Collision Course: Rail Transportation and the Regulation of Solid Waste

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The future of waste management may be glimpsed just behind a commercial strip of roadway in New Jersey, and it is not pretty. At that site, and at many sites throughout New Jersey, a new breed of railroad entrepreneur is playing out a vision for the waste industry that is starkly different from what the rest of us think of when we contemplate modern waste management.

There is an enormous pile of waste 40 feet high and hundreds of feet long lying on the ground, situated directly under a canopy of high tension lines. The pile contains friable plaster, scrap wallboard, old insulation, roofing shingles, metal, scrap wood, asphalt chunks, and other materials. A bulldozer is used to run over the pile, crushing the wastes and sending plumes of dust into the air. A portable grinder used to pulverize materials sits nearby. There is no building to enclose these activities, and there are no visible storm water controls, fugitive dust controls, or groundwater protections.

These wastes are being stored, aggregated, sorted, and processed, without any permits, licenses or governmental oversight, pending their shipment on an adjacent rail line. According to a small group of waste-to-rail advocates, no such permits, licenses, or oversight are required or even allowed. This is in direct contrast to the overwhelming majority of waste management facilities, which are subject to extensive permitting and regulatory oversight. At the more typical waste facility, there has been careful site selection to find a location that will minimize impacts, and then many years of environmental study and permitting, culminating in the issuance of many permits by state, regional, and local authorities with overlapping jurisdiction, mandating environmental controls, traffic mitigation, host community benefits, and public health protections.

The dichotomy between these two visions for solid waste management arises from the exclusive jurisdiction to regulate railroads and rail operations that Congress has granted to the Surface Transportation Board, and the recent attempts by some waste-to-rail entrepreneurs to extend that exclusive jurisdiction to include solid waste management facilities deliberately sited adjacent to rail lines. This development has placed solid waste rail facility advocates on a collision course with both state and local regulators and the waste management companies currently operating under state and local jurisdiction.

Rail transportation has been subject to extensive federal regulation since the adoption of the Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379, which established the Interstate Commerce Commission. Over the years, Congress modified the federal regulatory scheme in significant ways, first increasing the regulatory intensity of federal oversight as the economic power of railroads grew in the earlier part of the twentieth century, and then later deregulating the rail industry in response to growing competition from trucking companies.

The most recent changes to federal regulation were embodied in the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, which established the Surface Transportation Board (STB) as the exclusive regulator of railroads and reduced to a minimum the role of this new federal board in providing regulatory oversight. Importantly, the ICCTA contained express preemption language, providing that the jurisdiction of STB over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities" would be "exclusive." 49 U.S.C. § 10501(b). The ICCTA further stated that "the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.*

Following the enactment of the ICCTA, railroads were empowered to operate under the sole jurisdiction of STB, with few of the constraints of state and local regulation. The policy rationale behind this jurisdictional grant was to offer the rail industry the ability to operate a nationally uniform system free from varying state requirements. Congress specifically worried that state and local regulation of rail would undermine the industry's ability to provide seamless service and would threaten its competitive viability, particularly with respect to the dominant trucking industry. The ICCTA therefore was viewed as the means of ensuring that all economic regulation of rail transportation was standardized under federal law. S. Rep. No. 104-176, at 6 (1995); H.R. Rep. No. 104-311, at 95–96 (1995).

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Comparing governmental regulation of the rail industry to that of the solid waste industry is a little bit like contrasting the North and South Poles. While there are some similarities, they are actually about as distant as one can get while standing on the same planet.

Solid waste is typically handled by companies that pick up wastes from their point of generation and transport them either directly to a disposal site or to transfer stations. When wastes are shipped to transfer stations, the wastes are aggregated, sorted, processed, and then shipped, either for disposal or recycling. The current point of controversy between the rail and solid waste industries arises at the transfer station.

Solid waste regulation originated on the state and local levels of government, as opposed to the rail industry, where comprehensive federal regulation has generally been the rule. In states where there are high levels of urbanization and land is relatively scarce, solid waste management is stringently controlled and regulatory schemes are often extremely robust, particularly relating to transfer stations. This has led to vastly disparate regulatory schemes from one state to another, unlike in the rail industry where the federal government has specifically attempted to create a uniform set of national requirements.

