

LATHAM & WATKINS^{LLP}

July 3, 2014

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Re: Federal Preemption of S.B. 861

Dear Ms. Williamson,

At our meeting on June 18, 2014, Union Pacific and BNSF requested the State to consider amending S.B. 861 because federal law preempts the financial security and contingency plan requirements that this legislation would impose on the railroads. State officials at the meeting acknowledged that federal law would preempt oil spill prevention requirements but expressed the view that emergency response requirements are nonetheless saved from preemption by the Clean Water Act. We agreed to explain in further detail why we believe that view is wrong as a matter of federal law. We write now to do so.

I. EMERGENCY RESPONSE PLANNING

A. Preemption Under The Federal Rail Safety Act

As you know, Congress directed in the Federal Railroad Safety Act ("FRSA") that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish that objective, Congress provided that a State may no longer "adopt or continue in force a law, regulation, or order related to railroad safety" once the "Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2).¹

¹ The statute provides an exception for requirements "necessary to eliminate or reduce an essentially local safety or security hazard," *id.* § 20106(a)(2)(A), but the risk of a spill into California waterways "is not one that is fundamentally different from those of other locales" and therefore does not come within the exception, *Union Pacific R.R. Co. v. Cal. Pub. Util. Comm'n*,

The contingency response plans mandated by S.B. 861 are preempted by § 20106 for two reasons. First, the subject of oil spill contingency plans, including emergency response, has already been “cover[ed]” by Department of Transportation (“DOT”) regulations and orders. Second, § 20106 applies to *any* regulation that DOT adopts related to rail safety. It does not matter whether the regulation is adopted under the FRSA, the Clean Water Act (“CWA”), or some other federal law. The CWA preemption provision accordingly does not govern the validity of the mandates imposed by S.B. 861. Section 20106 of the FRSA controls, foreclosing any state regulation of the railroads’ oil spill contingency plans.

1. The Subject Of Oil Spill Contingency Plans Has Been Covered

As state officials at our meeting acknowledged, the Secretary of Transportation has adopted regulations that cover the subject of oil spill prevention. We accordingly do not address that issue further here. But the Secretary of Transportation has also prescribed regulations covering the subject matter of oil spill contingency planning, including *emergency response* to oil spills, in 49 C.F.R. Part 130 (titled “Oil Spill Prevention and Response Plans”). The purpose of these regulations is to adopt requirements for “spill *response* planning and response plan implementation intended to prevent *and contain* spills of oil during transportation.” 61 Fed. Reg. 30533 (June 17, 1996) (emphasis added). Much like the contemplated California regulations, the federal regulations require covered parties (including railroads) to “[s]et[] forth the manner of response to discharges that may occur during transportation,” identify “private personnel and equipment available to respond to a discharge,” and identify the “appropriate persons and agencies (including their telephone numbers) to be contacted in regard to such a discharge.” 49 C.F.R. § 130.31(a). Where a covered party transports oil in sufficiently high quantities, the regulations impose additional requirements, including the obligation to “ensure[] by contract or other means the availability of . . . private personnel . . . and the equipment necessary to remove, to the maximum extent practicable, a worst case discharge . . . and to mitigate or prevent a substantial threat of such a discharge.” *Id.* § 130.31(b)(4).

Unlike the California legislation, however, the Part 130 regulations intentionally omit any location-specific spill planning for environmentally sensitive areas. *Compare* 61 Fed. Reg. 30538 (June 17, 1996) (“Neither the basic nor the comprehensive plan is required to address response on a vehicle- or location-specific basis.”), *with* Cal. Gov. Code § 8670.29(d)(4) (requiring “[p]rovisions detailing site layout and locations of environmentally sensitive areas requiring special protection”). Instead, federal authorities determined that the railroads’ contingency plans did *not* need to include “location specific” plans as long as the plan “covers the range of spill scenarios that the [railroad] foreseeably could encounter.” 61 Fed. Reg. 30538. The agency reasoned that the required plans, including the “basic plans,” represent a “complete and practical document that serves” the purpose of “ensur[ing]” that “personnel are trained and available and equipment is in place to respond to an oil spill” and that “procedures are established before a spill occurs so that required notifications and appropriate response actions will follow expeditiously.” *Id.*

346 F.3d 851, 862 (9th Cir. 2003) (noting the “more than 10,000 miles of track . . . adjacent to waterways in North America”).

