UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)	
v.	)	Civil Action No. 2:16-cv-16
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	)	

MOTION FOR PRELIMINARY INJUNCTION AND EMERGENCY HEARING

NOW COMES Defendant, Town of Shelburne, and hereby moves for a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a), with an emergency hearing to be held on the instant motion, ordering Plaintiff, Vermont Railway, Inc., to cease work on property located at 2087 Shelburne Road, also identified as parcel 6-1-13, with Span number 582-183-11857. In support thereof, Defendant submits the following Memorandum of Law and supporting materials.

MEMORANDUM OF LAW

The Town of Shelburne ("the Town") is seeking a preliminary injunction ordering Vermont Railway, Inc. ("Railway") to cease developing property located at 2087 Shelburne Road, also identified as parcel 6-1-13, with Span number 582-183-11857 ("the Property") while this Court rules on the pending claims, in part, for declaratory judgment as to whether the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts certain state and local laws that the

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Town asserts are applicable to this project. As will be discussed further, the Town has a likelihood of success on the merits and faces continued irreparable harm if Railway is continues project development on the Property for the pendency of the action.

I. PROCEDURAL HISTORY

On January 20, 2016 Joe Colangelo, as the Town Manager/Zoning Enforcement Officer for the Town issued a Notice of Violation for development on the Property. Complaint for Injunctive and Declaratory Relief, Civil Action No. 1:16-cv-16 ("Federal Complaint") ¶ 17; *see also* Notice of Violation, Jan. 20, 2016 (Federal Complaint Ex. B); Notice of Violation, Feb. 11, 2016 (attached hereto as Ex. 1). On January 25, 2016 the Town filed Town of Shelburne v. Vermont Railway, Inc., Docket No. 1-9-16 Vtec in State of Vermont Superior Court, Environmental Division. *See* Federal Complaint ¶ 20 (Federal Complaint Ex. C); *see also* Complaint, 1-9-16 Vtec (Federal Complaint Ex. C). The Town also concurrently filed its Motion for Preliminary Injunction. Motion for Preliminary Injunction, 1-9-16 Vtec (attached hereto as Ex. 2). The Town moved to amend its Complaint on January 26, 2016, Motion to Amend Complaint, 1-9-16 Vtec (attached hereto as Ex. 3); Amended Complaint, 1-9-16 Vtec ("Amended State Complaint") (attached hereto as Ex. 4), and served its Complaint, Amended Complaint, Motion to Amend Complaint, and Motion for Preliminary Injunction on Railway on January 27, 2016. Acceptance of Service, 1-9-16 Vtec (attached hereto as Ex. 5).

Railway did not initially notice the removal of the state action to federal court pursuant to 42 U.S.C. § 1441 *et seq*. Federal Complaint. Instead, Railway filed its own, and competing, complaint. Id. On January 27, 2016 Railway noticed the

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removal of Town of Shelburne v. Vermont Railway, Inc., Docket No. 1-9-16 Vtec, Notice of Removal (attached hereto, without exhibits, as Ex. 6).

Both the federal and state actions raise the same question regarding preemption of state and local law by the ICCTA. *Compare* Federal Complaint *with* Amended State Complaint. However, the Town's state action also raises a private cause of action regarding the Railway's unlawful interference with the Town's easement rights. Amended State Complaint ¶¶ 38–43. Railway filed its Stipulated Motion to Consolidate on February 3, 2016, to which the Town assented. Stipulated Motion to Consolidate, Civil Action Nos. 1:16-cv-16 and 1:16-cv-20 (attached hereto as Ex. 7).

Given the extensive development work already done on the Property, the Town now moves this Court for a preliminary injunction ordering Railway to cease work on the Property. The Town also moves this Court to schedule a preliminary injunction hearing at the earliest possible date.

III. PRELIMINARY INJUNCTION

Federal courts have the power to grant preliminary injunctions under Fed. R. Civ. P. 65(a). The Second Circuit has required a showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Cacchillo v. Insmed, Inc., 638 F.3d 401, 405–06 (2d Cir. 2011). Whether the preliminary injunction is in the public interest should also be considered. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a

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preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). Further, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tx. v. Camenisch, 451 U.S. 390, 395 (1981). Absent an injunction, there is no way to go back in time and put the parties in their current positions if Railway is allowed to continue with unfettered development during the course of this litigation and this Court finds that the ICCTA does not preempt all state and local laws relative to this project.

