SUPREME COURT
STATE OF NEW YORK COUNTY OF STEUBEN

In the Matter of the Application of the SIERRA CLUB; PEOPLE FOR A HEALTHY ENVIRONMENT, INC.; COALITION TO PROTECT NEW YORK; JOHN MARVIN; THERESE FINNERAN; MICHAEL FINNERAN; VIRGINIA HAUFF; and JEAN WOSINKSI,

Petitioners,

For a Judgment under Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SWEPI, LP; and the WELLSBORO AND CORNING RAILROAD, LLC,

Respondents.

NOTICE OF MOTION OF RESPONDENT WELLSBORO AND CORNING RAILROAD, LLC

Index No.: 2012-0810

Motion by:	Respondent, Wellsboro and Corning Railroad, LLC
Date, Time and Place of Hearing	_____, 2012, at ____a.m. at Bath, New York
Supporting Papers:	(1) Verified Answer and Objections in Point of Law, filed September 20, 2012, (2) the accompanying Memorandum of Law, dated September 28, 2012, and (3) Notice of Motion on behalf of Respondents the Village of Painted Post Painted Post Development, LLC, and Swepi, LP and supporting documents filed herewith including Memorandum of Law and the Affidavit of Roswell Crozier, together with the exhibits attached thereto, sworn to August 1, 2012, the Affidavit of Larry Smith, together with the exhibits attached thereto, sworn to August 1, 2012, the Affidavit of Robert Drew, together with the attached exhibits sworn to on August 1, 2012, the Affidavit of William Myles, sworn to on August 2, 2012, the Affidavit of Anne Names, sworn to on August 1, 2012, the Affidavit of William Gough, sworn to on August 1, 2012.
Grounds:	1. The Objections set forth in the Respondent's Verified Answer and Objections in Point of Law;

2. CPLR §§ 7803 and 7804 (f) in that the action may not be maintained with respect to the movant under Article 78 of the CPLR;

3. CPLR § 3211 (a)(3) in that Petitioner lacks standing to maintain this proceeding;

4. CPLR § 3211 (a)(7) in that the action may not be maintained with respect to the movant for failure to state a cause of action; and

5. CPLR § 3212 for summary judgment for the reasons set forth in the documents submitted herewith in that any relief sought against the moving Respondent is preempted by the Interstate Commerce Commission Termination Act of 1995, 49 USC §701 to §702 and §10101 to §16106.

Relief Requested:

1. An Order dismissing Verified Petition in its entirety with prejudice and/or and Order granting summary judgment to the Moving Respondent in all aspects and dismissing with prejudice Petitioner's Verified Petition dated June 22, 2012; and

2. Such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Responding Papers:

Pursuant to CPLR § 2214(b), all answering papers, including cross-motions, if any, must be served upon the undersigned at least seven (7) days prior to the return date of this motion, and all reply papers, if any, will be served at least one (1) day prior to the return date of this motion .

DATED: October ___, 2012
Elmira, NY and Mt. Laurel, NJ

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Respondents.

MEMORANDUM OF LAW ON BEHALF OF RESPONDENT WELLSBORO AND CORNING RAILROAD, LLC IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PETITIONERS' ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

Respondent, Wellsboro and Corning Railroad, LLC ("WCOR") submits this Memorandum of Law in Support of their Motion to Dismiss Pursuant to CPLR § 3211(a)(3) and (a)(7), for Summary Judgment pursuant to CPLR § 3212, and in opposition to the Article 78 Petition filed by Petitioners, Sierra Club, People For A Healthy Environment, Inc., Coalition To Protect New York (collectively the "Organizational Petitioners"), John Marvin, Therese Finneran, Michael Finneran, Virginia Hauff, and Jean Wosinski (collectively the Individual Petitioners and, together with the Organizational Petitioners, the Petitioners"). Respondents, the Village of Painted Post, Painted Post Development, LLC (the "Village") and SWEPI, LP ("SWEPI" and collectively with the Village, "Co-Respondents") have also filed a Motion to Dismiss, for Summary Judgment, and Opposition to Petitioners Request for a Judgment pursuant to Article 78. Respondent WCOR joins in the Memorandum of Law on behalf of Co-Respondents with regard to the positions taken in Legal Argument I that Petitioners have no right to maintain the proceedings because they do not have standing or a private right of action under the New York Environmental Conservation Law or the National Environmental Policy Act, and that the proceeding is barred by the Doctrine of Laches and is moot. WCOR also joins with Co-Respondents' Legal Argument II that the Village complied with the requirements of the New York State Environmental Quality Review Act. Respondent WCOR relies upon the Certifications filed by Co-Respondents in support of its Motion.

For the sake of brevity, Respondent WCOR supplements the Legal Arguments set forth by Co-Respondents in Legal Argument I(C)(1) that the third cause of action fails to state a claim because the National Environmental Policy Act does not apply and Legal Argument II(A)(2) which indicates that the construction, development and operation of the transloading facility by

the railroad is not subject to SEQRA because SEQRA is preempted by the ICCTA. The supplemental legal arguments set forth by Respondent WCOR in this Memorandum of Law address the federal regulation of railroads and the statutory preemption set forth in the Interstate Commerce Commission Termination Act of 1995, 49 USC §§ 701 to 707 and §§ 10101 to 16106 ("ICCTA").

Through the Verified Petition, Petitioners seek to prevent all Respondents from proceeding with all activities at the rail transloading facility in the Village of Painted Post, New York, including the accompanying transportation of water from the municipal water system to the Village of Wellsboro, Pennsylvania until the Respondents have complied with the New York State Environmental Quality Review Act, Article 8 ("SEQRA"), the New York State Water Supply Law, the National Environmental Policy Act, 42 USCS § 4321, et seq. ("NEPA") and other federal laws. Through the accompanying Order to Show Cause, Petitioners seek a preliminary injunction enjoining all work in furtherance of the construction of the rail transloading facility in Painted Post, New York. As construction is complete, the request for an injunction relative to the same is moot.

Specifically, as to Respondent WCOR, Petitioners allege the violation of the water transport permit requirements pursuant to New York's Water Supply Law (Second Cause of Action); and the failure to obtain federal permits and federal NEPA review (Third Cause of Action). As to the latter, in Paragraphs 20 and 139 of the Verified Petition, Petitioners indicate that permits must be obtained from the Federal Surface Transportation Board ("STB") or the Federal Railroad Administration ("FRA") and that such agency "would have to engage in an environmental review pursuant to NEPA. Plaintiffs detail their allegations regarding the "impacts from the operations of the rail loading facility" as to the Village of Painted Post in

paragraphs 31-52 and at paragraphs 53-56 as to Wellsboro, Pennsylvania and the surrounding areas. The alleged impacts of the proposed rail facility cited by the Petitioners include anticipated traffic blockage and congestion, and increased noise and air contamination.

In making these arguments relative to Respondent WCOR, Petitioners ignore the federal regulatory scheme applicable to railroads engaged in interstate commerce and the scope of the express preemption provision set forth in the ICCTA. Pursuant to the express terms and the cases interpreting the ICCTA, Respondent WCOR submits that the allegations made and the relief sought by the Petitioners are untenable under applicable law for the following reasons:

1. The ICCTA permits the construction of a transload facility and related rail spurs without requiring Respondent WCOR to obtain any permits;

2. Where the STB does not exercise regulatory authority over action by a railroad, review under NEPA is not triggered;

3. The ICCTA expressly preempts any state or local permit or preclearance requirements which would interfere with rail operations;

4. The ICCTA does not permit state or local regulations or laws or private actions to address the traffic blockage and congestion and increased noise alleged by Petitioners; and

5. The ICCTA expressly preempts all remedies with respect to rail transportation under federal or state law.

STATEMENT OF FACTS

1. Respondent WCOR incorporates by reference the Statement of Facts presented by Co-Respondents in the Memorandum of Law.

2. WCOR is a class three railroad which has authorization from the Federal Surface Transportation Board to operate as a railroad in interstate commerce. The rail transload facility

in the Village of Painters Post is located on a site that has a facility which is already served by rail associated with the former Ingersoll Rand site. See, Certification of William Myles at para 6. In connection with the transloading performed in Painted Post, the only equipment or facilities that were constructed are a siding and some above ground piping to allow the water from existing pipes to be conveyed onto the rail cars in addition to installation of automated metering equipment and facilities to facilitate the pumping of the surplus water into the rail cars. Id. No additional rail lines have been laid or will be laid for the subject facility.

3. The operations of the subject rail loading facility includes the operation of a single train once a day that will travel along the rail line located on Chemung Street to a pre-existing designated interchange point. Id. at para. 2. This train is comprised of 42 empty cars which travel to the rail facility where the rail cars will be automatically filled. The 42 cars filled on the previous day are removed and travel to a site located in Wellsboro, Pennsylvania.

4. Based on the rail operations as stated herein, the two locomotives are expected to spend no more than two hours per day within the Village. As such, there will be no significant periods of idling by the locomotives. (Id. at para. 3).

5. The rail loading operations which are the subject of the Verified Petition will involve the addition of one single train per day as compared to existing rail traffic. Id. at para. 4. The subject rail line in the village has been used for decades.

6. While motor vehicle traffic may be impacted to some degree by this single operation and movement, no significant impact is anticipated.

7. The activities associated with the rail loading facility will be limited to filling rail cars with surplus water and the once a day changing out of the empty cars with the full ones. As

such, there is no significant noise impact associated with these transportation activities. Id. at para. 5.

8. WCOR did not obtain and was not required to obtain any permits for the subject transloading facility or associated operations from the FRA, the Surface Transportation Board or any other agency given that WCOR will be using an existing rail-served facility on an existing rail line.

LEGAL ARGUMENT

I. WHEN CONGRESS DRAFTED THE ICCTA, IT PLACED EXCLUSIVE REGULATORY AUTHORITY WITH THE SURFACE TRANSPORTATION BOARD AND PREEMPTED ALL OTHER FEDERAL, STATE, AND LOCAL LAWS TO THE EXTENT THAT SUCH LAWS INTERFERE WITH RAIL OPERATIONS INCLUDING THE RELIEF SOUGHT BY PETITIONERS.

A. The Scope Of The ICCTA Express Preemption Provision Is Sweeping.

The express preemption provision in the Interstate Commerce Commission Termination Act of 1995, 49 USC §§ 701 to 707 and §§ 10101 to 16106 ("ICCTA") is broad, clear, and sweeping. To fully understand the pervasive preemption Congress intended, WCOR submits that it is useful to examine the ICCTA's predecessor statute, the Interstate Commerce Act ("ICA"). The ICCTA is merely the latest statute expressing Congress's intent to comprehensively regulate interstate rail commerce. The ICA is "among the most pervasive and comprehensive federal regulatory schemes." See, City of Creede Co. - Petition for Declaratory Order, 2005 STB LEXIS 486 *9 STB Finance Docket No. [service date May 3, 2005][1], citing

[1] Decisions of the federal Surface Transportation Board are available on its website at http://www.stb.dot.gov.

Chicago & N.W. Transp. Co. v Kalo Brick and Tile Co., 450 US 311, 318 [1981]. A copy of the City of Creede decision is attached as Exhibit "1" hereto.

Congress broadened the preemption clause in the ICA in 1995 with the enactment of the ICCTA. Section 10501(b) of the ICCTA provides in relevant part:

> (b) The jurisdiction of the Board over--
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. (Emphasis added.)

Further, 49 USC §10101 contains an express statement of the policies underlying the ICCTA. That section specifically provides, in part,

> §10101 Rail Transportation Policy
>
> In regulating the railroad industry, it is the policy of the United States Government. . . .
>
> (7) to reduce regulatory barriers to entry into and exit from the industry. . .

In one case, the STB noted that "in summarizing the court and Surface Transportation precedents, the courts observed that `it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations than that contained in Section 10501(b).'" See, City of Creede, supra, citing CSX Transp., Inc. v Georgia Pub. Serv. Comm., 944 F Supp 1573, 1581-1584 [ND Ga 1996]. The Supreme Court of New York,

Appellate Division, also has recognized the broad preemption provisions in the ICCTA and noted:

> It has been observed that "the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities" (*Green Mtn. R.R. Corp. v Vermont*, *supra* at 645), and "[c]ourts that have considered the ICCTA preemption clause have found its language to be clear and broad" (*Wisconsin Cent. Ltd. v City of Marshfield*, 160 F Supp 2d 1009, 1013 [2000]; *see Pejepscot Indus. Park, Inc. v Maine Cent. R. Co.*, 215 F3d 195, 202 [2000]).

Matter of Metropolitan Transp. Auth., 32 AD 3d 943, 945- 946, 823 NYS 2d 88, 91, [2d Dept 2006].

1. The Proposed Facility Qualifies For Preemption Because It Clearly Is "Transportation By Rail Carrier" As Defined In The ICCTA.

In order for a given facility to fall within the purview of federal preemption, the facility must fall within the parameters of "transportation by rail carrier." 49 USC §10502. Whether a given facility qualifies as transportation by rail carrier is a two-part inquiry. First, the facility must be involved in transportation, and second, the transportation must be by rail carrier. It is plain that the proposed facility at issue in this case, when fully operational, will constitute "transportation by rail carrier."

It is well settled that the activity at facilities such as the one at issue here is "transportation." The ICCTA defines transportation as follows:

> "transportation" includes--
>
> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing,

> ventilation, storage, handling, and interchange of passengers and property . . . (emphasis added)

49 USC §10102(9). Under this expansive definition of transportation, ICCTA precludes state and local regulation of a wide range of activities. For example, states and localities may not exercise control over a railroad's operation of a passing track; Wisconsin Central, Ltd. v City of Marshfield, 160 F Supp 2d 1009, 1013-14 [WD Wis 2000]; over the maintenance of railroad business offices, See Burlington Northern Santa Fe Corp. v Anderson, 959 F Supp 1288, 1295 [D Mont 1997]; CSX Transportation, Inc. v Georgia Pub. Serv. Comm'n, 944 F Supp 1573, 1582 [ND Ga 1996]; over the construction of transloading and storage facilities, see Green Mountain R.R. Corp. v Vermont, 404 F3d 638, 640 [2d Cir 2005], cert denied 546 US 977 [2005]; or over the demolition of buildings at a rail yard. See CSX Transp., Inc. v City of Plymouth, 92 F Supp 2d 643, 658 [ED Mich 2000], aff'd 283 F3d 812 [6th Cir 2002].

It is well-established that transload operations and transload facilities are "transportation" within the meaning of ICCTA. See, e.g., Green Mountain, 404 F3d at 640 (ICCTA preemption applied to salt shed at transload facility as "certainly, the plain language grants the Transportation Board wide authority over the transloading and storage facilities."); Soo Line R.R. Co. v City of Minneapolis, 38 F Supp 2d 1096, 1101 [D Minn 1998] (ICCTA preempts any state or local regulatory authority over "the construction, development, and operation of [a] proposed bulk transfer facility"); Hi Tech Trans, LLC - Petition for Declaratory Order, 2003 STB LEXIS 475 [service date Aug. 14, 2003]. ("There is no dispute that Hi Tech's transloading activities are within the broad definition of transportation."); Joint Petition for Declaratory Order - Boston & Maine Corp. & Town of Ayer, MA, 2001 STB LEXIS 435 [service date Apr. 30, 2001] (automobile unloading facilities was rail transportation facility); and Green Mountain

Railroad Corporation - Petition for Declaratory Order, 2002 STB LEXIS 322 [service date May 28, 2002] (cement transloading facility).

