Articles

ICCTA Preemption: The Spaghetti Western Starring Solid Waste

John V. Edwards*

This is a tale of the spaghetti western[1] starring ICCTA preemption, set in the context of transloading municipal solid waste ("MSW") and construction and demolition debris ("C&D"),[2] the ending of which has yet to be written. Like other spaghetti westerns, this story of ICCTA Preemption will not try to answer all questions, cite every case, or run down every detail. Instead, it tells a story of low budgets, violence to historical notions, and the minimalist approaches that have brought us to

* The author is a Senior General Attorney for Norfolk Southern Corporation specializing in transactional and Interstate Commerce law. The opinions expressed are solely those of the author, and not necessarily the opinions of Norfolk Southern.

1. The term "spaghetti western" refers to a genre of western films, filmed in Italy and characterized by low budgets, violence, and minimalist cinematography that eschewed many of the conventions of earlier westerns. The Wikipedia article on "Spaghetti Western" can be found at http://en.wikipedia.org/wiki/Spaghetti_Western.

2. "MSW and C&D are different types of solid waste, and the specific definitions of those terms may differ from jurisdiction to jurisdiction. Definitions applicable in New Jersey can be found at N.J.A.C. 7:26-1.4. Those definitions provide that MSW 'means residential, commercial and institutional solid waste generated within a community,' and C&D 'means waste building material and rubble resulting from construction, remodeling, repair, and demolition operations on houses, commercial buildings, pavements and other structures.'" State of New Jersey, Department of Environmental Protection v. J.P. Rail, Inc., Civ. Action Docket No. ATL-C-41-06, opinion served August 14, 2007 ("*JP Rail*"), slip op. at 18-19, n.2.

the uncertain place we are today. It focuses on a few characters and follows a story line defined as much by the characters populating the story as anything else.[3]

As with eating spaghetti without the proper utensils, "transferring solid waste from truck to rail car is not the cleanest of businesses."[4] Therefore, this article begins by providing some of the basic utensils by explaining the fundamentals of ICCTA Preemption, beginning with the story of Hi Tech Trans and how that, aided the bright line test in *Effingham*, combined to put the industry in the position it is now in.

The story of ICCTA Preemption in the solid waste context is a parallel to the story of the Good, the Bad and the Ugly.[5] While ICCTA is necessary for the continued development of the railroad industry, it has been used by some characters in a not so desirable way. Why have they done so? According to some, because doing so can result in a "Fistful of Dollars"[6] for the purported railroads. Those in the private sector fighting the fight, however, are not altogether with clean hands either, as they are often in the business, or hosting such business, and may be themselves out For a Few Dollars More.[7] Finally, this article notes that the legislative and regulatory efforts to stem the perceived problems may make this issue something that happened Once Upon a Time in the West.[8]

As an important aside, however, the author notes that the discussion of specific companies in this article is not meant to single them out, but instead is to create a limited focus group of examples in which to conduct the discussion of ICCTA Preemption in the C&D and MSW environment. In the same manner, this article will note some of the economic incentives driving those seeking to reign in the use of ICCTA Preemption for certain transload facilities. This is not meant to denigrate the obvi-

3. In other words, if the reader is looking for an article with citations to every case remotely touching upon the topic, that reader is looking at the wrong article.

4. New York Susquehanna and Western Railway Corp. v. Jackson, No. 07-1675, served Sept. 4, 2007 ("*NYSW v. Jackson*"), slip op. at 6.

5. The film "The Good, the Bad and the Ugly" is a 1966 Sergio Leone spaghetti western starring Clint Eastwood, Lee Van Cleef and Eli Wallach. In the movie, three gunslingers of various moral outlooks seek fortune in buried Confederate gold.

6. The film "A Fistful of Dollars" is a 1964 Sergio Leone film starring Clint Eastwood. It was the first of the so-called spaghetti westerns. In the movie, a gunslinger takes advantage of a feud between two families, aiding each while inciting the feud to ever increasing levels of violence.

7. The film "For a Few Dollars More" is a 1965 Sergio Leone film staring Clint Eastwood, Lee Van Cleef, and Gian Maria Volonte. The movie portrays two bounty hunters, each with his own motivation, seeking to bring in a ruthless outlaw.

8. The film "Once Upon a Time in the West" is a 1968 Sergio Leone film, in which Clint Eastwood did not appear. "This is a story of the 'civilizing' of the West through two agents: one coolly mechanical (the railroad), the other warmly human (Claudia Cardinale, representing womanhood at its most nurturing and radiant)." Time's 100 All-Time Best Movies, http://www.time.com/time/2005/100movies/0,23220,once_upon_time_in_the_west,00.html.

ously well intentioned efforts of Federal, state and local officials seeking to protect the public health and safety.

As second important aside, the author notes that the title to this article is purposefully inaccurate. This is NOT a spaghetti western about solid waste, but instead is a spaghetti western about C&D and MSW transloading. The distinction is important. C&D and MSW as commodities generally have no inherent value. In fact, of each might be said that the commodity has a negative value, insofar as the value is in its elimination, or at least its removal from the immediate area.[9] On the other hand, the legislative reaction to many of the cases described and cited herein has been to address transloading of "solid waste" as defined in Resource Conservation and Recovery Act[10] ("RCRA"), which is far broader and includes "other discarded material . . . resulting from industrial, commercial, mining, and agricultural operations. . .."[11] As such, this legislative

9. There was substantial testimony and argument included in two of the primary cases discussed in this article concerning the value of recyclables that may be discovered in the bulk C&D brought into transloading facilities. While it is true that these have some value in bulk, it is unlikely that a sufficient amount of these recyclables are garnered from the several dozens of dump truck loads to make a significant difference in the profitability of a transloading facility. It is this author's opinion that if the business model of a C&D transloading facility is based upon revenues from recyclables, that business model is seriously flawed. Apparently the experience of NYSW supports this, as the Third Circuit found that the amount of this recovery effort at the NYSW facilities to be "immaterial" in the scope of the operations. *See, NYSW v. Jackson*, slip op. at 27. When New England Transrail testified before the STB that it desired to shred C&D material in order to aid in compaction of the material both to allow for more material to be placed into each rail car and to protect rail cars from damage, and further that it had not anticipated sifting through received material for recyclables, however, the STB found that testimony not credible. STB Finance Docket No. 34797, *New England Transrail, LLC d/b/a/ Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA*, served July 10, 2007 ("*NET*"), slip op. at 14-15, petition for reconsideration filed, July 30, 2007, appeal docketed, sub nom., *Commonwealth of Massachusetts v. STB*, Docket No. 07-2393, September 11, 2007. When one considers the cost of adapting facilities and setting up a manual process for sifting through C&D materials, the manpower required, and the uncertainty of the potential receivable revenue flow, the endeavor may not be worth the opportunity costs for performing these tasks. Contrary to the Board's assertion that "businesses rarely forgo significant economic opportunities," *id., slip op.* at 15, businesses do exactly that when it is rational to do so. The real life experience of the NYSW facilities, which have operated for years, should be instructive.

