(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE COMMISSION’S INVESTIGATION, UPON ITS OWN INITIA­TIVE, INTO THE EFFECT OF THE INTER­STATE COMMERCE COMMISSION TER­MINATION ACT (49 U.S.C. §§ 10501, ET SEQ.)  ON THE COMMISSION’S JURISDICTION OVER AND REGULATION OF RAILROAD CORPORATIONS IN THE STATE OF IDAHO. | ))))))))) | CASE NO.  GNR-R-97-1ORDER NO.  26971 |

BACKGROUND

On March 21, 1997, this Commission was served with a summons and complaint filed in the District Court for the Fourth Judicial District of the State of Idaho by the Burlington Northern and Santa Fe Railway Company (BNSF).  The Complaint seeks a declaratory ruling and injunctive relief to the effect that the Interstate Commerce Commission Termination Act of 1995 (the ICCTA), found in 49 U.S.C. §§ 10501, et seq., preempts the Commission’s jurisdiction and/or regulatory authority over railroads operating in the state of Idaho.  Specifically, BNSF desires to close its Sandpoint agency and seeks a ruling from the Idaho District Court to the effect that the Commission cannot prohibit BNSF from closing that agency.  In 1991, BNSF filed an Application with this Commission in Case No. BN-RR-91-2 requesting the authority to close its Sandpoint agency.  BNSF voluntarily withdrew its Application in that case.  Consequently, the Commission never issued a ruling with respect to BNSF’s Sandpoint agency.  Since that time, BNSF has not formally requested the Commission’s approval of the closure of its Sandpoint agency.

On April 10, 1997, the Commission issued a Notice of Inquiry and Order No. 26882 soliciting writing briefing from all interested persons regarding the effect of the ICCTA on the Commission’s jurisdiction, regulation and oversight of the maintenance and operation of railroad agencies in the state of Idaho.  Comments and/or briefs were submitted by BNSF, the Commission Staff, the Port of Pend Oreille, Bonner County Emergency Management, Union Pacific, Idaho State Senator Shawn Keough and Tri-Pro Cedar Products.  Tri-Pro Cedar Products believes that the closure of the Sandpoint agency would have an adverse effect on local shippers.  Tri-Pro states that its needs for rail cars changes on a daily basis and that the Sandpoint and Spokane BNSF offices are necessary so that Tri-Pro can swap cars with other mills as needed.

Senator Keough expresses concern about the needs of his constituents, most of whom are opposed to the closure.  He states that having a local agent enables BNSF to be flexible and responsive to the customers’ needs, weather conditions and safety issues.

The Port of Pend Oreille opposes the closure stating that it relies on the Sandpoint agency to assist it each morning by providing information on what empty and loaded cars are going to be delivered and when.  The Port states that it often relies on BNSF’s Sandpoint agent to physically inspect a car or to contact the BNSF crew to warn it about potential problems or concerns.  Furthermore, the Port contends that communication with BNSF’s centralized offices will be ineffective.

The Bonner County Emergency Management Coordinator, Irma McNeff, is concerned about the effect that the closure of the Sandpoint agency will have on safety.  McNeff notes that the BNSF tracks going through Sandpoint traverse near four schools, two day care centers, two nursing homes and two retirement centers.  Given the amount of hazardous materials that these trains carry, McNeff contends, all of the foregoing facilities are at risk of possible evacuation if a spill or leak should occur.

Union Pacific supports and adopts the briefing submitted by BNSF in this case and further moves the Commission for an Order modifying its prior Order No. 26548 and allowing Union Pacific to immediately terminate its two remaining agencies at Montpelier and Sandpoint.  Union Pacific further contends that the ICCTA also preempts the Commission from regulating railroads with regard to safety matters.

Finally, the Commission Staff expresses concern over the effect of the closure of railroad agencies but, nonetheless, believes that the ICCTA has preempted the Commission’s jurisdiction over and regulation of railroad agencies.  Staff does not believe, however, that the Commission is preempted from imposing and enforcing safety regulations on railroads.  BNSF filed a copy of the brief submitted in district court in support of a Motion for Summary Judgment it filed.

LEGAL ANALYSIS

Through the passage of the ICCTA, Congress terminated what was formerly known as the Interstate Commerce Commission and created the Surface Transportation Board (STB).  Many provisions of the ICCTA mirror federal laws already in existence prior to implementation of the Act.  The Act does contain a new provision, however, around which this proceeding is centered.  Specifically, 49 U.S.C. § 10501(b) provides:

(b) The jurisdiction of the Board over—

(1)transportation by rail carriers, and 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, 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.

