

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NORFOLK SOUTHERN RAILWAY COMPANY,)
Plaintiff,)
)
v.)
)
CITY OF ALEXANDRIA, *et al.*,)
Defendants,)
)
v.)
)
RSI LEASING, INC., *et al.*,)
Third-party and Counterclaim Defendants.)
)

Case No. 1:08-CV-618

**THE CITY OF ALEXANDRIA’S RESPONSE IN OPPOSITION TO THE
MOTION FOR SUMMARY JUDGMENT OF NORFOLK SOUTHERN
RAILWAY COMPANY AND RSI LEASING, INC. AND IN SUPPORT OF
THE CITY’S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Norfolk Southern Railway Company (“NSRC”) owns, and RSI Leasing, Inc. (“RSI”) operates, an ethanol transloading facility (“Facility”) in the City of Alexandria (“City”). Trucks owned, operated and controlled by trucking companies and ethanol purchasers drive to and from the Facility. The City has issued Permits regulating those trucks as they drive over City streets near residential and other populated areas. Even though the Permits apply only to the movement of trucks, NSRC and RSI (collectively “NSRC”) move for summary judgment based on the effect the Permits will allegedly have on the transloading operation. They argue that because transloading is a rail activity, because the trucks drive to and from the transloading facility, and because regulation of the trucks has an indirect effect on the economic viability of the Facility, the City’s Permits are preempted by federal laws relating to railroads, railroad safety and railroad handling of hazardous materials. To support this argument, NSRC paints a picture of the Permits

causing rail cars to back up through its entire system, virtually bringing interstate commerce to a halt.

This argument is fundamentally flawed. Even if transloading is considered a railroad activity, it does not mean that every truck or person with some contact with the Facility is protected from local regulation. As discussed below, courts have uniformly rejected that argument, based in part on the recognition that because almost all goods travel by rail at some point, such logic would preempt local regulation of a wide range of conduct with no direct connection to railroad operations or safety. More fundamentally, NSRC's argument fails because it cannot point to any federal law or regulation that conflicts with the Permits, directly or indirectly. Although NSRC paints a nightmare scenario if the Permits are enforced, it can easily avoid those consequences by either providing the ethanol storage expressly permitted, and in some cases required, by the very regulations NSRC claims preempt the Permits, or taking other measures contemplated or allowed by federal law. At most, the Permits may force NSRC to make economic choices it would rather not make. But the law is clear that such indirect economic consequences cannot form the basis of a federal preemption claim. As detailed below, NSRC has failed to meet its burden to demonstrate that Congress intended to preempt the City's authority to regulate ethanol-filled trucks traveling on City streets.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

The City objects to NSRC's Material Fact 17 as being an improper legal conclusion and/or legal opinion, and not a fact. The City concedes that it did not follow the procedures in 49 U.S.C. § 5112(c), but that fact is immaterial because the City did not have to follow those procedures, as detailed below. In addition, the City maintains that many of NSRC's undisputed

facts and facts set forth in its “Factual Background” are immaterial to this matter. Accordingly, although the City does not accept the accuracy of all of those assertions, for purposes of this Motion for Summary Judgment only, the City does not dispute the factual assertions themselves at this time, except as expressly addressed below.

ARGUMENT

As the party asserting preemption, NSRC bears a substantial burden to demonstrate that Congress intended to preempt local regulation of ethanol-filled trucks operating on City streets. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 116-17 (1992). It is clear that NSRC has failed to demonstrate that Congress intended to preempt local authority to regulate trucks on City streets under the ICC Termination Act of 1995, 49 U.S.C. §§ 10101-16101 (“ICCTA”), the Federal Rail Safety Act of 1970, 49 U.S.C. §§ 20101-20153 (“FRSA”), or the Hazardous Materials Transportation Act of 1976, *as amended*, 49 U.S.C. §§ 5101-5127 (“HMTA”).

I. THE PERMITS DO NOT REGULATE THE OPERATION OF THE VAN DORN FACILITY AND THUS ARE BEYOND THE REACH OF ICCTA PREEMPTION

The ICCTA’s preemption clause grants the Surface Transportation Board (“STB”) exclusive jurisdiction over “transportation by rail carrier,” requiring both the act of *transportation* and the performance of that act by, or under the auspices of, a *rail carrier*. 49 U.S.C. § 10501(a). *See also Hi-Tech Trans., L.L.C. – Petition for Declaratory Order*, STB Fin. Docket No. 34192, 2003 WL 21952136 at *3. Acts that are not considered “transportation” are not covered by this clause, nor is transportation not performed by a rail carrier. *See, e.g., Grafton & Upton R.R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, 175 (D. Mass. 2006) (ICCTA preemption in 49 U.S.C. § 10501(b) “does not apply to activities over which the STB’s jurisdiction does not extend”). On the undisputed facts, that mandates judgment in favor of the City.

A. The ICCTA Does Not Preempt Local Regulation of Trucks Traveling on City Streets Just Because They Haul Materials From a Rail Yard

The Permits on their face apply to trucks traveling on City streets. *Norfolk Southern Ry. Co.'s & RSI Leasing, Inc.'s Brief in Support of Motion for Summary Judgment*, Exhibit 8, No. 1:08-CV-618 (E.D. Va. Nov. 24, 2008) (“*NSRC Br. Ex. 8*”). They do not apply to or purport to regulate transloading or any other activity in the Van Dorn Yard. Neither NSRC nor RSI owns, controls or operates the trucks. *Memorandum of Points and Authorities in Support of the City of Alexandria's Motion for Summary Judgment*, Exhibits 6 & 7, No. 1:08-CV-618 (E.D. Va. Nov. 24, 2008) (“*City Mem. Exs. 6 & 7*”). The trucks are dispatched by ethanol shippers or purchasers to pick up ethanol that has been delivered to the Facility. Joint Stipulation of Facts at ¶¶ 11 & 13, No. 1:08-CV-618 (E.D. Va. Nov. 24, 2008) (“*Stips. 11 & 13*”). Moreover, the Permits are issued only to the trucking companies and RSI, none of which are rail carriers. *Stips. Ex. 7*. There is no genuine dispute, therefore, that the Permits do not apply to rail transportation *or* rail carriers. Accordingly, the ICCTA simply does not apply.

Every court that has addressed whether the ICCTA preempts local regulation of trucks driving to and from a rail yard has rejected the claim and upheld the local regulation.¹ ICCTA preemption simply “does not reach local regulation of activities not integrally related to rail service,” including distribution facilities involving “non-railroad business activities.” *CFNR*, 282 F. Supp. 2d at 1118 (citing *Fla. E. Coast Ry.*, 266 F.3d at 1328-31).

¹ See *In re Vermont Ry.*, 769 A.2d 648, 502 (Vt. 2000) (no preemption for local regulations regarding hours, routes, and number of trucks exiting storage facility for salt brought via rail); *CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114 (N.D. Cal. 2003) (“*CFNR*”) (sublessee of railroad operated bulk transfer facility on railroad property to transfer pumice and cement from rail cars to trucks for delivery to local customers; city business license and requirements regarding possible environmental hazards including dust, traffic and water run-off were not preempted by ICCTA); *Hi-Tech Trans, L.L.C. v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2004) (no preemption for truck transportation of construction and demolition waste en

NSRC attempts to brush aside the critical fact that the Permits do not, in fact, regulate the Facility or rail activity by insisting without explanation or citation to legal authority that “[i]t does not matter that . . . the City will claim that the Ordinance merely regulates truck traffic to and from the Facility.” *NSRC Br.* at 10. The cases discussed above demonstrate that the limited applicability of the Permits not only “matters,” it is decisive; the Permits do not regulate rail transportation and are therefore beyond the scope of the ICCTA. Indeed, as one court noted in a case with similar facts:

Taken to its logical conclusion, [the railroad’s] argument would mean that any trucking company who picks up goods from a railroad terminal for delivery to a customer would be free from local regulation. Congress, however, could not have intended such an expansive interpretation of the ICCTA’s reach.

