18–188-cv

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT RAILWAY, INC.,

Plaintiff-Counter-Defendant-Appellee,

–v.–

TOWN OF SHELBURNE,

Defendant-Counter-Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLEE VERMONT RAILWAY, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee Vermont Railway, Inc. discloses that it is wholly owned by Trans Rail Holding Company, a Vermont corporation. No publicly held corporation owns stock in Vermont Railway, Inc. or Trans Rail Holding Company.

TABLE OF CONTENTS

Brief Pages

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly held following a multi-day evidentiary hearing that the Town of Shelburne's Storage Ordinance was preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. §§ 10501 *et seq.* as to the Railroad and its facilities because the ordinance (1) discriminates against the Railroad; and (2) significantly interferes with Railroad operations.

2. Whether the District Court abused its discretion in issuing a permanent injunction against enforcement of the Storage Ordinance and similar provisions in the Town's Zoning Bylaws.

STATEMENT OF THE CASE

I. INTRODUCTION

This appeal involves the historic federal preemption of state and local laws regulating railroads and a municipality's efforts to unduly restrict lawful railroad operations and thereby interfere with interstate commerce.

Plaintiff-Appellee Vermont Railway, Inc. ("Railroad") is a family-owned short-line railroad serving the rail freight needs of customers and shippers in Vermont. In late 2015, the Railroad purchased a tract of industrially-zoned land on its main line in Shelburne, Vermont to develop a state-of-the-art, rail-to-truck transloading facility ("Transloading Facility") intended for the handling of bulk

commodities, primarily road salt, shipped to Vermont by rail and used for deicing winter roads.[1]

Defendant-Appellant Town of Shelburne ("Town") thereafter sought to impose pre-construction permitting requirements on the Transloading Facility in conflict with this Court's preemption decision in Green Mountain Railroad Corp. v. State of Vermont, 404 F.3d 638 (2d Cir.), cert. denied, 546 U.S. 977 (2005). In response, the Railroad brought the underlying action for declaratory and injunctive relief on grounds that local regulation was preempted since railroad activities in Shelburne constituted "transportation" by a "rail carrier" within the meaning of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. §§ 10501 *et seq.*

In an Opinion and Order dated June 29, 2016 (Joint Appendix ("JA")-315-52), the District Court (Sessions, *J.*) agreed with the Railroad that activities at the Transloading Facility were "transportation" by "rail carrier" within the meaning of ICCTA and enjoined the Town from imposing pre-construction permitting requirements. The Town thereafter moved for reconsideration, which the District Court denied on June 28, 2017. (JA-353-88). On August 21, 2017, the District Court entered partial final judgment on its June 29, 2016 and June 28, 2017 Orders. (JA-389). The Town did not appeal and as a result, the District Court's

[1] Transloading is the practice of transferring a shipment from one mode of transportation to another, as in rail-to-truck.

determination that the Railroad's transloading in Shelburne constitutes "transportation" within the meaning of ICCTA is *not* at issue in this appeal.

In response to the District Court's Order denying the Motion to Reconsider, the Town enacted an Ordinance Regulating the Storage, Handling and Distribution of Hazardous Substances ("Storage Ordinance") on August 8, 2017, to regulate the location, quantity, and storage duration of freight and commodities transported by the Railroad through the Transloading Facility.[2] (JA-394-400). The Town claimed the Storage Ordinance was enacted pursuant to the narrow "police power" exception to ICCTA preemption. At the time of enactment, the Transloading Facility had been constructed and was operational.

The Railroad again sought injunctive relief. In an Opinion and Order dated December 7, 2017 (Special Appendix ("SA")-1-30), the District Court made extensive factual findings after an evidentiary hearing and concluded that the Storage Ordinance, as well as Sections 1950.1 and 1950.2(A) of the Town's Zoning Bylaws ("Performance Standards"), were preempted by ICCTA because they discriminated against rail carriage and constituted an unreasonable burden upon Railroad operations. The District Court permanently enjoined their enforcement against the Railroad and its facilities in the Town. Final judgment

[2] Amended on October 24, 2017 (JA-401-09).

was entered on January 2, 2018. (SA-31-33). The Town appeals this Final Judgment and the December 7, 2017 Opinion and Order.

