Prepared by the North Dakota Legislative Council staff for the Agriculture and Natural Resources Committee

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RAILROAD FUEL SURCHARGES STUDY - BACKGROUND MEMORANDUM

House Bill No. 1370 (attached as Appendix A) directs the Legislative Council to study railroad fuel surcharges. House Bill No. 1370, as introduced, would have provided that the Public Service Commission, to the extent not inconsistent with federal law, prohibit fuel surcharges in North Dakota by a railroad which are higher than the average of fuel surcharges imposed by that railroad in other states in which that railroad operates. House Bill No. 1370, as engrossed, would have provided that the Public Service Commission, to the extent not inconsistent with federal law, prohibit the assessment of a railroad fuel surcharge on a shipment of commodities in this state if the surcharge is not assessed in a region, zone, or area on a per car basis or if the surcharge exceeds on a per car basis the surcharge on a carload shipment of the commodities originating in the same or similar region, zone, or area.

STATE JURISDICTION OVER RAILROADS

Barring a constitutional limitation, states have the power to regulate railroads within the state. The major limitation on this power comes from the commerce clause of the Constitution of the United States. Under the commerce clause, a state may not discriminate against an out-of-state entity without an important noneconomic state interest and there can be no reasonable nondiscriminatory alternative. Even if a state does not discriminate, a state cannot burden interstate commerce if the burden outweighs the state's interest. Even if a state passes one of the preceding tests, under the supremacy clause, the "Constitution, and Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land" and Congress can supersede conflicting state laws or preempt all the state laws in the same field under a specifically listed power in the Constitution.

Under the commerce clause, Congress has the power to "regulate commerce with foreign nations, and among the several states, and with Indian tribes." Under the necessary and proper clause, Congress can "make all laws which shall be necessary and proper for carrying into execution" the commerce clause. The commerce clause is broad in scope and regulation under the clause may address any activity, even if entirely intrastate, that taken with other like acts affects commerce in other states. The necessary and proper clause is broad in scope and extends the commerce clause to anything appropriately related to railroads. In short, Congress has the power to regulate anything relating to railroads.

Generally, the intent of Congress is that railroads should be regulated primarily on the national level through an integrated network of federal law. In particular, Congress has passed laws relating to railroad employees, economic regulation, safety regulation, and taxation.

Economic Regulation

Under the Interstate Commerce Act of 1887, freight railroads became the first industry in the United States to become subject to comprehensive federal economic regulation. Railroads were regulated by the federal government through the Interstate Commerce Commission for the next 93 years. In 1980 Congress passed the Staggers Rail Act. The Staggers Rail Act deregulated the railroad industry, but not completely. The Interstate Commerce Commission retained authority to set maximum rates or take certain other actions if railroads were found to have abused market power or engaged in anticompetitive behavior. In addition, the Interstate Commerce Commission had jurisdiction over railroad line abandonments. With the passage of the Interstate Commerce Commission Termination Act of 1995, the Surface Transportation Board succeeded the Interstate Commerce Commission as the federal agency with jurisdiction over railroads. Under 49 U.S.C. § 10501(b), the Surface Transportation Board has **exclusive jurisdiction** over:

> **(1) transportation by rail carriers**, and remedies . . . with respect to rates, classifications, rules . . ., practices, routes, services, and facilities of such carriers; and
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> (2) the construction, acquisition, operation, abandonment, discontinuance of a spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, . . .
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> [T]he remedies . . . with respect to regulation of rail transportation are **exclusive and preempt** the remedies as provided under Federal or State law. (emphasis supplied)

Transportation is defined as including property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail and services related to that movement, including receipt, delivery, storage, handling, and

interchange of passengers and property. Rail carriers is defined as a person providing common carrier railroad transportation for compensation. Railroad is defined to include a switch, spur, track, terminal, terminal facility and freight depot, yard, and ground, used or necessary for transportation.

In exercise of commerce power, Congress has preempted most economic regulation by states of railroads. There are three forms of preemption--express, field, and conflict. Express preemption is when Congress explicitly preempts state law. Field preemption is when congressional regulation of a field is so pervasive or the federal interest so dominant that the intent to preempt can be inferred. Conflict preemption is when a state law stands as an obstacle to the purpose of a federal statute. When the preemption is explicit, as in the previous statute, the first step is to look at the plain meaning of the statute. However, there is a presumption against the federal government supplanting the historic state police powers unless preemption is the clear and manifest purpose of Congress.

In a 2002 article in *Widener Journal of Public Law*, "Wheeling and Lake Erie Railway Co. v. Pennsylvania Public Utility Commission: Pennsylvania Maintains Police Powers Over Railroad Bridge Construction Despite the Interstate Commerce Commission Termination Act of 1995," the author states:

> Few courts in the country have addressed whether the ICC Termination Act preempts the states' police powers, and the courts that have addressed this issue have held that Congress intended to preclude the states from regulating any aspect of the railway industry based on the broad jurisdiction clause of the statute.