CFNR, 282 F. Supp. 2d at 1119. *See also Hi-Tech Trans.*, 382 F.3d at 309 (the fact that construction debris was ultimately transported by rail “does not morph” the hauling and loading of debris onto railcars “into transportation by rail carrier.”).

B. Even If Transloading Is Rail Transportation, The ICCTA Does Not Preempt Local Regulation of Trucks Driving To and From a Transloading Facility

In an effort to support the notion that the Ordinance and Permits constitute “a regulation of the Facility itself,” NSRC provides great detail regarding the nature and operation of the transloading. *NSRC Br.* at 11-13 & 14. NSRC also relies on inapposite cases involving the *direct* regulation of rail operations. *Id.* at 15-17. But the question of whether the transloading operation itself is subject to STB jurisdiction is irrelevant here because the Permits regulate truck operations on City streets, not transloading on railroad property.²

route to transloading facility, even though the debris was ultimately transported in rail cars; trucking involved transportation “to a rail carrier,” not transportation “by a rail carrier”).

² The City does not accept the position that the transloading operation is a rail operation and has raised that issue before the STB. *City of Alexandria, Va. – Petition for Declaratory Order*, STB Finance Docket No. 35157 (Filed June 17, 2008). For purposes of this motion, however, it is immaterial whether the transloading operation itself is or is not rail transportation because the

All of the cases relied upon by NSRC to make its ICCTA preemption argument involve activities or construction *by a rail carrier or its agent* involving *railroad activities*. See *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (local land use and environmental laws requiring railroad to obtain permit before repairing and improving track sidings, snow sheds, tunnels and communication towers); *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996) (state utilities commission asserting authority over railroad agency closings); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state statute prohibiting railroad from blocking crossing for more than five minutes); *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3rd Cir. 2007) (rail carrier's agent transloading from trucks to railcars); *Canadian Nat'l Ry. Co. v. Rockwood*, (Civil Case No. 04-40-323), 2005 U.S. Dist. LEXIS 40131 (E.D. Mich. June 1, 2005) (rail carrier's agent transloading from railcar to trucks); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005) (local regulation requiring pre-construction permit for construction of facility on railroad property); *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass. 2002) (local permitting process applied to railroad's construction and operation of automobile unloading facility).

Here, in contrast, the trucks regulated by the Permits are not owned, controlled or operated by a railroad. The Permits regulate only truck activity on City streets and not any rail activity. None of the cases NSRC cites supports the view that the ICCTA preempts local regulation of trucks. Courts considering the indirect impact of local regulations of non-rail transportation have uniformly rejected the notion that such indirect effects on railroad commerce are preempted:

Indeed, if Hi-Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail

Permits and ordinance apply only to trucks owned, operated and controlled by entities that are not rail carriers.

carrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.

Hi-Tech Trans., 382 F.3d at 309. Each of NSRC’s specific argument fails for this same reason.

NSRC argues that local permitting processes are *per se* preempted. *NSRC Br.* at 13-14. To support this argument, NSRC cites cases in which a railroad was required to comply with local permitting requirements before making repairs and improvements on its own track and facilities.³ But Congress “narrowly tailored” the ICCTA preemption provision to displace state laws that had the effect of managing or governing rail transportation, “while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *Florida E. Coast Ry.*, 266 F.3d at 1331. As discussed above, courts have uniformly found local regulation of truck traffic on local streets not to be preempted by the ICCTA. *See supra, n. 1.*

Moreover, in cases cited by NSRC such as *City of Auburn*, the courts held the local permitting processes were preempted because the permitting process was unduly burdensome on the railroad. The ICCTA preempts permitting regimes that would have the effect of preventing the railroad from “constructing, acquiring, operating, abandoning, or discontinuing of spur, industrial, team, switching, or side tracks, or facilities” *City of Auburn*, 154 F.3d at 1030. Here, however, the Permits apply to trucks, not railroad operations, they were issued as a matter of administrative routine and NSRC does not claim that the permitting process delayed operations. Even if the Ordinance could be understood to apply to rail transportation, therefore, the Permits are not the kind of local permit that is preempted.

NSRC further argues that the Permits are preempted even if they are health and safety regulations and regardless of the effect of the regulations. *NSRC Br.* at 15-17. Again NSRC

misses the point. The issue is not whether the Permits are economic regulation or health and safety regulation; the issue is whether they regulate rail transportation. Again NSRC cites *Green Mountain, City of Auburn, Boston & Maine* and *CSX Transportation, Inc.*, *supra*, p. 6, all of which involved the direct regulation of railroad construction and development. As *Florida East Coast, CNFR, Vermont Railway* and the other cases discussed above establish, the ICCTA does not preempt local permit requirements for trucks driving to and from a rail facility.

The only effort NSRC makes to establish that the City's regulation of trucks on City streets is in fact regulation of rail transportation is the argument that certain City officials have expressed the desire to shut the facility down and that the City could revoke or refuse to issue the Permits to achieve this. *NSRC Br.* at 14 & n.2 & 3. But NSRC provides no legal authority for the proposition that preemption can be based on perceived animus, however. In fact, such arguments have been rejected as a matter of law:

That the City hoped FEC would move its railroad operations elsewhere is not relevant to our analysis: in evaluating whether the local regulation is pre-empted by the federal law, we focus on the federal statute (including its mandates and purposes) and determine the extent to which the actual effects of the local regulation interfere with the intended functioning of the federal law.

Florida E. Coast Ry., 266 F.3d at 1339 n.12. In any event, the City would be justified in regulating the movement of ethanol-filled trucks on its streets even if it supported the transloading operation.

Moreover, the City's actions demonstrate that this argument lacks merit. Although the City would like the Facility to relocate, the City has pursued an entirely lawful and orderly strategy of seeking a declaration from the STB that the City has the legal authority to regulate the

³ *King County*, No. 33095, 1 STB 731 (Sept. 25, 1996); *Cities of Auburn and Kent*, Nos. 96-71051, 97-70022, 97-70920, 2 STB 330 (July 1, 1997), *aff'd*, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

Facility. *See supra*, n.2. There is simply no basis, in fact or in law, for NSRC to claim that general statements of City officials regarding the Facility somehow transforms an administratively issued permit for trucks on City streets into the kind of direct regulation of railroads that would be preempted by the ICCTA. Indeed, no legislative statements of intent to regulate the railroad or its transloading accompanied the issuance of the Permits or passage of the amendment to Ordinance 5-2-27 on June 14, 2008. Stips. Ex. 7; Minutes of the City Council of Alexandria, Virginia, June 14, 2008 at ¶ 27, attached as Exhibit 1.

Finally, NSRC's speculative fear that the City may refuse to issue future Permits is baseless. The City issued the Permits, and has continued to issue them, on its own accord (even over the objections of NSRC). If the City were to act unreasonably in issuing or not issuing a permit in the future, NSRC could seek to challenge that action. But NSRC has not challenged the reasonableness of the Permits or their conditions. Instead it has challenged facially the City's authority to regulate the trucks *at all*. As demonstrated above, the City's inherent power to regulate the use of its streets is not preempted by the ICCTA. NSRC cannot overcome that well-established principal by speculating that some future action by the City might be unreasonable.

