RUNAWAY TRAIN?
FEDERAL PREEMPTION OF
STATE AND LOCAL LAWS REGULATING RAILROADS

A report prepared for the Shoreham Area Advisory Committee

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ABSTRACT

Since the 1880’s, regulation of railroads has fallen almost exclusively within the jurisdiction of the federal government. Even though Congress has pursued a policy of railroad deregulation since the 1970’s, and thus railroads now face fewer regulations on their operations than they did in years past, the regulatory authority that does remain has been consolidated within the federal government.

As with all state laws, state laws that regulate railroad operations are presumptively valid. To the extent that they affect railroads or interstate commerce in general, however, state regulations must be consistent with, and secondary to, any Federal laws on the subject. Federal courts use a three-part analysis to determine whether the state law in question is preempted by federal law. The Surface Transportation Board (STB), the federal agency charged with regulation of railroads, uses a different three-part preemption test that gives greater weight to the reasonability of the challenged state regulation.

In cases challenging the validity of state laws that regulate railroads, most courts have found that the STB’s exclusive jurisdiction over “regulation of transportation by rail” precludes all state regulation. Some courts have barred states from enforcing their environmental, zoning, and other statutes against railroads even in situations where the STB also lacks regulatory authority. This has created a “regulatory vacuum” with regard to construction of intermodal facilities and certain types of railroad tracks. On the other hand, some courts (particularly state courts) have permitted states to impose reasonable regulations on railroad facilities and operations, so long as the state laws do not unreasonably burden or interfere with interstate commerce.
I. FEDERAL LAW PERTAINING TO RAILROADS

As a matter of U.S. Constitutional law, the authority to regulate development and land use generally rests with the states.\(^1\) States have various tools for achieving their desired development results, including Tax Increment Financing, zoning ordinances, environmental laws, and the power of eminent domain. In some cases, however, a state’s ability to regulate certain businesses is circumscribed by state or federal laws, or by the U.S. Constitution. This is certainly the case with railroads, which fall almost exclusively under the control of the federal government.

A. The U.S. Constitution generally gives Congress the authority to regulate railroads.

The United States Constitution, Article I, Section 8, clause 3, states that the U.S. Congress has the authority to “regulate commerce between the several states.” This clause is often referred to as the “Commerce Clause.” The main rationale for allowing the federal government to control interstate commerce is to ensure a uniform set of standards and rules for businesses to follow. If states were allowed to control interstate commerce, businesses might find it overly burdensome and expensive (and sometimes impossible) to comply with a panoply of varying regulations in 50 different states and thousands of different localities.

One of the first Supreme Court cases to interpret the meaning of the Commerce Clause was *Gibbons v. Ogden*, an 1824 Supreme Court case about whether state governments could regulate ferry boat operations.\(^2\) Ogden operated a ferry between New York City and Elizabethtown Point in New Jersey, pursuant to a New York state law that gave him the exclusive right to operate steamboats in New York waters. Gibbons began operating a ferry service that competed with

\(^1\) States, in turn, can delegate their planning authority to cities, counties, or other political subdivisions. In legal discussions about land use, however, the word “state” is often used to refer to both states and their political subdivisions, because cities and counties do not have their own independent status in the U.S. Constitution, but rather rely on states for their existence and their powers. Therefore, the term “state” as it is used in this article refers to both a state and its political subdivisions.

\(^2\) 22 U.S. 1 (1824).
Ogden’s, but Gibbons was licensed under a federal law rather than a state law. Ogden and the state of New York claimed that Gibbons’ ferry service violated Ogden’s exclusive right to operate under the New York law. The Supreme Court, however, ruled that the ferry boats were part of interstate commerce, and therefore the federal government, and not the states, had the authority to grant operating licenses to ferry operators.

_Gibbons v. Ogden_ is an important precedent because the Supreme Court chose to adopt a broad interpretation of the Commerce Clause, holding that the federal government has the authority to regulate all commerce, unless such commerce: 1) takes place completely within a state; 2) does not concern any other states; and 3) and does not affect Congress’s ability to execute some general power of government.\(^3\) Subsequent cases have generally continued to apply this broad definition of interstate commerce, giving Congress the authority to regulate in a wide variety of fields.

The broad reach of the Commerce Clause does not merely give the U.S. Congress a lot of authority over interstate commerce. The Supreme Court has also found that the Commerce Clause limits the authority of state legislatures to pass laws that affect interstate commerce, unless Congress has explicitly declared its intention to share its authority over interstate commerce with the states. If a state law favors in-state businesses over out-of-state businesses, the Supreme Court may declare it unconstitutional under a doctrine known as the “Dormant Commerce Clause.” The purpose of the Dormant Commerce Clause is to prevent states from erecting unreasonable or self-serving barriers to interstate commerce that would hinder trade between states and prompt other states to retaliate with barriers of their own. Although the Commerce Clause of the U.S. Constitution does not explicitly say anything about the states, the Supreme Court through its Dormant Commerce Clause cases has expanded the Commerce Clause to include a presumptive prohibition on state-level regulation of interstate commerce.

\(^3\) _Id._
Although the Supreme Court has historically interpreted the Commerce Clause broadly so as to favor federal control over commerce, a recent pair of Supreme Court cases signaled that the federal government’s reach under the Commerce Clause is not infinite. In *United States v. Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990 on the grounds that Congress lacked the authority to pass laws regulating crime that are in no way connected to interstate commerce. In *United States v. Morrison*, the Supreme Court invalidated portions of the Violence Against Women Act on similar grounds. The implication of these cases is that it is up to states, rather than the federal government, to pass legislation in these areas.

Regulation of railroads, however, has been found by courts to be well within Congress’s power under the Commerce Clause. In 1989, the Supreme Court observed that “Congress has exercised its Commerce Clause authority to regulate rail transportation for over a century.” In fact, railroads were one of the first industries over which the federal government exerted its regulatory power. The Interstate Commerce Commission (ICC), which was created in 1887 “to protect shippers from the monopoly power of the railroad industry,” was the first independent regulatory agency that Congress created. Cases such as *Houston, E. & W. Tex. Railway v. United States* confirmed that railroads are “interstate carriers as instruments of interstate commerce,” and that even *intra*state regulation of railroad rates and routes have “such a close and substantial relation to interstate traffic” that Congress has the power to regulate them through the ICC.

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8 234 U.S. 342, 350-52 (1914), also known as the “Shreveport Rate Cases.”
In summary, the Constitution and the Supreme Court’s interpretation of it give Congress broad authority to regulate railroads. Congress’s approach to doing so is discussed in the next section.

B. Congress has retained and consolidated its power over railroads, rather than sharing it with state and local governments.

Even when the Constitution vests Congress with the authority to make laws on a particular topic, Congress does still have the option of sharing this authority with states and localities. With regard to businesses engaged in interstate or foreign commerce, the Supreme Court has noted that “Congress may, if it chooses, take unto itself all regulatory authority over them, share the task with the States, or adopt as federal policy the state scheme of regulation.”

This type of power-sharing or “cooperative federalism” has not occurred in the case of railroads. Cases such as *U.S. v. Baltimore & Ohio Railroad Co.*, 333 U.S. 169 (1948), describe the Interstate Commerce Act as “one of the most comprehensive regulatory plans that Congress has ever undertaken.” Similarly, the Supreme Court in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) noted that Congress’s regulation of railroads has traditionally been “among the most pervasive and comprehensive of federal regulatory schemes.” Even though the federal government has pursued a policy of deregulation of railroads since the 1970’s, and thus railroads now face fewer regulations on their operations than they did in years past, the regulatory authority that does remain has been consolidated within the federal government. Federal government control over railroads is not increasing per se, but it is increasing relative to the control over railroads enjoyed by the states.

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10 333 U.S. 169, 175.

11 “Congress sought to federalize many aspects of railway regulation that previously had been reserved for the states in an effort to ensure the success of Congress’ attempt to deregulate and thereby revitalize the industry.” *Cedarrapids,*
1. Pre-ICCTA Federal Economic Regulation of Railroad Routes and Rates

Prior to the mid-twentieth century, the main statement of Congressional railroad policy was the Interstate Commerce Act (ICA) of 1887. The main purposes of the ICA were to regulate the prices that railroads charged shippers and to ensure that all communities received adequate railroad service. The ICA also created the Interstate Commerce Commission (ICC), an independent five-member panel that was charged with the responsibility of implementing many of the provisions of the ICA.

The ICA was passed at a time when the railroad industry was booming. By the 1970’s however, rail transport was declining due to increased competition from motor vehicle transport. In an attempt to enable railroads to compete more effectively with other modes of transportation, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976. This legislation gave rail companies greater flexibility in setting rates “to conform to market forces.” The Staggers Rail Act of 1980 continued the trend of deregulation that began in the 1970’s and took it even further, enhancing competition between railroads and making it easier for railroads to merge with one another.

The Staggers Act also limited states’ ability to regulate intrastate rail lines. Prior to the Staggers Act, a state had the authority to regulate rates charged by wholly intrastate rail lines, as long as the state regulations were fair and did not impede interstate commerce. After the Staggers Act, states could only regulate intrastate railroads within their borders if the state regulations


mirrored federal standards.\textsuperscript{16} The Staggers Act changed the railroad industry significantly, and was part of a broader pattern of deregulation at the time.