10. 42 U.S.C. Section 6901, et seq. *See*, notes 70-71 and accompanying text.

11. 42 U.S.C. Section 6903(27) provides that "The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.]."

action will have a significant spill-over effect on transportation far beyond the controversial transportation efforts it seeks to address.

I. Setting the Tale in Context – ICCTA Preemption

As with all other stories, we must begin this spaghetti western by setting the tale in context. In this case, describing that context must begin with the statutory preemption provisions in the Interstate Commerce Commission Termination Act of 1995, found at 49 U.S.C. Section 10501(b)[12] ("ICCTA Preemption"). The statutory provisions that constitute ICCTA Preemption are relatively short and straightforward. Section 10502(b) of Title 49 currently reads:

> (b) The jurisdiction of the Board over –
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> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
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> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, 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.

"The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce."[13] In short, Section 10501(b) provides that the Surface Transportation Board ("STB" or the "Board") has exclusive jurisdiction over transportation performed by or on behalf of a rail carrier, and over the associated transportation facilities.[14]

The term "rail carrier" is defined, in relevant part, as "a person pro-

12. Unless specified otherwise, any reference to a codified statute shall be a reference to Title 49 of the U.S. Code. Prior to the Interstate Commerce Termination Act of 1995 ("ICCTA"), Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995), the statute provided for somewhat overlapping Surface Transportation Board/State authority jurisdiction. *See*, 49 U.S.C. §§ 10501(b)-(d) and 10907(b)(1) (1988). *See*, *NET*, slip op. at 7-8 (describing the main difference being that, in 1995, "Congress broadened the express Federal preemption, making the Board's jurisdiction 'exclusive' for all rail transportation and rail facilities that are part of the national rail network—including even the ancillary track.").

13. *NET*, slip op. at 8 (citing H.R. REP. NO. 104-311, at 95-96 (1995), as reprinted in 1995 U.S.C.C.A.N. at 807-08).

14. STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order, served August 14, 2003 ("*Hi Tech II*"), slip op. at 5 ("To come within the preemptive scope of 49 U.S.C. 10501(b), [the] activities [under scrutiny] must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier").

viding common carrier railroad transportation for compensation."[15] The term "transportation" is defined as well. According to Section 10102(9), the definition of "transportation" is as follows:

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

The term "transportation" is to be broadly interpreted. According to the Board, "'transportation' is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage."[16] It "encompass[es] the facilities used for and services related to the movement of property by rail, expressly including 'receipt, delivery,' 'transfer in transit,' 'storage,' and 'handling' of property."[17]

The STB ably summarized the nature and extent of the preemption as follows:[18]

> The courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action: any form of state or local permitting or preclearance that, by its nature, could be used to deny the railroad the ability to conduct its operations or to proceed with activities that the Board has authorized, and state or local regulation of matters directly regulated by the Board (such as the construction, operation, and abandonment of rail lines). Otherwise the section 10501(b) preemption analysis requires a factual assessment of whether a particular action would have the effect of preventing or unreasonably interfering with railroad transportation. *See, e.g.*, City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use permitting are preempted); Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), *aff'd*, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002) (state and local permit requirements and environmental review of construction and operation of railroad intermodal facility preempted); N. San Diego County Transit Dev. Bd. – Pet. For Decl. Order, STB Finance Docket No. 34111 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment).

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15. 49 U.S.C. § 10102(5).

16. *NET*, slip op. at 2.

17. Id.

18. STB Finance Docket No. 34914, Desertxpress Enterprises, LLC – Petition for Declaratory Order, served June 27, 2007, slip op. 4-5, n.4.

Thus, any State and local regulation seeking to directly regulate such transportation and facilities are preempted.[19] "Other state or local requirements are not preempted unless, as applied, they would have the effect of preventing or unreasonably interfering with interstate commerce."[20] Although normally "railroads can be required to comply with some uniform health and safety rules, such as fire and electrical codes,"[21] the compliance requirements must be "clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service."[22] Further, a regulation or regulatory scheme must not discriminate against movement by rail.[23] Any analysis of whether a particular regulation constitutes an unreasonable burden on interstate commerce, or is discriminatory to rail carriers, requires an examination of the facts surrounding the regulation and its application.[24]

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19. Federal statutes that may apply to the facilities and operations of rail carriers, such as certain environmental laws (the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, and the regulation of railroad safety under the Federal Railroad Safety Act, must be "harmonized" with the Interstate Commerce Commission Termination Act. *See*, *NET*, slip op. at 2, 9. *See, e.g.*, Tyrell v. Norfolk Southern Railway Co., 248 F.3d 517 (6th Cir. 2001) (Federal Rail Safety Act and state law implementing that act are not preempted by ICCTA).

20. *NET*, slip op. at 9. *See also*, *NYSW v. Jackson*, slip op. at 36 ("What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as 'economic' or 'environmental.'); City of Auburn v. STB, 154 F.3d 1025, 31 (9th Cir. 1998) (certain environmental permitting regulations "will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.")

21. *NET*, slip op. at 9. The railroad must permit inspections of its facilities and inform local officials when undertaking new endeavors that otherwise would require a permit if undertaking by others. *Id.* (citing Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry., 750 A.2d 57, 66 (N.J. 2000) and STB Finance Docket No. 33971, Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, served May 1, 2001 ("*Ayer*"), slip op. at 8, *aff'd*, Boston & Me. Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002)).

22. *NYSW v. Jackson*, slip op. at 40-41. Even the right to inspect a facility for compliance concerning an otherwise applicable regulation, which the STB has noted is permissible, *NET*, slip op. at 9, can be open to abuse and preempted on an "as-applied" basis. *NYSW v. Jackson*, slip op. at 44.

23. *See*, *NYSW v. Jackson*, slip op. at 38 – 40 ("Thus, for a state regulation to pass muster, it must address state concerns generally, without targeting the railroad industry."). As noted in *NYSW v. Jackson*, however, "[f]or the Board, the touchstone is whether the state regulation imposes an unreasonable burden on railroading." *Id.*, slip op. at 37 (citation omitted).

