NO. 18-35704

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY, a federally recognized Indian Tribe,

Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Appellant.

ON INTERLOCUTORY APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:15-cv-00543-RSL
The Honorable Robert S. Lasnik
United States District Judge

AMICUS CURIAE BRIEF OF WASHINGTON STATE, NEW YORK, AND OREGON SUPPORTING PLAINTIFF-APPELLEE SWINOMISH INDIAN TRIBAL COMMUNITY AND URGING AFFIRMANCE

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The States of Washington, New York, and Oregon (Amici States) have an interest in appropriately delineating the preemptive reach of the Interstate Commerce Commission Termination Act (ICCTA). It is understood that Congress enacted ICCTA in part to preempt state and local regulations that interfere with interstate rail operations over which the federal government has asserted exclusive jurisdiction. But when a railroad voluntarily limits its operations via contract, the obligations it assumes are not "regulations" for purposes of ICCTA preemption. *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218–20 (4th Cir. 2009). Accordingly, absent extraordinary facts not present in this case, ICCTA does not shield railroads from contractual commitments.

Like the Swinomish Indian Tribal Community (Tribe), Amici States must be able to enforce voluntary agreements with railroads. If ICCTA provides railroads legal cover to renege on contractual promises with Tribes, then it also provides cover to break promises made to states and local governments. It is unimaginable that Congress intended this result.

II. BACKGROUND

Since September 2012, Burlington Northern Santa Fe Railway Company (BNSF) has been transporting crude oil in 100-car "unit trains" across the Tribe's land. Such transportation is inherently dangerous because petroleum crude oil is flammable. *See* Recommendations for Tank Cars Used for the Transportation of

Petroleum Crude Oil by Rail, 79 Fed. Reg. 27370 (May 13, 2014). The "risk of ignition is compounded in the context of rail transportation because petroleum crude oil is commonly shipped in unit trains that consist of over 100 loaded tank cars." *Id.*

This risk is not theoretical. In July 2013, a 72-car train carrying crude oil derailed in Lac-Mégantic, Quebec. Transportation Safety Board of Canada, Report R13D0054, Runaway and Main-Track Derailment (Aug. 19, 2014), www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054.pdf. The resulting fire and explosions were catastrophic, killing 47 people, destroying dozens of buildings, and polluting nearby waterbodies. *Id.* at 3.

Despite the serious risks of crude-by-rail transportation, the federal Department of Transportation recently repealed an important safety rule that required oil trains to use a more advanced electronic braking system. Hazardous Materials: Removal of Electronically Controlled Pneumatic Brake System Requirements for High Hazard Flammable Unit Trains, 83 Fed. Reg. 48393 (Sept. 25, 2018).

The current dispute arises against this backdrop. The Tribe is a sovereign nation that may exclude non-Indians from its land. *See* Treaty of Point Elliott, 12 Stat. 927 (art. II) (1855) (setting aside certain tracts of land for the "exclusive use" of signatory tribes). Regardless, BNSF and its predecessors have conducted unauthorized rail operations on the Tribe's land since 1889. *See* Appellee's

Answering Br. at 4–8, 20–25. In 1991, the Tribe settled a trespass lawsuit against BNSF in part by granting the railroad a right-of-way easement. ER 860. This settlement was highly valuable to BNSF. For the first time, BNSF had permission to cross the Tribe's land en route to oil refineries at nearby March Point. *See* BNSF's Opening Br. at 17.

In exchange for lawful access, BNSF agreed to pay annual rent and promised that "unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the [Tribe's] Reservation each day." ER 869. BNSF also promised to keep the Tribe apprised of the cargo being transported. *Id.*

Despite the easement agreement's clear terms, BNSF began shipping crude oil in 100-car trains across the Tribe's land in 2012. It provided no notice and failed to obtain the Tribe's written consent. After the Tribe unsuccessfully demanded compliance with the easement agreement, the Tribe sued BNSF in federal court. The Tribe requested damages and an injunction prohibiting BNSF "from running more than one train of twenty-five cars or less in each direction over the Right-of-Way per day." ER 1084.

The district court granted summary judgment to the Tribe on the issue of whether BNSF breached the easement agreement. ER 0028. It concluded that BNSF "failed to timely disclose its cargo," and that it "made no attempt to obtain

the Tribe's written agreement to an increase in traffic across the reservation until long after the unit train shipments had begun." ER 0017.

The district court then rejected BNSF's argument that ICCTA preempted enforcement of the agreement. ER 0007 (order on reconsideration). It ruled that "preemption is not a defense to any of the claims asserted in this litigation." ER 0011. This ruling is now before the Court on interlocutory appeal.