The Interstate Commerce Commission Termination Act, or ICCTA, was passed by Congress in 1995 and went into effect on January 1, 1996.\textsuperscript{17} The primary propose of the ICCTA was to reconfigure the federal government’s oversight of transportation industries to reflect the government’s shrinking role in regulating rail, motor carrier, and pipeline industries. The ICCTA transferred many of the ICC’s functions to the Department of Transportation, and created the new Surface Transportation Board to carry out a limited number of remaining functions. Congress gave the Surface Transportation Board significant authority to interpret and enforce the provisions of the ICCTA. According to the Senate Committee on Commerce, Science, and Transportation, the ICCTA “generally does not attempt to substantively redesign rail regulation.”\textsuperscript{18} The main components of the ICCTA are described in the next section.

2. \textit{The Content of the ICCTA}

The ICCTA makes some modifications but leaves the regime established under the Staggers Act largely intact. However, the ICCTA does make one very significant modification to the regulation of \textit{intra}state rail transportation (transport that takes place entirely in a single state.) Whereas under the Staggers Act, states still had a small but explicit role in setting intrastate rail transport rates, the ICCTA turned rate-setting over to market forces for the most part, and consolidated the rate-setting authority that remained with the federal government. In this way, the ICCTA continued the twin trends of deregulation and federalization that are contained in the Staggers Act.

\textsuperscript{17} The Interstate Commerce Commission Termination Act is codified at 49 U.S.C §§10101 \textit{et. seq}.
Under the ICCTA, railroads must apply for a license from the STB in order to construct new railroad lines or to extend existing railroad lines. In reviewing such applications, the STB’s primarily consideration is the economic consequences of the proposed project. The STB also considers the environmental and aesthetic impacts of the project, and may require the railroad to meet certain federal environmental and historic preservation standards as a condition of issuing such a license.

II. PREEMPTION OF STATE LAWS PERTAINING TO RAILROADS

As described previously, the U.S. Congress has broad authority to regulate railroads. States, of course, also have an interest in regulating the location, environmental impacts, and safety of railroads and other businesses that operate within their jurisdiction. These state laws are presumptively valid. But to the extent that they affect railroads or interstate commerce in general, state regulations must be consistent with, and secondary to, any Federal laws on the same topic. This primacy for federal laws stems from the Supremacy Clause of the U.S. constitution, which states that “[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.”

Businesses that are subject to the conflicting state and federal laws can challenge the state law on the grounds that it treads into regulatory territory that is reserved for Congress. If a court finds first that the federal government had the authority under the Constitution to pass the law, and

20 See 49 CFR 1105.6 (requiring preparation of Environmental Impact Statements for rail construction proposals); 49 CFR 1105.8 (requiring preparation of a Historic Report prior to the “lease, transfer, or sale of a railroad's line, sites or structures.”); 36 CFR 800.01-.16 (describing the process by which federal agencies “take into account the effects of their undertakings on historic properties” pursuant to Section 106 of the National Historic Preservation Act.) But see infra notes 118-132 and accompanying text, describing “loopholes” that allow some railroad construction and expansion projects to go forward without any environmental or historic preservation review.
22 U.S. const. art. VI, cl. 2.
second that the state’s law cannot be reconciled with the federal law, then the Supremacy Clause of the U.S. Constitution dictates that the state law must be nullified.23

A. The Supreme Court’s Three-Part Preemption Framework: Express, Conflict, and Field Preemption

In deciding whether state law is preempted by federal law, a court will look first to Congressional intent. The court will try to determine whether Congress intended for its federal law to preempt any state laws on the same subject. “The purpose of Congress is the ultimate touchstone’ of pre-emption analysis.”24

Courts may particularly scrutinize preemption of state laws in areas that are usually left to the states, such as criminal law, education, health, and welfare.25 Courts want to be sure that Congress actually intended to delve into regulatory issues that are traditionally left to the states. Courts will be more suspicious of state economic regulations, given Congress’s express authority from the Constitution to regulate interstate commerce.

The Supreme Court has set out three kinds of preemption:26

1. express preemption, where Congress’s intent to preempt state statutes is “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”27
2. field preemption, where “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”28

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3. conflict preemption, where state law actually conflicts with federal law.\(^{29}\)

If a court finds that one or more of these types of preemption exist, it will strike down the state law as a violation of the Supremacy Clause of the Constitution.

**B. The Statement of Jurisdiction in the ICCTA Suggests Broad Preemption**

Since the intent of Congress is central to a preemption analysis, a party has the best chance of establishing preemption if it can show that a Congress *expressly* preempted the state statute in question when it was writing its own federal statute. Most Federal laws have a specific section that describes whether Congress intended for the law to preempt similar state laws. For example, §10501 of the ICCTA states the following:

(a) (1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

. . .

(b) The jurisdiction of the [Federal Surface Transportation] 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.\(^{30}\)

The word “transportation” as it is used in the ICCTA is quite expansive, and 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

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(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.\textsuperscript{31}

The ICCTA’s definition of “railroad” is similarly broad, including
(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.\textsuperscript{32}

“Rail carrier” is defined as
a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.\textsuperscript{33}

The preemption clause in the Federal Railroad Safety Act (FRSA) is slightly more accommodating to state regulation.

It reads as follows:

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety 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 when the law, regulation or order – (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.\textsuperscript{34}

\textsuperscript{31} 49 U.S.C. §10102 part (9).
\textsuperscript{32} 49 U.S.C. §10102 part (6).
\textsuperscript{33} 49 U.S.C. §10102 part (5).
\textsuperscript{34} 49 U.S.C. §20101.
C. Courts Help Eliminate Uncertainty about the Preemptive Effect of the ICCTA

When new laws such as the ICCTA and the FRSA are passed, there is usually some initial uncertainty about the exact meaning of important terms in the statutes and about what the overall impact of the statutes will be. Thus it becomes the duty of the courts to interpret the laws that Congress has written. A number of courts, for example, have been called upon to settle disputes about the preemptive effect of the ICCTA and the FRSA. These disputes usually arise when a one party (such as a state or city) seeks to enforce a state law against a railroad and the railroad refuses to comply, claiming that the state law in question is void because it is preempted by federal law.

Although some newly-passed federal statutes result in divergent strains of interpretation in various courts, courts throughout the U.S. have arrived at largely the same conclusions about the meaning of the ICCTA’s preemption clause. In nearly all of the cases that interpreted the ICCTA’s preemption clause, the court has found that §10501(b) of the ICCTA expressly preempted the state statute in question. In some of these cases, courts have also found that the ICCTA preempted the entire field of railroad regulation and that the ICCTA and the state statute in question presented an irreconcilable conflict of duties for the railroad.

Although a finding of preemption is nearly universal, the one trend worth noting is that state courts appear to be more likely than Federal courts to find that a state law is not preempted by the ICCTA. A number of these decisions are described in greater detail below.

D. The STB’s Role in Interpreting the Preemptive Effect of the ICCTA

In addition to courts, federal agencies also play a role in clarifying the meaning of new federal statutes. For example, the STB has issued volumes of rules detailing how railroads must go about complying with the ICCTA. The STB’s rules cover matters such as how railroads must

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35 The majority of cases interpreting the ICCTA have focused on portions of the statute that are not relevant to this analysis, including the rate-setting and corporate consolidation provisions.

36 A number of these cases interpreting the ICCTA and FRSA are included in the case studies Appendix.
calculate their freight for recordkeeping purposes and the types of retirement programs railroads must offer their employees.

The STB also has the authority to respond to specific inquiries requesting clarification of laws relating to railroad transportation. A railroad, a state, or some other affected party can send an inquiry to the STB directly, or a court may request that the STB intervene in a dispute between a railroad and a local government when the dispute turns on an unclear provision of a railroad-related statute. The STB can issue three different types of documents in response to inquiries about the content of railroad-related laws:

First, the STB can respond to relatively simple inquiries about the application of railroad laws with an informal opinion letter. These informal opinion letters are written by members of the STB staff, who are likely to be quite familiar with statutes regulating railroads. The main advantages of such informal opinions are that they are inexpensive and can be obtained rapidly – sometimes within a matter of days. On the other hand, such letters are merely informational. They are not binding on any party, including the STB. A court would assign such opinion letters relatively little weight in the context of a judicial proceeding.

Second, the STB Secretary has the authority to issue an informal decision in response to an inquiry from a railroad or some other interested party. As with informal opinion letters written by STB staff, an informal decision by the Secretary is not binding on parties or on the Board. Nonetheless, courts will often afford deference to these informal decisions out of respect for the

37 See, e.g., Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444, at *1-2 (Aug. 12, 2004). The Town of Milford initiated the declaratory order proceeding with the STB.
38 See, e.g., Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (May 1, 2001) and Boston and Maine Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003). In this case, the U.S. Court of Appeals for the First Circuit requested an evaluation from the STB regarding the preemption of the local environmental regulations at issue in the case.
STB Secretary’s expertise and familiarity with the railroad-related laws in question. The informal decision process takes several weeks and costs $900.39

Third, the STB has discretionary authority to deliver formal decisions, in order to eliminate controversy and remove uncertainty as to the content of laws regulating railroads. These formal decisions are called declaratory orders, and they are written by the full Board. Courts will generally give significant weight to STB declaratory orders. It costs $1,400 and can take six months or more to obtain a declaratory order. Certain parties, such as local government entities, can apply for a waiver of the $1,400 filing fee.

