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## How States and Municipalities Can Retain the Power to Regulate Rail Carrier-Owned Solid Waste Transfer Facilities in the Context of the *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson* and *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson* Decisions

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**How States and Municipalities Can Retain  
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Context of the *Metro Enviro Transfer, LLC v.  
Village of Croton-on-Hudson* and *Buffalo  
Southern Railroad, Inc. v. Village of  
Croton-on-Hudson* Decisions**

CHRISTINA HAWKINS\*

**I. INTRODUCTION**

Historically, municipalities throughout the United States have exercised the right to control the development and uses of the land within their geographical boundaries through the use of zoning and other land use laws. Towns may set up commercial districts, residential districts, or require special permits for land uses for which the land is not zoned, or for which the town would like to impose restrictions or conditions. The authority to control land use allows a municipality to create laws protecting the health of its residents and the environment.

State and local law, including zoning and land use law, may be preempted by federal law. Preemption of state law by federal law occurs when, “(1) the preemptive intent is ‘explicitly stated in [a federal] statute’s language or implicitly contained in its structure and purpose’; (2) state law ‘actually conflicts with federal law’; or (3) federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”<sup>1</sup>

This comment will focus on the preemption of local land use regulation by the Interstate Commerce Commission Termination Act of 1995 (ICCTA). The ICCTA explicitly provides that transportation by rail carriers and the construction and operation of ancillary facilities fall under the jurisdiction of the Surface Trans-

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1. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2d Cir. 2005) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

portation Board (STB), a federal regulatory agency.<sup>2</sup> The allocation of jurisdiction to the STB of facilities operated by rail carriers can create conflict when municipalities seek to regulate land use in local rail yards. Throughout this comment, the cases of *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson* (“*Metro Enviro Transfer*”)<sup>3</sup> and *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson* (“*Buffalo Southern R.R.*”)<sup>4</sup> will be used to illustrate the issues that arise when federal law preempts local regulation of possible environmental hazards.

In *Metro Enviro Transfer*, the Court of Appeals of New York upheld the denial of a special permit by the Village of Croton-on-Hudson to a solid waste transfer facility located in local rail yards.<sup>5</sup> In 1998, the Village Board of Trustees issued a three-year special permit to Metro Enviro Transfer, LLC allowing for the operation of the transfer station, in accordance with forty-two special conditions.<sup>6</sup> In 2001, Metro Enviro Transfer sought to renew the special permit, but the Board voted not to renew based on evidence of repeated and intentional violations of the permit.<sup>7</sup> The court of appeals found that the Board’s decision to refuse to renew the permit was backed by evidence of the violations, and was not based upon “generalized opposition”<sup>8</sup> to its renewal. Furthermore, the court of appeals held that the Village did not have to show that Metro Enviro Transfer’s violations of the permit resulted in actual harm, but that the many willful violations were enough to support the Board’s decision.<sup>9</sup>

In 2006, the Buffalo Southern Railroad (BSR), a successor to operations at the solid waste transfer station in the train yards brought suit against the Village of Croton-on-Hudson in the United States District Court for the Southern District of New York.<sup>10</sup> BSR sought to enjoin the Village from commencing an eminent domain proceeding on the property, but also sought to enjoin the Village from enforcing local zoning requirements on the prop-

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2. 49 U.S.C. § 10102(9) (2006).

3. *Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson*, 833 N.E.2d 1210 (N.Y. 2005).

4. *Buffalo S. R.R. v. Vill. of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006).

5. *Metro Enviro Transfer, LLC*, 833 N.E.2d 1210.

6. *Id.* at 1211.

7. *Id.*

8. *Id.* at 1212.

9. *Id.*

10. *Buffalo S. R.R.*, 434 F. Supp. 2d 241.

erty.<sup>11</sup> The district court held that the ICCTA preempts state and local regulations that interfere with railroad operations.<sup>12</sup> The holding of *Buffalo Southern R.R.* leaves the Village facing the prospect that a rail carrier may decide to use the facility to engage in solid waste transloading operations under the preemption of the ICCTA. The Village no longer has the ability to regulate the hours of operation of the facility or to monitor the types of waste being processed and transported through the Village en route to the site.

The second section of this comment discusses the ICCTA, and its preemption of state and local law, as interpreted by the Surface Transportation Board (STB) and the federal courts. In the third section, this paper reviews the cases of *Metro Enviro Transfer* and *Buffalo Southern R.R.*, which exemplify the conflict that ICCTA preemption presents for municipalities. The fourth section of this paper considers three ways that municipalities may retain some regulatory control over rail-owned facilities within their geographical boundaries: through proposed federal amendments to the ICCTA, by implementing traditional state police powers, and by a revised, narrower interpretation of the preemption provision of section 10501 of the ICCTA by the courts.

## II. THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT

Congress passed the ICCTA in 1995, amending the Interstate Commerce Act of 1978, in an effort “to reform economic regulation of transportation, and for other purposes.”<sup>13</sup> The ICCTA terminated the Interstate Commerce Commission and set up the Surface Transportation Board (STB).<sup>14</sup> The STB is an “economic regulatory agency . . . charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers,”<sup>15</sup> and the ICCTA gives the STB exclusive jurisdiction over:

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including

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11. *Id.* at 243.

12. *Id.* at 250.

13. H.R. Rep. No. 104-422, at 1 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 850.

14. *Id.* at 3.

15. Surface Transportation Board, <http://www.stb.dot.gov> (last visited Sept. 10, 2008).

car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.<sup>16</sup>

“Transportation” is defined broadly to include a yard, property or a facility at which “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property” occur.<sup>17</sup> The definition of “transportation” does not include manufacturing or commercial activities that take place on railroad-owned property that are not an integral part of rail service.<sup>18</sup> “Rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.”<sup>19</sup>

Courts throughout the country, as well as the STB, have interpreted 49 U.S.C. § 10501(b) as preempting local and state zoning and environmental regulations. As stated above, preemption of state law by federal law occurs when “(1) the preemptive intent is ‘explicitly stated in [a federal] statute’s language or implicitly contained in its structure and purpose’; (2) state law ‘actually conflicts with federal law’; or (3) federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”<sup>20</sup> In *Green Mountain R.R. Corp. v. Vermont*, a case concerning a railroad seeking to construct a facility for the unloading and temporary storage of bulk salt, bulk cement and other non-bulk items, the Second Circuit held that a Vermont law requiring a preconstruction permit was preempted by the ICCTA, stating that “the plain language of section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities.”<sup>21</sup>

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16. 49 U.S.C. § 10501(b) (2006)

17. 49 U.S.C. § 10102(9) (2006).