24. *Id.*, slip op. at 38. In any event, it is an axiom that "[w]hether a particular activity constitutes transportation by rail carrier under [ICCTA] is a case-by-case and fact-specific determination." STB Finance Docket No. 33971, Joint Petition for Declaratory Order - Boston and Maine Corporation and Town Of Ayer, MA, served October 5, 2001 (petition for reconsideration of the May 1, 2001 decision denied). This analysis is not, however, a balancing of interests test. *Cf.*, *NYSW v. Jackson*, slip op. at 38.

II. The Good, the Bad and the Ugly

A. Historic Use of ICCTA Preemption

These provisions are vital to the continuing development of the interstate rail system. Railroading is a network operation stretching vast distances over private facilities.[25] Rail facilities located in one location often are necessary for the transportation of goods that do not either originate or terminate in that location, but merely use that location as a transit point. Further, in only certain instances does a train originating in one location end up in another made up of the same rail cars with which it began. A train moving cars other than coal traffic often will wind its way across the rail system setting off and picking up blocks of rail cars, or individual rail cars, with the result being that its consist can be completely different at the end of its journey. Many trains from throughout a rail system's territory may need to be coordinated and intermesh in a 24 hour per day, 7 day per week, 365 day per year operation. The rail facilities that support these operations sometimes can be intrusive on a landscape or are otherwise not necessarily in character with their surroundings in a community, but are nevertheless necessary for the safe and efficient operation of the railroad. Other rail facilities were in place long before, or actually were the catalyst for the birth of, the communities and neighborhoods that grew up around them, many of which are now subject to a gentrification that may seem inconsistent with the presence of a freight railroad. ICCTA Preemption is absolutely necessary in order to permit the interstate rail operations to continue notwithstanding local and parochial opposition.

Many rail operations and facilities may not be on the forefront of one's mind immediately when one thinks of ICCTA Preemption. Most are not controversial. Every day, for example, railroads exercise the rights inherent in ICCTA Preemption to:

- locate communication towers to carry radio signals necessary to permit dispatchers to communicate with the road crew;
- light up rail yards so that those yards can be safely operated around the clock in order to accommodate the complex interstate network operation coordination required to get the right cars to the right place at the right time in the making and breaking up of trains as they wind their way across the country;
- construct and rehabilitate bridges that may be the single facility that ties together an interstate route;
- create a curb cut to provide access to a driveway serving an intermodal facility;

25. Most truck transportation takes place over public facilities, even if those facilities are toll facilities, which distinguishes those operations from those performed by rail.

- cut trees on a property in order to develop sight lines for the safe operation of a switch yard or rail-highway grade crossing;
- move over the road and on an emergency basis re-railing equipment to reopen railroad rights of way, movements that otherwise might be prohibited in order to clear the roads for non-commercial traffic;
- close or rearrange local sales and agency offices to conform with the nature of businesses over several state regions;[26]
- route traffic in the most efficient manner;[27]
- place and operate fueling and on-line car and locomotive repair facilities;
- defend against adverse possession and condemnation efforts; and
- construct and operate new yards and facilities in locations even though the traffic that moves through those yards and facilities may never originate or terminate in those locations.[28]

At the same time, larger railroads have numerous interfaces with state and local officials, over a variety of subjects in a variety of different contexts. It is in the larger railroad's self interest to consult and accommodate when possible state and local officials' legitimate public interests, even when preempted.

B. ICCTA Preemption and the Hi Tech Cases

When one thinks of ICCTA Preemption these days, the first thought is not about curb cuts, radio towers or fueling facilities; the first thought is of the C&D and MSW transloading facilities cropping up in the Northeast United States, primarily in New Jersey, much in the manner of the mysterious strangers turning up in the dark of night in the quiet Western towns of old. The first of many prominent cases to come to light was that of Hi Tech Trans, and its operations in Oak Island Yard, New Jersey.

In the first of several proceedings,[29] Hi Tech[30] asked the STB to is-

26. Burlington Northern Railroad Co. v. Page Grain Co., 249 Neb. 821 (1996) (local agencies).

27. STB Finance Docket No. 34662, CSX Transportation, Inc. – Petition for Declaratory Order, slip op. at 7 (served Mar. 14, 2005), *reh'g denied*, (served May 3, 2005), *appeal docketed, sub nom.* District of Columbia v. STB, No. 05-1220 (D.C. Cir. filed June 22, 2005) (cited in, *NET*, slip op. at 8-9).

28. Norfolk Southern Railway Company v. City of Austell, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997) (container transload facility); *Ayer.*

29. Ignored for the purpose of this article is a misguided early attempt. STB Finance Docket No. 33901, Hi Tech Trans, LLC - Operation Exemption - Over Lines Owned by Canadian Pacific Railway and Connecting Carriers, served July 7, 2000. Further, although there were several simultaneous proceedings either before the New Jersey Department of Environmental Protection or Federal District Courts, this article will focus on proceedings before the STB. *See, e.g.*, Hi Tech Trans., LLC v. N.J., 382 F.3d 295 (3d Cir. 2004) (discussing the history of administrative actions).

30. The original petition for declaratory order was requested on behalf of both Hi Tech and Canadian Pacific Railway Company ("CPR"), but CPR was subsequently removed as a party petitioner.

sue a declaratory order that one particular phase of its operations – the truck transport of C&D material prior to any transloading activities at its facility located at the Oak Island facilities for Canadian Pacific Railway Company ("CPR") – was within the STB's jurisdiction under Section 10501(b). Although the facts would change for subsequent proceedings,[31] in this proceeding Hi Tech allegedly agreed to transport C&D material from a shipper's demolition site to delivery points on CPR's lines. Hi Tech would hire truck companies to move the C&D from the demolition site to the Hi Tech facility. Hudson County (New Jersey) had a solid waste management plan that required such materials originating in Hudson County to be moved through a different facility, and informed Hi Tech that any truck transport to the Hi Tech facility of C&D material originating in Hudson County would be in violation of that plan. Hi Tech sought the STB's protection, claiming that the solid waste management plan was preempted by ICCTA, under the theory that the truck transport was part of an uninterrupted flow of the commodity from the origin to the railhead and beyond.

The STB made short shrift of that argument. The STB determined that ICCTA Preemption did *not* extend to the truck transportation of C&D material from the construction site to the truck to rail transload site.[32] According to the STB, this movement was not "transportation" as defined in Section 10501(b); instead, "[t]o come within the preemptive scope of 49 U.S.C. 10501(b), . . . these activities must be integrally related to the railroad's ability to provide rail transportation services."[33] The STB recognized that the limits of ICCTA Preemption were being tested, and tried to put some limits on the reach of ICCTA Preemption: "As NJDEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction."[34]

The decision, however, simply set up the real question: just how far did the Board's jurisdiction extend? The Board had a second bite at the

31. The original petition for declaratory order listed Hi Tech as an "agent" for CPR, but this designation was removed subsequently. Later filings, such as Hi Tech's request for reconsideration of the STB's November 19, 2002 decision, reinvigorated this designation. In its later-filed request for declaratory order concerning the status of the Hi Tech facility, however, Hi Tech referred to itself as a "licensee" of CPR. The distinction, of course, is significant.

