



EPA Clearance Record

1 Directive Title

Delegations Manual - Revised Delegation

DRAFT *As on revision*
 A-96-01
 II-A-642

2 Type of Directive (indicate type of issuance proposed)

- a. Manual (Organization, Delegation, Other) d. New
 b. Order c. Notice e. Revision

3 Originator (name, division, mail code, & telephone number)

Kristin McNamara
 Management & Organization Division
 PM-213 382-5000

4 Explanation

The Assistant Administrator for the Office of External Affairs (OEA) proposes to transfer responsibility for delegations of the Noise Control Act of 1972 to the Assistant Administrator for Air and Radiation (OAR) who was originally responsible for these delegations. OEA and OAR agree that OAR can better manage any regulatory and technical issues arising under the Act. OEA will retain responsibility for information dissemination, education and approval of grants and cooperative agreements

5 Originating Division/Staff Director (name, signature, & date)

Kathy Petruccioli, Director
 Management and Organization Division

6 Central Directives Officer (signature, date, & telephone number)

- a. Clearance necessary and approved
 b. Clearance needed
 Thelma Adams, 382-5000

7 Clearance Due Date

B. NOTE: Complete items 9b & 9c and RETURN TO ORIGINATOR by the due date. If you have problems with the attached directive or you need more time to review it, contact the originator.

9. Clearance Routing (if additional space is needed, use EPA Form 1315-16A, Clearance/Approval Record (Continuation))

a. Office Name & Mail Code:	b. Mark "X"			c. Clearing Official (signature & date)
	(1) Concur	(2) Concur w/ Comment	(3) Do Not Concur	
OGC (LE-130)				
OPPE (PM-219)				
OC (PM-225)				
OIG (A-109)				
OECM (LE-133)				
ORO (A-101)				
OAR (ANR-443)				
POSS (PM-208)				

Instructions for Completing EPA Form 1315-16, "Clearance/Approval Record"

General Instructions

Originators must complete and attach this form to all new or revised proposed directives. (*Organization proposals should also include EPA Form 1110-1.*) This form is completed and routed as follows:

(1) The originator completes items 1, 2, 3, 4, 5 and, if clearance is contemplated, 9a.

(2) The originator forwards this form with the proposed directive (*organization proposals should also include EPA Form 1110-1*) to the CDO who reviews the directive for compliance with the Directives Manual. The CDO will complete item 6 and return the form to the originator. Should the CDO have problems with the proposal, the CDO will contact the originator. After the CDO and originator reach agreement, the CDO will complete item 6.

(3) If clearance is necessary, the originator completes item 7, and sends a clearance package (*including EPA Form 1110-1 if appropriate*) to all clearing offices. The originator retains the originals.

(4) The clearing offices complete items 9b and 9c and return this form to the originator.

(5) The originator consolidates all clearance responses onto the original (*annotate the item 9b responses and "/S/" and the date signed into the appropriate spaces*). The approval package is then constructed, approved by the originating senior management official and forwarded to the CDO who will review the package for compliance with policy and procedures and forward for required approval.

Specific Instructions

Each item number is followed by an acronym that indicates who completes that item. Those acronyms are: O = Originator, CDO = Central Directives Officer, CO = Clearing Official, RO = Reviewing Official, and AO = Approving Official.

Item 1 (O): Self-explanatory.

Item 2 (O): Indicate by marking "X" in the appropriate boxes whether the proposed directive is a manual or order and whether it is new or a revision to an existing directive. Additions to an existing directive (e.g., new manual chapter, new appendix, etc.) are considered to be revisions.

Item 3 (O): Insert the information necessary for clearance offices to send this form back to you; normally this includes division/office name, name of person handling the clearance, and mail code. In addition, list the name and phone number of the individual most knowledgeable about the proposed directive.

Item 4 (O): Provide a brief explanation of why the directive is being proposed and what its major implications are. If it's essential that a longer explanation be provided than the item 4 space will allow, enter "continued on attached sheet" in the lower-right portion of item 4 and continue on EPA Form 1315-16A, entitled "Clearance Record (Continuation Sheet)."

Item 5 (O): After the originating division/staff director determines that the proposed directive is ready to be forwarded to the CDO, the originating staff/division director enters signature and date.

Item 6 (CDO): The CDO indicates agreement with the construction of the directive and the originator's clearance plan by marking "X" in the appropriate box and by entering phone number, signature and date signed.

Item 7 (O): If a clearance is necessary, the CDO enters the due date. As a rule of thumb, allow 10 working days for a short and noncontroversial directive and 15 working days for a long or controversial directive or when the regions are commenting. The originator may grant extensions if reviewers have serious problems with the proposed directive and request more time to review it.

Item 8: Self-explanatory.

Item 9a (O): Enter the office name and mail code of the offices selected for clearance; usually a widely used acronym is acceptable for the office name, e.g., OPTS, Reg. II, etc.

Items 9b(1), 9b(2) & 9b(3) (CO): Indicate concurrence with the proposed directive by marking "X" in items 9b(1) or 9b(2) as appropriate. If *serious objections* exist after negotiating with the originator and consultation with the CDO, mark "X" in item 9b(3) to indicate nonconcurrence. Nonconcurrences must be accompanied by a memorandum that explains nonconcurrence and what course of action you consider appropriate. If you cannot resolve the problem satisfactorily after consultation, contact the CDO.