The Part 130 regulations supplement another set of federal regulations governing emergency response preparation for transportation of hazardous materials, including petroleum crude oil. In 49 C.F.R. Part 172 subpart G, the Secretary required “persons who . . . transfer or otherwise handle hazardous materials during transportation” to have “[e]mergency response information . . . immediately available for use at all times the hazardous material is present.” 49 C.F.R. § 172.600(b), (c)(1). The required emergency response information includes the “[i]mmediate precautions to be taken in the event of an accident or incident,” the “[i]mmediate methods for handling fires,” the “[i]nitial methods for handling spills or leaks in the absence of fire,” and “[p]reliminary first aid measures.” *Id.* § 172.602(a). Moreover, the regulations require an emergency response telephone number “[m]onitored at all times the hazardous material is in transportation” by a person with “comprehensive emergency response and incident mitigation information for that material.” *Id.* § 172.604(a). Given this “comprehensive regulatory framework,” the Secretary determined in 1996 that “no additional spill prevention or containment requirements are necessary” beyond those imposed by Parts 172 and 130. 61 Fed. Reg. 30536 (June 17, 1996).

These DOT emergency response regulations are more than sufficient to “cover” the subject of oil spill contingency planning and to trigger complete preemption of any state requirements on this subject under the express terms of the FRSA preemption provision. In addition, where federal officials have affirmatively determined that certain requirements are unnecessary—as they did with respect to site-specific response planning—the “authoritative federal determination that the area is best left *unregulated* [has] as much pre-emptive force as a decision *to regulate*.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Ser. Comm’n*, 461 U.S. 375, 384 (1983)).

Even if federal authorities subsequently determine that greater protections may be warranted, States are not permitted to step in and adopt additional requirements of their own. *See Norfolk Southern R.R. Co. v. Shanklin*, 529 U.S. 344, 355-56 (2000) (holding federal regulations covering a subject preempted state tort law notwithstanding federal agency’s view that additional safety regulation was appropriate). And in any event, here there is no need for State supplementation, because the federal government has demonstrated its commitment to updating its safety requirements as necessary. To that end, the Secretary recently issued orders that cover particular aspects of oil spill contingency planning in even greater depth than the earlier Part 130 and Part 172 regulations. Specifically, in his May 7, 2014 Emergency Order, the Secretary ordered railroads transporting large quantities of crude oil to notify state authorities of the estimated number of trains traveling through each county of the State, provide certain emergency response information required by 49 C.F.R. Part 172, subpart G, and identify the route over which the oil will be transported. And in his February 25, 2014 Emergency Order, the Secretary ordered certain changes in the way petroleum crude oil is classified and labeled during shipment, emphasizing that “with regard to emergency responders, sufficient knowledge about the hazards of the materials being transported [is needed] so that if an accident occurs, they can respond appropriately.” February 25, 2014 Emergency Order at 13.

Under 49 U.S.C. § 20106(a)(2), these DOT regulations and orders preempt California’s distinct (though in many respects overlapping) requirements covering the same issues. California may not, for example, require railroads to provide the detailed information about oil

shipments described in Cal. Gov. Code § 8670.29(e), because the Secretary’s May 7 Emergency Order has already covered the issue of what information a railroad must provide to state officials when transporting petroleum crude oil through the State. California may not require railroads to adopt “[p]rovisions for emergency medical treatment and first aid,” Cal. Gov. Code § 8670.29(d)(2), because the Part 172 regulations already cover the issue of emergency medical care after a spill. And more generally, California may not require railroads to prepare California-specific oil spill contingency plans, *see* Cal. Gov. Code § 8670.29(a), because the Secretary has already determined precisely what sorts of planning the railroads are required to undertake in 49 C.F.R. Part 130. The subject of oil spill contingency plans is covered.

2. The Terms Of § 20106 Govern The Preemptive Force Of All DOT Regulations And Orders Related To Rail Safety

The text of § 20106 is unambiguous. It plainly states that the terms of § 20106 govern the preemptive force of *all* DOT regulations and orders related to rail safety. At our meeting, State officials nevertheless expressed the view that the text of the FRSA preemption provision must be disregarded and that the preemption provision of the Clean Water Act, 33 U.S.C. § 1321(o)(2)—which would allegedly permit this legislation—should govern here. A State official reasoned that this was the correct outcome because the Part 130 regulations were adopted pursuant to authority granted under the Clean Water Act.²

Section 1321(o)(2) simply states that § 1321 does not *itself* preempt state law regarding removal activities. Thus, where no other preemption provision is applicable, the Part 130 regulations have no preemptive force. That is why, as DOT explained in response to a comment by the American Trucking Associations, the Part 130 regulations would not preempt state laws governing cleanup of oil spills from highway accidents. *See* 61 Fed. Reg. 30539 (June 17, 1996).

