

Railroads as Neighbors: Tough Nuts to Crack

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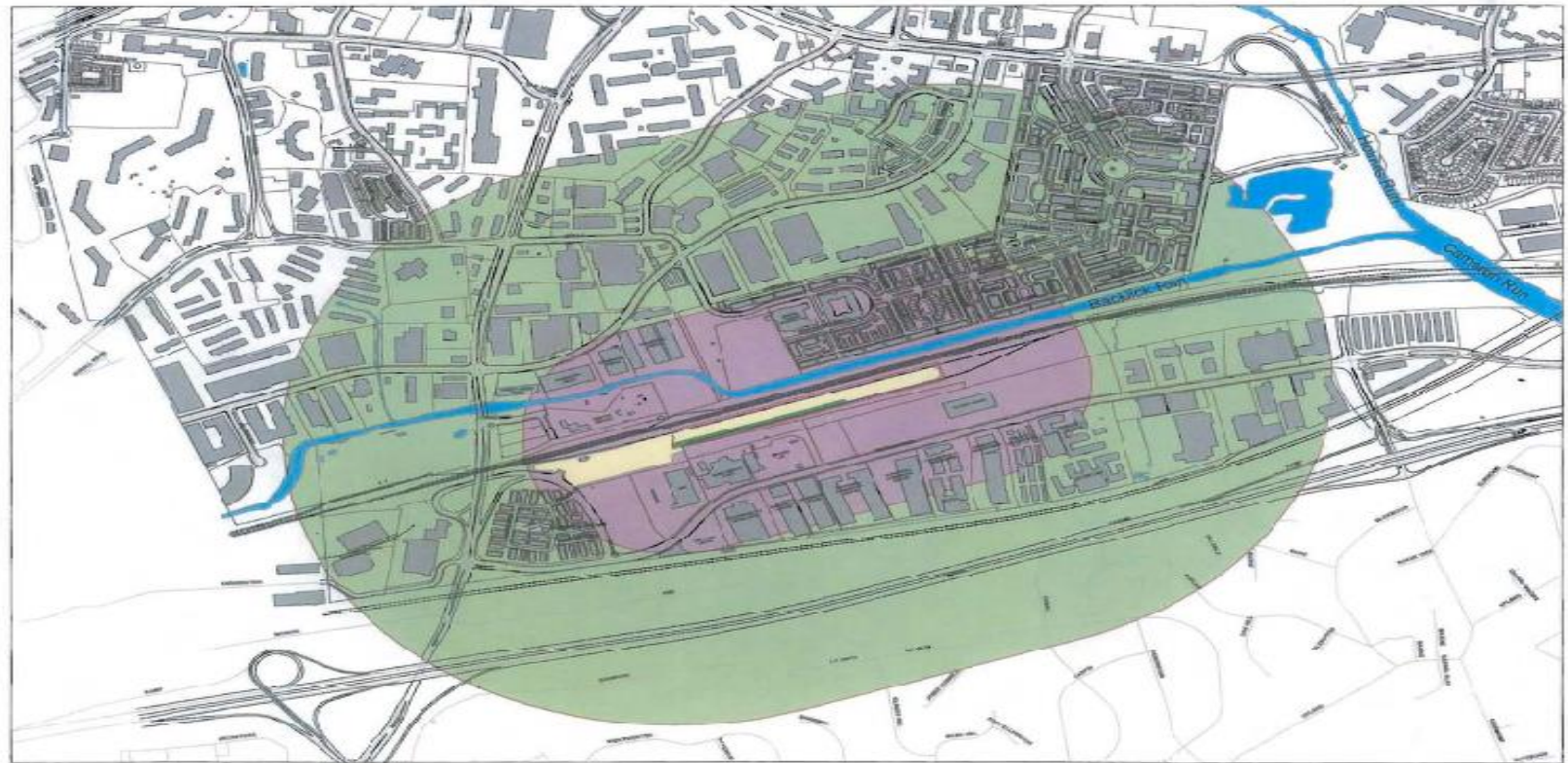


A Rail Line Near You





Norfolk Southern in Alexandria



Norfolk Southern Ethanol Facility

Map Prepared: 06/30/2010

Legend

- Site
- 1000 FT Buffer
- 100 FT Buffer
- City Boundary
- Railroad Line
- Roads
- Rivers
- Buildings