The genesis of the Commission’s authority to regulate railroads is found in Title 61 of the Idaho Code.  Idaho Code § 61-501 empowers the Commission to “supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of [the Idaho Public Utilities laws].”  Idaho Code § 302 requires every public utility to “furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.”

In Application of Burlington Northern Railroad Co., 112 Idaho 693, 735 P.2d 1004 (1987), the Idaho Supreme Court acknowledged the authority of this Commission to regulate the closure of a railroad agency.  Based on the Supreme Court’s ruling and the aforementioned statutory law, and in order to ensure the safe and adequate provision of railroad services, the Commission has historically required railroads operating in this state to seek Commission approval prior to the closure of a railroad agency.  The question now before us is whether the ICCTA preempts our regulation and oversight of railroad agencies.

It is a well-established principle of law that there are three situations in which federal law preempts state law:

(1)express preemption—this exists when Congress has explicitly identified the extent to which its enactment preempts state law;

(2)field preemption—this occurs where state law regulates conduct in a field that Congress intended the federal government to exclusively occupy, and;

(3)conflict preemption—this arises when it is impossible to comply with the federal and state requirements or where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

See, English v. General Electric Co., 496 U.S. 72 (1990).  The overriding determination in determining whether federal law has preempted state law, however, is whether Congress intended to preempt state law.  See, Medtronic v. Lohr, \_\_\_ U.S. \_\_\_, 116 S.Ct. 2240, 2255 (1996); English, 496 U.S. at 80.

The United States Constitution itself notes that “the laws of the United States . . . shall be the supreme of the land.”  U.S. Const. Art. VI, C.L.2.  The United States Supreme Court has recognized, however, that when determining whether federal law preempts state law, the adjudicating court must proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act unless preemption is found to be “the clear and manifest purpose of Congress.”  Cipollone v. Liggette Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 2617 (1992); See also, Dunbar v. United Steelworkers of America, 100 Idaho 523, 525, 602 P.2d 21, 23 (1979).  Moreover, the U.S. Supreme Court has held that preemption exists if the intent of Congress either is explicitly stated in the statute’s language or is implicitly contained in its structure and purpose.  Shaw v. Delta Airlines, Inc., 463 US 85, 95 (1983); see also State Ex Rel. Andrus v. Click, 97 Idaho 791, 534 P.2d 969 (1976).

The United States District Court for the District of Montana recently had occasion to resolve the same issue involved in this proceeding; that is, whether the ICCTA preempts state public utilities commissions from regulating railroad agencies.  The state of Montana had in place a statutory regime requiring railroad companies to seek and receive the Montana Public Service Commission’s approval prior to discontinuing station agents, abandoning stations on main or branch lines or abandoning or removing side tracks or spurs.  The BNSF filed a complaint against the Montana Commission seeking a declaratory judgment that the ICCTA preempts Montana law under which the Montana Commission exercised jurisdiction over the maintenance, closure, consolidation or centralization of railroad shipping facilities, stations and agencies.  On March 24, 1997, Judge Lovell issued the Court’s ruling that the Montana laws regarding the regulation of railroad agencies have been preempted by the ICCTA.  Burlington Northern Santa Fe Corp. v. Anderson, et al, C.A. No. CV 96-55-4-CCL, D. Mont. (decided March 24, 1997).

In addressing the issue, the Montana Court first analyzed whether the provisions of 49 U.S.C. § 10501(b) even apply to railroad agencies.  The Montana Commission argued that because Congress failed to specifically mention agencies in the foregoing statute, there was no preemption of the Commission’s jurisdiction over them.  Relying on a decision of the United States District Court for the Northern District of Georgia, however, the Montana Court rejected this argument and concluded that railroad agencies come with the ICCTA’s definition of “transportation by rail carriers” as referenced in 49 U.S.C. § 10501(b)(1).  See, CSX Transp., Inc. v. Georgia Pub. Srvc. Comm’n, 944 F.Supp.  1573, 1581 (GA. 1996).  The Montana Court further noted that the STB, in a public notice discontinuing state recertification proceedings instituted under the former ICCTA, provided the following interpretation of that Act:

The new law . . . differs in several important respects from the old law. . . . For present purposes, it suffices to note that the certification regime of old 49 U.S.C. § 11501(b)(2)-(5) no longer exists, because the underlying state regulatory law no longer exists. . . .It follows that the certifications . . . that were effective as of December 31, 1995, ceased to be effective as of January 1, 1996.  We are therefore discontinuing the [recertification] proceedings heretofore instituted . . . .