The proposed transload facility is a rail facility that constitutes transportation under ICCTA. 49 USC §10501(b)(1). WCOR's proposed facility meets any reasonable construction of this definition. As a service necessary to the eventual interstate rail movement, WCOR provides facilities and equipment to transfer water onto railcars, and then ship the same via railcars to Pennsylvania. WCOR's transload facility is an essential part of its interstate rail transportation network, and is certainly "related to the movement of ... property ... by rail." 49 USC §10102(9)(A). The transfer of water onto railcars at the transload facility for transport to Pennsylvania likewise is part of WCOR's "receipt, ... handling, and interchange of ... property." 49 USC §10102(9)(B).

A recent decision by the United States Court of Appeals for the Fifth Circuit bears striking resemblance to the rail transloading operations which are the subject of the Petitioners' Verified Petition. See, Texas Central Business Lines Corporation v City of Midlothian, 669 F3d 525 [5th Cir 2012]. The Texas Central case involved the movement of sand in interstate commerce. In that case, the sand arrived in railcars traveling on Interstate Railroad lines operated by Union Pacific Railroad. Once the railcars arrived at the silo project, the sand exited into a pit through the ports on the cars, was elevated and later offloaded onto trucks that carried sand to natural-gas wells at distant locations. In determining that the subject transloading qualifies as "rail transportation" the 5th Circuit noted

> This activity satisfies the coverage of the statute as it concerns the "elevation" and also the "storage, handling, and interchange of ... property" involving the movement of a locomotive. Id. § 10102(9). Though authority is hardly necessary for this indisputable point, authority is available. See, e.g., Norfolk So. Ry. Co. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010);

> N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 248 (3d Cir. 2007); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005).

669 F3d at 530. Significantly, the 5th Circuit summarized its decision as follows

> As noted, this case involves a category of industrial activity known as transloading. Of preliminary concern then, is whether the statutory term "transportation" encompasses transloading. This inquiry need not detain us long.
>
> Id.

The Second Circuit similarly has recognized that the construction of transloading facilities on railroad property are within STB's exclusive jurisdiction because they are "integral to the railroads operation". See, Coastal Distribution, LLC v The Town of Babylon, 216 Fed Appx 97, 101 [2nd Cir 2007].

It is equally clear that WCOR is a "rail carrier". In order to qualify as a rail carrier, an entity must first qualify as a railroad.[2] The ICCTA defines the term "railroad" as follows:

> (6) "railroad" includes--
> (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

49 USC §10102(6). Again, WCOR obviously is a "railroad" within the broad meaning the ICCTA imparts upon the term. The WCOR holds a certificate of public convenience and necessity ("certificate") issued by the STB. Under the authority granted by the certificate,

---

[2] It is not actually clear that it is necessary for an entity to be a "railroad" in order to be a "rail carrier." See, e.g., New Jersey Rail Carrier LLC--Acquisition and Operation Exemption--Former Columbia Terminals, Kearny, NJ, 2004 STB LEXIS 40 [service date January 16, 2004]. Nevertheless, WCOR is clearly a railroad, and therefore it is that much easier to conclude that it is in fact a "rail carrier."

WCOR transports freight (other than the water which is the subject of this action) by rail in interstate commerce throughout New York and Pennsylvania.

Because WCOR is a railroad offering common carrier service to the public it is also clear that WCOR is a "rail carrier" within the meaning prescribed by the ICCTA. The ICCTA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation . . ." 49 USC §10102(5). WCOR holds itself out as a common carrier to the public, and will do so at the facility. WCOR will accept the freight of any and all customers who are properly licensed, and is in fact legally obligated to do so. (See, 49 USCS §11101 "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part [49 USCS §§ 10101 et seq.] shall provide the transportation or service on reasonable request.) Therefore, because WCOR proposes to offer "transportation by rail carrier" at the facility, WCOR qualifies for preemption under 49 USC §10502.

B. Contrary To Petitioners' Petition, No Permits From The STB Or The FRA Are Required For Construction And Operation Of The Rail Transloading Facility.

Cases decided under the ICCTA have recognized that the STB does not require rail carriers to request licensing or approval from it prior to the construction of facilities. In Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, et als, 2001 STB LEXIS 670 [service date August 15, 2001], the STB noted:

> However, there is no statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets. See Nicholson v. ICC, 711 F.2d 364, 368-70 (1983), cert. denied, 464 U.S. 1056 (1984); Riverdale [*14] I. Railroads also do not require Board authority to upgrade an existing line, or to increase the level of traffic on a line, Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995) (Detroit/Wayne). ...As the court noted in Flynn, 98 F. Supp.2d at 1189-90, "There is an important distinction

> between the STB having jurisdiction over a facility [pursuant to 49 U.S.C. 10501(b)] and the STB regulating the construction of the facility . . . .

Id. at *13-15 emphasis added).

In the Flynn case cited by the STB in Friends of Aquifer, supra, the court noted

> Ancillary facilities also are not regulated by the STB. Borough of Riverdale, supra at 5. In Borough of Riverdale, the STB observed that "many rail construction projects are outside of the Board's regulating jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated or industrial team tracks." Borough of Riverdale, supra at 5. Should the STB determine that the Hauser Facility is an ancillary facility on a spur or side track, the STB may decide that while it has jurisdiction, it does not have regulatory authority over the facility. Borough of Riverdale, supra at 10 Jurisdiction over railroad facilities . . . is limited to those facilities that are a part of a railroad's ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities."

Flynn v Burlington Northern Santa Fe Corp., 98 F Supp 2d 1186, [1190 ED Wash 2000]. (emphasis added).

The Flynn case also was cited by the STB in Suffolk & Southern Rail Road LLC--Lease and Operation Exemption--Sills Road Realty, LLC, 2007 STB LEXIS 752 [service date December 20, 2007]. In that case, the STB reiterated:

> But ancillary track means track that is ancillary to the operations of the carrier that proposes to operate over it, not ancillary to some other carrier's operations. Compare Ohio & Morenci RR. Acquisition, 221 I.C.C. 558, 560 (1937) [*12] (license needed for ancillary "switching" track because of the physical separation of the tracks in question from other tracks of the railroad applicant) n1 with Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (railroads do not require authority to build facilities ancillary to their railroad operations).

Id. at *11-12.

These cases make clear that the STB has jurisdiction over the subject facility and rail operations, however, the STB does not regulate (or require permits) for construction and operations at the facility.

C. When No Regulatory Authority Is Exercised By The Surface Transportation Board, NEPA Review Is Not Triggered.

Petitioners complain that permits should have been obtained from the STB and that the agency would have to engage in an environmental review pursuant to NEPA. (See, Third Cause of Action and paragraphs 20 and 139 of the Verified Petition). The STB has confirmed that no NEPA review and documentation is required in those instances where, although the STB has jurisdiction, it does not exert regulatory authority over a project. See, Friends of the Aquifer, City of Hauser, ID, Hauser Lake & Water District, et als, Id. In the Friends of the Aquifer case, the STB specifically noted

> Plaintiffs sought an injunction against BNSF proceeding with the project until we have acted and a NEPA review has been conducted. In Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp.2d 1186, 1190-93 (E.D. Wash. 2000) (Flynn), the court granted BNSF's motion to dismiss. The court noted (id. at 1193) that, "Plaintiffs appear to have a viable opportunity to raise their environmental concern regarding the Hauser Facility before the STB." But the court expressly found that we "would be obligated to consider NEPA and possibly require [environmental documentation] regarding the Hauser facility only if [we] exerted [our] regulatory authority over the project." Id. See also id. at 1189-90. Petitioners then filed this declaratory order request.

Id. at *5-6. (emphasis added).

Essentially, because there is no requirement for a license or a permit from the STB for construction and operation of the subject transload facility, and no regulatory authority is thereby exercised by the STB, NEPA review is not triggered.

Although it may appear that a loophole may exist, this conclusion that NEPA review is not triggered by the construction of a transload facility is supported by the language set forth in the Code of Federal Regulations. 49 CFR 1105.1 sets forth the purpose relative to the procedures for implementation of environmental laws. That section provides

> These rules are designed to assure adequate consideration of environmental and energy factors in the Board's decision making process pursuant to the National Environmental Policy Act, 42 U.S.C. 4332; the Energy Policy and Conservation Act, 42 U.S.C. 6362(b); and related laws, including the National Historic Preservation Act, 16 U.S.C. 470 F, the Coastal Zone Management Act, 16 U.S.C. 1451, and the Endangered Species Act, 16 U.S.C. 1531.

The Supreme Court has made clear that the requirements of NEPA are essentially procedural. See, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail, Inc. and Consolidated Rail Corporation, 1998 STB LEXIS 1559 [service date July 23, 1998] citing Marsh v Oregon Natural Resources Council, 490 US 360, 371 [1989]. It also should be noted that in any event, only "major federal actions require review under NEPA". Union Pacific Railroad Company - Abandonment Exemption - In Bexar County, TX; Alamo Golf Coast Railroad Company - Continuance Exemption - In Bexar County, TX, 2007 STB LEXIS 58 [service date February 13, 2007] and Mid States Coalition for Progress v Surface Transportation Board, 345 F3d 520 [8th Cir 2003] .

In any event, as noted by Co-Respondents, Petitioners do not have standing to allege a violation of NEPA as set forth in the Third Cause of Action. For example, in Flynn v Burlington

Northern Santa Fe Corporation, 98 F Supp 2d 1186 [ED Wash 2000], the plaintiffs were individuals who relied on an aquifer for water. They sought a declaratory judgment seeking to compel the defendant railroad to obtain a permit from the Surface Transportation Board for the construction of a proposed railroad refueling facility as the Plaintiffs alleged a potential environmental contamination of the aquifer. The court in the Flynn case noted that the NEPA is a procedural statue that does not provide a private right of action. Id. at 20-21, citing Sierra Club v Penfold, 857 F2d 1307, 1315 [9th Cir 1988]. The court in Flynn also noted the fundamental principle that the STB "would be obligated to consider NEPA and possibly require an environmental impact statement regarding the (Hauser Facility) only if it exerted its regulatory authority over the project". Id. at 1193 citing, 49 CFR 1105.1.

D. Once It Is Established That The Facility Constitutes "Transportation By A Rail Carrier," Any Permitting Or Pre-Clearance Requirement Imposed By The State Of New York Or Local Regulations Would Be Preempted.

Petitioners allege the unlawful failures of the Respondents to comply with the state Environmental Quality Review Act, Environmental Conservation Law, Article 8 ("SEQRA") in the First Cause of Action and the state Water Supply Law, Environmental Conservation Law, Article 15, Title 15, in the Second Cause of Action. Each of these state laws have pre-clearance requirements. Pre-clearance or permitting requirements are exactly the type of State action sought to be preempted by the ICCTA.

The STB noted that "the courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. See, CSX Transp. Inc. - Petition for Declaratory Order 2005 STB LEXIS 675 [service date May 3, 2005], supra. In that case, the court noted that:

> The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the board has authorized.
>
> Second, there can be no state or local regulations of matters directly regulated by the board -- such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.
>
> In other words, state and local laws that fall within one of the precluded categories are a per se unreasonable interference with interstate commerce. For such cases, once the parties have presented enough evidence to determine that an action falls within one of those categories, no further factual inquiry is needed.

Id. at *5-6 (Emphasis added) (citations omitted). A copy is attached hereto as Exhibit "2". Therefore, any pre-clearance or permitting requirements in the state and local laws and regulations are clearly preempted pursuant to Section 10501(b) of the ICCTA as being per se unreasonable restraints on interstate commerce.

The New Jersey Supreme Court decision in Village of Ridgefield Park is consistent with this analysis. In that case, the Court accepted the STB determination in the companion case of Borough of Riverdale Petition for Declaratory Order, the New York Susquehanna & West. Ry. Corp., 1999 STB LEXIS 531 [service date Sept. 10, 1999]. A copy is attached hereto as Exhibit "3". See Village of Ridgefield Park v New York Susquehanna & West. Ry., 163 NJ 446 [2000]. In the Riverdale case, the STB determined that state and local permitting requirements (i.e. zoning, land use and construction) "are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations." Borough of Riverdale, 1999 STB LEXIS 531 at *14. The STB also recognized, however, that "localities retain certain police powers to protect health and safety" so long as their actions do not "have the effect of foreclosing or

restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce." Id. at *19.

The Courts and the STB have applied similar fundamental principles when each has determined that it appropriate to preempt state and local permitting processes related to interstate rail commerce. See, Cities of Auburn and Kent Petition for Declaratory Order, 1997 STB LEXIS 143 [service date July 1, 1997], aff'd City of Auburn v United States Gov't, 154 F3d 1025 [9th Cir 1998], cert denied 527 US 1022 [1999] (copy of STB decision attached as Exhibit "4") and Green Mountain R.R. Corp. v Vermont, supra 404 F3d at 643-644. The STB and the Court explained that permitting processes confer the power on the governing body to delay or deny authorization and prevent construction. Id. In the Cities of Auburn and Kent matter, the STB explained that the local government "if allowed to subject the railroad to the permitting process, could delay or deny (the railroad) authority to undertake the improvements to the line and thus could, in effect, prevent (the railroad) from operating the line." See, Cities of Auburn and Kent, supra, STB decision at *5. The Superior Court of New Jersey, Appellate Division, also has recognized that "preclearance permitting requirements . . . are preempted." See, Town of Kearny, et al. v New Jersey Rail Carriers, LLC, et als., 2005 NJ Super Unpub LEXIS 466 [App Div Sept 28, 2005 No. A-1304-04T5]. The STB also has unequivocally stated that ". . .courts have made clear that any state or local permitting or pre-clearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted." CSX Transportation, Inc. - Petition for Declaratory Order, 2005 STB LEXIS 134 [service date March 14, 2005]. A copy of that decision is attached as Exhibit 5 hereto.

The ICCTA also prohibits any state and local regulation that would dictate the design or construction of transload facilities. See, e.g., Green Mountain, 404 F3d at 640-41 (state requirements on size, color, and location of salt storage shed at transload facility were preempted); Canadian National Rwy. Co. v City of Rockwood, 2005 US Dist LEXIS 40131 at *4 [ED Mich June 1, 2005 No. 04-40323] (regulation requiring paved roads and enclosing buildings at C&D transload facility preempted); Soo Line, 38 F Supp 2d at 1098 (requirement of demolition permits for construction at rail transload facility preempted); Norfolk So. Ry. Co. v City of Austell, Ga., 1997 US Dist LEXIS 17236, at *4 [ND Ga Aug. 18, 1997 No. Civ. A1:97-CV-1018] (attempt to regulate construction of intermodal transload facility preempted); Town of Ayer, 2001 STB LEXIS 435 [service date May 1, 2001] (regulation requiring preapproval of construction plan for automobile transload facility preempted).