Since the STB is interpreting the same statutory language as the courts, it is not surprising that most STB opinion letters, informal decisions, and declaratory orders have concluded that the ICCTA preempts a wide range of state laws. Interestingly enough, however, the STB seems to have adopted a somewhat more limited view of the ICCTA’s preemptive power than that of the courts. The STB’s opinions, while acknowledging the broad reach of the ICCTA’s preemption clause, still suggest that there is some room for state regulation of railroads.

In contrast to the three-part express/conflict/field preemption framework used by the courts, the STB decisions incorporate a three-part “reasonableness” standard for preemption. The STB preemption framework examines whether state statutes “conflict with” federal regulation, “interfere with” federal authority, or “unreasonably burden” interstate commerce. The STB three-part framework is described in the next section.

40 This authority is derived from 49 U.S.C. 721 and 5 U.S.C. 554(e).
41 Telephone interview with Rudy Saint-Louis, STB Staff Attorney, January 10, 2005.
42 49 CFR 1002.2(e)(1). See also cover letter from Gerald Moody to Surface Transportation Board, transmitting petition for declaratory order, Dec. 8, 2003.
43 July 10, 2000 letter from Nancy Beiter, Staff Attorney, STB Office of Congressional and Public Services, ¶4.
E. The STB’s Three-Part “Reasonableness” Standard for Preemption: conflict with federal regulation, interference with federal authority, and reasonableness of burden on interstate commerce

It is not exactly clear how the STB arrived at the position that only “unreasonable” state statutes are preempted by the ICCTA. Moreover, the STB’s “reasonableness” standard is somewhat difficult to reconcile with the conclusion of most federal courts, which is that the ICCTA preempts all state statutes regardless of whether they are reasonable or unreasonable. Nonetheless, the STB has continued to repeat its “reasonableness” standard in its formal and informal decisions, and this formulation has also been adopted by a number of state courts.

The STB has articulated its position as follows: “Not all state and local regulations that affect interstate commerce fail. Only those that ‘conflict with’ federal regulation, ‘interfere with’ federal authority, or ‘unreasonably burden’ interstate commerce are preempted.”44 A state statute must fulfill all three criteria in order to valid.

Informal opinion letters from STB staff help to define the contours of these criteria. It appears that a key factor in determining whether a state statute “interferes with federal authority” is whether the state’s power under the statute, if exercised fully, would give a state the ability to prohibit a given railroad activity entirely. For example, requiring a railroad to apply for county grading, building and conditional use permits prior to beginning a construction project would be preempted, because the county’s authority to evaluate the permit application also implies the authority to deny the permit entirely.45 However, state can still enforce laws “that police specific deleterious actions, such as dumping waste [into local creeks].”46 A permissible law would not have the power to bring the project to a halt, but would merely place reasonable restrictions on the

45 See June 20, 1996 letter from STB Secretary Vernon Williams to Robert Derrick, Director of King County Department of Development and Environmental Services, and Jeffrey Moreland, Senior Vice President of Law and General Counsel for Burlington Northern Santa Fe, regarding the Stampede Pass Subdivision Line Repair/Upgrade.
46 Id.
The STB’s criteria for a state law that does not “unreasonably burden” interstate commerce appears to be that the law either does not burden commerce whatsoever; or uses the least intrusive means possible for achieving a reasonable goal, resulting in a negligible impact on interstate commerce. The permitting requirements at issue in the King County case were deemed to impinge on interstate commerce, because they had the potential to significantly interfere with track maintenance, an essential activity for railroads engaging in interstate commerce. On the other hand, STB informal opinion letters suggest that an ordinance imposing fines for pollution could be enforceable against railroads. Perhaps this is because it should be possible for a railroad to engage in interstate commerce without polluting streams, and thus the hypothetical pollution fines do not burden interstate commerce. Alternatively, even if the fines would have a negligible effect on a carrier’s interstate business, they perhaps represent the least intrusive means possible for achieving a reasonable environmental goal.

The STB Secretary has also expressed the opinion that Indiana Code §8-6-7.6-1, which required railroads to maintain an unobstructed view of 1500 feet on either side of a public crossing, would be preempted by the ICCTA. Since “[a]n incident of a carrier’s right to operate over a line is the right to interchange cars with long-haul carriers,” a state law that greatly inhibited or

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47 Id.
48 the King County case is described in detail at notes 88-96 infra.
49 See June 20, 1996 letter from STB Secretary Vernon Williams to Robert Derrick, Director of King County Department of Development and Environmental Services, and Jeffrey Moreland, Senior Vice President of Law and General Counsel for Burlington Northern Santa Fe, regarding the Stampede Pass Subdivision Line Repair/Upgrade, at ¶¶6-9.
50 Id., ¶¶8-9.
51 See letter from STB Secretary Vernon Williams to Mr. LaKemper, responding to an April 21, 2000 request for an informal opinion regarding the scope of Federal preemption.
foreclosed the exercise of this right would be, in the opinion of the Secretary, preempted.\textsuperscript{52} The Secretary did note, however, that “less intrusive way to protect motor vehicles from being injured by oncoming trains such as grade crossing signals and gates” might be permissible.\textsuperscript{53} In other words, a state law may be able to meet the STB’s “no unreasonable burden on interstate commerce” criteria if the law stands up to a least restrictive means test.

III. PREEMPTION CASE STUDIES: WHEN STATE LAWS ARE CHALLENGED ON PREEMPTION GROUNDS

Although each case that goes to court has its own unique set of facts, past case law precedents can provide clues as to how future disputes over the interpretation of statutes might come out. In this section, previous cases are used to shed light on how a number of Minnesota statutes would fare in the face of preemption challenges from railroads.

The state laws that have given rise to these preemption challenges addressed a wide variety of issues. Some of these state statutes were specifically directed at railroads, but it is important to note that even state statutes that do not mention railroads at all can be preempted by federal railroad law. For example, a law of general application that requires all property owners to obtain building or demolition permits may be found unconstitutional \textit{as applied to railroads} because it imposes a burden on a railroad that is preempted by federal law.

In the following discussion about preemption, it is also important to remember that state laws are presumed to be valid until a court finds that they are preempted (either in full or in part.) Moreover, a railroad always has the option of \textit{voluntarily} complying with state laws, even those that have been found to be preempted as to railroads. As long as a railroad can comply with the state law without violating the federal law, the railroad always has the option of doing so.

\textsuperscript{52} \textit{Id.}, ¶9.
\textsuperscript{53} \textit{Id.}, ¶10.
A. Key Preliminary Terms: “transportation by rail carriers” and “Regulation of Rail Transportation”

The most clear example of “regulation of rail transportation” would be the setting of rates and conditions for transporting goods via rail. Although states did have certain limited authority to set intrastate rates under the Staggers Act, it is universally accepted that ICCTA §10501 has removed this authority from states. Courts have also made clear that most state laws regulating railroad crossings, train noise, and the closing of local railroad depots are also impermissible regulation of rail transportation.

Although stationary railroad depots may not initially seem to fall within the definition of “rail transportation,” the word “transportation” as it is used in the ICCTA has an extremely broad definition. It includes “facilit[ies] … of any kind related to the movement of passengers or property, or both, by rail” and “services related to that movement, including … storage.” Since depots are clearly “facilities related to the movement of passengers or property by rail,” any state law regulating the operation of railroad depots are preempted by the ICCTA.

In summary, a general rule of thumb might be that if a state law explicitly uses the word “railroad,” that law is probably preempted by the ICCTA. A notable exception to this rule is in the area of fencing railroad right-of-ways. In two nearly identical cases, Oklahoma state courts found that railroad right-of-ways were not railroad “facilities” or otherwise included within the ICCTA’s definition of “transportation.” Therefore, the courts held that the state did have the authority to compel railroads to fence their right-of-ways at the request of adjacent landowners. It is unclear, however, whether a federal court would reach the same conclusion as the Oklahoma state courts, since federal courts have tended to interpret the ICCTA’s preemption provisions more broadly than state courts.
Whereas state laws that regulate railroads directly are almost always preempted by the ICCTA, disagreements still remain as to the ICCTA’s preemptive effect on laws of general application. For example, a number of states have argued that zoning, environmental, and historic preservation laws that apply to everyone in the jurisdiction do not constitute “regulation of rail transportation,” even though their enforcement sometimes has an incidental effect on railroad operations. The states maintain that since the purpose of such laws is to regulate traditional state areas of expertise such as land use, public health and safety, and cultural preservation, state enforcement of such laws should not be characterized as “regulation of rail transportation” and thus removed from state authority.

States have had some limited success in advancing this argument, particularly in state courts.54 States have also had some success in enforcing laws of general application against non-railroad lessees whose operations happen to be located on railroad property.55 This is because the ICCTA’s preemption only applies to “transportation by rail carriers,”56 and non-railroad lessees are not considered “rail carriers.”