Item 9c (CO): The head (or acting head) of the clearing office must sign and date the form.

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOTE TO DON FRANKLIN

FROM: Kristin McNamara

I talked with Ken Feith and he agreed that your FTE is not tied to the noise delegations, and that OAR will not pursue having an FTE transferred back from OEA.

Attached is a draft of the green border M&O will send out. I understand you and Ken are meeting on October 22 to discuss it. I will wait to hear from you after that meeting.

Please call me at 382-5000 if you have any questions.



Office of Administration

Management and Organization Division



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

MAR 3 1987

OFFICE OF
EXTERNAL AFFAIRS

MEMORANDUM

SUBJECT: Possible Noise Regulation

FROM: R. A. Edwards
Deputy Assistant Administrator
for External Affairs

TO: Don Clay
Deputy Assistant Administrator
for Air and Radiation

In keeping with our January 1987 agreement, relative to your office handling the development of any additional regulatory measures required under the Noise Control Act of 1972, as amended, I believe it is appropriate to pass on to you several items we have received that may possibly require the issuance of new Federal regulations in the noise arena.

First, a request was made to the Administrator on August 12, 1986, by the City of Seattle, for a "special local determination" under 40 CFR 201 to permit them to regulate a railyard located in the City of Seattle. Although this type regulation is permitted under the Noise Control Act, the agency has not issued any guidance in the Federal Register as to exactly how it is to be accomplished. Our contact with Seattle leads us to the conclusion that this regulatory problem now needs to be addressed. A copy of the request and the interim response from EPA is attached for your information.

Second, during the October 1986 term of the Supreme Court, the State of Delaware appealed a Third Circuit decision in a railyard case to the court. The case was accepted by the Supreme Court and subsequently they vacated the Third Circuit decision and remanded the case back to them for further consideration. During November 1986, the firm of Verner, Liipfert, Bernhard, McPherson and Hand, representing Norfolk Southern Corporation, contacted the Solicitor General and indicated that if Delaware were given the right by the courts to regulate railyards by the issuance of state regulations, the stage would "... be set for a return to court to compel EPA to issue the missing [noise] regulations." This obviously will require a great deal of regulatory activity in the very near future. A copy of the appropriate documents related to this matter are attached for your information.

If I can provide you with additional information or assistance, please do not hesitate to contact me on 302-5053.

Attachments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

NOV 5 1986

Mayor Charles Royer
 City of Seattle
 1200 Municipal Building
 Seattle, Washington 98101

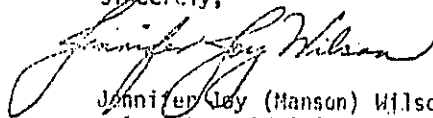
Dear Mayor Royer:

The Administrator has asked me to provide an interim response to your letter to him of August 12, 1986, regarding railyard noise issues in the Seattle area.

In your letter, you ask for special local condition status so that the City of Seattle might apply different noise standards than those set out at 40 CFR, Part 201. This request stems from concerns expressed by the Queen Anne/Magnolia Communities Noise Abatement Group (NAG), relative to a noise problem the City of Seattle has with the Burlington Northern Railroad switch yards. Section 17(c)(2) of the Noise Control Act of 1972 provides for waivers of federal preemption for state or local regulations necessitated by special local conditions, so long as the standards are not in conflict with Federal regulations. In a Federal Register notice, published December 2, 1982, EPA stated that requests for special local condition waivers would be handled on a case-by-case basis.

You will be contacted by EPA in the near future regarding your request for special local condition status. If I can be of further assistance please do not hesitate to contact me.

Sincerely,



Jennifer Ley (Manson) Wilson
 Assistant Administrator
 for External Affairs

November 26, 1986

DFRANKLIN-DC

A-1048

CONCURRENCES						
SYN	OFA/IE	OFA	DOE	OEA		
JRN	Pulcinna	Sanchez	Alicia	Howard		
DATE	11/2/86	11/2/86	12/1/86	2-1-86		

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DEC 5 1986

Honorable Mike Lowry
House of Representatives
Washington, D.C. 20515

Dear Mr. Lowry:

Thank you for your letter of September 24, 1986, to Lee Thomas, Administrator of the Environmental Protection Agency (EPA) with an enclosed letter from the Queen Anne/Magnolia Communities Noise Abatement Group (NAG) and another letter from the Mayor of the City of Seattle, Washington, relative to their concern about the noise from a railyard operated by Burlington Northern Railroad. Since both letters addressed the problem of noise abatement, they were referred to this office for a reply.

