

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

NORFOLK SOUTHERN RAILWAY COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:08-CV-618
)	
CITY OF ALEXANDRIA <i>et al.</i> ,)	
)	
Defendants.)	
)	

CITY OF ALEXANDRIA,)	
)	
Counterclaim Plaintiff,)	
)	
v.)	Case No. 1:08-CV-618
)	
NORFOLK SOUTHERN RAILWAY COMPANY,)	
)	
Counterclaim Defendant, and)	
)	
RSI Leasing, Inc.,)	
)	
Third Party Defendant.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
THE CITY OF ALEXANDRIA’S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In April, 2008, RSI Leasing, Inc. (“RSI”) began operating an ethanol transloading facility (the “Facility”) at the Van Dorn Yard, a rail yard owned by Norfolk Southern Railway Company (“NSRC”) located in the City of Alexandria (the “City”). Rail tank cars full of ethanol are delivered to the Facility by NSRC. RSI pumps the ethanol from the rail tank cars into tank

trucks that are under contract to either ethanol shippers or ethanol blenders to whom the ethanol is shipped. The trucks leave the Facility and drive over City streets to access the Van Dorn Street entrance to the Beltway. The Facility is within 1,000 feet of two residential neighborhoods, an elementary school, the Van Dorn Street Metro parking lot and other populated areas, including a number of industrial facilities. The trucks drive next to one neighborhood, Summers Grove, as well as the Van Dorn Street Metro Station parking lot on their way to the Beltway.

Ethanol is a Class 3 hazardous substance. It is flammable, and an explosion involving an ethanol-filled truck would pose a serious risk to people and property. Because of legitimate concerns about the safety of the ethanol-filled trucks on City streets, the City has issued a series of permits pursuant to City of Alexandria Code § 5-2-27 to regulate the use of City streets by trucks using the Facility (collectively, the “Permits”). The Permits specify the times and days during which the trucks may operate (7:00 a.m. - 7:00 p.m., Monday - Friday), the number of trucks that may leave the facility per day (20), the specific route the trucks must use (using only signalized intersections), as well as several other conditions.

The issue in this case is the legal authority of the City of Alexandria to regulate the trucks as they drive over approximately one-half mile of City streets between the Facility and the Beltway.¹ NSRC and RSI contend broadly that because NSRC is a rail carrier and the transloading operation is a rail activity, the City is preempted by several federal laws from *any* regulation of the use of City streets by trucks driving to and from the Facility, even though the

¹ The City and NSRC are litigating the distinct question of whether the City may regulate the transloading activity itself in a separate proceeding before the Surface Transportation Board (“STB”). *City of Alexandria, Va. -- Petition for Declaratory Order*, S.T.B. Finance Docket No. 35157 (Filed June 17, 2008). The STB has asked for additional briefing and factual submissions in that proceeding to be filed between November 26 and December 8, 2008.

trucks are owned, operated and controlled by trucking companies and ethanol shippers or blenders. NSRC and RSI also challenge the applicability of the City's permitting process to those trucks.

The fatal flaw in NSRC and RSI's position is readily apparent: they rely on NSRC's status as a rail carrier and federal statutes addressing railroad operations and railroad safety to preempt local regulation of trucks owned, operated and controlled by non-railroad entities operating on City streets. Federal rail statutes cannot preempt local regulation of trucks, and NSRC and RSI can point to no statute or other authority supporting their sweeping view of federal railroad preemption.

In order to overcome this fundamental bar, NSRC and RSI argue that secondary, indirect effects of the City's regulation of trucks impact railroad safety. Specifically, they assert that limiting the number of trucks that traverse City streets on their way to and from the Facility on any one day would impair NSRC's ability to comply with federal rail safety requirements regarding expediting the delivery of goods. As demonstrated below, however, this argument is without merit because those same regulations provide several alternatives for compliance that do not require RSI to transload immediately all of the ethanol that may be delivered on any given day. Accordingly, NSRC cannot meet the high bar the law establishes for preemption based on indirect effects.

More fundamentally, however, NSRC's safety concerns are largely pretextual. Even if it could not otherwise comply with federal safety guidelines (which it can), NSRC could readily comply with *both* federal safety standards *and* the City's Permits by accepting less ethanol at the Facility. NSRC does not want to do that because it is apparently concerned that its revenue and profit targets for the Facility would be adversely affected. But the federal rail and safety statutes

NSRC invokes do not protect NSRC's profits at this particular Facility, and certainly do not preempt any local regulation that might affect NSRC's profits.

The regulation of local traffic over local streets lies at the core of the City's police powers. There is no dispute that ethanol is a flammable substance that poses a distinct safety risk. The proximity of ethanol-filled trucks to residential areas, important public and private infrastructure and places of employment compels the City to regulate that activity. NSRC is plainly motivated by its belief that such regulation of trucks leaving its facility will harm its commercial and competitive interests, presenting it with business choices it would rather not face. But the mere fact that NSRC is a railroad does not wrap everything that in any way affects it with the protective cloak of federal preemption. No federal law protects NSRC's ability to achieve its profit target at a specific facility, and NSRC can comply with the Permits *and* all the federal safety standards it claims preempt the Permits. Accordingly, the City's authority to regulate the use of City streets by ethanol-filled trucks should be affirmed and summary judgment entered in favor of the City and against NSRC and RSI.

MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Alexandria is a municipal corporation organized and existing pursuant to Title 15.2 of the Code of Virginia. Stipulation of Facts (filed Nov. 24, 2008) ("Stip.") 2.
2. On April 9, 2008, an ethanol transloading operation began at the Facility to transfer ethanol from rail tank cars to tank trucks. Stips. 4, 5 & 16.
3. Transloading operations currently are conducted from 7 a.m. to 6 p.m.. Stip. 15.
4. Ethanol is classified and regulated as a flammable, hazardous material by the U.S. Department of Transportation at 49 C.F.R. § 172.101. Stip. 7.
5. After the ethanol has been transloaded into trucks, the ethanol is transported in

trucks using roads located in the City of Alexandria to I-495, and then to destinations outside the City of Alexandria. Neither RSI Leasing, Inc. (“RSI”) nor NSRC direct the routes or any other aspect of how the trucks drive to or from the Facility. Stip. 17.

6. The Samuel W. Tucker Elementary School, the ballfield and other playing fields behind the school, the Van Dorn Street Metro Station, several businesses and Eisenhower Avenue are within 1000 feet of the Facility. Declaration of Steven V. Mason (“Mason Decl.”) ¶¶ 5 & 8 (Nov. 24, 2008), attached as Exhibit 1.

7. There are a number of community parks and recreation facilities within one mile of the Facility, including Armistead L. Boothe Park, Ben Brenman Park, Joseph M. Hensley Park, Ewald Park Tennis Courts and Holmes Run Greenway/Holmes Run Parkway. Mason Decl. ¶ 6, Ex. 1.

8. Parts of Cameron Station and Summers Grove, high-density residential neighborhoods, are within 1,000 feet of the Facility. The rest of these neighborhoods and many other homes are within 1/2 mile of the Facility. Mason Decl. ¶ 7, Ex. 1.

9. When tank trucks laden with ethanol leave the Facility bound for Interstate 495, they must drive past the Summers Grove neighborhood and the Van Dorn Street Metro Station Parking Lot, as well as several places of business. Mason Decl. ¶ 9, Ex. 1.

10. An accident on City streets involving a tank truck laden with ethanol would pose a serious risk of injury to persons and property, depending upon the circumstances of the accident. Answer to Counterclaim and Third Party Claim ¶ 16 (filed July 10, 2008) (“NSRC Answer”).

11. The handling of ethanol by NSRC poses unique fire and spill response hazards requiring specialized equipment and training. E-mail from Doug McNeil, NSRC, to Adam

Thiel, City of Alexandria (May 14, 2008), attached as Exhibit 2; Adam Thiel's Presentation to Alexandria City Council (May 27, 2008), attached as Exhibit 3.

12. By letter on April 29, 2008, the City informed NSRC that a haul permit would be required for "bulk tank trucks leaving the facility." Letter from Adam Thiel, City of Alexandria, to Mike Webb, NSRC (April 29, 2008), attached as Exhibit 4.

13. NSRC took the position that it did not need to obtain a haul permit from the City and did not apply for a permit. Stip. 25.

14. On June 3, 2008, the City issued a Haul Permit, a copy of which is attached to the Stipulation of Facts as Exhibit 4. Stip. 26.

15. On June 14, 2008, the City adopted Ordinance 4555 amending City Code Section 5-2-27, a copy of which is attached the Stipulation of Facts as Exhibit 6. Stip. 28.

16. NSRC recognizes that City Code Section 5-2-27 as amended on June 14, 2008, applies to trucks hauling ethanol from the Facility. Response of Norfolk Southern Ry. Co. to Petition for Declaratory Order at 10, *City of Alexandria, Va. -- Petition for Declaratory Order*, S.T.B. Finance Docket No. 35157 (filed July 2, 2008), attached as Exhibit 5.

17. Since July 3, 2008, the City has issued a series of Haul Permits pursuant to the Ordinance, copies of which are attached to the Stipulation of Facts as Exhibit 7. Stip. 29.

18. NSRC and RSI take the position that the Permits are preempted and inapplicable and NSRC has directed RSI that it need not comply with the restrictions contained in the Permits except that RSI, at NSRC's direction, has encouraged truck drivers to voluntarily comply with the route set forth in the Permits. Stip 30.

19. RSI conducts the transloading operation pursuant to a contract with NSRC. RSI's responsibilities at the Facility are set forth in its contract with NSRC, a copy of which is attached

to the Stipulation of Facts as Exhibit 2. Stip. 19.

20. The trucks that haul the ethanol away from the Facility are owned by trucking companies, not by NSRC or RSI. Plaintiff NSRC's Response to Defendant's Interrogatory No. 3, attached as Exhibit 6; Plaintiff RSI's Response to Defendant's Interrogatory No. 3, attached as Exhibit 7; Stip 11.

21. All arrangements made to transport ethanol by truck from the Facility are made between the ethanol shippers/receivers and the trucking companies. Neither NSRC nor RSI is involved in making the truck arrangements. Stip. 11.

22. Because of the rates at which the shippers dispatch trucks to pick up ethanol from the Facility, not all rail tank cars are unloaded within 48 hours of arrival in Alexandria. Some have remained loaded in the Van Dorn Yard for up to five days. Stip. 22.

23. RSI does not have any input regarding the volume of ethanol shipped by shippers. Stip. 21.

24. RSI does not contact customers to tell the shippers or trucking companies to send more trucks because there is ethanol waiting to be unloaded at the Facility. Stip. 23.

25. NSRC has not communicated with the trucking companies. Stip. 21; NSRC's Resp. to Def.'s Interrog. No. 3; Deposition of William Landrum, pp. 74-75 (Sept. 19, 2008), attached as Exhibit 8.

26. Since the Facility opened, the number of trucks into which ethanol is transloaded at the Facility has varied from day to day depending upon interstate rail operations, the number of ethanol rail tank cars in the transportation system, and customer demands. Between April 9, 2008, and November 18, 2008, an average of 20.4 ethanol-filled trucks have left the Facility each day. Stip. 16 and Report attached to the Stipulation of Facts as Exhibit 1.