C. The Court Need Not Reach the Question Whether the City's Ordinances Impose a Burden on Interstate Commerce

NSRC argues that the City's Permits are preempted because they "unreasonably burden interstate commerce." *NSRC Br.* at 17. In support of this argument, NSRC ignores the legal shortcomings of its claim and paints a nightmare scenario in which the permit restrictions may have a "ripple effect," "congesting not just the Yard, but other locations elsewhere on the NSRC interstate rail system as well, affecting not only the delivery of ethanol but other commodities as well." *Id.* at 18.

As demonstrated above, however, the ICCTA does not preempt local regulation of non-rail activities even if there is some impact on interstate rail commerce. NSRC has not asserted or established a direct claim under the Commerce Clause, cannot show that the Permits apply to rail operations or facilities and has not introduced credible evidence other than broad assertions from one of its officials that interstate commerce will be adversely affected. For example, NSRC has no evidence to support its speculation that other communities might impose permitting requirements similar to the City's thereby choking the flow of ethanol. Deposition of David Lawson, pp. 65-72 (Oct. 16, 2008), attached as Exhibit 2.

Fundamentally, however, this nightmare scenario is a transparent scare tactic that NSRC could avoid by transloading at alternative locations or by building storage tanks and safely storing tank cars on sidings and other tracks at the Van Dorn Yard.⁴ NSRC could also reduce the volume of ethanol processed through the Facility. Lawson Dep., 73; *City Mem.* Ex. 11. Any of those steps would avoid the ripple-effect congestion nightmare. In any event, interstate commerce will not come to a screeching halt even if NSRC's competitive position is eroded, because NSRC's competitors are in a position to ensure carriage of the goods. *Id.*

NSRC's fears about the impact of the current Permit restrictions and its assertion that the City has not justified the Permit restrictions, *NSRC Br.* at 17-20, are similarly baseless. NSRC has never argued to the City, or alleged in this Court, that the Permits' restrictions are not reasonably related to the City's safety concerns. Rather, NSRC argues that the City has no authority whatsoever to issue the Permits. If justified, the City would consider modifying

⁴ There is capacity to store a total of 40 cars in the Facility. The Yard has capacity to store a total of approximately 400 cars, although non-ethanol traffic on certain days limits the capacity for ethanol-laden cars to about 50. Deposition of James Reiner, pp. 48-50 (Sept. 19, 2008), attached as Exhibit 3. NSRC has not demonstrated that there is insufficient storage capacity at the Yard or in its system to safely store its actual and expected ethanol traffic.

specific Permit conditions upon a showing that safety would not be impaired. But the fact that the current Permit conditions may have an economic impact on NSRC does not provide a basis to conclude that the City's authority to issue any permits is preempted entirely.

In the end, NSRC is not so much concerned with interstate commerce as it is with its own profits. *NSRC Br.* at 17 & n.4. As a matter of law, however, protecting NSRC's bottom line is not a basis to preempt legitimate local regulations:

Naturally, at some level, all regulation places constraints on firms' profit-maximizing behavior; to allow [plaintiff's] argument to prevail would subsume all local regulation to the profit-maximizing priorities of individual railroad companies.

Florida E. Coast Ry., 266 F.3d at 1338 n.11.

II. THE CITY'S ORDINANCE DOES NOT RELATE TO RAIL SAFETY AND IS NOT PREEMPTED BY THE FEDERAL RAIL SAFETY ACT

NSRC's argument that the FRSA preempts the Permits and Ordinance suffers from the same fundamental flaw as its ICCTA argument: the preemptive scope of the FRSA is limited to regulations of rail safety, 49 U.S.C. § 20106, and the Permits apply solely to transportation by truck. The FRSA does not preempt regulation of trucks traveling on streets and not rails.

Implicitly recognizing this bar, NSRC argues that the Ordinance and Permits are preempted under the FRSA because they force the delay of transportation of a hazardous material. *NSRC Br.* at 22. This argument is without merit.⁵

⁵ NSRC's argument that the FRSA's "savings clause" applies only to states, and therefore the FRSA completely preempts municipal regulation of rail transportation, *NSRC Br.* at 20-24, is beside the point, because the Ordinance and Permits do not regulate or relate to rail transportation and are therefore not within the preemptive scope of the FRSA.

A. The Transportation of Hazardous Materials by Truck Is Not a Subject Matter that Relates to Rail Safety

NSRC argues that the transportation of hazardous materials “is a subject that relates to rail safety.” *NSRC Br.* at 23 (citing *CSX Transp. Inc. v. Pub. Utils. Comm’n*, 901 F.2d 497, 503 (6th Cir. 1990)). NSRC’s argument is premised on the fact that some HMTA regulations have been incorporated by statute into the FRSA. NSRC infers that because the FRSA incorporates HMTA regulations, and because the HMTA relates to the transport of hazardous materials, the FRSA preempts the Permits because they affect trucks carrying ethanol.

This position glosses over the fact that while the HMTA regulates the transport of hazardous materials by all modes, the FRSA incorporates only the HMTA regulations related to the transport of hazardous materials *by rail*. The case NSRC cites makes this clear. *CSX Transp.*, 901 F.2d at 501 (“We find that the language of the FRSA, “any law . . . relating to railroad safety,” 45 U.S.C. § 434, applies to the HMTA as it relates to the transportation of hazardous material by rail.”). Thus, the Ohio regulations relating to transportation of hazardous materials *by rail* were preempted.

NSRC cites no authority for the proposition that the FRSA preempts local regulation of trucks hauling freight to or from a rail facility. Indeed, the only court presented with that novel argument rejected it. The Supreme Court of Vermont considered a local permit specifying, *inter alia*, routing trucks hauling salt from a rail yard, the number of trucks exiting the facility daily, hours during which trucking could occur and conditions designed to avert potential environmental contamination from the salt. *In re Vermont Ry.*, 769 A.2d at 655. The court held that the permit was *not* preempted by the FRSA for the simple reason that the permit conditions “do not attempt to regulate the subject matter of railroad safety nor does *Vermont Ry.* point to any conditions that conflict with specific federal regulations regarding railway safety.” *Id.*

(emphasis added). As in *Vermont Ry.*, Alexandria’s regulation of trucks hauling ethanol on City streets by specifying the hours, number of trucks and their route does not attempt to regulate the subject matter of railroad safety and is not preempted by the FRSA.