In your letter you requested that EPA respond to the City of Seattle and provide your office with a copy of the response. Enclosed is a copy of the letter that the agency provided to Mayor Royer dealing with his request for special local condition status under the provisions of the Noise Control Act of 1972.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

Jennifer Joy Wilson
Jennifer Joy (Manson) Wilson
Assistant Administrator
for External Affairs

Enclosure

A-104-DFRAIKLIN-dc:mit October 28, 1986

CONCURRENCES

SYMBOL	ALP	CFALF	LE-132A	LE-132A	LE-132A	1002	101A
URNAM	DFRAIKLIN	Dickerson	Hedden	3910	EWAT/ES	Whelan	Adams
DATE	10/28/86	10/22/86	10/23/86	10/23/86	10/23/86	10/1/86	12-1-86
PL	(12-70)						

OFFICIAL FILE COPY

U.S. GPO : 1985-467-553

Office Of The Mayor
City of Seattle

Charles H. Rosen, Mayor

August 12, 1986



Lee Thomas, Administrator
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

Dear Mr. Thomas:

In 1980, the U.S. Environmental Protection Agency (EPA) promulgated regulations limiting noise levels from railroads (40 CFR, Part 201). One provision of the Noise Control Act of 1972 (42 USC 4916 (c)(2)) noted the ability of local governments to request a "Special Local Conditions" status which would permit more stringent noise standards to apply to the noise source than those in 40 CFR, Part 201. The purpose of this letter is to explore the possibility of such a designation for the Interbay area of Seattle.

The Interbay area is the valley of a highly populated residential neighborhood of Seattle (see map). The valley floor is dominated by the Burlington Northern Railroad switch yards. The activity of these yards includes car coupling, engine testing, whistles, retarders and train traffic. Each of these activities involves attendant elevated noise levels. These noise levels have been well documented in the last few years by the Port of Seattle tests of the residential areas (see attached studies). Further, petitions have circulated the residential areas asking for reduction in the levels (see attached synopsis of petitions).

The City of Seattle has attempted and will continue to attempt to involve Burlington Northern in a cooperative remedy to these noise problems. However, the company has not been convinced that a problem exists. Indeed, Federal Railroad Administration tests of the yards last summer confirmed the yards comply with federal noise regulations, nevertheless, there can be no doubt that the geography of the site contributes to noise problems in this highly residential community.

Lee Thomas, Administrator
Page Two
August 12, 1986

We therefore request special local condition status and ask that you advise us regarding the appropriate procedure for applying for it as well as the showing necessary to obtain such status. We are also interested in other areas which have made similar requests.

Your prompt attention is appreciated.

Sincerely,


Charles Royer

BILL
[SEE P. 5]

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November 10, 1986

WRITER'S DIRECT DIAL NUMBER
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* ADMITTED IN NEW YORK ONLY
* ADMITTED IN MARYLAND ONLY
* ADMITTED IN NEW YORK AND
NEW JERSEY ONLY

Honorable Charles Fried
Solicitor General of the United States
U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Oberly v. Baltimore & Ohio Railroad Co.,
U.S. Supreme Court No. 85-1773

Dear Mr. Fried:

This case involves the preemptive effect of federal regulations issued under the Noise Control Act, 42 U.S.C. § 4901, et seq. The courts below held that the rules under this statute addressing noise from railroad equipment and facilities, when read against their particular background, supplanted Delaware's own efforts to regulate that same area. Baltimore & Ohio Railroad v. Oberly, 606 F. Supp. 1340 (D. Del. 1985); aff'd, 782 F.2d 29 (3d Cir. 1986). Delaware has appealed to the Supreme Court, and we understand that the Court has asked you for a statement of your views on this question.

We represent Norfolk Southern Corporation, a company that, like all major railroads, has long been concerned with this issue and has a substantial stake in it. We are writing to urge you to affirm the position supporting preemption long adopted by the government and reaffirmed by the Justice Department and the Environmental Protection Agency before the Third Circuit. As far as we can see, any reversal of that position would amount either to a collateral repudiation of directly binding D.C. Circuit authority or to a claim that the Environmental Protection Agency was in default of its obligations under that authority. For the reasons given below, we see little merit in either outcome from either an intellectual or a practical standpoint.

Honorable Charles Fried
November 10, 1986
Page 2

I. Background

A. Congress passed the Noise Control Act in 1972, P.L. 92-574, 86 Stat. 1234. Section 17 of that statute, 42 U.S.C. 4916, directed EPA to issue regulations setting "limits on noise emissions resulting from operation of the equipment and facilities" of "surface carriers engaged in interstate commerce by railroad." It further provided that after the effective date of "a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility" of such a carrier, no state could adopt or enforce any different standard applicable to "noise emissions resulting from the operation of the same equipment or facility" without obtaining special permission from EPA.

B. EPA proposed regulations to implement this section in 1974, 39 Fed. Reg. 24580, and issued them in final form in 1976, 41 Fed. Reg. 2184. In those rules EPA set requirements for only three sets of railroad equipment. EPA justified that choice by arguing that (1) it had discretion not to set standards for some categories of railroad "equipment and facilities," and (2) in exercising that discretion, it could consider whether it was more desirable (a) to regulate a given noise source federally, thus preempting state regulation, or (b) to omit the federal standards, thus leaving states and localities free to act.

C. In 1977 the D.C. Circuit flatly rejected EPA's position, holding that Congress had required EPA to regulate all railroad "equipment and facilities" within the accepted meaning of that term. The court further found that Congress' purpose in doing this had been precisely to relieve railroads through preemption of the burden of differing state and local rules applicable to such equipment and facilities. Association of American Railroads v. Costle, 572 F.2d 1310 (D.C. Cir. 1977) ("AAR").