18. *Railroad-Owned Solid Waste Transload Facilities: Hearing Before the Subcomm. on Railroads, Pipelines and Hazardous Materials*, 110th Cong. (2007) (statement of Charles D. Nottingham, Chairman, Surface Transp. Bd.).

19. 49 U.S.C. § 10102(5).

20. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2d Cir. 2005) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

21. *Green Mountain R.R. Corp.*, 404 F.3d 638, 645.

Other cases in accord include: *City of Auburn v. United States*,<sup>22</sup> *Soo Line R. Co. v. City of Minneapolis*,<sup>23</sup> and *Boston and Maine Corp. v. Town of Ayer*.<sup>24</sup>

Typically, there are three ways in which issues involving the handling of solid waste at facilities located along rail lines come before the STB: “(1) proposals to build a new line into a new service area; (2) proposals that involve a new carrier or a small Class III carrier seeking to acquire and operate an existing line; and (3) the construction of facilities ancillary to already-authorized rail lines.”<sup>25</sup> When there is a proposal to build a new line into an area or a proposal of a new carrier seeking to operate an existing line, the railroad must receive a license from the STB. The railroad can file an application for authority under 49 U.S.C. § 10901, or it may seek an exemption under 49 U.S.C. § 10502, which allows the rail to use an abbreviated procedure to obtain authority, subject to review after issuance.<sup>26</sup>

Although the construction of facilities ancillary to already-authorized lines falls under the jurisdiction of the STB under 49 U.S.C. § 10501, construction of these facilities is excepted from the STB’s licensing authority, under 49 U.S.C. § 10906. Section 10906 of the Act states that the STB does not have authority over the construction, acquisition or operation of certain types of tracks including spur, switching and side tracks.<sup>27</sup> Whether or not a section of track is a side or spur track has significant ramifications for the environmental regulation of the site. If the track is subject to the exception under 49 U.S.C. § 10906, the STB may still have jurisdiction over it, preventing a municipality from imposing any regulation upon the operations. Because these tracks and facilities are not subject to licensing of the STB, the STB does not have

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22. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (city challenged STB’s finding of preemption of local environmental laws by ICCTA, in regard to reopening of rail line).

23. *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D.Minn. 1998) (city permitting process for demolition of five buildings at rail yard was preempted by ICCTA).

24. *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D.Mass. 2002) (town preconstruction permit preempted by ICCTA in case of construction of new facility for unloading automobiles from rail line).

25. *Railroad-Owned Solid Waste Transload Facilities: Hearing Before the Subcomm. on Railroads, Pipelines and Hazardous Materials*, 110th Cong. (2007) (statement of Charles D. Nottingham, Chairman, Surface Transp. Bd.).

26. 49 U.S.C. §§ 10901, 10502.

27. 49 U.S.C. § 10906.

the authority to conduct formal environmental review or to impose special environmental conditions on the operations.<sup>28</sup>

This statutory interpretation results in a situation in which environmental regulation of certain waste transloading facilities is only subject to federal environmental statutes and regulations that do not necessarily take into account the factors important to different localities. In his statement in the hearing before the House Subcommittee on Railroads, Pipelines and Hazardous Materials, Charles D. Nottingham, chairman of the STB, pointed out that not all state and local laws are preempted by the jurisdiction of the STB, just those that interfere or prevent rail transportation.<sup>29</sup> Traditional police powers accorded to local government, like those used to protect public health and safety (including local fire, electric and building codes), are not preempted.<sup>30</sup>

Although the explicit preemption of section 10501(b) of the ICCTA allows for state and local governments to exert some control over railroad-owned solid waste transfer facilities, this control is very limited. As will be discussed below, using the experience of the Village of Croton-on-Hudson as an example, the federal preemption of local regulations can leave a community feeling vulnerable to environmental harms and with concerns for public safety.

### **III. METRO ENVIRO TRANSFER, LLC V. VILLAGE OF CROTON-ON-HUDSON AND BUFFALO SOUTHERN RAILROAD, INC. V. VILLAGE OF CROTON-ON-HUDSON**

In 1997, Metro Enviro Transfer leased a parcel of property from Greentree Realty, Inc. The property, located on ten acres in the Village of Croton-on-Hudson, contains a spur of track, 1600 feet in length, a warehouse facility, storage yards, a one-story office building, and a parking lot.<sup>31</sup> Although the property was zoned as "L-1," for light manufacturing uses, since 1984, successive owners and lessees have been using the property as a waste transfer station and wood recycling center and each has had to obtain a special permit from the Village.<sup>32</sup> In 1998, Metro Enviro

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28. *Railroad-Owned Solid Waste Transload Facilities: Hearing Before the Subcomm. on Railroads, Pipelines and Hazardous Materials*, 110th Cong. (2007) (statement of Charles D. Nottingham, Chairman, Surface Transp. Bd.).

29. *Id.*

30. *Id.*

31. *Buffalo S. R.R.*, 434 F. Supp. 2d at 244.

32. *Id.* at 244.

Transfer obtained a permit from the Village containing 42 special conditions, including capacity limitations, restrictions on the type of waste allowed in the facility, and requiring training of employees of the facility.<sup>33</sup>

During the three-year period in which the permit was in place, Metro Enviro Transfer exceeded capacity limitations twenty-six times and accepted prohibited types of waste at least forty-two times.<sup>34</sup> Further violations included “the inadequate training of facility personnel, insufficient record keeping and inappropriate storage of tires on the site.”<sup>35</sup>

Upon application for a renewal of the permit in 2001, the Village Board of Trustees granted over ten temporary extensions and conducted extensive hearings before finally denying the application in January of 2003.<sup>36</sup> Metro Enviro Transfer then commenced an Article 78 proceeding against the Village, claiming that the Board’s decision was arbitrary and capricious, as the violations that occurred did not result in actual harm to the community or the environment.<sup>37</sup> The supreme court found that the Board’s decision not to renew the permit was based on “generalized opposition, which remains uncorroborated by any empirical data.”<sup>38</sup> The appellate division reversed the supreme court’s decision finding that the court had “erroneously substituted its own judgment for that of the Village.”<sup>39</sup> The appellate division dismissed Metro Enviro Transfer’s Article 78 proceeding.

The court of appeals affirmed the appellate division’s decision. A board maintains discretion in deciding whether to grant a special use permit, but it may not base its decision on “generalized community objections.”<sup>40</sup> In considering whether to renew Metro Enviro Transfers permit, the Village Board reviewed extensive evidence of violations and expert opinions, and although there was no actual harm, the Board found the violations were potentially harmful. The court found that “the Board was entitled to conclude that the history of repeated, willful violations created an unac-

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33. *Metro Enviro Transfer, LLC*, 833 N.E.2d at 1211.