While Congress has adopted a legal structure for regulating the solid waste industry under the Resource Conservation and Recovery Act, formerly known as the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 *et seq.*, in practice the U.S. Environmental Protection Agency has never pursued a vigorous federal program. As a result, there are very few environmental regulations or permitting programs that are focused exclusively on solid waste transfer stations. The resulting void has been filled, in some cases aggressively, by state and local governments.

In Massachusetts, new solid waste transfer stations must complete an extensive environmental impact review under the jurisdiction of the state secretary of environmental affairs, then must obtain siting approval from both the state Department of Environmental Protection (MA DEP) and the local board of health in the affected municipality, which each have concurrent and overlapping jurisdiction. Facility developers then must generally obtain local zoning, wetlands, and site plan approvals before they can actually commence environmental permitting. Once these requirements have been met, developers must obtain a solid waste construction permit and a companion operating permit from the MA DEP. This process customarily consumes two to four years, depending on site complexities, and is very costly.

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In New Jersey, new solid waste transfer stations must complete a similarly stringent permitting process. In addition to obtaining state and local approvals similar to those required in Massachusetts, facility developers must complete a comprehensive and intrusive background investigation of all companies and individuals involved in the project, obtain a certificate of public convenience and necessity, execute a contract with a state waste management district and become incorporated into the district's waste disposal plan, complete and submit detailed environmental and health impact statements, and obtain approval of detailed engineering designs from the New Jersey Department of Environmental Protection.

In contrast, an existing railroad may build a support facility without any regulatory approvals. *See Borough of Riverdale–Petition for Declaratory Order*, STB Finance Docket No. 33,466 (STB served Sept. 9, 1999). For instance, if a railroad seeks to build and operate a traditional transload facility for use in receiving, storing, and transferring intermodal containers from trucks to rail, the railroad can simply build it. STB has no permit application process, no site selection process, no environmental or health impact review, and no engineering design standards. The railroad does not need to apply for any state permits, as these permitting processes are preempted by the ICCTA. Transload facilities, while subject to exclusive STB jurisdiction, are simply not regulated by STB. *Flynn v. BNSF*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

STB does recognize that the regulation of health and public safety has been traditionally viewed as part of the police powers reserved to the states by the U.S. Constitution. However, in practice STB has interpreted this reservation narrowly, indicating that while the standards contained in traditional safety requirements such as building codes apply, local permitting processes do not. Any permitting process is construed by STB as a preclearance requirement, with the potential to obstruct a railroad's activity, so all such permitting is generally deemed to be preempted. *See CSX Transportation—Petition for Declaratory Order*, STB Finance Docket No. 34,662 (STB served May 3, 2005).

This stark disparity between the strict state and local regulatory oversight of solid waste facilities on the one hand and the minimalist STB oversight of ancillary rail operations on the other is the precise point of intersection between the rail and solid waste industries where so much tension and conflict have recently developed. In all states, but most importantly here, in those states with the most aggressive solid waste regulatory structures, railroads are able to operate ancillary facilities with virtually no state or local regulatory role.

To a few enterprising entrepreneurs, in most cases newcomers to the rail industry, the lure of operating under the protective umbrella of a railroad as a means of overcoming the enormously difficult barriers to entry into the solid waste industry has proved great. Thus, in urbanized and highly regulated states, specifically in Massachusetts, New Jersey, and New York, there have been many recent attempts to build and operate solid waste transfer stations adjacent to rail lines. In these cases, project proponents have acted without attempting to obtain a single state or local permit, arguing that their facilities are rail-related and are therefore exempt from all state and local approvals.

A traditional rail transload facility is owned and operated by a railroad that is engaged in the transportation business. The facility is generally critical to the operation of a railroad: Commodities are delivered by truck or ship under a bill of lading that designates the terms of shipment, these commodities are temporarily stored, and then they are loaded onto rail cars and shipped. Similarly, a transload facility will receive goods by rail, unload them, and ship them on to their destination using other transportation modes.