32. STB Finance Docket No. 34192, Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, served November 20, 2002 (*"Hi Tech I"*).

33. *Hi Tech I*, slip op. at 3 (*citing* STB Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp.*, slip op. at 9, served Sept. 10, 1999). Later in the decision, the STB uses different language, stating that such activities "must be closely related to providing direct rail service." *Id.*, slip op. at 4.

34. *Id.*, slip op. at 3.

apple with Hi Tech. The New Jersey Department of Environmental Protection served a cease and desist order against Hi Tech seeking to close the facility.[35] Hi Tech filed with the STB a petition for declaratory order aimed at having Hi Tech's Oak Island Yard transload facility declared to be within the STB's jurisdiction and within the reach of ICCTA Preemption.

On August 14, 2003, the STB announced its decision. The STB found that, while "[t]here is no dispute that Hi Tech's transloading activities are within the broad definition of transportation,"[36] but in any event it was being operated by Hi Tech as a shipper, and not as a railroad or on the railroad's behalf.[37] The final chapter in the Hi Tech saga found Hi Tech eventually giving up the ghost, and petitioning the Board to withdraw its petition for reconsideration after it sold its facilities to CPR.[38]

C. ICCTA Preemption and the NYSW Cases

Perhaps the best know series of cases in this area after the *Hi Tech* line of cases is that involving the New York, Susquehanna and Western Railway Company ("NYSW"). NYSW has operated a number of C&D facilities in New Jersey that have been the target of several cases. Unlike the case of the strangers wandering into town like Hi Tech, NYSW was, and continues to be, a line haul railroad with a lengthy lineage and connection to the communities in which it operates.

The NYSW operated four C&D transfer facilities. Its business model is typical of what can be found in the industry:[39]

> At each facility, Susquehanna sold most of its shipping capacity to a primary

35. Hi Tech filed with the federal district court in New Jersey a petition to enjoin New Jersey DEP from enforcing the cease and desist order, but that court refused to do so. "Letter from Hi Tech to the STB," dated June 26, 2003, filed in STB Finance Docket No. 34192, Sub-No. 1 on June 27, 2003, at 2.

36. *Hi Tech II*, slip op. at 5-6

37. *Id.* (although the functions performed by Hi Tech constituted transportation, as that term is used in Section 10501(b), "the facts of this case establish that Hi Tech's relationship with CP is that of a shipper with a carrier," and therefore state and local regulation is not preempted as to those activities). The principles set forth in Hi Tech continue to govern preemption cases today. *See, e.g.*, STB Finance Docket No. 35057, Town of Babylon and Pine Lawn Cemetery – Petition for Declaratory Order, served February 1, 2008 ("*Babylon*"), petition for reconsideration filed, February 20, 2008, slip op. at 4 ("The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are preformed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party's operations"). In *Babylon*, the Board found that the totality of the facts presented demonstrated that the subject operation was one operated by a shipper, not by the railroad by and through an agent.

38. STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, served June 25, 2004.

39. *NYSW v. Jackson*, slip op. at 7-8.

> customer. These primary customers, known as "shippers," acted as middlemen between the generators of waste and the railroad. For a fee, they took title to C&D waste from the operators of the sites that generated it and hauled it by truck to Susquehanna's C&D transloading facilities. They then paid Susquehanna to load the waste onto rail cars and ship it to out-of- state landfills (which they paid to take final title to the waste). Because the shippers' value added was their ability to move waste efficiently from C&D sites to landfills, they used guaranteed-capacity contracts with Susquehanna to ensure that they could do so. Rather than operating the transloading facilities itself, Susquehanna hired a loading company to unload the trucks bringing in the waste, oversee its storage, and load it onto rail cars.

The NYSW facilities quickly gained the attention of the New Jersey Department of Environmental Protection ("NJ DEP"), in part, because "[a]t least initially, the transloading facilities were a mess. Nearby residents complained that their houses and yards were covered in dust and grime, the noise was excessive, and the wastewater and stormwater runoffs were dirty."[40]

NYSW filed suit against NJDEP because NJDEP levied a $2.5 million fine and initiated enforcement action against the NYSW for the continuing operation of the four C&D transload facilities (and one hazardous soils transload facility) in violation of New Jersey's so-called "2-D regulations."[41] NYSW sought to have the 2-D regulations declared preempted. In the Federal district court, it achieved an unmitigated success, when the court determined that all of the 2-D regulations were preempted.[42]

On appeal, NYSW was not quite so successful. The Third Circuit found that the transloading operations were unquestionably "transportation" as the processes taking place at the facilities were well within the plain meeting of that term as defined in Section 10102(25), and otherwise subject to the provisions of Section 10502(b).[43]

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40. *Id.*, slip op. at 8.

41. These regulations, found at N.J.A.C. § 7:26-2D.1, *et seq.*, are the railroad-operated transload facility equivalent to the State's regulations governing the operation of transload facilities run by non-railroads, and require, among other things, for the transload process to take place within an enclosed building with an impenetrable surface, waste water run-off management systems, cleaning the tipping floor every 24 hours, odor debris, dust and insect management, and restricting access to the facility to trucks that are properly registered and displaying decals and registration numbers. *See, id.*, slip op. at 12-17 (summarizing N.J.A.C. § 7:26-2D.1(d)).

42. N.Y., Susquehanna and W. Ry. Corp. v. Jackson, 2007 U.S. Dist. LEXIS 11907 (D. N.J. 2007).

43. *NYSW v. Jackson*, slip op. at 25. *See also, id.* at 23 ("It is undisputed that operations of the facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and interchange of rail cargo, which the Termination Act explicitly defines as 'transportation.' *See*, 49 U.S.C. § 10102(9)(B). These operations fit within the plain text of the Termination Act preemption clause.").