34. *Id.* at 1211.

35. *Id.*

36. *Id.*

37. *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 777 N.Y.S.2d 170, 171 (App. Div. 2004).

38. *Metro Enviro Transfer, LLC*, 833 N.E.2d at 1211.

39. *Metro Enviro Transfer, LLC*, 777 N.Y.S.2d at 171.

40. *Metro Enviro Transfer, LLC*, 833 N.E.2d at 1212 (citing *Twin County Recycling Corp. v. Yevoli*, 665 N.Y.S.2d 627 (1997)).

ceptable threat of future injury to health or the environment.”<sup>41</sup> As a result of the ruling, Metro Enviro Transfer’s operations on the property ceased.

*Metro Enviro Transfer* was a victory for the Village. The community ended the operations of a company that disregarded the environmental and health safeguards that the Village had insisted upon in the special permit issued in 1998.

After Metro Enviro Transfer ceased operations at the site, its lease to the property was taken over by Northeast Interchange Railway, LLC (NIR).<sup>42</sup> In December of 2005, NIR applied for and was granted permits by the New York State Department of Environmental Conservation and Westchester County for handling of solid waste and the operation of a waste processing facility on the property.<sup>43</sup> NIR then applied to the STB for a Notice of Exemption Transaction to operate as a common carrier by rail on the stretch of track on the property.<sup>44</sup> The STB reviewed and formally rejected NIR’s Notice of Exemption, giving substantial weight to the fact that NIR had never engaged in common carrier operations before and to a petition filed by the Village in opposition to the exemption arguing, among other points, that NIR simply sought to carry on the same waste processing as Metro Enviro Transfer under the guise of another entity.<sup>45</sup> NIR could then submit a full application or a formal petition for exemption.<sup>46</sup>

Before NIR made any further application to the STB, the Village began considering condemning the property, and using it for municipal office space and as a storage lot for salt, sand, and municipal vehicles.<sup>47</sup> Pursuant to New York Eminent Domain Procedure Law, a public hearing was held on February 6, 2006 and an appraisal of the site established a fair acquisition price of five million dollars.<sup>48</sup>

Before the Village made a decision whether or not to acquire the property, BSR filed suit against the Village in federal court to

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41. *Metro Enviro Transfer, LLC*, 833 N.E.2d at 1212.

42. *Buffalo S. R.R.*, 434 F. Supp. 2d at 245.

43. *Id.* at 245.

44. *Id.* at 245. Metro Enviro Transfer was not a rail carrier and therefore was not under the jurisdiction of the STB. Thus, it was not required to apply for the exemption.

45. *Northeast Interchange Ry.*, No. 34734, 2005 WL 3090145 (S.T.B. Nov. 17, 2005).

46. *Buffalo S. R.R.*, 434 F. Supp. 2d at 245.

47. *Id.*

48. *Id.* at 246.

enjoin the eminent domain proceeding and to bar the enforcement of any of the Village's zoning regulations affecting the yard.<sup>49</sup> BSR is a Class III rail carrier, as classified by the STB, that owns a stretch of track near Buffalo, New York, and ships freight across the state.<sup>50</sup> After NIR abandoned its interest in the property, Greentree Realty leased the property to RS Acquisitions Co., which, in turn, subleased the property to BSR in March 2006, unbeknownst to the Village.<sup>51</sup> Although, BSR began holding itself out as a common carrier, offering transloading services on the property, little activity took place before the suit was commenced.<sup>52</sup>

To obtain a preliminary injunction, the applicant must show a likelihood of "suffer[ing] irreparable injury if such relief is denied . . . and a likelihood of success on the merits."<sup>53</sup> As for the first requirement, the court reasoned that if the Village was allowed to continue with the eminent domain proceeding, BSR would lose the ability to conduct business in the yard and that would clearly constitute irreparable harm.<sup>54</sup>

In regard to whether BSR would have a likelihood of success on the merits if litigation were to commence, BSR argued that under the ICCTA, any state or local regulation of a common carrier by rail would be preempted.<sup>55</sup> Against the backdrop of *Green Mountain R.R. Corp.*, the court held that the Village zoning and permit ordinances were preempted by the ICCTA.<sup>56</sup> Further, the court enjoined the Village from continuing in its eminent domain proceeding against the site, stating, "the ICCTA has been held to preempt eminent domain proceedings where the state action would 'prevent or unreasonably interfere with railroad operations.'"<sup>57</sup> If the eminent domain proceeding commenced by the Village were allowed to go forward, and the Village were allowed to acquire the whole parcel, it would clearly interfere with BSR's operations.

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49. *Id.* at 247.

50. *Id.* at 246. Class III rail carriers have annual revenues of under \$20 million.

51. *Buffalo S. R.R.*, 434 F. Supp. 2d at 246.

52. *Id.*

53. *Id.* at 247.

54. *Id.*

55. *Id.* at 248.

56. *Buffalo S. R.R.*, 434 F. Supp. 2d at 248.

57. *Id.* (quoting *Maumee & W. R.R. Corp.*, STB Fin. Docket No. 34354 (S.T.B. Mar. 3, 2004)).

The Village then argued that BSR was not a “rail carrier” as defined in the ICCTA because it did not have a license to operate as a common carrier out of the Croton-on-Hudson property.<sup>58</sup> Under 49 U.S.C. § 10902(a), a Class III rail carrier, such as BSR, “may acquire or operate an extended or additional rail line under this section only if the Board issues a certificate authorizing such activity.” Because BSR had not obtained the authority from the STB, it was not a “rail carrier” and its facility is not within the jurisdiction of the STB.

BSR responded first by arguing that the illegality of its operations in Croton was irrelevant to the issue of ICCTA preemption and, second, that it did not actually need to seek any certificate from the STB before commencing operations under 49 U.S.C. § 10906, which states that the STB “does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance or spur, industrial, team, switching or side tracks.”<sup>59</sup> BSR contends that its operations in Croton do not include the extension or addition of rail lines, but rather the track on the property is a “spur” track.<sup>60</sup>

The court rejected the Village’s assertion that BSR was not a rail carrier because its local operations were illegal and concluded that as long as BSR was legally providing rail carrier service somewhere, then it was a rail carrier under the ICCTA. It simply was a rail carrier conducting illegal operations in an area where it was not licensed to provide service.<sup>61</sup> “Illegal operations by a rail carrier do not preempt preemption.”<sup>62</sup> Further evidence of Congressional intent to secure jurisdiction over rail carriers, such as BSR, is that the ICCTA contains remedies for violations, such as operating without a license, as the Village contends BSR was doing.<sup>63</sup>

The court granted BSR’s request for a preliminary injunction upon the condition of BSR’s posting \$100,000 bond and BSR’s continued refusal to accept solid waste material.<sup>64</sup> On April 26, 2007, BSR notified the STB that it was seeking to withdraw the Notice of Exemption that it had filed in regard to its operations at the

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58. *Id.* at 250.

