



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

27 FEB 1987

n-96-01  
II-A-643

MEMORANDUM

OFFICE OF  
AIR AND RADIATION

SUBJECT: Railroad Noise Litigation  
FROM: K.E. Feith  
TO: D.R. Clay

Following our meeting with OFA and OGC re. the railroad litigation, you requested that I prepare a paper that presents the probable course of events that the Agency might anticipate from the remand by the U.S. Supreme Court of the Third Circuits decision in the case involving the State of Delaware. Please find attached the subject paper that contains my assessment and recommendations; OGC has reviewed the paper, provided comment, which I have incorporated, and is in agreement.

I have had further discussions with Dick Sanderson of OFA concerning our relative roles with respect to noise matters and I believe we are in total understanding and agreement. In keeping with your commitment to OFA, we (OAR) will restrict our activities to noise rulemaking matters. OFA will continue to serve as the Agency point of contact for all other noise-related matters. They retain responsibility for responding to noise correspondence and the conduct of reviews, mandated by the Noise Control Act, of other Federal organizations noise related activities.

The availability of extramural funding for expert consultant services and other activities that may be required as an indirect result of the subject litigation, was discussed by me with Dick Sanderson and Georgia Callahan of the Comptroller's Office. OFA has no money now or budgeted for this activity. The Comptroller's position is that the anticipated required funds should be available from OAR's FY 87 budget in light of the increased funding it received for GFC's; I gave an initial estimate of between \$150,000 and 200,000 for near term rail activities, depending on the Agency's selected course(s) of action. Callahan did concede that if the "worse case" scenario were to play out, the front office would have to dig deep for the necessary funds.

The attached paper lays out several possible outcomes of the litigation and those contingent activities that the Agency (OAR) may want to consider, along with an estimate of their associated costs.

cc: P. Stolpman, OPAR  
N. Ketcham-Colwill, OGC  
G. EDWARDS, OFA  
D. SANDERSON, OFA

## Railroad Noise Litigation

### ISSUE

The remand by the U.S. Supreme Court to the Third Circuit Court of Appeals of the appeal by the State of Delaware concerning Federal preemption of the State's railroad noise ordinances, is likely to result in a demand by the loser for EPA to take regulatory action:

- \* The railroad, wanting action to satisfy their preemptive insistence for continuing Federal (EPA) protection from, in their opinion, the intrusion of State and local noise ordinances on their equipment and facilities.
- \* Delaware and other States requesting specific exemptions from the railroad regulation under the Special Local Conditions provision of the Noise Control Act of 1972, as amended.

What courses of action are available to the Agency to satisfy the to-be-anticipated demands, and what contingent activities should be undertaken in the interim.

### BACKGROUND

#### A. History of the Case

B&O Railroad asked a U.S. District Court to enjoin the State of Delaware from enforcing a state noise statute against a type of railroad equipment (trailers-on-flatcars or "TOFCs") found in B&O's railyard in Wilmsere, Delaware. The Court granted the B&O's request, finding that Delaware's statute as applied to TOFCs was preempted by EPA regulations promulgated under the Noise Act.

Delaware appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit; that court affirmed the lower court's decision in a brief opinion which cited a Memorandum of Law filed by the U.S. Government that agreed with the lower court's decision that EPA regulations preempted the disputed application of Delaware's statute.

Delaware then asked the U.S. Supreme Court to hear an appeal of the Third Circuit's decision. The Department of Justice filed an amicus brief in the Supreme Court that reversed the position the U.S. Government had taken in the Third Circuit. They argued that existing EPA regulations did not preempt Delaware's regulation of TOFCs, and recommended the Supreme Court remand the case to the Third Circuit for reconsideration in light of the Government's change of position; the Court accepted this recommendation (see attached order).

B. Status of the Case

In the remand the Chief Justice noted that, absent the revised position of the U.S. Government, the case would have been docketed for hearing by the Supreme Court. The timing and briefing of the remand are now at the Third Circuit's discretion; no notice has been received by the Agency as of this date as to when the Third Circuit will reconsider the case, and whether it will seek further briefing on the issues. In any event the Third Circuit will have before it the amicus brief filed by the Department of Justice before the Supreme Court which resulted in the remand.

C. Implications for EPA

EPA is not directly a party to the instant proceedings before the Third Circuit, nor is the Administrator's legal obligation to regulate TOFCs directly at issue. However, the Court's decision on the preemptive effect of EPA's promulgated rail noise regulations is likely to result in one of the following:

1. Court Decision: EPA Promulgated Regulations do Preempt Delaware's Statute (i.e. sustains original decision, B&O wins).

This decision is reasonably certain to result in Delaware appealing again to the Supreme Court and, based on the Chief Justice's note on the remand, is likely to be docketed for hearing by the Supreme Court. This will delay a decision, and thus the necessity of further action by EPA into the Fall, 1987 or into the next court calendar.

2. Court Decision: EPA Promulgated Regulations do not Preempt Delaware's Statute (i.e. Delaware wins on remand).

This decision would entail a finding that EPA had not specifically regulated TOFCs and, consequently Federal preemption is not "effective", and the State is free to regulate.

