

**Before the
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36575 (Sub-No. 1)

ENTERED
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July 5, 2023
Part of
Public Record

**TOWNLIN RAIL TERMINAL, LLC
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
IN SUFFOLK COUNTY, NY**

**TOWNLIN ASSOCIATION REPLY IN OPPOSITION TO PETITION FOR
DECLARATORY ORDER**

Townline Association, Inc., Richard & Carol DiGrandi from Commack, NY, Keith & Patricia Macartney from Northport, NY, and Brian & Keegan Harris from Kings Park, NY (collectively, “Association”) respectfully submit to the Surface Transportation Board (“STB”) their reply in opposition to the Town of Smithtown’s (“Smithtown”) petition to institute a declaratory order proceeding in the above-captioned proceeding and to establish a procedural schedule to address the hypothetical issue of Townline Rail Terminal, LLC’s (“Townline”) obligation as a common carrier to transport hazardous materials in the event it receives an exemption from the prior approval requirements of 49 U.S.C. §10901 to construct approximately 5,000 feet of new rail line in Smithtown, NY (the “Proposed Line”). There is no need for a declaratory order proceeding here as the STB has ruled on numerous occasions that the common carrier obligation extends to hazardous materials and local or state regulations to prohibit such activities are clearly preempted.¹

¹ The Association has filed a Motion to Dismiss in the related construction proceeding on the ground, among others, that the Proposed Line would not involve “transportation by a rail carrier” but is only a project for a shipper, a private transload facility company, that is not within the jurisdiction of the STB. The Association is responding to this petition for declaratory order in the event the STB denies this jurisdictional argument. If the Board grants its motion on this jurisdictional ground, this petition for declaratory order of course would be moot.

1. Background

This inquiry by Smithtown at this point in the proceeding stems from the Association's recent submission of evidence on May 3, 2023, to the STB that it found on the CarlsonCorp Inc. ("CarlsonCorp") and the Toby A. Carlson Facebook websites. This evidence included numerous posts on these websites that specifically provide Townline will not transport hazardous materials on its railroad once constructed. The Association explained in its submission that this refusal to transport hazardous materials by Townline would obviously be a violation of its rail common carrier obligation and demonstrates as noted by the Association in its Motion to Dismiss that Townline will not be a railroad due to the construction project at issue in this proceeding.

On May 16, 2023, Townline filed a response to this supplementary filing claiming that despite these clear statements by CarlsonCorp (the owner of Townline) to the contrary, it would be obligated to transport hazardous materials if a rail shipper makes a reasonable request for the service on the Proposed Line. Townline argued that the social media comments were not made by Townline, and Mr. Carlson's comments related solely to the CarlsonCorp trans-loading facility ("Facility"), which will be controlled by local law and its NYSDEC permit.² It explained that CarlsonCorp will not seek approval from Smithtown or the DEC to handle hazardous materials at the Facility.

Apparently, Smithtown was surprised by this assertion claiming that Townline will definitely carry hazardous materials on the Proposed Line. This version of the Proposed Line's hazardous materials operations apparently did not jibe with the description Smithtown had been

² Townline is clearly backpedaling here as the statement in a Facebook post provided by the Association stated "**Townline rail** would not handle any hazardous chemicals, petrochemicals or toxic waste at any time. So rest assure these tragedy's with hazardous spills will not be on our horizon at all, as those goods would never be shipped from or to our facility." (Emphasis added.) Obviously, Townline has been telling one story to Smithtown and the public and another to the STB.

provided by Townline. (To date, Smithtown’s leadership has been a huge supporter of this Proposed Line.³) As a result, Smithtown filed this petition for a declaratory order proceeding to understand the full impact of this rail and trans-loading project on the town.

2. Townline Clearly Must Carry Hazardous Materials Upon Reasonable Request to Comply with its Common Carrier Obligation as Determined by the STB.