Even where a state or local regulation does not explicitly prescribe a particular design or construction, ICCTA preempts all "state and local regulation ... used to veto or unreasonably interfere with railroad operations." Town of Ayer, 2001 STB LEXIS 435 at *17. Even if a state requirement could have no impact on rail operations in some situations, the requirement is nevertheless preempted if it has the potential to restrain a rail carrier's construction or operations. See Green Mountain, 404 F3d at 644. Therefore, the question is whether the state requirements "stand as an obstacle to a carrier's ability to construct facilities or conduct operations." City of Rockwood, 2005 US Dist LEXIS 40131 at *19.

The purportedly "environmental" purpose of the state regulations under SEQRA and the Water Supply Law does not change the analysis. In the first place, preemption is a question of "the language and congressional intent of the specific federal statute"; it does not depend upon "the nature of the state regulation." City of Auburn v United States, 154 F3d 1025, 1031 [9th Cir.

1998]. The broad language of ICCTA leaves no room for the kind of regulation that New York has tried to impose -- regardless of the state's alleged justification. In rejecting a similar attempt to subject railroads to "environmental" regulation, the Ninth Circuit has recognized that there is little difference between the effect of an "environmental" regulation and an "economic" regulation. Id. ("[I]f local authorities have the ability to impose `environmental' permitting regulations on the railroad, such power will in fact amount to `economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.").

The Courts and the STB have acknowledged that purportedly environmental regulation is preempted. See, Green Mountain R.R. Corp. v Vermont, supra (state application of its environmental regulation to the railroad plans are preempted); CSX Transportation, Inc. - Petition for Declaratory Order, 2005 STB LEXIS 134 [service date March 14, 2005] (any state or local permitting or pre-clearance requirements of any kind, including environmental permitting requirements, that would affect rail operations are preempted."); North San Diego County Transit Dev. Bd. Petition for Declaratory Order, 2002 STB LEXIS 490 [service date Aug. 21, 2002] (city is prohibited from requiring the railroad to obtain an environmental permit in order to build a passing track); and Vermont Railway, Inc. Petition for Declaratory Order, 2005 STB LEXIS 1 [service date January 4, 2005] (Vermont's environmental statute which require separate permits are preempted by the STB's exclusive jurisdiction). A copy of the latter STB decision is attached as Exhibit "6".

Particularly compelling to Respondents' position in this case is the determination that the ICCTA preempts the California (state) Environmental Quality Act or "CEQA". See, City of Auburn, 154 F3d at 1031; City of Encinitas v N. San Diego County Transit Dev. Bd., 2002 US Dist. LEXIS 28531 at *5 [SD Cal Jan. 14, 2002 No. 01-cv-1734-J(AJB)], and Desertxpress

Enters., LLC - Petition for Declaratory Order, 2007 STB LEXIS 343, *3 [service date June 27, 2007].

E. Plaintiffs Complaints Concerning Anticipated Traffic Blockage And Congestion In Addition To Increased Noise And Air Contamination Cannot Be Addressed Through The Application Of State Or Local Regulations Or Plaintiffs' Private Action.

In paragraphs 31-56 of the Verified Petition, Plaintiffs complain of anticipated traffic blockage and related issues in addition to increased noise and air contamination. These issues cannot be addressed through state or local regulation or private action and do not otherwise qualify for the limited exception to the ICCTA preemption for certain police powers.

Petitioners do not cite to specific state or local violations relative to their allegations of anticipated traffic blockage and increased noise and air contamination attributable to the subject rail operations. Assuming that Petitioners present these allegations by way of common law claims by private parties, such claims should not be countenanced by the court. Several federal circuit and district courts which have consistently held that the ICCTA preempts state common law claims with respect to railroad operations. See, e.g., Friberg v Kansas City S. Ry. Co., 267 F3d 439, 444 [5th Cir. 2001] (ICCTA preempts claims of negligence and negligence per se with respect to railroad's alleged road blockages); Pejepscot Industrial Park, Inc. v Maine Central Railroad Co., 297 F Supp 2d 326, 334 [D Maine 2003)] (state-law tortious interference claim preempted by ICCTA); Guckenberg v Wisconsin Cent. Ltd., 178 F Supp 2d 954, 958 [ED Wis 2001] (state law nuisance claim with respect to railway traffic is preempted); Rushing v Kansas City S. Ry. Co., 194 F Supp 2d 493, 500-01 [SD Miss 2001] (ICCTA preempts state law nuisance and negligence claims regarding noise and vibrations from railroad's operation of switchyard); South Dakota R.R. Auth. v Burlington N. & Santa Fe Ry. Co., 2003 DSD 12, 280 F

Supp 2d 919, 934-35 [DSD 2003] (state law claims for punitive damages and tortious interference are preempted by ICCTA); Maynard v CSX Transp., Inc., 360 F Supp. 2d 836 [ED Ky 2004] (Plaintiff property owners' state common law claims for nuisance and denial of ingress and egress to their places of residence against defendant railroad were preempted); and Pace v CSX Transp., Inc., 613 F3d 1066 [11th Cir 2010] (Plaintiff landowners state law nuisance claims alleging that the railroad's operation of a side track adjacent to plaintiffs' property caused an increase in noise and smoke due to the traffic on the track and made their land virtually unusable was deemed preempted by the ICCTA).

In one case where the private Plaintiffs asserted, inter alia, a nuisance claim, the court indicated that state nuisance laws continue to apply to railroads. See, Fayard v Northeast Vehicle Servs., LLC, 533 F3d 42 [1st Cir 2008]. The court further noted, however, that "specific applications (of state nuisance laws) may be preempted--for example, because the specific state claim is expressly preempted by federal law, e.g., Noise Control Act of 1972, 42 USC § 4916 et seq. (2000); Balt. & Ohio R.R. v Oberly, 837 F2d 108 [3d Cir 1988], or implicitly preempted because it interferes with interstate commerce or federal regulation." (citations omitted). In fact, in the Fayard case, the Court acknowledged that compliance with the conditions sought to be imposed by the Plaintiffs as to hours, noise, lighting and the like would make rail operations impossible and thus, arguably would interfere directly with operations that have been authorized by the Board under the ICCTA. 49 USC § 10704(a)(1). That matter was ultimately remanded due to lack of a federal cause of action.

To the extent that Petitioners' complaints relative to traffic issues and increased noise and contamination are premised upon state or local regulations, such claims similarly would be deemed preempted to the extent of interference with rail operations. For example, in Texas

Central Business Lines Corporation v City of Midlothian, 669 F3d 525 [5th Cir 2012], the plaintiff railroad sought a declaratory judgment as to whether a city's ordinances were preempted by the ICCTA. The court determined that the city's building height restriction, embankment and road grading, and paving ordinances were preempted as to the operations at the facility. In so holding, the Court stated:

> We have held express preemption to bar a related restriction that regulated the length of time a train might occupy a road crossing. See Elam, 635 F.3d at 807 (Mississippi statute); and Friberg, 267 F.3d at 444 (Texas statute). Those cases instruct that state and local law cannot "govern a railroad's decisions in the economic realm." Elam, 635 F.3d at 807. Although we have not precisely indicated the meaning of "economic" decisions, we have held that they include decisions "pertaining to train length, speed or scheduling." Friberg, 267 F.3d at 444. A city regulation which dictates the construction design and layout of railroad tracks would frustrate economic decision making.

Id. at 533. (emphasis added).

In the Texas Central case, supra, the Fifth Circuit relied upon its earlier decision in Friberg v Kansas City Southern Railway, 267 F3d 439 [5th Cir 2001]. In the Friberg case, the 5th Circuit had determined that the Texas "anti-blocking" statute was preempted. The "Texas Anti-Blocking Statute" prohibited railroad officers, agents, servants or receivers from willfully allowing a standing train to block a street, highway or railroad crossing for more than five minutes. In finding preemption, the court noted that:

> the plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent. We cannot accept the trial court's reasoning that the Texas Anti-Blocking Statute is a criminal provision that does not reach into the area of economic regulation of railroads. Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains, with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty.

Id. at 443.

Similarly, in CSX Transportation, Inc. v City of Plymouth, 283 F3d 812 [6th Cir 2002], in determining that a Michigan statute was preempted as it would force a railroad to modify the length of its trains, the court recognized a decision of the Supreme Court which "long ago held that state regulation of train length violates the Commerce Clause". Id. at 817 citing S. Pac. Co. v Arizona, 325 US 761 [1945] (holding that the safety benefits of limiting the length of trains is outweighed by the resultant burden upon interstate commerce).

Any attempts by Petitioners to address anticipated increased noise from the rail operations is governed by federal law. 42 USC 4916 provides:

> c) State and local standards and controls.
> (1) Subject to paragraph (2) but notwithstanding any other provision of this Act, 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.
> (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 is not in conflict with regulations promulgated under this section.

In fact, 49 CFR 222.1 sets forth the purpose of that certain set of federal regulations which "provide for safety at public highway-rail grade crossings by requiring locomotive horn use at public highway-rail grade crossings except in quiet zones established and maintained in

accordance with this part." See, 49 CFR 222.1 through 222.59 which address the use of horns by railroads and "quiet zones". Thus, it is submitted that any allegation of "noise issues" should be preempted as Petitioners do not even suggest that they have consulted with Secretary of Transportation for an exception to the prohibition against noise emission standards pursuant to section (c)(2) above.

1. The State Regulations Do Not Otherwise Qualify For The Limited Exception To The ICCTA Preemption For Certain State Police Powers.

Provisions of state and local laws affecting development (i.e. other than pre-clearance or permitting requirements which are per se preempted) must be reviewed on an individual basis to determine their validity as applied to railroad operations under the standards set forth herein. It is important to review the cases which culminated in the decision of the Supreme Court of New Jersey which addressed the limited exception to preemption for certain police powers. See, Village of Ridgefield Park v New York, Susquehanna & Western Railroad, 163 NJ 446 [2000]. Essentially, this exception recognizes that "localities retain certain police powers to protect health and safety" so long as their actions do not "have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce." See, Borough of Riverdale Petition for Declaratory Order, 1999 STB LEXIS 531 at *19 [service date September 10, 1999].

In the Riverdale and Ridgefield Park cases, the STB found the challenged building codes, zoning and environmental regulations were preempted, and further noted that "even health and safety regulation is preempted where Congress intended to preempt all state and local law." Borough of Riverdale Petition for Declaratory Order, 1999 STB LEXIS at *20 & n. 16 [service date September 10, 1999]. The STB indicated that, although it could not provide a specific

opinion without more information, in some instances rail carriers might be required to comply with certain non-discriminatory electrical, fire, and plumbing codes, so long as such regulations do not unduly burden rail transportation and do not require pre-clearance. Id. at *14. Later, the New Jersey Supreme Court relied upon the STB's Riverdale opinion to affirm an Appellate Division decision finding similar local regulations preempted by ICCTA. Village of Ridgefield Park v NYS&W, 163 NJ 446 [2000].

Expanding upon dicta in the STB's Riverdale decision, the New Jersey Supreme Court also narrowed the scope of preemption found by the lower court, finding that local regulators could access the rail facility for purposes of inspection, and could enforce some generally applicable fire, plumbing, health, and safety regulations, so long as they did not unduly burden rail operations or interfere with interstate commerce. Id.; but see Engine Manufacturers Ass'n v South Coast Air Quality Management Dist., 541 US 246, 256 [2004] (courts may not read into the unconditional words of a federal preemption statute an exception for state regulations). Ridgefield Park cautioned regulators to act pragmatically in attempting to apply local regulations to railroad facilities, because "compliance with all [regulations] may be impractical, and may not be are intended to be, environmental regulations to be applied to railroads and to rail transportation. See Id.

The decisions that suggest ICCTA may allow some incidental state regulation of transportation by rail carriers all make clear that such regulation may not impose an undue burden on rail operations or interstate commerce. See, e.g., Borough of Riverdale, 1999 STB LEXIS at *19 [service date September 10, 1999]. Granting Plaintiffs the requested relief would effectively halt WCOR's transportation of water in interstate commerce. It is difficult to imagine a greater "burden" on rail transportation than an order stopping that transportation entirely.

It is further submitted that the STB has severely limited the "police powers" exemption to ICCTA preemption. For example, the classic case of the exercise of a state police power was evident in the enactment by the District of Columbia of the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, which sought to govern the transportation of hazardous materials moving by rail through the District of Columbia. See, CSX Transportation, Inc. - Petition for Declaratory Order, 2005 STB LEXIS 134 [service date March 14, 2005]. Notwithstanding that the District of Columbia maintained that "its law was enacted to protect its citizens from a potential terrorist attack on a train carrying hazardous materials, and therefore is an exercise of the District's police powers," the STB issued a declaratory order that the District of Columbia Act was preempted by the ICCTA. In so doing, the STB noted that:

> states or municipalities are not free to impose any requirements that they wish on a railroad in the name of police power. They cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce.

Id. Importantly, the STB also noted that the ICCTA legislative history makes clear that states may exercise their police power only to the extent that the use of such police power does not unreasonably interfere with rail transportation.

F. The Issuance Of An Injunction Against WCOR's Rail Operations Expressly Is Precluded By the ICCTA.

Plaintiffs request the issuance of a preliminary injunction against all activities in furtherance of the construction and operation of the subject transloading facility. As previously stated, the construction of the facility is complete and thus, the request for an injunction as to construction is moot. In any event, fundamentally, the Petition for a preliminary injunction against all construction and rail activities is preempted and should not be countenanced by the court. As heretofore stated, a finding of preemption pursuant to the ICCTA would prohibit any

action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. The ICCTA provides that all remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. 49 USC §10501(b). Clearly, the Plaintiffs' request for cessation of the subject operations is the most blatant form of interference with rail transportation.

Generally, in order to prevail on a motion for preliminary injunctive relief, the movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Coastal Distrib., LLC v Town of Babylon, 2005 US Dist. LEXIS 40795 [ED NY July 15, 2005, No. cv 05-2032 (JS) (ETB)] modified on other grounds, 216 Fed Appx 97 [2nd Cir 2007]. As heretofore stated. WCOR respectfully submits that it has demonstrated the likelihood of success on the merits of its claim that Plaintiffs claims are barred due to the preemption provisions under the ICCTA.