27. If only 20 trucks could leave the Facility each day, RSI would be able to transload ethanol from tank cars into trucks. Deposition of Anthony Rosenthal, pp. 135-137 (Sept. 17, 2008), attached as Exhibit 9.

28. If only 20 trucks could leave the Facility each day and shippers sent a matching volume of ethanol to the Facility, NSRC would be able to deliver ethanol to the Facility and would not face the possibility of congestion on its rail lines due to unloaded tank cars. Landrum Dep., pp. 78-79; Deposition of James Reiner, p. 46 (Sept 19, 2008), attached as Exhibit 10.

29. If capacity at the Facility is limited, shippers will find alternative means to get their ethanol to the markets. Deposition of David Lawson, p. 73 (Oct. 16, 2008), attached as Exhibit 11.

ARGUMENT

A party is entitled to summary judgment when there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 118-19 (4th Cir. 1991). In this case, based on the material facts not genuinely in dispute, the City is entitled to judgment as a matter of law.

I. THE CITY’S AUTHORITY TO REGULATE ETHANOL-FILLED TRUCKS ON CITY STREETS IS NOT PREEMPTED BY FEDERAL LAW

NSRC claims in Counts III, IV and V of its Complaint that the City’s authority to regulate the use of City streets by ethanol-filled trucks is preempted by several federal laws. As detailed below, the federal laws cited by NSRC either apply solely to rail operations – not to trucks on city streets operated by non-rail companies – or simply do not apply to the kind of local, intra-City regulation imposed by the Permits. NSRC cannot overcome the presumption that Congress did not intend to preempt local health, safety and welfare regulations.

A. The City Has the General Authority to Regulate, by Permit or Otherwise, the Movement of Ethanol-filled Trucks over City Streets

As a city chartered by the Commonwealth, the City possesses broad powers to enact laws and take other actions necessary and appropriate to promote the health, safety and welfare of the residents of the City. City of Alexandria, Va. Charter, Code § 2.01, a copy of which is attached to the Appendix of Legal Authorities² (“App.”) at Appendix B. Those powers include the authority to regulate the use of City streets by trucks such as those departing from the Facility. *Id.* at § 2.03 (App. B). The City Charter also confers specific additional powers on the City to regulate the use of streets and roads in the City through the use of permits and other regulations. *Id.* at § 2.04 (App. B).

On April 29, 2008, the City informed NSRC that it would have to apply for and obtain a haul permit for the movement of trucks away from the Facility pursuant to Section 5-2-27. Material Fact 12. City Code § 5-2-27 requires that trucks hauling a wide variety of materials obtain permits in order to use City streets. Material Fact 15. NSRC refused to file such an application, taking the position that the Ordinance was inapplicable on its face and preempted. Material Fact 13. On June 3, 2008, the City issued a permit regulating trucks using the Facility, and has thereafter issued a successive series of Permits. Material Facts 14 & 17.

There is no genuine dispute that the City has the inherent, organic power to regulate the use of its streets. NSRC Answer ¶¶ 19-22. NSRC and RSI claim primarily that application of that power to trucks using the Facility is preempted by federal law. As discussed below, NSRC and RSI cannot overcome the heavy burden they bear to establish that federal law preempts such

² For the Court’s convenience the City has attached an Appendix of Legal Authorities with copies of certain regulations, City ordinances and legislative history cited herein, as well as a Table of Authorities.

a basic aspect of local police powers as the regulation of streets by trucks carrying hazardous materials.

B. The City Is Entitled To A Presumption That Its Regulatory Authority Over Its Streets is Not Preempted

Courts must presume that “state and local regulation of health and safety matters can constitutionally coexist with federal regulation.” *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 716 (1985). Accordingly, “the historic police powers of the States [are] not to be superseded by [a Federal Act] unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). A party seeking to preempt a local regulation bears “a heavy burden” to demonstrate that Congress clearly intended to preempt local regulation of the specific activity at issue. *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). This presumption against preemption limits “congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). Thus, “if the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.” *Id.* (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 116-117 (1992)). As demonstrated below, NSRC cannot meet that burden with respect to any of the federal statutes it claims preempt the City’s power to regulate the use of City streets by trucks using the Facility.

C. The Rail Safety Rules Under the Federal Rail Safety Act Do Not Preempt Local Regulation of Trucks on City Streets

NSRC claims in Count III of the Complaint that City Code § 5-2-27 as applied to the Facility is preempted by the Federal Rail Safety Act of 1994, 49 U.S.C. § 20101-20153 (1997) (“FRSA”), because it “in effect regulates the use and operation of the Facility and will result in

delaying transport and transloading of ethanol, a subject matter that ‘relates to rail safety,’ and, therefore, is preempted by 49 U.S.C. § 20106(a).” Complaint ¶ 56. A reading of the plain language of Section 20106 and the other statutes limiting the scope of the FRSA to railroad safety make it clear that Congress did not intend the FRSA to preempt local ordinances regulating trucks operating on city streets just because those trucks happen to be carrying materials that were once transported by rail.

1. The FRSA Is a Rail Safety Statute That Does Not Apply to or Preempt the City’s Regulation of Trucks on City Streets

Congress expressly limited the FRSA’s preemptive scope by providing that “[l]aws, regulations, and orders *related to railroad safety* shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106 (emphasis added). In order to be preempted, therefore, City Code § 5-2-27 and the Permits must relate to railroad safety as defined in the FRSA. It is clear that they do not.

The FRSA defines “railroad” as “any form of nonhighway ground transportation that runs on rails or electromagnetic guideways,” and authorizes the Secretary of Transportation to “prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.” 49 U.S.C. § 20102(2)(A). Thus, the potential preemptive scope of the FRSA is expressly limited to “railroad safety.” Congress provides no hint that the FRSA could apply to trucks and other non-rail transportation taking place on roads.

