

**1. Section 10501(b)**

- Gives Board exclusive jurisdiction over “*transportation by rail carriers*” and expressly preempts any state law remedies with respect to rail transportation; ICA defines “transportation” broadly to include all of the related facilities and activities that are part of rail transportation (section 10102(9))
- Purpose of section 10501(b) is to prevent patchwork of local regulation from unreasonably interfering with interstate commerce

**2. Reach of the Section 10501(b) Preemption**

- Statute not limited to “economic” regulation (City of Auburn v. United States, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998))
- While most state and local laws are preempted, overlapping federal statutes (including environmental statutes) are to be harmonized, with each statute given effect to the extent possible (Tyrrell v. Norfolk Southern Ry., 248 F.3d 517 (6<sup>th</sup> Cir. 2001) (there is no “positive repugnancy” between the Interstate Commerce Act and the Federal Railway Safety Act); Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001) (Congress did not intend to preempt federal environmental laws such as the Clean Air Act and the Clean Water Act, even when those statutory schemes are implemented in part by the states))
- Two types of state and local actions are categorically preempted:
  - (1) any form of state and local preclearance or permitting that, by its nature, could be used to deny or defeat the railroad’s ability to conduct its operations (City of Auburn v. United States, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998) (environmental and land use permitting categorically preempted); Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)) and
  - (2) state or local regulation of matters directly regulated by the Board (CSXT Transportation, Inc.-Pet. For Decl. Order, STB Finance Docket No. 34662 (STB served March 14, 2005), reconsideration denied (STB served May 3, 2005), petitions for judicial review pending, District of Columbia v. STB, No. 05-1220 et al. (D.C. Cir. filed June 22, 2005) (any state or local attempt to determine how a railroad’s traffic should be routed is

preempted); Friberg v. Kansas City S. Ry., 267 F.3d 439 (5<sup>th</sup> Cir. 2001) (state statute imposing limitations on a railroad expressly preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted))

- **Otherwise, preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation** (Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8<sup>th</sup> Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads))
- **Notwithstanding section 10501(b), it is permissible to apply state and local requirements such as building, fire, and electrical codes to railroad facilities so long as they are not applied in a discriminatory manner; however, need to seek building permit is preempted** (Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000); Borough of Riverdale – Pet. for Decl. Order – The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)).
- **Railroads are encouraged to work with localities to reach reasonable accommodations** (Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served Dec. 1, 2003) (carrier cannot invoke section 10501(b) preemption to avoid obligations under an agreement it had entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce))

### 3. Who Interprets Section 10501(b)?

- **Board in cases that require a license & environmental review**
- **Either the Board in a declaratory order or a court (either with or without referral to the Board) in other cases**
- **When class exemption was invoked to lease and operate 1,600 feet of track for use in transferring construction and demolition waste between truck and rail, the Board stayed the proceeding to obtain additional information** (Northeast Interchange Ry., LLC-Lease & Oper. Exem.-Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734 et al. (STB served August 5, 2005))

- **Board has discretion to decide whether to institute a declaratory order proceeding and denied request that it do so to address solid waste operations on property owned by the New York, Susquehanna and Western Ry. in North Bergen, NJ, and other similarly situated solid waste operations, because the North Bergen facility is permanently closed, petitioners failed to point to an alternative site that would warrant continuing with the proceeding, and the railroad and the New Jersey Department of Environmental Protection are involved in ongoing court litigation related to the facility (National Solid Wastes Management Association, Et Al.-Petition for Declaratory Order, STB Finance Docket No. 34776 (STB served March 10, 2006))**

#### **4. Case Law on Facilities**

- **Preemption applies to proposals to build or acquire ancillary facilities that assist a railroad in providing its existing service, even though the Board lacks licensing authority over the projects**
  - i. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983)
  - ii. Borough of Riverdale — Pet. for Decl. Order — The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)
  - iii. Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000)
  - iv. Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001)
- **No preemption where the operation does not constitute transportation by a rail carrier**
  - i. High Tech Trans, LLV v. New Jersey, 382 F.3d 295 (3d Cir. 2004); High Tech Trans, LLC- Pet. For Decl. Order- Hudson County NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (both agreeing with New Jersey Dept. of Environ. Protection that there is no preemption for truck transportation of construction and demolition waste en route to transloading facility, even though a railroad ultimately uses rail cars to transport the debris)
  - ii. Grafton and Upton R.R. v. Town of Milford, Civ. No. 03-40291 (D. Mass. Feb. 14, 2006); Town of Milford, MA- Pet. For Decl. Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (no preemption for planned steel fabrication facilities that are not part of “transportation”)
  - iii. Florida East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11<sup>th</sup> Cir. 2001) (no preemption for aggregate

distribution plant because the plant, although located on railroad property, was not railroad-owned or operated and thus was not part of rail transportation)

- **Activities That Do Qualify for Federal Preemption as Transportation Conducted by a Rail Carrier**
  - i. Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preemption for cement transloading facility in Vermont)
  - ii. Joint Pet. For Decl. Order- Boston & Maine Corp. v. Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F.Supp.2d 128 (D. Mass. 2002), rev'd solely on attys fee issue, 330 F.3d 12 (1<sup>st</sup> Cir. 2003) (preemption for automobile loading facility in Massachusetts)
  - iii. Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 WL 1113647 (N.D. Ga. 1997) (local zoning and land use permitting regulation for railroad facility preempted)
  - iv. Canadian National Ry. v. City of Rockwood, No. 04-40323, 2005 WL 1349077 (E.D. Mich. 2005) (county zoning laws and permitting and preclearance requirements preempted for a railroad's transload facility in Michigan)