...handling, interchange of passengers and property....³⁵

An intermodal container, regardless of contents, sealed at origin, taken in a continuous haul to a transfer station, where it is loaded on a railcar for delivery to its final destination qualifies as a “service[] related to that movement, including receipt, delivery, transfer in transit [and] interchange.”³⁶ Historically, the Interstate Commerce Act was recognized as “among the most pervasive and comprehensive of federal regulatory schemes.”³⁷ The broad preemptive effect of the Board’s jurisdiction reflects the importance of, and compelling need for uniformity in, operation of the interstate rail system. In preempting State laws, Congress has eliminated all

³³ See *Id.* at 1107 (citing 126 Cong. Rec. 19397 (1981)).

³⁴ See 49 U.S.C. § 10501(b).

³⁵ 49 U.S.C. § 10102(9).

³⁶ *Id.*; see *Pickup & Delivery*, at *11 (“The courts and the Commission have found since the earliest days of intermodalism that the motor and rail legs of a continuous TOFC/COFC movement are related.”).

³⁷ *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). See *City of Auburn*, 154 F.3d at 1030 (“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”).

obstacles to execution of Federal law and the accomplishment of Federal objectives. As the Board noted recently “the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states.”³⁸

As such, state and local railroad regulation has long been preempted to a significant extent. State or local laws affecting rail transportation can be categorically preempted or preempted “as applied.”³⁹ Two broad categories of state and local actions have been found to be categorically preempted regardless of the context or rationale for the action: (1) state or local permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized; and (2) state or local regulation of matters that are directly regulated by the Board.⁴⁰ All state laws that have the effect of managing or governing rail transportation are thus preempted.⁴¹

Even if a state or local law is not categorically preempted, it still may be preempted “as applied” if it would have “the effect of unreasonably burdening or interfering with rail transportation.”⁴² In such cases, the facts and circumstances must be reviewed “to determine

³⁸ *Ass’n. Am. RRs—Pet. for Dec. Order*, FD 36369, slip op. at 2-3 (STB served Dec. 30, 2020); see, e.g., *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 804 (5th Cir. 2011) (a purpose of ICCTA was to create a “[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation”) (quoting H.R. Rep. No. 104–311, at 93 (1995)); *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1338-39 (11th Cir. 2001) (stating that a desire to prevent a “patchwork of regulation...motivated the passage of the ICCTA” and that “[i]n reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across the nation.”); *Pet. of Norfolk S. Ry. for Expedited Declaratory Order*, FD 35949, slip op. at 3 (STB served Feb. 25, 2016) (“The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce.”).

³⁹ *U.S. EPA—Pet for Dec. Order (EPA Dec. Order)*, FD 35803, slip op. at 7 (STB served Dec. 30, 2014).

⁴⁰ *CSX Transp., Inc.—Pet. for Dec. Order*, FD 34662, slip op. at 3 (STB served May 3, 2005); *Pet. of Norfolk S. Ry.*, FD 35949, slip op. at 3.

⁴¹ See *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry.*, 266 F.3d at 1331).

⁴² See *City of Auburn v. STB*, 154 F.3d 1025, 1030-31 (9th Cir. 1998); *EPA Dec. Order*, at 8.

the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.”⁴³

Deregulation of certain aspects of the railroad industry does not circumscribe this preemptive effect. By 1980, academics and policymakers reached consensus that economic regulation of transportation was counterproductive and led to inefficiency.⁴⁴ Economic deregulation of the airline industry began in 1974 when the Civil Aeronautics Board first encouraged experiments with discount fares and was completed in 1983 when all regulations on fares, entry, and exit were eliminated. Similarly, deregulation of motor carriers and railroads began at the ICC and was later enhanced by Congress. Notably, even as Congress extended its deregulation of railroads in ICCTA, it also affirmed and expanded the preemptive effect of the Board’s jurisdiction.⁴⁵

The Board’s broad preemption applies without regard to whether or not the Board actively regulates the particular activity involved.⁴⁶ The courts have noted that the exercise of the agency’s section 10502 “exemption authority neither lodges nor dislodges agency jurisdiction; instead, it presupposes ICC [now Board] jurisdiction over the persons or services

⁴³ *Joint Pet. For Dec. Order—Boston & Maine Corp. and Town of Ayer, MA (“Ayer”),* FD 33971, slip op. at 10 (STB served May 1, 2001).

⁴⁴ See Clifford Winston, U.S. Industry Adjustment to Economic Deregulation, *Journal of Economic Perspectives*—Vol. 12, No. 3, 89, 91 (1998).

