SOUTHERN ENVIRONMENTAL LAW CENTER

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December 22, 2020

Via Electronic Mail
Councilmember Dustin Hillis
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RE: Norfolk Southern's Proposed Development at the Chattahoochee Brick Site

Councilmember Hillis:

On behalf of the Southern Environmental Law Center, I am writing regarding Norfolk Southern's proposed construction of an ethanol storage and distribution facility on the Chattahoochee Brick site.

As you know, essentially the same facility was proposed by the Lincoln Terminal Company ("Lincoln Terminal") several years ago. After submitting an application for a special use permit to the City of Atlanta and then contending that no such permit was required, Lincoln Terminal withdrew its application and dismissed its court appeal. Now Norfolk Southern is pursuing the same project and asserting that it does not need to comply with the City of Atlanta's special use permit requirements and other laws because those laws are preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA"). But ICCTA preemption is the exception, not the rule. Norfolk Southern cannot simply claim preemption; it must prove that all elements necessary for ICCTA preemption apply here. The information currently available does not demonstrate that the facility would be operated by a rail carrier nor does it prove that the City of Atlanta's special use permitting law regulates railroad transportation activities. Accordingly, unless these elements are proven, all state and local laws are not preempted and should be enforced accordingly.

ICCTA Preemption

The central issue is whether the City of Atlanta's special use permit requirements and other applicable laws are preempted by the ICCTA. 49 U.S.C. § 10101 *et seq*. Under the ICCTA, the Surface Transportation Board has exclusive jurisdiction over the regulation of rail transportation, including "the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities." 49 U.S.C. § 10501(b)(1). This provision has been interpreted to preempt the regulation of railroad transportation activities under state or local laws.

Railroad regulation has a long and colorful history at the federal, state, and local levels. The ICCTA's preemption provision arose from the need to adopt uniform national standards for regulating railroad transportation and to avoid the administrative difficulty of complying with a myriad of state and local regulations.[1]

ICCTA's preemption of state and local laws may be broad, but it is not absolute. State and local laws that have a remote or incidental impact on rail transportation are not preempted by the ICCTA. *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2009). Generally applicable, non-discriminatory laws that protect public health, safety, and welfare are not preempted. *Green Mtn. R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005).

State and local laws, including zoning laws, are entitled to a presumption of validity and non-preemption. *City of W. Palm Beach*, 266 F. 3d at 1328-9 *citing Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[H]istoric police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Thus, if Norfolk Southern believes it is entitled to preemption then it bears the burden of demonstrating that the ICCTA applies. ICCTA preemption is the exception, not the rule.

Norfolk Southern Must Demonstrate That The Facility Is Operated By A Rail Carrier

The first key question is whether the proposed facility would be operated by a "rail carrier" as defined by the ICCTA. To qualify for ICCTA preemption, the project must be a railroad transportation activity "performed by, or under the auspices of, a rail carrier." *City of Alexandria, VA-Petition for Declaratory Order*, STB Finance Docket No. 35157, 2009 WL 381800 *1 (Feb. 17, 2009). Under the ICCTA, Norfolk Southern is a rail carrier and Lincoln Terminal is not. 49 U.S.C. § 10102(5).

Thus, the question becomes whether the facility will be operated by Norfolk Southern or Lincoln Terminal for ICCTA purposes. The facility was initially proposed by Lincoln Terminal, and would be located on land owned by Lincoln Terminal but purportedly leased to Norfolk Southern. Lincoln Terminal continues to advertise the proposed facility as its own on its website.[2] Beyond this information, little is known about the terms and scope of the arrangement between Norfolk Southern and Lincoln Terminal.

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[1] Matthew C. Donahue, *Federal Railroad Power Versus Local Land-Use Regulation: Can Localities Stop Crude-by-Rail in Its Tracks?*, 74 Wash. & Lee L. Rev. Online 146, 163 (2017), https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss1/12

[2] *"Southeast Products/Biofuels Marketer Buys North Carolina Terminal"* https://lincolnenergysolutions.com/southeast-products-biofuels-marketer-buys-north-carolina-terminal/ (Last visited Dec 22, 2020). A copy of this press release is attached.

Disputes frequently arise regarding the application of the ICCTA to situations like this, where a rail carrier engages in a joint venture with a non-rail carrier. To determine which entity is operating a facility for ICCTA purposes, courts and the Surface Transportation Board have engaged in a fact-specific analysis focused on control, ownership, and liability for the facility. Key considerations in this analysis include:

1) Does the rail carrier hold out this facility as part of its services?
2) What degree of control does the rail carrier have over operation of the facility?
3) Which party owns the property and which pays the utilities?
4) Which party has maintenance obligations?
5) Which party is liable for damage to shipments during loading or unloading?
6) How is financing for the project structured?