59. *Id.* at 251.

60. *Id.*

61. *Buffalo S. R.R.*, 434 F. Supp. 2d at 252.

62. *Id.* at 253.

63. *Id.*

64. *Id.* at 256.

Croton site.<sup>65</sup> BSR cancelled its lease at the Croton property sometime in 2007.<sup>66</sup>

This case made it clear to local authorities that if the facility at the Croton train yard is leased by a rail carrier, there is no way to prevent it from being used as a solid waste transfer station. Furthermore, if the facility is to become a rail carrier-owned solid waste transfer facility, the Village is preempted by the ICCTA from imposing regulations on the transfer station. As long as a rail carrier operates the facility, the Village can only hope that federal regulation of the facility covers some of its concerns.

#### IV. ANALYSIS

As in *Buffalo Southern R.R.*, courts throughout the country have interpreted section 10501 of the ICCTA to be an explicit statement of congressional intent to preempt state and local zoning and environmental regulations as applied to railroads and their operations.<sup>67</sup> Yet, all hope may not be lost for communities seeking to regulate rail-owned facilities, as there are three ways in which states and municipalities may retain some ability to regulate aspects of facility operation. First, states and municipalities may continue to exercise traditional police powers. The state of New Jersey has effectively managed to exert control over rail-owned solid waste transfer facilities through environmental regulations promulgated by the New Jersey Department of Environmental Protection. Second, litigation concerning the preemption of state and local law by section 10501 of the ICCTA has not gone unnoticed by the federal government. In both the House of Representatives and the Senate, amendments to the ICCTA have been proposed that would change the language of section 10501(b) by removing solid waste transfer facilities from STB jurisdiction. If none of the legislation amending the ICCTA is passed, and if states do not create regulations similar to those in New Jersey, communities will find themselves unable to regulate the environmental hazards posed by rail-operated solid waste transfer facilities. In this situation communities may benefit by the resolution

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65. *Buffalo S. R.R.*, STB Fin. Docket No. 34903 (S.T.B. June 6, 2007).

66. *Railroad-Owned Solid Waste Transload Facilities: Hearing Before the S. Comm. on Railroads, Pipelines and Hazardous Materials*, 110th Cong. (2007) (statement of Gregory J. Schmidt, Mayor, Vill. of Croton-on-Hudson, N.Y.).

67. *Accord City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2d Cir. 2005); *Soo Line R. Co. v. City of Minneapolis*, 38 F.Supp. 2d 1096 (D.Minn. 1998).

of sections 10501 and 10906 of the ICCTA, as they relate to STB control over “spur tracks.” The third part of this section will consider court interpretations of these two sections and how a narrower interpretation of the ICCTA preemption provision would benefit communities seeking to regulate rail-owned facilities.

### A. Exercise of State Policing Powers

Although section 10501 of the ICCTA preempts most state and local attempts to regulate solid waste transfer stations owned by railroads, local authorities may continue to exercise their “traditional police powers” provided that: “the regulations protect the public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays and can be approved (or rejected) without the exercise of discretion on subjective questions.”<sup>68</sup> This includes “direct environmental regulations enacted for the protection of public health and safety,”<sup>69</sup> so long as the regulations do not unreasonably interfere with railroad operations.

New Jersey is an example of a state that has used its traditional police powers to successfully promulgate environmental regulations for rail carriers that transfer solid waste. Under section 7:26-2D.1 of the New Jersey Administrative Code, the New Jersey Department of Environmental Protection (NJDEP) outlines solid waste requirements for rail carriers that transfer containerized or noncontainerized solid waste to or from rail cars. The regulations, known as the 2D regulations, apply to rail carriers that provide “common carrier railroad transportation for compensation” as defined in the ICCTA at 49 U.S.C. § 10102(5).<sup>70</sup> The rail carrier must be approved by the STB pursuant to ICCTA sections 10901 and 10902 or have been otherwise recognized as a rail carrier by the STB as holding itself out to “the general public that the operations at the facility are being conducted by it or on its behalf as part of its rail transportation services.”<sup>71</sup>

Once it has been established that the railroad fits the definition of a rail carrier that transfers solid waste to and from rail cars, the rail carrier is then subject to the requirements of the regulations. Rail carriers must provide the geographical location and

68. *Green Mountain R.R. Corp v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005).

69. *Id.*

70. N.J. ADMIN. CODE § 7:26-2D.1(a) (2008).

71. *Id.*

the address of the facility to the NJDEP.<sup>72</sup> Standards for rail carrier operation are broken down into two categories: one for carriers that engage in the transportation of solid waste in sealed containers, and one for those that engage in solid waste tipping, processing, sorting or other transfer of solid waste from a container to another container or vehicle.<sup>73</sup> For rail carriers that transport solid waste in sealed containers, the regulations provide the duration of time that waste can remain at a facility, a prohibition on the migration of odors or air contaminants, fire fighting and emergency procedures, regulation of noise levels, regulation of solid waste vehicles including no queuing on public streets and no traffic backups and hazards on access roads, and a requirement that vehicles transporting to the site be registered pursuant to N.J. Admin. Code section 7:26-3 with the Division of Solid and Hazardous Waste.<sup>74</sup> Rail carriers must keep a record of all waste receipts, a summary of which is required to be submitted in a quarterly report.<sup>75</sup> Under section 7:26-2D.1(c)(2)(x), authorized representatives and inspectors of the NJDEP reserve the right to enter, observe, photograph, and sample at facilities in order to ascertain compliance with the regulations. The rail carrier is subject to penalties under the N.J. Solid Waste Management Act for failure to comply with the 2D regulations.<sup>76</sup>

The 2D regulations provide similar provisions for rail carriers transporting noncontainerized waste.<sup>77</sup> The main difference between the standards for containerized and noncontainerized waste is that the standards for noncontainerized waste provide requirements to ensure the safe handling of waste within the facility.<sup>78</sup> Rail carriers are also subject to N.J. Admin. Code section 7:26-1.10, requiring every solid waste facility holding a transfer station to obtain a master performance permit in accordance with procedures at section 7:26-2.4.

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72. *Id.* § 7:26-2D.1(b).

73. *Id.* § 7:26-2D.1(c), (d).

74. *Id.* § 7:26-2D.1 (c).

75. *Id.* § 7:26-2D.1(c)(2)(xiii).

76. *Id.* § 7:26-2D.1(c)(2)(xiv).

77. *Id.* § 7:26-2D.1(d).