III. ARGUMENT

Although this case has a complicated history involving BNSF's longstanding disregard of the Tribe's treaty rights, the legal issue before this Court is fundamentally a matter of contract enforcement. Plainly, BNSF breached the easement agreement. The railroad now seeks to evade its promises using ICCTA as a shield. But ICCTA preempts only state and local laws that directly regulate or unreasonably interfere with interstate rail transportation. Contractual obligations are not "regulations" in this context. And, as voluntary commitments, such obligations generally cause no unreasonable interference with interstate rail operations. Accordingly, absent extraordinary facts, ICCTA does not provide cover to break contractual promises.

A. ICCTA Expressly Preempts Direct Regulation of Rail Operations by States or Local Governments

1. A Regulation Is a Law that has the Effect of Managing or Governing Rail Operations

By its terms, ICCTA preempts state and local laws that directly regulate interstate rail operations over which the federal government has asserted exclusive jurisdiction. ICCTA's preemption provision states, "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). Thus, the provision applies only if the challenged remedy is a "regulation of rail transportation." *Id.*; *see Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) ("Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation[.]'").

The Ninth Circuit has stated that, for purposes of ICCTA preemption, "regulation" means a law that "may reasonably be said to have the effect of managing or governing rail transportation." *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007)).

An example of a "regulation" in this context is a state law that requires a railroad to obtain a permit before removing material within designated fish habitat. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069,

1077 (9th Cir. 2016) (ICCTA preempted state's "removal-fill" law as applied to railroad's track repair work).

Another example is state law that targets the rail industry by requiring railroads to collect hazardous material fees from shippers and, in turn, to remit those fees to the state. *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 761 (9th Cir. 2018). Such a law cannot withstand ICCTA preemption because it directly manages or governs railroad rates. *Id.* Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rates. 49 U.S.C. § 10501(b).

ICCTA can also preempt a municipal regulation. In *City of Seattle v. Burlington Northern Railroad Company*, for instance, the Washington Supreme Court struck down an ordinance that attempted to "regulate railroad switching activities" on city streets. *City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169, 1172 (2002). The ordinance had the effect of managing or governing rail operations because it directly impacted the speed and scheduling of trains.

2. The Easement Agreement Is Not a Direct Regulation for Purposes of ICCTA Preemption

Here, ICCTA does not expressly preempt enforcement of the easement agreement because BNSF's voluntary commitments are not "regulation[s]" under 49 U.S.C. § 10501(b). Unlike a permitting requirement, a hazardous material fee, or a municipal assertion of authority over switching activities, BNSF's promise to limit traffic on the right-of-way and to keep the Tribe

apprised of the cargo being transported are not laws that have the effect of "managing or governing rail transportation." *Ass'n of Am. Railroads*, 622 F.3d at 1097.

The Ninth Circuit has not yet decided whether a railroad's contractual commitments presumptively lie beyond ICCTA's express preemptive reach. But at least two other federal courts of appeal have supported this conclusion.

In *PCS Phosphate Company v. Norfolk Southern Corporation*, 559 F.3d 212 (4th Cir. 2009), the Fourth Circuit held that ICCTA does not expressly preempt enforcement of a contract that impacts rail transportation. In reaching this conclusion, the court sought to avoid the absurd result that "every contract with 'rail transportation' as its subject would be preempted." *PCS Phosphate*, 559 F.3d at 218 (quoting 49 U.S.C. § 10501(b)). The court also noted that the STB has "emphasized that courts, not the STB, are the proper forum for contract disputes, even when those contracts cover subjects that seem to fit within the definition of 'rail transportation.'" *Id.* at 220. Finally, the court reviewed ICCTA's legislative history and found no evidence that Congress intended to preempt voluntary agreements concerning rail transportation. *Id.* at 219.

The Seventh Circuit has also recognized a distinction between "regulations" and "voluntary agreements." In *Union Pacific Railroad Company v. Chicago Transit Authority*, 647 F.3d 675, 682 (7th Cir. 2011), the court cautioned that "[f]ederal preemption does not apply to *all* situations where the

use of property prevents or unreasonably interferes with railroad transportation; it applies to those situations where a *regulation* prevents or unreasonably interferes with railroad transportation." *Union Pacific R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 682 (7th Cir. 2011) (emphasis in original). Thus, "[i]f a state or local government secures the use of property in a way that affects railroad transportation by contract or other agreement, there is no issue of federal preemption; but if it attempts to secure such use by regulation (in this case, by condemnation), then the possibility of federal preemption may arise." *Id.*

This Court should likewise hold that nothing in ICCTA expressly preempts enforcement of contractual obligations that impact rail operations. A voluntary commitment is "not the sort of rail 'regulation'" that triggers express preemption analysis under ICCTA. *PCS Phosphate*, 559 F.3d at 214.

B. Although ICCTA May Impliedly Preempt an Agreement that Unreasonably Burdens Rail Operations, the Easement Agreement Imposes No Such Burden

According to the Fourth Circuit, even though ICCTA does not expressly preempt voluntary commitments, the statute may impliedly preempt an agreement if enforcement would unreasonably interfere with rail operations.[1] *PCS Phosphate*, 559 F.3d at 220–21. The focal point is whether the agreement

[1] The Fourth Circuit made this suggestion because it was not prepared to hold that voluntary agreements are "categorical[ly]" beyond ICCTA's preemptive reach. *PCS Phosphate*, 559 F.3d at 221. The Ninth Circuit is not bound by this suggestion and may draw a categorical distinction between regulations and voluntary agreements.

unreasonably burdens rail operations. As discussed below, the agreement in this case does not unreasonably burden BNSF's operations.