The Circuit Court of Appeals for the District of Columbia previously decided in Association of American Railroads (AAR) v. Costle, that the Administrator is obligated to regulate noise from "all" railroad equipment and facilities. When so regulated, the federal rules preempt differing state and local government regulations of the same equipment and facilities. The EPA was directed to consult with the AAR as to what, in the AAR's view, was "necessary" to regulate to provide the AAR the preemptive protection mandated by the Noise Act. The AAR-EPA agreement resulted in certain limited EPA regulations being promulgated, and a statement by the Agency that this action preempted the field of railroad equipment and facilities. It was this position that the

State of Delaware effectively challenged, in that EPA had not regulated TOFCs and thus the State was not preempted from issuing and enforcing their own regulations.

It is not in question that Federal (EPA) regulations on noise from railroad equipment and facilities are preemptive, nor that EPA is mandated by legislation (as further interpreted by AAR v. Costle) to promulgate regulations which provide such preemption.

Accordingly, a court decision that EPA's existing regulations do not preempt Delaware, is likely to result in the AAR taking further action to call into force the AAR v. Costle decision requiring EPA to promulgate the necessary preemptive regulations. It will likely set in motion the necessity of a comprehensive review of the further actions necessary by EPA to comply with the original AAR v. Costle, to provide the preemption for the railroads which they demand. This can be anticipated to encompass any other (than TOFCs) equipment or facilities "threatened" by state and local noise ordinances.

At the minimum, B&O (possibly joined by the AAR et.al.) can be expected to demand that the Administrator regulate TOFCs.

Notwithstanding the foregoing, the Administrator is empowered to make "Special Local Conditions" determinations, to provide site specific relief to states and local governments where nationally uniform preemptive rail noise regulations are in effect. Petitions for such relief from several states and local communities have been received by the Agency. To this point EPA has not responded positively to such petitions, nor established the policies/procedures or due process for managing such petitions. It may reasonably be expected that should the Administrator now regulate TOFCs, Delaware and others will move legally to seek local relief from EPA's then nationally preemptive regulations. Such Special Conditions determinations as may be made by the Administrator are not "waivers" per se, which are not authorized by the Act, thus they likely must take the form of regulatory actions, or amendments to the existent regulations. Each such special condition determination made by the Administrator may be expected to be vigorously contested by the AAR or railcarrier concerned.

## CONTINGENT ACTIVITIES

### Resources

The Agency should anticipate that the impending decision of the Third Circuit will necessitate the development of strategy options, to respond to the assured follow-on actions of the AAR and its member carriers, and by state and local governments.

Recognizing that the Agency does not intend to reestablish the noise program that was administratively abolished in 1982, and further the very limited inhouse technical expertise available to bring to bear on these matters in an efficient and timely manner, it is recommended that funds be set aside in FY87 for expert consultants/contracts to provide for quick-reaction services and support to meet the anticipated Agency requirements.

### Recommendations:

#### 1. Expert Consultant(s):

Immediately execute a purchase order(s) in the amount not-to-exceed \$20k (each), for one to two consultants who are intimate with the federal regulatory policy and technical issues involved.

This action will assure the Agency of the on-call availability of key skills to assist in laying out any required strategy/options, as well as to provide expert advice on the issues which will be presented to the Agency as a result of the unfolding litigation.

#### 2. Contractor(s):

It can be reasonably anticipated that relatively substantial quick-reaction technical work will be required should regulatory action be mandated. It is projected that a minimum two-person year effort may be required in the remainder of FY87, or approximately \$150k. A significantly larger effort in FY88 could be called for, probably on the order of \$600-750k.

However, it would be premature to obligate funds to a contractor(s) in the absence of definitive tasks that can only be clearly identified following the decision of the Third Circuit, and the parties response thereto. Therefore, it is recommended that "no-year" funds be set aside in FY87 which can be obligated on relatively short notice, likely in early FY88.

APPEALS -- SUMMARY DISPOSITION

85-1773 OBERLY, CHARLES M., ET AL. V. B&O RR CO., ET AL.

The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of the position presently asserted by the Solicitor General in his brief, as amicus curiae, filed November 10, 1986. The Chief Justice would note probable jurisdiction and set the case for oral argument.

~~86-94 PIPKIN, WAYNE V. COLORADO~~

~~86-5513 FRANKLIN, JOSEPH P. V. TENNESSEE~~

~~The appeals are dismissed for want of a substantial federal question.~~

~~86-571 MENDONCA, KATHERINE V. OREGON~~

~~86-586 HUDSON, ROBERT V. EDGETT, JAMES, ET AL.~~

~~86-5587 PRENZLER, LYLE V. JONES, JULIA, ET AL.~~

~~86-5603 STEVENSON, STEVE V. ELUA, HALE M.~~

~~86-5633 SEITU, KWASI M. V. JACKSON, MISSISSIPPI, ET AL.~~

~~The appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.~~

~~86-612 PRUDENTIAL FED. SAV. & LOAN V. FLANIGAN, MILDRED~~

~~The appeal is dismissed for want of a properly presented federal question.~~