II. THE TRANSLOADING FACILITY

The Railroad is a Class III short line railroad operating 128 miles of rail line between Hoosick Falls, New York and Burlington, Vermont. (JA-31/772:11-773:9, JA-60/889:5-24, JA-317). The Railroad is a "rail carrier" as defined by ICCTA, 49 U.S.C. § 10102(5). It is one of five separate railroads comprising the Vermont Rail System, which connect to long haul carriers as part of the national interstate rail system. (JA-61/890:7-13). While the Railroad offers some passenger service, it primarily transports freight, from which it derives over 95% of its revenues. (JA-61/890:14-891:3).

Prior to constructing the Transloading Facility, the Railroad transloaded salt at its facility in Burlington, Vermont (the "Burlington Facility"). (JA-317). By 2015, the Burlington Facility had become outdated and inefficient for the Railroad. (JA-318). Its sheds had not been designed to store road salt and were too small to accommodate the State of Vermont's increased salt needs and the short-term storage capacity required by the Railroad's major shipping customer.[3] (JA-63/898:16-899:9, JA-193/45:7-46:21, JA-318).

Increased short-term storage capacity was critical. The Railroad's shipping

[3] Cargill.

customer sought to transport more salt to the region in summer months when (1) rail car movement was more efficient and (2) in order to utilize the railcars for shipping to other regions during the fall and winter months. (JA-51/853:2-25, JA-193/46:22-47:12). The Burlington Facility's short-term salt storage could only accommodate 40,000-45,000 tons and greater seasonal storage capacity would be required to accommodate the logistical needs of the shipper. This is in part because the facility had run out of salt during prior seasons. (JA-51/853:2-5, JA-52/854:2-8, JA-193/47:13-23). By increasing short-term storage capacity, more salt could be efficiently received in warmer weather for eventual distribution during the winter season when demand was strong. (Id.).

In late 2015, the Railroad acquired a 34-acre tract of land in Shelburne, Vermont (the "Shelburne Property") to construct a much-needed facility for unloading bulk road salt and other commodities arriving by rail, and for the temporary storage of salt in sheds pending local distribution. (JA-317-19). The Shelburne Property was selected for operational efficiency and location—it is situated on the Railroad's main line in an area zoned for industrial use and north of Shelburne Village. (JA-204/89:4-16).

In late 2015, the Railroad hired environmental engineering firm Vanasse Hangen Brustlin, Inc. ("VHB") to provide planning and development services for the Shelburne Property. (JA-194/51:20-23). VHB is also responsible for

permitting and environmental assessment at the Transloading Facility. (JA-218/147:12-19). Mr. Jeffrey Nelson, VHB's Director of Environmental and Energy Services, has overseen this work since late 2015. (JA-218/147:4-11).

In 2016, VHB, on behalf of the Railroad, submitted an application to the Vermont Department of Environmental Conservation ("DEC")—acting as federal designee of the U.S. Environmental Protection Agency (JA-218/148:8-13)—for an NPDES[4] Multi-Sector General Permit for Industrial Activity Stormwater Discharges ("MSGP"). (JA-113/570:16-571:5). A Stormwater Pollution Prevention Plan ("SWPPP") was prepared and submitted as part of that application. (JA-219/149:7-150:15). DEC, in consultation with the Department of Fish and Wildlife and other State agencies, evaluated the plan for the facility and its potential impact on water quality, wetlands, and endangered species. (JA-219/150:7-151:24). The Town was invited to, and did participate in the SWPPP process. (SA-11). A public hearing was held. (JA-280/389:25-290:2).

Bordering the Shelburne Property is the LaPlatte River. (JA-57/877:14-17). A rail line's proximity to a body of water is not uncommon in Vermont, as the Railroad's President, Mr. David Wulfson, explained:

> we live in a mountainous area and in the mid 1800's when the engineers constructed these railroads they took the easiest and most efficient route, and in Vermont that

[4] "NPDES" stands for "National Pollutant Discharge Elimination System."

> generally is alongside a river or a stream in a valley or on the side of a mountain.

