Chapter 33

The Federal Laws Applicable to Railroads

33-100 Introduction

Congress and the courts long have recognized a need to regulate railroad operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). A number of federal laws are controlling, but three commonly found to preempt state and local attempts to regulate railroad activities are the Interstate Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972.

The state and local issues examined in this section are limited to those that are primarily related to land use. The general principal arising from the statutory and case law is that, if a railroad is engaged in transportation-related activities, federal law will preempt state and local attempts to regulate.

33-200 The Interstate Commerce Commission Termination Act of 1995

The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") *(*49 U.S.C.A. §10101 *et seq.)* abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided 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. *49 U.S.C. § 10501(b).*

The ICCTA preempts state and local *regulation, i.e.*, "those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation." *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150, 157-158 (4th Cir. 2010) (city ordinance regulating the transportation of bulk materials, including ethanol, and city permit unilaterally issued to the railroad under the ordinance regulating the transport of ethanol to the railroad's transload facility, was preempted by the ICCTA). Thus, the ICCTA preempts the state and local regulation of matters directly regulated by the Surface Transportation Board, such as the construction, operation, and abandonment of rail lines. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001). Whether a state or local regulation is preempted requires a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation. *Emerson, supra.*

Following is a summary of state and local permitting or preclearance requirements preempted by the ICCTA because, by their nature, they could be used to deny a railroad the ability to perform part of its operations or to proceed with activities authorized by the Surface Transportation Board *(collected in Emerson, supra)*:

- Preconstruction permitting of a transload facility. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).

- Preconstruction permitting (building permit) and inspection requirements related to the use, construction, and occupation of a railroad crew building staffed around the clock and occupied by railroad employees who work in and on the trains. *Norfolk Southern Railway Co. v. City of Toledo*, 2015 WL 45537, at 5-6 (N.D. Ohio 2015)

- Environmental and land use permitting. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

- The demolition permitting process. *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D.Minn. 1998).

- Requirement that railroad companies obtain state approval before discontinuing station agents, abandoning rail lines, or removing side tracks or spurs. *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D.Mont. 1997).

Following is a summary of areas of state and local regulations directly regulated by the Surface Transportation Board and, therefore, are preempted by the ICCTA *(collected in Emerson, supra)*:

- State statutes regulating railroad operations. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state and local regulations such as those attempting to limit the duration that crossings are blocked are operational requirements and are preempted); *R.R. Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002) (state statute regulating railroad operations preempted); *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing limitation on duration at which crossing may be blocked by train, which is related to train speed, was preempted).

- State statutes regulating contracts between rail carriers. *San Luis Cent. R.R. Co. v. Springfield Terminal Ry. Co.*, 369 F. Supp. 2d 172 (D.Mass. 2005) (contract between rail carriers concerning use of railroad cars and payment rates preempted in light of other ICCTA provisions regulating those issues).

- Attempts to condemn railroad tracks or nearby land. *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005) (attempt to use eminent domain to acquire portion of property abutting a rail line for municipal bicycle trail preempted); *Wis. Cent. Ltd. V. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D.Wis. 2000) (attempt to use state's condemnation statute to condemn an actively used railroad track preempted).

- State negligence and nuisance claims. *Friberg, supra* (state claims of negligence and negligence per se concerning a railroad's alleged blockages of road leading to plaintiff's business were preempted); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D.Miss. 2001) (state law nuisance and negligence claims that would interfere with operation of railroad switchyard preempted).

Following is a summary of state and local activities not preempted by the ICCTA:

- Voluntary agreements entered into by the railroad. *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559 F.3d 212, 221 (4th Cir. 2009) (quoting the Surface Transportation Board that "voluntary agreements may be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce," though this rule is not absolute).

- Traditional police powers over the development of railroad property such as electrical, plumbing and fire codes, at least to the extent that the regulations protect the public health and safety, are settled and defined, and can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved or rejected without the exercise of discretion on subjective questions. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). The regulations may not discriminate against rail carriers or unreasonably burden rail carriage. *Southern Norfolk, supra.*

- Zoning regulations applied to railroad-owned land used for non-railroad purposes by a third party. *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

- Miscellaneous laws and acts determined to not have anything to do with transportation. *Emerson, supra* (summary judgment for railroad was reversed because the railroad's acts of depositing old railroad ties and other debris into a drainage ditch abutting plaintiff's property, which allegedly caused the flooding of plaintiffs' property, were not preempted because they had nothing to do with transportation); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) (state regulation of solid waste disposal facility serving railroad was not preempted).

- State statute requiring railroads to pay for pedestrian crossings across railroad tracks. *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008) (determined not to be preempted by the ICCTA).

Spotlight on *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010)

The Context: There are several federal laws that either preempt, or partially preempt, local regulation of railroad activities pertaining to rail transportation. Among them is the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") *(*49 U.S.C.A. §10101 *et seq.)*, which abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided 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. *49 U.S.C. § 10501(b).*

The Issue: Whether a locality's regulatory and permitting scheme pertaining to the transportation of ethanol in the locality were preempted by the ICCTA.