Opinion at p. 10 (Citing State Intrastate Rail Auth., Pub.  L.  No. 96-448, Ex Parte No. 388, Surface Transportation Board (April 3, 1996)).

The Montana Commission further argued that the term “facilities” used in 49 U.S.C. § 10501(b) does not include agencies.  The Montana Court rejected this argument as well, however, noting that the state statutes creating jurisdiction over agencies use the term “facility” themselves.  The Court concluded, therefore, that railroad agencies constitute “facilities” of rail carriers and, consequently, the Montana statutes were expressly preempted by the ICCTA.  In light of the language of the ICCTA itself, as well as the accompanying legislative history of the Act, the Montana Court also found that Congress, through passage of the Act, intended to preempt the entire field of the economic regulation of rail transportation.  Finally, the Court concluded that the Montana statutory regime at issue conflicted with federal law because it has a direct and substantial effect on the field of economic regulation of railroad transportation.  Consequently, the Court ruled, the state statutes were preempted under the doctrine of conflict preemption.

As noted earlier, the Montana Federal Court relied upon the Georgia Federal District Court’s ruling in CSX Transp.  In that case, currently under appeal to the Eleventh Circuit, the Court concluded that Georgia law requiring approval of the state’s public service commission of the modification of railroad agency services was preempted by the ICCTA.  The Georgia Court’s opinion mirrors that of the Montana Court.  The Georgia Court concluded that state jurisdiction over railroad agencies had been preempted based upon the language of the ICCTA and the legislative Act’s history.  944 F.Supp. at 1583.

The Nebraska Supreme Court has also had occasion to analyze the effect of the ICCTA on state regulation of railroad agencies.  In Burlington Northern Railroad Co. v. Page Grain Co., 249 NEB 821 (1996) the Court held:

State courts no longer have the jurisdiction to consider the practices, routes, services, and facilities of interstate rail carriers because § 10501(a) of the federal ICCTA Termination Act of 1995 grants the federal Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers as part of the interstate rail network. . . . The Supremacy Clause of the U.S. Constitution dictates that state law, including a state’s constitution, is superseded to the extent that it conflicts with federal law. . . . As a result of the ICCTA Termination Act of 1995, this Court has no authority to address the subject matter brought before it in this appeal.

Id. at 823.

FINDINGS

We note that no party or interested person who commented in response to the Commission’s Notice of Inquiry issued in this case has cited or identified any legal authority to support the notion that the ICCTA has not preempted this Commission’s legal authority to regulate the economic activities of railroad agencies.  To the contrary, the only authority brought to this Commission’s attention, as discussed earlier, reaches the opposite conclusion.  The issue extant in this proceeding as well as the District Court case filed by BNSF, is identical to that addressed by the Montana Federal District Court in the Burlington Northern case.  This Commission’s past policy of requiring railroads to obtain Commission approval prior to the closure of agencies appears to fall directly in conflict with an enactment of the United States Congress.  The facts presented to us allow for no other conclusion.  We find, therefore, that our authority to regulate the economic activities of railroad agencies has been preempted by the ICCTA.

As Staff notes in its brief submitted in this proceeding, the scope of this proceeding has been limited to the effect of the ICCTA on the Commission’s jurisdiction over the economic regulation of railroad agencies.  We find that there is nothing in the ICCTA, nor any of the authority cited by any participant in this proceeding, suggesting that the Commission’s authority to impose and enforce safety regulations on railroads has been preempted.

As a final matter, we find that, given the substance of today’s ruling, logic and fairness dictate that we apply this ruling equally to BNSF and the Union Pacific Railroad Company.  We note that no party opposed the Motion filed by Union Pacific for an Order allowing the immediate termination of its two remaining agencies at Montpelier and Sandpoint.  Union Pacific’s Motion is granted.

O R D E R

IT IS HEREBY ORDERED that this Commission declares that its authority to regulate the economic activities of railroad agencies has been preempted by the Interstate Commerce Commission Termination Act of 1995.  The Motion filed by Union Pacific for an Order allowing the closure of Union Pacific’s Montpelier and Sandpoint agencies is granted.

THIS IS A FINAL ORDER.  Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. GNR-R-97-1  may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. GNR-R-97-1 .  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration.  See Idaho Code § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of June 1997.

                                                                                                                                       DENNIS S. HANSEN, PRESIDENT

                                                                                            RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

vld/O:GNR-R-97-1.bp2

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

June 3, 1997