In addition to having exclusive jurisdiction over "transportation by rail carriers," the broadly inclusive phrase "regulation of rail transportation" evidences congressional intent to preclude state remedies for violation of any state laws or rules regulating rail transportation. As stated in *CSX Transportation, Inc. v. Georgia Public Service Commission,* 944 F. Supp. 1573 (N.D.Ga. 1996), "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." In *Burlington Northern Santa Fe Corporation v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997), the court stated the "federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive."

In *City of Auburn v. U.S. Government*, 154 F.3d 1025 (1998), cert. denied, 119 S. Ct. 2367 (1999), the Ninth Circuit Court of Appeals addressed federal preemption of local environmental regulation. In that case, the city of Auburn asserted that congressional preemption over railroads only related to economic regulation of rail transportation, not the traditional state police power of environmental review. The court found that the plain language of the Interstate Commerce Commission Termination Act explicitly granted the Surface Transportation Board exclusive authority over railway projects. The court found that any distinction between economic and noneconomic regulation begins to blur. Noneconomic regulation can turn into economic regulation if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

Safety Regulation

The federal regulation of railway safety is accomplished through the Federal Railway Safety Act. In the Act, Congress has expressly provided for state regulation of railroad safety. Under 49 U.S.C. § 20106, national uniformity is provided as follows:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. 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 railroad safety or security when the law, regulation, or order--
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> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
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> (2) is not incompatible with a law, regulation, or order of the United States Government; and
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> (3) does not unreasonably burden interstate commerce.

Under this scheme, state regulations can fill gaps where the Secretary has not regulated and a state can respond to safety concerns of a local, rather than national, character. In addition, under 49 U.S.C. § 20113, the states may enforce federal safety regulations in certain circumstances if the state is certified to investigate railroads for violations under 49 U.S.C. § 20105.

In *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993), the United States Supreme Court found that language under the Federal Railroad Safety Act preempted the state common-law duty to operate a train at a safe speed. The Court said that federal regulation of speed limits should be understood as "covering the subject matter" of the state law. Federal railroad safety regulations cover the same subject matter if the regulation substantially subsumes the same subject matter as a federal

regulation and does more than merely touch upon or relate to a federal regulation. Under *Burlington Northern and Santa Fe Railway Company v. Doyle*, 186 F.3d 790 (1999), the Seventh Circuit Court of Appeals opined that even nonregulation can be regulation preempting state regulation. This happens when the Federal Railroad Administration has examined and determined that there is no need for regulation.

Congress has provided for specific regulation applicable to different aspects of railway safety under 49 U.S.C. §§ 20131 through 20153 and the Federal Railroad Administration has made many rules relating to these areas of railroad safety. There are statutes or rules relating to noise omissions, whistles, locomotive boiler inspections, and safety as to cars and the coupling of cars, among other things. Whether a certain state action is preempted depends upon the type of regulation. For example, locomotive boiler inspection and car safety are preempted through field preemption. In other areas, there may be no rule or rules that allow cooperation between state and federal authorities. Any state regulation of safety requires a review of federal law and Federal Railroad Administration rules to determine if the regulation is preempted or allowed and, if allowed, in what measure. The courts give great weight to an agency delegated with authority over an area to determine whether a state law should be preempted.

Under North Dakota Century Code Section 49-11-19:

1. A person may not operate any train in a manner as to prevent vehicular use of any roadway for a period of time in excess of ten consecutive minutes except:
   a. When necessary to comply with safety signals affecting the safety of the movement of trains;
   b. When necessary to avoid striking any object or person on the track;
   c. When the train is disabled, by accident or otherwise;
   d. When the train is in motion except when engaged in switching operations or loading or unloading operations;
   e. When vehicular traffic is not waiting to use the crossing;
   f. When necessary to comply with a government statute or regulation; or
   g. When allowed by written agreement between the governmental entity that controls the roadway and the interested commercial entities. The agreement must indicate which party is responsible for the timely notification of local emergency service providers regarding the crossing that will be blocked and the period of time the crossing will be blocked.
2. A person that violates this section is guilty of a class B misdemeanor. This section does not apply to a city that has an ordinance covering the same subject matter.

In *CSX Transportation, Inc. v. City of Plymouth,* 283 F.3d 812 (2002), a similar statute was reviewed to determine if the state regulation was preempted by federal regulation. A Michigan statute prohibited trains from continuously blocking grade crossings for more than five minutes. There were two exceptions to the prohibition--if the train is continuously moving in one direction, then the train can block a grade crossing for up to seven minutes, and if the train stopped because of an accident, mechanical failure, or unsafe condition. CSX has been repeatedly fined for violating the statute.

Federal regulation provides for the regulation of speed, length, and brake testing. The Sixth Circuit Court of Appeals found that these regulations preempted Michigan's law because the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed the train is traveling. As such, the federal regulations substantially subsume the subject matter of the state statute.

