CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
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Baltimore, Maryland 21202

July 15, 2015

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill L015-0133 – Rail Shipments of Crude Oil and other Distillates

Dear President and City Council Members:

At the hearing of the above bill, the Law Department was asked to address the City's ability to regulate rail shipments in Baltimore. As discussed at the hearing, the analysis can be categorized under three general headings: what the City is clearly authorized to regulate; what the City is clearly prohibited from regulating; and what the City may possibly regulate.

Health and safety: what the City is clearly authorized to regulate

Rail shipments are governed under the Interstate Commerce Commission Termination Act ("ICCTA"), codified at 49 U.S.C. §§ 10101 et seq. The ICCTA preempts State and local law "that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir.2009). The ICCTA, however, "does not preempt those state or local laws that have a more remote or incidental impact on rail transportation. Moreover, state and local governments may act, pursuant to their general police powers, to regulate certain areas affecting railroad activity; for example, local electric, building, fire, and plumbing codes are generally not preempted." *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010).

Our 4th Circuit explains that local regulations are not preempted under the ICCTA when they exhibit four characteristics. Specifically, they must: (1) protect public health and safety; (2) be settled and defined; (3) be obeyed with reasonable certainty; (3) entail no extended or open-ended delays; and (4) be approved (or rejected) without the exercise of discretion on subjective questions. 608 F.3d at 160.

While rail shipments are governed under the ICCTA, rail safety is principally governed under the Federal Railway Safety Ac, 49 U.S.C. § 20101, et seq. ("FRSA"). It authorizes the Secretary of Transportation, acting through the Federal Railway Administration, to prescribe comprehensive national track safety standards addressing maintenance, repair, and inspection of

tracks. 49 C.F.R. Part 213. State and local regulation directed at railroad safety are generally prohibited unless they satisfy three conditions. Specifically, they must be (1) necessary to eliminate or reduce an essentially local safety or security hazard; (2) not incompatible with a law, regulation, or order of the United States Government; and (3) not unreasonably burdensome to interstate commerce. *Duluth, Winnipeg & Pac. Ry. Co. v. City of Orr*, 529 F.3d 794, 796 (8th Cir. 2008). According to *Duluth*, this local authority "enables the states to respond to local situations not capable of being adequately encompassed within the uniform national standards." *Id.*

These two federal laws and their related case significantly limit the City's authority to regulate matters that touch and concern rail shipments. Local health and safety regulations are permissible only to the extent they affect the persons, places and things within Baltimore City. Any impact beyond the City limits would make the regulation voidable.

The movement of freight traffic: what the City is prohibited from regulating

Under the ICCTA, if a local regulation attempts to manage or govern rail transportation, it will be preempted by the regulatory authority of the federal Surface Transportation Board ("STB"). The ICCTA grants the STB "exclusive" jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b)(1). It defines the term "transportation" to include a "yard, property [or] facility ... of any kind related to the movement of [property] by rail...." 49 U.S.C. § 10102(9)(A). Thus, the powers of the STB are broad in scope. They impact all aspects of the movement of rail freight and extend to the facilities used in handling rail freight.

The case law suggests that, except for narrowly-tailored police power regulations, local regulations impacting railway operations or the movement of rail freight from one location to another are prohibited by either the ICCTA or the FRSA. The prohibition would include such things as requiring local permits before entering the City or regulating the speed of rail traffic with the City limits. The *City of Alexandria* pointed out, for example, that "courts have recognized that requiring a rail carrier to obtain a locally issued permit before conducting rail operations—generally referred to as 'permitting' or 'preclearance' requirements—will impose an unreasonable burden on rail transportation." *City of Alexandria*. 608 F.3d at 160. In *Duluth*, the City of Orr argued that its ordinance restricting the speed limits of rail cars was permissible under the FRSA because the legislation intended to regulate "an essentially local safety or security hazard." The Court disagreed. Local regulation concerning rails speeds was preempted subject matter because "the particular condition cited ... [was] capable of being covered by the national track safety standards." 529 F.3d at 799.