For example, the Town of Milford, Massachusetts sought to impose environmental permitting requirements on Boston Railway Terminal Company (BRT), a steel beam fabricator that planned to establish operations in the town. BRT claimed that it did not have to comply with local environmental laws because its operations were to be located on property owned by Grafton and Upton Railroad Company (GU), and that the steel beams used in BRT’s fabrication operations would be delivered to the fabrication facility by GU via rail.57

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54 See text accompanying notes 97-116 infra.
55 See, e.g., Florida East Coast Ry. v. City of Palm Beach, 110 F.Supp.2d 1367 (S.D. Fla. 2000), aff’d, 266 F.3d 1324 (11th Cir. 2001).
The Town sought a declaratory order from the STB to resolve the conflict over the applicability of local laws.\(^{58}\) The STB, however, stated that there is no need for the Board to institute a proceeding, because it is clear that: (1) the Board does not have jurisdiction over steel fabrication activities; (2) the Board does not have jurisdiction over rail/truck transloading activities that are not performed by a rail carrier, or on behalf of a rail carrier, that holds itself out to offer those services to the public; and (3) the broad Federal preemption of section 10501(b) does not apply to activities over which the Board’s jurisdiction does not extend.

The STB noted that the process of transloading the steel beams from railcars to trucks did fall within the definition of “transportation” under the ICCTA. However, the fact that the transloading would be performed by BRT rather than a “rail carrier” such as GU meant that the STB lacked jurisdiction over the transloading operation.\(^ {59}\) An important aspect of being a “rail carrier” is providing common carriage,\(^ {60}\) and there was no evidence in this case that BRT was holding itself out to the public as a common carrier willing to provide its services to any paying customer. The fact that GU would be “transporting rail cars for BRT and leasing it some surplus property” was not sufficient to bring the facility under the exclusive jurisdiction of the STB.\(^ {61}\) A Federal court in Florida reached a similar conclusion in 2000, finding that rail/truck transloading activities performed by a third party non-railroad-carrier were not exempt from local zoning and occupational licensing ordinances.\(^ {62}\)

\(^{58}\) Id.

\(^{59}\) Id. at *3 (“for transloading activities to qualify for preemption, they must be offered by a rail carrier (either directly or through its agent).”)

\(^{60}\) See definition of “rail carrier” supra at note 33.

\(^{61}\) Town of Milford, MA at *3.

\(^{62}\) Florida East Coast Ry. v. City of Palm Beach, 110 F.Supp.2d 1367 (S.D. Fla. 2000), aff’d, 266 F.3d 1324 (11th Cir. 2001). Cases like this one and Milford make some intuitive sense: if federal preemption applied to all railroad-owned property regardless of who leased the property and what took place there, then nothing would prevent a railroad from buying up vast tracts of land and then leasing out parcels to unrelated business owners who simply want to evade state regulations.
B. Federal preemption of State Laws Specifically Directed at Railroads

This section addresses a number of categories of regulation that are of particular relevance to state-railroad interactions. The list is not exhaustive, but it should provide a flavor of the extent to which state laws are preempted by the ICCTA and FRSA.

1. State laws regulating railroad depots/station agencies

Many states have sought to protect their local farmers and manufacturers from having to pay exorbitant rates in order to ship products via railroad. States have also attempted to prevent railroads from laying off workers or closing local train depots. These types of economic regulations have been resoundingly unsuccessful in light of the ICCTA’s broad preemption clause. Since the main purpose of uniform federal railroad regulation is to encourage commerce, state laws that interfere with the economic activities of railroads in a particular state are clearly in conflict with the federal law.

_CSX Transp., Inc. v. Georgia Public Service Commission_ and _Burlington Northern Santa Fe Corp. v. Anderson_ were two of the first cases interpreting the ICCTA, and both addressed a question that garnered significant interest in the wake of the ICCTA’s passage: whether states retained the authority that they previously had to regulate “railroad station agencies” within their borders.

Station agencies, also known as depots, are railroad business offices located on railroad property and staffed with railroad clerical employees. The Staggers Act of 1980 included an

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63 Again, the term “state” as it is used in this article refers to both a state and its political subdivisions, such as cities and counties. A court’s preemption analysis is the same regardless of whether a state statute or a local ordinance is at issue. _Scurlock v. City of Lynn Haven_, 858 F.2d 1521 (11th Cir. 1988).
64 The idea for this breakdown according to category came from the publication “Railroads and Cities,” League of Minnesota Cities, May 2004, 465.1. This document provides an especially good overview of a city’s role in regulating railroad crossings, train speeds, railroad noise, and taxation of railroad property, topics which are not discussed at length in this paper.
explicit mechanism for states to be involved in railroad operations within their states. This state authority included regulating staffing changes and closings at station agencies. The ICCTA, however, turned over such business decisions to the railroads themselves. Therefore, both courts found that the state’s attempt to regulate railroad agency closings was preempted by the ICCTA.

The outcome in this case was not surprising, and it seems clear that Congress would have agreed with the court’s interpretation of the ICCTA in this case. The Georgia and Montana state laws in question made it much more difficult for railroads to shut down unnecessary railroad agencies. This is precisely the kind of economic inefficiency that prompted Congress to deregulate and consolidate control over the railroad industry via legislation such as the ICCTA.

In finding preemption of the state law, the Montana court made an explicit link between the economic nature of the state laws in question and the ICCTA’s goal of regulating the economic aspects of railroad transportation:

In this case, state regulation of the closure, consolidation or centralization of agencies has a direct and substantial effect on the field of economic regulation of railroad transportation. Thus the state regulation at issue falls squarely in the preempted field of *economic regulation*, and it affects the policy of deregulation of railroad transportation. The statutory language and accompanying legislative record evidence Congress’ . . . intent to occupy the entire field of *economic regulation*, including the regulation of railroad agencies.67

The Georgia court in *CSX*, on the other hand, adopted a very broad reading of the ICCTA’s preemption clause when it opined that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”68 Rather than limiting its decision to the clear preemption of state economic regulation at issue in the case, the Georgia court gave the appearance of adjudicating the much more difficult question of the states’ role in health, safety, and environmental regulation of railroads under the ICCTA. A number of subsequent courts

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68 944 F.Supp. at 1581.
have cited this catchy dicta in CSX to justify a much more expansive interpretation of the ICCTA’s preemption clause than is actually justified by the holding in the CSX case itself. Particularly troubling is the use of the CSX case to justify preemption of state laws directed at health, safety, general welfare, and local land use.69 Unlike economic regulation of interstate carriers, which has always been a federal bailiwick, the exercise of eminent domain is traditionally one of the most important powers of state government.

2. **State regulation of Rail-street crossings**

As noted above, the preemption language of the FRSA does not seem to go as far as preemption under the ICCTA. For example, state courts in Oklahoma have found that the FRSA does not preempt a state from requiring a railroad to fence its right-of-way to keep cattle from wandering onto railroad tracks.70

Nonetheless, certain state regulations with a bearing on safety may still be preempted by the ICCTA. For example, an informal decision by the STB Secretary in 2000 takes the position that a law requiring railroads to maintain unimpeded lines of sight for 1500 feet on either side of a crossing would unduly interfere with railroad operations and thus would be preempted by the ICCTA.71

The Washington state court of appeals similarly invalidated city ordinances that prohibited railroad switching activities during weekday rush hours and imposed penalties on any railroad that

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69 Wisconsin Central v. Marshfield, 160 F.Supp.2d 1009, 1013 (passage from CSX used to support preemption of eminent domain powers); Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 236 F.Supp.2d 989, 1005 (D.S.D. 2002) (same); City of Auburn v. United States Government, 154 F.3d 1025 (9th Cir. 1998) (passage from CSX used to support preemption of environmental permitting requirements); Soo Line Railroad Co. v. City of Minneapolis, 38 F.Supp. 2d 1096, 1099 (passage from CSX used to support preemption of historic preservation ordinance).


71 See letter from STB Secretary Vernon Williams to Mr. LaKemper, responding to an April 21, 2000 request for an informal opinion regarding the scope of Federal preemption.
blocked a city street or alley for more than four minutes in the course of switching activities.72 The court held that such ordinances were “overbroad and seek to overly restrict railroad operations,” and that they “interfere with the railroad’s ability to conduct the [railroad operations] activity specifically set forth in 49 U.S.C. § 10501(b)(2).”73

These two documents call into question the validity of Minnesota Statute §219.384. This law states that municipalities can require railroad companies to remove obstructions to railroad right-of-ways, and can impose fines on the company if it fails to remove the obstruction within 30 days. It seems possible that a court would find this law to be “regulation of rail transportation” and therefore preempted by the ICCTA.

3. State laws regulating the Acquisition of Railroad property via eminent Domain

The power to condemn private property via the exercise of eminent domain is one of the most significant powers of state governments. Most states, including Minnesota, have chosen to share or delegate this power to local governments. The power of eminent domain enables states and localities to make way for public amenities such as roads and to encourage successful development of blighted and underutilized property.

A city or state will probably find it difficult if not impossible to condemn a segment of active railroad track, however. For example, the court in Wisconsin Central Ltd. v. City of Marshfield found that the ICCTA preempted the city’s attempt to condemn an active railroad track in order to make way for the city’s planned road improvements.74 The city argued that a mere relocation of railroad property did not constitute the sort of “regulation of rail transportation” that is preempted by §10501 of the ICCTA. The court disagreed, unequivocally stating that

72 City of Seattle v. Burlington Northern Railroad Company, 22 P.3d 260 (WA App. Div. 1 2001.)
73 Id. at 263.
“condemnation is regulation”75 and that “[g]iving effect to the condemnation authority of municipalities over railroad property conflicts with Congress’ purpose in enacting the ICCTA.”76

The state of Minnesota has sought to avoid an outcome such as the one in Marshfield by enacting a special eminent domain statute that applies to condemnation of railroad property. The statute appears to have been drafted specifically to conform to federal law, so that local governments could exercise their eminent domain powers without running afoul of the ICCTA and other federal statutes. As described below, however, it is not clear whether the Minnesota statute would hold up to preemption scrutiny.