78. *Id.* (standards specific to noncontainerized waste include, but are not limited to concrete tipping floors to ensure the containment and channeling of wastewater, section 7:26-2D.1(d)(2); daily cleaning of areas where waste is stored, section 7:26-2D.1(d)(4); control of insect and rodents in compliance with the New Jersey Pesticide Control Code, section 7:26-2D.1(d)(10)).

Rail carriers operating solid waste transfer stations in New Jersey were unhappy with the implementation of the 2D regulations. In *New York Susquehanna and Western Ry. Corp. v. Jackson*, New York Susquehanna and Western Railway Corporation (Susquehanna) sued New Jersey state officials, contending that the regulations pertaining to railroad carriers that transport solid waste are preempted by the ICCTA.<sup>79</sup> Susquehanna operates five solid waste transfer facilities in New Jersey.<sup>80</sup> New Jersey found Susquehanna to be in violation of several standards in the 2D regulations, including not properly controlling dust migration or the channeling of wastewater, spilling hazardous waste onto tracks and adjoining areas, not properly controlling odor emissions, insects and rodents, and failing to clean the facilities daily.<sup>81</sup> Civil penalties were assessed against Susquehanna at a rate of \$2,000 per day per facility, totaling \$2.5 million.<sup>82</sup>

In response to the civil penalty, Susquehanna sued the State in the United States District Court for the District of New Jersey, claiming that the 2D regulations were preempted by the ICCTA and asking that the State be enjoined from enforcing the penalty.<sup>83</sup> The district court held that the ICCTA preempts the 2D regulations.<sup>84</sup> On appeal, the Third Circuit held that the State's environmental regulation of the operation of the facility and the power to enter and inspect the facility were not "per se unreasonable" so as to compel preemption by the ICCTA.<sup>85</sup> The court first determined that Susquehanna's operations fit the definitions of "rail carrier" and "transportation," so as to bring the railway under the jurisdiction of the ICCTA.<sup>86</sup> Based on determinations made by the STB and prior court cases on the subject, the court then stated that "a state law that affects rail carriage survives preemption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage."<sup>87</sup> State regulations do not discriminate against rail carriers if they "address state con-

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79. *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 242 (3d Cir. 2007).

80. *Id.*

81. *Id.* at 245, 246.

82. *Id.* at 245.

83. *Id.* at 246.

84. 500 F.3d at 246.

85. *Id.* at 257.

86. *Id.* at 247-251 (This determination was made in response to the State's argument that Susquehanna was not under the jurisdiction of the ICCTA and therefore the preemption language of section 10501(b) did not apply.).

87. *Id.* at 254.

cerns generally, without targeting the railroad industry.”<sup>88</sup> A state regulation is unreasonably burdensome if it “prevents the railroad from carrying out its business in a sensible fashion.”<sup>89</sup> The regulations “must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service.”<sup>90</sup> The regulations promulgated by New Jersey were not per se unreasonable, but a determination must be made on a regulation-by-regulation basis; a determination to be made on remand to the district court and not by the Third Circuit.<sup>91</sup> The court noted specifically that it appears that many of the 2D regulations are more relaxed than those applying to other solid waste facilities, “probably because the State was trying to steer clear of a preemption problem.”<sup>92</sup>

Although the court did not make a decision as to whether all of the 2D regulations were outside the scope of preemption, it did suggest that many of the provisions might not be preempted.<sup>93</sup> This is a positive outcome for communities in New Jersey seeking protection from the environmental hazards associated with solid waste transfer facilities. Many of the provisions found in the 2D regulations would help to deal with the concerns of the Village of Croton-on-Hudson. In his testimony to the House Subcommittee on Railroads, Pipelines and Hazardous Materials, Croton Mayor Gregory J. Schmidt specifically mentioned the Village’s inability to monitor the types of waste being trucked through the streets to the facility and the lack of control over the use of an access road to the facility that is shared with a 2,000-space commuter parking lot.<sup>94</sup> Regulations similar to those in New Jersey would deal with these concerns, as they would require the rail carrier to maintain daily records of waste received and report quarterly to an administrative agency of the State. Vehicles transporting waste to the facility would be prohibited from queuing on the access road, which would prevent traffic backups. Furthermore, fear of being subject to monetary penalty for violation of the regulations would help to ensure compliance.

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88. *Id.*

89. 500 F.3d at 254.

90. *Id.*

91. *Id.* at 256.

92. *Id.*

93. *Id.*

94. *Railroad-owned Solid Waste Transload Facilities Before the H. Subcomm. on Railroads, Pipelines, and Hazardous Materials*, 110th Cong. (2007) (statement of Gregory J. Schmidt, Mayor, Vill. of Croton-on-Hudson, N.Y.).

Currently, New York does not have a specific set of regulations applying to rail carriers that operate solid waste transfer facilities. In New York solid waste transfer facilities are subject to the same requirements as other solid waste facilities under the rules and regulations of the Department of Environmental Conservation (NYDEC).<sup>95</sup> Solid waste management facilities must operate in accordance with a valid permit issued by the NYDEC and must follow certain operational requirements.<sup>96</sup> When an operator of a solid waste transfer station is not a rail carrier, the transfer station will be subject to the New York regulations. A rail carrier acting as the operator of a solid waste transfer facility can claim preemption under the ICCTA, and be subject to federal jurisdiction. New York should create a set of regulations similar to the 2D regulations in New Jersey to avoid the preemption of section 10501(b) of the ICCTA.

The outcome of the *Susquehanna* case, as well as statements made by Charles D. Nottingham, Chairman of the STB, suggest that regulations such as those in New Jersey are a viable alternative for states that wish to retain some environmental control over solid waste transfer facilities. In his address to the U.S. House of Representatives Committee on Transportation and Infrastructure's Subcommittee on Railroads, Pipelines and Hazardous Materials, Nottingham stated:

[I]t would be consistent with everything the Board has said about the scope of the section 10501(b) preemption that states can apply their regulations to rail-related waste facilities so long as the regulations are not applied in a discriminatory manner and the regulations do not unreasonably interfere with the railroad's right to conduct its operations. Therefore, I would not object to New Jersey implementing its 2D regulations, or to other states adopting and implementing similar regulations.<sup>97</sup>

States seeking to regulate the potential environmental hazards of solid waste transfer facilities can carefully craft regulations similar to the 2D regulations. If the regulations do not unreasonably interfere with a rail carrier's ability to operate and do

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95. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-11.1 (2008).

96. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.7 (2008).

97. *Railroad-owned Solid Waste Transload Facilities Before the Subcomm. on Railroads, Pipelines, and Hazardous Materials*, 110th Cong. (2007) (statement of Charles D. Nottingham, Chairman, Surface Transp. Board).