Pursuant to 49 U.S.C. § 11101(a), “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.” This requirement is termed the “common carrier obligation” for rail carriers. The STB and its predecessor, the Interstate Commerce Commission (“I.C.C.”), as well as the courts, have ruled on numerous occasions that railroads have a common carrier obligation to carry hazardous materials. *See Union Pac. R.R.—Pet. for Declaratory Order*, FD 35219, slip op. at 4 (STB served June 11, 2009); *Strohmeyer—Acquis. & Operation Application—Valstir Indus. Track in Middlesex & Union Ctys., N.J.*, FD 35527, slip op. at 2 (STB served Oct. 20, 2011), *aff’d sub nom. Riffin v. STB*, 733 F.3d 340 (D.C. Cir. 2013) (upholding Board’s determination that railroads have a common carrier obligation to carry hazardous materials); *Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458, 464 (1977); *Classification Ratings on Chemicals, Conrail*, 3 I.C.C.2d 331, 337-38 (1986); *U.S Energy Research and Development Admin. v. Akron, Canton & Youngstown R.R. Co.*, 359 I.C.C. 659 *pet. for review den. Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162, 1169 (6th Cir. 1979); *Trainload Rates on Radioactive Materials, Eastern RRs*, 362 I.C.C. 756 (1980) *aff’d by Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981). Therefore, there remains nothing

³ See, e.g., <https://www.smithtownny.gov/687/TOWNLINE-RAIL-TERMINAL-QUESTIONS-ANSWERS>; Smithtown Support Letter, No. 305606 (Oct. 28, 2022).

to decide on this issue as the Board has made clear its position on the carriage of hazardous materials by rail in this long line of cases.

Smithtown appears to confuse federal jurisdiction over rail operations with the local and state regulatory authority over the Facility. Townline claims that the Facility is separate from the railroad it is seeking authority to construct here, thereby bringing it solely within the jurisdiction of the local and state government's regulatory powers.⁴ Therefore, the state and local governments would be able to control the type of solid waste handled at the Facility, including a prohibition on handling hazardous waste.

However, Townline also stated that it intends to handle inbound and outbound commodities for other nearby customers. For example, Covanta Energy is near the Facility. This waste-to-energy operation is located in East Northport, New York. It is a facility that serves the towns of Huntington and Smithtown with its waste management capabilities. It uses anhydrous ammonia⁵ to reduce toxic pollutants from its facility. If Covanta Energy requested rail service

⁴ Even if the facility was part of the railroad, it appears the regulatory jurisdiction over the Facility would still remain with the state and local governments under the Clean Railroads Act of 2008 ("CRA"), Pub. L. No. 110-432, 122 Stat. 4848, amended 49 U.S.C. § 10501(c)(2) (restricts the jurisdiction of the STB over solid waste rail transfer facilities. The CRA also added three new statutory provisions—49 U.S.C. §§ 10908-10910—that address the Board's regulation of such facilities, which is now limited to issuance of "land-use-exemption permits" in certain circumstances. Under the CRA, a solid waste rail transfer facility must comply with all applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier, except for laws affecting the siting of the facility that are covered by the land-use exemption permit.)

⁵ Anhydrous Ammonia is regulated by the United States Department of Transportation ("USDOT") as a hazardous material, and its classification, description, hazard communications requirements, and packaging for transportation are governed by the Federal Hazardous Materials Transportation Regulations ("HMR") in Title 49 of the Code of Federal Regulations. The HMR regulate anhydrous ammonia as a Division 2.3 toxic gas for international shipments and provide an exception classifying it as a Division 2.2 non-flammable gas for domestic transportation. Both entries in the hazardous materials table require ammonia to be identified as an inhalation hazard on shipping papers and hazard marking on packaging. The USDOT regulates anhydrous ammonia as a Hazard Zone D inhalation hazard (49 CFR 173.116 (a)). Hazard Zone D materials have a lethal concentration (LC 50) greater than 3000 parts per million and less than or equal to 5000 parts per million.

that sought delivery of this hazardous material to its facility, Townline obviously would have to comply with this reasonable request and carry anhydrous ammonia on its rail line to abide by its common carrier obligation. The shipping of anhydrous ammonia would have no relation to the Facility as it is not solid waste and consequently would not be subject to the local or state laws that would regulate the Facility. As noted, even Townline concedes that it would be required to carry hazardous materials in such instances.⁶

While this is just one obvious example of the possibility of rail common carriage that could arise on Townline if approved, numerous other reasonable requests for the transportation of hazardous materials could be made to Townline who would then have to move them. This principle of the common carrier obligation applying to the carriage of hazardous materials does not require a declaratory order proceeding here as it is so well established under prior STB and court decisions cited herein.

3. Assuming Townline or Smithtown Argues that Local or State Regulations that Prohibit Hazardous Materials from Moving on Townline's Track Could Bar these Movements, There Is a Long Line of Preemption Cases that Flatly Reject this Position.