In contrast, a solid waste transfer station is typically owned and operated by a solid waste company that is in the waste management business. The purpose of the facility is to aggregate waste materials; inspect the wastes for banned substances; process, separate and size the wastes to extract items of value; and ensure direction to proper facilities for either recycling or disposal. Some transfer facilities, particularly those managing construction and demolition debris, handle a large percentage of recyclable materials and these facilities are designed specifically to separate, sort, and process items of value and redirect them to raw materials markets. Materials arrive at the facility as mixed wastes, and the facility employs various processing techniques to separate items of value for recycling. Hence, these facilities create valuable raw materials out of trash—they are in the value creation business. Once the mixed wastes are sorted and processed, the different streams are sent off-site for disposal.

The similarities in the outward appearance of a transload facility and a solid waste transfer station have been exploited by those seeking to gain an unfair competitive advantage. The resulting conflict between those operating solid waste facilities in compliance with costly state and local requirements, and those attempting to operate the same facilities under exclusive STB jurisdiction, has inevitably made its way to STB and state and federal courts. The question raised is a classic one of preemption, pitting the language of the ICCTA against the rights and desires of states and municipalities to regulate issues of environmental impact, public health, safety, and welfare.

STB has interpreted the ICCTA preemption provisions in a broad manner, finding that the ICCTA preempts a wide swath of municipal zoning and permitting processes. For example, in *Joint Petition for Declaratory Order–Boston and Maine Corp. and Town of Ayer, MA,* STB Finance Docket No. 33,971 (May 1, 2001) (*Town of Ayer*), the Town of Ayer was presented with a 57.7-acre automobile unloading facility built alongside an existing rail line. The proposed project included parking for three thousand cars and involved a facility that would unload cars from railcars, temporarily store them, and prepare them for shipment by truck to car dealers throughout New England, all on a site located in a wellhead protection area for a nearby drinking water aquifer. Following Boston and Maine's lawsuit against the Town of Ayer in federal district court, the court referred the issue of preemption to STB. Following that referral, STB determined that the town's zoning, nuisance ordinances, and wetland protection bylaw and permitting were preempted.

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In its decision, STB found that "state and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." *Town of Ayer,* at 8. Relying on earlier indications from STB that federal environmental laws would not be preempted, the town cast its regulatory authority as having derived from both the Safe Drinking Water Act and the Clean Water Act. However, STB found that the town's citation to these federal environmental statutes was merely a pretext to allow it to implement local permitting requirements that interfere with interstate commerce. *Id.* at 10.

The Statutory Grant of Exclusive Jurisdiction

The ICCTA provides a fascinating and limited authority to STB. According to the statute, only a few enumerated activities may require a permit or license from STB, including the construction of a new rail line or an extension of an existing line, and the statute specifically states that many activities are exempt from STB permitting review. STB has interpreted this language to mean that it can order an envi-

ronmental review *only* where it has permitting or licensing authority. As a result, neither board approvals nor environmental reviews are required to build or expand rail support facilities such as intermodal facilities or locomotive repair facilities. When the ancillary facility regulatory gap is coupled with STB's conclusion that state and municipal laws attempting to regulate these facilities are preempted, the result is the creation of a regulation-free zone. Without federal, state, or local regulations, the result is a void in environmental review and oversight in which entrepreneurial waste-to-rail developers have set up shop.

The lynchpin in the analysis of how ancillary rail facilities are regulated turns largely on whether these facilities are actually within the scope of the ICCTA's preemption language. The ICCTA grants STB exclusive jurisdiction over "transportation by rail carrier," requiring both the act of *transportation* and the performance of that act by a *rail carrier*. 49 U.S.C. § 10501(a).

This language presents two interesting questions. First, one must determine whether the entity responsible for the activity is actually a rail carrier, which the ICCTA defines as a "person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). In *Hi Tech Trans, LLC v. New Jersey*, the Third Circuit Court of Appeals found that STB did not have exclusive jurisdiction over a facility that was built to transload construction and demolition waste operated by an entity under license from a rail carrier in which the rail cars were owned and operated by the rail carrier. The court noted that the facility operator was not a rail carrier and that even if it was, the transloading facility was not transportation *by* rail carrier but instead, transportation *to* rail carrier. 382 F.3d 295, 308 (3d Cir. 2004).