Unlike *Vermont Ry.*, the FRSA cases upon which NSRC relies all involved direct regulation of railroad activities or safety. *NSRC Br.* at 22. For example, *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 627 (6th Cir. 1996), involved an ordinance prohibiting trains from blocking a street for more than five minutes and requiring at least five minutes between obstructions. The case deals with railroad operation and has nothing to do with the local regulation of trucks carrying goods from a rail yard. The other cases cited by NSRC are similarly inapposite.⁶

B. NSRC Can Comply with the Permits Without Compromising Railroad Safety

Even if the “related to” language of the FRSA extends its preemptive reach beyond direct regulation of rail safety, NSRC’s arguments still fail. NSRC relies on the Sixth Circuit’s understanding of the preemptive reach of the FRSA to argue that “it is on the basis of potential safety aspects of compliance with the ordinance that the challenged ordinance relates to railroad safety.” *NSRC Br.* at 22 (citing *City of Plymouth, supra*). However the Supreme Court has since adopted a narrower understanding of preemption through indirect effects to avoid expanding the preemptive effect of federal law. In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Supreme Court held that a local law will be

⁶ See *CSX Transp. Inc.*, 901 F.2d 497 (6th Cir. 1990) (FRSA preemption of state regulation of intermodal transportation of hazardous materials); *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (local regulation of trains traveling near the U.S. Capitol).

understood to “relate to” the subject matter of a federal law only if it produces “such acute, albeit indirect . . . effects, by intent or otherwise,” as to defeat the Congressional purpose behind the federal statute.” *Id.* at 668. Thus, a local law must not merely touch on the subject of federal regulation, it must force action that defeats Congressional intent. Applying that test, the Fourth Circuit explained that a local law that creates indirect economic incentives “that affect but do not bind the choices” of the affected groups “is generally not preempted.” *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007).

Here, NSRC points to no provision of the FRSA that would be thwarted by the Permits. Nor does NSRC cite any FRSA or HMTA regulation (to the extent incorporated into the FRSA) that would be undermined by the Permits. 49 C.F.R. § 174.14 relates only to expediting shipments upon receipt by a railroad, not upon delivery to a yard. NSRC admits that if it cannot move ethanol off the yard immediately, it will have to store it on the yard somewhere, and also admits that 49 C.F.R. § 174.16(b) expressly allows such storage. *NSRC Br.* at 24. *See also* 49 C.F.R. § 174.304 (permitting the transportation of ethanol by rail only if delivered to a consignee on a private track or to a storage tank). The Permits cannot be preempted merely because they *might* force NSRC to store ethanol in precisely the manner permitted, if not required, by the same law NSRC claims preempts the Permits. No Congressional goal is thwarted by the City’s regulation.⁷

Finally, NSRC’s sweeping claim that the FRSA and HMTA preempt anything that in any way delays the transportation of hazardous materials by rail is unsupported. No provision of either statute imposes such a broad prohibition. Indeed, as noted above, federal regulations

⁷ Currently, NSRC allows tank cars full of ethanol to remain on its tracks for up to five days when the consignee does not pick up the ethanol immediately. Stip. 22. Either NSRC is violating the FRSA itself, or such storage is not inconsistent with the FRSA.

permit storage if immediate transportation is not possible. NSRC cites an agency decision, *State of Rhode Island Rules and Regulations*, 44 Fed. Reg. 75566, 75571 (Dec. 29, 1979), to argue that delays caused by the Permits are “incongruous with safe transportation” and therefore prohibited under the HMTA and preempted under the FRSA. *NSRC Br.* at 25. The Rhode Island case, however, deals only with HMTA regulation of truck transportation, and is not therefore incorporated into the FRSA. *CSX v. Public Util. Comm’n*, 901 F.2d at 501.

Moreover, the delay in the Rhode Island case stemmed from a permitting process that, *inter alia*, prohibited trucks carrying liquefied natural gas from travelling during morning or afternoon rush hours, requiring trucks to interrupt their journey to wait for the end of rush hour. 44 Fed. Reg. at 75566. *See also National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982). That case is clearly distinguishable. The Permits do not require trucks or trains to interrupt their travels. Any pause in the transportation of the ethanol merely requires storage in a manner directed by the HMTA. *See* 49 C.F.R. § 174.16. NSRC provides no authority for its proposition that a rail safety statute preempts local regulation of trucks on City streets.

III. THE ORDINANCE AND PERMITS APPLIED TO TRUCKS TRANSPORTING ETHANOL ON CITY STREETS ARE NOT PREEMPTED BY THE HMTA

A. The Permits Are Not Preempted by the HMTA’s Hazardous Materials Highway Route Designation Procedures

NSRC argues that the Permits are preempted because the City did not follow the procedures under the HMTA for designating highway routes for trucks carrying hazardous materials. *NSRC Br.* at 26-27. As discussed in greater detail in the City’s *Memorandum of Points and Authorities in Support of the City of Alexandria’s Motion for Summary Judgment*, the plain language and legislative history of the HMTA demonstrate that the highway route designation procedures do not apply to site-specific, point-to-point regulations such as the

Permits. *City's Mem.* at 25-26. *See also* 49 U.S.C. § 5112(c); 49 C.F.R. §§ 397.65, 397.69; H.R. REP. 101-444(II), Selected Provisions & I, 101st Cong., 2nd Sess. 1990, attached to *City's Mem.* as Appendix D.

NSRC attempts to overcome the limited applicability of the HMTA's highway routing designation procedures by arguing that the "local nature of the routes is immaterial." *NSRC Br.* at 27. The only authority NSRC cites for this broad construction of the HMTA is Department of Transportation ("DOT") Preemption Determination ("PD") 31(F), *District of Columbia Requirements for Highway Routing of Certain Hazardous Materials*, 71 Fed. Reg. 18137 (April 10, 2006). That decision provides no support for NSRC's position. That case involved an attempt by the District of Columbia to keep hazardous materials at least 2.2 miles from the Capitol by prohibiting trucks carrying hazardous materials from using I-295 through the District, forcing them instead to use the Beltway in Maryland and Virginia. 71 Fed. Reg. at 18141.

In contrast, the City's Permits do not divert hazardous materials around Alexandria or into other jurisdictions; they regulate the movement of trucks to and from a specific facility within City limits. Nor do they cut off access to the Facility, as NSRC suggests. The trucks have access to the Facility subject only to reasonable restrictions reflecting the character of the area. Indeed, the route specified by Permits is one of two possible direct routes between the Facility and the Beltway. The Permits' time-of-day restrictions are longer than the Facility's current hours of operation. Future changes in the Facility's hours can be addressed in future permits. Accordingly, there is nothing about the Permits that brings them within the scope of the HMTA highway route designation procedures and they are not preempted.

B. The Permits Do Not Apply to Transloading and Are Not Preempted by HMTA Provisions Relating to Transloading

The HMTA provides that local regulation of the transportation of hazardous materials is only preempted if it: (1) is “substantially the same” as a federal regulation in one of the specific subject areas covered by the statute, (2) makes it impossible to comply with a HMTA requirement, and (3) is an obstacle to achieving an objective of the HMTA. 49 U.S.C. § 5125(a) & (b). Unable to argue that the Permits directly do any of those things, NSRC argues that the Permits are preempted because the alleged indirect effects of the Permits on transloading (1) are substantially the same as HMTA regulations on “repacking” and “loading,” and (2) make it impossible to comply with both the Permits and the HMTA. *NSRC Br.* at 27-29.

First, the Permits are not substantially the same as any HMTA regulation regarding “repacking” or “loading,” and NSRC does not cite a single HMTA regulation on any of the covered subjects as to which the Permits are not substantially similar. Indeed, it is difficult to imagine that such a regulation *could* exist, given that the Permits address the movement of trucks before and after transloading but are silent regarding any aspect of transloading.