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not discriminate against rail operation, they will likely survive judicial review, and the STB would approve them.

**B. Proposed Federal Regulation**

Litigation regarding ICCTA preemption of state and local regulation of solid waste transfer facilities has not gone unnoticed by the House of Representatives and the Senate. The most direct way of ending the litigation and returning jurisdiction over rail carrier-operated solid waste facilities to states and municipalities is by amending section 10501(b) of the ICCTA. During October 2007, the House Committee on Transportation and Infrastructure's Subcommittee on Railroad, Pipelines, and Hazardous Materials held hearings on railroad-owned solid waste transload facilities. Among those testifying were STB Chairman Charles Nottingham, STB Commissioner Francis P. Mulvey, and Croton-on-Hudson Mayor Gregory J. Schmidt.

While several bills have been proposed to modify the ICCTA, none of them have been enacted into law. On May 1, 2007, the Federal Railroad Safety Improvement Act of 2007 was introduced in the House. The purpose of the Federal Railroad Safety Improvement Act is to "amend title 49, United States Code, to prevent railroad fatalities, injuries and hazardous materials releases, to authorize the Federal Railroad Safety Administration, and for other purposes."<sup>98</sup> Section 617 entitled "Surface Transportation Board Jurisdiction Over Solid Waste Facilities" proposes to amend section 10501(b) of the ICCTA by limiting jurisdiction to "facilities (except solid waste rail transfer facilities as defined in subsection (c)(3)(C))."<sup>99</sup> Solid waste rail transfer facilities would be defined as "the portion of any facility owned or operated by or on behalf of a rail carrier, at which occurs the (i) collection, storage, or transfer, outside of original shipping containers; (ii) separation; or (iii) processing (including baling, crushing, compacting, and shredding) of solid waste, as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903)."<sup>100</sup> The amended subsection (c)(3)(C) of section 10501 would state "[n]othing in this section preempts a State or local governmental authority from regulating solid waste rail transfer facilities."<sup>101</sup> This bill has been passed in the House of Representatives and received in the Senate as an act

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98. H.R. 2095, 110th Cong. (2007); S. 1889, 110th Cong. (2007).

99. *Id.*

100. *Id.*

101. *Id.*

of the same title.<sup>102</sup> It has been referred to the Senate Committee on Commerce, Science and Transportation. The Senate version of the proposed bill differs from that of the House in that the proposed amendment to ICCTA section 10501 has different language. The proposed changes in the Senate version are the same as those proposed in the Clean Railroads Act of 2007.

In February 2007, the Clean Railroads Act was introduced in both houses of Congress. The sole purpose of this Act is to amend section 10501 of the ICCTA, so as to exclude solid waste disposal from the jurisdiction of the STB.<sup>103</sup> Section 10501 is amended:

1) by striking ‘facilities,’ in subsection (b)(2) and inserting ‘facilities (except solid waste management facilities (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903))),’; and

(2) by striking ‘over mass transportation provided by a local governmental authority.’ in subsection (c)(2) and inserting ‘over—(A) mass transportation provided by a local governmental authority; or (B) the processing or sorting of solid waste.’

The proposed language of the Act limits the 10501(b) jurisdiction of the STB to rail-operated facilities other than solid waste management facilities. Under the current version of section 10501(c)(2), the STB does not have jurisdiction over mass transportation that is provided by a local government authority.<sup>104</sup> The proposed amendment to section 10501(c)(2) would have the effect of removing processing and sorting of waste in solid waste transfer stations from the jurisdiction of the STB.<sup>105</sup> This bill has been referred to the Senate Commerce, Science and Transportation Committee and the House Transportation and Infrastructure’s Subcommittee on Railroads, Pipelines and Hazardous Materials.

The Federal Railroad Safety Improvement Act and the Clean Railroads Act remove solid waste transfer stations from the jurisdiction of the ICCTA. The difference in the proposed amendments lies in their definitions of the term “solid waste transfer facility” or “solid waste management facility.” Under the Federal Railroad Safety Improvement Act, the term “solid waste transfer facility” is defined as including rail-owned facilities where waste is collected,

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102. *Id.*

103. S. 719, 110th Cong. (2007); H.R. 1248, 110th Cong. (2007).

104. 49 U.S.C. § 10501(c)(2).

105. S. 719, 110th Cong. (2007); H.R. 1248, 110th Cong. (2007).

stored or transferred “outside of original shipping containers.”<sup>106</sup> By this definition, solid waste transfer facilities apply only to those that transfer noncontainerized waste.<sup>107</sup>

Under the Clean Railroads Act, STB jurisdiction excludes solid waste management facilities as defined in the Solid Waste Disposal Act. The Solid Waste Disposal Act defines solid waste management facilities to include “any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.”<sup>108</sup> This definition includes *any* facility that transports or transfers solid waste and does not make the distinction that the waste must be outside of the original shipping containers. Solid waste transfer stations that handle containerized waste are included in this definition, making it broader and more inclusive.

Municipalities where solid waste facilities are operated will benefit from the passing of any of the proposed legislation. The Clean Railroads Act provides that states and municipalities have jurisdiction over solid waste transfer stations that handle both containerized and noncontainerized waste.<sup>109</sup> This allocation of jurisdiction will allow for localities to impose environmental regulations on facilities that will help to ensure the safety and health of their communities.

In addition to the above, proposed amendments, states and municipalities may be afforded more immediate relief by a temporary law included in the FY 2008 Omnibus Appropriations Bill. The bill, signed into law by President Bush in December 2007, includes the Lautenberg Law (named for Senator Frank R. Lautenberg of New Jersey), a provision allowing states to deny approval of solid waste facilities at rail sites for one year while permanent legislation proceeds.<sup>110</sup> The law will require STB to effectively get permission from states before approving any new facility or declaring any existing rail waste facility lawful to

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106. H.R. 2095, 110th Cong. (2007).

107. *Id.*

108. Solid Waste Disposal Act, 42 U.S.C. § 6903(29)(c) (2006).

109. S. 1889, 110th Cong. (2007); S. 719, 110th Cong. (2007); H.R. 1248, 110th Cong. (2007).

110. Press Release, Senator Lautenberg, Lautenberg Measure To Let States Regulate Waste Sites Along Rail Lines Becomes Law (Dec. 27, 2007), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=290175&>.

operate.<sup>111</sup> It applies to any STB permit issued in fiscal year 2008.<sup>112</sup> This bill will be beneficial to communities that are faced with the prospect of a solid waste transfer station opening within 2008.