(JA-204/91:2-9).

On November 21, 2016, DEC issued the MSGP, authorizing the Railroad to discharge stormwater from the Transloading Facility to the LaPlatte River. (JA-769). An MSGP may be appealed within 30 days of issuance pursuant to 10 V.S.A. Chapter 220.[5] The Town chose not to appeal. (JA-770, SA-11).

The Railroad's MSGP includes monitoring requirements in compliance with the SWPPP and annual reporting obligations. (JA-769-70). The Railroad must "monitor for the following parameters as identified in the approved [SWPPP]; pH, temperature, conductivity, and chloride." (JA-769, SA-12). The SWPPP mandates quarterly groundwater and surface water monitoring and adherence to environmentally-focused best management practices ("BMPs"). (JA-228/185:3-14, SA-11-12). The Railroad must also "prepare an annual report that includes the findings from the annual comprehensive site inspection and any corrective action documentation. The report must be submitted to [DEC] within 45 days of conducting the annual compliance inspection." (JA-769-70, SA-11).

Construction began on the Transloading Facility in early 2016. The final construction plans included a rail spur, two salt sheds with a combined capacity of

[5] The Town's drinking water does not come from water sources in the vicinity of the Transloading Facility. The drinking water for the Town is sourced from the Champlain Water District. (JA-225/175:6-12).

80,000 tons; a truck scale and truck scale office; and a stormwater pond and associated infrastructure. Construction on the first salt storage shed was completed in late fall 2016 (SA-6) and the Railroad began receiving deliveries of salt for the 2016/2017 winter season after DEC approved the MSGP.

A second salt shed was completed in June 2017, at which point the Railroad had invested $5.5 million in construction of the new facility. (JA-189/30:10-16, JA-203/87:1-6). It was only after the second salt shed was completed that the Town hastily enacted its Storage Ordinance.

III. PRIOR PROCEEDINGS

In June 2015, the Railroad met with the Town to discuss early site plans prepared by VHB. (JA-319). On December 23, 2015, a copy of the Notice of Intent submitted to DEC as part of the application for a NPDES Discharge Permit for Stormwater Runoff from Construction Sites ("Construction General Permit") was submitted to the Town.[6] (JA-319). On January 20, 2016, the Town issued a Notice of Violation asserting that the Railroad had violated the Town's Zoning Bylaws by commencing land development without a zoning permit. (JA-320). On January 25, 2016, the Town filed a Complaint and Motion for Preliminary Injunction against the Railroad in the Environmental Division of the Vermont

[6] The Construction General Permit was issued on February 24, 2016. (JA-319).

Superior Court. (JA-320).

On January 26, 2016, the Railroad filed the underlying action in the District of Vermont seeking a declaratory judgment that ICCTA preempts the Town's zoning regulations as applied to the Transloading Facility. (JA-321). On January 27, 2016, the Railroad removed the Town's state court action to the District of Vermont, and the cases were consolidated in Case 2:16-cv-00016. (JA-321).

A. The District Court's June 29, 2016 Opinion and Order

A six-day evidentiary hearing was held in May 2016 on the Town's Motion for Preliminary Injunction and the Railroad's Motion for Judgment on the Pleadings and request for Declaratory Judgment. (JA-315-21). The District Court heard evidence from nineteen witnesses "on several broad topics," including impact of the development on the environment and traffic; relationship between the Railroad and the Transloading Facility's operator, Barrett Trucking, Inc.; and engineering and design by VHB. (JA-321-22).

On June 29, 2016, the District Court held that the Railroad's activities at its Transloading Facility constitute "transportation" by a "rail carrier." It issued an Opinion and Order wholly consistent with the precedent established in Green Mountain that ICCTA preempts the Town's pre-construction zoning requirement, and enjoined the Town from enforcing these requirements against the Railroad and its Transloading Facility. (JA-316-17). The District Court separately denied the

Town's motion for a preliminary injunction.[7] The District Court reserved judgment on the question of whether ICCTA preempts certain police powers relating to the operation of the Transloading Facility until the Town identified which specific ordinances or regulations it sought to enforce against the Railroad. (JA-317).

