

## Chapter 33

### The Federal Laws Applicable to Railroads

#### 33-100 Introduction

This chapter briefly examines the state and local land use issues related to railroads, including the relationship of railroad infrastructure, especially during its planning and construction, to local land development requirements, and the railroads' impact on the public health, safety, and welfare resulting from their operation.

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 (9<sup>th</sup> Cir. 1998). This chapter examines three of those federal laws – the Interstate Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972. The three Acts generally preempt state and local attempts to regulate railroad activities if the railroad is engaged in transportation-related activities.

#### 33-200 The Interstate Commerce Commission Termination Act of 1995

The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) (49 U.S.C. §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 (4<sup>th</sup> 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 (10<sup>th</sup> Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5<sup>th</sup> 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*.

#### 33-210 State and local permitting or preclearance requirements preempted by the ICCTA

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 (2<sup>d</sup> 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) (unpublished).
- Environmental and land use permitting. *City of Auburn v. United States*, 154 F.3d 1025 (9<sup>th</sup> 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).

### **33-220 State and local regulations pertaining to subject matter directly regulated by the Surface Transportation Board and preempted by the ICCTA**

Following is a summary of areas of state and local regulations pertaining to subject matter 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 (5<sup>th</sup> 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 (6<sup>th</sup> Cir. 2002) (state statute regulating railroad operations preempted); *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6<sup>th</sup> 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).
- Attempts to condemn railroad tracks or nearby land. *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8<sup>th</sup> 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).

### **33-230 State and local activities not preempted by the ICCTA**

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 (4<sup>th</sup> 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); see also *Edwards v. CSX Transportation, Inc.*, 983 F.3d 112 (4<sup>th</sup> Cir. 2020) (residents of North Carolina city adequately alleged that they were direct, intended beneficiaries of a contract among the rail line operator's predecessor, the city, and a drainage district in their breach of contract claim arising from the rail line operator's failure to allow the city to construct an emergency dam over railroad tracks to protect their part of the city from flooding during two hurricanes).
- Traditional police powers over the development of railroad property such as electrical, plumbing and fire codes (*Edwards*, 983 F.3d at 121; *Norfolk Southern Railway Company*, 608 F.3d at 158), 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 (2<sup>d</sup> 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 (11<sup>th</sup> 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 plaintiff’s property, were not preempted because they had nothing to do with transportation); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3<sup>rd</sup> 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 (6<sup>th</sup> Cir. 2008) (determined not to be preempted by the ICCTA).

***Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150 (4<sup>th</sup> Cir. 2010)**

**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 city’s 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 regulations, *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: (1) 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; (2) they entailed extended or open-ended delays in permit-issuance; and (3) 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**

The purpose of the Federal Railroad Safety Act of 1970 (“FRSA”) is to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. FRSA is the “primary source of

legislation dealing with the various railroad safety problems.” *Jordan v. Burlington Northern Santa Fee R. Co.*, 2009 WL 112561 (Tenn. Ct. of App. 2009) (unpublished). 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 (7<sup>th</sup> Cir. 1977).

The FRSA includes a preemption savings clause that, among other things, allows state and local governments to regulate only those matters on which the Secretary of Transportation has not yet regulated. *Association of American Railroads v. Hatfield*, 435 F. Supp. 3d 769 (E.D.Ky. 2020). In 2007, Congress amended the FRSA to add an exception to FRSA’s preemptive effect for certain causes of action under state law, including causes of action that a party has failed to comply with its own plan, rule, or standard that it created pursuant to a federal regulation or order. *Rhinehart v. CSX Transportation, Inc.*, 2017 WL 3500018 (W.D.N.Y. 2017) (unpublished). This exception is not discussed in this section.

Issues of state and local concern such as train speed and the duration that railroad crossings are blocked are considered under the FRSA. The Secretary regulates train speeds, which depend on the classification of the tracks. *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6<sup>th</sup> 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 adjoining 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); *Association of American Railroads, supra* (state law prohibiting trains from blocking grade crossings preempted by FRSA).

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 (6<sup>th</sup> 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**

The Noise Control Act (“NCA”), 42 U.S.C. §§ 4901–4918, is a federal statute “aimed at addressing the adverse environmental, physical, and psychological effects of inadequately controlled noise caused by vehicles and machinery in interstate commerce.” *Rivera-Colon v. Torres-Diaz*, 252 F. Supp. 3d 68, 73 (D.P.R. 2017). “It is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare.” 42 U.S.C. § 4901(b). The NCA establishes “federal noise emission standards for certain products distributed in commerce.” 42 U.S.C. § 4901(a)(3). In other words, this environmental statute regulates noise emission standards in relation to narrowly defined commercial transportation machinery, for example, interstate rail. *Rivera-Colon*, 252 F. Supp. 3d at 76, citing 42 U.S.C. § 4916.

The preemption provision under the NCA has been described as “decidedly narrow.” *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496 (5<sup>th</sup> 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; Jones v. Union Pacific RR*, 79 Cal.App.4<sup>th</sup> 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](http://www.fra.dot.gov).