

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CHELAN COUNTY,)	
)	DOCKET NO. TR-061442
Petitioner,)	
)	PETITIONER CHELAN
v.)	COUNTY'S BRIEF ON
)	JURISDICTIONAL ISSUES
BNSF RAILWAY COMPANY)	
)	
Respondent.)	
_____)	

I. Introduction and Relief Requested.

 Comes now Chelan County, by and through its deputy prosecuting attorney, and submits the following brief in response to Respondent BNSF's Brief on Jurisdictional Issues. The county respectfully requests that the commission find that the WUTC has jurisdiction over the subject matter of the county's petition and deny BNSF's motion for dismissal of the county's petition.

II. Statement of Facts.

 In the interests of public safety, Chelan County petitioned the WUTC on September 11, 2006 for an order authorizing alteration and relocation of the under-crossing¹ at the location where the county's Chumstick Highway passes

¹ RCW 81.53.010 provides that "The term 'under-crossing,' when used in this chapter, means any point or place where a highway crosses a railroad by passing under the same.

under the BNSF Railway Company's ("BNSF") railroad trestle in Chelan County, Washington.

The county's petition can be distilled into the following points: (1) that the under-crossing in question is an unsafe, obsolete design at a location presenting engineering challenges, (2) that the BNSF railroad bridge must be altered and relocated to create a safe highway at the under-crossing, and (3) that the county agrees to contribute its WUTC-determined share of the cost of altering and relocating the bridge.

By its Amended Answer and Affirmative Defenses and its Brief on Jurisdictional Issues, BNSF opposes the county's petition and alleges that the WUTC is not authorized to grant the relief requested in the county's petition because the Surface Transportation Board ("STB") has exclusive jurisdiction over "railroad facilities." Chelan County asserts that this argument is not well-taken.

III. Statement of Issues.

Whether jurisdiction over the subject matter of Chelan County's Petition rests exclusively with the Surface Transportation Board?

IV. Evidence Relied Upon.

Chelan County relies upon the pleadings and material filed with the WUTC in this matter and the attached exhibits.

V. Authorities, Analysis and Argument.

BNSF's premise is that "State regulatory authority over railroad operations is expressly preempted" by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") and that "The STB has exclusive jurisdiction over the

proposed construction project described in Chelan County's Petition." See Respondent BNSF's Brief on Jurisdictional Issues, §V, A –B at pp. 3-6.

Chelan County concedes that "railroad operations" are highly regulated under ICCTA and that the STB has broad jurisdiction over matters involving railroad operations

However, BNSF states its position in terms of absolutes and does not acknowledge that the STB's "exclusive jurisdiction" is not entirely "exclusive," nor are states "expressly preempted" from exercising authority over all matters railroad.

As discussed below, it is more accurate to say that the STB's jurisdiction is relatively "exclusive" and is sometimes a "preemption" under 49 USC §10501(b).²

One needs not inquire too deeply to see that Congress did not intend for the STB to preempt the field of regulating railroad operations in relation to rail safety³, rail labor⁴, or homeland security.⁵

For example, this point is clearly expressed in the Federal Rail Safety Act, which states in pertinent part that:

² 49 USC §1051(b) states in pertinent part that:

(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 . . .

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.

³ 49 USC §§ 20101, et seq.

⁴ 45 U.S.C. §151, et seq.

⁵ Homeland Security Act of 2002, §§401-402.

A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to rail safety or security when the law, regulation, or order—

- (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

49 U.S.C. §20106.

This view is reinforced by the STB acknowledging that 49 U.S.C. §10501(b) “does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C. 20101 et seq.” *Borough of Riverdale and The New York Susquehanna and Western Railway Corp.*, STB Finance Docket No. 33466 (February 27, 2001).

Of course, ICCTA does address many areas of economic regulation of railroads. ICCTA contains provisions for standards for establishing rates, classifications, routes, rule and practices (49 U.S.C. §§10701-10747), licensing (49 U.S.C. §§10901-10907); operations regarding transportation, service, and rates (49 U.S.C. §§11101-11164); finance (49 U.S.C. §§11301-11328); federal-state relations regarding taxes (49 U.S.C. §§11501-11502); enforcement in the form of investigations, rights, and remedies (49 U.S.C. §§11701-11707); and civil and criminal penalties (49 U.S.C. §§11901-11908).

Despite this level of specificity by Congress in crafting the statute, ICCTA is silent on the subjects of railroad and highway grade crossings, under-crossings, over-crossings, or safety issues.