But railroads are different. Unlike § 1321(o)(2), § 20106 is not tied to a particular source of federal regulatory authority. Rather, it is directed to ensuring broad regulatory uniformity on the subject of railroad safety—whatever the source of federal authority may be.³ As the Solicitor General has explained, Congress “recognized that the Secretary had diverse sources of statutory authority . . . with which to address rail safety issues,” and therefore “preemption had to apply to regulations issued” under *any* of those sources, for “otherwise, the desired uniformity could not

² Even if the CWA preemption provision governed the effect of DOT regulations adopted pursuant to the CWA—and, as we explain, it does not—that would not save all of the state requirements at issue. The Part 172 emergency response requirements and the Secretary’s recent Emergency Orders, which by themselves cover much or all of the subject matter the State is now attempting to regulate under S.B. 861, were not promulgated pursuant to the CWA.

³ Because the Department addressed the preemptive effect of the Part 130 regulations only with respect to the trucking industry, it had no occasion to discuss their preemptive force as to state rail safety requirements under § 20106. However, as we explain above, the Department has subsequently taken the position that *all* of its regulations have preemptive force in connection with overlapping state rail safety requirements. *See* 74 Fed. Reg. 1790-91 (Jan. 13, 2009).

be attained.” Brief for United States as Amicus Curiae at 6, *Public Util. Comm’n of Ohio v. CSX Transp., Inc.*, 498 U.S. 1066 (1991) (No. 90-95), available at <http://www.justice.gov/osg/briefs/1990/sg900560.txt>; see also H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970) (“[S]uch a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government.”).

In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), for example, DOT had adopted the relevant grade crossing provisions under the Highway Safety Act. As the Eleventh Circuit there noted, the Highway Safety Act—unlike FRSA—contains no preemption provision and reflects no Congressional intent to preempt a field. See *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1555 (11th Cir. 1991). Nevertheless, the Supreme Court held that regulations adopted solely pursuant to the Highway Safety Act would have preemptive effect under FRSA if they covered a subject matter related to railroad safety, because “the plain terms of [§ 20106] do not limit the application of its express pre-emption clause to regulations adopted by the Secretary pursuant to FRSA. Instead, they state that any regulation ‘adopted’ by the Secretary may have pre-emptive effect, regardless of the enabling legislation.” 507 U.S. at 663 n.4; see also Brief for United States as Amicus Curiae Supporting Affirmance at 19 n.17, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (No. 91-790), 1992 WL 12012044 (“[R]egulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA’s express preemption if a State regulation ‘relate[s] to railroad safety’ and the Secretary’s regulations ‘cover[] the subject matter’ of the state law requirement at issue.”).

Similarly, in *CSX Transp., Inc. v. Public Util. Comm’n of Ohio*, 901 F.2d 497 (6th Cir. 1990), the Sixth Circuit addressed regulations promulgated by the Secretary solely under authority conferred by the Hazardous Materials Transportation Act (“HMTA”). There, too, the preemption provision of the authorizing statute was more solicitous of state regulation than was § 20106. “[U]nlike the preemption provision of FRSA, . . . the HMTA allows state regulations which are consistent with federal regulation.” *Id.* at 501. Nevertheless, the court concluded that “the language of the FRSA . . . applies to the HMTA as it relates to the transportation of hazardous material by rail,” preempting state requirements that were otherwise permissible under the HMTA. *Id.* That approach, it said, “retains the essential character and purpose of both statutes,” showing respect for “[t]he national character of railroad regulation” while also preserving “regulation of hazardous material transportation” in its different forms. *Id.* at 503.