Facilities: what the City may possibly regulate

As discussed above, the STB controls matters relating to "transportation by rail carriers," in which "transportation" includes railway facilities. Accordingly, the 4th Circuit recognizes the ICCTA as granting the STB "wide authority" over these facilities. In *City of Alexandria*, for example, the 4th Circuit held that, notwithstanding the City's police powers, STB regulations preempted City regulation of transloading operations of a railroad facility owned and operated by the railway. The prohibited regulation purported to require any truck serving the facility to obtain

a City permit before the hauler could transport fright from the facility. *City Of Alexandria*, 608 F.3d at 160.

It would be a mistake, however, to read the case too broadly. The 4th Circuit ruling appears grounded on the fact that the railroad at issue – Norfolk Southern – owned the facility. It was not owned or controlled by an independent party. This fact is significant because cases in other circuits hold that if a facility is not owned or controlled by a railway, the facility and its operations can be the subject of local regulation. In other words, the ICCTA preempts local regulation when a railway owns or controls rail facilities, but when a facility is not owned or controlled by a rail carrier, local regulation of the facility is possible – or so other circuits have found.

For example, in *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66 (2d Cir. 2011), a railway entered into an agreement with a company to build and own a facility to transloads construction materials delivered by the railway. The railway contracted with a second company to operate the facility. In reviewing the ICCTA, the New York Court noted that "where the railroad maintains the appropriate control over the transload facility, the STB exercises its exclusive jurisdiction and federal preemption applies" 635 F.3 at 74. But "the issue before this court ... is whether the STB exercises exclusive jurisdiction ... even when such facilities are not operated by, or under the control of, a "rail carrier." 635 F.3d at 71. The 2nd Circuit, in fact, concluded that the record "failed to demonstrate NYAR exercised sufficient control over the Facility to bring it within the STB's jurisdiction." 635 F.3d at 73. Given these findings, the Court ruled that a local zoning regulation was not preempted by the ICCTA.

Cases in other Circuits have similarly concluded that before the ICCTA applies, a railway facility must first be under the ownership or control of a railway. See e.g., Girard v. Youngstown Belt Ry. Co., 134 Ohio St.3d 79 (2012) (railway yard owned and controlled by entity other than the railway does not trigger ICCTA preemption); *Florida E. Coast Ry. Co.*, 266 F.3d at 1332–1336 (construction-aggregate distribution center, operated by a non-rail-carrier lessee of railway property, did not constitute rail transportation and was not governed by the ICCTA); *Milford, Mass.—Petition for Declaratory Order,* STB Finance Docket No. 34444, 2004 WL 1802301 (Aug. 11, 2004) (despite contractual agreement with a rail carrier, the transloading of steel by a nonrail carrier in a manner that was not being offered as part of common-carrier services for the public did not constitute rail transportation and was not governed by the ICCTA*); Hi Tech Trans, L.L.C. v. New Jersey*, 382 F.3d 295, 308–309 (3d Cir.2004) (bulk-waste transloading facility, operated by a nonrail carrier on rail carrier's property, did not constitute rail transportation and was not governed by the ICCTA).

Our 4th Circuit has yet to decide a case that concerns rail facilities not owned or controlled by a railway. Until such time a similar case is decided by the 4th Circuit, the Law Department is reluctant to conclude that a local regulation of an independently-owned facility in Baltimore will not trigger a successful lawsuit against the City. Nonetheless, no case to date in any Circuit appears to contradict the above holdings.

Final thoughts

At the hearing on Council Bill L015-0133, the Law Department was asked whether the City might require information from rail companies moving freight through Baltimore; specifically, whether railways can be ordered to give City officials notice of impending rail traffic through the City and identify their cargoes, especially in regard to hazardous materials. Testimony at the hearing indicated the State has successfully asked for and received similar information. We point out the City is in the same legal position as the State in this regard. Both the State and City possess nearly identical sets of police power. Requesting this type of information is well within the scope of those powers.

If information were supplied of this sort, it could serve a variety of purposes. At a minimum, however, it may assist the City in preparing for local emergencies involving the spillage of railroad cargos within the City limits. Furthermore, a rail company would be hard pressed to argue that a request for this information presents an unreasonably burden on interstate commerce.

Very truly yours,

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Chief Solicitor

cc: George Nilson, City Solicitor
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