In the state of Minnesota, if a local authority77 desires to exercise eminent domain over railroad property, it must show that all of the following four conditions are satisfied:

(1) the railroad track has either been abandoned under federal law, or it is not required to be abandoned under federal law.

(2) the railroad property in question is either not currently used for, or is used for but is not reasonably necessary for, the following railroad activities:
   (i) switching;
   (ii) loading or unloading; or
   (iii) classification activities.
   The local authority can satisfy condition (2) even if the railroad uses the property in question for storage, maintenance, and repair activities.

(3) some part of the property contains land pollution, or contains a release or threatened release of petroleum, or contains a release or threatened release of a pollutant, contaminant, hazardous substance, or hazardous waste.

(4) the authority intends to develop the property and has a plan for its cleanup and development within five years in order to maximize its market value.

75 Id. at 1013.
76 Id. at 1015.
77 Normally states have the power of eminent domain, but states can delegate their eminent domain powers to entities or authorities at the local level. For the purposes of this law, which regulates the use of eminent domain for railroad property, “authorities” include housing and redevelopment authorities, port authorities, economic development authorities, redevelopment agencies, municipalities administering a development district, etc.
Each of these conditions is considered in turn.

(1) the railroad track has either been abandoned under federal law, or it is not required to be abandoned under federal law.

This condition, along with condition (2), are designed to insure that this Minnesota statute does not run afoul of the ICCTA and other federal laws. Condition (1) limits the state’s jurisdiction to those situations in which federal laws regulating rail line abandonment have either been fulfilled or do not apply.

The first way for a local authority to establish that condition (1) has been satisfied is to show that any tracks in question have been abandoned under federal law. The other way to satisfy condition (1) is to show that any tracks on the land are not “required to be abandoned under federal law.” Neither the ICCTA, nor the Code of Federal Regulations, nor the Minnesota statute, provides a definition of what types of railroad tracks are “required to be abandoned under federal law.” The federal statute does explicitly state, however, that certain kinds of railroad tracks are not subject to federal abandonment procedures. “The [Surface Transportation] Board does not have any authority under this chapter [49 U.S.C. Chapter 109] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”

In other words, 

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78 For the most part, railroads must seek federal government approval in order to abandon their own railroad tracks. This is because Congress was concerned that if railroads were allowed to discontinue rail service on less profitable lines, certain shippers (especially farmers in rural areas) would be left with no way to transport their products to urban centers. Therefore, railroads usually must go through a lengthy process before they can abandon a rail line.

In the case of Shoreham Yards, it seems certain that CP has not gone through the formal federal abandonment process for any of the railroad tracks that exist Shoreham Yards. To the contrary, CP continues to assert that the Yard is being actively used for railroad purposes. Therefore, the railroad tracks on the property have not “been abandoned under federal law.”

79 49 U.S.C. 10906. No definitions for “spur, industrial, team, switching, or side tracks” are given in the federal statute. In general, however, these are short lengths of track used for such purposes as enabling two trains to pass one another at a junction or connecting a shipper’s loading and unloading facility with the main interstate rail lines. The STB has identified a number of guidelines for determining whether particular tracks should be characterized as “spur, industrial, team, switching, or side tracks.” See “Spur, Industrial, Team, Switching or Side Track Exemption,” Surface Transportation Board Office of Congressional and Public Assistance document. In any given court case, the question of whether or not a particular track falls within the definition of “spur, industrial, team, switching, or side track” is an issue that would ultimately be decided by the judge or jury. Louisiana & A. Ry. Co. v. Missouri Pac. R. Co., 288 F.Supp. 320 (E.D.La. 1968), aff’d 415 F.2d 751, cert. denied 396 U.S. 1060.
abandonment of “spur, industrial, team, switching, or side tracks” would qualify as “tracks not required to be abandoned under federal law,” since the federal agency in charge of regulating abandonments has no authority over these types of tracks.

Moreover, under certain conditions, even track types that do not fall into one of the four categories listed above are still exempt from the federal abandonment requirement. The STB must exempt a railroad from the normal abandonment procedure if the STB finds that such regulation:

(1) is not necessary to carry out the transportation policy of section 10101\(^{80}\) of this title; and
(2) either-- (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.\(^{81}\)

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\(^{80}\) Section 10101 of United States Code Title 49 states that:
- In regulating the railroad industry, it is the policy of the United States Government--
  1. to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
  2. to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
  3. to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
  4. to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
  5. to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
  6. to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
  7. to reduce regulatory barriers to entry into and exit from the industry;
  8. to operate transportation facilities and equipment without detriment to the public health and safety;
  9. to encourage honest and efficient management of railroads;
 10. to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;
 11. to encourage fair wages and safe and suitable working conditions in the railroad industry;
 12. to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;
 13. to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;
 14. to encourage and promote energy conservation; and
 15. to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

\(^{81}\) 49 U.S.C. §10502(a).
Assuming that the railroad tracks at Shoreham Yards do meet the criteria set forth above (for example, if there is no rail traffic currently running on a particular set of lines) then one could argue that the tracks are entitled to an automatic exemption from the federal abandonment requirements, and they are therefore “not required to be abandoned under federal law.” If this argument were successful, then condition (1) of Minnesota statute 117.57 would be satisfied. Under normal circumstances, however, it would be the railroad and not some other party that would seek an abandonment exemption under the criteria set forth above. In the case of Shoreham Yards, CP would probably oppose being exempt from the abandonment requirement, because exemption would make it easier for the city to use its eminent domain powers. Since all the laws and regulations are written with an eye toward the railroad applying for the Section 10502 exemption, it is unclear whether other parties are equally entitled to claim such an exemption.

If the city of Minneapolis wants to use the eminent domain powers granted to it under Minnesota statute 117.57, its best chance for success will be if it can establish that the tracks on Shoreham Yards are “spur, industrial, team, switching, or side tracks,” and therefore “not required to be abandoned under federal law.”

(2) the railroad property in question is either not currently used for, or is used for but is not reasonably necessary for, switching; loading or unloading; or classification activities. The local authority can satisfy condition (2) even if the railroad uses the property in question for storage, maintenance, and repair activities.

The second condition of Minnesota statute 117.57 is also designed to limit the statute’s reach so as to not encroach upon federal jurisdiction. The state statute asserts jurisdiction over property that is “not currently used for … railroad activities,” which the federal government acknowledges it does not control. However, the Minnesota statute also asserts jurisdiction over

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82 Even if a city can successfully establish that any tracks in question are outside of federal regulatory powers, it is not clear that they are within the state’s regulatory powers. See the section below on “spur, industrial, side tracks.”
property that “is used for but is not reasonably necessary for … railroad activities,” and goes on to state that local authorities can also acquire railroad property being used for “storage, maintenance, and repair activities.”

Given the broad preemptions from state regulation that courts have granted to railroads under the ICCTA, a railroad would probably challenge this statute, arguing that it is also preempted at least in part by federal law. The railroad would argue that the Minnesota statute violates the Commerce Clause and/or the Supremacy Clause of the Constitution to the extent that it allows a state to impose regulatory burdens on interstate rail operations that are already regulated under the ICCTA.

The local authority could defend the Minnesota statute in a number of ways. First, it could argue that the ICCTA, does not preempt all state regulations, but merely those that are unreasonable, contradict the ICCTA or other federal statutes, or burden interstate commerce. Second, the local authority could assert that federal regulation over a minimally-used portion of Shoreham Yards does not advance the goals set forth in ICCTA, and that in this situation there should be an exemption from federal law under §10502(a), as described above.

If the Minnesota statute survives a constitutional challenge, the question of whether a particular area was being used for “switching; loading or unloading; or classification activities” would be a factual matter for the court to determine, based on the evidence presented by both parties.

(3) some part of the property contains land pollution, or contains a release or threatened release of petroleum, or contains a release or threatened release of a pollutant, contaminant, hazardous substance, or hazardous waste.

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83 See note 80 above.
84 See footnotes 80 and 81 above, along with accompanying text.
Many of the terms used in condition (3) have specific definitions under Minnesota law.

“Land pollution” is defined in Minnesota Statutes section 116.06 as “the presence in or on the land of any waste in such quantity, of such nature and duration, and under such condition as would affect injuriously any waters of the state, create air contaminants or cause air pollution.”

A "Release" of petroleum, as defined by Minnesota Statutes chapter 115C, means “a spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum from a tank into the environment whether occurring before or after June 4, 1987, but does not include discharges or designed venting allowed under agency rules.”

A release of a of a pollutant, contaminant, hazardous substance, or hazardous waste means, according to Minnesota Statutes chapter 115B.02, “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment which occurred at a point in time or which continues to occur,” but does not include exhaust emissions, a release of nuclear waste, or “any release resulting from the application of fertilizer or agricultural or silvicultural chemicals, or disposal of emptied pesticide containers or residues from a pesticide…."