To bridge this gap, NSRC strains to draw an indirect connection between the Permits and the transloading process. NSRC first argues that the Permits are analogous to a Nevada statewide permitting regime struck down in *Southern Pacific Transp. Co. v. Public Serv. Comm’n*, 909 F.2d 352 (9th Cir. 1990). *NSRC Br.* at 28. The court held that Nevada imposed requirements for the physical transloading and unloading of hazardous materials that were different than specific HMTA regulations covering the same processes. *Id.* at 356. In contrast, NSRC can point to no HMTA regulations addressing the same topics addressed in the Permits.⁸

⁸ Similarly, NSRC cites *New York Dept. of Env’tl Conservation Requirements on the Transfer and Storage of Hazardous Waste Incidental to Transp.*, 60 Fed. Reg. 62527, 62537 (Dec. 6,

Second, NSRC argues that the Permits' limitation on truck traffic affects the "pace" of transloading. *NSRC Br.* at 28. Again, however, NSRC points to no HMTA regulation that addresses the "pace" of transloading and admits that there are no such regulations. *Id.* Turning the concept of express preemption on its head, NSRC cites *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-72 (1978), to argue that the *absence* of regulations reflects a regulatory decision that there should be no regulation of such pacing at all. *Id.* But *Ray* does not stand for such a sweeping view of preemption through silence. The Court in *Ray* rejected the argument that mere regulatory silence establishes preemption; there must be an affirmative regulatory decision not to regulate in a given subject area. 435 U.S. at 171-72.

Here, NSRC does not provide any evidence that the Pipeline and Hazardous Materials Transportation Board made an affirmative decision not to regulate the pacing of transloading. Moreover, as demonstrated above, to the extent the Permits do affect the timing of transloading, they do not impose any requirement substantially different than anything required by the HMTA. *See supra*, p. 14 (citing 49 C.F.R. §§ 174.14, 16, & 304). By relying on regulatory silence to impliedly preempt the Permits, NSRC would convert the limited preemptive scope of the HMTA into field preemption. Congress specifically drafted the HMTA to avoid that construction.

Similarly, NSRC argues that the permit condition providing that "[a] copy of the permit must be provided to each driver," somehow conflicts with HMTA requirements regarding shipping documents. *NSRC Br.* at 29. Again, however, NSRC points to no specific shipping

1995), to argue that the HMTA broadly preempts local regulations regarding repackaging. *NSRC Br.* at 27-28. That decision is inapposite. First, the Permits do not address transloading or repackaging. Second, on reconsideration, one of the state requirements was found to be not preempted because not only was it not "substantially similar" to any HMTA provision, but the challenger failed to demonstrate that compliance with the state requirement was either an obstacle to the goals for the HMTA or a bar to compliance with the HMTA. 62 Fed. Reg. 15970, 15973 (Apr. 3, 1997). The same is true for the Ordinance and the Permits.

document regulation that is not substantially similar to the Permits, nor can it. 49 C.F.R. Part 72 & § 177.817 provide detailed requirements for shipping documents, mostly related to identifying the nature of the materials being shipped and the shipping containers. Those provisions cover subjects completely different than the matters addressed in the Permits.

Moreover, the case cited by NSRC, *Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), is readily distinguishable. That case involved the State's requirement for annual submission of detailed plans for repairing and replacing trucks, driver training and other matters. The court found that the advance submittal aspect of that requirement was different than the HMTA requirements, thereby the state provisions were preempted. *Id.* at 1582. The Permits are different in kind because they do not require the truckers, NSRC or RSI to generate any paperwork; the City issues the Permits without any application process. At most, the trucking companies must provide a copy of the Permit to its drivers, however they are not required to carry it, contrary to NSRC's assertion otherwise. Photocopying and distributing a permit is hardly the kind of documentation requirement preempted by the HMTA.

NSRC's argument that it cannot comply with both the HMTA and the Permits also lacks merit. NSRC argues that the Permits are preempted because they conflict with the requirement in 49 C.F.R. § 177.800(d) that hazardous materials be delivered by truck without "unnecessary delay." *NSRC Br.* at 29-30. But a local regulation to ensure the safety of its residents is not "unnecessary." More fundamentally, the Permits do not delay the movement of trucks once they are filled with ethanol. As discussed above, the cases relied on by NSRC preempted state and local requirements that forced trucks to interrupt trips or to wait while obtaining an approval or permit. The City's Permits impose no such requirements, and do not cause delay in the movement trucks during the hours the Facility is open. NSRC's sweeping construction of the

HMTA would preempt such ordinary regulations as speed limits, traffic signals, railroad crossings and indeed anything that could have the effect of slowing the movement of hazardous materials over local streets. This cannot have been what Congress intended in crafting the HMTA preemption scheme that expressly allows states and localities to use their police powers in all but the enumerated areas of hazardous material regulation.

Respectfully submitted,

CITY OF ALEXANDRIA, a municipal
corporation of Virginia
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2008, the foregoing document was electronically filed pursuant to the Court's ECF, which will provide notice of such filing to all counsel of record:

Gary A. Bryant, Esq.
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EXHIBIT 1

CITY COUNCIL OF ALEXANDRIA, VIRGINIA

City Council Public Hearing
Saturday, June 14, 2008 - - 7:00 p.m.

* * * * *

Present: Mayor William E. Euille, Vice Mayor Redella S. Pepper, Members of Council Ludwig P. Gaines, K. Rob Krupicka, Timothy B. Lovain, Paul C. Smedberg and Justin M. Wilson.

Absent: None.

Also Present: Mr. Hartmann, City Manager; Mr. Pessoa, City Attorney; Ms. Evans, Deputy City Manager; Mr. Jinks, Deputy City Manager; Mr. Caton, Legislative Director; Mr. Castrilli, Communications Director, City Manager's Office; Ms. Harris, Communications Officer, City Manager's Office; Mr. Mason, Special Assistant to the City Manager; Police Captain Ogden; Police Chief Baker; Deputy Police Chief Corle; Ms. Boyd, Director, Citizen Assistance; Ms. Vosper, Recreation, Parks and Cultural Activities; Mr. Kagawa, Recreation, Parks and Cultural Activities; Ms. Carton, Recreation, Parks and Cultural Activities; Mr. Baier, Director, Transportation and Environmental Services; Mr. Garbacz, Transportation and Environmental Services; Mr. Skrabak, Director, Office of Environmental Quality; Mr. Tran, Office of Environmental Quality; Ms. Hamer, Director, Planning and Zoning; Mr. Josephson, Deputy Director, Planning and Zoning; Mr. Farner, Planning and Zoning; Ms. Peterson, Planning and Zoning; Mr. Milone, Planning and Zoning; Mr. Bray, Planning and Zoning; Mr. Leiberg, Planning and Zoning; Mr. Wagner, Planning and Zoning; Ms. Haefeli, Planning and Zoning; Ms. Niebauer, Director, Office of Human Rights; Fire Chief Thiel; Mr. Catlett, Director, Code Enforcement; Mr. Hunt, Code Enforcement; Mr. Mandley, Director, General Services; Mr. Lloyd.

Recorded by: Jacqueline M. Henderson, City Clerk and Clerk of Council

OPENING

1. Calling the Roll.

The meeting was called to order by Mayor Euille, and the City Clerk called the roll; all the members of Council were present.

2. Public Discussion Period.

(a) John Antonelli, 1016 S. Wayne Street, Arlington, spoke of a plan by the Washington Metropolitan Area Transit Authority (WMATA) to take four blue line trains that normally run through Rosslyn, Foggy Bottom and Farragut West and run them over the long bridge out to L'Enfant Plaza. He said Metro's reason for doing it is they claim that with that area redeveloping, that is where people really want to go. What is really going on is that is a plan to take those four blue line

General Services 520,000
Health 114,000
Human Rights 5,000
Human Services 504,000
Information and Technology Services 739,000
Non-Departmental 265,000
Office of Historic Alexandria 25,000
Office on Women 15,000
Other Correctional Activities 21,000
Personnel 7,000
Planning and Zoning 520,000
Police 291,000
Recreation and Cultural Activities 412,000
Registrar of Voters 22,000
Sheriff 497,000
Transit Subsidies 1,004,000
Transportation and Environmental Service 2,941,000
Total General Fund \$ 9,501,000

Section 12. That this ordinance shall become effective upon the date and at the time of its final passage.