Second, if the entity conducting the activity is a rail carrier, STB's exclusive jurisdiction is limited to those facilities that are "integrally related" to a railroad's ability to provide transportation services. As a result, if a facility serves primarily a manufacturing or production purpose, rather than a transportation purpose, it is not within the exclusive jurisdiction of STB. *See Borough of Riverdale*. For example, in *Florida East Coast Railway Co. v. City of West Palm Beach*, a federal district court found that the operation of a concrete distribution facility was not integrally related to rail service, contrasting such an activity against traditional intermodal operations in which railroads load and unload trailers and containers as a necessary component of transportation. 110 F. Supp. 2d 1367, 1379 (S.D. Fla. 2000), *aff'd*, 266 F.3d 1324 (11th Cir. 2001).

An additional level of inquiry is also applied to determine whether state or local regulation is a function of local police powers reserved by the U.S. Constitution. STB has recognized that state and local regulation is permissible "where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Town of Ayer*, at 9. STB applies a balancing test to weigh police power concerns against the ICCTA's protective purpose in promoting uniform rail operations. In *Town of Ayer*, STB determined that the town could not impose so-called preclearance permits because these permits unduly interfered with interstate commerce "by their nature." This leaves open the question of what state or local requirements, beyond building and electrical codes, could survive the heavy weight that STB gave to its balancing of local and rail interests.

This question is gradually being addressed by the federal courts. The courts have uniformly agreed that the ICCTA contains strong preemptive language. "[I]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations. . . . " *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). However, even with this language, there are local powers that the ICCTA has not removed. Citing the exercise of traditionally local police powers, the Eleventh Circuit held in *Florida East Coast Railway* that local zoning and licensing ordinances were *not* regulations with respect to "regulation of rail transportation" and therefore did not fall under the express preemption provision of the ICCTA. 266 F.3d at 1331–32.

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In its examination of the preemption language, the Eleventh Circuit found that there are clear limits to the preemptive effect of the ICCTA. The court conducted a detailed review of the legislative history of the ICCTA and found that limitations in the statute's preemptive effect are "bolstered by the history and purpose of the ICCTA itself." *Florida East Coast*, 266 F.3d at 1337. In particular, the court noted Congress appeared concerned that the state exercise of police power not intrude into the *economic* regulation of railroads. *Id.* at 1338. "Allowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared 'balkanization' of the railroad industry . . . ," noting that while "State law" is explicitly preempted, the statute does not include the term "municipal law." *Id.* at 1330 and 1338.

The Case Law Challenging Preemption

Beginning with the passage of the ICCTA in 1995, there have been a number of challenges to STB's exclusive jurisdictional grant. These cases have generally pro-

ceeded in three separate waves, each more focused and nuanced than its predecessor.

The first judicial challenge to reach a circuit court of appeals was a frontal assault on the concept that STB had exclusive jurisdiction over any land use or environmental regulation. In that case, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied,* 527 U.S. 1022 (1999), the Burlington Northern and Santa Fe Railway (BNSF) sought STB approval to acquire a portion of the Stampede Pass rail line running through the Cascade Mountains in Washington State and proposed substantial track repairs as part of the acquisition. BNSF claimed that municipal permitting for the track repair was preempted by the ICCTA, and several municipal governments challenged this assertion, first before STB, and then directly to the Ninth Circuit Court of Appeals following a decision by STB that the project could proceed. *See Burlington Northern*, STB Finance Docket No. 32,974 (Oct. 25, 1996).

The city of Auburn argued that the ICCTA preempted only economic regulation of rail transportation and not any land use or environmental authorities, as those functions were reserved to the states in their exercise of traditional police powers. The Ninth Circuit, however, found that Congress intended a broad preemptive effect when it enacted the ICCTA, and that there was no evidence Congress intended to provide the states or municipalities any active role in imposing environmental or land use regulations on railroads.

A similar challenge to ICCTA preemption occurred in Minnesota, where the city of Minneapolis attempted to block the demolition of five buildings in a rail yard by denying the rail operator, Canadian Pacific Railway, demolition permits applied for under the city code. On appeal to the federal district court, the railroad argued that the ICCTA preempts the city's authority to withhold the permits, and the district court agreed, holding that the ICCTA preempts both state and local regulatory authority over the demolition project. *Soo Line Railroad v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998).