Nothing in City Code § 5-2-27 or the Permits applies to any aspect of a “railroad.” City Code § 5-2-27 applies only to trucks operating on streets. The Permits apply only to the operation of trucks on City streets *before* and *after* they have been loaded with ethanol. Neither City Code § 5-2-27 nor the Permits impose any obligation relating to any aspect of railroad

operation, and they do not address in any way how ethanol is transported along the rails or unloaded from the rail cars.

The Supreme Court of Vermont considered a similar local regulation in *In re Vermont Ry.*, 769 A.2d 648, 655 (Vt. 2000), and held that a local permit specifying, *inter alia*, the routing of trucks hauling salt from a rail yard, the number of trucks exiting the Facility on a daily basis, hours during which trucking could occur, and conditions designed to avert potential environmental contamination from the salt were *not* preempted by the FRSA. The court held that the permit conditions “do not attempt to regulate the subject matter of railroad safety nor does Vermont Railway point to any conditions that conflict with specific federal regulations regarding railway safety.” *Id.* (emphasis added). As in *Vermont Railway*, Alexandria’s regulation of trucks hauling ethanol on City streets and the Permits specifying hours, the number of trucks and their route does not attempt to regulate the subject matter of railroad safety and is not preempted by FRSA.

2. The Permits Do Not “Relate To” Rail Transportation Just Because the Trucks Use the Facility

In an attempt to somehow bring a local permit for operating trucks on streets within the preemptive ambit of a railroad safety statute, NSRC relies on the FRSA’s requirement that rules “related to” railroad safety be nationally uniform. NSRC argues that City regulation of the trucks will delay the unloading of ethanol from the trains, thereby delaying the transport and transloading of the ethanol, which “relates to railroad safety.” Complaint ¶ 56. Apparently, NSRC’s concern is that if only 20 trucks per day can be filled, and there is more ethanol to be pumped, NSRC would not be able to comply with federal safety requirements because it would be forced to delay transloading operations.

NSRC bears a heavy burden to establish that the regulation of trucks on streets is preempted by rail safety regulations. A local law will be 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. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). A state or local law that creates only indirect economic incentives “that affect but do not bind the choices” of the groups affected by the federal law “is generally not preempted.” *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007). To apply a less strict test for “related to” would undermine Congress’ intent to create a presumption against preemption. *Travelers Ins. Co.*, 514 U.S. at 655. When a local regulation does not expressly discuss or reference the subject matter of the federal statute, courts consider the consequences of compliance with the local regulation in light of the purposes of the federal statute. *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996); *Retail Indus. Leaders*, 475 F.3d at 193.

The manifest and limited purpose of the FRSA is to “promote safety in every area of railroad operations and [to] reduce railroad-related accidents and incidents.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 661 (1993) (quoting 49 U.S.C. § 20109), *superseded by statute on other grounds*. The question thus becomes whether application of the Permits would *require* NSRC to take some action that would decrease railroad safety in a manner inconsistent with the FRSA.

It is clear that City regulation of trucks would not force NSRC to take action that would impair safety. 49 C.F.R. § 174.16 (App. C) provides that if a consignee fails to pick up a Class 3 flammable liquid such as ethanol within 48 hours, a railroad must take certain steps to store the ethanol safely. Thus, NSRC could comply with federal safety requirements even if the ethanol is

not hauled away within 48 hours of arrival at the Facility. In any event, even if storage were not an option, the Facility averaged almost exactly 20 trucks per day between April and November. Material Fact 26. Thus, even if the Permits would preclude the complete emptying of tank cars on one day, there is capacity on other days to pick up the remainder.³

Fundamentally, NSRC could readily address its so-called safety concerns by matching ethanol delivery rates to trucking capacity. That is unacceptable to NSRC, however, because it is concerned that reducing the amount of ethanol delivered to the Facility would make the Facility less profitable. But there is no federal safety regulation imposing a *minimum* volume of ethanol at this kind of facility. Indeed, under the logic of *City of Plymouth, supra*, fewer trains would enhance safety. Nor does the FRSA provide NSRC any profit or revenue guaranty. The reduction in ethanol volume may present NSRC with an unwanted economic effect, but the creation of such indirect economic incentives cannot cause a state law to be preempted. *Retail Indus. Leaders*, 475 F.3d at 193.⁴

³ NSRC's claim that the City may impair its ability to comply with the 48-hour rule rings hollow when testimony from RSI personnel makes clear that shippers are not picking up ethanol within 48 hours of arrival from time to time, Material Fact 22, even though NSRC and RSI have instructed the truckers to disregard the 20-truck per day condition of the Permits. Material Fact 18. Moreover, it seems clear that the *current* system of transloading the ethanol violates federal safety standards. 49 C.F.R. § 174.304 provides as follows:

A tank car containing a Class 3 (flammable liquid) material . . . may not be transported by rail unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is to be delivered and unloaded . . . or to a party using railroad siding facilities which are equipped for piping the liquid from the tank car to permanent storage tanks of sufficient capacity to receive the entire contents of the car.

App. C. Because the unloading at the Facility does not occur on private tracks or into permanent storage tanks, the current transloading operation is inconsistent with federal safety requirements for shipping and transloading ethanol by rail.

⁴ In any event, it is unclear how severe an economic impact NSRC would suffer given that the Facility averaged almost exactly 20 trucks per day between April and November.