27. Public Hearing, Second Reading and Final Passage of an Ordinance to Clarify the Requirements For Obtaining a Truck Haul Route Permit. (#23.1, 6/10/08) [ROLL-CALL VOTE]

(A copy of the City Manager's memorandum dated June 6, 2008, is on file in the Office of the City Clerk and Clerk of Council, marked as Exhibit No. 1 of Item No. 27; 6/14/08, and is incorporated as part of this record by reference.

A copy of the informal memorandum explaining the ordinance is on file in the Office of the City Clerk and Clerk of Council, marked Exhibit No. 2 of Item No. 27; 6/14/08, and is incorporated as part of this record by reference.

A copy of the ordinance referred to in the above item, of which each Member of Council received a copy not less than 24 hours before said introduction, is on file in the Office of the City Clerk and Clerk of Council, marked Exhibit No. 3 of Item No. 27; 6/14/08, and is incorporated as part of this record by reference.)

WHEREUPON, upon motion by Councilman Krupicka, seconded by Vice Mayor Pepper and carried unanimously, by roll-call vote, City Council passed an ordinance to clarify the requirements for obtaining a truck haul route

permit.

The voting was as follows:

Ayes: Mayor Euille, Vice Mayor Pepper, Councilman Gaines, Councilman Krupicka, Councilmember Lovain, Councilman Smedberg, Councilman Wilson.

The ordinance reads as follows:

ORDINANCE NO. 4555

AN ORDINANCE to amend and reordain Section 5-2-27 (HAULING OF WASTE MATERIALS, CONSTRUCTION MATERIALS, ETC., PROHIBITED) of Chapter 2 (STREETS AND SIDEWALKS), Title 5 (TRANSPORTATION AND ENVIRONMENTAL SERVICES) of The Code of the City of Alexandria, Virginia, 1981, as amended.

THE CITY COUNCIL OF ALEXANDRIA HEREBY ORDAINS:

Section 1. That Section 5-2-27 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 5-2-27 Hauling of waste materials, construction materials, etc., prohibited.

(a) Hauling waste materials of any type, building or construction supplies of any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type is prohibited on all streets within the City, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (e) of this section.

(b) The director of transportation and environmental services is hereby authorized to issue permits to haul such materials, supplies or equipment over the streets within the City, subject to such conditions and restrictions specifying the time and route for such hauling, and such additional conditions and restrictions, as the director may deem appropriate to promote traffic safety and to minimize disruption to established residential, commercial, institutional and other areas in the City.

(c) Any person who, as the owner, lessee, operator or driver of a motor vehicle or trailer, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(d) Any person who, as the owner of any land, building or structure to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(e) The prohibition set forth in subsection (a) of this section shall not apply to the hauling of such materials, supplies or equipment (1) to or from any specific location or site at the rate of five or fewer trips for pickup or delivery of such materials or equipment in any consecutive thirty day period, (2) to the business location of a retail merchant for use by such merchant in the ordinary course of such merchant's business or from the business location of such a merchant in the ordinary course of such merchant's business to specific locations or sites, but subject to the limitation in clause (1) for each such location or site, nor (3) to the non-commercial hauling of such materials or equipment to or from a dwelling unit, by a resident therein.

Section 2. That this ordinance is declaratory of existing law.

Section 3. That this ordinance shall become effective upon the date and at the time of its

final passage.

27.2. Introduction and First Reading. Consideration. Passage on First Reading of an Ordinance to Revise the Membership of the Public Health Advisory Commission.

(A copy of the City Manager's memorandum dated March 4, 2008, is on file in the Office of the City Clerk and Clerk of Council, marked as Exhibit No. 1 of Item No. 27.2; 6/14/08, and is incorporated as part of this record by reference.

A copy of the informal memorandum explaining the ordinance is on file in the Office of the City Clerk and Clerk of Council, marked Exhibit No. 2 of Item No. 27.2; 6/14/08, and is incorporated as part of this record by reference.

A copy of the ordinance referred to in the above item, of which each Member of Council received a copy not less than 24 hours before said introduction, is on file in the Office of the City Clerk and Clerk of Council, marked Exhibit No. 3 of Item No. 27.2; 6/14/08, and is incorporated as part of this record by reference.)

WHEREUPON, upon motion by Councilman Krupicka, seconded by Vice Mayor Pepper and carried unanimously, City Council approved the proposed ordinance on first reading and scheduled it for public hearing, second reading and final passage on June 24, 2008.

The voting was as follows:

Ayes: Mayor Euille, Vice Mayor Pepper, Councilman Gaines, Councilman Krupicka, Councilmember Lovain, Councilman Smedberg, Councilman Wilson.

DEFERRAL/WITHDRAWAL CONSENT CALENDAR (28-30)

28. SPECIAL USE PERMIT #2008-0031 816 NORTH SAINT ASAPH STREET
FLEX AWARE LEARNING

Public Hearing and Consideration of a request for a change of ownership, increased hours of operation, an increase in the number of students allowed, and a request for a parking reduction, zoned CDX/Commercial Downtown Old Town North. Applicant: Flex Aware Learning Corp., by Heidi Thompson

29. SPECIAL USE PERMIT #2007-0107 CARLYLE DEVELOPMENT - Area bounded by Duke Street to the north,

Holland Lane to the east, Eisenhower Avenue to the south and Mill Road to the west, known as the Carlyle Development

CARLYLE COORDINATED SIGN PROGRAM

Public Hearing and Consideration of a request for an amendment to the Carlyle Coordinated Sign Program; zoned CDD-1/Coordinated Development District - 1. Applicant: Carlyle-Lane-CFRI Venture II, LLC and LCOR Ballenger Avenue, LLC by Jonathan P. Rak, attorney

30. Public Hearing and Consideration of an Appeal of the Board of Architectural Review's decision to take no action on a tie vote on a request

for approval of after-the-fact alterations at 900 Prince Street, zoned CL Commercial, BAR2007-0240. Applicant: PMA Properties, 900 LLC.

APPELLANT: Townsend Van Fleet on behalf of petitioners.

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF EASTERN DISTRICT OF VIRGINIA
 3 ALEXANDRIA DIVISION

4 - - - - -x

5 NORFOLK SOUTHERN RAILWAY :
 6 COMPANY, :
 7 Plaintiff, : Case No. 1:08-CV-618

8 vs. :

9 CITY OF ALEXANDRIA, et :

10 al., :

11 Defendants. :

12 - - - - -x

13 CITY OF ALEXANDRIA, :

14 Counterclaim Plaintiff, :

15 vs. :

16 NORFOLK SOUTHERN RAILWAY : Case No. 1:08-CV-618

17 COMPANY, :

18 Counterclaim Defendant, :

19 and :

20 RSI LEASING, INC., :

21 Third-Party Defendant. :

22 - - - - -x

1 Highly confidential 30(b)(6) deposition of DAVID
2 T. LAWSON called for examination pursuant to notice
3 of deposition, on Thursday, October 16, 2008, in
4 Alexandria, Virginia, at the Offices of the
5 Alexandria City Attorney, City Hall, 301 King
6 Street, Suite 1300, at 9:17 a.m., before DONALD R.
7 THACKER, a Notary Public within and for the
8 Commonwealth of Virginia, when were present on
9 behalf of the respective parties:

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W. ERIC PILSK, ESQ.
Kaplan, Kirsch & Rockwell LLP
1001 Connecticut Avenue, Northwest
Washington, DC 20036
202.955.5600 202.955.5616
Epilsk@kaplankirsch.com
On behalf of City of Alexandria

- continued -

1 the market and, B, the revenue expectation that we
2 have, if we were restricted, because I would assume,
3 presumably at some point with the backup the
4 customers might decide to not route their business
5 with us.