The Case: Norfolk Southern began operating an ethanol transloading facility in the city near two residential neighborhoods, an elementary school, a metro station and other populated areas. Tank trucks loaded at the facility transported the ethanol, a highly flammable material, on city streets. The city ordinance regulated the transportation of bulk materials and required that the railroad obtain a haul permit from the city in order for the tank trucks, owned by private trucking companies, to transport ethanol through the city from the railroad's transload facility.

The city argued that its regulations controlled only the trucks leaving the transloading facility, not the transloading process itself, and the regulations did not regulate any aspect of the movement of trains, the unloading or transloading of trains, the time of day during which transloading could occur, or the number of trucks that could be filled with ethanol. The court held that the ICCTA preempted state and local regulation, *i.e.*, "those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation."

The city also argued that its regulations were valid under its police powers because they protected public health and safety, a narrow exception allowed under the ICCTA if certain prerequisites were satisfied. While noting the laudable basis for the regulations, the court nonetheless held that they were preempted because: (i) they allowed the city to halt or significantly diminish the transloading operation by declining to issue haul permits or by increasing the restrictions placed on those permits; (ii) they entailed extended or open ended delays in permit-issuance; and (iii) involved the exercise of discretion.

Its Implications: This case has the following implications:

- This case is consistent with other decisions throughout the country finding that the ICCTA preempts local regulations on matters pertaining to rail transportation.
- "Rail transportation" will be broadly construed under the ICCTA to effectuate the Act's purposes.
- In addition to the ICCTA, the Federal Railroad Safety Act of 1970 and the Noise Control Act of 1972 are two other common federal laws pertaining to railroads that deal with issues such as train speed, the length of time railroad crossings are blocked, and noise from train horns.
- Laudable purposes, such as protecting public health and safety, will not save a regulatory scheme from state or federal preemption if the elements for preemption are present.

33-300 The Federal Railroad Safety Act of 1970

Issues regarding state and local regulation of train speed and the duration that railroad crossings are blocked are also considered under the Federal Railroad Safety Act of 1970 ("FRSA"). The FRSA contemplates a comprehensive

and uniform set of safety regulations in all areas of railroad operations. *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977). The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. § 20101*.

The FRSA includes a preemption provision that, among other things, allows state and local governments to regulate only those matters on which the Secretary of Transportation has not yet regulated. The Secretary regulates train speeds, which depend on the classification of the tracks. *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing a limitation on the duration at which a crossing may be blocked by a train, which is related to train speed, was preempted); *see also CSX Transportation, Inc. v. City of Mitchell*, 105 F. Supp. 2d 949 (S.D.Ind. 1999) (granting summary judgment to railroad and enjoining city from enforcing law prohibiting railroad from blocking crossing for more than 10 minutes); *Drieson v. Iowa, Chicago & Eastern Railroad Corporation*, 777 F. Supp. 2d 1143 (N.D. Iowa 2011) (partial summary judgment for railroad; federal regulations governing the movement of trains, including blocked crossings as they pertained to air brake testing requirements, preempted state and local laws).

In *Plymouth*, the attorney general argued that the crux of the state statute was not train speed, but "the time that trains may block highway traffic." The court of appeals was unpersuaded by this contention, explaining that "the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling." The court concluded that the statute would require the railroad to modify either the speed at which its trains travel or their length, and would also restrict the railroad's performance of federally mandated air brake tests. The court also concluded that numerous federal regulations covered the speed at which trains may travel and, thus, the federal regulations "substantially subsume the subject matter of the relevant state law." *Plymouth*, 283 F. 3d at 817.

Congress intended that the ICCTA and the FRSA coexist. While the Surface Transportation Board must adhere to federal policies encouraging "safe and suitable working conditions in the railroad industry," the ICCTA and its legislative history contain no evidence that Congress intended for the Surface Transportation Board to supplant the Federal Railroad Administration's authority over rail safety under the FRSA. *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001). Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and the FRSA to be construed *in pari materia. Tyrell, supra.*

33-400 The Noise Control Act of 1972

Issues regarding state and local regulation of train noise are evaluated under the Noise Control Act of 1972 ("NCA"), which establishes the maximum noise levels for rail cars engaged in interstate commerce. The preemption provision under the NCA has been described as being "decidedly narrow." *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496 (5th Cir. 1999).

Many cases in this area are based on state nuisance claims brought by abutting landowners. Generally, if the noise generated by the train has a transportation purpose and is within the NCA's noise limits, state and local regulation is preempted. *Rushing, supra* (holding that a triable issue of fact existed based on the plaintiffs' lay opinion that the railroad's expert's opinion regarding compliance was based on sound measurements which did not reflect the true sound level plaintiffs typically heard); *Jones v. Union Pacific RR*, 79 Cal.App.4th 793 (2000) (holding that plaintiff's nuisance claim could proceed against the railroad for excessive idling and horn blowing near plaintiff's home because plaintiff had adequately alleged that these activities did not have a transportation purpose but were, instead, done solely to harass the plaintiff).

With respect to train horns, the "Train Horn Rule" (49 CFR Part 222) requires locomotive engineers to begin to sound train horns at least 15 seconds, and no more than 20 seconds, in advance of public grade crossings. There are other requirements and exceptions under the Rule. Localities have an opportunity to mitigate the effects of train horn noise by establishing "quiet zones." See the United States Department of Transportation Federal Railroad Administration's webpage regarding the Train Horn Rule and quiet zones at www.fra.dot.gov.