Senator Charles E. Schumer of New York backed the temporary Lautenberg legislation and is a cosponsor of the Clear Railroads Act.<sup>113</sup> Schumer expressed his support for the temporary provision to the Joint Senate-House Conference Committee, stating:

It's imperative that we include this provision so local communities in Croton and Middletown don't see their quality of life threatened by the rail companies trying to construct solid-waste facilities under the radar. . . . Jurisdiction over siting solid waste facilities should rest primarily with local and state authorities because they are on the ground and are best able to judge what [is] best for their community and region. Firms should not be able to hide behind the claim of federal preemption to avoid appropriate regulation when it comes to building and operating solid waste facilities.<sup>114</sup>

Community concern over federal preemption of local regulation of solid waste transfer facilities has not gone unnoticed. Given the support of local legislators, the several proposed amendments to section 10501 of the ICCTA and the temporary measure in place, it seems hopeful that a more permanent measure may be passed into law.

### C. Conflict between § 10906 and § 10501 and the term "spur track"

If none of the permanent legislation amending the ICCTA is passed, and if New York does not create regulations similar to the 2D regulations in New Jersey, Croton will remain in a position where it has no control over the solid waste facility due to preemption by the ICCTA. Further, an issue brought up, but not decided, by the *Buffalo Southern R.R.* court may prove another concern: whether or not the length of track at the facility is a side or spur

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111. *Id.*

112. *Id.*

113. Press Release, Senator Schumer, Schumer Backs Bill To Give Local Authorities In Croton And Middletown The Power To Keep Solid-Waste Transfer Stations On Rail Lines Out Of Communities' Backyards (Oct. 30, 2007), available at <http://schumer.senate.gov/SchumerWebsite/pressroom/record.cfm?id=286386>.

114. *Id.*

track under ICCTA. As stated above, section 10501(b)(2) of the ICCTA gives the STB exclusive jurisdiction over side and spur tracks.<sup>115</sup> However, section 10906 of the ICCTA states that “[t]he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”<sup>116</sup> The STB has jurisdiction over spur and side tracks, but does not have authority over them, an odd result. Not only will the Village be unable to impose specific conditions on the facility, but the STB will not be able to exercise environmental review or provide conditions in permitting, as well. The facility will then only be under environmental regulation of federal statutes.

The distinction between a railroad line and a spur track “turns on the intended use of the track segment, not on the label or cost of the segment.”<sup>117</sup> Railroad lines, including main or branch lines, are “lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel.”<sup>118</sup> Spur tracks are those “naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.”<sup>119</sup> Given these definitions of spur track and railroad line, the track in the Croton train yard used by Buffalo Southern R.R. is a spur track. The 1600-foot track is not used for continuous transportation, as it is a dead-end, and is designed to be used for loading and unloading from the facility located in the rail yard.<sup>120</sup>

In 1999, the Seventh Circuit decided the case of *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, in which Union argued that because section 10906 of the ICCTA states that the STB has no authority over spur tracks, it therefore has no jurisdiction over spur tracks.<sup>121</sup> Union attempted to argue that the STB’s determination that a section of rail is a spur track is not entitled to *Chevron* deference because the STB has no au-

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115. 49 U.S.C. § 10501(b)(2).

116. *Id.* § 10906.

117. *Nicholson v. Interstate Commerce Comm’n*, 711 F.2d 364, 367 (D.C. Cir. 1983).

118. *Id.* (quoting *Detroit & M. Ry. v. Boyne City, G. & A.R.R.*, 286 F. 540, 546 (E.D.Mich. 1923)).

119. *Id.*

120. *Buffalo S. R.R.*, 434 F. Supp. 2d at 244.

121. *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999).

thority over spur tracks and therefore lacks jurisdiction.<sup>122</sup> The court held that the “unambiguous statutory language” of section 10501(b)(2) states that the STB does have jurisdiction over spur tracks.<sup>123</sup> The court stated that “[s]tatutory provisions are to be interpreted to be consistent with one another. It is unreasonable to interpret one provision as eliminating another unless the language requires it.”<sup>124</sup> The STB’s authority to authorize the construction and operation of rail lines does not apply to spur tracks, although the Board still has jurisdiction.<sup>125</sup>

The holding in *Union*, although a clear statutory interpretation, still provides no relief to communities concerned about operations on spur tracks in their municipalities. Facilities under the jurisdiction of the STB, but not under its authority, are still subject to federal environmental statutes, but there is a gap when it comes to local concerns. This could be dealt with by giving the STB authority over the spur tracks, which will at least provide for STB environmental review, and the possible imposition of requirements and conditions in licenses. The second, and more favorable option, would be to remove facilities located on spur tracks from STB jurisdiction, either by amending the ICCTA (as written about above), or by following the footsteps of courts that have read the ICCTA preemption more narrowly.

In the article *Who’s Driving the Train? Railroad Regulation and Local Control*, the author suggests courts use an “economically integral” test to determine if rail-owned facilities are under STB jurisdiction.<sup>126</sup> Essentially, the test asks whether the local regulation impacts the rail carrier in “an economically meaningful way.”<sup>127</sup> If it does, then the law is preempted by the ICCTA.<sup>128</sup> However, if the regulation does not impact the rail carrier in an economically meaningful way, it is not preempted by the

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122. *Id.* at 612.

123. *Id.*

124. *Id.*

125. *Id.*

126. Maureen E. Eldredge, *Who’s Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 583 (2004). Eldredge cites the 11th Circuit case, *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1327 (11th Cir. 2001), and the Vermont state court case of *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000) as examples of the “economically integral” approach to determining whether the ICCTA preempts state and local regulation. In both cases, the court found that local regulation was not preempted by the ICCTA.

127. *Id.*

128. *Id.*

ICCTA.<sup>129</sup> This narrower preemption is based on courts interpretation of the preemption language of ICCTA section 10501 in light of congressional intent “to free the railroad industry from economic impediments.”<sup>130</sup>

In the case of *Florida East Coast Ry. Co. v. City of West Palm Beach*, the court used the “economically integral” test to find that the City’s regulation of an aggregate distribution business operated by the lessee of the railway was not subject to ICCTA preemption.<sup>131</sup> The court began its reasoning by acknowledging that under the Supremacy Clause of the Constitution there exists a basic assumption against preemption in fields of law where states have traditionally exerted their police powers.<sup>132</sup> Historically, local governments have dictated the use of property in their geographical limits by zoning regulations, therefore entitling the City’s ordinances to a presumption of validity.<sup>133</sup> The court looked at the express preemption language of section 10501 of the ICCTA and noted that the provision does not apply to “all other law.”<sup>134</sup> In fact, the “express pre-emption applies only to state laws ‘with respect to regulation of rail transportation.’”<sup>135</sup> The court reached the holding of the case, as stated above, by interpreting the meaning of “with respect to regulation of rail transportation,” in light of the definitions provided in the ICCTA and the legislative history of the Act, which focuses 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 the regulating economic impacts of the railroad industry.”<sup>136</sup> The zoning ordinances of the City, which the court found to be entitled to an assumption of validity under the Supremacy Clause, “do not frustrate the objectives of federal railroad policy” and are not preempted by the ICCTA.<sup>137</sup>

Although the “economically integral” test may help to narrow the scope of preemption, it is a fact-based determination that may not always result in the decision most favorable to the environ-

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129. *Id.*

130. *Id.* at 587.