Building on these decisions, DOT has recognized that “[t]hrough [the Federal Railroad Administration] and [the Pipeline and Hazardous Materials Safety Administration], DOT comprehensively and intentionally regulates the subject matter of the transportation of hazardous materials by rail These regulations leave no room for State . . . standards established by any means . . . dealing with the subject matter covered by the DOT regulations.” 74 Fed. Reg. 1790 (Jan. 13, 2009). Thus, “with the exception of a provision directed at an essentially local safety or security hazard, § 20106 preempts any State statutory, regulatory, or common law standard covering the same subject matter as a DOT regulation or order.” *Id.* at 1791. The Department has taken this position not only in its regulatory actions, but also in amicus briefs filed in response to state regulatory efforts that seek to supplement the uniform federal scheme. See, e.g., Brief for Amicus Curiae United States of America at 6, *Union Pacific R.R. Co. v. Cal. Pub.*

Util. Comm'n, No. C-97-3660 (Sept. 14, 1998). California's apparent view to the contrary—that FRSA's preemption provision does not apply to regulations related to railroad safety adopted by the Secretary pursuant to some other authorization other than § 20106—is thus inconsistent with both binding legal precedent and the repeatedly expressed views of the Department itself.

State officials in attendance at our meeting also suggested that California's new contingency planning requirements would escape preemption under § 20106 because they are targeted toward protecting the environment rather than toward "rail safety." Again, this argument is contrary to controlling law. Section 20106(a)(2) covers any state law "related to railroad safety." The Supreme Court has recognized that phrases like "related to," "relating to," and "relate to" are intended to "express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387 (1992); see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (phrase is "deliberately expansive"); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (phrase is "conspicuous for its breadth"). As the Solicitor General has observed, FRSA's "preemption provision covering all laws relating to railroad safety" should be "construed broadly." Brief for United States as Amicus Curiae at 8, *Pub. Util. Comm'n of Ohio v. CSX Transp., Inc.*, 498 U.S. 1066 (1991) (No. 90-95).

One need venture nowhere near the limits of the phrase's logical meaning to conclude that "related to railroad safety" encompasses the statutory requirements at issue here. S.B. 861 embodies the State's conclusion that "the emphasis must be put on *prevention*, if the risk and consequences of oil spills are to be minimized." Cal. Gov. Code § 8670.2(f) (emphasis added). Preventing railroad accidents is, of course, the very heartland of "railroad safety." But even setting aside the core focus on prevention and looking to just those aspects of the statute targeted at post-accident response, the relation to railroad safety remains obvious. Just as an airbag is obviously "related to" automobile safety because it minimizes the injuries that result once a crash has already occurred, so too a response plan is "related to" railroad safety because it minimizes the harmful impact of a railroad accident.

That a response plan is *also* "related to" protection of the environment does not exempt it from the scope of § 20106. In *Union Pacific R.R. Co. v. California Public Utilities Comm'n*, for example, the challenged state regulations were directed toward reducing the "risk of severe environmental damage." 346 F.3d 851, 861 (9th Cir. 2003). It made no difference. Because federal regulations covered the same subject matter, the state regulations were preempted. *Id.* Indeed, Congress has directed that railroad safety regulations are appropriate for the express purpose of protecting the environment. See 49 U.S.C. § 20104(a) (authorizing Secretary to issue emergency orders to prevent "significant harm to the environment"). The Secretary's Emergency Orders reflect this concern, directing the railroads to take "steps to increase the safety of petroleum crude oil shipments by rail," and thereby "assist emergency responders in mitigating the effects of accidents," including "environmental damage." May 7, 2014 Emergency Order at 4, 7. The state requirements for oil spill contingency plans are "related to railroad safety" and the DOT regulations and orders covering that subject must be given full preemptive effect under the Supreme Court's decision in *Easterwood*.

B. Preemption under the Interstate Commerce Commission Termination Act

Along with being preempted under FRSA, the new state requirements also run afoul of a second federal railroad law. The Interstate Commerce Commission Termination Act (“ICCTA”) confers exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the Surface Transportation Board (“STB”). Under 49 U.S.C. § 10901, the “Board has exclusive licensing authority for . . . operation of new railroad lines” and may certify rail line operation unless the STB finds the project to be “inconsistent with the public convenience and necessity.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1073 (9th Cir. 2011). To determine public convenience and necessity, the STB looks at a variety of circumstances surrounding the proposed action, “which can include consideration of the applicant’s *financial fitness*, the public demand or need for the service, and the potential harm to competitors.” *Alaska Survival v. STB*, 705 F.3d 1073, 1078 (9th Cir. 2013) (emphasis added).