In addition, the Third Circuit found that the NYSW facilities were operated "by" the railroad, even though the operations took place on behalf of NYSW by a contract operator.[44] But that was not enough. NJ DEP argued that, as to these facilities, NYSW was a private carrier at best, notwithstanding the fact that NYSW is, and throughout its history has been, a rail carrier. Arguably, the guaranteed capacity agreement dedicated each of the facilities to one shipper's use, and prevented NYSW from holding itself out to serve others at these facilities. The Third Circuit looked to distant precedent to provide it guidance:[45]

> The common law differentiates between "private carriers" and "common carriers." *See, e.g.*, York Co. v. Cent. R.R., 70 U.S. 107, 112 (1865) (holding that common carriers may limit their liability by undertaking private carriage). We have held that "[t]he distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." Kelly v. Gen. Elec. Co., 110 F. Supp. 4, 6 (E.D. Pa.), aff'd and adopted as circuit precedent, 204 F.2d 692, 692 (3d Cir. 1953). A private carrier, on the other hand, offers services to limited customers under limited circumstances and assumes no obligation to serve the public at large. Lone Star Steel Co. v. McGee, 380 F.2d 640, 645 (5th Cir. 1967) (citing Ward Transp. Inc. v. Pub. Untils. Comm'n, 376 P.2d 166, 169 (Colo. 1962)).

Under the Third Circuit's analysis, in order to determine whether a service provided is one of common carrier or private carrier service, one needs to look beyond the particular facility or the particular side track upon which the facility might reside. Instead the analysis must examine the character of the service in the context of the entire railroad, the characteristics of the commodity, and the broader industry being served. In an analysis that should be equally applicable to service to any number of situations in which a common carrier provides dedicated service to a single origin or destination – a coal mine, a power plant, a plastics transload facility, and a flour warehouse to name but a few – the Third Circuit stated:[46]

> In the context of shipping bulk waste, we believe the concept of "common carrier" must be flexible enough to accommodate reasonable commercial practice. Indeed, in its decisions the Board merely defines the term "common carrier" as "a person or entity that holds itself out to the general public

44. *Id.*, slip op. at 30 (acting through a contract operator does not remove the facility from the Board jurisdiction). *See also*, Canadian National Ry. v. City of Rockwood, 2005 U.S. Dist. LEXIS 40131 (E.D. Mich. June 1, 2005) (rail to truck transload operated by a contractor to Canadian National).

45. *Id.*, slip op. at 31-32.

46. *Id.*, slip op. at 33-34.

> as engaged in the business of transporting persons or property from place to place for compensation." [STB Finance Docket No. 34502, American Orient Express Ry. Co. – Petition for Declaratory Order, served December 29, 2005, slip op. at 4]. "In determining whether there has been a holding out, 'one must look to the character of the service of the party in relation to the public.'" *Id.* (quoting Penn. R.R. Co., 347 I.C.C. 536, 549 (I.C.C. 1974)). On this record it appears that Susquehanna holds itself out to the public as providing waste transport services in the manner common in the industry. This, we believe, is sufficient to affirm the District Court's determination that Susquehanna acts as a common carrier.

The Third Circuit thus determined that: (1) what NYSW was performing at its facilities constituted "transportation" and (2) that NYSW was acting as a common carrier in performing that transportation. Its analysis was not done, though.

The Third Circuit thought that the 2-D regulations were not the type of regulation that would preempted on their face. Instead, the regulator scheme was a type of generally applicable regulation, and each of the 2-D regulations had to be examined as applied to determine whether it constituted an unreasonable burden on interstate commerce.

Finally, the Third Circuit determined that the rules were not discriminatory against railroads even though they applied only to railroad-operated transfer facilities. Without question, the 2-D regulations did apply *only* to railroads-operated facilities. But in this situation, the regulations were put into place because the state had realized that the regulatory scheme that applied to transfer facilities operated by non-railroad entities would be automatically preempted in its application to transfer facilities operated by rail carriers because there was a pervasive element of permitting and preclearance. The state had attempted to construct, in its 2-D Regulations, a parallel regulatory scheme that resolved those legal impediments.[47]

Because the district court did not engage in an analysis that examined each of the individual regulations, both in the context of its burden on interstate commerce and its potential discriminatory effect against the railroad industry, the appellate court remanded the case back for further proceedings.

D. ICCTA Preemption and the NET Cases

NET is the latest of the several C&D transfer facility cases to be heard by the Board. In this case, the sheriff turned over the wagons in the streets, and turned out the townsfolk to man the barriers to keep out the gunslingers. So far, those barriers are holding, but only barely. The

47. *Id.*, slip op. at 44-45.

facts are described by the Board as follows:[48]

> On December 5, 2005, NET, a noncarrier, filed a petition for exemption to acquire, construct, and operate a rail line and related facilities in Wilmington and Woburn, MA. NET proposes to receive by truck at the site, and provide rail transportation for, a variety of commodities, including sand and gravel, plastic resins, liquids, municipal solid waste (MSW) and construction and demolition debris (C&D). NET explains that it would sort, grind, crush, aggregate, segregate, and/or bale all of the C&D and some of the MSW it receives before loading the materials onto rail cars or containers for rail shipment. NET asserts that all of its proposed activities and operations at the site would either constitute rail transportation, or would be integrally related to such transportation, and would therefore be subject to the Board's jurisdiction. A number of parties disagree, maintaining that NET's proposed activities involving C&D and MSW would not be part of rail transportation.

After a protracted series of proceedings and hearings, on July 10, 2007, the Board issued what can only be described as a preliminary decision.

The Board first determined that NET would be a rail carrier if it was allowed to proceed with constructing and operating its future facility as proposed. It then examined each of the activities that NET proposed to engage in at that facility. After an examination along traditional lines, the Board determined that most, but not all of the activities it would engage in at its new facility constituted "transportation" covered by Section 10501(b).

NET is significant for several reasons. First, a majority of the Board endorsed the very simple principle that "what our statute [49 USC 10501(b)] does not permit, in this or any other case, is to have different legal standards for what is part of rail transportation based on the particular commodity involved."[49] The specter that could not be dismissed in any of the previous decisions was that somehow cases involving the transloading of MSW or C&D were different.[50]

Second, the Board engaged in a detailed, fact-specific analysis as to

48. STB Finance Docket No. 34797, New England Transrail, LLC – Construction, Acquisition and Operation – in Wilmington and Woburn, MA, served March 29, 2007 (notice of oral argument), slip op. at 1-2.

49. *NET*, slip op. at 2.