131. *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1327 (11th Cir. 2001)

132. *Id.* at 1327-28.

133. *Id.* at 1329.

134. *Id.* at 1331.

135. *Id.* at 1331 (quoting 49 U.S.C. § 10501(b)).

136. *Florida East Coast Ry. Co.*, 266 F.3d at 1337.

137. *Id.* at 1339.

ment or health of a community. Applying the test to the Village of Croton-on-Hudson's dilemma is a good example. In *Buffalo Southern R.R.*, the rail carrier sought to enjoin the Village from commencing an eminent domain proceeding on the property. The Village's eminent domain proceeding would surely be preempted by the ICCTA. Eminent domain would strip the rail carrier of its property and its business, and would cause a tremendous economic harm. This would not classify as an "incidental" economic effect. However, conditions such as those specified in the special permit to Metro Enviro Transfer are less likely to be considered economically meaningful. Permit requirements specifying the reasonable hours of operation, prohibiting queuing of trucks on access roads and regulating noise levels might all be considered to have an incidental economic effects on a rail-carrier's waste transfer operations, but these permit requirements will not cause the business to fail or significantly impact the operations. In requiring these permit conditions the Village is not regulating the operation of a railroad, so much as it is acting within its police powers in an effort to protect the safety and health of the community from the possible dangers associated with the operations of a waste transfer station.

As stated above, one of the major concerns of the Village is that it will not be able to control the vehicles bringing waste through the town streets. In *In re Vermont Railway*, the Vermont Supreme Court upheld a decision of the lower court allowing the City of Burlington to impose certain permitting conditions on a salt shed facility operated by the Vermont Railway.<sup>138</sup> In distinguishing between permit conditions that are not preempted by the ICCTA and those that are, the court stated that a line is drawn between "conditions that [are] purported to regulate the operation of the railroad, including the transport of goods by the railway, and conditions that merely regulated activity regarding motor vehicles coming and going from the facility and the storage of materials at the facility."<sup>139</sup> According to the Vermont Supreme Court, conditions not preempted under the ICCTA include those that control the routing of trucks leaving the facility, the number of trucks exiting the facility on a daily basis, the hours at which trucking can occur, parking at the facility, and "conditions designed to avert potential contamination from the salt shed such as

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138. *In re Appeal of Vermont Ry.*, 769 A.2d 648 (Vt. 2000).

139. *Id.* at 655.

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. . . requirements that salt be handled on impervious surfaces.”<sup>140</sup> Application of conditions such as those listed above would help to assuage some of the fears the Village of Croton-on-Hudson has concerning the trucking of solid waste through its streets.

In cases where a section of track has been determined to be a spur track, a narrow interpretation of preemption under ICCTA section 10501 is essential to allowing a municipality or state to exercise its traditional police powers. The narrow interpretation of the “economically integral” test can erase the regulatory gap that exists under ICCTA sections 10501 and 10906 by opening facilities owned by railroads to regulation by municipalities. If the courts do not use a narrower interpretation of ICCTA preemption, facilities located along spur tracks will be left under the jurisdiction of the STB, but under the authority of neither the STB nor the municipality.

## V. CONCLUSION

The outcome of *Buffalo Southern R.R.* produced a result with possible negative environmental ramifications for the Village of Croton-on-Hudson and its citizens. No longer able to control the kinds of waste or the way in which that waste is transported through the town, the community is now open to the threat of real environmental danger. Croton is not the only municipality dealing with this issue; it has become an important issue in other states and for the federal government.

There are several ways in which the issue of preemption under the ICCTA can be resolved in favor of state and local regulation of solid waste transfer facilities. First, states can use their traditional police powers to promulgate environmental regulations specifically tailored to avoid ICCTA preemption. These regulations must not discriminate against rail carriers and must not be unreasonably burdensome. New Jersey’s 2D regulations provide a good example of standards enacted to protect the health and welfare of communities that are sufficiently narrow in scope so as to avoid preemption. Second, communities seeking the ability to control solid waste facilities must express their concerns to their congressional representatives. Although a temporary federal law is in place, the best possible outcome will be achieved by the passing of one of the proposed amendments to 49 U.S.C. § 10501. A clear amendment to the law by the federal government

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140. *Id.*

will return jurisdiction over solid waste facilities to the municipalities where they are located and will prevent further litigation on the subject. Third, a narrower interpretation of section 10501 of the ICCTA will avoid a regulatory gap created by section 10906. This narrower interpretation will allow municipalities to exert control over solid waste facilities in situations where the STB does not have authority.

It is imperative that either federal or state legislatures take action in regards to the preemption provision of the ICCTA. The environment and the health of communities depend upon it.

### **ADDENDUM- SOME GOOD NEWS**

In the time between writing this comment and publication, President George W. Bush signed into law the Railroad Safety Enhancement Act of 2008 on October 16, 2008. The Railroad Safety Enhancement Act amends the ICCTA section 10501 by providing in subsection (c)(2) that the STB does not have jurisdiction over solid waste transfer facilities as defined in section 10908 of the ICCTA.<sup>141</sup> Section 10908 further specifies that rail transfer facilities:

shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility.<sup>142</sup>

Rail carrier-owned waste transfer facilities will now have to comply with state laws and will be required to seek state approvals to operate.<sup>143</sup> Although the new law allows the STB to provide a land-use exemption where it finds that a state or municipal law unreasonably burdens interstate commerce or discriminates against rail carrier-operated waste transfer stations, the law places a much greater degree of control over siting and operation of these facilities in the hands of the states.<sup>144</sup> In taking rail carrier-owned solid waste transfer facilities out of STB jurisdiction

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141. 49 U.S.C. § 10501(c)(2) (2008).

142. 49 U.S.C. § 10908(a) (2008).

143. *Id.* § 10908(b)(1), (2).

144. 49 U.S.C. § 10909(a)(1) (2008).

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and subjecting them to the same requirements as non-rail carrier-owned facilities, the new law brings regulation of these facilities one step closer to local government influence. Communities, like Croton-on-Hudson, will have a new, more accessible forum in which to express their concerns and have their voices heard when it comes to the citing and operation of waste transfer stations.