D. In subsequent rulemaking to implement the court's order, EPA issued standards for four additional classes of railroad equipment. It proposed standards for one additional class of equipment, and for facilities, but never promulgated them.

Instead, EPA moved the D.C. Circuit to dismiss the case on the ground that since the standards already issued "cover[ed] the major sources of noise from railroad equipment" and therefore derivatively also "regulate[d] to a significant degree noise emissions from rail facilities," their "cumulative effect" was to "effectively regulate both railroad equipment and railroad

Honorable Charles Fried
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facilities" in satisfaction of the court's order. Status Report, Association of American Railroads v. Costle, No. 76-1353 (D.C. Cir. Nov. 12, 1981), reproduced in Appellants' Appendix p. A-77.

The D.C. Circuit dismissed the AAR litigation on November 24, 1981.

EPA then published much the same document in the Federal Register, withdrawing both its proposed facility standards and the one remaining equipment standard and explaining to the public generally that by the final issuance of the first four standards it had "satisfied the court's order" so as to make further compliance steps "unnecessary" because the standards already established amounted to direct or derivative regulation of all railroad "equipment and facilities" within the accepted meaning of that term. 47 Fed. Reg. 54107 (Dec. 1, 1982). The wording of this notice, its presentation in satisfaction of EPA's AAR obligations, and the explicitly recited assent of AAR to the position taken could leave little doubt in a reader's mind that EPA intended the rulemaking that it terminated to institute Federal preemption of state regulation of noise from all railroad "equipment and facilities."

No one sued to challenge that position either within the 90-day deadline prescribed by the Noise Control Act, 42 U.S.C. § 4915, or at any later time.

II. Legal Analysis

A. This case involves a very narrow legal issue with no relation to any of the broad standards or doctrines that set the framework of federal preemption analysis. Instead, it involves the specific language of a particular unquestionably preemptive statute, as implemented in a specific rulemaking that followed on and in turn implemented a specific circuit court decision.

B. The court in the AAR case directed EPA to set noise emission standards for all railroad "equipment and facilities" within the common meaning of that term. The activities at issue here -- the parking of piggyback trailers and containers in loading yards -- fall, as far as we can see, within anyone's interpretation of that phrase. Indeed, the AAR court specifically identified "yards and terminals" as facilities to be regulated, 562 F.2d 1318-19. The purpose of that judicial directive was to require preemption of potentially duplicative state regulation of such facilities.

Honorable Charles Fried
November 10, 1986
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Given this background, it seems to us that there could be only two ways of concluding that Delaware's regulation of this field is not preempted. These are (1) to assert that the AAR case was wrongly decided, and that the original EPA position rejected there was in fact correct, and (2) to assert that the AAR decision was in fact correct, but that EPA has failed to implement its mandate.

Neither view would seem to have much merit as a position to be adopted by the government of the United States.

1. Though we believe the AAR case was correctly decided, of course there might be differing opinions on that point, as there might with any other judicial decision. But AAR is the only law on the subject; it was issued almost a decade ago by the federal court with exclusive competence to review Noise Control Act rules, and the United States never even sought Supreme Court review of it. It would be extraordinary against this background for the Solicitor General to advise the Supreme Court that to rely on such a precedent constitutes legal error.

2. The assertion that EPA failed to comply with a correct mandate strikes us as no more attractive.

a. EPA claimed it had discharged all its duties under the AAR mandate and sought dismissal of the case on that ground, not just in full consultation with the Justice Department, but through the Justice Department. That representation to the court was a representation of the United States, which should not be disturbed except for compelling reasons. Given the extremely narrow issues the current Supreme Court case presents, no such compelling reasons are present.

b. EPA published its conclusion formally in the Federal Register where it could have been challenged, like any other Noise Control Act rule, by any interested person who filed a petition for review within the prescribed review period of 90 days. No one filed such a petition.

i. Congress has included these preclusive review provisions in most of the modern regulatory statutes precisely to make sure that regulatory decisions become fixed, so that the world can rely on them, within set periods after their issuance. If the United States now takes the position that the preclusive rule is waivable, it will set a precedent that will be invoked against it in many cases where the government would rather have stability.

Honorable Charles Fried
November 10, 1986
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ii. To assert that Delaware's rules are not preempted in this case, however, does more than simply demolish the standard of repose erected by Congress. Even if we concede, purely for the sake of argument, that the question of compliance with the D.C. Circuit's mandate might be reopened, the only proper place to reopen it would be before the D.C. Circuit, which is both the court that issued the mandate in question and the only court that could have issued such a mandate under the exclusive review provisions of the Noise Control Act. We submit that the Solicitor General should not express a conclusion on that issue in Supreme Court papers before the issue has even been presented to the D.C. Circuit.

c. If the position that EPA did not obey the AAK mandate becomes law, the stage will be set for a return to court to compel EPA to issue the missing regulations. The railroad industry will feel forced to do that by the prospect of multiple and conflicting state regulation. However, EPA will have great difficulty in obeying any such order, because it has dismantled its noise control office and the entire program has been budgeted at zero for the last few years.

d. Finally, that result, which could follow almost inevitably from an anti-preemption position, would be contrary to administration policy. Scaling back federal noise control programs was one of this administration's environmental regulatory priorities when it first took office. It is virtually the only one of those priority programs that has actually been realized. Yet, to argue against federal preemption here could lead to a significant reversal of that effort in this field.

