International Municipal Lawyers Association 2014 Annual Conference

Baltimore, Maryland

Work Session IV Transportation

Rail Transport and Public Safety – Bakken Crude Volatility – Is your Community Safe?

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Rail Transport and Public Safety – Bakken Crude Volatility – Is your Community Safe?[1]

Crude oil from the Bakken Shale Formation ("Bakken Crude") nearly tripled between 2010 and 2013. The Bakken Crude is being transported throughout North America and Canada through various means, including by rail. Over the last few years, there have been a number of derailings of trains transporting Bakken Crude. On July 6, 2013, a train carrying 72 tank cars, each filled with 30,000 gallons of Bakken Crude, derailed in a small village in Quebec, Canada. The resulting explosion destroyed a large part of the town and killed 47 people. There have also been derailings in Alabama, North Dakota, and Virginia.

In California alone, rail shipments of crude oil have increased from 45,000 barrels in 2009 to 6 million barrels in 2013. Significant increases in shipments are expected in the upcoming years, with the vast majority of these shipments being Bakken Crude. Rail route maps indicate that over 4 million California residents live and work within the 1/2 mile federal evacuation zone for crude oil rail tanker accidents.

After months of testing, the U.S. Department of Transportation ("DOT") determined that the Bakken Crude is more volatile than other crude oils. Additionally, DOT-111 railcars were determined not to be safe enough for transportation of the flammable oil. The Federal Government has taken some steps to decrease the risks associated with Bakken Crude transportation by rail, but many states and municipalities believe that DOT can, and should, do more to address the significant safety risks associated with rail transport. In addition, many local agencies would like to see state and local agencies authorized to address local safety needs. Direct local railroad regulation is almost entirely preempted by federal regulations. Depending on the particular state laws, there may be the possibility of addressing some safety issues through regulations and environmental mitigation measures imposed on refineries and other local projects that directly accept and/or refine Bakken Crude.

On July 24, 2014, DOT issued a Notice of Proposed Rulemaking ("NPRM") and an Advanced Notice of Proposed Rule Making ("ANPRM") to address crude oil rail shipments. Comments are due in September. DOT has indicated that it intends these regulations to broadly address safety concerns. However, many agencies and citizens believe that the proposed regulations are not sufficient to address the serious safety issues raised by these crude oil shipments.

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[1] Thank you to Benjamin E. Johnson, Summer Associate, Best Best & Krieger LLP for his superb research and assistance in writing this paper.

I. Federal Railroad Regulations

Federal jurisdiction is based on the Commerce Clause of the U.S. Constitution (U.S. Const., art. I, §8, cl. 3), which grants Congress the power to regulate commerce among the states. Combined with the Supremacy Clause (U.S. Const., art. VI, § 2), this authority supersedes any state or local control of interstate commerce.

Additionally, the Supreme Court has cited the need for uniform regulations over common carriers as justification of exclusive federal control over railroads. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 312 (1981) ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress").

The Federal Government has regulated railroads since the creation of the Interstate Commerce Commission in 1887. The Interstate Commission was initially formed to prevent rate discrimination and to provide rate stability for shippers. Over the years federal regulation increased, eventually cementing the railroad's obligation to act as a "common carrier" and provide freight service over all of their active lines. Because of this "common carrier" obligation, railroads must seek federal approval before halting service on particular lines.

In 1995, the Legislature passed the Interstate Commerce Commission Termination Act ("ICCTA") to "deregulate" railroads by removing much of the existing regulatory scheme and replacing it with streamlined procedures aimed at allowing the railroads to function with minimal federal oversight. But while the ICCTA reduced federal control of railroads, it also provided that state and local governments could not introduce their own regulations to replace federal control by preempting state regulation.

There are two primary federal railroad regulatory agencies. The ICCTA created the Surface Transportation Board ("STB"), which operates under DOT. The STB focuses largely on regulatory mergers and rail lines extensions and abandonments. The Federal Railroad Administration ("FRA") was created by the Department of Transportation Act of 1966. The FRA establishes and enforces federal railroad safety standards, including speed limits, rail car specifications, and track maintenance. *See* 49 C.F.R. § 200.1 *et seq.*

II. Federal Preemption of State and Local Railroad Regulations

A. The ICCTA Preempts State and Local Regulation of Rail Transportation and Rail Facilities.

The ICCTA gave the STB exclusive jurisdiction over "transportation by rail carriers" and rail facilities. 49 U.S.C. § 10501(b). Courts throughout the country have interpreted 49 U.S.C. Section 10501 Subdivision (b) as preempting state and local zoning and environmental regulations. "We believe the congressional intent

to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it." *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

There is ambiguity over the coverage of spur tracks. Spur tracks are railroad lines "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." *Nicholson v. I.C.C.*, 711 F.2d 364, 367-68 (D.C. Cir. 1983), quoting *Detroit & M. Ry. v. Boyne City, G. & A.R.R.*, 286 F. 540 (E.D. Mich. 1923). Section 10501(b)(2) of the ICCTA gives the STB exclusive jurisdiction over side and spur tracks, but section 10906 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." Thus, arguably, the STB has exclusive jurisdiction over spur tracks, but no authority to regulate them.