A. IRREPARABLE HARM

The Town lacks complete information from the Railway regarding the scope of the project. The lack of information leads to difficulty in assessing the totality of the irreparable harm. Railway has already cut trees to the edge of the LaPlatte River.[1] Affidavit of Gary von Stange (attached hereto as Ex. 8) ¶ 5; Amended State Complaint ¶ 13; Affidavit of Derrick Senior (attached hereto as Ex. 9). Requests for a site visit, made in connection with proceedings in a petition to abandon two Act 250

[1] "[H]earsay evidence may be considered by a district court in determining whether to grant a preliminary injunction. The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage. To hold otherwise would be at odds with the summary nature of the remedy and would undermine the ability of courts to provide timely provisional relief. Mullins v. City of N.Y., 626 F.3d 47, 52 (2d Cir. 2010); *see also* Univ. of Tx. v. Camenisch, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.").

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permits that remain outstanding on the property, have been objected to.[2] Petitioner's Objection to Town's Request for a Site Visit (attached hereto as Ex. 10).

Beyond what is visible from just east of the railroad tracks and the LaPlatte River and the images provided by Town residents, the Town has no definitive way of knowing what is happening on the Property. Certainly, however, what is known to have happened on the property is already quite extensive and the vast tree cutting and clearing of acres and acres of unique forest habitat has already changed the state of the Property in a permanent and irremediable way. These changes have already caused irreparable harm to the Town and its residents and will continued to cause further harm if Railway is allowed to continue with this unbridled demolition of ecosystems and construction. Some of the clearing is even suspected to be within an easement held by the Town. *See* Amended State Complaint ¶ 39. Full-grown trees cannot be put back in the ground, and large-scale clearing of this kind cannot be reversed.

The Town has reason to believe that the completed project will alter the traffic patterns of the area and lead to a significant increase in site trips per day, which has the potential to create a public health and safety hazard. *See* id. ¶¶ 8–9; Affidavit of James W. Warden ¶¶ 4–5 (attached hereto as Ex. 11). In fact, Railway, in response to being served with a Notice of Violation, temporarily blocked off a thoroughfare through a parking lot previously used for emergency response vehicles, which created

[2] While not pertinent to this litigation, the State of Vermont, Natural Resources Board District 4 Environmental Commission is currently reviewing Northern Vermont Financial Corporation's request to abandon certain Act 250 permits. The most recent hearing was held on January 11, 2016 and no decision and order has been issued since.

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a health and safety issue for the Town. *See* id. ¶¶ 6–9; *see also* Heather McKim, Vermont Rail System Files Complaint Against Shelburne, Shelburne News, Jan. 27, 2016 (attached hereto as Ex. 12); Lynzi DeLuccia, Hundreds of Shelburne Residents Raise Concerns Over Salt Shed Project, WCAX.com, Jan. 27, 2016 (attached hereto as Ex. 13).

It is also reasonably likely—especially given the property's location in close proximity to the LaPlatte River, and the presence of wetlands and archaeological artifacts—that there will be significant and irreparable damage from construction without proper review. *See* Amended State Complaint ¶¶ 4–6, 10–11; Letter from Heather Furman, Director of The Nature Conservancy to Peter Keibel, District #4 Coordinator, Natural Resources Board (Jan. 27, 2016) (attached hereto as Ex. 14); Eric Sorenson, Charlie Hohn & Avery Shawler, Natural Communities of the LaPlatte River Marsh Natural Area (Jan. 2016) (attached hereto as Ex. 15); State of Vermont Land Use Permit, 2C0828 "Revised" ¶¶ 21–22, (Explains permit requirements for "unstudied" and "studied portions of the archeologically sensitive areas" of the Property.) (attached hereto as Ex. 16); State of Vermont, District Environmental Commission, Application #4C0828, Findings of Fact and Conclusions of Law and Order "Revised" ¶¶ 31–32 ("The Vermont Division for Historic Preservation has reviewed the project and determined that portions of the property along the LaPlatte River appear to be archeologically sensitive . . . .") (attached hereto as Ex. 17). Some of this damage is already been done and is relative to the extent of the work. *See* Affidavit of Gary von Stange ¶ 2. Without access to the Property, there is no way to fully evaluate and appreciate the extent of the impacts.