I appreciate your consideration of this letter. If you or your staff would like additional support materials on this issue, or if you would like to discuss it further, please feel free to contact me.

Sincerely,


Jeffrey S. Berlin
Attorney for Norfolk
Southern Corporation

ORDER LIST

RECEIVED NOV 11 1966

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, 1966. 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.

86-5609 STEVENSON, STEVE V. ELVA, HALE H.

86-5633 SEITU, KWASI H. 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.

No. 85-1773

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES M. OBERLY III, AND JOHN E. WILSON, III,
APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
E. HENRY HABECHT II
Assistant Attorney General
PETER E. STUBBINS
RAYMOND B. LUDWISZEWSKI
KAREN E. FLORINI
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS S. BLAKE
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether application of the state noise control regulation at issue here to an interstate rail shipping facility is preempted by the Environmental Protection Agency's determination in 1982 that railroad facility regulations under the Noise Control Act of 1972, 42 U.S.C. (& Supp. II) 4901 *et seq.*, were unnecessary.

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TABLE OF AUTHORITIES

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<i>City of Burbank v. Lockheed Air Terminal, Inc.</i> , 411 U.S. 624	9
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , No. 83-1925 (June 3, 1985)	8, 11, 12
<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n</i> , 461 U.S. 190	8
<i>Wardair Canada v. Florida Dep't of Revenue</i> , No. 84-902 (June 18, 1986)	7

Constitution, statutes, regulation and rule:

U.S. Const.:

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Noise Control Act of 1972, 42 U.S.C. (& Supp. II) 4901 *et seq.*:

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44 Fed. Reg. 22960 (1979)	3
45 Fed. Reg. (1980):	
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47 Fed. Reg. (1982):	
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48 Fed. Reg. 27039 (1983)	12
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In t

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1773

CHARLES M. OBERLY III, AND JOHN E. WILSON, III,
APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

*ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Wilmere "intermodal" shipping facility, so termed because both rail and trucking operations are handled there, is a privately owned and operated railyard located in New Castle, Delaware, directly adjacent to a residential neighborhood. In addition to the noise associated with all railyards, intermodal facilities generate noise through operation of "piggyback" refrigeration units, known as trailers on flat cars (TOFCs), which can be transferred as a unit between truck-trailers and railroad flatcars. The noise results from the fact that the generators or compressors of the units operate continuously so that the units remain cold while awaiting further transport (J.S. App. A3).

Until recently, the Wilmere facility was operated primarily as a rail switching yard. Beginning in late 1983, however, intermodal operations increased dramatically:

in the 8-month period ending July 31, 1984, the average number of refrigerated trailers at the facility was 30 per day, a figure that varied greatly on a seasonal basis, from a low of 1 per day in July to a high of 62 per day in May. J.S. App. A69 para. 7. Noise complaints by neighboring residents showed a parallel increase, prompting the Delaware Department of Natural Resources and Environmental Control (DNREC) to inform the owners of the Wilsmere facility in August 1984 that DNREC was preparing to file suit to seek injunctive relief for violations of the Delaware Noise Control Act and its implementing regulations. J.S. App. A54 para. 11. Specifically, Section 6.0.2 of the state noise regulations prohibits any source from emitting noise that "exceeds the ambient noise level by 10 dBa when measured at the point of complaint origination within the receiving property."¹ J.S. App. A49. Measurements taken by DNREC showed that the ambient noise level without the refrigerator units running was 52 dBa, while the level with the units running was 79 dBa (a total of 27 dBa of noise above the ambient levels). J.S. App. A94 paras. 12, 14.

2. Section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916, requires the Administrator of the Environmental Protection Agency (EPA) to promulgate noise emission regulations pertaining to the "operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad." Although there are no federal regulations governing noise emissions from TOFC equipment, noise emissions from other kinds of interstate rail carrier equipment are extensively regulated, 40 C.F.R. 201.11-201.16. EPA first issued rail regulations in 1976, when it promulgated a trio of regulations that governed locomotive operations under stationary and moving conditions, and rail car operations. At that time, EPA stated

¹ "dBa" are decibels as measured by a particular methodology. Because the dBa scale is logarithmic, each increase of 10 decibels indicates a perceived doubling of sound.

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The following promulgate *Railroads v. 1977*). Rest preemption 17(a) as giving of its duty to 17(a) obligate facilities" a interstate rail tions previous the agency year.

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that it had concluded that other types of equipment and facilities could best be regulated by state and local governments, because the problems they caused were primarily local in nature, and it appeared that such regulations would have no adverse effect on interstate commerce, 41 Fed. Reg. 2184, 2185 (1976).