The Supremacy Clause of the United States Constitution provides that federal law “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI, cl. 2. Accordingly, “[u]nder the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect.” *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 104–05 (2d Cir. 1999) (abrogated on other grounds). “Federal law may preempt state and municipal law expressly or impliedly,” *id.* at 105, and express preemption occurs “when a

⁶ Townline Reply, No. 306617, at 3-4 (May 16, 2023).

federal statute expressly directs that state law be ousted,” *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 101 (2d Cir. 2009) (internal quotation omitted).

The Interstate Commerce Commission Termination Act (“ICCTA”) vested the STB “with broad jurisdiction over ‘transportation by rail carriers.’” *Island Park* (quoting 49 U.S.C. § 10501(b)(1)). The ICCTA gave the STB exclusive jurisdiction over “(1) transportation by rail carriers ... and (2) the construction, acquisition, operation, or discontinuance of ... tracks, or facilities.” 49 U.S.C. § 10501(b). The ICCTA defines “transportation” to include:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9). It defines “rail carrier,” in relevant part, as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). There can be no dispute that transportation of hazardous materials by rail falls within this definition of “transportation.”

In addition to the above-cited jurisdiction provision, the ICCTA contains an express preemption clause. Specifically, the statute indicates that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). Interpreting that clause, the STB and the courts have held that the “ICCTA preempts all state laws that may reasonably be said to 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.” *Island Park, LLC*, 559 F.3d at 102 (internal quotations omitted); *Ass’n of Amer. R.R. – Pet. for Dec. Order*, FD 36369, slip op. at 3 (STB served Dec. 30, 2020).

Because the carrying of hazardous materials by rail would be subject to the ICCTA's preemption clause, the only question that remains is if state and local regulation of the rail transportation of hazardous materials falls within the scope of ICCTA preemption. *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (hereinafter "*N.Y. Susquehanna*"). As noted above, the plain language of the ICCTA grants the STB broad authority to regulate the railway industry. Nonetheless, it is well established that "not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). In order for a state or local regulation to escape ICCTA preemption under the police power exception, the regulation "must not (1) discriminate against rail carriers or (2) unreasonably burden rail carriage." *Norfolk S. Ry. Co. v. City Of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) (citing *N.Y. Susquehanna*, 500 F.3d at 254 (citing *Green Mountain*, 404 F.3d at 643)).

In this situation involving Townline's proposed rail operation, state or local regulation would not fall within this exception to the broad preemption powers of the ICCTA because any prohibition on the rail carriage of hazardous materials would unreasonably burden rail transportation. See *Vermont Ry Inc. v. Town of Shelburne*, 287 F.Supp.3d 493, 500 (D. Vt. 2017) (town's storage ordinance regarding hazardous materials is not a valid use of the town's police powers and is preempted by the ICCTA with respect to the railway's facility); *Norfolk Southern Ry Co.*, 608 F.3d at 160 (4th Cir. 2010) (the city ordinance and permit regarding transportation of ethanol, as applied to Norfolk Southern, are preempted notwithstanding the police powers under the ICCTA.); *BNSF Ry Co. v. California Dep't of Tax and Fee Admin.*, 904 F.3d 755 (9th Cir. 2018) (California Senate Bill requiring railroads to collect fees from customers shipping

certain hazardous materials and then to remit those fees to California was preempted by ICCTA); *CSX Trans., Inc. – Pet. for Dec. Order*, FD 34662 (STB served May 3, 2005) (ICCTA preempts an Act of D.C. that seeks to govern the transportation of hazardous materials through the District); *San Pedro Peninsula Homeowner’s United Inc., et al*, FD 36065, slip op. at 5 (STB served Mar. 6, 2017) (“any terms in the temporary rail permit that attempt to restrict rail operations, including the transportation of hazardous materials, are preempted.”) Accordingly, any state or local prohibitions on the rail carriage of hazardous materials by Townline would be preempted as a burden on interstate commerce.

4. Conclusion

Based on the foregoing discussion, there is no need for a declaratory order proceeding here as the STB and courts have ruled on numerous occasions that the common carrier obligation extends to hazardous materials, and local or state regulations to prohibit such activities are clearly preempted.

Respectfully submitted,

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Certificate of Service

I certify that I have, on this 5th day of July 2023, served by the most efficient means copies of the foregoing document on all parties of record.

/s/ Daniel R Elliott
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