In the opinion of the United States District Court for the Eastern District of New York in the Coastal Distribution, LLC, case, supra, Plaintiffs, a railway and a contractor, sued defendants, a town, town officials, and landowner, seeking to enjoin the town from enforcing a stop work order against the contractor on the grounds that the Interstate Commerce Commission Termination Act (ICCTA), gave exclusive jurisdiction over rail operations to the Surface Transportation Board (STB). The Court noted that in order to prevail on their motion for a preliminary injunction, plaintiffs must not only demonstrate a likelihood of success on the

merits, but must also demonstrate irreparable harm. In concluding that the railroad would suffer irreparable injury in the event of the grant of the injunction, the District Court stated:

> Consequently, based on the loss of goodwill, future contracts and market opportunities, I conclude that both Coastal and NYA, by virtue of their co-dependency, will suffer irreparable injury unless the preliminary injunction sought here is issued. At least one other court recently faced with similar facts has come to this same conclusion. *See* Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 U.S. Dist. LEXIS 40131, 2005 WL 1349077, at *9 (E.D. Mich. June 1, 2005) (holding that, upon review of facts very similar to the instant case, "the loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of [construction and demolition debris], are inherently speculative, making these damages too difficult to calculate. Hence, these loses (sic) are also irreparable.").

Id., 2005 US Dist LEXIS at *63.

The final test in considering whether to grant preliminary injunctive relief is the relative hardship to the party in the granting of such relief. This involves a determination of whether the balance of the equities favors the grant of temporary relief to maintain the status quo. Significant to such analysis is the Congressional enactment of the broad and very specific preemption provision in the ICCTA which codifies the Congressional intent to curtail piecemeal regulation and to further centralize and streamline regulation of the railroad industry. Specifically, 49 USC §10101 announces the policies underlying the ICCTA, including the statement that it is the policy of the United States Government "to reduce regulatory barriers to entry into . . . the industry." In conclusion, the requested relief should be denied.

CONCLUSION

The subject transloading facility provides for the transportation by rail carrier of commodities in interstate commerce, and, as such, qualifies for preemption under the ICCTA. Any requirements of the State which would constitute unreasonable interference with interstate commerce are preempted. Clearly, the state application and approval requirements are

preempted and cannot be applied to the rail transloading facility. Attempts to frustrate and/or deny rail operation are expressly foreclosed by the ICCTA. As such, Respondent Wellsboro and Corning Railroad, LLC requests that its motion to dismiss and for summary judgment be granted. Further, in any event, the Plaintiffs have not met the requirements for the imposition of injunctive relief in their favor and thus, the application for an injunction should be denied.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.
Attorneys for Respondents
Wellsboro and Corning Railroad, LLC

By: _____
Joseph Zakhary

By: _____
Mary Ellen Rose

By: _____
John K. Fiorilla

DATED:

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_34376_0**

Case Title: **CITY OF CREEDE, CO--PETITION FOR DECLARATORY ORDER**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **BOARD RESPONDED TO QUESTIONS REGARDING FEDERAL PREEMPTION REFERRED TO IT BY THE FEDERAL DISTRICT COURT OF COLORADO. THE BOARD FOUND THAT THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION NEEDED THE FULL WIDTH OF ITS RIGHT-OF- WAY IN THE CITY OF CREEDE, CO (CITY), TO SAFELY AND EFFICIENTLY PROVIDE RAIL SERVICE, AND THAT THE CITY'S ZONING ORDINANCES ARE PREMEPTED UNDER 49 U.S.C. 10501(b).**

Decision Attachments

35239.pdf	29 KB
	51 KB

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Full Text of Decision

35239 SERVICE DATE – LATE RELEASE MAY 3, 2005
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34376

CITY OF CREEDE, CO–PETITION FOR DECLARATORY ORDER

Decided: May 3, 2005

This decision responds to a petition for declaratory order filed by the City of Creede, CO (City), pursuant to an order of the U.S. District Court for the District of Colorado (U.S. District Court) referring

to the Board three questions related to the issue of federal preemption of the City's zoning laws as applied to the outer portions of the railroad right-of-way (ROW) for a line of the Denver & Rio Grande Railway Historical Foundation (D&RGHF), a Class III railroad.

BACKGROUND

In Union Pacific Railroad Company–Abandonment Exemption–in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 11, 1999) (May 1999 Decision), the sale of a 21.6-mile rail line known as the Creede Branch (the line) from Union Pacific Railroad Company (UP) to D&RGHF was approved pursuant to the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904 and 49 CFR 1152.27. The line, located in Rio Grande and Mineral Counties, CO, extends from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede. It historically served local mines, but had not been operated for many years prior to the sale. The portion of the line's ROW that runs through the City of Creede is 100 feet wide. D&RGHF's existing track is located on the 25-foot wide strip in the center of the ROW, which court documents refer to as the "clear space." This "clear space" accommodates the tracks and side clearance on both sides of the tracks. The remainder of the ROW consists of strips on both sides of the clear space, each 37.5 feet wide.

In a decision served on May 24, 2000, the Board denied a petition to reopen the May 1999 Decision filed by the City, finding that it had not made the showing required by 49 U.S.C. 722(c) and 49 CFR 1115.4 to reopen an administratively final proceeding. The sale of the line was also consummated on May 24, 2000.

On November 2, 2000, the City filed an action against D&RGHF in state court, seeking a declaration that a City residential zoning ordinance applied to the ROW, except for the "clear space." City of Creede v. Denver & Rio Grande Railway Historical Foundation, Dist. Ct., Mineral County, Colo., No. 00-CV-4. The case was removed to the U.S. District Court. In City of Creede v. Denver & Rio Grande Railway Historical Foundation, No. 01-RB-318 (CBS) (D. Colo. May 9, 2003), the U.S. District Court, under the doctrine of primary jurisdiction, referred the following questions to the Board:

> "A) Is the land in the outer portions of [D&RGHF's] 100 feet wide railroad [ROW] in South Creede, Colorado, each of which is 37.5 feet wide, necessary for the safe and convenient use of the central portion of the [ROW], which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?
>
> B) If the answer to question A is negative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF's] 100 feet wide railroad [ROW], each of which is 37.5 feet wide, or are these ordinances: i) federally preeempted by 49 U.S.C. §10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?
>
> C) If the answer to question A is affirmative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF's] 100 feet wide railroad [ROW], each of which is 37.5 feet wide, or are these ordinances: i) federally preeempted by 49 U.S.C. §10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?"

On July 2, 2003, the City filed a petition for declaratory order with the Board pursuant to the U.S. District Court's order referring the preemption issue to the Board. As part of its referral order, the U.S. District Court ordered the parties to submit to the Board, within 80 days, all portions of the court record relevant to the preemption issues that were referred. Pursuant to this order, on October 14, 2003,

the City submitted to the Board over 400 pages of materials (largely unrelated to the preemption issues), along with a request that the Board reopen the abandonment exemption proceeding in STB Docket No. AB-33 (Sub-No. 132X), to revoke the "OFA rights" obtained by D&RGHF. The Board treated the request as another petition to reopen the May 1999 Decision, and in a decision in STB Docket No. AB-33 (Sub-No. 132X), served on June 22, 2004 (June 2004 Decision), denied the petition. On November 5, 2004, the Concerned Citizens of Creede and Mineral County, CO, filed another petition to reopen prior decisions in the OFA proceeding. A decision on that petition is being issued today in STB Docket No. AB-33 (Sub-No. 132X).

By a decision also served on June 22, 2004, the Board instituted the instant declaratory order proceeding on the preemption issues and set a procedural schedule, which was modified in a decision served on August 19, 2004. The City filed its opening statement on August 11, 2004, D&RGHF filed its reply on September 13, 2004, and the City filed its rebuttal on October 4, 2004.

PRELIMINARY MATTER

By petition filed on September 13, 2004, the Association of American Railroads (AAR) requests leave to intervene as amicus curiae. In support of its request, AAR states that it has an interest in the outcome of this proceeding and that the Board's acceptance of AAR's amicus curiae brief will not disrupt the schedule of filings or unduly broaden the issues. According to AAR, both the City and D&RGHF have consented to AAR's filing. Because AAR has shown good cause for its intervention as amicus curiae and apparently neither party objects, AAR's petition will be granted and its amicus curiae brief will be accepted for filing.

POSITIONS OF THE PARTIES

The City, which contends that no traffic has moved over the City of Creede portion of the line since 1972 and the entire line since 1985, argues that D&RGHF has neither the capability nor the plans for providing rail service on this line. Accordingly, the City argues that the rail line in question is not an active rail line and, therefore, that it should not be protected by federal preemption. The City further alleges that D&RGHF plans to establish commercial enterprises on the ROW (including a restaurant and hotel facilities) that would be unrelated to any railroad use. (This claim was also made by the City in its original complaint before the Colorado state court, although those assertions were denied by D&RGHF in its answer.)

In its reply, D&RGHF contends that, as a matter of law, a railroad is entitled to exclusive possession of its ROW, and that, as a matter of fact, D&RGHF intends to use the full width of its ROW for rail activities. Specifically, D&RGHF states that it needs the full width of the ROW to rehabilitate the rail yard (consisting of four tracks) and a depot that currently lie within the ROW. According to D&RGHF, it plans to use this rail yard and depot for "spotting empty freight cars; delivering loaded freight cars; loading and unloading of freight shipments; storage of freight and passenger railcars; switching and staging of freight and passenger train movements; and for general railroad purposes." D&RGHF also notes that it needs the 37.5-foot strips on both sides of the track for access to the track by maintenance vehicles and personnel, as well as for the storage and marshaling of track materials used in maintenance. Finally, D&RGHF states that it is exploring the possibility of adding sidetrack facilities for the transloading of commodities from truck to rail. Based on these intended transportation uses, D&RGHF argues that local zoning laws are preempted by 49 U.S.C. 10501(b), which gives the Board exclusive jurisdiction over not only railroad operations, but also the facilities, structures, property, equipment, and services needed in conjunction with those operations. See 49 U.S.C. 10102(9).

AAR also argues that the City's zoning regulations should be found to be preempted, as a rail

carrier is presumptively entitled to full use of its ROW. AAR supports D&RGHF's position that it needs the outer portions of its ROW for rail-related activities. In addition, AAR notes that railroads often need substantial width "to maintain the track, to repair equipment, to store materials, to build access roads, to minimize property damage and personal injury from derailments, to act as a buffer against trespassers and noise, and to maintain sight lines for safe operation."

DISCUSSION AND CONCLUSIONS

Before turning to the specific questions referred by the U.S. District Court, we will address the scope of the ICC Termination Act (ICCTA) preemption, in order to assist the court.

The Scope of the ICCTA Preemption.

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims).

Although the ICA has long included a preemption clause, Congress further broadened the Act's express preemption in 1995. Section 10501(b) now expressly provides that "the jurisdiction of the Board over transportation by rail carriers" over any track that is part of the interstate rail network is "exclusive." And the term "transportation" is defined expansively in the ICA to embrace "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services relating to that movement." 49 U.S.C. 10102(9). Section 10501(b) also expressly provides that "the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" are "exclusive and preempt the remedies provided under Federal or State law." Thus, section 10501(b) does not leave room for state and local regulation of activities related to rail transportation.

As we recently noted in CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005) (CSXT), in summarizing the court and Board precedent, the courts have observed that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b). CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping. And, as particularly pertinent here, the courts have made it clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted. City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use regulation preempted); Green Mountain R.R. v. State of Vermont, No. 04-0366 (2d Cir. April 14, 2005) (Green Mountain) (preconstruction permitting of railroad transload facility necessarily preempted); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (Austell) (local zoning and land use regulations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp.2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted). Accord Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna &

Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (local zoning and land use constraints on the railroad's maintenance, use, or upgrading of its lines preempted).

The agency's broad and exclusive jurisdiction over railroad operations and facilities also has been found to prevent application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use. Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S.S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted). Accord Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment). See also CSXT (state or local power to determine how a railroad's hazardous materials traffic should be routed preempted under 49 U.S.C. 10501(b)); North San Diego County Transit Development Board—Petition for Declaratory Order, STB Finance Docket No. 34111 (STB served Aug. 21, 2002) (California Coastal Commission regulation of construction and operation of rail siding preempted).

While the section 10501(b) preemption is broad and far-reaching, there are, of course, limits. For example, section 10501(b) preemption does not apply to operations that are not part of the national rail network. Thus, application of city zoning and licensing ordinances to an aggregate distribution plant operated by a non-railroad entity has been found not to be preempted, despite the fact that the plant was located on railroad-owned property. Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (Florida East Coast) (because the railroad's involvement ended with delivery to the shipper's plant, the plant itself was not part of "rail transportation" or a rail "facility"). See also Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson County, NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (Hi Tech Trans) (no preemption for activity that is not part of "rail transportation"). Additionally, the section 10501(b) preemption does not apply to state or local actions under their retained police powers so long as they do not interfere with railroad operations or the Board's regulatory programs. See CSXT at 9-10.

The Questions Referred by the U.S. District Court

I. Initial Question.

The first question posed by the U.S. District Court is whether the outer portions of D&RGHF's ROW are "necessary for the safe and convenient use of the central portion of the ROW, which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?"

Many railroad lines have a wider ROW than might appear to be used, but that does not mean that all of the property is not needed for rail operations. As noted by D&RGHF and AAR, extra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more tracks and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. See Midland Valley R.R. v. Jarvis, 29 F.2d 539, 541

(8th Cir. 1928).

In City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served Aug. 11, 2004), we recently rejected an attempt by the City of Lincoln, NE (Lincoln), to condemn a 20-foot-wide strip in the outer portion of a railroad's 100-foot wide ROW for use as a recreational trail. In that decision, we held that, where, as here, the railroad opposes a plan to take part of a ROW and claims that the property is or will be needed for the conduct of rail operations, the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes. Finding that Lincoln had not made that showing, we concluded that the proposed taking under state eminent domain law was federally preempted.

Similarly, in this case the City has not met its burden of showing that the full width of the ROW is not, and will not be, needed for rail use. In fact, the City has not even addressed the issue. Instead, the City argues that D&RGHF will never provide rail freight service on this line. This argument is essentially a restatement of the arguments from its petition to reopen in STB Docket No. AB-33 (Sub-No. 132X) that D&RGHF had no intention of providing rail freight service when it purchased the line and that D&RGHF lacks the finances necessary to restore the line to service. The Board, however, recently rejected those very claims in the June 2004 Decision in that proceeding. There, we found that "D&RGHF's intent to operate the line has been demonstrated by its continued efforts to rehabilitate the line." We observed that "[t]he City [had offered] nothing compelling to warrant a challenge to the . . . determination of D&RGHF's financial responsibility . . . ." We will not revisit those conclusions here.

We are mindful that, at the present time, D&RGHF is not using any of the ROW for rail service, as it is still in the process of rehabilitating the line. However, as the June 2004 Decision explains, the legal status of the Creede Branch under the statute is that of an active rail line with all the rights and obligations attendant to that designation. Moreover, D&RGHF recently has cleared the line of vegetation and debris and has shored up the roadbed adjacent to a river. D&RGHF has also installed hundreds of cross-ties, rail lengths, angle bars, tie plates, and spikes; has brought the majority of the line back into gauge; has replaced three road crossings; and has installed a new crossing. There would be little incentive for D&RGHF to have taken these steps if it did not intend to operate the line.

D&RGHF has indicated that, once rehabilitation is complete, it will resume rail freight service, and that it intends to use the full width of the ROW for the conduct of rail operations. Inasmuch as the City has failed to show that this property is not now and will not likely be needed for rail uses, and the railroad has explained why it needs the full width of its ROW for current and future rail operations, we determine that the 37.5-foot wide outer portions of the ROW are necessary for railroad purposes.