The following year, however, the agency was directed to promulgate further standards. *Association of American Railroads v. Costle (AAR)*, 562 F.2d 1310 (D.C. Cir. 1977). Resting its analysis in part on Section 17(c)'s preemption provision, the AAR court interpreted Section 17(a) as giving EPA no discretion in determining the scope of its duty to regulate. Instead, the court held that Section 17(a) obliged the agency to regulate all "equipment and facilities" as that term was customarily used in the interstate rail industry. Leaving in effect the three regulations previously promulgated by EPA, the court ordered the agency to promulgate additional regulations within a year.

Thereafter, EPA proposed a package of regulations covering retarders, refrigerator rail cars, and car coupling operations; the agency also proposed property-line standards limiting the total noise emitted by a railroad facility. 44 Fed. Reg. 22960 (1979).² The retarder and car-coupling standards were promulgated in final form on January 4, 1980. 45 Fed. Reg. 1252.³ At that time, EPA stated that further time was needed to analyze the public comments on the proposed property-line standards; the agency also noted that public commenters had stated that refrigerator

² The agency stated that the proposed "standards [would] meet the requirement of the Court order of providing comprehensive preemption." 44 Fed. Reg. 22961 (1979).

³ EPA also promulgated standards for locomotive load cell test stands and switcher locomotives, which had not previously been proposed, but which had been discussed in the context of the prior proposal's property-line standard and on which public comments had been received.

cars were seldom being manufactured any longer, and questioned whether a refrigerator car standard was necessary. 45 Fed. Reg. 1258 (1980). As a result of these comments, the agency decided not to promulgate a source standard for refrigerator cars, "in part to allow time to evaluate the effect of their declining use" (*ibid.*). The agency observed that refrigerator cars were being replaced by TOFCs and that TOFCs had not been "addressed by EPA in the proposed rules" (*ibid.*). The agency stated that it expected to respond further to those comments in its promulgation scheduled for January 1981 (*ibid.*).

However, EPA did not proceed with the scheduled promulgation. Instead, on November 12, 1981, the parties to the *AAR* litigation filed with the court a "Status Report," stating that the agency had "concluded that no further standards are necessary to regulate rail facilities and equipment" (J.S. App. A78). After describing the additional equipment standards that already had been promulgated pursuant to the court's order, the report stated (J.S. App. A78-A79):

the cumulative effect of these standards * * * effectively [is to] regulate both railroad equipment and railroad facilities. * * * Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish fur[t]her property line facility emission standards specifically for railyards.

An agreement to dismiss the appeal pursuant to Fed. R. App. P. 42 was submitted by the parties, and an order of dismissal was entered by the court on November 24, 1981.

EPA then published a Federal Register notice reflecting this agreement, in which it explained:

The parties to the [*AAR*] case filed an agreement to dismiss on November 12, 1981, stating their belief

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The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a larger proportion of the noise emissions from rail facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate, to a significant degree, noise emission from rail facilities, it was agreed by the AAR, the State of Illinois [as intervenor-defendant] and EPA that it is unnecessary for EPA to establish further property line facility emission standards.

47 Fed. Reg. 54107, 54108 (1982). Concluding that "the proposed standards are unnecessary," EPA withdrew both the proposed property line and refrigerator car standards (*ibid*).

3. Appellees filed this action for declaratory and injunctive relief when they were informed of the State's intention to take enforcement action against the Wilmsere facility.⁴

The district court granted a preliminary injunction, concluding that EPA had preempted the entire field of noise

⁴ In addition to alleging that Delaware's regulation, as applied, was preempted by the federal regulations, the complaint also alleged that the Delaware regulation as applied was an impermissible burden on interstate commerce in violation of the Commerce Clause, and that the Delaware Act and its implementing regulations were void for vagueness under the Fourteenth Amendment. Because of their rulings on preemption, the lower courts did not reach those issues. If the preemption determination now on appeal is reversed (either by this Court after noting probable jurisdiction or by the court below on remand if this Court vacates and remands for reconsideration), a fuller factual record on the Commerce Clause issue would be required before that issue could be addressed.

emissions from interstate rail carriers. The district court observed that regulatory preemption may occur even absent a directly applicable federal regulation, because a "Federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*." J.S. App. A8 (quoting *Arkansas Electric Coop v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original but not included by the district court)). The district court concluded that EPA's 1982 decision to withdraw its proposed refrigerator car and property-line standards constituted such a preemptive determination (J.S. App. A6-A8). Based on that withdrawal, the court concluded that the states were permanently precluded from implementing similar regulations, and thus enjoined Delaware from taking enforcement action against the Wilsmere facility. The court of appeals affirmed⁵ in a short per curiam opinion adopting the reading of the district court (J.S. App. A18-A20).⁶

⁵ The appeal to the court of appeals was taken from the district court's entry of a preliminary injunction. At oral argument before the court of appeals, however, the parties informed the court that they did not contemplate putting on any additional evidence. The court requested the parties to stipulate that the court could review the matter "on the standards which one would evaluate a final injunction rather than a preliminary injunction," and the parties did so. J.S. App. A24.

