

May 8, 1997

No. 8249

This opinion is in response to a question from Claudia L. Howells, Railroad Services Coordinator, Oregon Department of Transportation, concerning the state statutes regulating the abandonment of railroad agencies.

### QUESTION PRESENTED

Are ORS 823.073 and 823.075,<sup>(1)</sup> which require approval from the Oregon Department of Transportation (department) before railroads may abandon their agencies located within Oregon, preempted by the federal ICC Termination Act of 1995 (the Act).

### ANSWER GIVEN

We conclude that as applied to railroad agency closings ORS 823.073 and 823.075 are preempted by the Act and that railroads do not need approval from the department before closing their agencies.

### DISCUSSION

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which requires that federal law control conflicts between state and federal law. US Const Art VI, cl 2. *Teper v. Miller*, 82 F3d 989, 993 (11th Cir 1996). Enforcement of any state law that conflicts with a valid federal statute is prohibited. *Taylor v. General Motors Corp.*, 875 F2d 816, 826 (11th Cir 1989).

The courts have recognized three categories of preemption: (1) express preemption, when Congress defines explicitly the extent to which its enactments preempt state law; (2) field preemption, when Congress' regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred; and (3) conflict preemption, when state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal statute. *Teper* at 993, citing *English v. General Elec. Co.*, 496 US 72, 78-79, 110 S Ct 2270, 110 L Ed2d 65 (1990). The critical question in any preemption analysis is whether Congress intended to preempt state law. "[A]ny understanding of the scope of a preemption statute must rest primarily on `a fair understanding of congressional purpose.'" *Medtronic v. Lohr*, 116 S Ct 2240, 2250, 135 L Ed2d 700 (1996), citing *Cipollone v. Liggett Group, Inc.*, 505 US 504, 112 S Ct 2608, 120 L Ed2d 407 (1992).

The intent of Congress to preempt state law is primarily discerned from the language of the preemption statute, although the policy behind the statute, as well as the structure and purpose of the statute as a whole, is also relevant in determining whether Congress intended the statute to preempt state law. *Medtronic* at 2250-2251.

The Act went into effect January 1, 1996. Public Law No. 104-88, 109 Stat 805-852 (1995).<sup>(2)</sup> The Act eliminated the Interstate Commerce Commission (ICC) and the Federal Maritime Commission, repealed various ICC regulatory functions and transferred the residual functions relevant to your question to a new Intermodal Surface Transportation Board (board). See 49 USC § 702, 721.

As to the board's jurisdiction and preemption of state law, the Act provides:

(b) *The jurisdiction of the Board over --*

(1) *transportation by rail carriers*, and the 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; *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. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 USC § 10501(b) (emphasis added).

"If [a] statute contains an express preemption clause, the task of statutory construction must \* \* \* focus on the plain wording of the clause, which necessarily contains the best evidence of preemptive intent." *CSX Transp. Inc. v. Easterwood*, 507 US 658, 664, 113 S Ct 1732, 123 L Ed2d 387 (1993). The last sentence of 49 USC § 10501(b) is such an express preemption clause. Therefore, we first focus on the plain wording of that clause.

49 USC § 10501(b) provides that, except as otherwise provided under Part A of the Act,<sup>(3)</sup> the "remedies" under that part "with respect to regulation of rail transportation are exclusive and preempt" remedies available under federal or state law. The plain meaning of this provision is that the federal remedies provided under the Act are the only remedies available as to the regulation of rail transportation and, except where the Act expressly provides otherwise, those remedies are exclusive of any state remedies.

Although the Act regulates the abandonment of railroad lines, 49 USC § 10903, it does not expressly regulate the abandonment of railroad agencies. Consequently, there are no "remedies" provided in the Act for unlawful abandonment of railroad agencies. In *CSX Transportation v. Georgia Public Service Commission*, 944 F Supp 1573 (ND Ga 1996), the court considered an argument by the state commission that its authority to regulate railroad agency closings in Georgia was not preempted because 49 USC § 10501(b) preempts state remedies only when federal remedies are provided under the Act and the Act does not provide a "remedy" for railroad agency closings. The court rejected the state's argument, holding that the plain language of section 10501(b) expressly preempts any remedies provided under state law for railroad agency abandonments. *Id.* at 1581.