II. The Remaining Preemption Question.

The U.S. District Court further asks that we determine if the outer portions of the ROW are subject to the City's zoning ordinances, which restrict use of the land to residential purposes, or if these ordinances are preempted by 49 U.S.C. 10501(b) or invalidated by the Commerce Clause of the U.S. Constitution.

To come within the Board's jurisdiction and the federal preemption provision, an activity must be both "transportation" and offered by a "rail carrier." E.g., Florida East Coast; Town of Milford, MA–Petition for Declaratory Order, STB Finance Docket No. 34444, slip op. at 2 (STB served Aug. 12, 2004) (Town of Milford). The term "transportation" is defined broadly in the ICA to expressly include property and facilities related to the movement of passengers or property by rail. See 49 U.S.C. 10102

(9)(A); Green Mountain. That term also includes all of the services related to that movement, including receipt, delivery, transfer and handling of property. See 49 U.S.C. 10102(9)(B). As discussed above, zoning ordinances have been found to be preempted on their face to the extent they apply to "transportation" by rail carriers because by their nature they could be used to deny a railroad the right to conduct its operations. E.g., City of Auburn, 154 F.3d at 1030-31; Austell; Borough of Riverdale.

Conversely, state and local laws are not preempted where the activity is not "transportation" or is not offered by a "rail carrier." For example, if the property were being used for a restaurant or hotel or some other non-transportation purposes, then there would be no preemption under section 10501(b) and the City's zoning ordinance would apply. Similarly, even if the property is being used for transportation purposes, the activity must be performed by a duly authorized rail carrier. E.g., Florida East Coast; Hi Tech Trans; Town of Milford. The center of this dispute—whether an activity is "transportation" offered by a "rail carrier"—is often a fact-specific determination.

The City argues that preemption does not apply because D&RGHF has not engaged in railroad transportation and will not engage in railroad transportation because it has neither the intent nor the capability to provide rail service on this line. In its rebuttal, the City suggests that, because D&RGHF will not be providing rail service, "the Board has no basis to appropriately exercise its jurisdiction to make any determination relating to the questions referred to the Board by the [U.S.] District Court." City's Rebuttal, filed Oct. 4, 2004, at 5. The City also asserts in its petition for declaratory order that D&RGHF plans to establish commercial enterprises on the ROW. But the City has provided no evidence to support its claim that D&RGHF plans to use any portion of the ROW for such purposes. D&RGHF states that it plans to use the outer portions of the ROW to construct a rail yard, depot, and possibly additional sidetrack—all of which are transportation purposes—and the City has not shown that D&RGHF intends to use its property otherwise.

D&RGHF is a licensed railroad that holds itself out as a common carrier and that has not sought abandonment or discontinuance authority from the Board. Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment. Atchison, Topeka & Santa Fe Ry. – Abandonment Exemption – in Lyon County, KS, Docket No. AB-52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991). And, as in City of Lincoln, the City has not met its burden of demonstrating that D&RGHF is engaging in activities that are not transportation; at this juncture, it has merely alleged that D&RGHF plans to establish commercial non-transportation enterprises along its ROW. However, regardless of whether the City has at this time shown that D&RGHF has current plans to use its ROW for non-transportation activities, the general rule articulated above will apply. Should D&RGHF engage in activities that are not considered transportation pursuant to 49 U.S.C. 10102(9), then the City's ordinance would not be preempted as to those activities whenever they should arise.

Based on this record, we find that D&RGHF's planned activities on the entire ROW are part of rail transportation and, accordingly, that the City's local zoning laws are federally preempted with respect to those activities.

Because we have found that the City's zoning laws are preempted under 49 U.S.C. 10501(b), we need not further address the second part of the court's question regarding preemption pursuant to the Constitution under the Commerce Clause.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. AAR's petition for leave to intervene as amicus curiae in this proceeding is granted.

2. This proceeding is concluded.

3. This decision is effective on its date of service.

4. A copy of this decision will be served on:

The Honorable Robert E. Blackburn
United States District Judge
United States Courthouse A741
909 19th Street
Denver, CO 80294

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_34662_0**

Case Title: **CSX TRANSPORTATION, INC.--PETITION FOR DECLARATORY ORDER**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **DENIED THE DISTRICT OF COLUMBIA'S PETITION FOR RECONSIDERATION AND THE SIERRA CLUB'S PETITION TO REOPEN THE BOARD'S DECISION SERVED MARCH 14, 2005.**

Decision Attachments

35720.pdf 36 KB

53 KB

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Full Text of Decision

35720 SERVICE DATE – LATE RELEASE MAY 3, 2005
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Decided: May 3, 2005

In a declaratory order served March 14, 2005, we concluded that 49 U.S.C. 10501(b) preempts an act of the District of Columbia (District or D.C.) that seeks to govern the transportation of hazardous materials moving by rail through the District. In this decision we deny requests for reconsideration and reopening of that decision.

BACKGROUND

In a petition filed February 7, 2005, CSX Transportation, Inc. (CSXT) requested a Board order declaring that the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the D.C. Act)—which would ban transportation of certain classes of hazardous commodities within a 2.2-mile radius of the United States Capitol Building without a permit from the D.C. Department of Transportation—is preempted by section 10501(b). We invited a response by the District, as well as comments from other interested persons. The District and the Sierra Club submitted replies opposing the petition. Comments supporting CSXT's petition were filed by the United States Department of Transportation (U.S. DOT), the Association of American Railroads, other railroad interests, shippers (including producers and users of hazardous materials), and Members of Congress.

After considering all of the submissions, we concluded that the D.C. Act is preempted by section 10501(b), based on the language of the statute and well-established precedent. We explained that, in enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed.

On March 23, 2005, the District filed a petition under 49 CFR 1115.3 for administrative reconsideration, to which CSXT replied on March 31, 2005. On April 25, 2005, the Sierra Club filed an untimely petition for reconsideration, which we will treat as a petition to reopen under 49 CFR 1115.4. CSXT replied on April 27, 2005. The District and the Sierra Club base their petitions on claims of material error in our prior decision, but, as discussed below, they have not shown such error. Therefore, the petitions for reconsideration and reopening will be denied.

DISCUSSION AND CONCLUSIONS

The District makes three broad claims in its petition for reconsideration. First, it alleges that in our decision we ignored its argument that the D.C. Act is an appropriate use of its police power, and it complains that we made factual findings without conducting an adequate factual inquiry. Second, the District maintains that in our decision we failed properly to take into account relevant precedent regarding the role of other federal statutes administered by other agencies, as well as the role of the courts in addressing preemption issues. Finally, the District argues that we failed to take into account the assertedly unique nature of the safety and security threats faced by the District. We will address each argument in turn.

1. The Types of Action at Issue Here are Categorically Preempted

The District and the Sierra Club first argue that we erred in assessing the reasonableness of the D.C. Act without conducting a full factual inquiry and without accommodating the District's police power to protect its citizens from the threat of terrorism. District Pet. at 1-3; Sierra Club Pet. at 4-6. But it was neither necessary nor appropriate to engage in either line of inquiry because the type of action precluded in the D.C. Act is wholly preempted regardless of the circumstances surrounding the action.

As discussed in our prior decision (at 7), Congress in 1995 broadened the express preemption provision of the Interstate Commerce Act to the point that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Section 10501 (b) gives the Board exclusive jurisdiction over "transportation by rail carriers," and the term "transportation" is defined by our statute, at 49 U.S.C. 10102(9), to embrace all of the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b)

expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad's traffic should be routed is preempted.

Indeed, the courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. City of Auburn v. United States, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (City of Auburn) (environmental and land use permitting categorically preempted); Green Mountain R.R. v. State of Vermont, No. 04-0366, slip op. at 13-20 (2d Cir. Apr. 14, 2005) (Green Mountain I) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)).

Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. 11321-11328); and railroad rates and service (see 49 U.S.C. 10501(b), 10701-10747, 11101-11124). Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (the Interstate Commerce Act so pervasively occupies the field of railroad governance that it completely preempts state law claims). See also Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001) (Friberg) (state statute imposing operating limitations on a railroad expressly preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted).

Both types of categorically preempted actions by a state or local body would directly conflict with exclusive federal regulation of railroads. City of Auburn, 154 F.3d at 1030-31. Accordingly, for those categories of actions, the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.

Green Mountain I, slip op. at 16 ("what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases"); City of Auburn, 154 F.3d at 1031, citing Shaw v. Delta Airlines, 463 U.S. 85, 95 (1983) (preemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language). In other words, state and local laws that fall within one of the precluded categories are a per se unreasonable interference with interstate commerce. For such cases, once the parties have presented enough evidence to determine that an action falls within one of those categories, no further factual inquiry is needed. Green Mountain I, slip op. at 20.

For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation. Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads). Thus, in Borough of Riverdale—Petition for Declar. Order—The New York Susquehanna & W. Ry., STB Finance Docket No. 33466, slip op. at 7-8 (STB served Sept. 10, 1999), cited by the District (Pet. at 3), the Board noted that whether the section 10501(b) preemption precluded application of a local requirement for a 25-foot landscaped buffer between residential zones and a transportation facility presented a fact-bound question. Similarly, in Joint Pet. for Decl. Order—Boston & Maine Corp. & Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9-13 (STB served May 1, 2001),

aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp.2d 128 (D. Mass. 2002), rev'd solely on attys' fee issue, 330 F.3d 12 (1st Cir. 2003) (Dist. Pet. at 3), the Board explained the types of measures that might be permissible—i.e., conditions requiring railroads to share their plans with the community, when they are undertaking an activity for which a non-railroad entity would require a permit, or to comply with local codes for electrical, building, fire, and plumbing.

In sum, as explained in our prior decision (at 9-10), while the states' police powers are not entirely preempted by section 10501(b)—for example, railroads can be required to comply with some health and safety rules, such as fire and electric codes if they are applied without discrimination—states are not free to impose any requirements they wish in the name of their

police power. Rather, it is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce. See, e.g., Friberg; Green Mountain I.

Here, the D.C. Act seeks to regulate when and where particular commodities can be carried by rail. In doing so, it plainly falls within the two broad types of actions that are categorically preempted by section 10501(b). To the extent that the D.C. Act would require a permit to move certain rail traffic through protected parts of the City, it is directly covered by the categorical preemption against state and local permitting processes. And to the extent that the D.C. Act would otherwise ban the specified movements, it would directly conflict with the Board's regulatory authority over rail operations, including matters such as routing over which any state action is expressly preempted by section 10501 (b). Thus, once we had enough information to determine that the D.C. Act fell within a category of action that is per se preempted, no further factual inquiry was necessary. Accordingly, the record that we had before us provided all of the information needed for us to conclude that the D.C. Act is preempted by 49 U.S.C. 10501(b).

Notwithstanding that the subject matter of the D.C. Act is clearly preempted, the District and the Sierra Club continue to argue that the ban is needed to protect safety, that CSXT could cope with the ban if it were allowed to go into effect, and that the Board should have addressed these arguments. But the issue before this Board was not whether additional safety or security measures may be needed or whether the railroad could cope with the ban. Rather, the issue was whether the District may take the actions that would occur under the D.C. Act on its own. As discussed further below, such actions can only be taken by the appropriate federal agencies.

2. Our Prior De cision Did Not Impinge On or Ignore Other Federal Statutes or Other Forums

The District and the Sierra Club argue that, in our analysis of the section 10501(b) preemption, we wrongly ignored precedent regarding the role of other relevant federal statutes and forums. Dist. Pet. at 4-7; Sierra Club Pet. at 1-4. To the contrary, our decision expressly addressed (at 9-10) the overlapping nature of the various federal statutes addressing matters of rail safety and security and the need for the various federal bodies charged with administering those statutes to coordinate and cooperate with each other as appropriate. It also discussed (at 10) the relationship between the various preemption clauses in those statutes.

As we explained (at 9), while a literal reading of section 10501(b) would suggest that it preempts

all other federal law, neither the Board nor the courts have interpreted the statute in that manner. Rather, where there are overlapping federal statutes, they are to be harmonized, with each statute given effect to the extent possible. See, e.g., Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001) (Tyrrell) (there is no "positive repugnancy" between the Interstate Commerce Act and the Federal Rail Safety Act (FRSA)). Multiple statutes can be applied in complementary fashion, including, for example, regulation of railroad safety under FRSA and the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5013 et seq. See, e.g., Tyrrell, 248 F.3d at 523 (both the Board and the Federal Railroad Administration (FRA) have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted). In Tyrrell, the court agreed with the Board's conclusion that the section 10501(b) preemption did not apply to the state action involved in that case—an Ohio track clearance regulation adopted under FRSA. But the court's decision does not suggest that particular state regulations cannot be preempted under more than one applicable federal statutory scheme.

As acknowledged in our prior decision (at 10), Congress has vested aspects of federal rail oversight in three different bodies: U.S. DOT, which includes the Research and Special Programs Administration, with regulations imposing specific requirements for hazardous materials transportation, and FRA, with primary responsibility for matters involving safety of railroad operations; the Department of Homeland Security (DHS), for transportation security matters; and this Board, with broad general jurisdiction over railroad activities conducted over the interstate rail network. And as the comments submitted by U.S. DOT in this proceeding

reflect, Congress expects each of these bodies to recognize the others' roles and expertise, and to work together, as necessary, to carry out their respective statutory responsibilities.

Significantly, the section 10501(b) preemption would not preclude either U.S. DOT or DHS from prescribing enhanced safety and security measures for specific rail routes (including the two CSXT lines that pass through the District) under the statutes they administer. Thus, contrary to the District's and the Sierra Club's suggestions (Dist. Pet. at 4-5, 7-8; Sierra Club Pet. at 1-4), our declaratory order does not usurp or interfere with the role of other federal agencies in regulating railroad safety and security and hazardous materials transportation under other federal regulatory statutes; nor does it shield CSXT from federal actions taken under those other federal statutes. Accordingly, the Sierra Club's claim (Pet. at 1, 4) that we have assessed the D.C. Act in a vacuum, or implicitly repealed FRSA, is meritless.

None of the cases cited by the District and the Sierra Club is inconsistent with our preemption analysis here. In Florida East Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001), for example, application of local zoning and licensing ordinances to an aggregate distribution plant operated by a non-railroad entity was found not to be preempted because the plant, although located on railroad property, was not railroad-owned or operated and thus was not part of railroad transportation. Here, in contrast, the rail provisions of the D.C. Act are without question directed to the operations of a railroad (CSXT). And in Iowa, Chicago & E.R.R. v. Washington County, IA, 384 F.3d 557, 561-62 (8th Cir. 2004), the court simply found that a state's traditional authority over the safety of roads and bridges at grade-separated rail/highway crossings pursuant to other statutory schemes is not preempted by section 10501(b) so long as no unreasonable burden is imposed on a railroad. The Sierra Club notes that, in CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), the Supreme Court made it clear that, under FRSA, where the federal government has failed to act, the FRSA savings clause preserves state authority to issue rail safety laws. See 49 U.S.C. 20106. But, as we stated in our prior decision

(at 5), U.S. DOT has concluded that the D.C. Act is preempted by its federal safety regime under FRSA (as well as the HMTA). U.S. DOT comments at 14. Therefore, we defer to U.S. DOT's interpretation of the statutes it administers.