B. The District Court's June 28, 2017 Opinion and Order

In September 2016, the Town filed a Motion for Temporary Restraining Order and Motion for Relief from the District Court's June 29, 2016 Opinion and Order ("Motion to Reconsider"). (JA-353-54). The Town argued once again that the Railroad's activities at the Shelburne Property involved long-term warehousing that did not constitute "transportation" by a "rail carrier" within the meaning of ICCTA. (JA-381).

The District Court permitted additional discovery and held a second evidentiary hearing over five days in March and April 2017. (JA-354). In an Opinion and Order dated June 28, 2017, the District Court denied the Town's Motion to Reconsider, once again "find[ing] that the activity on the Shelburne property constitutes transportation by a rail carrier for purposes of 49 U.S.C.

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[7] The Town filed a notice of interlocutory appeal challenging the District Court's denial of its motion for a preliminary injunction. (JA-13/ECF 86). However, the Town voluntarily dismissed its own appeal. See Vermont Railway, Inc. v. Town of Shelburne, Docket No. 16-2648, 2017 WL 3254913 (2d Cir. Jan. 26, 2017).

§ 10501, and is thus subject to preemption under the ICCTA." (JA-388). The District Court noted that "the evidence the Town points to in fashioning [its] argument was largely available to the Court at the last hearing [in May 2016]. It is as unavailing to the Town now as it was then." (JA-382).

On August 21, 2017, the District Court entered Partial Final Judgment on the June 29, 2016 Opinion and Order in accordance with that order and the June 28, 2017 Opinion and Order. (JA-389). The Town did *not* appeal the Partial Final Judgment.

IV. PERMANENT INJUNCTION PROCEEDINGS/SUBJECT MATTER OF APPEAL

In its June 29, 2016 Order, the District Court ordered the Town to indicate "precisely which zoning regulations it intends to enforce" pursuant to its police powers. (JA-317). After the Town failed to respond for over a year, the Railroad filed a Motion to Enforce on July 24, 2017. (SA-6). The Town requested an extension of time to file its response to the Motion to Enforce until August 9, 2017—the day after a Town Selectboard meeting. (SA-6).

At that August 8, 2017 meeting, the Town Selectboard hastily enacted the Storage Ordinance, which was to go into effect on October 7, 2017. (JA-390). On August 9, 2017, the Town filed a response to the Railroad's Motion to Enforce advising the District Court that it intended to enforce the newly enacted Storage Ordinance and unspecified provisions in the Town's Performance Standards

against the Railroad. (SA-7).

On September 1, 2017, the Railroad filed a Motion for Preliminary Injunction to enjoin enforcement of the Storage Ordinance on grounds it was preempted. A preliminary injunction hearing was held on September 25, 2017. (JA-390). That same day, the Court entered a Temporary Restraining Order ("TRO") finding the Railroad had sufficiently demonstrated a likelihood of irreparable harm in that "the Storage Ordinance could likely lead to a complete shutdown of the Railway's transloading facility." (JA-391).

The parties thereafter completed discovery and a permanent injunction hearing was held on November 1-2, 2017.[8] (SA-8).

A. The August 8, 2017 Storage Ordinance

The Storage Ordinance prohibits the "storage" of any so-called "hazardous substance" within 250 meters of any school or waterway. (JA-396). A substance is deemed to be "stored" when it is "located on a site or in a facility for more than twenty-four hours." "Facility" is defined specifically to include any "rail car" as well as any "site or area where a hazardous substance is present on site, has been deposited, or is stored . . . placed or otherwise is located." (JA-395-96).

A substance is deemed "hazardous" if it contains "any item listed in Section

[8] On October 30, 2017, the Railroad submitted a written brief requesting a permanent injunction. (JA-25/ECF 251).