⁴⁵ See H.R. Rep. No. 104-311, at 95-96 (1995) (noting it is “the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system”).

⁴⁶ See, e.g., *Port City Properties v. Union Pac. R.R.*, 518 F.3d 1186, 1188-89 (10th Cir. 2008) (preemption applies to activities on spur track, which are not regulated by the Board); *Green Mountain RR. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005); *Joint Pet. for Dec. Order—Boston & Me. Corp. and Town of Ayer*, 5 S.T.B. 500 (2001), clarified and reconsideration denied, Finance Docket No. 33971 (STB served Oct. 5, 2001).

exempted.”⁴⁷ Moreover, the Staggers Act “reaffirm[ed] that where the [agency] has withdrawn its jurisdiction to regulate, the State could not assume such jurisdiction.”⁴⁸

Any other outcome would inevitably result in an unworkable patchwork of regulation, as states and localities stepped in to regulate rail transportation. As the legislative history of ICCTA explains, “the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.”⁴⁹ For example, the Board’s well-established exemptions from statutory requirements for certain transactions, including acquisitions, operations, and abandonments, are still subject to the Board’s exclusive jurisdiction, even though they are exempt transactions; states cannot step in and impose restrictions on those transactions. Indeed, it would frustrate the very purpose of these exemptions, and ICCTA preemption itself, were a state or local authority allowed to step in to regulate such transactions. Similarly, the Board does not have regulatory authority to license side, spur, or industrial track. Yet, railroad operations over that track are subject to Board jurisdiction, and states may not place restrictions on their construction, operation, or abandonment.⁵⁰

⁴⁷ *Central States*, at 1102.

⁴⁸ *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451-52 (D.C. Cir. 2010) (quoting the Congressional Record).

⁴⁹ H. Rep. No. 104-311, at 95-96 (1995).

⁵⁰ See *Allied Erecting and Dismantling Co., Inc. v. STB*, 835 F.3d 548, 550 (6th Cir. 2016); see also H. Rep. No. 104-311, at 95 (“The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907.”).

Of course, the Board's jurisdiction is not infinite and federal preemption over state authority is not absolute. States and localities retain certain police powers to protect public health and safety, such as fire, building, and electrical codes, as long as those police powers are nondiscriminatory in nature, do not interfere with interstate rail operations, or otherwise unreasonably burden interstate commerce.⁵¹ Moreover, where an apparent conflict exists between the ICCTA and another federal law, then the courts strive to harmonize the two laws, giving effect to both if possible, notwithstanding the very broad language of section 10501.⁵²

Congress also limited federal preemption over rail transportation in a very specific way in the Clean Railroads Act of 2008 (CRA).⁵³ Even if a solid waste rail transfer facility is owned or operated by or on behalf of a rail carrier, the facility must comply with applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier.⁵⁴ However, Congress did not limit the Board's jurisdiction related to the transportation services at, to, and from those facilities. And Petitioners correctly note that:

⁵¹ See *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 411-12 (5th Cir. 2010) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)).

⁵² For example, federal environmental statutes like the Clean Air Act and Clean Water Act and railroad safety regulations under the Federal Railway Safety Act apply to rail carriers, so long as they do not unreasonably interfere with interstate commerce. See, e.g., *Ayer*, at 9-1; *EPA Dec. Order*, at 8-10 (explaining a State's rules under the auspices of the Clean Air Act to address air quality issues would likely be preempted because the rules cannot be harmonized with the purposes of § 10501(b)).

⁵³ Public Law 110-432, 122 Stat. 4848.

⁵⁴ See *Solid Waste Rail Transfer Facilities*, EP 684, slip op. at 2 (STB served Nov. 20, 2012).

The House sponsor of the CRA emphasized that TOFC/COFC services are regulated exclusively by the STB and nothing in the new statute changed this. “[T]he amendment does not apply to containerized facilities. **They still are subject to the Federal preemption.**” Federal Railroad Safety Improvement Act of 2007, 153 Cong. Rec. H11671-02, H11691, 2007 WL 3024635 (Oct. 17, 2007) (emphasis added).⁵⁵

* * *

In considering the petition in this proceeding, the Board should recognize the well-established regulatory balance the agency has created in exempting intermodal service and the role those exemptions have played in facilitating the free flow of intermodal commerce. The agency and the courts have established the principles of preemption described above to ensure that Congress’s intent to avoid a patchwork of differing state or local regulations affecting railroads is fulfilled. The Board’s resolution of this petition should protect that framework and ensure the continuous flow of intermodal containers and trailers.

Respectfully submitted,



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June 4, 2021

⁵⁵ Petition at 19.

CERTIFICATE OF SERVICE

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