Also under 115B.02, A “pollutant or contaminant” means any element, substance, compound, mixture, or agent, other than a hazardous substance, which after release from a facility and upon exposure of, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in the organisms or their offspring. Pollutant or contaminant does not include natural gas, natural gas
liquids, liquefied natural gas, synthetic gas usable for fuel, or mixtures of such synthetic gas and natural gas.”

"Hazardous substance" is defined by 115B.02 as “(1) any commercial chemical designated pursuant to the Federal Water Pollution Control Act…, (2) any hazardous air pollutant listed pursuant to the Clean Air Act…, and (3) any hazardous waste. Hazardous substance does not include natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel, or mixtures of such synthetic gas and natural gas, nor does it include petroleum, including crude oil or any fraction thereof which is not otherwise a hazardous waste.”

“Hazardous waste” includes “any refuse, sludge, or other waste material or combinations of refuse, sludge or other waste materials in solid, semisolid, liquid, or contained gaseous form which because of its quantity, concentration, or chemical, physical, or infectious characteristics may (a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. Categories of hazardous waste materials include, but are not limited to: explosives, flammables, oxidizers, poisons, irritants, and corrosives. Hazardous waste does not include source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended.” (Minnesota Statutes 116.06).

(4) the authority intends to develop the property and has a plan for its cleanup and development within five years in order to maximize its market value.

The first three conditions are the hardest for an authority to meet. On the fourth requirement, however, courts will give local government authorities the benefit of the doubt. Courts will assume that the authority’s cleanup and redevelopment plan is acceptable, unless the railroad
that owns the land can show, with clear and convincing evidence, that the railroad use is a superior use of the land.

If an authority successfully uses eminent domain to acquire property that has ongoing railroad use, the authority must pay for the relocation costs of the railroad operations.85 This is a departure from the normal operation of eminent domain. Non-railroad landowners whose property is acquired by eminent domain generally only receive the fair market value of their land, and are not reimbursed for relocation costs.

C. Federal preemption of State Laws of General Application

4. State Environmental laws

Historically, laws regulating land use, environmental protection, and human health were considered to be within the purview of state control. In the 1960’s and 1970’s, however, a number of high-profile events such as the Love Canal and the near-extinction of bald eagles described in Rachel Carson’s book *Silent Spring* indicated that the existing system of state controls on pollution was inadequate to protect the public and the environment. Thus began a wave of federal-level environmental regulations that set standards for air and water quality, protection of endangered species, and toxic waste handling and cleanup. These federal laws apply to essentially all businesses and individuals in the United States, including railroads.86

Several of the major federal environmental laws delegated certain inspection and enforcement duties to states. The Clean Air Act and the Clean Water Act, for example, put state agencies such as the Minnesota Pollution Control Agency (MPCA) in charge of monitoring air

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85 The Minnesota legislature incorporated federal standards for relocation costs into Minnesota law. The federal law entitled “Assistance and Real Property Acquisition Policies Act of 1970,” as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, describes the applicable relocation costs.

86 The statutes do provide exemptions for certain businesses and individuals, but they are not relevant here.
quality standards and establish water quality standards for the “navigable waters” within the state. In cases where the MPCA is enforcing a federal law, the MPCA is essentially acting in the federal government’s stead. The state government’s actions cannot be preempted by any federal law, because the state is already acting under the auspices of a federal law. The state and the federal government have a cooperative arrangement whereby the state “steps into the federal government’s shoes.”

In contrast with the Clean Air Act and Clean Water Act, however, the federal government retains ultimate control over all toxic waste cleanups under CERCLA. This law, often referred to as the “Superfund” law, imposed strict liability for cleanup on owners of contaminated property and created a fund to pay for toxic waste cleanups on abandoned properties. Although CERCLA was ultimately successful in bringing about cleanup of some of the most polluted sites in the U.S., the progress of cleanups was slow. As time went by it became clear that it might take the EPA decades to initiate cleanup of sites with medium- and low-level pollution. Therefore, even though the United States Environmental Protection Agency (EPA) is ultimately responsible for overseeing all toxic waste cleanups in the United States, many states were dissatisfied with the EPA’s slow pace and passed their own toxic waste cleanup laws. These laws generally created Voluntary Investigation and Cleanup (VIC) programs, whereby landowners received technical and sometimes financial assistance with cleanup in exchange for voluntarily entering the cleanup program.

To avoid duplication, the EPA has an explicit policy of withholding enforcement action against landowners that are actively participating in a state Voluntary Investigation and Cleanup (VIC) program. When a landowner successfully completes a voluntary cleanup under a state program, the landowner can ask the EPA for a certification letter verifying that the EPA will not require any additional cleanup of the property. Since most landowners find it is easier to work with
a state agency rather than a federal agency, they opt to participate in the state’s toxic waste cleanup
program rather than facing the possibility of enforcement action from the EPA.

Since a state-run VIC program operates under the auspices of state law, the state agency
overseeing a toxic waste cleanup never “steps into the federal government’s shoes.” In the case of a
railroad, therefore, a state VIC program would probably be preempted by the ICCTA.
Nevertheless, a railroad might choose to comply with such a state environmental law because
compliance would be relatively inexpensive, or because it would generate good will with neighbors
or the state regulatory agency. A railroad might also voluntarily submit to state regulation in order
to avoid facing federal penalties or regulatory action. If at some point a railroad decides that it
would fare better with the EPA than with a state agency, however, it can simply cease to comply
with the state agency and the EPA would be forced to take over the case.87

A final type of environmental law does not regulate environmental quality outcomes, but
rather mandates a process that takes environmental quality into consideration. The National
Environmental Policy Act, or NEPA, requires environmental review of all proposed major federal
actions. The purpose of NEPA is to ensure that the environmental impacts of a federal action have
been considered before the project goes forward. Since most railroad building projects require
approval from the STB, they are considered “federal actions” that are subject environmental review
under NEPA.

Many states have also adopted their own environmental review laws that mirror the
requirements established under NEPA. Since NEPA only applies to actions of the federal
government, state legislatures have sought to extend the same sorts of procedural requirements to

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87 This almost never happens, however. The EPA strongly encourages landowners to participate in state-run voluntary
investigation and cleanup programs, largely because the budget at the federal level is already strained. Any landowner
who ignores the EPA’s advice would likely find itself trying to work with a rather grumpy and unaccommodating EPA
staff.
the actions of state governments and private parties. Such state programs may also be more stringent than the federal environmental review under NEPA.

Because these are state rather than federal laws, however, a railroad can challenge the state’s actions on preemption grounds. This principle was established by what has come to be known as the “Stampede Pass” litigation. 88 This case began in 1996, when Burlington Northern Railroad Company (BN) petitioned the STB for authorization to re-purchase a seventy-eight-mile portion of the Stampede Pass rail line in Washington State. BN intended to increase traffic on the line, and therefore planned a number of repairs and improvements to the tracks and adjacent facilities. 89

Initially BN applied to the STB for approval to re-purchase the line, and BN also applied for permits from local government entities for the construction and improvements it intended to make. Subsequently, however, BN contended that it only needed to obtain federal approval, and that local review of any aspect of the project was preempted by the ICCTA. BN claimed that the project was only subject to federal-level environmental review, and that the ICCTA preempted all other state-level environmental review. 90

The local governments, however, contended that it was still within their “police power” to review the environmental impact of BN’s planned construction and alteration of the existing rail line. The local governments sought an informal, nonbinding opinion from the STB as to whether

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88 Stampede Pass is one of the most important cases interpreting the ICCTA for two reasons: first, the case reached the federal Appeals Court level, which gives it greater precedential weight than cases that were resolved at the Federal District Court level. Second, the STB issued a formal decision in this case, which is a relatively rare occurrence. This means that both the STB and the Federal courts have endorsed the outcome in this case – that state environmental review requirements were preempted by the ICCTA. This case illustrates nearly all of the potential legal steps that a state government may take in challenging a railroad project, from requesting an informal STB decision to bringing an action in Federal Appeals court.

89 These included replacement of track sidings, replacement of maintenance-of-way buildings and snow sheds, improvement of the Stampede Pass tunnels, and installation of communication towers.

90 The National Environmental Policy Act (NEPA) requires federal agencies to gauge the potential environmental impacts of their proposed actions. 42 U.S.C. 4321 et seq. The STB’s decisions about railroad line acquisition are an example of a federal agency action that is subject to environmental review under NEPA. Thus, when the STB was deciding whether or not to allow BN to re-acquire and make improvements to the western portion of the Stampede Pass, the STB was required to conduct an Environmental Assessment pursuant to the procedure set forth in NEPA.
their review of the Stampede Pass project was preempted by the ICCTA. The informal opinion concluded that the project was not subject to state and local permit requirements.91

The STB’s informal opinion was only advisory, however. In order to bring an appeal in Federal Court, the local governments needed to receive a final binding decision from the STB.92 Therefore, in October 1996, the local governments requested that the STB make a formal, binding decision on the same issue.93 Not surprisingly, the STB reached the same conclusion in its formal opinion, finding that laws were preempted by the ICCTA.94 The issuance of the final decision, however, opened the door for the local governments to challenge the STB’s decision in Federal Court.