102, Table 302.4 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" *or* is listed by the Town in Table 1.0 of the Storage Ordinance. (JA-395). The Town included sodium chloride (common road salt) in the list of "hazardous" materials subject to regulation in Table 1.0 despite sodium chloride not being considered a hazardous substance by CERCLA or any other federal or state law.[9] The Town limited storage of road salt to 550 tons. (JA-400). At the time of enactment, there were two salt storage facilities in the Town—the Town's salt shed and the Railroad's Transloading Facility. The Town's salt shed has a maximum capacity of 550 tons. (JA-246/254:3-12). Table 1.0 also prohibits storage of ammonia, chloride, and hydrogen fluoride in amounts greater than 34,500 gallons, which happens to be the precise volume set by the U.S. Department of Transportation in 49 C.F.R. § 179.13 for maximum railroad tank car capacity. (JA-201/78:7-17).

In addition to regulating storage, the Storage Ordinance prohibits the "release" of any Table 1.0 substance. (JA-395). "Release" is defined as "releasing, discharging, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a [Table 1] hazardous substance into a waterway or…onto [Town]

[9] After hearing evidence from current and former members of the Shelburne Selectboard, the District Court concluded that it "is not convinced that the Town had a reasonable basis for classifying road salt as a hazardous substance…and attempting to regulate it as such." (SA-22).

land…." (JA-395). As noted by the District Court, this definition "would likely cover any spillage of road salt that occurs in the transloading process." (SA-10).

The Storage Ordinance provides for a fine of $800 per day for a violation, with each day of the violation constituting a separate offense. (JA-398). If an action is commenced in Vermont Superior Court for a violation, the violator may be subject to civil penalties of $10,000 per violation, with each day constituting a continuing and separate violation. (JA-398). This fine is in addition to any costs and fees incurred by the Town for removal, remediation, and monitoring of the site. (JA-398).

B. Amended Storage Ordinance

The Storage Ordinance was amended on October 24, 2017. (JA-401). The amendments included increasing the storage duration from 24 to 72-hours and the fuel-oil volumes in Table 1.0. (JA-403, 409). The definition of "Release" was amended to expressly permit the release or discharge of salt on Town roads, private driveways, parking lots, walkways, trails, and docks for anti-icing and de-icing. (JA-402).

C. The November 1-2, 2017 Evidentiary Hearing And December 7, 2017 Order

At the November 1-2, 2017 evidentiary hearing, the District Court heard testimony from twelve witnesses and received numerous documentary exhibits. The following individuals were called to testify by the Railroad:

- David Wulfson: President, Vermont Railway, Inc.
- Jeffrey Nelson: Director of Energy & Environmental Services at VHB
- Paul Goodrich: Town Highway Superintendent
- Josh Dein: Town Selectboard Member
- Antoinette Supple: Former Town Selectboard Member
- John Kerr: Former Vice Chair of Town Selectboard
- Joseph Colangelo: Town Manager

The Town called the following individuals to testify:

- Andres Torizzo: Principal Hydrologist, Watershed Consulting Associates
- John Diego: Principal, Mountain View Environmental Services
- Gary V. Hunter: C.E.O., Railroad Industries Incorporated
- Colleen Parker, M.D.: Town Selectboard Member
- Gary von Stange: Chair of Selectboard, Town of Shelburne

At the hearing, the parties agreed that the District Court could consider evidence and testimony introduced at the May 2016 and March/April 2017 evidentiary hearings. (JA-189/29:14-30:7).

After hearing evidence and considering previously introduced evidence and the parties' post-hearing memoranda, the District Court made factual findings and permanently enjoined enforcement of the Storage Ordinance in an Opinion and Order dated December 7, 2017. (SA-1).

SUMMARY OF THE ARGUMENT

Railroad transportation is subject to a pervasive and comprehensive scheme of federal regulation that significantly restricts the authority of states and municipalities to impose their own forms of regulation.

The District Court conclusively determined in its June 29, 2016 and June 28, 2017 Opinion and Orders (JA-315-388) that the Railroad's Transloading Facility and activities in the Town constitute "transportation" by "rail carrier" and thus are entitled to ICCTA preemption. Final judgment was entered on these orders and the Town did not appeal. (JA-389). Thus, this appeal is not about interpreting the text of ICCTA or whether activities and storage at the Transloading Facility constitute "transportation" within the Act. The Town is foreclosed from challenging these rulings.