50. *See, JP Rail*, slip op. at 45 ("From this court's perspective, the processing of solid waste is qualitatively different from the handling of other materials more typically involved in the transloading process. In that context it is reasonable to suggest that the transloading of solid waste should be considered 'transportation to rail' rather than 'transportation by rail' irrespective of the identity of the individuals or entities involved in the transloading process, at least when it involves the type of dumping and extraction or segregation of materials involved here. All processing of solid waste, even that performed by a railroad's own employees, would be subject to state regulation, including permitting.").

whether each activity to be conducted at the facility was integrally related to transportation, and in fact found one process to not meet that test. NET had argued that it intended to shred the material received in order to compact it so that more could fit into, and to reduce the damage the material would cause to, each rail car. The Board surprisingly departed from long term practice to the extent it appears to be based, in part, on a substitution of the Board's business judgment for that of the rail carrier on how to perform this one part of the transloading process.[51] As a result, the Board determined that the NET plan for shredding – as opposed to bailing and wrapping – the material was not integrally related to transportation. As a result, "[i]f NET chooses to conduct the shredding activities, they would be subject to the full panoply of state and local regulation."[52]

This puts the Board's decision in *NET* in tension with the Third Circuit's decision in *NYSW v. Jackson*. In the *NYSW v. Jackson* case, the Third Circuit did not need to decide whether shredding would constitute transportation. But in its application of the law of ICCTA Preemption, when it came to analyzing the processes that are conducted at the NYSW facilities, the Third Circuit looked solely to the plain language of the statute, and found that the processes that were taking place at those facilities to be largely taken up in the more general category of "transloading." In fact, the Third Circuit seems to chide the Board for going further: "Hence, whatever the legal effect of the [Surface Transportation] Board's adverb 'integrally' (which we suspect is minimal or none), transloading qualifies as transportation."[53]

Of equal note, however, is the Board's strong affirmation of *Effingham*[54] and the principles that underlay the bright line test enunciated there. *Effingham*, which actually consisted of three different cases considered together, dealt with Effingham Railroad Company's desire to be declared a common carrier, and to construct and operate track that would serve a new industrial park. The important docket for the purposes of

51. *NET*, slip op. at 15.

52. *Id.*

53. *NYSW v. Jackson*, slip op. at 25. On the other side of the spectrum is the state court opinion in *JP Rail*. In that case, the court found the 2-D regulations not subject to preempted at all, in part because the facility in question carried on the transload and processing of C&D (as opposed to other commodities), and in part because the 2-D regulations did not impose permitting or preclearance review. Although the court allowed JP Rail's facility to operate, it will do so subject to the full enforcement rights of the 2-D regulations, presumably to the point of actually forcing a closure of the facility for failure to comply with those regulations. *JP Rail*, slip op. at 49-50.

54. STB Docket No. 41986, Effingham Railroad Co. – Petition for Declaratory Order – Construction at Effingham, IL, served September 18, 1998, *aff'd*, United Transportation Union – Illinois Legislative Board v. Surface Transportation Board, 183 F.3d 606, 613-14 (7th Cir. 1999).

this discussion was STB Finance Docket No. 33468, in which Effingham Railroad Company filed a notice of exemption[55] to become a rail carrier by gaining authority to operate over approximately 200 feet of existing railroad track.

In its decision, the STB utilized traditional factors to analyze whether the operation sought to be conducted over the line converted what otherwise would be an exempt line of trackage to a jurisdictional line of railroad. "It is well settled . . . that whether a particular track is a railroad line or a switching track turns on the intended use of the track segment. In addition, in those cases where a tenant railroad's intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant's use, rather than the character of the trackage itself, is controlling with regard to its own operations, subject to consideration of the purpose and effect of the construction. . .."[56]

But then the Board made the one statement that will significantly influence future ICCTA Preemption cases, in essence eliminating for the most part one of the two element ICCTA Preemption test for new start up entities: "In the initial notice [of exemption] . . . [Effingham] became the operator of a line of track. . .. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was [Effingham's] initial railroad operation, this [200 foot] track segment became [Effingham's] entire line of railroad and was not, as to [Effingham], a siding or spur."[57] In other words, the Board created a bright line test that could be used in the future: ICCTA Preemption is available to a "rail carrier" performing "transportation," and if a non-railroad party acquires control over a track segment – no matter how small and insignificant – that non-railroad party suddenly satisfies the "rail carrier" prong of the ICCTA Preemption test as long as it professes an intention to serve the general public.[58] The only issue for this newly minted rail carrier (for the

55. Under the ICCTA, persons may need the prior approval of the STB in order to obtain control over another railroad, construct track, and to perform a variety of other acts. The STB has created a variety of short-form procedures to permit persons who qualify to be exempt from the normal approval processes, but requires those persons to file a "notice of exemption" with the STB to give notice to the world that these persons are taking advantage of these short-form procedures. The STB is not required to act in order for a notice of exemption to become effective (and thus for the necessary prior approval to be garnered), but the notice of exemption takes some time to become effective, giving other parties the time they need to intervene to stop the process if necessary. In this case, the Effingham Railroad filed, in addition to the two notices of exemption, a petition for declaratory order, which does require STB action.

56. *Id.*, slip op. at 4 (internal citation omitted).

57. *Id.*, slip op. at 5 (emphasis added).

58. *See also*, STB Finance Docket No. 34435, Ameren Energy Generating Company – Construction and Operation Exemption – In Coffeen and Walshville, IL., served Feb. 17, 2006, and STB Finance Docket No. 34497, Coffeen and Western Railroad Co. – Lease and Operation

purpose of ICCTA Preemption) is whether what that new carrier does with the track constitutes "transportation."

It was because of *Effingham* that non-carrier entrepreneurial companies have been able to take advantage of ICCTA Preemption. Unlike existing carriers, and new short line spin-offs from existing carriers, the non-carrier whose entire operation consists of a C&D or MSW transload does not have several different points of contact with State and local officials. There is little economic and regulatory incentive for these start-ups to cooperate with officials, and every incentive for them to test every boundary of ICCTA Preemption that exists.[59]

On June 7, 2007, several large railroads filed a petition for rulemaking, seeking to expand the amount of information to be submitted by persons filing a notice of exemption, and seeking to have the Board overrule the bright line test in *Effingham*.[60] The petitioners did not need to wait for the Board's decision in the rulemaking petition to get their answer as to the bright line test in *Effingham* – they received it in *NET*.

Some parties to the *NET* proceeding had suggested that NET should not be considered a rail carrier because its length of haul would be relatively short. The Board labeled this notion as simply wrong, finding that "[t]he length of the track involved is pertinent only to an analysis of whether particular track can be categorized as ancillary 'spur' or 'switching' track that would not require Board authorization to construct," and as not relevant in a determination of whether the operator of that track was a rail carrier.[61]

The Board did not eliminate the need for *some* actual anticipated movement of traffic over the track by the entity seeking to be a rail-

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Exemption – near Coffeen, IL, served May 10, 2004 ("*Coffeen*") (subsidiary of a power plant leases approximately 2/10 of a mile of in-plant track to a new subsidiary for the purpose of obtaining railroad carrier status and to use that status to facilitate the construction of a build-out).