The courts have found the ICCTA to preempt two broad categories of state and local actions. First, the ICCTA preempts any form of state or local permitting or preclearance that could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized. These include preconstruction permitting of a transload facility (*Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005)); environmental and land use permitting (*City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998)); the demolition permitting process (*Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D. Minn. 1998)); and the requirement that railroad companies obtain state approval before discontinuing station agents, abandoning rail lines, or removing side tracks or spurs (*Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D. Mont.1997)).

Second, the ICCTA preempts state or local regulation of matters directly regulated by the STB. These matters include the construction, operation, and abandonment of rail lines (*see* 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-11328); and railroad rates and service (*see* 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124).

For example, the STB has exclusive and plenary jurisdiction over a rail carrier seeking to abandon a rail line. *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 548 (6th Cir. 2002). Local regulation of the time a train can spend in a rail crossing is operational and therefore preempted. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001). State statutes regulating contracts between rail carriers are preempted in light of the ICCTA provisions regulating those issues. *San Luis Cent. R.R. Co. v. Springfield Terminal Ry. Co.*, 369 F.Supp.2d 172 (D. Mass. 2005). And a state cannot condemn railroad tracks or nearby land. *Wis. Cent. Ltd. v City of Marshfield*, 160 F.Supp.2d 1009 (W.D. Wis. 2000) (attempt to use state's condemnation statute to condemn an actively used railroad track preempted).

Finally, state nuisance and negligence *per se* laws are treated as attempts at local regulation. Nuisance laws may be preempted if they interfere with railroad operations. *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493 (S.D. Miss. 2001) (state law nuisance and negligence claims based on the operation of railroad switchyard are preempted).

However, states and municipalities have a limited ability to regulate railroad property through their traditional police powers. But the police power can only be exercised "to the extent that the regulations protect 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." *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005). Additionally, the state or municipality cannot "discriminate against rail carriage" or "unreasonably burden rail carriage." *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007).

Examples of appropriate use of state police power include applying zoning regulations to railroad-owned land used for non-railroad purposes by a third party (*Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).) and a state statute requiring railroads to pay for pedestrian crossings across railroad tracks (*Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008).)

B. Federal Railroad Safety Act.

The Federal Railroad Safety Act of 1970 (49 U.S.C. § 20101 *et seq.*, "FRSA") is a comprehensive and uniform set of safety regulations in all areas of railroad operations. *Chicago Transit Authority v. Flohr*, 570 F.2d 1305, 1308 (7th Cir. 1977). The FRSA includes a preemption provision that, among other things, allows state and local governments to regulate only those matters on which the Secretary of Transportation has not yet regulated. 49 U.S.C. § 20106(a)(2).

States may adopt more stringent safety requirements, provided they are necessary to prevent a local hazard, do not conflict with federal law, and do not unreasonably burden interstate commerce. 49 U.S.C. § 20106(a)(2). Unlike the ICCTA, the FRSA does not allow removal of state tort law claims related to railroad safety to federal court. 49 U.S.C. § 20106(c). It also does not preempt state tort law causes of action. 49 U.S.C. § 20106(b)(1). It does, however, preempt state standards of care by superseding state regulations. *Henning v. Union Pac. R. Co.*, 530 F.3d 1206, 1215 (10th Cir. 2008).

C. Noise Control Act of 1972.

Issues regarding state and local regulation of train noise are evaluated under the Noise Control Act of 1972 ("NCA"), which establishes the maximum noise levels for rail cars engaged in interstate commerce. The preemption provision under the NCA has been described as being "decidedly narrow." *Rushing v. Kansas City*

Southern Ry. Co., 185 F.3d 496 (5th Cir. 1999). Under certain circumstances, states may establish their own "quiet zones" without FRA approval.

III. Federal Responses to Rail Transportation of Bakken Crude

A. Emergency Order 28.

The Federal Railroad Administration issued Emergency Order 28 on August 2, 2013, in response to the derailment in Quebec. Emergency Order 28 imposed restrictions on leaving trains transporting hazardous materials unattended unless specifically authorized by the FRA. In order to receive authorization to leave a train unattended, railroads must develop and submit to FRA a process for securing unattended trains transporting hazardous materials. Railroad employees who are responsible for securing trains must report the number of hand brakes applied, the tonnage and length of the train or vehicle, the grade and terrain features of the track, any relevant weather conditions, and the type of equipment being secured. Train dispatchers verify and record the information.

B. Safety Measures Voluntarily Agreed to by Railroad Companies.

Transportation Secretary Foxx issued a "Call to Action" on February 12, 2014, to top executives of railroad companies, associations, shippers, and other stakeholders to discuss ways to limit accidents involving crude oil. After this meeting, railroads voluntarily agreed to several safety measures.