Finally, it was an appropriate exercise of the Board's discretion to issue a declaratory order here, but not in Green Mountain R.R.—Petition for Decl. Order, STB Finance Docket No. 34052 (STB served May 28, 2002) (Green Mountain II). See Central Freight Lines v. ICC, 899 F.2d 413, 418-19 (5th Cir. 1990) (Central Freight) (recognizing the Board's discretion to determine when to issue a declaratory order). In short, the Board has discretion under 5 U.S.C. 554(e) as to whether to grant a request for a declaratory order, and several of its rulings in declaratory order cases have noted that preemption issues involving section 10501(b) can be decided either by the Board or the courts in the first instance. In Green Mountain II, the Board chose not to issue a declaratory order, in deference to a federal District Court before which the same matter was pending and which had made clear its desire to resolve its case without referral to the Board. Under those circumstances, the Board chose to assist the court by summarizing existing law with regard to the section 10501(b) preemption without expressing a view on the application of the law to that case. Here, while CSXT has also instituted a federal court action
with respect to the D.C. Act, its court action is not limited to the issue of the section 10501(b) preemption, and the federal District Court in the case had expressed an interest in receiving the Board's views on the application of the section 10501(b) preemption to the D.C. Act.

3. The District's Claim of Uniqueness Does Not Alter the Preemption Analysis

Finally, the District argues that it was wrong for us to suggest in our prior decision (at 11) that the D.C. Act, if allowed to stand, would likely lead to further piecemeal attempts by other localities to regulate rail shipments. The District argues that its situation is unique and that there would thus be no basis for other localities to claim that they are similarly situated. Pet. at 7-8. See also Sierra Club Pet. at 6 and Exhibit Nos. 1-11.

Although it is widely known through press reports that various other cities and states are considering such measures, our preemption analysis did not turn on whether or not the District's situation is unique or whether or not other states or municipalities might try to adopt similar measures. Rather, as explained above and in our prior decision, any permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

For all of these reasons, the District and the Sierra Club have failed to show that there was a material error in our prior decision, and we stand by our prior conclusion that the D.C. Act is preempted by section 10501(b). Accordingly, the District's petition for reconsideration and the Sierra Club's petition to reopen will be denied.

It is ordered:

1. The petitions for reconsideration and reopening are denied.

2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams

Secretary

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_33466_0**

Case Title: **BOROUGH OF RIVERDALE--PETITION FOR DECLARATORY ORDER--THE NEW YORK SUSQUEHANNA AND WESTERN RAILWAY CORPORATION**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **GRANTED THE BOROUGH'S REQUEST TO INSTITUTE A DECLARATORY ORDER AND ESTABLISHED A PROCEDURAL SCHEDULE.**

Decision Attachments

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Full Text of Decision

29023 SERVICE DATE - LATE RELEASE SEPTEMBER 10, 1999

EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33466

BOROUGH OF RIVERDALEPETITION FOR DECLARATORY ORDER

THE NEW YORK SUSQUEHANNA AND WESTERN RAILWAY CORPORATION

Decided: September 9, 1999

On September 8, 1997, the Borough of Riverdale (the Borough), a New Jersey municipal corporation, filed a petition for a declaratory order in this case. The Borough seeks a determination regarding the extent to which certain facilities constructed and operated in Riverdale by The New York, Susquehanna and Western Railway Corporation (NYSW) are covered by the federal preemption provisions contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 807 (1995) (ICCTA).

The Borough contends, among other things, that the railroad's construction of a truck terminal and corn processing plant in a residential zone in Riverdale without first obtaining approval from the municipal Planning Board raises health and safety concerns. It asks for a ruling regarding whether the facilities are subject to federal jurisdiction, and, if so, the extent to which local laws and regulations (specifically zoning ordinances) apply. NYSW did not file a reply.(1) As discussed below, we will (1) grant the Borough's request that we institute a declaratory order proceeding, (2) summarize relevant recent agency and court cases construing the ICCTA and its effect on state and local regulation, to assist the parties and the court in resolving some of the preemption questions raised in this case, and (3) establish a schedule for the submission of further pleadings by the Borough, NYSW and other interested persons. (2)

BACKGROUND

This controversy arises from the Borough's opposition to NYSW's construction and use of certain facilities within or between two residential zones of Riverdale. The facts, as represented by the Borough in the material furnished to us (its complaint and other material from the Borough's civil action seeking injunctive relief in New Jersey State court),(3) are as follows.

The facilities in question, a truck terminal, weigh station, and corn processing plant, evidently were constructed either within NYSW's right-of-way or on property that it owns adjacent to the right-of-way. The right-of-way, which is 100 feet wide, is situated on 3.59 acres within Riverdale. In addition to the right-of-way, NYSW owns a small parcel of land immediately adjacent to and west of the northernmost portion of the right-of-way, with 28 feet of frontage on the Paterson-Hamburg Turnpike. An asphalt parking area provides access to a former railroad passenger depot located within the right-of-way. The 1,080-foot portion of the right-of-way to the north is within the Riverdale central business area, while the 485-foot portion of the right-of-way to the south is between two residential zones.(4)

A water pipe installed within the right-of-way apparently has 20 or more outlets to transfer hot water to standing railroad tank cars for the purpose of heating the materials inside the tank cars to facilitate transfer of the materials to trucks. The outlets are located on the west side of the track, and there is a 20-foot wide paved area to accommodate the trucks that separates the track from the adjacent residences. The Borough is concerned about the potential for spills and malfunctions in the heat transfer process that could result in adverse environmental impacts. The Borough further states that NYSW has also established a corn processing facility that would bring 10 to 20 tanker trucks to the site per day to off-load its rail cars. These activities allegedly violate Riverdale's land use and permissive zoning ordinances as prohibited uses within this residential district.

In addition to these activities, the truck weigh station, which is located adjacent to the eastern edge of NYSW's property approximately 158 feet from where the property intersects with the Paterson-Hamburg Turnpike, allegedly poses a risk of injury to the public because of the proximity of large

tractor trailers to high tension power lines. Concern was also expressed that NYSW's construction activities may cause flooding, disrupt traffic, and produce unacceptable noise levels for the town's firehouse and library located next door.

According to the material filed by the Borough, NYSW's construction activities took place without appropriate municipal approvals and permits and have resulted in noncompliance with local ordinances.(5) The Borough states that NYSW's agents, asserting that their activities were permitted under Federal law, opened local hydrants, filled its paver machines, and paved from Hamburg Turnpike to Post Lane, thereby connecting NYSW's property to local streets and county roads. The Borough also alleges that the improvements violate the landscaping buffer regulations that require 10-foot width buffer adjacent to and parallel with any street and provide for a buffer not less than 25 feet in width for lots contiguous to any residentially zoned lot.

In the Borough's civil suit, the court, by decision entered September 7, 1996, ordered: (1) NYSW to file a Site Plan Application with the Borough's Planning Board; (2) the Borough to review the application, subject to its standard procedures, but in a way that would not inappropriately obstruct the operation of NYSW's facility; and (3) the Borough to approve the application by January 31, 1997, or report back to the court for further proceedings. The court also directed NYSW to: (1) stop further construction except for emergency measures that were to be reported to Riverdale; and (2) comply with "applicable safety, health and welfare regulations." At the same time, the court determined that NYSW is not "bound by Local Zoning regulations as to Land Use and Utilization," which the court found to be preempted by the ICCTA. The court added that the Borough "shall not use regulatory measures regarding safety, environmental or health matters as a device for getting rid of NYSW's [Riverdale facilities]." Nor, in the court's words, can the Borough "preclude or interfere with [NYSW's] operation of the facilities."(6)

DISCUSSION AND CONCLUSIONS

We will exercise our discretionary authority to institute a declaratory order proceeding pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721 to eliminate the controversy and remove uncertainty on the preemption questions raised in this case. We will express our understanding of the nature and effect of the preemption in 49 U.S.C. 10501(b) as it relates to the appropriate role of state and local regulation (including the application of local land use or zoning laws or regulations and other state and local regulation such as building codes, electrical codes, and environmental laws or regulations) regarding the construction and operation of NYSW's facilities in Riverdale.

We did not attempt to move this proceeding forward sooner because of the pendency of the "Stampede Pass" litigation.(7) Now that that litigation has concluded, we will establish in this decision a schedule for the submission of opening statements and replies by the Borough and the railroad.(8) We are providing the opportunity for further filings to ensure that we have the specific information we need to address the issues to which interested parties may seek an answer. As noted, the record consists mainly of material from a state court proceeding decided in 1996, before many of the recent Board and court decisions addressing the reach of the ICCTA preemption provisions were issued. Moreover, the record before us at this point does not reflect what has taken place in Riverdale following the issuance of the New Jersey state court's September 1996 decision.

In any event, to provide guidance, we will summarize here recent relevant agency and court decisions concerning the reach of the express statutory preemption in section 10501(b). This precedent gives us a basis, with the material provided by the Borough, to now address certain issues raised by the Riverdale case where the law has become well settled as to how preemption applies. Other issues presented in this case involving what types of state and local regulation of railroad facilities and activities may be

appropriate under the ICCTA have not yet been directly addressed by the agency or the courts. As to these types of issues, we are providing our preliminary conclusions, in light of the existing court precedent, as to how a court would likely apply the preemption provisions. Our preliminary conclusions, of course, could change depending on our understanding of the facts after we have reviewed the parties' comments, evidence and arguments. Finally, there may be additional unresolved preemption issues as to which parties believe the Board should provide clarification that involve the extent to which state and local governments may regulate a railroad's construction plans or the operation of its facilities.

I. Existing Precedent.

When it finds it necessary to do so, Congress has the authority to preempt, that is, to provide for the application of federal rather than state or local law. State and local railroad regulation has long been preempted to a significant extent. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981) (historically, the Interstate Commerce Act was recognized as "among the most pervasive and comprehensive of federal regulatory schemes.").

In 1980, Congress adopted "an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers [Rail] Act of [1980]." H.R. Rep. No. 104-311, reprinted in 1995 U.S.C.C.A.N. 807-08 (ICCTA Conference Report). In 1995, in the ICCTA, Congress broadened the express preemption, so that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b). See City of Auburn, 154 F.3d at 1029-31.

A. Court Rulings. Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track.(9) In such cases, we can provide advice about how preemption applies, but we have no direct involvement in the process. Thus, the interpretation of the preemption provisions has evolved largely through court decisions in cases outside of our direct jurisdiction and in which we were not a party.

One court that has addressed the issue concluded that zoning ordinances and local land use permit requirements are preempted by 49 U.S.C. 10501(b) where the facilities are an integral part of the railroad's interstate operations. In particular, in Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997) (Austell), the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. The court held that "a city may not . . . attempt to regulate land use and planning via local laws when Congress' intent to preempt such local laws is clear and manifest." Similarly, other courts have viewed the preemption provisions broadly. See CSX Transp., Inc. v. Georgia Public Service Com'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (Georgia) ["It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in 49 U.S.C. 10501(b)]; Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1294-95 (D. Mont. 1997) (the preemption provisions in ICCTA show an intent to occupy the entire field of regulation).(10)

B. Board Rulings. Where railroad activities have required Board approval, the Board has had occasion to address the scope of the Federal preemption law. In the Stampede Pass cases, the Board found that state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations. The

Ninth Circuit, in reviewing the matter, agreed and specifically rejected (as contrary to the statutory text and unworkable in practice) the argument that the statutory preemption in section 10501(b) is limited to state and local "economic" regulations. City of Auburn, 154 F.3d at 1029-31.(11)

At the same time, in Stampede Pass we expressed our view that not all state and local regulations that affect railroads are preempted.(12) In particular, we stated that state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.(13) We also explained that state and local agencies can play a significant role under many federal environmental statutes. We offered the following examples of state and local regulation that in our view would not be preempted:(14)

[E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Finally, in the Stampede Pass cases we noted that, where Board authorization is required, state and local governments can participate in the Board's environmental review process under NEPA and related laws. We further concluded that Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.

II. The Application of This Precedent To Riverdale's Petition.

The Riverdale petition involves construction activities that do not require our regulatory approval. Nevertheless, we can issue a declaratory order explaining how we believe those issues might be analyzed by a court with appropriate jurisdiction.

A. Local Zoning Ordinances. The Borough has specifically requested that we address whether local zoning ordinances apply to the facilities constructed by NYSW in Riverdale. Given the broad language of section 10501(b) and the recent court and agency decisions construing it, it is well settled that, as the New Jersey state court determined, the Borough can not apply its local zoning ordinances to property used for NYSW's railroad operations. The Borough suggests in its petition that NYSW should have located its transloading facilities not in Riverdale but in a nearby industrial zone and that one of NYSW's alleged zoning violations is "non-permitted use of land." But as the court found, the zoning regulations that the Borough would impose clearly could be used to defeat NYSW's maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce. As the courts have found, this is the type of interference that Congress sought to avoid in enacting section 10501(b). See Austell, at 22 (local zoning ordinance and land use permitting requirements "frustrate and conflict with Congress' policy of deregulating and rejuvenating the railroad industry"); Georgia, 944 F. Supp. at 1583.

B. Local Land Use Restrictions. Local land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. Austell; City of Auburn. Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question. In that regard, the material provided by the Borough indicates that the Borough would require a 25-foot

landscaped buffer between residential zones and NYSW's transportation facilities. As the railroad has not been involved in our proceeding, and as we know few specifics about the buffer issue, we cannot say at this time whether such a requirement, if applied in such a way as not to discriminate against railroads, would significantly interfere with NYSW's railroad operations and interstate commerce. Parties may file further information and comment on this issue.

C. Environmental and Other Public Health and Safety Issues. Similarly, recent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.(15) City of Auburn, 154 F.3d at 1029-31; Stampede Pass, slip op. at 6-7. That means that, while state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.(16) We cannot go beyond these general principles here without more information as to the particular police power issues that may be involved in this case. Parties may file further information and comment on these issues.

D. Building Codes. Given the broad language of 49 U.S.C. 10501(b) and the case law interpreting it, our preliminary view is that local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause.(17) At the same time, we believe local authorities can take actions that are necessary and appropriate to address any genuine emergency on railroad property, and that interstate railroads such as NYSW are not exempt from certain local fire, health, safety and construction regulations and inspections.

Specifically, under the law enacted by Congress, as interpreted by the courts, it appears to us that state and local entities can enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities. With regard to the kinds of inspections that are permissible on property owned or used by interstate railroads, the potential for interference depends on the nature of the action by the state or local government and the effect on rail transportation and Board remedies; we see no simple, clear line of demarcation that has been or could be drawn, except that the inspection requirements or local regulations must be applied and enforced in a non-discriminatory manner and that preclearance permitting requirements plainly are preempted. E.g., City of Auburn; Stampede Pass. Again, we cannot go beyond these general principles here without more information about particular inspection and similar requirements that may be at issue in this case. Parties may file further information and comment on these issues.

