



BUILDING AMERICA®

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North American Rail Shippers Association 2017 Annual Meeting

Regulatory Update

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Regulatory Update



- **STB Regulatory Expansion**
- **STB Process Improvements**
- **ICC Termination Act (ICCTA) Preemption**

Regulatory Expansion On Pause

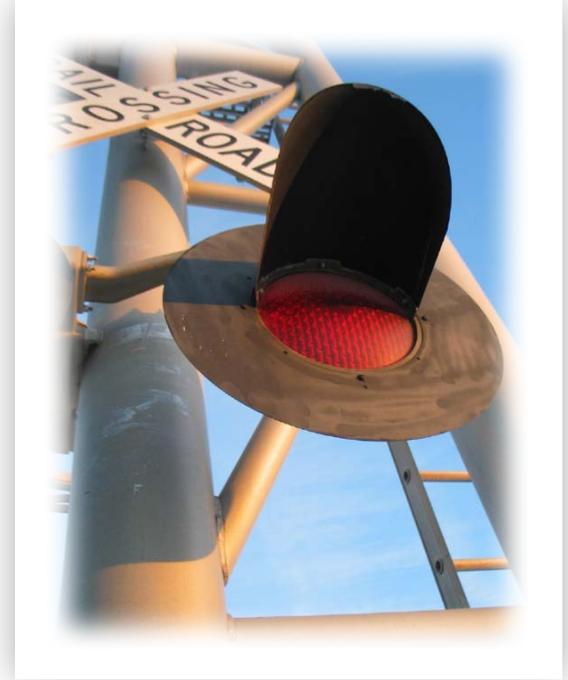


- 2 vacancies on Board
 - Regulatory Reform Officer appointed
 - Serious questions whether STB can adopt proposed rules
 - Legal
 - Policy
- EP 704(1) **Review of Exemptions**
 - Proposed reregulation of crushed stone, concrete, iron & steel products and scrap, and coke
 - Target date for decision: TBD
 - EP 711(1) **Reciprocal Switching**
 - Proposed rules to make it easier for shippers to require railroad to switch for competitor
 - Interested parties meeting with Board members
 - No target date for closing record
 - EP 722 **Revenue Adequacy**
 - Various proposals on *how* to apply Revenue Adequacy constraint submitted
 - No target date for proposed rule

Process Improvements Final Or Moving Forward



- **Final Rules Issued**
 - EP 724(4) *Performance Data Reporting*
 - EP 730 *Revisions to Arbitration Rules*
 - EP 731 *Rules for Board-Initiated Investigations*
- **Moving Forward Towards Final Rules**
 - EP 528(1) *Publication Requirements for Agricultural Products*
 - Target date for final decision June 2017
 - EP 729 *Offers of Financial Assistance*
 - Target date for final decision June 2017
 - EP 733 *Expediting Rate Cases*
 - Reply Comments due June 2017



ICCTA Preemption Battles



- Preemption = when federal law trumps state/local law
- Benefits rail shippers
- ICCTA preemption very broad
 - The *jurisdiction of the STB* over –
 1. *Transportation* by rail carriers, and the remedies provided with respect to rates, classifications, rules, *practices, services and facilities*; and
 2. The *construction, acquisition, operation, abandonment, or discontinuance 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,is *exclusive*....The *remedies provided [in ICCTA] are exclusive and preempt the remedies provided under federal or state law.*
- Despite ICCTA preemption, communities still seek to prevent or limit movement of certain freight or all trains

Can Communities Bar Or Restrict Rail Shipments Of Certain Commodities?



- ***Holmquist v. U.S.*** (E.D. Washington)
 - Activists in Spokane want to ban rail transportation of coal & crude oil.
 - Seek injunction of ICCTA preemption claiming violation of constitutional rights to “livable climate” and for “community self-government”
- ***Valero Refining – Petition for Declaratory Order (STB)***
 - Benicia denied refinery’s permit for unloading facility for crude oil
 - Opponents demanded mitigating conditions for “uprail” communities such as gas & vapor detection and enhanced rail cars
 - STB denied Valero Petition because conditions on rail operations not actually imposed



Can States Require Railroads to Collect HazMat Charges from Shippers?



- California imposed \$45 charge for each rail car loaded in or crossing into the state
 - Applies to 25 hazmats (e.g., diesel fuel, ethanol, gasoline, crude oil, chlorine)
 - Railroads required to collect and remit to state
- Hazardous Material Transportation Act (HMTA) *does* allow states to collect such “fees” – but only if fair
 - No similar charge for truck shipments
 - Funds to be used for equipment to respond to either rail or truck accidents
 - Flat fee regardless of distance
- ***BNSF et al. v. California State Board*** court enjoined
 - Found ICCTA preemption in harmony with HMTA
 - ICCTA preempted

Can Courts Order Railroads to Not Transport Crude Oil Trains Across Indian Reservation?



- BN settled 1977 lawsuit with Swinomish Tribe by agreeing to easement that limited BN to 2 trains with 25 cars daily.
 - Consent required to raise limit
 - Rent to be adjusted
- Crude oil trains to Tesoro exceeded limit and BNSF did not get tribe's consent.
- Swinomish sued BNSF for damages and asked for injunction. BNSF lost motion to dismiss on ICCTA preemption grounds.
- Tesoro asked STB to declare ICCTA preempted order that would prevent BNSF from moving its trains. STB deferred to court.
- ***Swinomish Indian Tribal Community v. BNSF*** court found BNSF breached agreement
 - ICCTA did not preempt damages or rent adjustment
 - ICCTA did preempt injunction on number or type of trains

Must Railroads Comply with CEQA?



- ***Town of Atherton v. CHSRA***, California Appellate Court ruled that CHSRA fell within “market participant” exception to ICCTA preemption. CHSRA did not appeal decision.
- ***Friends of Eel River v. North Coast Railroad Authority***, a different California Appellate Court rejected the “market participant” doctrine when railroad is subject to STB jurisdiction.
 - Lawsuits by 3rd parties against state agency to enforce CEQA are not proprietary actions by State
 - Case recently argued before California Supreme Court
- ***CHSRA – Petition for Declaratory Order*** STB decided that ICCTA categorically preempted CEQA as a preclearance requirement because CHSRA will be part of interstate rail network.
 - CHSRA voluntary participation in CEQA review process did not waive preemption arguments.
 - Whether CHSRA must comply with CEQA as a condition of Proposition 1A funding is question of state law for California courts to decide.



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