⁶ The court of appeals noted that in an amicus curiae filing made at the court's request, the Environmental Protection Agency agreed that the federal regulations preempt application of state noise regulations to the Wilsmere facility (J.S. App. A20). Regrettably, because of a failure of communication within the Department of Justice, that brief was filed in the court of appeals without having been brought to the attention of either the Assistant Attorney General for Land and Natural Resources or the Solicitor General, and therefore without the former's approval or the latter's authorization.

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ARGUMENT

1. We consider first the statute and its legislative history in order to discern Congress's expectations as to the preemptive scope of federal regulations issued under Section 17. See *Wardair Canada v. Florida Dep't of Revenue*, No. 84-902 (June 18, 1986), slip op. 4 ("the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law"). On the basis of that consideration, we conclude that federal regulations under Section 17 were to have a narrow preemptive effect, preempting only state regulations that sought to regulate, directly or indirectly, the *same type* of equipment or facility. Contrary to the assumptions of the courts below, Congress did not intend federal regulations to have a blanket preemptive effect upon the entire field.⁷

a. The wording of Section 17(c) supports a narrow interpretation. Under that provision preemption occurs only *after* the "effective date of a regulation," and bars states from adopting "any standard" applicable to "the *same* equipment or facility * * * unless such standard is identical to a [federal] standard * * *." This language strongly suggests that each federal regulation, as it is enacted, bars *analogous* state regulations: it cannot reasonably be read as indicating that the adoption of any federal regulation—or the decision not to issue a regulation—bars all subsequent state efforts to regulate interstate rail carriers.⁸

⁷ Accordingly, at least insofar as the AAR decision was based on a different reading of the Section 17 preemption provision, we believe it was erroneous.

⁸ The state should probably be preempted from indirectly, as well as directly, regulating equipment and facilities that are federally regulated. For example, if there were a federal TOFC noise regulation, the state would be preempted from enforcing a general property line noise regulation in a situation where the violation resulted from noise attributable to TOFCs that complied with the federal standard. Because there is no federal TOFC standard, however, it is unnecessary to consider here the extent of the indirect preemptive effect of federal noise regulations.

This narrow reading of Section 17(c) does not render it superfluous, although state regulations that are in actual conflict with federal regulations are automatically preempted by the Supremacy Clause, even in the absence of any preemption clause in the relevant federal statute (see, e.g., *Hillsborough County v. Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 5). Section 17(c) significantly lowers the burden of establishing preemption. Under Section 17(c), all that need be established is that both state and federal regulations apply to the same type of equipment. It is not necessary, as it would be in the absence of Section 17(c), to assume the further burden of establishing that compliance with both sets of regulations is impossible, or that the local law obstructs the accomplishment of the objectives of the federal law. Cf. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983).

Similarly, the existence of the waiver provisions of Section 17(c)(2) is consistent with a narrow reading of the exemption provision; Congress in that subsection simply provided a procedure for permitting a state to enforce regulations that do overlap analogous federal regulations. See 118 Cong. Rec. 37318 (1972) (Sen. Tunney, bill sponsor, explains that waivers under 17(c)(2) would be appropriate "where local law requires lower speeds or different operating procedures, or modifications of routing").

b. The minimal legislative history of the preemption provision tends to support our interpretation. The authority for EPA to regulate noise emission from interstate carriers (and the associated preemption provision) was included in the original Senate bill (S. 3342, 92d Cong., 2d Sess. (1972)), not the original House bill (H.R. 11021, 92d Cong., 1st Sess. (1971)). After passage by the House, H.R. 11021 was sent to the Senate, which struck everything after the enacting clause and inserted in lieu thereof the text of S. 3342. H.R. 11021 then went back to the House, which likewise struck everything after the

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enacting clause and substituted a compromise text that incorporated elements of both the original House and Senate bills. The Senate immediately acceded to the final House bill without further amendment and after very brief debate. Section 17 first appeared in its final form in the compromise House bill.

This Court has recognized (*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 (1973)) that, in interpreting the Noise Control Act, "[t]he statements by Congressman Staggers and Senator Tunney are weighty ones." Unfortunately, those statements do not appear to be entirely consistent on this issue. We submit, however, that Senator Tunney's remarks in presenting the compromise House bill to the Senate are persuasive (118 Cong. Rec. 37318 (1972)):

The purpose of the [interstate carrier] amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers.

I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect.

This succinct explanation of the precise provision under consideration, identifying the nature of the congressional concern over federal-state conflicts, was presented to the Senate as the authoritative explanation of the provision that they promptly adopted. It is, therefore, entitled to very substantial weight as an indication of congressional intent.

In contrast, the House debates on the compromise bill contain no specific references to the new interstate carrier provision or its associated preemption and exemption provisions. In explaining his motivation for urging passage of

a federal noise control act, Representative Staggers simply remarked (118 Cong. Rec. 37083 (1972)):

We have evidence that across America some cities and States are trying to pass noise regulations. Certainly we do not want that to happen.

This is hardly an authoritative interpretation of the scope of the particular preemption provision in the interstate carrier section of the bill. Indeed, Congressman Staggers could scarcely have been focusing on that provision, because it in fact *weakened* the Senate bill's original preemption provision.⁹ The original Senate version provided for preemption, "after the effective date of [federal] regulations," of state or local standards "*respecting* noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce by railroad." In contrast, the House version (which was enacted) takes effect "after the effective date of a [federal] regulation" and preempts only state or local standards "applicable to noise emissions resulting from the operation of *the same* equipment or facility of *such* carrier." See App., *infra*, Ia.