59. The bright line test in *Effingham* is not only significant for the future of ICCTA Preemption, it affects other areas of railroading as well. The first of these involved the proposal by an outfit calling itself Comrail International Railroad, Inc. Comrail (not associated with Conrail) proposed to operate over several yard tracks. STB Finance Docket No. 34291, Comrail International Railroad, Inc. – Operation Exemption – Chicago Heights Railcar, Inc., served December 10, 2002, purportedly for the purpose of performing contract switching operations for the car repair facility that owned the trackage. But the true goal seemed to gain rail carrier status in order to develop a railroad police force. When that intent became apparent, and when Comrail was unable to respond to questions concerning its operations and employees, Comrail decided to withdraw its authority and move on. STB Finance Docket No. 34291, Comrail International Railroad, Inc. – Operation Exemption – Chicago Heights Railcar, Inc., served February 26, 2003.

60. STB Ex Parte No. 673, Petition to Institute a Rulemaking, filed on behalf of BNSF Railway Co., Canadian National Railway Co., Canadian Pacific Railway Co., CSX Transportation, Inc., Norfolk Southern Railway Co., and Union Pacific Railway Co.

61. *NET*, slip op. at 11. *See also*, *Coffeen*, slip op. at 1 (noting the length of track to be operated as "approximately 0.2 miles of rail line").

road,[62] but there is an argument that the Board's decisions could be strung together to get to that point. Perhaps future cases will involve the question of whether a proposed operation will be over track sufficiently short as to undermine the allegation that rail operations would take place over that track, but it is possible to argue that the Board's broad definition of "rail carrier" could be read to eliminate the use by the rail carrier of any locomotive work whatsoever.

Finally, the decision is notable because Board Member Mulvey takes issue with the majority's determination of whether certain processes are "integrally related" to transportation. In Mulvey's view, apparently "activities that would occur even absent rail transportation" should be viewed as "facilitating" transportation, not "integrally related" to transportation.[63] Further, Mulvey takes issue with the majority's finding that the scope of preemption is not determined by the commodity being transported.[64] In his mind, there is a distinct difference between MSW and other commodities. Mulvey explains that the Federal government is charged with regulating rail transportation, that the State and local government is charged with regulating MSW, and that it is that regulatory framework that should govern the Board's decisions in this area. But that argument can be made with regard to most areas of preemption law that require intervention by the courts or by regulatory boards – the cases out on the edges are easy to determine, it is in the middle murky area that requires a judgment and a determination as to which interest will prevail. And, in the area of preemption, it is often the Federal interest that will prevail.

III. A Fistful of Dollars

A. Incentives to Enter the MSW and C&D Transload Business

These various attempts to enter into the MSW or C&D transload business under the guise of ICCTA Preemption is, according to some, plainly a Fistful of Dollars. "Shipping solid waste to Midwestern landfills has become big business – particularly in places like New Jersey where capacity at in-state landfills is scarce."[65] In a Petition for Declaratory Order filed on behalf of the National Solid Wastes Management Associa-

62. *See, id.*, slip op. at 12, n.55 (discussing the need to acquire "necessary equipment and personnel to conduct rail operations") and 14 ("NET could not accomplish its planned rail operations without the ability to first store and then load the waste materials," implying that "its planned rail operations" were different than the transloading activities associated with those rail operations).

63. *Id.*, slip op. at 19 (Mulvey, dissenting).

64. *Id.*, slip op. at 20 (Mulvey, dissenting).

65. *NYSW v. Jackson*, slip op. at 6.

tion, among others, it was alleged that:[66]

> Solid waste facility operators who team with short line railroads and claim protections under the ICCTA gain an unfair and unusually generous advantage over environmentally responsible operators because they avoid the high compliance costs and time consuming regulatory process inherent in building and operating a protective facility. * * * This ploy threatens fair and open competition in the solid waste management industry nationwide. . .. The result is unfair. . ..

As described in that Petition, the process of obtaining regulatory approval for the siting, construction and operation of a C&D or MSW transload facility can take years. The cost of compliance with the attendant regulatory requirements is significant. Couple these considerations with the fact that the commodity being transloaded and shipped has negative commercial value, and there are significant economic incentives to being able to open an unpermitted and low-quality transload facility.[67]

Therefore, other entrepreneurs adopted and adapted the approach to utilize ICCTA Preemption to operate bulk transload facilities for the transfer of MSW or C&D from trucks to rail cars for further movement.[68] There is a score of examples.[69]

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66. STB Finance Docket No. 34776, National Solid Waste Management Association – Petition for Declaratory Order, filed October 27, 2005 ("*NSWMA Petition for Declaratory Order*"), at 8. The STB eventually denied the request for a declaratory order, as the facility in question – operated by New York, Susquehanna and Western Railway Company – had closed. STB Finance Docket No. 34776, National Solid Waste Management Association – Petition for Declaratory Order, served March 10, 2006.

67. *See also*, *NYSW v. Jackson*, slip op. at 26 (characterizing certain concerns of the waste as follows: "But here's the rub: waste processing is a heavily regulated industry. According to [Amici National Solid Wastes] Association, the railroad gains a competitive advantage if it can shield its processing activities from regulation by characterizing them as 'transportation by a rail carrier' and thus preempting burdensome state regulations.").

68. Very few cases involve the reverse – the transfer of MSW or C&D from rail car to truck, but this was the subject of Canadian National Ry. v. City of Rockwood, 2005 U.S. Dist. LEXIS 40131 (E.D. Mich. June 1, 2005) (finding the operation to be the subject of ICCTA Preemption).

69. *See, e.g.*, STB Finance Docket No. 34986, Ashland Railroad, Inc. – Lease and Operation Exemption – Rail Line In Monmouth County, NJ, served August 16, 2007 (decision rejecting notices of exemption filed; the proceeding included allegations by others that the railroad's operations would include a MSW or C&D transload); STB Finance Docket No. 34734, Northeast Interchange Railway, LLC – Lease and Operation Exemption – Line in Croton-On-Hudson, NY, served November 18, 2005 (rejecting a notice of exemption involving a potential C&D transload facility due to the controversial nature of the proposal – the proposal is best placed before the STB by means of an application rather than as a notice of exemption); STB Finance Docket No. 34392, New Jersey Rail Carrier LLC – Acquisition and Operation Exemption – Former Columbia Terminals, Kearny, NJ, served January 20, 2004 (lifting a stay to allow the notice of exemption to become effective after the applicant satisfied NJ DEP's concerns, in part by stating that it would not engage in bulk transload of C&D); Coastal Distribution, LLC v. Town of Babylon, No. 05-CV-2032, 2006 WL 270252, at *6-7 (E.D.N.Y. Jan. 31, 2006) (C&D storage and transloading), *aff'd as modified*, 216 Fed. Appx. 97 (2d Cir. 2007) (cited in *NET*, slip op. at 10, n.46); J.P. Rail, Inc. v. N.J. Pinelands Comm'n, 404 F.Supp. 2d 636 (D. N.J. 2005).