This silence on safety issues is consistent with Congress's focused intent in enacting ICCTA to accomplish "the direct and complete preemption of State economic regulation of railroads." H.R. Rep. No. 104-311, 104 Cong., First Sess. at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08. The legislative history explicitly evidences a legislative policy of occupying the entire field of economic regulation of the interstate rail transportation system while recognizing that states retain police powers reserved by the constitution. *Id.* at 807-08.

It follows that ICCTA is silent on safety issues because ICCTA is not intended by Congress to regulate safety issues, and therefore, ICCTA does not explicitly grant the STB exclusive jurisdiction over under-crossings or safety. BNSF apparently concedes this point because BNSF does not cite any cases from any court, or from the STB, in which ICCTA has been held to preempt state law regarding alteration and relocation of under-crossings or railroad bridges.

There are apparently no published Washington state appellate cases addressing the particular public safety issues now before the WUTC in Chelan County's petition. The Ninth Circuit Court of Appeals has also not yet issued any decision involving the relationship of ICCTA and safety.

There is a 2001 Eighth Circuit Court of Appeals case similar to the matter now before the WUTC and which will be discussed below. BNSF did not disclose this Eighth Circuit case in its brief but instead relies on a series of cases

which are distinguishable because the cases cited by BNSF address economic regulation, not safety.

In one case cited by BNSF, *Seattle v. Burlington N.R.R.*, 105 Wn.App. 832, 836, 22 P.3d 260 (2001) *aff'd* 145 Wn.2d 661 (2002), a city ordinance prohibiting switching across arterials during peak traffic hours was held to be preempted by ICCTA. In the second case cited by BNSF, *City of Auburn v. United States Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998), the court determined that local environmental standards sought to be enforced for reopening a railroad line are preempted by ICCTA. Both of these cases addressed economic regulation, not safety.

Likewise, the STB cases cited by BNSF deal with economic regulation, not safety. In the *City of Creede*, STB Finance Docket No. 34376 (May 3, 2005) and *North San Diego County Transit Development Board*, STB Finance Docket No. 34111 (September 16, 2002), the STB found that state or local permitting or preclearance requirements affecting rail operations were categorically preempted by ICCTA.

In contrast to the cases cited by BNSF, the Eight Circuit Court of Appeals addressed a matter with factual and legal similarity to the Chumstick Highway under-pass case. The Eighth Circuit decision is found at *Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa*, 384 F.3d 557 (2004).

In that case, the Iowa, Chicago & Eastern Railroad Corporation (the "railroad") had four bridges over highways in Washington County, Iowa (the "county"). The county petitioned the Iowa Department of Transportation for an

order requiring replacement of the four bridges because of “substandard highway safety conditions” creating a risk to motorists. Id at 558. The railroad claimed that the bridges were serviceable for railroad purposes, and therefore, the railroad was unwilling to pay to replace the bridges. The railroad asserted that bridge replacement was preempted economic regulation that would benefit its trucking competitors. Id at 558.

The railroad sought a declaratory judgment to determine if the county’s action before the Iowa Department of Transportation was preempted by ICCTA. Id at 558-9.

The railroad argued that (1) an order requiring the railroad to pay for bridge replacement was economic regulation expressly preempted by ICCTA, (2) an order requiring replacement of railroad bridges over highways was an expressly preempted regulation of essential railroad facilities, and (3) Congress preempted the field for economic and facilities regulation. Id at 559.

The Eighth Circuit Court of Appeals determined that the railroad’s arguments were wrong and the court observed that:

The [railroad’s] argument is simple, but it is deceptively simple, for it ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than ICC or the STB, and that Congress left intact in enacting ICCTA.

Id at 559.

The court then reviewed and analyzed the purpose of federal statutes remaining intact after enactment of ICCTA, including the Federal Rail Safety Act (“FRSA”), federal regulation of highway bridges under the Federal Highway

Administration, and the Highway Bridge Replacement and Rehabilitation Program. Id at 559-562.

From this analysis, the court reasoned that in enacting ICCTA, Congress did not intend to “impliedly repeal” statutes and regulations in place at the time of enactment of ICCTA. Id at 561. The Eight Circuit court found the reasoning of the Sixth Circuit Court of Appeals to be persuasive on this point. Citing *Tyrell v. Norfolk S. Ry.*, 248 F.3d 517, 522 (6th Cir., 2002), the court adopted the Sixth Circuit court’s holding that ICCTA and the FRSA should be read *in peri materia* to avoid implied repeal of the FRSA, the statute which grants the Federal Railroad Administration primary authority over rail safety. The court found that the FRSA, and not ICCTA, determines whether or not a state rail safety law is preempted by federal law. Id at 560. ⁶

Comment [MSOffice1]:

What the court of appeals found particularly convincing was that ICCTA is silent on the problems “of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular.” Id at 560.