In a more recent case raising the same issue, the Vermont Agency of Natural Resources attempted to impose the stringent environmental and land use permitting process known as Act 250, VT. STAT. ANN. tit. 10, §§ 6001 *et seq.*, on the proposed construction by the Green Mountain Railroad Corporation of bulk unloading and temporary storage facilities. Green Mountain initially operated under a permit issued to its project partner, but did not comply with all conditions and sought federal court and STB intervention when the state sought to enforce violations of the permit terms.

On appeal to the Second Circuit, the state argued that Act 250 applied to the project and could not be preempted unless all possible permitting conditions would conflict with federal law. The court of appeals disagreed, finding that the permitting process itself was preempted as an impermissible act of regulation, and that the question of preemptive effect was not determined by the outcome or length of any particular permitting matter. *Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 643–644 (2d Cir. 2005). The state also argued that Act 250 was an environmental, not economic, regulation and therefore should not be preempted, but again the court of appeals disagreed and found that the proposed transloading and storage are "integral to the railroad's operation" and are "easily encompassed within" STB's exclusive jurisdiction. *Id.* at 644.

City of Auburn, *Soo Line*, and *Green Mountain* have been favorably cited by many courts, and stand for a simple and now generally accepted proposition: STB has exclusive jurisdiction over railroads, and states may not impose regulatory permitting obstacles to impede railroads or their rail construction projects. However, this is just the beginning of the preemption inquiry.

The second wave of cases to challenge ICCTA preemption involves activities that are more remote from traditional rail functions. These cases arise from businesses that are not traditional railroads, but are engaged in activities that use rail as a transportation mode and are seeking protection from state and local law under the protective umbrella of the ICCTA.

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In *Florida East Coast Railway v. City of West Palm Beach*, 110 F. Supp. 2d 1367 (S.D. Fla. 2000), *aff'd,* 266 F.3d 1324 (11th Cir. 2001), the Florida East Coast Railway (FEC) entered into a business arrangement with its largest customer in which it leased an abandoned rail yard to Rinker Materials Corporation (Rinker), a building material supply company. Rinker used the yard as an aggregate storage and distribution location. FEC shipped materials to the yard and Rinker conducted site operations; it unloaded, stockpiled, segregated, weighed, and reloaded the materials. As the district court found, "Rinker effectively ran a Rinker operation on FEC property." *Id.* at 1371.

There were several factual concerns about this arrangement. First, the site was located in an area that was resi-

dentially zoned under the local zoning ordinance, and it abutted two predominantly African American communities that had been targeted by the city of West Palm Beach for redevelopment. Second, the court of appeals, which conducted a *de novo* review, noted that the two private parties had initially considered a like-kind property exchange, but when Rinker recognized that the yard was not properly zoned for the intended use, FEC proposed to use a lease to "set precedent for continued use and expansion as an aggregate terminal." *Id.* at 1326.

Based on these facts, the court of appeals determined that the local zoning ordinance was not preempted. The court held that "existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws 'with respect to regulation of rail transportation'." *Id.* at 1331.

In reaching this decision, the court of appeals found several important qualifications to the express preemption language contained in the ICCTA. First, the statute does not define the specific state law that is preempted, and is therefore less expansive a grant of preemption than is found in some other statutes.

Second, the ICCTA expressly preempts state law, but not municipal law. As Congress specifically stated its intent to preempt municipal law in other contexts involving rail regulation, the court found no express preemption—only that the effects of municipal law should be closely examined to determine whether there would be an impermissible burden resulting from the application of municipal law.

Third, the express preemption of state law in the ICCTA applies only to state laws with respect to the *regulation* of rail transportation. *See* 49 U.S.C. § 10501(b). The limitation to *regulation* of rail transportation was, to the court of appeals, "qualitatively different from" a preemption of *all laws* with respect to rail transportation. The court referred to the definition of "regulation" in *Black's Law Dictionary* and found that this term narrowly tailored the preemption provision to displace only those state laws that 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. *Florida East Coast*, 266 F.3d at 1331.