1. Absent Extraordinary Facts, Voluntary Agreements Do Not Unreasonably Burden Interstate Rail Operations

When a railroad agrees to limit its operations via contract, it calculates that its obligations are worth whatever consideration it receives in return. Accordingly, as the STB has recognized, contractual limitations "must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." *Twp. of Woodbridge, N.J. v. Consol. Rail Corp.*, 5 S.T.B. 336, 2000 WL 1771044, at *3 (Nov. 28, 2000) (ICCTA did not preempt local government's attempt to enforce court-approved settlement of nuisance action against railroad).

As an example, the Fourth Circuit in *PCS Phosphate* found no unreasonable interference where a mine owner sought to enforce a railroad's promise to relocate certain tracks at the railroad's expense. The record showed that the railroad freely agreed to the relocation provision, believing that lawful access to the mine was "worth the cost" of the obligation it assumed. *PCS Phosphate*, 559 F.3d at 221. Importantly, the court declined to second-guess the railroad's determination that this bargain was reasonable. It explained, "In the context of voluntary agreements, we let the market do much of the work of the benefit-burden calculation." *Id.* The court then concluded that the railroad could

not use ICCTA to shield itself "from its own commitments." *Id*. at 222 (quoting *Twp. of Woodbridge, N.J.*, 2000 WL 1771044, at *3).

2. Enforcement of the Easement Agreement Will Not Unreasonably Interfere with BNSF's Rail Operations

Here, enforcement of the easement agreement will not unreasonably interfere with BNSF's rail operations. BNSF bargained for a right-of-way across the Tribe's land believing that lawful access to nearby oil refineries and settlement of the Tribe's trespass lawsuit were collectively worth the cost of limiting traffic on the right-of-way and keeping the Tribe apprised of its cargo. It agreed to these limitations freely and unambiguously. And it received the benefit of its bargain for many years before suddenly reneging. Under these circumstances, this Court should "let the market do much of the work of the benefit-burden calculation" and hold that BNSF's voluntary commitments do not trigger implied preemption under ICCTA. *PCS Phosphate*, 559 F.3d at 221.[2] In other words, this Court can rely on BNSF's implied "determination and

[2] BNSF makes no mention of *PCS Phosphate* in its opening brief. In its reply brief, it may attempt to distinguish the case on the basis that the agreement before the Fourth Circuit "explicitly stated that the relocation [of the railroad's track] will not affect the ability of [the railroad] to comply with its legal obligation to serve any existing customer then on its line." *PCS Phosphate*, 559 F.3d at 222. The absence of a similar provision here is a distinction without a difference. Even without the provision, the Tribe's requested remedy will not impair BNSF's ability to "serve any existing customer." *Id.* Read in the proper context, "existing customer" must mean a customer whose shipments are *authorized by the easement agreement*. In other words, any shipment that overburdens the easement cannot be considered service to an "existing customer."

admission" that the obligations it assumed do not "unreasonably interfere with interstate commerce." *Twp. of Woodbridge, N.J.*, 2000 WL 1771044, at *3.

C. Amici States Are Entitled to Rely on Voluntary Commitments

This case interests Amici States because if a railroad can unilaterally waive promises made to a Tribe, then it can do the same to a state or a local government. The harm in each scenario is the same: The railroad's promises are meaningless, and the non-railroad party shoulders all the risk of the agreement. That isn't fair, and it can't be what Congress intended.

Amici States have many interactions with railroads that might lead to a dispute like the present lawsuit. For instance, the states are landowners and—like the Tribe here—they might grant a right-of-way easement that limits a railroad's operations in some fashion. The states might also require a railroad to adhere to heightened safety standards as "voluntary mitigation" in exchange for expedited environmental review of a rail-related project. Or, the states might require a railroad to revise an internal policy or procedure to settle a hazardous material notification penalty. If the states bear the entire risk of these agreements, they may hesitate to entertain them. The result will likely be less collaboration and more litigation. The better outcome is to encourage parties to "fulfill their contractual commitments." *PCS Phosphate*, 559 F.3d at 225.

IV. CONCLUSION

When a railroad voluntarily limits its operations via contract, it implicitly admits that the obligations it undertook will not unreasonably interfere with interstate commerce. Thus, when a railroad attempts to renege on those obligations using ICCTA as a shield, this Court should defer to the parties' bargain and hold that, absent extraordinary facts, a railroad's voluntary commitments lie outside ICCTA's preemptive reach.

RESPECTFULLY SUBMITTED this 14th day of January 2019.

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STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), the State of Washington states that:

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