



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

ratkins@sidley.com
+1 202 736 8889

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June 17, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: STB Finance Docket No. 36036, Petition for Declaratory Order,
Valero Refining Company – California

Dear Ms. Brown:

I write on behalf of Union Pacific Railroad Company (“Union Pacific”) in support of the request of Valero Refining Company – California (“Valero”) for the Board to institute a declaratory order proceeding in the above-captioned matter.

The Board is besieged with work. A surge in requests for declaratory orders coupled with new duties created by Congress is undoubtedly stressing the Board’s resources. Where a request for a declaratory order asks the Board to apply established preemption standards to a new set of facts, the agency has recently begun deferring the questions to state or federal courts. Union Pacific well understands the Board’s workload and does not lightly ask the agency to begin another declaratory order proceeding to explore another aspect of the scope of ICC Termination Act (“ICCTA”) preemption.

But all stakeholders in the railroad industry need guidance from the STB on the scope of permissive *indirect* regulation of railroad operations. Union Pacific is not only concerned about the specific situation facing Valero, but the broader proliferation of state and local regulations, rules, conditions, permits, and approvals that impact rail transportation. States and localities frequently recognize that they cannot directly regulate railroads and rail operations, but with increasing frequency they attempt to control or even prohibit railroad operations through conditions imposed on rail customers seeking permits for their facilities. The problem is not community or commodity specific, and continues to expand across the country. The patchwork of state and local rules such an approach would create is unsustainable. Valero’s petition should be embraced as an opportunity for the Board to take public comment on this important issue and provide needed guidance to all stakeholders.

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Union Pacific expects that when the Board begins a proceeding in this matter, it will establish a procedural schedule providing an opportunity for all interested parties to submit their arguments about the scope of ICCTA preemption. We therefore simply highlight the core issues presented to emphasize why the Board should begin such a proceeding.

The facts of this controversy are not in dispute. As Valero explains in its petition, the company filed for a use permit application to install an off-loading rack and track at its Union Pacific-served oil refinery in Benicia California. The city of Benicia's professional staff authorized a complete Environmental Impact Report ("EIR"), but after careful review of preemption principles, its professional staff concluded that the city could not impose mitigation conditions on this project that would have the effect of regulating rail operations. As simply one example, opponents of the project were demanding conditions that would require Valero to accept crude-oil-by-rail only when hauled across the nation along tracks equipped with gas and vapor detection systems, by Tier 4 locomotives and transported in enhanced tank cars. That kind of local regulation is plainly preempted. The staff reasoned that the city could mitigate on-site environmental impacts by requiring Valero to install the off-loading rack and track within its plant, but not the off-site impacts generated by railroad operations. The city legal staff reasonably, and properly in our view, concluded that trying to use a local permitting process to regulate indirectly what the city cannot regulate directly was prohibited.

The Planning Commission disagreed and denied certification of the EIR on the basis of findings of adverse rail transportation impacts and the absence of mitigation of these impacts. Valero appealed the decision to the Benicia City Council and requested a decision be deferred to allow Valero time to seek declaratory relief from the Board. The Benicia City Council granted that request.

The Board is well aware of the broad nature of ICCTA's preemption provisions. *See* 49 U.S.C. § 10501(b). As the Board has explained, ICCTA was passed to "prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce." *See New England Transrail, LLC, d/b/a/Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA*, STB Fin. Docket No. 34797, at 8 (S.T.B. served July 10, 2007) (*citing* H.R. Rep. No. 104-311, at 95-96 (1995), *as reprinted in* 1995 U.S.C.C.A.N. at 807-08). In addition to preempting direct regulation of railroads, ICCTA also preempts regulation of activities conducted under the auspices of railroads. *See, e.g., Joint Petition for Declaratory Order – Boston & Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971 (S.T.B. served Oct. 5, 2001).

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The project is being conducted under the auspices of Valero and not Union Pacific, but this does not end the inquiry. ICCTA does not merely preempt state and local regulations aimed *directly* at railroads. It also preempts *indirect* regulation that affects a railroad's ability to conduct common carrier transportation. See *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010); *Boston & Maine Corp. and Springfield Terminal R.R. Co. – Petition for Declaratory Order*, STB Fin. Docket No. 35749 (S.T.B. served July 19, 2013) (“*Winchester*”). Even in *Sea-3, Inc. – Petition for Declaratory Order*, STB Fin. Docket No. 35853, at 7 (S.T.B. served March 17, 2015), a case in which the Board found that preemption was not applicable, it explained that a state or local permitting process cannot interfere unduly with a railroad's common carrier operations merely because a non-carrier seeks the permit. It is the proliferation of this kind of indirect regulation that concerns Union Pacific.

Further guidance from the Board is needed because states and localities now seek to regulate railroad-related activities by targeting railroad customers. Indeed, in both Valero's Benicia situation and in many other analogous ones around the country, political leaders are frequently advised whether a certain action is or may be preempted. But without authoritative guidance from the STB, political leaders nonetheless override staff recommendations. That was the circumstance, for example, in *Winchester*, when special counsel advised the local Board of Selectmen that a proposed regulation would be preempted, but that advice was ignored. A similar scenario unfolded over an ethanol rail loading facility in West Sacramento. The history of these projects demonstrates that planning staff and counsel are usually aware of the limitations ICCTA places on indirect regulation of railroad operations by states and localities, but may need guidance from the Board to convince state and local political leaders to reach the same conclusion.

Accordingly, Union Pacific respectfully requests that the Board initiate the proceeding requested by Valero and set a procedural schedule for comments.

Sincerely,



Raymond A. Atkins

cc: Rachel Koss; Adams Broadwell Joseph & Cardozo
Jaclyn Prange; Natural Resources Defense Council
Kevin Sheys, Nossaman LL
Justin Marks, Nossaman LLP