In the end, NSRC’s FRSA claim would stretch the preemptive scope of the FRSA well past the breaking point. The FRSA is specifically and narrowly applicable to railroad safety, and “railroad” is defined to exclude trucks operating on roads. The mere fact that a truck is carrying materials originally transported by rail, thereby creating the possibility that regulation of the truck might have an indirect impact on a railroad, is insufficient, particularly when such regulation does not impair safety. Indeed, by that logic, virtually any regulation of any vehicle or material that is headed to or from a rail unloading facility would be preempted.

D. The ICC Termination Act’s Regulation of Certain Activities by Rail Carriers Does not Preempt Local Regulation of Trucks on City Streets

NSRC claims that the City’s regulation of trucks on City streets is also preempted by the ICC Termination Act of 1995, 49 U.S.C. §§ 10101-16101 (1995) (“ICCTA”). Complaint ¶¶ 57-59. Recognizing that City Code § 5-2-27 and the Permits do not regulate any rail activity, NSRC makes the broad argument that the regulation of the truck traffic is an “implied right” to regulate the operation of the Facility and would “indirectly” constitute an impermissible regulation of “rail transportation.” Complaint ¶ 59. Again, NSRC argues that by limiting the number trucks that enter the Facility, the City is indirectly regulating rail transportation.

1. The ICCTA Does Not Preempt Local Regulation of Truck Traffic Because It Is Not Transportation by a Rail Carrier

Under the ICCTA, the STB has exclusive jurisdiction over “(1) transportation by rail carriers . . . and (2) the construction, . . . operation . . . or discontinuance of . . . tracks, or facilities.” 49 U.S.C. § 10501(b). The remedies provided by the ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* Thus the ICCTA only preempts local regulation of interstate “transportation” by a “rail carrier.” A “rail carrier” is a “person providing common carrier railroad transportation for compensation” *Id.* §§ 10102(5) & (6).

The preemptive scope of the ICCTA is by no means unlimited, even when local laws directly affect a rail carrier. The purpose of the ICCTA is to create a “nationally uniform system of economic regulation” for rail transportation. S. REP. NO. 104-176 at 6 (1995) (App. D). As the Eleventh Circuit explained, “[t]he statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning.” *Florida East Coast Ry.*, 266 F.3d at 1337 (emphasis added). Accordingly, “[the ICCTA’s] definition of ‘transportation’ does not encompass everything touching on railroads.” *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (local ordinance regulating a railroad’s disposal of railroad ties and other debris not preempted). Numerous courts as well as the STB have held that the ICCTA does not preempt many kinds of local health and safety regulations. *See e.g., New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007) (vacating injunction blocking direct regulation of railroad activities).

Given that the ICCTA does not preempt all *direct* local regulation of railroads, it is hardly surprising that courts have consistently agreed that local regulation of trucks driving to or from a rail facility is *not* preempted by the ICCTA because the truck operations do not “relate to” rail operations. As the Vermont Supreme Court explained in rejecting an ICCTA preemption argument that “*any* restriction on [a railroad’s] activity at [a railroad yard] *necessarily* has an economic impact on its railway operations that it is preempted”:

These conditions do not interfere with *railway* operation; 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.

Vermont Ry., 769 A.2d at 655 (emphasis in original).

Similarly, in *CFNR Operating Co., Inc. v. City of American Canyon*, 282 F.Supp. 2d 1114, 1116 (N.D. Cal. 2003), one of the plaintiffs, Apex Bulk Commodities, operated its bulk transfer facility to transfer pumice and cement from railcars to trucks, and then to local customers. The city denied several applications for a conditional use permit and cited Apex for operating the facility illegally. *Id.* In rejecting the argument that the city’s enforcement action was preempted by the ICCTA, the court noted that the enforcement action was not aimed at rail operations, “but [was] focused on Apex’s non-railroad business activities on the property” that were not “integrally related to rail transportation at the subject property.” *Id.* at 1118. The court specifically rejected the argument that just because the trucks hauled material that had been delivered by rail, the ICCTA protected the truck operation:

At the hearing, plaintiffs argued that because Apex hauls goods from its facility at the railroad terminal to the customer who ordered the goods, it completes the process of transporting goods by rail and so is subject only to ICCTA regulation. Taken to its logical conclusion, *plaintiffs’ 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.*

Id. (emphasis added). Moreover, transloading operations themselves are often subject to local regulation if not performed by the railroad. *Hi-Tech Trans., LLC, v. New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004).⁵

The material facts here establish as a matter of law that the City’s regulation of the trucks is not preempted by the ICCTA. The trucks are owned and operated by trucking companies, not by NSRC or RSI, or by any other railroad. Material Fact 20. The trucks are controlled by the ethanol shippers or consignees or truck companies; neither NSRC nor RSI control how many

⁵ As noted above, the issue of whether the transloading operation at the Facility is being performed by NSRC or RSI within the meaning of the ICCTA is before the STB. This Court need not address that issue, however, because even if the transloading is considered a rail operation, the City’s regulation of the trucks on City streets is not preempted by the ICCTA.

trucks are dispatched to the Facility or any aspect of their movements on City streets. Material Facts 21 & 24. Clearly, nothing about the operation of the trucks brings City regulation of those trucks on City streets within the preemptive ambit of the ICCTA.

2. The Permits Do Not “Indirectly Regulate” Transportation by a Rail Carrier

In an attempt to get around this overwhelming body of law, NSRC advances the argument that the City impermissibly “indirectly regulates” the rail operations at the Facility through its regulation of the trucks. This argument is unavailing, however, because the regulation of trucks is not the regulation of rail transportation. The ICCTA allows such local regulation even if it has an indirect impact on the railroad. *See Vermont Ry., supra.*

In any event, as discussed above, NSRC bears a heavy burden to demonstrate that the City’s regulation of trucks has such profound indirect effect on NSRC’s rail operations that it is preempted. The impact must produce “such acute, albeit indirect, effects, by intent or otherwise,” as to defeat the Congressional purpose of the federal statute. *Travelers Ins. Co.*, 514 U.S. at 668. A state or local law that creates only indirect economic incentives “that affect but do not bind the choices” of the groups affected by the federal law “is generally not preempted.” *Retail Indus. Leaders*, 475 F.3d at 193.