Texas Cent. Business Lines Corp. v. City of Midlothian, 669 F.3d 525, 530-31 (5th Cir. 2012).[3] If the rail carrier fails to demonstrate that it has the primary control, ownership, and responsibility for a joint venture, the project is not deemed to be operated by a rail carrier for purposes of the ICCTA and no preemption occurs. *New York & Atl. Ry. Co. v. Surface Transp. Bd*., 635 F.3d 66, 74-75 (2d Cir. 2011) and *SEA-3, Inc. – Petition for Declaratory Order*, FD 35853 (Surface Transportation Board served Mar. 17, 2015).

Based on the information currently available, Norfolk Southern has not demonstrated that it will be the primary operator of the facility as defined by these factors. Given Lincoln Terminal's history with this project, its ongoing involvement, and its desire to avoid the City of Atlanta's special use permitting requirements, Norfolk Southern's assertion that it will operate the facility for ICCTA purposes must be viewed with skepticism. Norfolk Southern cannot avoid the City of Atlanta's special use permitting requirements by simply claiming preemption; it must demonstrate that all conditions for preemption, including the criteria outlined above, have been met. The information currently available does not support this showing.

If Norfolk Southern continues to assert preemption without supporting evidence, the issue can be presented for resolution in several different ways. First, the City of Atlanta can attempt to halt construction on the site by issuing a stop work order. *City of W. Palm Beach,* 266 F. 3d at 1327. Second, the City could file suit in federal court seeking a declaration that ICCTA preemption does not apply. *Id.* Third, the City could file a petition before the Surface Transportation Board seeking a ruling on this issue. *See, e.g., Valero Refining Co.—Petition for Declaratory Order*, FD 36036 (Surface Transportation Board, Sep. 20, 2016) citing 49 U.S.C. § 1321 and 5 U.S.C. § 554(e).

[3] Essentially the same factors were applied in *Padgett v. Surface Transportation Board*, 804 F.3d. 103 (1st Cir. 2015) and *City of Alexandria, VA—Petition for Declaratory Order*, FD 35157, slip op. at 2–3 (Surface Transportation Board served Feb. 17, 2009).

Norfolk Southern Must Demonstrate That Atlanta's Zoning Regulates Its Rail Transportation Activities

In addition to proving that it will operate the proposed facility, Norfolk Southern must also demonstrate that the City of Atlanta's special use permit requirement and other laws constitute a regulation of its railroad transportation activities.

Generally applicable, non-discriminatory laws that protect public health and safety are not preempted under the ICCTA. *Green Mtn. R.R.*, 404 F.3d at 643. The ICCTA only preempts state and local laws to the extent that they regulate railroad transportation activities.

> Congress narrowly tailored the ICCTA preemption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have 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

City of W. Palm Beach, 266 F. 3d at 1331 (Internal citations and formatting omitted). Laws regulating railroad transportation activities fall into two categories. Preclearance requirements that directly regulate railroad transportation activity are categorically preempted. But "as applied" requirements are only preempted if they "have the effect of unreasonably burdening or interfering with rail transportation." *Valero Refining Co.—Petition for Declaratory Order*, FD 36036 (Surface Transportation Board, Sep. 20, 2016) at n. 7.

Given that the City of Atlanta applied the same special use permitting requirements when the project was proposed by a non-rail carrier (Lincoln Terminal), these requirements do not directly regulate railroad transportation activities and not categorically preempted. If Norfolk Southern believes that these requirements are preempted on an "as applied" basis, it has the burden of demonstrating how they unreasonably burden or interfere with rail transportation. Without such a showing, the ICCTA does not preempt these laws.

The *W. Palm Beach* case provides Eleventh Circuit authority on this issue. In that case, the Court upheld the city's effort to enforce its zoning regulations as to a property leased by a non-rail carrier from a rail carrier. The Court concluded that the ICCTA does not "mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad." *City of W. Palm Beach*, 266 F. 3d. at 1332. Although the Court declined to address the precise contractual arrangement here (with a rail carrier purportedly leasing property from a non-rail carrier), the overarching inquiry into the regulation's purpose and effect remains the same.