E. Other Issues As to Which Comments May Be Filed. The Borough has also raised complaints about NYSW's facilities that concern surfacing, fence height, site distance for ingress and egress, roads, train utility stations, the truck weigh station, and the truck depot. We do not have enough information to determine whether the non-discriminatory application of state or local regulation regarding those matters would unduly restrict NYSW's ability to provide transportation-related facilities and service. Parties may file further information and comment as to these matters, and any other unresolved preemption issues as to which parties believe the Board should provide clarification.

F. Non-Transportation Facilities. Finally, it should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or

subject to federal preemption. According to the Borough, NYSW has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities. See Growers Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215, 227 (1941). We cannot determine from the current record whether this facility is actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services. Accordingly, NYSW, in its opening statement, should describe the exact nature of this facility.

G. Summary. In this decision, we have (1) expressed our views on the local zoning ordinance issues raised; (2) expressed some general views and authorized the filing of additional information as to certain local land use issues; (3) expressed some general views and authorized the filing of additional information about environmental and similar issues, and about building codes; (4) authorized the filing of further information about the physical characteristics of the NYSW facilities; and (5) sought additional information about the corn processing plant. The views that the Board has expressed are based primarily on the interpretation by the courts of the statutory provisions on preemption.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by interested persons. All persons submitting comments must comply with the Board's Rules of Practice.

2. NYSW must file an opening statement by November 9, 1999

3. The Borough must file an opening statement by November 9, 1999.

4. Other interested persons may file comments by December 9, 1999.

5. NYSW and the Borough may file replies by December 29, 1999.

6. This decision, which, along with the Borough's petition (including attachments), will be served on NYSW, is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams

Secretary

1. The Borough did not include in its petition a certificate showing service on NYSW. See 49 CFR 1104.12. We will serve a copy of the Borough's petition (including attachments) and a copy of this decision on NYSW.

2. The material we have before us at this point does not permit a resolution of every one of the many preemption issues raised. We have only the Borough's initial filing, which consists principally of copies of New Jersey State court records and related documents. Nevertheless, the filing is sufficient to permit us to explain how certain preemption issues would be resolved under the statute; to support a determination that a question exists for which declaratory relief is appropriate; and to warrant institution of a declaratory order proceeding.

3. Borough of Riverdale v. NYSW, No. MRS-L-2297-96 (Superior Court of New Jersey, Law Division - Morris County) (Riverdale). The Board was not a party in that court case.

4. These residential zones evidently were established in September 1991 by Riverdale's Planning Board under its Master Plan. The boundary line between the two zones was set at the center of NYSW's right-of-way.

5. The Borough states that NYSW applied to the Morris County Soil Conservation Board for approval and that, after Morris County notified the Borough, the railroad informed the Borough that it wished to bring trailers to the site. Subsequently, a Borough engineer conducted a site inspection. The Borough then advised that the planned activities required a site plan and variances. The railroad evidently took the position that it could proceed with work construction pursuant to federal law.

6. The court also severed the Borough's complaint challenging NYSW's right to cross public roads, and transferred it to the Chancery Division of the Superior Court of New Jersey. This part of the complaint was predicated upon the theory that NYSW does not have an easement over these streets, which were termed "public rights-of-way." The complaint seeks an order directing NYSW to remove all rail and related fixtures "placed in the public domain without appropriate rights-of-way."

7. King County, WA--Petition for Declaratory Order--Burlington Northern Railroad Company--Stampede Pass Line, STB Finance Docket No. 33095 (STB served Sept. 25, 1996), clarified, Cities of Auburn and Kent, WA--Petition for Declaratory Order--Burlington Northern Railroad Company--Stampede Pass Line, STB Finance Docket No. 33200 (STB served July 2, 1997) (Stampede Pass), aff'd, City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S. Ct. 2367 (1999) (City of Auburn).

8. A notice that we are instituting this proceeding also will be published in the Federal Register.

9. See Nicholson v. ICC, 711 F.2d 364, 368-70 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984).

10. See also Georgia Pub. Serv. Comm'n v. CSX Transp. Inc., 481 S.E.2d 799, 801 (Ga. Ct. App. 1997); In re Burlington N.R.R., 545 N.W.2d 749, 751 (Neb. 1996).

11. The court explained that ". . . if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." City of Auburn, 154 F.3d at 1031. Although it recognized that some statutes limit preemption as to state and local environmental regulation, the court found preemption under provisions such as section 10501(b) to be broad. Id.

12. We also determined in Stampede Pass that section 10501(b) does not nullify the Board's own obligation to follow the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA), and related federal environmental laws in contexts where they are applicable. See 49 CFR 1105.1. Because the Board itself controls the proceedings in which it applies those requirements, there is no risk of interference with our jurisdiction over rail transportation.

13. See H.R. Conf. Rep. No. 104-422 at 167, reprinted in 1995 U.S.C.A.A.N. 850, 852 (identifying criminal law prohibitions on bribery and extortion as examples of the police powers that the Act does not preempt); Robey et al. -- Petition for Declaratory Order -- Levin et al., STB Finance Docket No. 33420 (STB served June 17, 1998).

14. Stampede Pass, slip op. at 7.

15. Railroads are required to provide adequate facilities for their traffic. Interchange of Freight at Boston Piers, 253 I.C.C. 703, 707 (1942). Moreover, an incident of the right to construct and operate a line is the right to maintain it and keep it in good operating condition. See Detroit/Wayne v. ICC, 59 F.3d 1314, 1317 (D.C. Cir. 1995). Accordingly, interfering with such activities could interfere with a railroad's right to operate its lines.

16. Notwithstanding the usual presumption to the contrary [see Shanklin v. Norfolk Southern Ry., 173 F.3d 386, 394 (6th Cir. 1999), citing Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)], even health and safety regulation is preempted where Congress intended to preempt all state and local law. As explained in City of Auburn, 154 F.3d at 1030-31, congressional intent to preempt a state or local permitting process for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it.

17. The Borough evidently seeks to require NYSW to obtain building permits for all construction activity, and a certificate of occupancy for NYSW's depot.

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_33200_0**

Case Title: **CITIES OF AUBURN AND KENT, WA--PETITION FOR DECLARATORY ORDER--BURLINGTON NORTHERN RAILROAD COMPANY--STAMPEDE PASS LINE**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **GRANTED KING COUNTY, WA. REQUEST TO INTERVENE, TREATED CITIES PETITION FOR DECLARATORY ORDER AS A PETITION FOR RECONSIDERATION OF KING COUNTY, AND IN ALL OTHER RESPECTS AS SET FORTH IN THE DECISION THE PETITION FOR RECONSIDERATION OF KING COUNTY AND THE CITIES' PETITION FOR DECLARATORY ORDER, ARE DENIED.**

Decision Attachments

21005.pdf

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SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_34364_0**

Case Title: **VERMONT RAILWAY, INC.--PETITION FOR DECLARATORY ORDER**

Decision Type: **Decision**

Deciding Body: **Director Of Proceedings**

Decision Summary

Decision Notes: **DENIED THE VERMONT RAILWAY, INC.'S PETITION FOR DECLARATORY ORDER AND DECLINED TO INSTITUTE A DECLARATORY ORDER PROCEEDING.**

Decision Attachments

34334.pdf	8 KB
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34334 SERVICE DATE – JANUARY 4, 2005
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34364

VERMONT RAILWAY, INC.–PETITION FOR DECLARATORY ORDER

Decided: January 3, 2005

Vermont Railway, Inc. (VTR), a Class III railroad, filed a petition for declaratory order requesting that a proceeding be instituted to determine that the State of Vermont (Vermont) and the City of Wallingford (Wallingford) are prohibited from requiring VTR to obtain permits or other prior approval to construct a 1,700-foot spur track and rail-to-truck salt transload facility on a 39-acre tract near Wallingford, VT. VTR is concerned that the project could be delayed or defeated under Vermont's environmental and land use statute, known as Act 250, which requires a permit for various forms of land development, or under Wallingford's zoning regulations, which require separate permits for use

approval and site plan approval. VTR argues that, under 49 U.S.C. 10501(b)(2) and 10901, such permitting requirements are preempted by, and intrude upon, the Board's exclusive jurisdiction over interstate rail operations.

Vermont and Wallingford (collectively, respondents) filed separate replies to the petition in which they contend that there is no controversy or uncertainty to resolve and, as a result, no basis for instituting a declaratory order. Respondents argue that it would be premature for the Board to issue a declaratory order, because VTR has not begun construction of the transload facility or spur track, does not have a contract with a supplier, has not applied for any permit, and does not own the land. Respondents also state that no action has been taken that would impede VTR's plans. Vermont separately argues that: (1) a proceeding is barred by sovereign immunity; (2) the proposed project is beyond the regulatory authority of the Board; and (3) the Federal Court for the District of Vermont initially held that Act 250 is not facially preempted by the ICC Termination Act (ICCTA).

PRELIMINARY MATTERS

In its petition, VTR requested the opportunity to reply to any opposition and, in accordance with that request, filed a Supplemental Petition, to which Wallingford and Vermont replied. Thereafter, VTR and Vermont filed letters and VTR filed another petition to supplement the record. Vermont replied in opposition to the petition to further supplement the record. A "reply to a reply" is normally not allowed by the Board's Rules of Practice. See 49 CFR 1104.13(c). In the interest of having a complete record and because no party will be prejudiced, however, the additional pleadings will be accepted. In both of its replies, Vermont requests that the Board hold this proceeding in abeyance until a similar case involving Green Mountain Railroad and the State of Vermont has worked its way through the court system. VTR opposes holding the proceeding in abeyance because it is concerned that this would prolong the proceeding for an undefined period of time. This decision renders Vermont's request to hold the proceeding in abeyance moot.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority–Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). However, the Board sees no reason to institute a declaratory order proceeding in this matter.

There are numerous Board and court decisions that address the scope of preemption as it relates to state permitting requirements. The Board has noted that local governments may require railroads, in advance of construction, to share their plans when the activity is one for which another entity would require a permit. See Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (Ayer), slip op. at 12 (STB served May 1, 2001). However, it is well-settled law that state and local regulation cannot be used to veto or unreasonably interfere with railroad operations (including facilities that are an integral part of the railroad's interstate operations). See Ayer and Auburn and Kent, WA — Pet. for Declar. Order — Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd, City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). It should be noted that not all state and local regulations that affect railroads are preempted; localities retain certain police powers to protect the public health and safety; and state and local regulation is permissible where it does not interfere with rail operations. For further guidance, the parties may refer to the Board decision in Green Mountain Railroad Corporation — Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002) and the United States District Court for the District of Vermont's decision specifically addressing Act 250, in Green Mountain

Railroad Corporation v. State of Vermont, et al., 1:01-cv-181 (D. Vt. Dec. 15, 2003), which is currently under review in the United States Court of Appeals for the Second Circuit, in No. 04-0366, Green Mountain Railroad Corp. v. State of Vermont.

Because the Board is not instituting a declaratory order, there is no need to address Vermont's sovereign immunity claims.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. VTR's petition for a declaratory order is denied.

2. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **FD_34662_0**

Case Title: **CSX TRANSPORTATION, INC.--PETITION FOR DECLARATORY ORDER**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **GRANTED THE PETITION OF CSX TRANSPORTATION, INC. FOR AN ORDER DECLARING THAT THE "TERRORISM PREVENTION IN HAZARDOUS MATERIALS TRANSPORTATION EMERGENCY ACT OF 2005" (THE D.C. ACT), WHICH SEEKS TO GOVERN THE TRANSPORTATION OF HAZARDOUS MATERIALS MOVING BY RAIL THROUGH THE DISTRICT OF COLUMBIA, IS FEDERALLY PREEMPTED PURSUANT TO 49 U.S.C. 10501(b).**

Decision Attachments

35599.pdf	60 KB
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Full Text of Decision

35599 SERVICE DATE - LATE RELEASE MARCH 14, 2005
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34662

CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Decided: March 14, 2005

In this proceeding, CSX Transportation, Inc. (CSXT) has petitioned the Board for an order declaring that the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the D.C. Act), which seeks to govern the transportation of hazardous materials moving by rail

through the District of Columbia (District or D.C.), is federally preempted pursuant to 49 U.S.C. 10501 (b). On February 8, 2005, the Board issued a decision inviting the District and other interested persons to file comments on CSXT's petition by February 16, 2005. The District and the Sierra Club submitted replies opposing the petition. Comments in support of CSXT's petition were filed by the United States Department of Transportation (U.S. DOT), the Association of American Railroads, other railroad interests, shippers, including producers and users of hazardous materials, and Members of Congress. Subsequent to the filing of this petition, CSXT filed a petition in the United States District Court for the District of Columbia, seeking to have the D.C. Act declared invalid, and has sought a preliminary injunction from the court to enjoin enforcement of the D.C. Act. A briefing schedule in that case has been set, and a hearing is scheduled for March 23, 2005.

the D.C. Act.

BACKGROUND

A. The D.C. Act

On February 1, 2005, the D.C. City Council passed the D.C. Act, which the Mayor signed on February 15, 2005. The D.C. Act would ban transportation of certain classes of hazardous commodities (including explosives, flammable gasses, poisonous gasses and other poisonous materials) within a 2.2-mile radius of the United States Capitol Building (the "Capitol Exclusion Zone") without a permit from the D.C. Department of Transportation (D.C. DOT). The D.C. Act also would ban the movement within that area of any rail car that is "capable of containing" such materials, thereby precluding the movement of empty hazardous materials rail cars within the Capitol Exclusion Zone without a permit from D.C. DOT. The D.C. Act provides for D.C. DOT to issue a permit for the movement of otherwise-banned commodities only if a carrier can demonstrate "that there is no practical alternative route" for the traffic.

B. CSXT's Petition

On February 7, 2005, CSXT filed a petition seeking a Board order declaring that the D.C. Act is preempted by section 10501(b). To prevent disruption to CSXT's rail service, CSXT requested that we grant expedited handling of this petition and act on its merits as soon as possible.

CSXT takes the position that the D.C. Act unreasonably burdens interstate commerce. CSXT states that enforcement of the D.C. Act could encourage other local jurisdictions to enact similar measures, and that the more extensive rerouting that would be needed to comply with the D.C. Act would merely transfer the risks associated with the transportation of hazardous materials to other cities and communities.

CSXT trains operating through the District contain both loaded cars containing hazardous materials and empty return movements of such cars. None of these movements originate or terminate within the District, and they are all interstate movements. CSXT notes that it must accept shipments of hazardous materials as part of its common carrier obligation to serve shippers upon request pursuant to 49 U.S.C. 11101(a).