State Taxation

The Railroad Revitalization and Regulatory Reform Act of 1976, often referred to as the 4-R Act, prohibits states from discriminatorily taxing railroads. Under 49 U.S.C. § 11501, a state is prohibited from unreasonably burdening or discriminating against interstate commerce. In particular, a state may not:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

In *Ogilvie v. State Board of Equalization of the State of North Dakota*, 893 F. Supp. 882 (D.N.D. 1995), the United States District Court found that the North Dakota tax system continued to violate the 4-R Act and previous court orders by exempting all personal property from taxation, except that of railroad companies, airlines, and public utilities and by granting a 5 percent discount for early payment of real property taxes while classifying a property used for railroad purposes as personal property.

In addition, under *Trailer Train Company v. State Board of Equalization of the State of North Dakota*, 710 F.2d 468 (1983), the Eighth Circuit Court of Appeals extended the rationale for the violation of the 4-R Act to a train car corporation. The train car corporation engaged in the business of providing standardized railroad flat cars to railroad companies. The court found that since tax discrimination against the train car corporation adversely affected railroad companies as directly and immediately as tax discrimination against the railroad cars of the railroad companies, North Dakota's practice of taxing personal property of the railcar corporation while exempting personal property of other commercial and industrial taxpayers was a violation of the Act.

Summary

Based on the foregoing discussion, it appears that states do not have much jurisdiction over railroads, especially if the regulation is directed at railroads. One explicit exception allowed by federal law is in the area of safety. The law on safety is not all-encompassing and there are opportunities for state regulation. Although case law shows a trend toward an expansive reading of the Interstate Commerce Commission Termination Act, there logically has to be a line where the reach of the Act ends or the states could not have any laws because all laws, even if remotely, tangently related to railroads, have an economic effect on railroads. That line has not been clearly defined in case law. One reason is the cases in which railroads have challenged state economic regulation appear to be over direct state regulation of the operation of a railroad line.

A trickle of recent cases have found no preemption in areas that are too tangental or remote. In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (2001), the Eleventh Circuit Court of Appeals found that city regulation by zoning and occupational licensing of a lessee of railway property that was engaged in the business of a distribution center involving unloading railcars was allowed. The court found a presumption against preemption that dictates if 49 U.S.C. § 10501(b) "can be read sensibly not to have a pre-emptive effect, the presumption controls." In addition, state tort and property law claims relating to negligence and nuisance for the railroad's construction of an earthen berm that caused damage though water damage was not preempted. The United States District Court in *Rushing v. Kansas City Southern Railway Company,* 194 F. Supp. 2d 493 (2001), held the economic effect of the railroad paying damages and removing the berm was not the type of economic regulation addressed by the Interstate Commerce Commission Termination Act. Because of the lack of resolution offered by case law, the most effective way of addressing areas of railroad economic regulation is through congressional action. A federal law delineating the reach of the present law would provide more timely clarity than railroad-driven case law.

RAILROAD FUEL SURCHARGES

Research has not found any state that has successfully enacted legislation prohibiting or limiting railroad fuel surcharges. Staff of the National Conference of State Legislatures and the Council of State Governments were also contacted and they were not aware of any state that has successfully enacted such legislation. Based upon the foregoing discussion, it appears that any attempt to prohibit or limit a railroad fuel surcharge, if not carefully drafted, may run afoul of the commerce clause, supremacy clause, or preemption clause of the United States Constitution.

On August 8, 2005, the Burlington Northern Santa Fe (BNSF) Railway issued a mileage-based fuel surcharge announcement. The announcement included a letter (Appendix B) from Mr. John P. Lanigan, Jr., Executive Vice President and Chief Marketing Officer, BNSF Railway, which stated in part that for a number of years, the BNSF Railway has assessed a fuel surcharge based on a percentage of a customer's freight bill. The fuel surcharge allows the BNSF Railway to recover a portion of its increased expense when the price of diesel fuel increases significantly. The fuel surcharge percentage changes as diesel fuel prices change. In response to feedback from its customers, the railway announced in March the railroad industry's first mileage-based fuel surcharge program is to take effect January 1, 2006. The effective date was set to allow customers and the railroad adequate time to design and implement system changes. The letter continued that in this era of tight transportation capacity, rapidly rising fuel prices and fuel price volatility, the railroad believes a mileage-based fuel surcharge program is the most direct and accurate method of reflecting the impact of fuel price changes on the railroad and its valued customers. A hypothetical comparison of mileage-based fuel surcharge with percentage fuel surcharge is attached as Appendix C, a compilation of mileage-based fuel surcharge frequently asked questions is attached as Appendix D, and the new mile rate tables are attached as Appendix E.

POSSIBLE STUDY APPROACH

In conducting its study of railroad fuel surcharges, the committee could solicit testimony from a number of sources. These include the Public Service Commission, the North Dakota Grain Dealer's Association, the agriculture and farm commodity groups in the state, and the railroads operating in the state.

ATTACH:5