IV. For a Few Dollars More

A. Incentives to Reign in the Use of ICCTA Preemption for Transload Facilities

As one can imagine, anyone interested in competing with the railroad-operated transfer stations would be interested in reigning in the use by those stations of ICCTA Preemption. It is no surprise, therefore, that the NSWMA would take the lead in some of the efforts on this front.[70] But further there are regulatory agencies in part financed by transfer facility fees, registration and decal fees, and operations outside of their regulatory purview are operations that escape the transfer facility fees.[71] There is no question that there would be many responses to calls for a posse.

V. Once Upon a Time in the West

A. Legislative Efforts to Reign in ICCTA Preemption

The line between right and wrong are certainly blurred in the spaghetti western. It is no less the same in the railroad-operated C&D and MSW transfer station regulation. For state regulators and lawmakers alike, the one thing that is clear is that "it is difficult to see any clear line that defines just when state regulation of that activity is preempted under ICCTA."[72] This ambiguity is unacceptable – and a resolution of the ambiguity in the wrong way is equally unacceptable. State regulators and lawmakers therefore seemed intent to eliminate ICCTA Preemption as it applies to MSW and C&D transloading.[73] There were two primary approaches.

One approach sought to address the problems raised by ICCTA Preemption in the C&D and MSW transloading context, by removing STB jurisdiction over "solid waste management facilities" and referencing the Solid Waste Disposal Act for definitions.[74] This proposal, however,

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Further, there is an occasional case presented to the Board in which the applicant seeks to be declared not to be a rail carrier. *See, e.g.*, STB Finance Docket No. 34952, Devens Recycling Center, LLC – Petition for Declaratory Order, served January 10, 2007 (party seeking declaration that construction of a track into its C&D transload facility will not be subject to STB jurisdiction).

70. See, e.g., NSWMA Petition for Declaratory Order.

71. *See*, for example, the discussion of the "system benefit fee" system used by Lane County, Oregon at http://www.co.lane.or.us/PW_WMD/SBF.htm.

72. *JP Rail*, slip op. at 16.

73. *See, e.g.*, Clean Railroads Act of 2007, H.R. 1248, introduced by Representative Pallone, February 28, 2007; Clean Railroads Act of 2007, S. 719, introduced by Senator Lautenberg, February 28, 2007 (identical bill); Railroad Safety Enhancement Act of 2007, S. 1889, introduced by Senator Lautenberg, July 26, 2007.

74. *See*, Section 601 of S. 719 as introduced ("Section 10501 is amended – (1) by striking

would impact the operation of the rail industry far in excess of the problem it seeks to solve. Generally this approach fails to exclude traffic such as the transloading and movement of scrap metal, automobile shredding residual material, hazardous soils and other material that has been moving for years by railroads without controversy. The proposals could be read to remove STB jurisdiction over some line haul facilities, including tracks and yards through which materials would move. And the proposals could impact a railroad's recovery and handling of its own railroad generated materials.

A second approach sought to address the problems raised by ICCTA Preemption in typical spaghetti western style by shooting the supporting cast – the trucks that move the C&D and MSW to and from railroad transfer facilities. This approach would make it unlawful for trucks to transport C&D and MSW, or, alternatively, solid waste, to such facilities unless those facilities were subject to State and local environmental laws, other than state permitting and preclearance laws. This proposal would allow railroad-operated facilities that opened prior to the change of the law to continue to exist, but would force the facilities to operate in accordance with state and local environmental laws.

A third approach proposed would allow have allowed existing railroad-operated transload facilities to remain open, subject to Federal, State and local environmental laws affecting operations, provided the facility seeks any required State and local facility licenses and permits, and sought, to the extent required, inclusion in the local solid waste management program. Under this approach, a facility would not have to comply with the local land use and zoning requirements, but failure to comply with these requirements would be taken into account in the decision as to whether to grant authority for the facility to continue to operate. A decision by any one of the several state and local elected and citizens boards and authorities, or the NJ DEP, to deny a license or permit, or inclusion in the local solid waste management program, would result in closure of the facility.

A final approach proposed, and the one that was actually adopted, is perhaps the least desirable. Under the Clean Railroads Act of 2008, and finally returning to our spaghetti western theme, the federalies have been called in to clean up the town and restore order. Unfortunately, bringing in the federalies creates its own problems, and sets up the possibility of a future conflict between the locals and the federals all over again.

'facilities,' in subsection (b)(2) and inserting 'facilities (except solid waste management facilities (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903))),'; and (2) by striking 'over mass transportation provided by a local governmental authority.' in subsection (c)(2) and inserting 'over – '(A) mass transportation provided by a local governmental authority; or (B) the processing or sorting of solid waste.'").

The Clean Railroads Act of 2008 bifurcates jurisdiction over solid waste rail transfer facilities between the STB and state and local jurisdictions. Jurisdiction over state and local siting matters regarding solid waste rail transfer facilities will now reside with the STB, setting up an interesting situation in which a Federal agency is tasked with essentially a State and local regulatory function. In furtherance of this function, the STB must consider such things as the level of risk to public health, safety and the environment, public notice and comment, regional planning efforts and how the subject facility fits into those efforts and other local considerations that can be very difficult to consider in the framework of a national transportation regulatory scheme.

Assuming that solid waste transfer facilities can receive a federal site license, the facilities otherwise would be subject to all State and local environmental and public health and safety regulations. Railroad facilities that now operate will have to come into compliance with any non-siting state and local regulation affecting health and safety.

Significant litigation should be expected under the new legislation, regarding such thorny issues as application of State and local regulation that blends both environmental and public health and safety matters, on the one hand, with siting considerations, on the other; the effect of such heavy handed State and local regulation as to make the STB's siting regulation immaterial; conditions that the STB may place on the grant of a siting license (including conditioning the continuance of the siting permit with compliance with State and local laws), what parties may seek to enforce those conditions (and whether the legislation in effect would permit those not able to enforce State and local laws directly to do so indirectly), whether the effect of the enforcement of those conditions on the Federal level may exceed the effect of enforcement of the same requirements under State and local laws, the enforcement mechanisms available to the STB short of revocation of a siting license; and the effect of revocation of a siting license.

VI. The Final Scene

A spaghetti western often ends in violence, with many dead and wounded, all wondering who was in the right, whether the fight was worth it, and uncertain as to the future. There have been many, and there will continue to be, gunfights played out in the story of railroad-operated transfer stations and ICCTA Preemption. Whether the ending will be characteristic of the typical spaghetti western is yet to be determined.