The express preemption clause in ICCTA declares that the STB’s jurisdiction over transportation by rail carriers “is exclusive.” Specifically, Section 10501(b), 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), . . . and facilities of such carriers; and

(2) the . . . operation . . . of spur, industrial, team, switching, or side tracks, or facilities . . .

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.

The purpose of this preemption provision is to protect the railroad industry from a patchwork of state regulations that would balkanize the network. The STB has explained that § 10501(b) “is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *9 (STB served Mar. 14, 2005).

The federal courts have repeatedly recognized that these provisions broadly preempt state laws regulating transportation operations. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (describing language of § 10521(b)(2) as “broad” and giving Board “exclusive jurisdiction over . . . operation . . . of rail lines”); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) (“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority.”). The STB observed that “[e]very court that has examined the statutory language has concluded that the preemptive effect of Section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that

would impinge on . . . a railroad’s ability to conduct its rail operations.” *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *6 (STB served Mar. 14, 2005).

Over the years, federal courts and the STB have found two types of state regulations of railroads to be so pernicious as to be “categorically” preempted, without any inquiry into the State’s reason for the regulation or burden on the railroad industry. *First*, States are categorically prevented from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, and licensing). *See 14500 Limited LLC—Pet. For Declaratory Order*, FD 35788, slip op. at 4 (served June 5, 2014) (citing *City of Auburn*, 154 F.3d at 1029-31). Thus, ICCTA categorically precludes any form of state regulation in traditional areas of economic regulation, such as the parameters of the common carrier obligation or licensing of carriers (which may include a financial fitness inquiry).

Second, States cannot impose permitting or preclearance requirements. The STB has reasoned that these kinds of regulation, by their nature, can be used to deny a railroad’s ability to conduct rail operations that the STB has authorized. *Id.* Thus, state permitting or preclearance requirements—including environmental and land use permitting requirements—are categorically preempted. *City of Auburn*, 154 F.3d at 1029-31. Otherwise, state authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the STB’s authorization of those facilities and operations. *14500 Limited* at 4 n.5 (citing *City of Auburn*, 154 F.3d at 1031; *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005)).

The California legislation implicates *both* of these categorical bans on state regulation. The legislation mandates that a railroad have an approved oil spill plan from California if it intends to transport crude oil in the state. Failure to do so exposes the railroad to criminal sanctions and massive fines. And the legislation permits the administrator to order the railroads to “cease and desist” any activity that “requires a permit, certificate, approval, or authorization under this chapter” if the railroad has not obtained such approval. Cal. Gov. Code § 8670.69.4.

ICCTA flatly prohibits this kind of state preapproval requirement. It is now beyond dispute that any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct its licensed common carrier operations is preempted by ICCTA. *City of Auburn*, 154 F.3d at 1030-31 (environmental and land use permitting categorically preempted); *Green Mountain Ry. v. Vermont*, 404 F.3d 638, 642-43 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by § 10501(b)). For example, the District of Columbia sought to require railroads to obtain a permit before shipping certain hazardous material through the District. The STB invalidated that provision under ICCTA. It reasoned that, “[t]o the extent that the D.C. Act would require a permit to move certain rail traffic through protected parts of the City, it is directly covered by the categorical preemption against state and local permitting processes.” *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005)).

Federal preemption of state permitting or preclearance regulations is not a new phenomenon. Since the turn of the last century, the Supreme Court of the United States has frequently invalidated attempts by states to impose obligations on common carriers that are

plainly inconsistent with the plenary authority of the STB. For example, in *Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77 (1958), the Court held that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers—an activity also subject to regulation under the Interstate Commerce Act—was facially invalid as applied to an interstate carrier. “[I]t would be inconsistent with [federal] policy,” the Court observed, “if local authorities retained the power to decide” whether the carriers could do what the Act authorized them to do. *Id.* at 87.

Here, federal law *requires* rail carriers to transport crude oil upon reasonable request. The railroads cannot simply stop transporting crude oil through California. They have a federal common carrier obligation under 49 U.S.C. § 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. § 10502. Crude oil has not been exempted from this obligation. “The common carrier obligation,” the Board thus explained, “requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations.” *See Union Pacific R.R. Co.—Pet. for Decl. Order*, FD 35219 (STB served June 11, 2009). A system under which California (and other states) could preclude carriers from operating because the carriers do not have a state-approved oil spill response plan in place could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act. As the Ninth Circuit explained, “if local authorities have 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 . . . operating . . . a line.” *City of Auburn*, 154 F.3d at 1031.