We similarly conclude that Oregon may not provide remedies for unlawful abandonment of railroad agencies. The Act specifies that its remedies not only "preempt" state remedies, but that they are also "exclusive" with respect to the "regulation of rail transportation." The broadly inclusive phrase "regulation of rail transportation" evidences Congress' intent to preclude state remedies for violation of any state laws or rules regulating rail transportation.<sup>(4)</sup> If the state could provide remedies for violating state law with respect to abandonment of agencies, the remedies provided under Part A of the Act would not be the exclusive or only remedies with respect to regulation of rail transportation. Moreover, because state regulation with respect to the abandonment of railroad agencies is meaningless without the authority to provide remedies for violation of the state law, we also conclude that the Act preempts ORS 823.073 and 823.075, which require railroads to obtain written authority from the department before abandoning their agencies in Oregon.

We reach the same conclusion based on the remaining language of 49 USC § 10501(b) and the overall intent of the Act. 49 USC § 10501(b) grants exclusive jurisdiction to the board over "transportation by rail carriers" and the "abandonment or discontinuance of \* \* \* facilities, even if the tracks are located \* \* \* entirely in one state." The Act defines "transportation" as including "property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail \* \* \* and services related to that movement, including receipt, delivery \* \* \* storage, handling, and interchange of passengers and property." 49 USC § 10102(9). For purposes of ORS 823.073 and 823.075, "agency" is defined as

any place provided by a for-hire carrier for the accommodation of the public in the receipt, delivery, billing or routing of freight, or in the loading or discharge of passengers, at which an agent is provided to serve the public.

ORS 823.071(1). An "agent" is "the person in charge of the transaction of business with the public at any station or agency." ORS 823.071(2). Thus, railroad agencies come within the meaning of "transportation" by rail carriers over which the board is given exclusive jurisdiction in 49 USC § 10501(b).

The exclusivity of the board's jurisdiction could be interpreted to refer to either regulatory or adjudicatory jurisdiction, or both. The plain language of 49 USC § 10501(b)(1) demonstrates that Congress intended the board to have exclusive jurisdiction over both regulation and adjudication of rail transportation. 49 USC § 10501(b)(1) grants the board exclusive jurisdiction over "transportation by rail carriers, *and* the remedies provided" in Part A of the Act with respect to specific, listed subjects. (Emphasis added.) If Congress had intended the board's exclusive jurisdiction to be only adjudicatory, e.g., depriving the courts of jurisdiction, the reference to remedies alone would have been sufficient. Instead, Congress granted the board exclusive jurisdiction over the regulation of virtually all aspects of railroad operations, expressly including the "abandonment or discontinuance of \* \* \* facilities." 49 USC § 10501(b)(2).

The Act was passed to continue the deregulation of the railroad industry that Congress has fostered since 1980. The Act's policy statement emphasizes this goal of deregulation.

In regulating the railroad industry, it is the policy of the United States Government--

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

\* \* \* \* \*

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

\* \* \* \* \*

(7) to reduce regulatory barriers to entry into and exit from the industry;

\* \* \* \* \*

(9) to encourage honest and efficient management of railroads[.]

49 USC § 10101. The Act's legislative history makes the extent of the deregulation even more apparent. The Senate Commerce, Science and Transportation Committee explained in its report that the bill under consideration would eliminate "unnecessary and burdensome regulatory requirements and restrictions on the rail industry."

The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation. However, nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill. \* \* \* Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficiency and competitive viability.

S Rep No. 176, 104th Cong., 1st Sess. (1995), 1995 WL 701522. *See also* HR Rep No. 311, 104th Cong, 1st Sess 95-96 (1996), *reprinted in* 1996 USCCAN 793, 807-808 (reflecting "the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system").<sup>(5)</sup>

To fill the gap left by the Act's elimination of state jurisdiction and policy of deregulation, Congress simultaneously created a Railroad-Shipper Transportation Advisory Council to address shipper concerns. 49 USC § 726. The Senate Commerce, Science and Transportation Committee explained the purpose of creating such a council, as follows:

The Committee recognizes that certain affected groups - most notably smaller shippers and smaller railroads - believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective \* \* \*. The Committee believes that the better approach, at this juncture, is to establish a mechanism which would (1) define and prioritize the most compelling problems faced by shippers and others today, (2) encourage those problems to be addressed without resorting to reregulation or some other governmental action in an area that might be more effectively addressed in the private sector, \* \* \*.

S Rep No. 176, *supra*, 1995 WL 701522. The Railroad-Shipper Advisory Council is mandated to advise the chairman of the board, among others, "with respect to rail transportation policy issues [the Council] considers significant" and "to develop within the private sector mechanisms to prevent, or identify and effectively address, obstacles to the most effective and efficient transportation system practicable." 49 USC § 726(f).