While the *Florida East Coast* court clearly rejected the extension of preemption to a third party leasing rail property, it specifically declined to rule on whether a municipal zoning ordinance could be applied to the operations of a railroad if it engaged in exactly the same operation as Rinker had conducted in this case. This limitation on the effect of the decision set the stage for the third wave of preemption cases.

A set of facts similar to those evaluated in the *Florida East Coast* decision existed at a solid waste processing facility site in New Jersey that was reviewed by the Third Circuit Court of Appeals. In that case, *Hi Tech Trans, LLC v. State of New Jersey*, 382 F. 3d 295 (3d Cir. 2004), Hi Tech Trans, a solid waste processing company, entered into a license agreement with the Canadian Pacific Railroad to develop and operate a bulk waste loading facility at a rail yard operated by Canadian Pacific. Hi Tech received waste shipments at the facility by truck, weighed and dumped them in a roofless dumping area, and loaded the waste into open-top rail cars using cranes and grapplers. The New Jersey Department of Environmental Protection (NJ DEP) inspected the site and determined that Hi Tech was operating a transfer station without state permits, approvals, or a certificate of public convenience and necessity. Hi Tech challenged this assertion, and the dispute was ultimately appealed to the Third Circuit.

Hi Tech argued in court that the entirety of the NJ DEP regulatory process was expressly preempted by the ICCTA. However, the court disagreed, finding that the connection between Hi Tech and Canadian Pacific was too tenuous to fall within the scope of the ICCTA. Hi Tech was not a rail carrier and therefore whatever activities it was conducting did not fall within the jurisdiction of the ICCTA. The court held that "the most cursory analysis of Hi Tech's operations reveals that its facility does not involve 'transportation by rail carrier.' The most it involves is transportation '*to* rail carrier.'" *Id.* at 308.

The limited relationship between Hi Tech and Canadian Pacific was instrumental in this decision, much the same as was the relationship between the parties in *Florida East Coast*. In *Hi Tech*, the court found that "it is clear that Hi Tech simply uses CPR's property to load [waste] into/onto CPR's railcars. The mere fact that the CPR ultimately uses rail cars to transport the [wastes] Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.'" *Id.* at 309.

The combined weight of the decisions in *FEC* and *Hi Tech* set the stage for the third wave of cases challenging ICCTA preemption. These cases are a logical outgrowth of the analysis applied in the first and second waves, and involve facts that explore the nuances in preemption doctrine.

The starting point for the third wave is that while case law has defined the limitations to preemption for companies that are not railroads, the courts and STB have reserved judgment on when a railroad itself may be engaged in activities that are outside of STB jurisdiction. The pivotal question for the cases that are now in development is whether a railroad may act under STB's exclusive jurisdiction when it engages in solid waste management functions that are traditionally performed by solid waste companies. If railroads may perform these activities under STB jurisdiction, then the railroads may compete with solid waste companies on an uneven playing field. The solid waste companies must comply with difficult and costly regulations and permits, while the railroads can avoid all of those costs and constraints.

Both STB and the courts have routinely determined that activities that are integrally related to the provision

of rail service are subject to STB jurisdiction, and that those not so related—those that "serve no public function and provide no valuable service" to the railroad—are not. *See Florida East Coast*, 266 F.3d 1324 at 1336–1337; *Green Mountain* at 644; *Borough of Riverdale*. It is then of paramount importance to determine whether the operation of a solid waste facility is integrally related to the provision of rail service.

To establish a railroad is a surprisingly simple exercise. STB actually maintains on its Web site a concise manual of the steps to take. *See So You Want to Start a Small Railroad* (STB, Mar. 1997), at www.stb.dot.gov/stb/elibrary/epubs.html. The easiest way to qualify as a railroad is to acquire or lease a small section of track from an existing railroad and enter into an interchange agreement with the railroad to move railcars from your track under established tariffs. The trackage involved can be quite short, and provided annual operating revenues do not exceed $20 million, a new railroad can be quickly established as a Class III carrier with no environmental review and no permitting approvals. For small projects, an applicant can proceed under a notice of exemption, *see* 49 U.S.C. § 10,502, which avoids the need to obtain a certificate of public convenience and necessity from STB. *See* 49 U.S.C. § 10,901. Once the railroad is established, a new transload facility can be constructed without any permits or approvals from STB or state or local governments. *See Borough of Riverdale*. Not a single locomotive or railcar need be procured, as arrangements can be made with existing railroads to provide the required rail service.