In sum, the STB and federal courts have repeatedly rejected state and local regulations of rail transportation that “giv[e] the local body the ability to deny the carrier the right to . . . conduct operations.” *Green Mountain*, 404 F.3d at 643 (quoting *Joint Pet. For Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (STB Apr. 30, 2001)). The same result can be expected with respect to the contingency planning requirements imposed here.

II. FINANCIAL RESPONSIBILITY CERTIFICATIONS

Along with the state-specific oil spill contingency planning requirements, S.B. 861 added a second new state requirement: the need to secure a certificate of financial responsibility to operate within the State. *See* Cal. Gov. Code § 8670.37.51(d). The legislation purports to give the Administrator authority to halt all transportation of oil by rail in the State until a railroad has complied with the still-to-be-developed state regulations. *See* Cal. Gov. Code §§ 8670.37.53(c)(1) (requiring railroads to “demonstrate to the satisfaction of the administrator the financial ability to pay for any damages that might arise during a reasonable worst case oil spill”).

Here, too, the State has made its way into an area in which federal control is exclusive. Regulating financial fitness of rail carriers is quintessential economic regulation that is categorically preempted by ICCTA. The STB is the only regulator (at a state or federal level) with the authority to review the financial fitness of a railroad or otherwise license a railroad to provide common carrier service. *N. Plains Res. Council*, 668 F.3d at 1073; *Alaska Survival v.*

STB, 705 F.3d at 1078; *Tongue River R.R.—Rail Construction & Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB service date Nov. 8, 1996) (explaining the purpose of the STB’s financial fitness test). Once the STB has granted a federal license to carriers to operate in interstate commerce, California cannot superimpose another layer of economic regulation by forcing carriers to obtain yet another certificate of financial responsibility before they can operate within California. *See R.R. Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351, 358-59 (1967) (city could not regulate the “financial ability” of a party to render safe service where the regulated service was an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act). As the Senate noted when it enacted ICCTA in 1995:

The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. 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 weaken the industry’s efficiency and competitive viability.

See S. Rep. No. 104–176, at 6 (1995), U.S. Code Cong. & Admin. News 1995, p. 793.

III. CONCLUSION

The railroads have been highly successful in challenging California regulations that seek to supplement the uniform federal safety program. *See, e.g., Union Pacific R.R. Co.*, 346 F.3d at 858-62 (holding that the FRSA preempted the CPUC’s attempt to regulate mountain grade rail operations as essentially local safety hazards pursuant to a California statutory mandate); *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (holding that ICCTA preempted the South Coast Air Quality Management District’s rules imposing limits on the permissible amount of emissions from idling trains); *City of Auburn*, 154 F.3d at 1029-31 (BNSF Railway Co. intervening party; court rejecting the City of Auburn’s arguments that ICCTA only preempted economic regulations, and holding that the scope of ICCTA’s preemption was broad and encompassed environmental regulations as well); *Union Pacific R.R. Co. v. Cal. Pub. Util. Comm’n*, No. 1:07-CV-00001-OWW-TAG, ECF No. 37 at 13–14 (E.D. Cal. June 1, 2007) (consent judgment stipulating that Union Pacific’s and BNSF’s Federal Security Programs satisfy the mandates of a California statute requiring local security plans). We hope, however, that resort to litigation will not be necessary this time.

Union Pacific and BNSF are not opposed to working with the State to improve railroad safety near state waters—or elsewhere. No one likes railroad accidents less than railroads. But we *are* opposed to a state-by-state approach in which different rules apply to the beginning, middle, and end of a single rail journey. Congress is too. *See* 49 U.S.C. § 20106(a)(1) (“Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.”); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (Congress’ assertion of federal authority over the railroad industry is “among the most pervasive and comprehensive of federal regulatory schemes”).

LATHAM & WATKINS^{LLP}

We therefore hope that, through negotiation and voluntary agreements, we can arrive at a mutually agreeable solution that addresses our shared safety concerns without need for resort to litigation.

Sincerely,

/s/

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cc: Martha Guzman-Aceves, Deputy Legislative Affairs
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