Scale: 1/32,000

City of Alexandria, Virginia



CSX in Fredericksburg





Legal Overview

- ▶ **ITS ALL ABOUT PREEMPTION**
 - ▶ Regulation of Railroads is Heavily Federalized
 - ▶ Limited Ability of State and Local Governments to Regulate Rail Activities
- ▶ **Making Client Aware of Limited Local Authority**
 - ▶ Regulation of Railroad Facilities and Related Activities
 - ▶ Safety Issues
 - ▶ Ownership and Other Issues
- ▶ **Making the Most of Limited Local Authority**



Meet Your New Friends

- ▶ **Surface Transportation Board (STB)**
 - ▶ Independent Agency within US DOT
 - ▶ Jurisdiction over interstate railroad transportation
 - ▶ Statutory Authority: ICC Termination Act, 49 U.S.C. §§ 10101-16101 (ICCTA)

- ▶ **Federal Railroad Administration (FRA)**
 - ▶ Part of US DOT
 - ▶ Authority over railroad safety
 - ▶ Statutory Authority: Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 (FRSA)



Railroad Facilities and Operations

Surface Transportation Board (STB)

- ▶ Exclusive jurisdiction over:
 - ▶ **Transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers; and
 - ▶ 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.
 - ▶ ICC Termination Act, 49 U.S.C. § 10501(b)





What Is Preempted

- ▶ “[A]ny 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” is “preempted regardless of the context or rationale for the action.”
Emerson v. Kansas City S. Ry., 503 F.3d 1126 (10th Cir. 2007).





What Is Preempted

- ▶ Regulation of railroad operations, including movement of trains & loading or unloading of freight
- ▶ Regulation or location or nature of railroad facilities, including sidings, tracks, terminals, transloading facilities (*E.g., Norfolk Southern Ry. Co. v. City of Austell, Ga.*, 1997 WL 1113647 (N.D.Ga.) (Zoning))
- ▶ Non-ministerial pre-permitting approval process, including environmental impact review, zoning/planning study or Council/Board review (*E.g., City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (Environmental review))
- ▶ Power to condemn railroad property before STB relinquishes jurisdiction (abandonment).



What *Can* You Do?

- ▶ “[S]tates and towns may exercise traditional police powers over the development of railroad property . . . to the extent that the regulations protect public health and safety, 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.”
- ▶ *N.Y., Susquehanna & W. Ry*, 500 F.3d at 253-54 (3d Cir. 2007).





What *Can* You Do?

- ▶ IF NOT DISCRIMINATORY AND NO SUBSTANTIAL IMPACT ON RAIL OPERATIONS:
 - ▶ Require compliance with building and fire codes
 - ▶ Enforce federal environmental laws where enforcement is delegated to state and local governments
 - ▶ Enforce environmental and similar laws, particularly where impacts are off-railroad property,
 - ▶ Filling Wetlands
 - ▶ Dumping Waste (*Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007))



Statutory Exception

- ▶ Special Rules for Solid Waste Transfer Facilities
 - ▶ Provisions included in the Passenger Rail Investment and Improvement Act of 2008 to clarify the scope of federal regulation over solid waste transloading facilities – amended 49 U.S.C. § 10501(c)(2); added 49 U.S.C. §§ 10908-10910.
 - ▶ Essentially reversed ICCTA preemption rule:
 - ▶ Solid Waste Transfer Facilities are generally subject to State and Local regulation
 - ▶ BUT, STB can “exempt” facility from local regulation if local regulation unreasonably burdens rail transportation of solid waste



Limits of Preemption

- ▶ Non-Railroad Activities & Transloading
 - ▶ General Rule: Non-Railroad businesses located on rail lines and/or on property owned by railroad may be regulated:
 - ▶ Gravel (CNFR and Florida East Coast); Recycle Transloading (Hi-Tech); Road Salt (Vermont Ry.)
 - ▶ Preemption often turns on contract and business terms:
 - ▶ Is transloader acting as agent for railroad or running an independent business
 - ▶ Does rail contract include transloading by railroad





Transloading Examples

- ▶ *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Fin. Docket 35057, 2008 WL 275697 (STB) (Feb. 1, 2008)*
 - ▶ New York Atlantic Ry. yard in Babylon NY
 - ▶ Coastal Distribution LLC tried to establish transloading operation for construction material
 - ▶ Town of Babylon sought to enforce Zoning Code
 - ▶ STB held that Coastal not part of railroad transportation because NYAR's obligations end when cars delivered to Coastal, Coastal markets transloading services and Coastal charges separate transloading fee