- Increased track inspections--beyond what is required by federal regulations--on routes with trains carrying 20 or more carloads of crude oil;

- Better braking technology allowing for faster stopping and a decreased likelihood of pileup;

- Traffic routing technology that uses the Rail Corridor Risk Management System to determine the safest and most secure routes for trains carrying 20 or more carloads of crude oil;

- Lower speeds through designated urban areas for trains carrying at least one older DOT-111 car; and

- Other steps including working with communities along crude oil rail transport routes, increased trackside safety technology, specialized training for local first responders, and emergency response capability planning.

C. DOT Emergency Order Requiring Stricter Standards to Transport Crude Oil by Rail.

On February 25, 2014, the Department of Transportation issued an Emergency Order requiring railroads to ensure that crude oil is properly tested and classified according to Pipeline and Hazardous Materials Safety Administration regulations (49 C.F.R. pts. 172, 173.) These regulations classify hazardous materials and prescribe their transportation requirements. The Emergency Order required that petroleum crude oil be transported in a more robust tank car than their classification would normally require, and prohibited reclassifying the crude oil to circumvent the increased safety requirements.

D. Notification Requirements for Trains Transporting Bakken Crude Oil.

On May 7, 2014, DOT issued another Emergency Order requiring each railroad carrier provide the State Emergency Response Commission for each state in which it operates trains transporting 1,000,000 gallons or more of Bakken Crude (about 35 car loads) notification regarding the expected movement of such trains through the counties in the state. Specifically, the notification must: (a) provide a reasonable estimate of the number of trains implicated by this Order that are expected to travel, per week, through each county within the state; (b) identify and describe the petroleum crude oil expected to be transported in accordance with 49 C.F.R. part 172, subpart C; (c) provide all applicable emergency response information required by 49 C.F.R. part 172, subpart G; and, (d) identify the routes over which the material will be transported.

E. Proposed Comprehensive Regulations of Trains Transporting Large Quantities of Flammable Material.

On July 23, 2014, DOT proposed comprehensive regulations to improve the safety of transporting large quantities of flammable material by rail – particularly crude oil and ethanol. Under these restrictions, "high-hazard flammable trains" (defined as a train carrying 20 or more carloads of flammable liquids) must operate at reduced speeds – 40 mph or less – and have enhanced braking controls. Additionally, tank cars carrying the high-hazard flammable liquids will have enhanced safety requirements. The DOT-111 cars will be phased out unless they are retrofitted to comply with these new design requirements. Finally, the notification requirements from the May 7 Emergency Order would be made permanent. Comments will be due in mid-to late September.

A copy of the Press Release regarding this NPRM and ANPRM is attached. The proposed regulations can be found at:

NPRM:
http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_9F3CE4CB7A6FCBD43CE

1757CD2E41F85A4C41000/filename/Signed_Proposed_Rulemaking-for_High-Hazard_Flammable_Trains.pdf

ANPRM:
http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_BABFA88BCBF63CA6CD719EC4EE36B2CA51490100/filename/Signed_Adv_Notice_of_Proposed_Rulemaking_for_High-Hazard_Flammable_Trains.pdf

Report summarizing the analysis of Bakken Crude data:
http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf

Localities are only now beginning to review the proposed regulations. Based on a very initial review it appears that, while the proposed regulations begin to address some of the safety issues, they likely do not go far enough to satisfy the safety concerns of affected states and local agencies. Among the safety concerns being raised are more stringent speed limits, the definition of urban areas based on population size, storage on tankers on sidings, emergency response and funding for local emergency response and continued use of the DOT-111 train cars during a two year phase out period rather than immediate cessation of use of these cars.

As an example of the early reaction to the proposed rules, see Sacramento Bee article: http://www.sacbee.com/2014/07/23/6578212/feds-propose-phasing-out-older.html# and the Sacramento Bee editorial:
http://www.sacbee.com/2014/07/25/6581033/editorial-safety-rules-for-oil.html

For non-governmental commentary on the proposed regulations (without taking any position of the content) see: materials from Natural Resources Defense Council. See also: http://www.dailykos.com/story/2014/07/24/1316150/-Feeble-Fiery-and-Frustrating-The-Top-10-reasons-to-hate-Obama-s-new-standards-for-oil-trains

F. Further Potential Measures.

When companies started extracting oil from shale in South Texas, they installed stabilizing facilities to reduce the oil's volatility. However, these facilities were not built in North Dakota, the location of the Bakken Shale Formation. The Federal Government could require Bakken Crude to be treated in a stabilization facility before being transported by rail.

This issue has been raised by congress members as well as by the states.

IV. Canadian Regulation of Bakken Crude Rail Transportation

Canada has already adopted regulations similar to those recently proposed by DOT. Canadian regulations require the phase out of DOT-111 tank cars by May 1, 2017, unless they are modified to meet increased safety standards. Trains

carrying 20 cars or more of crude oil or ethanol must not exceed 50 mph and that limit may be lowered for some locations after specific risk assessments for particular urban populations and sensitive assets such as water sources. The country's established Emergency Response Assistance Plans (ERAP) will be extended to cover trains with just a single carload of crude oil, ethanol, gasoline, diesel, or aviation fuel. ERAPs imply the pre-positioning of emergency response assets and trained personnel along the entire route.