The carrier further notes that a comprehensive scheme of federal regulation by U.S. DOT governs these movements. See generally, CSX Transp. Inc. v. The Public Utilities Comm'n of Ohio, 901 F.2d 497 (6th Cir. 1990); Consolidated Rail Corp. v. ICC, 646 F.2d 642, 648-49 (D.C. Cir. 1981). The regulations adopted by U.S. DOT's Research and Special Programs Administration (RSPA)

pursuant to the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5013 et seq., impose specific requirements for movement of hazardous materials. See 49 CFR Parts 171-180. The Federal Railroad Administration (FRA), has primary responsibility pursuant to the Federal Rail Safety Act (FRSA), 49 U.S.C. 20101 et seq., for matters involving safety of railroad operations, regulates railroad operations, including train speed, track and road bed conditions, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices, and drug and alcohol testing for railroad employees. See 49 CFR Parts 200-268. FRA also has promulgated comprehensive track safety standards, which prescribe, among other things, maintenance and inspection requirements and maximum speeds for track, and can restrict, where necessary for safety, the movement of hazardous materials. 49 CFR Part 213.

The railroad states that, following the terrorist attacks of September 11, 2001, CSXT worked with FRA and the Transportation Security Administration (TSA) (now part of DHS) to develop a specific security plan for the transportation of hazardous materials that was reviewed and approved by both of those agencies. In 2004, TSA undertook a comprehensive vulnerability assessment of CSXT's rail routes through the District, and CSXT is in the process of implementing certain enhanced security measures recommended by TSA. Neither TSA nor any other federal agency has directed CSXT to reroute cars of hazardous commodities away from the District altogether.

CSXT has two lines that pass through the District: CSXT's north-south main line (the I-95 Route) that runs from Jacksonville, FL, to Boston, MA, and its east-west main line (the East-West Route) from Washington, D.C., via Maryland and West Virginia, to Chicago, IL, and St. Louis, MO. In the Spring of 2004, CSXT, in consultation with federal officials, began voluntarily rerouting loaded cars carrying hazardous materials so that such cars no longer move over the I-95 Route through the District — the route that runs in close proximity to the Capitol. But the East-West Route, which is not near the Capitol, was not affected and continues to be used by CSXT for such traffic. Also, CSXT's voluntary rerouting does not apply to the movement of empty cars.

CSXT explains that the more extensive rerouting required by the D.C. Act would affect rail service around the country. According to CSXT, to avoid the District would in many cases add hundreds of miles and days of transit time to hazardous materials shipments. CSXT handles hazardous materials shipments in trains that also handle other traffic, and, accordingly, would have to delay trains at rail yards outside the District so that cars containing any of the commodities covered by the D.C. Act could be removed from the trains prior to entering the District. CSXT asserts that the additional switching operations and intermediate car handlings, and increases in the amount of dwell time spent in yards en route for cars handling hazardous materials, would add to congestion in rail yards already operating at or near capacity, could back up freight traffic on CSXT's main lines, and potentially could affect rail commuter and intercity passenger services operated over CSXT's lines in the metropolitan Washington area.

C. Replies in Opposition

In its February 16, 2005 reply, the District argues that CSXT's petition should be denied on the merits. The District maintains that its law was enacted to protect its citizens from a potential terrorist attack on a train (or truck) carrying hazardous materials, and therefore is an exercise of the District's police powers that is not preempted by section 10501(b). It also claims that section 10501(b) does not preempt the D.C. Act because the D.C. Act does not constitute direct economic regulation of railroads. The District suggests that its action may be protected from challenge under the doctrine of sovereign immunity.

The Fiscal Impact Statement attached to the enrolled original of the D.C. Act provides that "[t]he

primary impact of the legislation is to regulate the transport of hazardous materials by private organizations." Similarly, D.C. Council Members Patterson and Mendelson stated in a memorandum to D.C. Council members dated January 26, 2005, at 1, that the Act would "effectively prevent the through shipment of [hazardous materials] by rail or truck, thereby removing the risk and threat to our citizens."

Nevertheless, the District now maintains that the D.C. Act does not unreasonably burden interstate commerce. It contends that a provision of the D.C. Act that allows shipments to move if there is no practical alternative route and CSXT obtains a permit from D.C. DOT means that the Act is not a blanket prohibition of interstate commerce.

The District also argues that the Board does not have primary jurisdiction because FRA has primary responsibility for rail safety and DHS has primary jurisdiction over rail security. It contends that neither FRA nor DHS has adopted any regulations regarding the security concerns relating to the routing of hazardous materials movements, and therefore the District is free to adopt its own.

Sierra Club also opposes CSXT's petition. Sierra Club argues that the Board has no authority to address the D.C. Act because it does not constitute economic regulation. Sierra Club claims that CSXT's commerce clause arguments, as well as the carrier's preemption arguments related to the FRSA and the HMTA, should be addressed to the agencies that administer those statutes or to a federal district court.

Both Sierra Club and the District suggest that, if the Board addresses CSXT's request on the merits, further evidentiary proceedings should be conducted first.

D. Replies in Support

In comments supporting CSXT's petition, U.S. DOT presents its statutory analysis that interstate rail transportation is subject to overlapping regulatory oversight by three federal agencies—U.S. DOT, DHS, and the Board—and that, "[w]orking individually within their respective jurisdictions each has the complete authority to preempt non-Federal laws that undermine national rail uniformity" (comments at 5). U.S. DOT states that it has concluded that the D.C. Act is preempted by its safety regime under the FRSA and the HMTA, and that it interferes impermissibly with CSXT's routing decisions. Therefore, it urges the Board to find the D.C. Act to be preempted pursuant to section 10501(b), as well. U.S. DOT comments at 14.

The other commenters supporting CSXT's petition concur in CSXT's argument that the D.C. Act is preempted by section 10501(b). The commenters express concern that, if the District were successful in imposing such a restriction on interstate commerce, other municipalities would be encouraged to enact similar measures regarding when and where particular products could be carried, thereby disrupting commerce by rail throughout the country. The commenters recognize the public's concerns about hazardous materials transportation, but argue that local measures to force rerouting of hazardous materials shipments by rail could foreclose transportation routes and operations that are optimal in terms of overall safety, security, and efficiency.

DISCUSSION AND CONCLUSIONS

Although the Board does not have the power to invalidate the D.C. Act, the Board has discretion to grant a request for a declaratory order. Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a

declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority–Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). In this case, the Board will grant CSXT's petition and issue a declaratory order concluding that the D.C. Act is preempted by section 10501(b).

Before addressing the scope of section 10501(b), we will address certain preliminary matters. First, our decision here addresses only the preemptive effect of section 10501(b). The preemptive effect of other statutes is more properly addressed by the agencies that administer those statutes, and by the federal district court. Similarly, claims arising pursuant to the Constitution are also more properly addressed by the court.

Second, the District has suggested that it might require discovery in this proceeding to explore CSXT's factual allegations and that it should be permitted to present further evidence on the risks of terrorist attacks. In this connection, we do not make any factual findings in this decision. The issue presented here is a legal one, and the record before us provides the information we need to reach our conclusion. Therefore, neither discovery nor further evidentiary proceedings are necessary. See Consolidated Rail Corp.—Declaratory Order Proceeding, STB Docket No. 34319, slip op. at 7 (STB served Oct. 10, 2003).

Third, the District suggests that relief is barred here by the doctrine of sovereign immunity. But sovereign immunity does not preclude the issuance of a decision analyzing controlling federal law. See Dakota, Minn. & E.R.R. v. South Dakota, 362 F.3d 512, 517 (8th Cir. 2004), citing Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635, 645 (2002); Duke Energy Trading & Mktg. v. Davis, 267 F.3d 1042, 1053-55 (9th Cir. 2001), cert. denied, 535 U.S. 1112 (2002).

Finally, the fact that this matter is also pending in the federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court.

The Scope of the ICCTA Preemption

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981); accord Deford v. Soo Line R.R., 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims).

Although the ICA has long included a preemption clause, Congress further broadened the Act's express preemption in 1995. Section 10501(b) now expressly provides that "the jurisdiction of the Board over transportation by rail carriers" over any track that is part of the interstate rail network is "exclusive." And the term "transportation" is defined expansively in the ICA to embrace "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services relating to that movement." 49 U.S.C. 10102(9). Section 10501(b) also expressly provides that "the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" are "exclusive and preempt the remedies provided under Federal or State law." Thus, section 10501(b) does not leave room for state and local regulation of activities related to rail transportation, including routing matters.

As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b). CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996) (Georgia PSC). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations. Friberg v. Kansas City S. Ry., 267 F.3d 439, 443 (5th Cir. 2001) (Friberg) (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use regulation preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (City of Marshfield) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); Georgia PSC, 944 F. Supp. at 1573 (state regulation of a railroad's closing of its railroad agent locations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp.2d 1096 (D. Minn. 1998) (Soo) (local permitting regulation regarding the demolition of railroad buildings preempted); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (Austell) (local zoning and land use regulations preempted); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (Ridgefield Park) (complaints about rail operations under local nuisance law preempted). [Footnote]

The cases cited above illustrate that Congress broadly divested states and localities of a regulatory role over rail transportation. By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed.

The District contends that section 10501(b) only preempts direct "economic" regulation of railroads, and not a state or local measure aimed at protecting its residents. However, as the courts that have examined that provision have uniformly concluded, any notion that the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice. See, e.g., Friberg, 267 F.3d at 443; City of Marshfield, 160 F. Supp.2d at 1014 (section 10501(b) is broad enough to "expressly preempt[] more than just those laws specifically designed to regulate rail transportation"). In City of Auburn the court found that state and local environmental and land use permitting was preempted. 154 F.3d at 1030-31. As that court explained, if local authorities had the power to impose "environmental" permitting regulations on the railroad, such power would in fact amount to "economic" regulation if the carrier could thereby be prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. Thus, the scope of section 10501(b) is broader than just direct economic regulation of railroads.

The District suggests that the D.C. Act is not preempted because it does not totally bar the transportation of hazardous materials, but instead includes a process whereby a carrier can obtain a permit under certain circumstances and includes an exception in case of a temporary emergency elsewhere in the transportation system. However, the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted. See, e.g., City of Auburn, 154 F.3d at 1029-31; Soo; Austell; Ridgefield Park. [Footnote] The D.C. Act's permitting regime is even more closely tied to actual movement of rail cars than those local permitting

regimes that courts have already found to be preempted. Moreover, the District's view that the permitting provision demonstrates that the D.C. Act is not a burden on interstate commerce is at odds with the stated purpose in the enrolled bill as well as the statements of the D.C. Council members.

Of course, there are limits on the scope of section 10501(b), but they are inapplicable to the D.C. Act. For example, section 10501(b) preemption does not extend to operations that are not part of the national rail network. Thus, in Florida E. Coast R.R. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001), a case cited by the District, the court found that preemption did not extend to an aggregate distribution plant that was located on railroad property but was neither owned nor operated by a railroad and thus was not part of "railroad transportation" as broadly defined in the ICA. 266 F.3d at 1336. [Footnote] But here, CSXT is a railroad providing transportation services over the subject lines, which are an important part of the interstate rail network.

Moreover, although a literal reading of section 10501(b) might suggest that it supersedes other federal law, the Board and the courts have rejected such an interpretation as overbroad and unworkable. Instead, the Board and the courts have harmonized section 10501(b) with federal statutes, including FRSA. See, e.g., Tyrrell v. Norfolk S. Ry, 248 F.3d 517, 523 (6th Cir. 2001) (Tyrrell). [Footnote]

Also, as the ICCTA legislative history makes clear, states may exercise their police powers reserved by the Constitution to the extent the use of the police power does not unreasonably interfere with rail transportation. H.R. Rep. No. 104-311 at 95-96, reprinted in 1995 U.S.C.C.A.N. 793, 807-08. Thus, courts have found it permissible for a state to maintain traditional regulation of roads and bridges so long as no unreasonable burden is imposed on a railroad [Footnote] or to apply state and local requirements such as building and electrical codes as long as they do so without discrimination. [Footnote] But states or municipalities are not free to impose any requirements that they wish on a railroad in the name of police power. They cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. [Footnote] See, e.g., Friberg; City of Marshfield; Ridgefield Park. Regulating when and where particular products can be carried by rail, as the D.C. Act purports to do, would not have merely incidental effects on rail operations, as the District and Sierra Club suggest, but would constitute direct regulation of a railroad's activities.

Finally, contrary to the District's and the Sierra Club's claims, section 10501(b) applies even though other federal agencies have primary responsibility over rail safety and national security matters. As the comments of U.S. DOT underscore, Congress has vested aspects of national rail oversight in three different federal agencies: U.S. DOT (with primary jurisdiction over rail safety matters), DHS (for national security matters), and the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network). The jurisdiction and regulatory responsibilities of the three federal bodies necessarily overlap to some degree, and, where they do, the federal bodies coordinate and cooperate with each other as appropriate. See Boston & Maine Corp. v. STB, 364 F.3d 318 (D.C. Cir. 2004); Tyrrell. But the reach of the Board's jurisdiction over rail transportation, and the preemption of state and local ability to regulate that transportation, is the same regardless of the commodity at issue. As U.S. DOT points out, the fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of section 10501(b) or vice-versa. Tyrrell, 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted).

Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. The D.C. Act would unreasonably interfere with interstate commerce, and if permitted to exist, would likely lead to further piecemeal attempts by other localities

to regulate rail shipments. See "Pittsburgh Eyes Hazmat Ban," Traffic World at 29 (March 7, 2005) (reporting that Pittsburgh is considering adopting an ordinance similar to the D.C. Act should the D.C. Act be held lawful). However, in the Board's view well-settled precedent demonstrates that the D.C. Act is preempted by 49 U.S.C. 10501(b).

It is ordered:

1. CSXT's petition for a declaratory order is granted.

2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

CAPEHART SCATCHARD

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October 9, 2012

OVERNIGHT DELIVERY
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Bath, NY 14810

Re: Sierra Club, et al, v. The Village of Painted Post, et al,
Our File #9125-51212
Index No. 2012-0810

Dear Sir or Madam:

This firm represents the Respondent, Wellsboro and Corning Railroad, LLC, (the "Moving Respondent") in the above referenced Article 78 proceeding. Enclosed for filing please find the following documents:

1. Notice of Motion seeking dismissal or summary judgment against the referenced Verified Petition:
2. Memorandum of Law; and
3. Affidavit of Service.

We also enclose a check in the amount of $45.00 payable to the Steuben County Clerk as payment for the motion submitted herewith. The motion has been made returnable before the Honorable Joseph Valentino of the Monroe County Supreme Court on an underdetermined date. A courtesy copy of these papers were sent to Justice Valentino for his consideration. Please also date-stamp the enclosed copies and return them to my attention in the pre-paid self-addressed federal express package.

By copy of this letter, we are serving a copy of the enclosed documents upon the attorneys for Petitioners and Respondents, as well as providing a courtesy copy to Justice Valentino's chambers.

We appreciate the County Clerk's courtesies

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

Joseph Zakhary

JK/am
Encl.
2380074

cc: Hon. Joseph Valentino (w/encl. via overnight mail)
Rachel Treichler, Esq. (w/encl. via overnight mail)
Richard J. Lippes, Esq. (w/encl. via overnight mail)
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