This is the arena in which the next wave of preemption cases is being conducted. In the solid waste industry, single-purpose entities cloaked as newly organized railroads or existing short-line railroads operating as fronts for solid waste entrepreneurs seek protection from the application of state and local laws and thereby compete unfairly with nonrail-related solid waste businesses in a regulation free zone. "Paper railroads" can be quickly organized to front as transportation companies, or contracts can be executed with small existing railroads such that the existing railroad is presented as the owner of the project. Those impacted by these subterfuges—the host communities, states that are being stripped of jurisdiction, residential neighbors, and solid waste management companies that are suffering from unfair competition—are left with the heavy burden of challenging the dire environmental and economic impacts.

In late 2002, LB Railco, a small private company, filed a notice of exemption with STB proposing to lease a "terminal" and 750 feet of side track on a 3.5 acre parcel in Millbury, Massachusetts, from the Providence and Worcester Railroad (PWR) for the conduct of waste transfer operations. *LB Railco, Notice of Exemption*, STB Finance Docket No. 34,281 (Nov. 15, 2002). LB Railco indicated it intended to lease the facility and that PWR would provide a locomotive and crew at least once per day. All rail traffic would be carried by PWR. Following the submittal of numerous statements in opposition, LB Railco provided additional information to the board establishing that it intended to handle up to one thousand tons per day of construction and demolition debris, contaminated soils, and municipal solid waste in an environmentally sensitive zone. Ultimately, in the face of significant opposition, the project proposal was withdrawn.

In 2003, Magic Disposal, a small solid waste company, contacted Southern Railroad of New Jersey (SRNJ) and suggested a waste facility be established at a particular site controlled by principals of Magic so that the company could ship waste by rail. SRNJ entered into a ground lease for the property at a rental rate of $1 per year, and also entered into a car-loading agreement and facility-capacity agreement with separate companies owned by Magic principals.

The construction of the facility was challenged by the New Jersey Pinelands Commission, and SRNJ appealed to the federal district court, arguing that the preemption language in the ICCTA prevented the commission from regulating the facility. SRNJ asserted that the car-loading agreement and capacity agreement established that the railroad was the party responsible for transloading, and that the private parties were simply acting on behalf of the railroad. The district court, however, pierced through the contractual smokescreen and disagreed, and on cross motions for preliminary injunction, the court found that the waste activities were not being conducted on behalf of the railroad. The court granted the injunction requested by the Pinelands Commission, finding that the commission had demonstrated a likelihood of success on the merits, and that immediate irreparable harm would occur in the absence of injunctive relief. *J.P. Rail, Inc. v. New Jersey Pinelands Comm'n*, Civ. No. 05-2755 (D.N.J. Dec. 22, 2005).

In December 2003, New England Transrail, a small, single-purpose company, filed an exemption petition with STB "to commence the operation of common carrier rail service" and to construct a "bulk and container rail reload center. *See New England Transrail, Notice of Exemption*, STB Finance Docket No. 34365 (June 18, 2003). The company did not own or control any track, terminal or rail cars at the time of the application, and indicated it was negotiating with the property owners and with the connecting railroad, which it hoped would provide actual rail service.

Opponents of the New England Transrail proposal gradually coaxed additional information into the public record until it became clear that the actual proposal was to build and operate a large solid waste processing facility on a significantly contaminated property. STB eventually dismissed the petition on the basis that the proponent had presented "inadequate, incomplete, and misleading information about its proposal." *See New England Transrail, LLC—Construction, Acquisition and Operation Exemption*, STB Finance Docket No. 34,391 (May 3, 2005). The proponent subsequently refiled with STB and the board

opened a formal proceeding, which was pending as of the date this article was written. *See New England Transrail, LLC–Construction, Acquisition and Operation Exemption*, STB Finance Docket No. 34,797 (Mar. 3, 2006).