Here, NSRC cannot point to any unavoidable consequence of the Permits that would be inconsistent with the purpose of the ICCTA. There is no provision of the ICCTA that addresses, much less protects, how material is unloaded, transloaded or transported away from any specific facility and no STB or other federal approval is required to open or close such a facility. As the Eleventh Circuit explained in rejecting the argument that application of a local zoning ordinance would impermissibly impair the railroad’s ability to generate income:

This microeconomic focus is not consistent with the stated purpose of the ICCTA. In reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across

the nation. [] No statement or purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted. 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 East Coast Ry., 266 F.3d at 1338 & n.11. Indeed, the daily operation of market forces and business decisions by NSRC, RSI and their customers cause significant variations in the flow of ethanol through the Facility without raising any federal concerns. How shippers, consignees and NSRC respond to the Permits does not raise any issue that conflicts with the purposes of the ICCTA.

Moreover, there is no dispute that application of the Permits would not prevent NSRC from operating the Facility. Material Fact 27. Even if the Permits had the effect of reducing the volume of ethanol that could be trucked away on any one day, transloading could still occur. Material Facts 27 & 28. Moreover, a reduced volume of ethanol through the Facility would not necessarily result in a reduced flow of ethanol through interstate commerce in general or the rail system in particular. NSRC understands that if it is not able to meet demand, its competitors will. Material Fact 29.

Alternatively, nothing in the Permits prevents NSRC and RSI from loading ethanol into appropriate storage tanks, or filling tank cars that could be driven off on other days. Indeed, as described above, Federal regulations relating to hazardous materials permit and indeed require such storage in certain circumstances. Accordingly, the Permits in no way force NSRC to take any action that undermines the goals of the ICCTA.

At bottom, NSRC claims that application of the Permits would make the Facility less profitable and less competitive. But, as explained above, the ICCTA does not protect the ability of a railroad to obtain a desired profit level from a specific facility. *Florida East Coast Ry.*, 266

F.3d at 1338 & n.11. NSRC may be faced with an economic choice it does not like, but there is nothing about that choice that causes the Permits to be preempted. *Retail Indus. Leaders*, 475 F.3d at 193 (a state or local law that creates only indirect economic incentives “that affect but do not bind the choices” of the regulated groups “is generally not preempted.”).

NSRC also claims that the Permits are preempted because NSRC, as the property owner, is potentially subject to fines and penalties for violations of the Permits. Complaint ¶ 31. This claim lacks merit. Regulation of a railroad regarding non-rail activities is not preempted by the ICCTA; the ICCTA preempts only regulation of “rail transportation.” As the Vermont Supreme Court held in affirming permits with conditions very similar to those at issue here that were issued directly to a railroad, “mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state or local regulation.” *Vermont Ry.*, 769 A.2d at 654 (quoting trial court). *See also Florida East Coast Ry.*, 266 F.3d at 1331.

Finally, NSRC is likely to argue that the underlying intent of the City is to force NSRC to abandon the Facility by pointing to statements by the City objecting to NSRC’s decision to locate the Facility in Alexandria. The City does not dispute that it would prefer the Facility to be located elsewhere. But that is irrelevant because that desire does not cause to be preempted every regulatory action the City takes that may have some connection to the Facility:

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 East Coast Ry., 266 F.3d at 1339 n.12.

More fundamentally, whatever the City’s ultimate wishes regarding the Facility, the existence of the Facility today requires the City to take appropriate steps to ensure the safety of its residents. Ethanol is a flammable, hazardous material. Material Fact 4. An explosion

involving an ethanol-filled truck would create a risk of serious personal injury and property damage. Material Fact 10. Fighting an ethanol-fueled fire requires special equipment and training and the City has only a limited supply of the necessary foam. Material Fact 11. The Permits are, therefore, a reasonable exercise of the City’s police powers that do not in any way interfere with the intended functioning of the ICCTA. Accordingly, they are not preempted.

E. The Hazardous Material Transportation Act Does Not Preempt or Apply to the City’s Regulation of Ethanol-filled Trucks from the Facility on City Streets

In Count V NSRC claims that the Permits and City Code § 5-2-27 as applied to the Facility are preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127 (2008) (“HMTA”) under two theories. First, NSRC claims that the Permits and City Code § 5-2-27 as applied constitute an obstacle to compliance with regulations issued under the HMTA. Complaint ¶¶ 61-63. Second, NSRC claims that the Permit was not issued pursuant to the regulations relating to highway route designations for hazardous materials. *Id.* at ¶¶ 64-68. Neither claim has merit.

1. The City’s Regulation of Ethanol-filled Trucks on City Streets Is Not an Obstacle to NSRC or RSI Complying with the HMTA

The HMTA contains a preemption clause providing that local requirements are preempted if: (1) complying with the local requirement and the HMTA or a regulation promulgated thereunder “is not possible,” or (2) complying with the local requirement “is an obstacle to carrying out” the HMTA or its regulations.⁶ 49 U.S.C. § 5125(a). The Supreme Court has explained that a local ordinance will not be preempted as an “obstacle” to carrying out a federal statute unless it would impede achieving federal objectives in light of the goals and purposes of the federal statute. *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471

⁶ 49 U.S.C. § 5125(d) also provides that local requirements on certain subjects that are not substantially the same as the federal requirements are preempted. None of those subjects is at issue here.