6 The other effect that this potentially
7 could have with us is by causing us to have to limit
8 ourselves at this terminal, we may have to try to
9 find other solutions that are less efficient, less
10 cost effective, and unfortunately the unknown of
11 what other municipalities may do with regard to
12 issuing other permits at other locations.

13 Q When you say other options, what do you
14 mean?

15 A Well, in terms of where we might decide to
16 ultimately have to find other places to move this
17 ethanol to. Other municipalities like Alexandria
18 might decide to issue haul permits, then all of a
19 sudden this cascading effect of haul permits could
20 have a very negative and detrimental effect on
21 interstate commerce for the movement of ethanol or
22 any other potentially hazardous materials.

1 Q So, if I understand you correctly, you are
2 saying that if the haul permits unduly restrict the
3 operations at the Van Dorn Yard, Norfolk Southern
4 may have to look at other locations for the ethanol
5 transloading operation, that part is correct?

6 A That is correct.

7 Q And that at those other locations in
8 different municipalities may also be subject to
9 local regulation?

10 A It is not my contention that we would be
11 subject. My concern is if this permit were to be
12 enforced and upheld that that might cause other
13 municipalities to look to issue haul permits, and
14 that this notion of issuing haul permits -- begin to
15 cascade to other locations and have a much broader
16 and potentially detrimental effect on the entire
17 interstate commerce, from our perspective.

18 Q Okay.

19 A The other concern I have with the permit
20 is that from our perspective, is that it is a 30-day
21 permit, it is a temporary 30-day permit, and if it
22 lapses for any period of time, from the time of the

1 effective date to the expiration date, if the
2 expiration date comes and goes and it has not been
3 reissued, any ethanol that we have at our terminal
4 or that is in transit to the terminal is subject to
5 potential change. A 30-day notification of the
6 permit is tantamount to really not almost being able
7 to operate, because we just don't know whether it is
8 going to, the next permit is going to be
9 retroactive, or whether the next permit is going to
10 restrict yet even further the number of trucks.

11 And a 30-day notice, when we are trying to
12 coordinate interstate commerce in terms and
13 conditions that require lots of logistical
14 coordination, in our view a 30-day, any kind of a
15 permit, is just, to us is not valid or enforceable,
16 but the notion of the 30 days puts it in another,
17 whole other category.

18 Q I want to go back to the permits issued by
19 other municipalities to make sure that I understand
20 what you are saying, and I think I heard you say two
21 different, two distinct things, not contradictory
22 but two distinct, different things. I want to see

1 if I am correct.

2 Did I understand you correctly that if
3 Norfolk Southern is limited in the operations at Van
4 Dorn that it may have to look for other locations for
5 the ethanol operation, is that, did I understand you
6 correctly?

7 A Yes, we would look to other potential, if
8 we were restricted at Van Dorn we would begin to
9 look at other locations. Separately, our
10 competitors may be looking at whatever that business
11 that we couldn't handle is. So, there is our
12 ability to go and try to retain that which is being
13 restricted or regulated, and then there would be our
14 customers, I mean our competitors, excuse me, our
15 competitors who may be looking to gain share by that
16 volume that is being regulated.

17 Q Then if I understand you correctly, there
18 is a concern that at the other locations, that if
19 this permit were upheld, operations at those other
20 locations could also be restricted by local permits?

21 A That is correct. If Alexandria were to be
22 successful in upholding the legality of this permit,

1 our concern would be that this would have
2 potential -- have other municipalities where we
3 operate transload facilities or other forms of rail
4 transportation to get freight to our customers, that
5 that kind of permit could be issued to us at these
6 other locations, and so it would begin, potentially,
7 this further cascading of permits and restrictions
8 of our ability to move the interstate commerce.

9 Q Have you had any conversations with any
10 other localities about the possibility of their
11 issuing similar permits?

12 A No, I have not.

13 Q Are you aware of any within Norfolk
14 Southern, any conversations between anyone else at
15 Norfolk Southern and other localities about the
16 possibility of issuing permits similar to the
17 Alexandria's haul permits?

18 A I am personally not aware of that, no.

19 Q Okay. And other than that your concern
20 about the possibility of permits, do you have any
21 specific reason to believe that other municipalities
22 would issue similar permits?

1 A Yes, let me answer the question this way.
2 We operated this terminal up through about 2005 as a
3 trailer to railcar or railcar to trailer piggyback,
4 for lack of a better term, where we operated about
5 100 trucks a day in and out of that facility,
6 unfettered, without permits. And that volume would
7 grow over time and contract, depending upon market
8 conditions. And our ability to market that facility
9 was in no way deterred, and the ability for us to
10 grow and to contract that facility went with the
11 market conditions.

12 Q Uh-huh.

13 A Directly to your question, I have serious
14 concerns that if this permit were to be upheld and
15 viewed as enforceable to impose restrictions on our
16 ability to haul or to have trucks haul out of our
17 terminal to continue to move, transportation of the
18 ethanol all the way to the final end point for
19 multiple customers, it would have a potentially
20 devastating effect on our ability to move freight to
21 other locations, absolutely.

22 Q And my question is not geared to what your

1 concerns are but the basis for the concern, and if,
2 other than sort of a concern that you see, if there
3 is any external evidence, have other municipalities
4 mentioned, given any reason for you to believe that
5 they would or would not issue similar permits?

6 MR. BRYANT: Just for clarification, I am
7 just not sure how broad your question is. Are we
8 talking about ethanol transloading or are we talking
9 about municipalities trying to regulate hazmat?

10 BY MR. PILSK:

11 Q Well, let's take it both ways; ethanol
12 transloading.

13 A We have already seen where local
14 municipalities have attempted to regulate hazmat and
15 the movement of interstate commerce.

16 Q Can you give me an example?

17 A In the case of Washington, D.C., and CSX
18 as an example, and other municipalities, we are
19 aware, have raised concerns about movement,
20 Philadelphia, Cleveland, other places as well.

21 So we know that subject, in terms of
22 regulation of interstate commerce and the concern

1 that local municipalities have and have raised some
2 concerns about that.

3 Q And so you are, given that general, those
4 general attempts to regulate, your concern is that
5 that kind of regulation might be attempted, other
6 municipalities may attempt to similarly regulate the
7 ethanol transload facility at other locations if it
8 were relocated somewhere than Van Dorn?

9 A Absolutely.

10 Q And again my question is much more
11 specific, is have any other municipalities made any
12 specific mention to you, or to your knowledge anyone
13 at Norfolk Southern, about the possibility of them
14 regulating an ethanol transloading facility in their
15 municipalities?

16 A I have not had any discussions about
17 specifically ethanol transloading facilities,
18 permits being issued to us by the municipalities,
19 but I would be very concerned that the likelihood of
20 that occurring is probably pretty high.

