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9th Circ. Finds Calif. Railroad Pollution Laws Preempted

By **Mike Cherney**

Law360, New York (September 16, 2010) -- A federal appeals court has struck down rules designed to curtail pollution from idling trains in California, saying the guidelines developed by a local air quality agency are preempted by federal law.

The U.S. Court of Appeals for the Ninth Circuit issued the ruling Wednesday, agreeing with a previous ruling by the U.S District Court for the Central District of California. The local rules were challenged by the Association of American Railroads, BNSF Railway Co. and Union Pacific Railroad Co.

The rules were created by the South Coast Air Quality Management District, one of 35 state agencies tasked with drafting and proposing air quality rules for its region. The agency is in charge of air quality for much of the Los Angeles metropolitan area.

One of the rules at issue limits the permissible amount of emissions from idling trains, while the other two rules impose various reporting requirements, backed by penalties, on rail yard operators, according to the Ninth Circuit.

The railroads argued, and the Ninth Circuit eventually agreed, that the local rules were preempted by the Interstate Commerce Commission Termination Act of 1995, a federal act that substantially deregulated the railroad industry.

The Ninth Circuit explained that if a conflict exists between the ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both if possible. In addition, the ICCTA would not preempt a state law that does not target the railroad industry but still may have an incidental impact on the business.

A state law, however, the explicitly seeks to manage or govern the railroad industry would be preempted by the ICCTA, the court said. And it was fairly obvious that the three rules made by the air quality district targeted railroads, the Ninth Circuit said.

“Because the district’s rules have the force and effect of state law, ICCTA preempts those rules unless they are rules of general applicability that do not unreasonably burden railroad activity,” the Ninth Circuit said. “The district's rules plainly cannot meet that test.”

The air quality district argued that its rules would eventually have the equivalence of federal law. The district said it would submit the rules to the California Air Resources Board, which could integrate them into a state air quality implementation plan.

Under the Clean Air Act, the U.S. Environmental Protection Agency is charged with approving state implementation plans. Once the EPA signs off on California's plan, the local rules regarding idling trains would have the force of federal law, the air quality district argued.

But the Ninth Circuit was unconvinced, saying the rules were still only state laws until the EPA approved the statewide plan.

“Because the district's rules have not become a part of California’s EPA-approved state implementation plan, they do not have the force and effect of federal law, even if they might in the future,” the court said. “Accordingly, there is no authority for the courts to harmonize the district's rules with ICCTA.”

Robert Jenkins, a lawyer at Mayer Brown LLP who represented the railroads, said his clients have already been working with the state air resources board to cut down air pollution. Southern California now has the cleanest fleet of locomotives anywhere in the country, he said, a more environmentally friendly option than using trucks to move cargo.

As a result, the local air quality rules were an unnecessary overreach, Jenkins said. He also noted that about 10 years ago, the Ninth Circuit came to a similar conclusion in a case where a municipality in Washington state sought to regulate the reopening of a rail line.

“This all goes back to Congress wanting to promote freight rail transportation in the country,” he said. “Congress didn't want each individual state and each individual city and locality to be in a position to essentially stop or impose parochial regulations on the operations of these interstate railroads. It would just be unworkable.”

An attorney for the air quality district was not immediately available Thursday.

The railroads were represented by Mayer Brown LLP and Pillsbury Winthrop Shaw Pittman LLP.

The air quality district was represented by Daniel P. Selmi, a law professor at Loyola Law School Los Angeles, and Shute Mihaly & Weinberger LLP.

The case is Association of American Railroads et al. v. South Coast Air Quality Management District et al., case number 07-55804, in the U.S. Court of Appeals for the Ninth Circuit.