The local governments did challenge the STB’s decision in City of Auburn v. United States Government.95 The Federal Court reached the same conclusion as the STB, finding that local government review of railroad projects is preempted by the ICCTA. The court rejected a number of key arguments made by the local governments. For example, the court discredited the local governments’ use of legislative reports to show Congress’s intent to limit the reach of the ICCTA. It noted that resort to the legislative history was only appropriate when the meaning of the statute was ambiguous, and since in the court’s view the text of the ICCTA clearly preempted local regulation, there was no call to examine the legislative history that suggested otherwise. The court also rejected the local governments’ contention that the ICCTA’s preemption did not eliminate the

91 See June 20, 1996 letter from STB Secretary Vernon Williams to Robert Derrick, Director of King County Department of Development and Environmental Services, and Jeffrey Moreland, Senior Vice President of Law and General Counsel for Burlington Northern Santa Fe, regarding the Stampede Pass Subdivision Line Repair/Upgrade. See also Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, STB Finance Docket No. 33200 at *2, 1997 WL 362017 (I.C.C. July 1, 1997), describing the history of the Stampede Pass proceedings.
92 C.f. City of Auburn v. United States, No. 96-71051 (9th Cir. March 26, 1997) (dismissing the city’s appeal of the STB’s decision because, unlike Kent County, the City of Auburn had not obtained a final decision from the STB.)
94 Id.
95 154 F.3d 1025.
traditional police powers to the states. The court held that the ICCTA preempted both economic and environmental regulation of railroads at the state level.\textsuperscript{96}

In the case described above, the Washington statute apparently would have imposed much greater requirements on the railroad than the federal law. This made it worth the railroad’s time and energy to challenge the state law. Oftentimes, however, state environmental laws are either the same as or only slightly more stringent than their federal counterparts, and so it is common for railroads to simply submit to the state environmental laws. They do so even though the state law would technically be preempted by the ICCTA.

5. \textit{Local Zoning, Land Use, Building Maintenance, and Historic Preservation Ordinances}

A number of court and STB decisions have analyzed whether local zoning, land use, building maintenance, and historic preservation laws are preempted by the ICCTA.

The case of \textit{Norfolk Southern Railway Co. v. City of Austell}\textsuperscript{97} arose when two railroads jointly sought permission from the city to construct an intermodal facility. The facility was to be located on a 110-acre parcel of land owned by the railroads that was zoned for commercial use. The city maintained that its zoning statutes would not allow the intermodal operation on land zoned for commercial use, and the city also denied the railroads’ request to rezone the parcel for industrial use. The railroad then sued the city, claiming that application of city zoning ordinances to railroad property was preempted by §10501(b). The Federal District Court for the Northern District of Georgia agreed, holding that “the language of the ICCTA expresses Congress’ unambiguous and clear intent to preempt the City of Austell’s authority to regulate and govern the construction,

\textsuperscript{96} \textit{Id.} The court seemed to entirely discredit the economic versus environmental distinction that the city attempted to make. The city acknowledged that previous cases found state regulations to be preempted, but then attempted to distinguish those cases from the current situation by noting that previous cases dealt with \textit{economic} rather than \textit{environmental} regulation by states. The court’s response was to re-emphasize the sweeping breadth of the ICCTA’s economic regulatory power. The court seemed to imply that any bill granting such broad authority over economic regulation must necessarily cover environmental regulation as well.

development, and operation of the plaintiffs’ intermodal facility via the instant zoning ordinance and land-use permitting requirement.”

The court found that construction and operation of such facilities “comes within the exclusive jurisdiction of the STB.”

The proposed construction of an intermodal facility in Minneapolis also gave rise to a dispute about the application of local permitting laws to intermodal construction projects. In 1997, Soo Line/Canadian Pacific Railroad (CPR) applied to the City for permits to demolish five buildings at its Shoreham Yard site in Northeast Minneapolis. CPR’s desire to demolish the buildings was related to its planned construction of an intermodal/bulk transfer facility at Shoreham Yard. The Minneapolis Heritage Preservation Commission, however, withheld its approval of the demolition permits because the buildings had historic value and were candidates for the national or local list of historic places. CPR challenged the city’s refusal to issue the demolition permits in federal court, arguing that “The ICCTA expressly preempts the City’s authority to withhold the demolition permits.”

The U.S. District Court for the District of Minnesota agreed. It quoted the STB’s statement that “[l]ocal law… is preempted when the challenged state statute ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” and held that “[t]he City’s attempt to block CPR’s redevelopment of Shoreham Yard through its permitting process stands as an obstacle to the accomplishment of congressional purposes and objectives.”

Like the court in Austell, the court in Soo Line stated that only the STB could impose regulations

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98 Id. at 6.
99 Id. The court reached this ruling despite the fact that the STB has repeatedly denied having jurisdiction over intermodal facilities. See “State Regulation of Intermodal Facilities” section below.
100 See Soo Line Railroad Co. v. City of Minneapolis, 38 F.3d 1096 (D. Minn. 1998).
101 Id. at 1099.
102 Id. at 1100, quoting Cities of Auburn and Kent, WA – Petition for Declaratory Order, STB Finance Docket No. 33200, WL 362017 (I.C.C.) (July 1, 1997).
103 Id. at 1101.
and oversee the construction of CPR’s intermodal facility in Minneapolis.\footnote{Id. at 1101. The STB, however, has unequivocally stated that it lacks statutory authority to oversee construction of intermodal facilities. This apparent regulatory vacuum is discussed in the “State Regulation of Intermodal Facilities” section below.} The STB’s regulatory powers potentially include historic considerations, but only for buildings on the national register.

In a 2001 case between the same parties, however, the Minnesota state Court of Appeals found that the City’s heritage preservation designation of a locomotive roundhouse located at Shoreham Yard was not preempted by federal law. The court drew a distinction between the two cases: in the 1998 case, the railroad sought demolition permits as part of a specific plan for railroad-related construction, and the city’s refusal to grant the permits would have effectively forced the railroad to delay, modify, or cancel its project. In the 2001 case, however, the city’s heritage preservation designation did not interfere with the railroad’s current use of the building, nor did it stand in the way of any transportation-related project currently being contemplated by the railroad. The court therefore concluded that “there is no occasion here to examine in depth the content of relevant preemption law,”\footnote{Soo Line Railroad Company v. City of Minneapolis, 625 N.W.2d 834, 836 (Minn. App. 2001).} since upholding the historic police powers of the state in this case would not in any way interfere with federal law.\footnote{Id. at 837.} The court declined to provide the railroad with what it characterized as “an advisory opinion on possible future disputes,” noting that “whether a particular land use restriction interferes with interstate commerce’ or is preempted by federal law ‘is a fact-bound question.’”\footnote{Id., quoting Borough of Riverdale Petition for Declaratory Order, STB Finance Docket No. 33466, 1999 WL 715272, at *6 (I.C.C. Sept. 9, 1999).}

The Supreme Court of New Jersey reached a similar conclusion in Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corporation,\footnote{163 N.J. 446, 750 A.2d 57 (2000).} drawing practical, fact-based distinctions between the impact of various city ordinances on the railroad’s operations. It found that the village did not have the authority to dictate where along its right-of-way the railroad could build

\footnote{104 Id. at 1101. The STB, however, has unequivocally stated that it lacks statutory authority to oversee construction of intermodal facilities. This apparent regulatory vacuum is discussed in the “State Regulation of Intermodal Facilities” section below.  
105 Soo Line Railroad Company v. City of Minneapolis, 625 N.W.2d 834, 836 (Minn. App. 2001).  
106 Id. at 837.  
108 163 N.J. 446, 750 A.2d 57 (2000).}
its new engine maintenance and refueling facility, nor could the village require the railroad to obtain building or land use permits prior to building or operating the facility.\textsuperscript{109} The court held that these types of regulations were preempted by the ICCTA.

The Village could, however, require the railroad to “notify the Village when … undertaking an activity for which another entity would require a permit.”\textsuperscript{110} The village also had the right to access the railroad’s property, make reasonable inspections of its facilities, and enforce fire, health, plumbing, safety, and construction regulations. The court felt that only rarely would such regulations interfere with a railroad’s operations.\textsuperscript{111}

The Supreme Court of Vermont reached a similar conclusion in 2000, finding that federal law preempted some, but not all, local zoning and permitting requirements.\textsuperscript{112} At issue were a number of conditions that the city had placed on its approval of a road salt storage and distribution facility on the railroad’s property. The facility received large deliveries of salt via railcar, and then smaller loads of salt were distributed from the facility by truck during the snow season.

The Vermont Supreme Court upheld the trial court’s distinction 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.”\textsuperscript{113} It held that the city’s attempts to limit the quantity of salt delivered by rail and the hours and frequency of such deliveries were preempted by the ICCTA.\textsuperscript{114} On the other hand, the court upheld the city’s regulation of the number of trucks exiting the facility, the hours in which trucking could occur, the availability of parking at the

\textsuperscript{109} Id. at 460-62, 66-67.
\textsuperscript{110} Id. at 460, 66.
\textsuperscript{111} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
facility, and “conditions designed to avert potential contamination from the salt shed.”115 “These conditions,” the court said, “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.”116

6. Common Law Nuisance claims against Railroads

On several occasions, cities and/or their residents have attempted to bring common law nuisance claims against railroads in an attempt to attain reprieve from railroad noise, fumes, or vibrations. These efforts have met with little success, however, with most courts holding that the ICCTA preempts such claims.117

D. Railroad Law “Loopholes” - Special Cases where Federal/State Jurisdiction is Unclear

Although the STB has regulatory authority over most railroad construction projects, there are a number of exceptions to this rule. The STB lacks regulatory authority over expansion of existing railroad facilities, and it is also barred from imposing conditions or restrictions on the construction of intermodal facilities and spur, industrial, or side tracks.