The Future of Solid Waste Rail Facilities

Rail is a very important transportation mode for the solid waste industry. There are many solid waste facilities throughout the country that ship waste by rail, using either direct transfer from an industrial side spur, or intermodal containers that travel by truck to rail yards. Typically, these shipments travel long distances, where rail is very competitively priced in relation to trucking alternatives. As landfill space becomes more expensive, and as fuel costs increase, it is expected that solid waste shipments by rail will increase.

The preemption dispute, however, is not really about whether solid waste travels by rail. It does now, and it will in the future, so long as rail transport remains a competitive option. The more competitively priced rail transport is, the more solid waste will be consigned for rail shipment.

The preemption dispute is at its core a direct challenge to the environmental and public health protections that should apply to solid waste management activities. If the exclusive jurisdiction of STB is interpreted to include transfer stations, the state and local protections that currently exist for these facilities will disappear and there will be a race to the bottom in the industry. The siting requirements and design, construction, and operating standards embedded in state and local law are quite expensive to implement, and it is unlikely that any companies will volunteer to meet them if their competitors are not. The fiercely competitive nature of the business, and the price sensitivity of customers, will dictate the results.

For this reason, the national solid waste industry trade groups, representing most of the significant members of the industry, have joined with states and municipalities in a broad coalition seeking to ensure that there is a narrow application of STB jurisdiction over these facilities and that state and local law continues to apply.

The issues raised by this coalition have recently enjoyed expanding support in Congress. In his prefatory remarks on this issue at a hearing of the U.S. House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads (Railroad Subcommittee), Chairman Steven LaTourette (R-OH) stated:

> Now when you think of a rail carrier, you probably envision chugging locomotives, rumbling freight trains and tracks stretching beyond the horizon. But what if a company owns only a few hundred feet of track? Can it still legitimately claim to be a railroad? And what if that same company is engaged in a potentially noxious business, such as waste disposal? Should the ownership of a short piece of railroad track equate to a complete exemption from state and local oversight? In my mind, the answer is clearly no.

Hearing on Impacts of Railroad-Owned Waste Facilities, statement of Chairman Steven LaTourette, May 23, 2006.

There are several alternatives available to resolve this problem and clarify that the railroad and solid waste industries are separate and distinct. In his recent testimony before the Railroad Subcommittee, STB Chairman W. Douglas Buttrey offered that "[t]he question of what constitutes 'transportation by rail' . . . is still being fleshed out by the Board and the courts in the individual cases that arise." *Railroad Subcommittee Hearing on Impacts of Railroad-Owned Waste Facilities*, statement of Chairman W. Douglas Buttrey, May 23, 2006. STB is pursuing an incremental approach to this issue; in practice this process has been laborious and costly, and has created substantial local siting controversy. There are faster and clearer methods to address the problem.

First, STB could issue a decision clarifying that its exclusive jurisdiction does not extend to solid waste transfer stations. There are cases pending before STB as this article is written that offer STB an opportunity to issue such clarification, and clear STB guidance would send a strong message to prevent further abuse of the ICCTA's preemption language.

Second, STB could amend its regulations to clarify that facilities that manage and process solid wastes, other than those that simply transload containers, are not traditional rail facilities and do not fall within the board's exclusive jurisdiction. Again, STB action would resolve the issue and prevent future statutory abuse.

Third, Congress could take action to amend the ICCTA to clarify that waste management activities do not fall within ICCTA preemption and are not within STB's exclusive jurisdiction. Such legislation is currently pending in the Senate (S.1607) and in the House (H.R. 3577). As drafted, the legislation clarifies that STB does not have exclusive jurisdiction over solid waste management facilities, or over the processing or sorting of solid waste.

Both the rail and the solid waste industries have long and colorful histories. Each industry has experienced a dramatically different regulatory pathway, and there are very sound policy rationales for these distinctions. Just as there is strong reason for a uniform national approach to the regulation of rail, there is equally strong justification for separate state and local regulation of solid waste management. The mixing of regulatory jurisdictions has created profound problems that threaten public health, safety, and the environment, and that open a potential for enormous abuse of the sovereign power of states and municipalities.

There should be clarity and certainty in the application of the STB's exclusive jurisdiction over rail, and it should be abundantly clear that this exclusive jurisdiction does not extend to solid waste management facilities.