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Most importantly, Defendant is not amenable to temporarily delaying construction so as to give the Town and its residents the opportunity to engage in meaningful review and a dialogue as to the scope and impact of the project as envisioned by Railway. *See* Amended State Complaint ¶¶ 14–15. It was only after Railway received a Notice of Alleged Violation from the Vermont Department of Environmental Conservation (attached hereto as Ex. 18) that the Railway temporarily ceased clearing the Property, but it is anticipated that clearing will re-commence shortly. Given Railway's actions thus far, irreparable harm that will forever change the landscape of the Town and State will continue, unabated, unless they are enjoined.

B. SUCCESS ON THE MERITS

It is likely that the Town will succeed on the merits and review over some portion of the project will be required. "[T]here is a presumption that 'state and local regulation of health and safety matters can constitutionally coexist with federal regulation.'" In re Vt. Ry., 171 Vt. 496, 499–500 (Vt. 2000) (emphasis added) (citing Hillsborough County, Fla v. Automated Med. Labs., Inc. 471 U.S. 707, 716 (1985)); *see also* In re Appeal of Vt. Ry., Inc., Nos. 6-1-98 Vtec, 126-7-98 Vtec, 224-12-98 Vtec, 1999 WL 34792328 (Vt. Envtl. Ct. May 26, 1999) (Wright, J.), *aff'd*, 171 Vt. 496 ("The mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state or local regulation. The federal law preempts only state and local regulation related to the rail transportation aspects of the business . . . .").

1. MUNICIPAL POLICE POWER – HEALTH AND SAFETY

While details of the full magnitude of the project have not been disclosed, there are already key implications that the project will affect the health and safety of

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residents of the Town and State through traffic pattern modification and the storage and distribution of potentially dangerous materials in close proximity to the LaPlatte River. Congress narrowly tailored the ICCTA preemption only to displace state and local regulation that attempts to manage rail transportation. Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 157–58 (4th Cir. 2010). "[S]tate and local governments may act, pursuant to their general police powers, to regulate certain areas affecting railroad activity . . .." Id. at 158; Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1133 (10th Cir. 2007) ("[S]tate and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."); Island Park LLC v. CSX Transp., 559 F.3d 96, 105–06 (2d Cir. 2009). To the best of the Town's knowledge, Railway has not conducted a traffic impact analysis and the Property is already in an area with significant congestion. Affidavit of Gary von Stange ¶¶ 11–12. Monitoring and ensuring the health and safety of pedestrians and drivers falls squarely within a municipality's police powers. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health . . . these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.").

2. PROJECT OUTSIDE SCOPE OF THE ICCTA

What is known about the project already raises concerns that more than just "transportation by rail" will be occurring on the Property, meaning that certain aspects are outside the scope of the ICCTA and other federal railroad statutes. With the known dimensions of the proposed salt sheds, there will be the capacity to store enough salt on the Property, at any one time, to de-ice all of the state highways in

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Vermont through twenty storms. *See* Affidavit of Gary von Stange ¶¶ 8–10. This goes well beyond the scope of transporting salt by rail to a central location to then be distributed to the rest of Vermont via trucks. Further, upon information and belief, the distribution of salt and other materials from the Property will not be conducted by Railway or a subsidiary thereof, but rather Barrett Trucking, a private Vermont corporation. *See* Amended State Complaint ¶ 8.

The Surface Transportation Board ("STB" or "the Board") has noted that "'[m]any rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as *truck transfer facilities*, weigh stations, or similar facilities *ancillary* to their railroad operations . . . ." In re Vt. Ry., 171 Vt. at 500, n.* (emphasis in original) (citing Borough of Riverdale, S.T.B. Finance Docket No. 33466, slip op. at 5 (Sept. 9, 1999) (appended hereto)). As discussed above, much of the development on this site is, at best, ancillary to railroad operations, and therefore, outside the scope of STB review but within State and local review. If the planned spur is actually only used to transport salt and fuel for Barrett Trucking then it is more akin to a private track than a spur used by a common carrier, which puts the planned project outside the scope of the ICCTA and STB jurisdiction. *See* 49 U.S.C. §§ 10501(a)(1), 10901, 10906; *see also* B. Willis, C.P.A., Inc. v. Surface Transp. Bd., 51 Fed App'x 321 (D.C. Cir. 2002) (per curiam) (The Surface Transportation Board has determined that it does not have jurisdiction over private tracks). At present, Railway is not even subjecting itself to STB review since as of February 1, 2016 no filings pertaining to the Property had been submitted to STB. *See* Email from Gabriel S. Meyer, Surface

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Transportation Board, Attorney-Advisor to Anthea Dexter-Cooper (Feb. 2, 2016) (attached hereto as Ex. 19).