21 Q Probably, despite the stack, I am probably
22 pretty close. I don't know if anyone wants to take

1 a break.

2 (10:50 a.m. -- recess -- 10:55 a.m.)

3 BY MR. PILSK:

4 Q First, I have what I think is a
5 straightforward question, but what is a pig
6 facility?

7 A That is slang for piggyback or otherwise
8 known as intermodal truck-to-rail, literally the
9 trailer of the truck, the semitruck, the trailer,
10 being put onto the railcar, or a container being put
11 onto a railcar, pig is slang for that.

12 Q And then a question about follow up on the
13 potential impacts of actually application of the
14 permit to the facility.

15 A Uh-huh.

16 Q The concerns you expressed about the
17 potential for cars, railcars backing up in the
18 system, congestion, the ability to move the ethanol
19 through the system in a timely manner, that is a
20 function largely of the volume of ethanol that is
21 actually being shipped through the system; is that
22 correct?

1 A I want to clarify. When you say, you are
2 relating backing up as a result of the specific
3 location at Van Dorn.

4 Q And the permit of 20 trucks per day.

5 A The application of the permit to that
6 specific location, and then cars that are coming
7 from multiple origins, predominantly in the Midwest
8 to this location, backing up in our rail system.

9 Q Correct. In other words, my question is,
10 if the volume of ethanol decreased such that 20 cars
11 a day were sufficient, 20 trucks a day was
12 sufficient to accommodate the volume being shipped,
13 those congestion effects wouldn't occur; is that
14 correct?

15 A If we had the restrictions imposed upon us
16 and they were only going to ship the equivalent
17 number of railcars to satisfy the demand then, no,
18 we would not have congestion, because that ethanol
19 will find another way, the market will find another
20 way to satisfy that demand eventually, so no.

21 MR. PILSK: Okay, I am done.

22 MR. BRYANT: All right.

EXHIBIT 3

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

- - - - -x
 NORFOLK SOUTHERN RAILWAY :
 COMPANY, : Case No. 1:08-CV-618
 Plaintiff, :
 vs. :
 CITY OF ALEXANDRIA, et :
 al., :
 Defendants. :
 - - - - -x
 CITY OF ALEXANDRIA, :
 Counterclaim Plaintiff, :
 vs. :
 NORFOLK SOUTHERN RAILWAY : Case No. 1:08-CV-618
 COMPANY, :
 Counterclaim Defendant, :
 and :
 RSI Leasing, Inc., :
 Third Party Defendant. :
 - - - - -x

CONFIDENTIAL DEPOSITION OF JAMES EUGENE REINER

Alexandria, Virginia

September 19, 2008

REPORTED BY:

DONALD R. THACKER

ACE-FEDERAL REPORTERS, INC.

Nationwide Coverage

1 Deposition of JAMES EUGENE REINER, called
2 for examination pursuant to notice of deposition, on
3 Friday, September 19, 2008, in Alexandria, Virginia,
4 at the Offices of the Alexandria City Attorney, City
5 Hall, 301 King Street, Suite 1300, at 11:35 a.m.,
6 before DONALD R. THACKER, a Notary Public within and
7 for the Commonwealth of Virginia, when were present
8 on behalf of the respective parties:

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W. ERIC PILSK, ESQ.
Kaplan, Kirsch & Rockwell LLP
1001 Connecticut Avenue, Northwest
Washington, DC 20036
202.955.5600 202.955.5616
Epilsk@kaplankirsch.com
On behalf of Defendants

- continued -

1 A Yes.

2 Q Okay. Is there adequate, I think you
3 testified there was room for 20 cars on CO5 within
4 the fence; is that correct?

5 A Yes.

6 Q And is it also 20 cars on RHO1 within the
7 fence?

8 A Yes.

9 Q Is there sufficient storage space on your
10 existing tracks to handle existing loads of traffic?

11 A Yes.

12 Q And you have, you can do the math
13 precisely, but do you have a sense of how much, at
14 what point traffic would be too great to accommodate
15 on your existing track?

16 MR. BRYANT: Object to the form, because I
17 think that would be based in large part on how much
18 transloading is done, if you are talking about the
19 ethanol cars.

20 BY MR. PILSK:

21 Q At current, without any constraints, no
22 permit, no other restrictions, but there is a

1 physical limit that only 40 cars max can be within
2 the transload fence?

3 A Yes, that is right.

4 Q Do you have a sense of how much capacity
5 there is including CO5, RHO1 and your other tracks
6 of storage to accommodate empty and full cars
7 without unduly interfering with your other
8 operation?

9 A My total capacity of all my yard tracks is
10 about 400 cars. Now, I service 12 other industries,
11 one of them being Mirant, which I have a 100 car
12 coal train coming up tomorrow; it would very quickly
13 clog, congest my yard.

14 Q On any given day how many cars would you
15 say come through your, that Alexandria yard?

16 A From Lynchburg or cars total?

17 Q Yes, total of cars in and cars out, in
18 other words cars that you are moving around.

19 A Okay, depending on if we have a coal train
20 in town, how much coal we have on hand, in those
21 cases I would have to say that we handle about 350
22 cars a day. When we don't have, we are not handling

1 coal and placing coal and pulling empties out of
2 Mirant, maybe 200, 230, guesstimate.

3 Q And of that, at present levels
4 approximately how many tank cars for the ethanol
5 transload facility are you handling a day?

6 A I believe, I don't have the exact number,
7 I believe we did have a little over 30, so now after
8 servicing our facility tonight we have probably got
9 around 20.

10 Q 20 in?

11 A Loaded tank cars.

12 Q 20 loaded tank cars as of now?

13 A Yes.

14 Q Okay. Let me just have a couple minutes,
15 I think I am nearly done.

16 MR. BRYANT: Do you want to take a little
17 break?

18 MR. PILSK: Yes, why not.

19 (12:34 p.m. -- recess -- 12:40 p.m.)

20 BY MR. PILSK:

21 Q Mr. Reiner, assuming that traffic for
22 other industries and customers remained at about

1 and if we had, I could tell you that I could
2 accommodate 150 ethanol cars on my yard, but if I
3 had a 150 ethanol cars I would not be able to accept
4 my coal train.

5 Q That is what I am trying to get at is if
6 you assume your current levels of coal train
7 operations and your current levels of cars for your
8 other customers and other industries, and they, you
9 know, marketing came in and said we hit the jackpot,
10 we have got a huge customer for ethanol, how much
11 can you handle, and if you could, if you would give
12 them a range, you know, ballpark?

13 A I would ask them how many cars, our
14 ethanol facility is going to unload, I would have
15 know that before I could determine how many inbound
16 cars from Lynchburg I could handle on my yard
17 tracks.

18 MR. BRYANT: Would it help if he testified
19 just as to how many cars can get there?

20 MR. PILSK: Right.

21 MR. BRYANT: Forgetting the ethanol --

22 BY MR. PILSK:

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1 Q That is all I am trying to get to, is how
2 many cars can you fit?

3 A How many more ethanol cars can I receive
4 in my yard tracks from Lynchburg, is that the
5 question?

6 Q Yes.

7 A Right now, typically on any day maybe 50.
8 Any more than that would congest my yard.

9 MR. PILSK: Okay. All right, I think that
10 is it.

11 MS. JORDAN: That is it. We would like to
12 see it.

13 (Whereupon, at 12:50 p.m., the deposition
14 was concluded.)

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