At the same time, these projects are still within the STB’s exclusive jurisdiction under 10501, and therefore state regulation is still preempted. In other words, state regulation of these projects is preempted because of lack of jurisdiction, and federal regulation of these projects is barred because the STB lacks statutory authority. The result is that several types of railroad construction projects are effectively immune from any governmental regulation whatsoever.

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115 Id. at 504. The environmental conditions included “curbing requirements and requirements that the salt be handled on impervious surfaces.” Id.
116 Id. at 655.
117 See, e.g., Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corporation, 163 N.J. 446, 750 A.2d 57 (2000), noting that adjudication of common law nuisance claims in state court would “infringe on the STB’s exclusive jurisdiction over the location and operations of railroad facilities.” Id. at 462 / 67.
Railroads may voluntarily submit to environmental review or other types of regulation in these cases, but they are under no obligation to do so.

It is unclear why Congress would want the STB to retain exclusive jurisdiction over projects that the STB did not have the authority to regulate. If Congress intended for states to have regulatory authority over these projects, its purpose has been thwarted by the courts. On the other hand, if Congress did intend for the STB to regulate in these areas, then the STB has failed to receive that message. The third and most troubling possibility is that Congress actually intended to create a regulatory vacuum, in which neither states nor the federal government could oversee certain types of railroad construction. Regardless of Congressional intent, the outcome is the same: railroads are under no obligation to consider the environmental or historic preservation impacts of certain types of construction.

1. Upgrading Existing Facilities

In order to construct new railroad lines or facilities, a railroad must obtain a license from the STB. Part of the STB’s license review process includes conducting a review of the project’s potential impact on the environment and on historic structures.\textsuperscript{118} Railroads do not have to go through the same licensing process in order to expand existing facilities, however. As the STB has noted on at least two occasions,

\begin{quote}
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. Railroads also do not require Board authority to upgrade an existing line, or to increase the level of traffic on a line . . . .\textsuperscript{119}
\end{quote}

\begin{footnotes}
\item[118] 49 U.S.C. 10901. See also supra notes 19-20 and accompanying text.
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The difference between “new construction” and “expansion of existing facilities” is not spelled out in the ICCTA, but courts have distinguished the two based on whether the project in question allows a railroad to penetrate or invade a new market. Therefore, if the project occurs in the same geographic region as the railroad’s existing facilities, it will probably be considered an “expansion of existing facilities” rather than “new construction,” regardless of the actual magnitude of the project.

The distinction between new construction and expansion of existing facilities is an important one, because expansion of existing facilities does not require a license, and “[w]here no license is required, there is no environmental review conducted by the Board.”

For example, the STB found that construction of a refueling terminal in Hauser, Idaho did not require a license from the STB because the facility did not enable Burlington Northern Santa Fe to “compete in territories they had not previously served.” There was therefore no federal environmental review of the project, which featured “two 250,000-gallon storage tanks for holding diesel fuel, . . . a 20,000-gallon storage tank for bulk lube oil, a 27,000-gallon ground waste oil storage tank, and a 210,000-gallon industrial wastewater storage tank” as well as “a four-track fueling bay, a platform for unloading diesel fuel or lube oil from up to 18 tank cars to the on-site storage tanks, and various other structures such as an administration building,” all of which were situated over an aquifer that was the sole source of drinking water for 400,000 people in the area.

Environmental review at the state or local level was also precluded. The STB found that the provisions of 10501(b) continue to preempt state-level regulation regardless of

121 See, e.g., Friends of the Aquifer et. al. Decision, STB Finance Docket No. 33966, (Aug. 15, 2001) (finding no requirement to obtain a license despite the significant magnitude of the project.)
122 Id. at *1-2.
whether the STB has the authority to regulate in the state’s stead. “[T]he absence of environmental review by the Board does not mean that a project is open to environmental review at the state or local level. . . . the Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but state and local activity is preempted under 49 U.S.C. 10501(b) because of the Board’s exclusive jurisdiction over rail transportation.”

Although BNSF would still be bound to the environmental protection measures that it had volunteered to put in place, the railroad had apparently been under no obligation to make those voluntary commitments in the first instance.

2. Construction of Intermodal Facilities

The question of who has jurisdiction over intermodal facilities is particularly troubling. A number of courts have found that state regulation of intermodal facilities is preempted by §10501(b), and that therefore the STB has exclusive jurisdiction over the construction of intermodal yards. The STB, for its part, has repeatedly disavowed having any such authority. One letter from an STB staff member states that “the construction of intermodal yards is not regulated by the Surface Transportation Board…. The [ICCTA] statute … does not contain any authority for the Board to regulate this type of construction, and, in fact, it has never done so.”

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123 Id. at *10 (emphasis added.)
124 Id. at *9 (“to the extent a railroad is willing to undertake an activity or restriction, the activity or restriction generally should be seen as reflecting the carrier’s own determination that the condition is reasonable and will not unduly interfere with interstate commerce. See Township of Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000).”) See also Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (May 1, 2001), at *9 (“a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments. . . .”)
125 Id. at *2, noting BNSF’s belief that “it was not required to obtain local permits to build a locomotive servicing facility that is integrally related to its rail operations.”
Since the STB lacks the authority to regulate intermodal facilities at the federal level, and courts have denied states the ability to do so, the apparent result is that no one is in charge of regulating intermodal facilities.

The current confusion over regulation of intermodal facilities is especially disturbing for residents of cities in which intermodal facilities are located. The lack of clarity about who is responsible for regulating intermodal facilities suggests that a clarification from Congress is in order. Congress could fix this problem either by placing limits on the scope of §10501(b) preemption to allow for state regulation of intermodal facilities, or by clarifying the STB’s jurisdiction over construction of intermodal facilities.

3. Spur, Industrial, and Side Tracks

A similar “regulatory vacuum” exists with regard to spur, industrial, and switching tracks. These are tracks that branch off from the main railroad, usually to enable a shipper to connect its railcars full of products to the railroad’s main line. These tracks are often owned and maintained by the shipper rather than the railroad.

It seems logical for Congress to decide that these tracks were not the kind of railroad operations that required federal regulatory oversight. Therefore, spur, industrial, and switching tracks were included in §10906’s list of projects that do not require STB approval. 129 Unfortunately, however, Congress failed to go back and give states the authority to regulate these tracks, and so again it appears that no one has the authority to regulate such construction. The situation was explained by the STB as follows:

the law explicitly provides that a license is not required to construct "spur," "industrial," or "switching" tracks, see 49 U.S.C. 10906. Where no license is required, there is no environmental review conducted by the Board. Regardless of whether a project falls under section 10901 or 10906, however, the preemption

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129 49 U.S.C. 10906 states in relevant part that “The Board does not have [licensing authority] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”
provisions of section 10501(b) [preempting state regulation of “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities”] apply.\textsuperscript{130}

The problem with this “regulatory no-man’s land” is illustrated by a situation that arose in Westford, Massachusetts. Fletcher Granite Company, which operated a granite quarry and stone fabrication mill, sought to reestablish rail service on a sidetrack that connected its mill to the mainline of the Boston & Maine Railroad. The sidetrack had not been used for 35 years, and so when Fletcher Granite announced its plan to undertake extensive improvements to the track and resume rail service, neighboring residents had raised concerns about the noise and environmental degradation that might accompany the project. In an attempt to avoid local environmental review of the project, Fletcher Granite petitioned the STB to declare that the STB “has exclusive jurisdiction over the resumption of rail service and that local or state regulation is preempted.”\textsuperscript{131}

Although the STB declined to institute a declaratory order proceeding, it did review the relevant statutes and case law. The STB’s analysis suggests strongly that, as with expansion of existing facilities and construction of intermodal facilities, the maintenance and resumption of service on a side track is exempt from both state and federal regulation.\textsuperscript{132}

IV. FEDERAL AND STATE AUTHORITY OVER RAILROADS: CONCLUSION

Because there is generally a close connection between railroad operations and interstate commerce, and because federal legislation extends to the full reaches of its power and hasn’t pulled any punches, railroads have long enjoyed a high level of immunity from state and local laws. Joanna Liberman, a transportation policy specialist at the National League of Cities, confirmed that railroads enjoy a very particular brand of federal protection. “There is very little that local

\textsuperscript{131} Fletcher Granite at *1-2.
\textsuperscript{132} See supra note 130 and accompanying text.
governments can do to control railroad operations within their borders,” she said. “Any locality seeking to challenge a railroad will have a steep uphill battle.”

Railroads are not completely immune to local control, however. Some avenues for local control exist, and some communities have mounted successful challenges against railroads, as noted above. State laws that do not conflict with federal regulation, interfere with federal authority, or unreasonably burden interstate commerce may be allowed to stand.

In cases where state law is preempted, railroads are usually subject to federal regulatory authority. In limited situations, however, it appears that certain railroad construction projects are immune from both state and federal regulation. This “regulatory vacuum” suggests the need for Congressional action to close existing loopholes in railroad regulation.

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133 Telephone interview with Joanna Liberman, National League of Cities, April 5, 2004. 202-626-3042, liberman@nlc.org