The court explained that

ICCTA did not address these problems. Its silence cannot reflect the requisite “clear and manifest purpose of Congress” to preempt traditional state regulation public roads and bridges that Congress has encouraged in numerous other statutes.

⁶ As Chelan County stated earlier, there is apparently no Ninth Circuit case with facts similar to the Chumstick Highway matter. However in recent case in California involving shipment of cargo damaged in a train crash, the federal district court followed the Sixth and Eighth Circuits’ view that ICCTA and the FRSA must be construed *in peri materia*. *Nippon Yusen Kaisha v. Burlington and Northern Santa Fe Railway Co.*, 367 F.Supp. 2d 1292, 1300-1302 (2005).

Id at 561, citing *CSX v. Easterwood*, 507 U.S. 658, 664, 123 L.Ed. 387, 113 S.Ct. 1732 (1993).

The court a concluded that the railroad failed to establish federal preemption. Id at 561.

As if to highlight its ruling, the court disclosed in its opinion that the STB and the United States Department of Transportation filed amicus briefs and agreed with the court's conclusion that the railroad's "broad ICCTA preemption argument is unsound. . . ." Id at 562.

Viewed in the light of the *Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa* case, RCW 81.53.100 is a legitimate exercise of state authority in regulating highway and railroad safety. Chelan County brought its petition before the WUTC in the interests of public safety and RCW 81.53.100 provides an administrative remedy for the county to improve its highway safety. As in *Iowa, Chicago & Railroad Corp. v. Washington County, Iowa* case, the railroad bridge across the Chumstick Highway in Chelan County is serviceable for railroad purposes but is an obsolete design and configuration presenting a danger to public safety. As the railroad did in the Eighth Circuit case, BNSF also characterizes the issue before the tribunal as one of economic regulation. The WUTC should determine the issue to instead be a safety issue.

The WUTC has jurisdiction to hear a petition for alteration of railroad crossing in the interest of public safety, RCW 81.53.060, and to make findings and enter an order. RCW 81.53.070. The Washington state legislature recognizes that the state has the power to regulate railroad facilities in the public

interest. RCW 80.01.040 (amended at Chapter 234, Laws of 2007, Sec. 1(2), effective 07/22/2007); RCW 81.44.020 (amended Chapter 234, Laws of 2007, Sec. 39), effective 07/22/2007); RCW 81.53.010 et seq.

In 2007, the Washington legislature also adopted a new section to Chapter 81.04 RCW clarifying the WUTC's authority in relation to safety issues as follows: "The commission shall administer the railroad safety provisions of this title to the fullest extent allowed under 49 U.S.C. Sec. 20106 and state law." Chapter 234, Laws of 2007, Sec. 3, effective 07/22/2007.

Chelan County relies on the continuing authority of the state of Washington to regulate railroad crossings to enhance public safety, whether a crossing in question is at-grade, under-crossing, or over-crossing, or if the crossing is to be established or altered. RCW 81.53.060.

Finally, BNSF maintains Chelan County has "only recently provided BNSF with initial design drawings, but has not attempted to determine the projects' undeniably expensive price tag. The county asserts that the county has engaged the railroad in discussion of this matter and has been proposing plans since at least 2002. See Exhibit 1.

The essence of BNSF's arguments is that the relief requested by Chelan County may cost money and that constitutes "economic regulation" of the railroad. From this it can be inferred that Chapter 81.04 RCW, Chapter 81.44 RCW, and Chapter 81.53 RCW are seen by BNSF as being preempted by ICCTA. But as discussed above, ICCTA does not preempt the authority of other federal agencies or of the states related to safety issues.

VI. Conclusion.

In the interests of public safety, Chelan County petitioned the WUTC for alteration and relocation of the BNSF trestle over the Chumstick Highway as a part of project to bring the Chumstick highway up to modern design and safety standards. Contrary to BNSF's arguments that granting the county's relief would be economic regulation of the railroad under ICCTA, Chelan County asserts that safety is not addressed in ICCTA and that ICCTA should be read *in pari materia* with other federal law. In doing so, the WUTC can and should conclude that the WUTC, not the STB, has jurisdiction to hear the county's petition and to grant the county's requested relief.

Chelan County respectfully requests that BNSF's motion to dismiss be denied and that this matter go forward on the county's petition.

Dated this 29th day of May 2007.

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