2. The application of these general principles to the particular factual situation at issue in this case turns on the proper interpretation of the EPA's statements in 1982 that further standards, including property line regulations, were unnecessary.¹⁰ EPA there determined that a property line regulation was unnecessary, because existing regulations adequately controlled the major railroad noise sources.

⁹ We have reproduced in the Appendix, *infra*, a comparison of the original Senate provision and the final House provision (which was enacted), with all distinctions identified.

¹⁰ The state here apparently seeks to control only the increase in noise level at the Wilsmere facility resulting from the operation of the TOFCs (see page 2, *supra*). The federal standards apply to six types of railway equipment (40 C.F.R. 201.11-201.16), not including TOFCs. There is thus no existing analogous federal regulation.

As this Court addressed the problem through a series of preambles, in its decisions, we can see that it is clear if they are. *Hillsborough Laboratories, Inc.*, F. approach, which embodied in [the *ibid.*], leaves that a particular conclusion the regulation.

Instead, the Court determined more statements. notice--its law. Section 17 re promulgated of noise from result "it was AAR litigation further proper Reg. 54108 (1 to, and did not standards were state or local to federal regulation was withdrawn conjunction with the AAR litigation.

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As this Court has noted, "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 10. That approach, which reflects "the federal-state balance embodied in [the Court's] Supremacy Clause jurisprudence" (*ibid.*), leaves little room for equating a mere statement that a particular EPA regulation is "unnecessary" with a conclusion that the area involved must remain free of state regulation.

Instead, the agency's preemptive intent must be determined more specifically on the basis of its public statements. In its December 1982 *Federal Register* notice—its last pronouncement on the general subject of Section 17 regulations—EPA stated that the previously promulgated standards had addressed the major sources of noise from railyard operations, and observed that as a result "it was agreed [by the parties and intervenor to the AAR litigation] that it is unnecessary for EPA to establish further property line facility emission standards." 47 Fed. Reg. 54108 (1982). In that context, the agency had no need to, and did not, indicate that its conclusion that further standards were "unnecessary" was intended to preclude state or local regulation of types of equipment not subject to federal regulation. The agency's simple statement that it was withdrawing its proposed property line standard, in conjunction with the settlement and voluntary dismissal of the AAR litigation,¹¹ does not evince a clear intention to

¹¹ Because both parties agreed to the dismissal in AAR, the case was dismissed by the clerk of the court pursuant to Fed. R. App. P. 42; the agreement was not ratified by the court of appeals.

make the agency's regulations exclusive. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, slip op. 10.

Moreover, the particular litigation situation in which the federal regulations were considered and withdrawn further counsels against an assumption here that the agency's decision not to regulate implicitly determined that the area must remain unregulated by local authorities as well. See, e.g., *Arkansas Elec. Coop. v. Arkansas Public Service Comm'n*, *supra*. The federal regulations were proposed here in response to a judicial directive, which issued after the court rejected the agency's contention that the area should be left to state regulation. See, e.g., 41 Fed. Reg. 2184, 2185 (1976). In this peculiar context, the subsequent agency decision that these regulations were "unnecessary" scarcely has the force, for preemptive purposes, of the typical agency decision not to regulate.¹²

¹² Nor is this a situation in which a pervasive federal regulatory presence leads naturally to the conclusion that any gaps in those regulations are an intentional part of a comprehensive federal regulatory system. Since the 1982 promulgations, EPA has undertaken little substantive activity in the area of noise control, although it recently revised a previously promulgated standard for heavy and medium trucks, in response to a petition from the industry. 51 Fed. Reg. 850 (1986) (granting a two-year delay in the effective date of the standards, but also making the standards more stringent when they do take effect). See also 49 Fed. Reg. 26738 (1984) (correcting minor inconsistencies in previously promulgated final rule); 48 Fed. Reg. 27039 (1983) (same). The agency currently has no plans to develop any additional noise control regulations and has not been given appropriations by Congress for that purpose.

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¹³ See also

CONCLUSION

Because the court of appeals may have relied on the position espoused by the government in that court, it should have the opportunity to reconsider the issue in light of the views we have here expressed.¹³ Accordingly, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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NOVEMBER 1986

¹³ See also note 6, *supra*.

provided, however, That nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product as the Administrator, after consultation with the Secretary of Transportation may determine[] to be

necessitated by special local conditions or not in conflict with regulations promulgated under this part.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product *if* the Administrator, after consultation with the Secretary of Transportation, *determines that such standard, control, license, regulation, or restriction is* necessitated by special local conditions *and* not in conflict with regulations promulgated under this *section*.

APPENDIX A

additions are italicized; omissions are indicated by brackets.

State Language (Sec. 513):

Notwithstanding any other provision of this Act, after the effective date of regulations under this part,

any State or political subdivision thereof may adopt or enforce any standard relating to noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce by rail

unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section:

House Language:

Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the effective date of a regulation[] under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad,

no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier[]

unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(1a)