Transloading Examples

- ▶ *City of Alexandria, Virginia – Petition for Declaratory Order, STB Finance Docket No. 35157 (Feb. 19, 2009)*
 - ▶ Norfolk Southern established ethanol transloading facility on existing railroad yard
 - ▶ Contracted with RSI Leasing, Inc. to perform transloading
 - ▶ Shippers contracts with NS included transloading; RSI conducted no marketing or other business
 - ▶ STB: RSI was not an independent business and City was preempted from regulating transloading facility





Off Property Impacts

- ▶ No case law or STB decision
 - ▶ Above principles would seem to allow communities to require mitigation to avoid impacts on community
 - ▶ Fire Protection equipment, supplies & training
 - ▶ Spill Containment
 - ▶ Railroads generally cooperate on these issues
- ▶ Other Impacts
 - ▶ Truck traffic
 - ▶ Noise & light
 - ▶ Storage



Transloading: Off Property Impacts

- ▶ Test Case: *Norfolk Southern Railway v. City of Alexandria*, Case No. 09-1566 (4th Cir.) argued March 24, 2010
 - ▶ City issued “haul permits” under existing City law imposing certain restrictions on numbers, routes, etc of ethanol-filled trucks not operated by NS
 - ▶ NS argues regulation of trucks is same as regulation of transloading
 - ▶ City argues that restrictions on trucks on City streets does not restrict NS’s ability to transload – only shipper’s ability to truck
 - ▶ Decision expected later this year





Change in Ownership of Rail Lines

- ▶ Transfers and Abandonment of Rail Lines Require STB Approval
- ▶ Why You May Care
 - ▶ Adverse Abandonment
 - ▶ Long-dormant line may be acquired by small operator who wants to resume operations
 - ▶ New traffic, new business opportunities, construction and environmental impacts
 - ▶ Opportunity to acquire right to build trail
 - ▶ Potential Transit Corridors





Change in Ownership of Rail Lines

- ▶ Owner Must File Petition for Abandonment with STB
 - ▶ STB addresses ONLY right/obligation to provide rail service
 - ▶ Title to underlying property a matter of state law
- ▶ Third parties may file an “Offer of Financial Assistance” to subsidize or provide rail service
 - ▶ Offeror negotiates price for service with carrier
 - ▶ Communities may object or comment on proposal
- ▶ Communities may offer to acquire an “interest” for “Interim Trail Use”
 - ▶ Corridor is “rail banked” for potential future rail use
 - ▶ Some limits on use of corridor to assure (1) use for trail and (2) available for future rail use
 - ▶ Community must negotiate acquisition of right of way from railroad
- ▶ Notices of Abandonment posted on STB website and published in Federal Register
 - ▶ Notice to Local Government and participation in environmental review





Safety Issues: FRSA

Federal Railroad Administration (FRA)

- ▶ **(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 ..., 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.
- ▶ 49 U.S.C. § 20106



Scope of FRSA Preemption

- ▶ **“Local Safety Hazard”** Exception VERY narrow
- ▶ **States** may adopt or continue to enforce safety rules relating to railroad safety until DOT issues regulations covering same subject
- ▶ Issue: Does “state” include local governments
- ▶ If not, any local regulation that relates to railroad safety is preempted even if not “covered” by regulations
 - ▶ Cases applying 49 U.S.C. §2016 hold that “state” ≠ local governments. *E.g. CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996)*





Extent of FRSA Preemption

- ▶ Supreme Court: “the exclusion of political subdivisions cannot be inferred from the express authorization to the States because political subdivisions are components of the very entity the statute empowers [the states].”
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-608 (1991)
 - ▶ See also *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 425 (2002) (unless Congress expressly distinguishes local governments from states a statutory reference to “the ‘safety regulatory authority of a State’ undoubtedly would have embraced both state and local regulation”)
 - ▶ *City of Plymouth et al.* do not discuss or address *Mortier* or *Ours Garage*
- ▶ Fourth Circuit may reach this issue in *City of Alexandria*



Areas of FRSA Regulation

- ▶ At-Grade Railroad Crossings
 - ▶ Local Choices in Design using Federal Standards
 - ▶ Mandatory Horns and “Quiet Zones”
 - ▶ List of Crossings to Be Improved
- ▶ Train Speeds and Operational Safety Rules
- ▶ Very Limited Role for Local Governments



QUESTIONS?

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