

## **Federal Preemption of Laws Regulating Railroads: General Background**

### **I. Interstate Commerce Commission Termination Act (ICCTA) Preemption Provision**

49 U.S.C. § 10501(b)

(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.

#### **Definition of “transportation”**

49 U.S.C. § 10102(9):

(9) “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;

### **II. Federal Railroad Safety Act (FRSA) Preemption Provision**

49 U.S.C. § 20106

(a) National uniformity of regulation.--

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may

adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government;

and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.--

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

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### III. Select Vermont Cases Interpreting Preemption Provisions

#### A. *In re Vermont Railway*, 171 Vt. 496 (2000)

##### Background:

- Through a merger, Vermont Railway (VTR) obtained a parcel that had an existing salt shed facility. The salt shed stored salt delivered by rail prior to its loading onto trucks for further delivery.
- The City of Burlington issued VTR a permit subject to several conditions governing operation of the salt shed.
- VTR appealed the conditions to the environmental court, arguing that they were all preempted under the Interstate Commerce Commission Termination Act (ICCTA).
- Burlington argued that VTR's appeal was foreclosed by its (and its predecessor's) past failure to challenge the conditions, but the court agreed that acquisition of the facility by VTR and passage of the ICCTA constituted "changed circumstances sufficient to allow review of the permitting conditions."
- The environmental court removed or amended several conditions, and upheld others.
  - (i) The court "removed conditions that limited the total annual capacity of the salt shed to a certain amount of tonnage, that limited the hours during which salt could be delivered to the facility by rail, and that limited the total number of trucks that could pick up salt delivered by rail in the course of a snow season. Furthermore, the court amended

the condition that required the railway to make its log book and other records generally available to the City to ensure compliance with other conditions.”

(ii) The court “left in place the remainder of the challenged conditions which control activities such as routing of trucks leaving the facility, the number of trucks exiting the facility on a daily basis pending the completion of the Champlain Parkway, the hours during which trucking can occur at the facility, parking at the facility, and conditions designed to avert potential contamination from the salt shed such as curbing requirements and requirements that salt be handled on impervious surfaces.”

**Issue Presented:** Are Burlington’s zoning permit conditions with respect to operation of VTR’s salt shed facility preempted under the ICCTA or the Federal Railroad Safety Act?

**Held:** No, the zoning permit conditions upheld by the environmental court are not preempted.

**Court’s Analysis:**

(a) ICCTA

- The concern of the ICCTA is whether a challenged law “stands as an obstacle to the accomplishment and execution of” Congress’s objectives.<sup>1</sup>
- However, the ICCTA did not eliminate the authority of states to impose appropriate public health and safety regulation on interstate railroads; further, not all state and local regulations with any economic impact on rail operations are preempted.
- The environmental court drew a line between conditions “that purported to regulate the operation of the railroad, including the transport of goods by the railway, and conditions that merely regulated activity regarding motor vehicles coming and going from the facility and the storage of materials at the facility.”
- The conditions that the environmental court upheld “do not interfere with railway operations; they merely address traffic issues and concerns with environmental contamination, matters properly within the province of municipalities by virtue of the state’s delegation of its traditional police powers.”

(b) Federal Railroad Safety Act (FRSA)

- The Court quickly rejected VTR’s preemption claim under the FRSA, noting that the zoning conditions “do not attempt to regulate the subject matter of railroad safety nor does Vermont Railway point to any conditions that conflict with specific federal regulations regarding railway safety.”

**B. *Green Mtn. R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005)**

**Background:** Green Mountain Railroad (GMRR) proposed to build transloading facilities on property adjoining its rail line in Rockingham for:

- “(1) unloading bulk salt arriving by rail for local distribution by truck or for temporary storage in a shed pending distribution;
- (2) temporary storage and transport of ‘non-bulk goods, such as steel pipe[s]’; and
- (3) unloading bulk cement arriving by rail for storage in silos and eventual transport by truck.”

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<sup>1</sup> The Court cited legislative history of the ICCTA indicating Congress’s objectives were to deregulate the economic activity of surface transportation industries and to preempt state regulation of economic activities of railroads.

**Issue Presented:** Is Act 250’s pre-construction permit requirement preempted by the ICCTA in connection with GMRR’s proposed construction of the transloading facilities?

**Held:** Yes, the ICCTA preempts Act 250’s pre-construction permit requirement in this case.

**Court’s Analysis:**

- The plain language of 49 U.S.C. § 10501(b) and the definitions at § 10102 grant the Surface Transportation Board (STB) wide authority over the storage and transloading facilities proposed by GMRR.
- “Act 250’s pre-construction permit requirement is preempted for two reasons:
  - (i) it ‘unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations,’ and
  - (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.” (internal citations omitted).
- The Court rejected the State’s proposed standard of review—that Act 250 can only be facially preempted if there is no possible set of conditions that would not conflict with federal law. The Court conceded that some Act 250 applications could be “promptly approved without the slightest imposition on rail operations.” However, “what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases.”
- The Court rejected the State’s argument that Act 250 is not preempted because it is an “environmental” regulation and not an “economic” regulation. The Court characterized this distinction as “not useful” where the environmental regulation has a direct effect of preventing/delaying the construction of facilities “integral to the railroad’s operation.”
- The ICCTA does not preempt all state and local regulation that affects the development of railroad property. As long as the regulation does not effectively foreclose or restrict or unreasonably burden railroad operations, local bodies retain power to protect health and safety with regulations that:

“are settled and defined, 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. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.”

- “We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.”