U.S. 707, 713 (1985). In *Hillsborough*, the Court held that local regulations imposed on blood plasma collection centers did not conflict with the FDA’s regulation of the donation and collection of blood plasma because the local rules “do not imperil the federal goal of ensuring sufficient plasma.” *Id.* at 722. The Court acknowledged that although the local rules might have the effect of reducing the supply of plasma, reducing the supply would not necessarily make the supply insufficient. *Id.* at 721. Thus, a local regulation may affect or reduce the ability to meet a federal requirement, but is only preempted if it blocks achievement of the federal purpose. Moreover, like the HMTA, the federal blood plasma regulations explicitly “contemplated additional state and local requirements.” *Id.* It is plain that NSRC cannot demonstrate either that it is physically impossible to comply with both the Permits and the HMTA or that enforcement of the Permits would create an obstacle to achievement of the federal goals.

NSRC claims that two HMTA regulations requiring certain steps to ensure the prompt transportation of hazardous materials conflict with the Permits. 49 C.F.R. § 174.14 requires rail carriers to forward shipments of hazardous materials within 48 hours of receipt. App. C. 49 C.F.R. § 177.800(d) provides that truckers must transport shipments of hazardous materials “without unnecessary delay.” *Id.*

It is clear that the neither the Permits nor City Code § 5-2-27 as applied regulate directly NSRC’s ability to comply with these requirements. The Permits and City Code § 5-2-27 apply only to truck transportation on City streets and not to rail transportation, unloading from rail cars or transloading from rail cars. Accordingly, NSRC is again forced to argue that its ability to comply with Section 174.14 is indirectly impaired by the Permits. As discussed above, NSRC bears a heavy burden to make that showing, *supra* at p. 13, which it cannot meet here.

First, the plain terms of 49 C.F.R. § 174.14 demonstrate that there is no conflict with the Permits. Section 174.14 applies only to a rail carrier's duty to forward shipments upon *receipt* by the carrier. It is silent regarding, and does not apply to, the *unloading or transloading* of hazardous materials, which is the activity taking place at the Facility. NSRC has not made any showing that application of the Permits prevents it from forwarding any shipment of ethanol within 48 hours of the time NSRC receives the shipment.

Second, a carrier's duty regarding timely *delivery* is specified in 49 C.F.R. § 174.16 (App. C). Section 174.16 requires the *consignee* to remove hazardous materials within 48 hours of delivery to the rail yard *or* requires the *rail carrier* to take certain steps to store or dispose of the hazardous materials. In other words, the Permits do not create a conflict with, or obstacle to complying with, Section 174.16 because if the consignees do not pick up the ethanol within 48 hours, NSRC must store it. No purpose of the HMTA is undermined by storing ethanol in precisely the manner permitted, indeed required, by Section 174.16(b).

Third, NSRC's claims on this point ring hollow because under current operations, even though NSRC and RSI are ignoring the Permits, ethanol-filled tank cars often remain in the Facility for longer than 48 hours, sometimes as long as five days. Material Fact 22. Indeed, RSI does not contact the consignees to tell them to send more trucks to pick up the ethanol more quickly, and it appears neither does NSRC. Material Facts 24 & 25. Either NSRC is violating these regulations currently or storage in rail cars on NSRC property is not a violation of the regulations. In either case, nothing about the Permits *requires* NSRC to violate the regulations.

It is also clear that the Permits do not force NSRC or the truckers to take any action inconsistent with 49 C.F.R. § 177.800. Section 177.800(d) simply requires transport by truck without unnecessary delay, from the time the truck begins to be loaded until it is unloaded at its

destination. It is hard to see how delivery by truck would be delayed by the Permits since the route specified is approximately half a mile long and the hours permitted for hauling are longer than the Facility's current operating hours. Moreover, compliance with a valid, reasonable local safety regulation cannot be "unnecessary."

Finally, the purpose of the HMTA "is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 5101. Part of Congress's purpose was to develop and promote national uniformity in regulating transportation of hazardous materials. *See, e.g., Colo. Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1580 (10th Cir. 1991) ("Congress expressly contemplated that the Secretary would employ his powers to achieve safety by enhancing uniformity in the regulation of hazardous materials transportation"). As noted above, NSRC can comply with both the HMTA regulations and the Permits. Moreover, enforcement of the Permits does not interfere with the uniformity of the Secretary's regulatory structure or with the ability of the Secretary to enhance public safety in hazardous materials transportation because the Permits do not mandate any action inconsistent with any regulation. Accordingly nothing about the Permits conflicts with, or poses an obstacle to, the goals of the HMTA.

At bottom, NSRC's safety concerns are pretextual because, notwithstanding the other available means of compliance, NSRC could avoid any potential compliance issue by causing less ethanol to be shipped through the Facility. NSRC implicitly rejects that method of compliance, however, because its goal is to move higher volumes of ethanol through the Facility in order to maximize revenues. Thus NSRC's position reduces to the argument that its business plan to accommodate a certain volume of ethanol at the Facility preempts any local regulation

that might indirectly affect the success of that plan. Clearly, however, there is no basis to define the scope of federal preemption by NSRC's profit motives rather than Congressional intent to promote safety. A local regulation is not preempted merely because it imposes unwanted economic choices. *Retail Indus. Leaders*, 475 F.3d at 193; *Florida East Coast Ry.*, 266 F.3d at 1338 & n.11. NSRC, RSI and the trucking companies can comply fully with the requirements of the HMTA by storing the ethanol safely or by matching the volume of ethanol shipped through the Facility to the capacity of the trucks allowed under City regulation. Here, the Permits address a local safety issue on City streets in a way that does not undermine or impair compliance with any safety regulation regarding the transportation of hazardous material. Accordingly, the Permits are not preempted.