The Town does not currently have an understanding as to who will own the salt inside the salt sheds. The ICCTA does not contemplate exempting massive salt sheds from regulation simply because the salt was, at one point, transported by rail, especially when the storage of salt raises concerns about clean water and the discharge of pollutants. *See generally* 33 U.S.C. § 1251 *et seq*. It is anticipated that how to harmonize the ICCTA with other federal statutes will become a key portion of this litigation. *See, e.g.*, Tyrrell v. Norfolk S. Ry. Co., 248 F.3d 517, 523 (6th Cir. 2001).

C. BALANCE OF HARDSHIPS

Alternatively, this Court should grant the Town's motion for preliminary injunction because there are sufficiently serious questions going to the merits that make them fair ground for litigation, and the balance of hardships tips towards the Town. The party seeking to overcome the presumption that certain state and local regulations can coexist with federal regulations—here, the Railway—"bears a heavy burden." In re Vt. Ry., 171 Vt. at 500 (citing De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997)). While the ICCTA or other federal railroad acts may preempt some State and local ordinances, there is a strong likelihood that the Town will, at the very least, retain approval and review over aspects of the project concerning health and safety, and those portions of the project which are not related to "transportation by rail carriers." *See* 49 U.S.C. §§ 10102(9), 10501.

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Again, the lack of disclosure of project details by Railway makes it difficult to answer the necessarily fact-based question of ICCTA preemption, which requires an analysis of whether the state or local law "would have the effect of unreasonably burdening or interfering with rail transportation." Tubbs v. Surface Transp. Bd., __ F.3d __, 2015 WL 9465907, *3 (8th Cir. 2015) (internal quotation marks omitted) (appended hereto); *see also* Emerson, 503 F.3d at 1133 (citing CSX Transp., Inc., S.T.B. Finance Docket No. 34662, slip op. at 4 (May 3, 2005) (appended hereto)) ("The STB has held that to decide whether a state regulation is preempted 'requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.' We agree with this standard and adopt it."). A thorough preemption analysis will require facts not made available to the Town, thereby necessitating discovery. In no way is this action a means to stall a railroad, needlessly delay development permissible under federal law, or foreclose or unduly restrict Railway's ability to conduct its operations. A preliminary injunction will simply preserve the positions of the parties while this Court rules on the pertinent federal questions for which both parties are so keen to get an answer.

D. PUBLIC INTEREST

While what the public wants should not be determinative, it is in the public's interest to briefly "press pause" while the preemption issue is decided. Such a consideration is consistent with federal case law. *See* Winter, 555 U.S. at 20.

IV. CONCLUSION

As Railway is bound to argue, repeatedly, the ICCTA exists, in part, to ensure that railways are not delayed in their development because of cumbersome state and

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local regulations. However, preemption is a fact-based determination and the Town is only seeking to preserve the parties' respective positions and the current state of the Property while this Court rules on the preemption litigation and determines what laws apply to this development. Preliminary injunctions exist to serve just this sort of purpose, and maintain the status quo while litigation progresses. Delaying holding an emergency hearing and or denying the motion for preliminary injunction only prolongs the time period in which Railway can continue development without restriction of potentially applicable State and local law.

WHEREFORE, the Town respectfully requests that this Court:

A. Schedule an emergency hearing at this Court's earliest possible convenience;

B. Grant the Town's Motion for Preliminary Injunction; and

C. Order Railway to cease all development on the Property until this Court can issue a declaratory judgment on whether, and to what extent, the ICCTA preempts applicable state and local laws, and how best to harmonize the ICCTA with other federal laws including, but not limited to, the Clean Water, Clean Air and Safe Drinking Water Acts.

Dated this 16th day of February, 2016.

Respectfully submitted,
TOWN OF SHELBURNE
By and through its counsel,
__/s/ Claudine C. Safar, Esq.__

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