Beyond the City of Atlanta's special use permitting law, a number of other state and local laws of general application likely apply to the proposed facility and are even further removed from rail transportation regulation. For example, the Georgia Abandoned Cemeteries Act

prohibits burial grounds, human remains, and burial objects from being disturbed without a permit. O.C.G.A. § 36-72-4. The cremation and burial of dead convict laborers on the Chattahoochee Brick site has been widely researched and documented. Simply because a limited search with ground-penetrating radar did not detect human remains does not mean that this law has been satisfied. Under the statute, the "fact that the area was used for burial purposes shall be evidence that it was set aside for burial purposes," and the definition of human remains includes those "in any stage of decomposition, including cremated remains." O.C.G.A. § 36-72-2(3), (8). This law places permitting authority for the disturbance of burial grounds and human remains with the local governments where the project is proposed.

Likewise, the Metropolitan River Protection Act, O.C.G.A. § 12-5-440 *et. seq*., and the City of Atlanta's Flood Protection Code, City Code § 74-201 *et. seq.*, regulate activities based on their location in the floodplain or the Chattahoochee River corridor. Much of the Chattahoochee Brick site is located in the floodplain and floodway for the Chattahoochee River and Proctor Creek, so these laws will likely apply to the site. And because they regulate based on location and do not focus on rail transportation activities, they are not preempted by the ICCTA. The Metropolitan River Protection Act requires a permitting process involving both the Atlanta Regional Commission and the City of Atlanta with respect to the property in question.

Finally, the ICCTA does not compel the City of Atlanta to undertake any additional actions to accommodate this facility. For example, if Norfolk Southern (or Lincoln Terminal) requests a pipeline easement to cross the City-owned Parrott Avenue to reach storage tanks on the opposite side of the road, the ICCTA does not obligate the City of Atlanta to grant the easement.

Conclusion

The City of Atlanta's special use permitting requirement and the other laws described above exist to protect public health, welfare, safety, and the environment. The City of Atlanta can, and must, continue enforcing these laws unless Norfolk Southern successfully demonstrates that all elements of ICCTA preemption have been satisfied. Preemption is the exception, not the rule. So if Norfolk Southern seeks preemption under the ICCTA is must prove that each element of preemption applies. Unless Norfolk Southern successfully carries this burden of proof, the City of Atlanta should apply and enforce all laws applicable to the proposed project.

Thank you for your consideration of this letter and your work to protect Atlanta's neighborhoods and environment. If you have any questions or wish to discuss this matter further please do not hesitate to contact me.

Sincerely,

Brian Gist

cc: Heather Hussey-Coker (Groundworks Atlanta)

Southeast Products/Biofuels Marketer Buys North Carolina Terminal

Lincoln Terminal Co., a Southeast oil products and biofuels marketing and logistics company, recently announced that it has acquired the Eco terminal (former Crown) in Charlotte, N.C. expanding its terminal network to four.

Besides the new Charlotte terminal, Lincoln has two operational terminals in Chattanooga, Tenn., and Fredericksburg, Va., and it is building a third storage/rail facility in Chattahoochee, west Atlanta.

The Charlotte terminal has a total capacity of 130,000 bbl, and serves gasoline, ULSD, ethanol and biodiesel. The terminal has good tankage flexibility for different products and automated biodiesel blending will be an added service. The terminal is complementary to Lincoln's growing Southeast terminal footprint and aligns with the company's biofuels marketing effort in that region. Automated biodiesel blending is important to Lincoln and offers a convenient terminal solution not available in Charlotte today.

> "Eco had made improvements and maintained the terminal well during its ownership. Lincoln is completing further improvements including truck staging, enhanced loading efficiencies at the rack and additional product services." *Larry Burgamy, president of Lincoln, told OPIS (Oil Price Information Service)*

The terminal will resume operations in March following these improvements, he said.

In west Atlanta, Lincoln had acquired 45 acres in the Chattahoochee terminal community to construct a 90-car unit-train delivery facility with 24-hour unload capability.

The Atlanta facility will offer rail services for light oil products, butane, biodiesel and ethanol. The project, located on the Norfolk Southern, is expected to begin construction promptly.

Lincoln markets as well as trades biofuels across the Southeast through the company and third-party facilities. Lincoln's products marketing is primarily through niche facilities. The company is active in the Southeast from Maryland to Georgia and Tennessee with expansion north into Ohio and Kentucky in 2016. All companies combined, the 2016 projected sales are expected to exceed $1 billion in revenue.

Originally published by Oil Price Information Service (OPIS) opisnet.com

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