

Appendix L.
Union Pacific Railroad
Statement re: Preemption



UNION PACIFIC RAILROAD STATEMENT RE PREEMPTION

Union Pacific will not agree to any limitation on the volume of product it ships or the frequency, route or configuration of such shipments. Such restrictions are clearly preempted under federal law. A general overview of the case law is set forth below.

THE ICC TERMINATION ACT PREEMPTS STATE LAWS THAT MANAGE OR GOVERN RAIL TRANSPORTATION

The ICC Termination Act ("ICCTA") also preempts state laws with respect to rail transportation. The ICCTA, which became effective on January 1, 1996, created the Surface Transportation Board ("STB"). As codified at 49 U.S.C. § 10501, one section of the ICCTA addresses both the jurisdiction of the STB and the preemptive effect of its decisions and the remedies provided under the Act:

(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 U.S.C. § 10501(b) (emphasis added). The STB's substantive powers concern economic regulations or core operational decisions about railroads and other aspects of transportation. The ICCTA's definition of "transportation" includes the physical apparatus of railroad operations (locomotives, cars, rails and terminals that are owned by rail carriers) and the services related to the movement of passengers or property by rail. *See* 49 U.S.C. § 10102(9).

The ICCTA preempts laws "with respect to regulation of rail transportation." *Id.* § 10501(b). Congress' use of this phrase meant that it intended to preempt all laws that "have the effect of 'manag[ing]' or 'govern[ing]' rail transportation ... " *Florida East Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Because the STB's jurisdiction is exclusive, states may not legislate in the aforementioned areas, which embrace matters such as railroad construction and facility management.

The Ninth Circuit has interpreted the ICCTA as broadly preempting state laws that have the effect of impacting the operation of railroads- physically or economically. In *City of Auburn v. STB*, the Ninth Circuit held that if local authorities had the "ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." 154 F.3d 1025, 1029-31 (9th Cir. 1998). The court held that congressional intent to

preempt this kind of state and local regulation of rail lines is "explicit in the plain language of the ICCTA and the statutory framework surrounding it." *Id.*

Likewise, the Court of Appeals for the Fifth Circuit has held that the ICCTA expressly preempted a Texas law that prohibited railroads from willfully allowing a standing train to obstruct a crossing for more than five minutes. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439,441-44 (5th Cir. 2001). The *Friberg* court stated that the ICCTA's preemption provision "could not be more precise, and it is beyond peradventure that regulation of ... *train operations*, as well as the construction and operation of ... side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise." *Id.* at 443 (emphasis added); *see also Burlington N Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288, 1296 (D. Mont. 1997) (holding that a state law authorizing regulation of closure, consolidation, or centralization of railroad agencies was preempted by ICCTA because it has a direct and substantial effect on economic regulation of railroad transportation).

Therefore, the ICCTA preempts all state laws or orders that attempt to regulate railroad transportation- a field committed to exclusive STB jurisdiction under the ICCTA. 49 U.S.C. § 10501 (b).

THE COMMERCE CLAUSE LIMITS STATE REGULATION OF RAILROADS BECAUSE IT PROHIBITS STATES FROM UNDULY INTERFERING WITH INTERSTATE COMMERCE

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1960) the Supreme Court held that an Arizona law governing the length of trains unduly burdened interstate commerce and was unenforceable. 325 U.S. at 773. The Court emphasized the need for national uniformity in the field of train equipment, stating, "the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident." *Id.* at 773-74.

Similarly, in *Union Pacific R.R. v. Cal. Pub. Util. Comm'n*, the Ninth Circuit held that a California Public Utility Commission rule requiring railroads to develop performance standards for train configuration impermissibly burdened interstate commerce. 346 F.3d 851, 872 (9th Cir. 2003). The court held that the rule was "clearly excessive in relation to the putative local benefits." *Id.* Although the Commission's rule did not, on its face, regulate conduct outside California, "the extra-territorial effect of its regulation [was] undisputed" because any train entering or leaving the state would have to be configured "to meet the most stringent standards on its trip." *Id.* at 871; *see also Missouri Pacific R.R. Co. v. R.R. Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) (stating, "[I]t is difficult to imagine a state regulation of the train itself ... which could escape being a burden upon commerce").

Therefore, state-by-state regulation of train safety and operations may place an undue burden on interstate commerce by inhibiting interstate train movement. As the Ninth Circuit stated, "if [one state] can require the Railroads to develop and to implement [particular] standards, so can every other state, and there is no guarantee that the standards will be similar." *See Union Pacific*, 346

F.3d at 871. Moreover, the need for nationally uniform safety regulations makes this an area that "can only be regulated by the national government." *Id.* at 870. Congress and the FRA have consistently articulated the goal of national uniformity in the FRSA's preemption provision, 49 U.S.C. § 20106(a)(1), in the FRA's parity requirement for collision-avoidance equipment, 49 C.F.R. § 236.566, and in Congress' recent requirement for PTC interoperability, 49 U.S.C. § 20157(a)(2). Therefore, state-by-state regulation of train equipment or safety standards would likely violate the Commerce Clause.