2. The City's Regulation of Ethanol-filled Trucks on City Streets from a Specific Facility Is Not the Kind of Highway Route Designation Subject to HMTA Route Designation Procedures

NSRC also claims that the Permits violate the hazardous materials highway routing designation procedures of 49 U.S.C. § 5112. Complaint ¶¶ 64-68. The City does not dispute that it did not follow those procedures for the simple reason that it is not required to do so. The highway route designation procedures apply only to through routing for hazardous material shipments in general. Section 5112 does not apply to site-specific, intra-jurisdictional permits that only regulate the transportation of hazardous materials from a point within the City to the nearest highway.

The definition of "routing designation" is broad: "Any regulation, limitation, restriction, curfew, time of travel restriction, lane restriction, routing ban, port-of-entry designation, or route weight restriction, applicable to the highway transportation of [non-radioactive hazardous materials] over a specific highway route or portion of a route." 49 C.F.R. § 397.65. However, the HMTA routing designation procedures apply only to "highway route designations." 49

U.S.C. § 5112(c); 49 C.F.R. § 397.69. Thus, not all routing designations fall within the scope of the HMTA. The legislative history of the HMTA makes clear that Congress did not intend to preempt all local authority to regulate the use of local streets with respect to hazardous materials:

The bill gives policy direction for establishing standards to maintain good commercial transportation arteries for hazardous materials. At the same time, it recognizes the state interest in designating highways, along with reasonable limitations and restrictions that might pertain to highway use, especially as the latter may relate to public safety. Thus, it is understood that certain reasonable use restrictions might be imposed to minimize risk to the public based upon grave consequences to public safety absent such limitations or restrictions. Conceivably, these consequences could result from purely local circumstances and conditions.

H.R. REP. 101-444(II), Selected Provisions & I, 101st Cong., 2nd Sess. 1990 (App. E).

City Code § 5-2-27 represents the kind of regulation of “purely local circumstances and conditions” Congress intended to leave in the hands of local jurisdictions. City Code § 5-2-27 requires haulers to obtain permits. When issued, those permits allows specified cargo to move from a specified location in the City to another defined point subject to appropriate conditions. Neither City Code § 5-2-27 nor any permit issued thereunder address the shipment of all hazardous materials through the City. This kind of site-specific, point-to-point intra-city permitting process is simply not covered by the HMTA’s highway routing designation procedures. Accordingly those procedures do not apply to the City’s issuance of the Permits regarding the Facility.

II. NSRC AND RSI’S CLAIMS THAT CITY CODE § 5-2-27 IS INAPPLICABLE AND VAGUE ARE MOOT

In Counts I and II of its Complaint, NSRC claims that the former version of City Code § 5-2-27 was inapplicable to the trucks using the Facility and was unconstitutionally vague as applied. Although NSRC’s understanding of the former version of the City Code § 5-2-27 is incorrect, the Court need not consider that issue because these claims are moot.

Amendments to a challenged statute addressing the basis of the challenge “are ‘usually enough to render a case moot even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.’” *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). Dismissal for mootness is particularly appropriate when the challenging party has actual notice of the applicability of the law. *U.S. v. Klecker*, 228 F.Supp. 2d 720, 726 (E.D. Va. 2002), *aff’d*, 348 F.3d 69 (4th Cir. 2003).

Counts I and II of the complaint relate only to City Code § 5-2-27 as it existed on June 3, 2008, and to the June 3 permit issued thereunder. On June 14, 2008, the City enacted Ordinance No. 4555, as “[d]eclaratory of existing law,” in order to clarify that City Code § 5-2-27 applies to ethanol and similar substances. As amended, the operative section of City Code § 5-2-27 reads as follows:

- (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.

Material Fact 15.

As clarified, there is no dispute that City Code § 5-2-27 applies to trucks hauling ethanol and other commodities. As NSRC stated to the STB in July, 2008, regarding the amended ordinance: “[the City] modified the construction equipment and supply hauling ordinance so that it now applies to all bulk commodities – flour, corn syrups, and other bulk transload commodities – moving from a rail head to a non-retail facility.” Material Fact 16 (emphasis in original). Ethanol is a bulk transload commodity, and, as a product of corn, is a corn syrup.

Accordingly, the amended City Code § 5-2-27 and Permits issued under its authority apply to trucks hauling ethanol (or other materials) from the Facility.

The June 3 permit issued under the unamended version of City Code § 5-2-27 has expired by its own terms, and subsequent permits have been issued pursuant to the amended version of City Code § 5-2-27. Moreover, NSRC had actual notice that the unamended Ordinance applied to the trucks prior to the issuance of the first permit. Material Fact 12. Accordingly, Counts I and II are moot and should be dismissed.

III. THE COURT SHOULD ENJOIN THE TRUCKS USING THE FACILITY FROM FUTURE VIOLATIONS OF CITY CODE § 5-2-27

As demonstrated above, trucks using the Facility have ignored the Permits, based at least in part on instructions from NSRC and/or RSI. Because of the risk of serious injury posed by the operation of ethanol-filled trucks on City streets, a permanent injunction is appropriate in this case to ensure compliance with the Permits and City Code § 5-2-27 and to prevent the irreparable harm that would result from an accident involving an ethanol-filled truck. *See National Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 200-201 (4th Cir. 2005); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 347 (4th Cir. 2001).

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of the City and against NSRC and RSI and should deny NSRC and RSI’s Motion for Summary Judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2008, the foregoing document was electronically filed pursuant to the Court's ECF procedures, which will provide notice of such filing to the following counsel of record:

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