Our conclusion that the Act preempts state regulation as to abandonment of railroad agencies is consistent with the two court decisions interpreting 49 USC § 10501. In *CSX Transportation v. Georgia Public Service Commission*, 944 F Supp at 1584, the court reasoned that the Act's grant of exclusive jurisdiction over almost all matters of rail regulation to the board, including areas formerly regulated by states exclusively, demonstrates "an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations," thus preempting state regulation of railroad agency closings. In *Burlington Northern Railroad Co. v. Page Grain Co.*, 545 NW 2d 749, 751 (Neb 1996), railroad shippers sought review of the Nebraska Public Service Commission's grant of a railroad's application to discontinue a service agency. The Nebraska Supreme Court stated:

The rail service agency in question is a service of Burlington to its shipping customers, as well as a facility of that railroad. As such, the regulation of and remedies relevant to the rail service agency in question is under the exclusive jurisdiction of the federal government.

Based on the plain language of the federal statute, legislative history and court decisions, we conclude that the Act has preempted state regulation of railroad agency closings. Accordingly, we find that ORS 823.073 and 823.075 are preempted as to railroad agency closings by the Act. The Supremacy Clause of the United States Constitution prohibits enforcement of these state statutes as to railroads.

HARDY MYERS  
Attorney General

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1. ORS 823.073 provides:

No common carrier shall abandon any of its agencies, or withdraw the agent therefrom, without the prior written authority of the Department of Transportation. If the primary business of the agent or agency is not that of a common carrier, the loss of the use of such agent or agency without the fault of the carrier shall not be considered a violation of this section, provided that the carrier shall give to the department notice of such loss immediately upon being informed thereof and secure another agent or agency within a reasonable period of time.

ORS 823.075 provides:

(1) Any common carrier may petition the Department of Transportation for authority to abandon any agency or to withdraw the agent from an agency.

(2) Upon receipt of a petition to abandon or withdraw under this section, the department shall give written notice of the petition to all known current customers of such agency. If the petition requests authority to abandon or withdraw any agency or agent involved in transportation services using motor buses, the department shall provide notice of the petition for authority and of rights to protest by publication in addition to any written notice required by this subsection. When notice by publication is required under this subsection, such notice must be published in a newspaper of general circulation in the county where the affected agency is located.

(3) If any customer files with the department a written protest to the abandonment of the agency or the withdrawal of the agent therefrom within 30 days from the date written notice is given, the department shall schedule a hearing to be held within 30 days from the filing of such protest. If notice by publication is required under subsection (2) of this section then protest may be filed, as provided under this subsection, within 30 days after the written notice or published notice, whichever is later.

(4) If a hearing is provided under this section, the hearing shall be held at some convenient place in the county in which such agency is located.

(5) Where a common carrier seeks to move the location of its agent or agency from one point within a city to another point within such city the department may approve such move without a hearing.

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2. The ICC Termination Act was codified in numerous titles and sections throughout the U.S. Code. The portions pertaining specifically to railroads are codified at

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3. Part A of the ICC Termination Act is the only part of the Act regulating railroads.

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4. Congress intended the phase "regulation of rail transportation" to be both expansive and limiting, noting that the Act's exclusivity

is limited to remedies with respect to rail regulation - not State and Federal law generally. For example, criminal statutes governing antitrust matters are not pre-empted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with *the scheme of economic regulation (and deregulation)* of rail transportation.

HR Conf Rep No. 422, 104th Cong, 1st Sess 167 (1995), *reprinted in* 1996 USCCAN 850, 852 (emphasis added).

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5. The board also has interpreted the Act to preempt state regulation. On April 3, 1996, the board published a notice in the Federal Register that the authority of certain states (including Oregon) to regulate intrastate rail rates and related subjects was terminated by the ICC Termination Act of 1995, effective January 1, 1996. STB Public Notice, Ex Parte No. 388, 61 Fed Reg 14849 (1996). The board explained that the certification of states that sought jurisdiction over intrastate transportation by rail carriers was no longer necessary or effective since "the underlying state regulatory role *no longer exists*" because under 49 USC § 10505(b) the "jurisdiction of the Board is exclusive." *Id.* The United States Supreme Court "shows great deference to the interpretation given [a] statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 US 1, 16, 85 S Ct 792, 13 L Ed2d 616.

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