This appeal instead involves the very narrow question of whether the Storage Ordinance fits within the limited "police power" exception to ICCTA preemption. This exception is available only where the exercise of police power does not unreasonably interfere with rail transportation or discriminate against rail carriers.

The test for determining whether ICCTA preempts a municipality's exercise of police power is fact intensive. In reaching its decision in the December 7, 2017 Opinion and Order, the District Court heard testimony from twelve witnesses and

received numerous documentary exhibits during the November 1-2, 2017 evidentiary hearing. There was substantial evidence that the Storage Ordinance would severely interfere with the Railroad's operations at the Transloading Facility and force the Railroad to abandon operations in the Town. There was also substantial evidence that the Town discriminated against the Railroad by hastily enacting the Storage Ordinance and targeting the Railroad's salt storage facility while exempting the Town's own salt shed—the only other salt storage facility in the Town. Finally, there was no evidence that the Storage Ordinance "achieves any meaningful health or safety goals…." (SA-25). The Town's own expert witness, Mr. John Diego, testified that mere storage of road salt or other commodities at the Transloading Facility does not pose a danger to public health and safety. The District Court properly concluded that the Storage Ordinance and Sections 1950.1 and 1950.2(A) of the Town's Performance Standards do not fit within the "police power" exception to ICCTA.

STANDARD OF REVIEW

The District Court made findings of fact based on witness testimony and other evidence. Those findings "must not be set aside unless [they are] clearly erroneous." Diesel Props S.r.l. v. Greystone Bus. Credit II LLC, 631 F.3d 42, 52 (2d Cir. 2011); Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1144 (8th Cir. 2015) (review of ICCTA preemption's "unreasonable-burden-or-interference test is fact

intensive. The scope of [appellate] review is therefore 'quite narrow.'"). The District Court's application of preemption principles is reviewed *de novo*. Premium Mortg. Corp. v. Equifax, Inc., 583 F.3d 103, 106 (2d Cir. 2009).

The District Court's grant of permanent injunction is reviewed for abuse of discretion. S.E.C. v. Pittsford Capital Income Partners, LLC, 305 F. App'x 694, 695 (2d Cir. 2008).

ARGUMENT

I. OVERVIEW OF FEDERAL REGULATION OF RAIL TRANSPORTATION AND ICCTA

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state and local laws that "interfere with, or are contrary to" federal law are invalid and preempted. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211 (1824); Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 104-05 (2d Cir. 1999) ("Under the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect.") (abrogated on other grounds)).

A. Rail Transportation Has Been Subject To Pervasive And Comprehensive Federal Regulation For Over A Century

"State and local railroad regulation has long been preempted to a significant extent." Joint Petition for Declaratory Order - Boston & Maine Corp. & Town of Ayer, Mass., STB Finance Docket No. 33971, 2001 WL 458685, at *4 (STB Apr. 30, 2001).

In 1887, Congress exercised broad regulatory authority over rail transportation when it enacted the Interstate Commerce Act and created the Interstate Commerce Commission. Island Park, LLC v. CSX Transp., 559 F.3d 96, 102 (2d Cir. 2009). Nearly one hundred years later, the Supreme Court observed that the statute counted as "among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981).

Thus, the Supreme Court "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with the congressional policy as reflected in the" Interstate Commerce Act. Id. (collecting cases); see, e.g., Missouri Pac. R. Co. v. Stroud, 267 U.S. 404, 408 (1925) (stating "[i]t is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive.").

In 1980, "Congress took additional steps to reduce regulatory authority of the states over interstate rail lines by passing the Staggers Rail Act of 1980." City of Auburn v. U.S. Government, 154 F.3d 1025, 1029 n.6 (9th Cir. 1998). Congress had found that over time, "[t]he combination of . . . onerous Federal regulations

and stiff competition from the motor carrier industry proved lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial collapse." H.R. Rep. No. 104-311, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802.

B. The ICC Termination Act of 1995

Congress continued this process of deregulation in 1995 when it enacted ICCTA. ICCTA abolished the Interstate Commerce Commission and created the Surface Transportation Board ("STB"), which Congress vested with "broad jurisdiction 'over transportation by rail carriers.'" Island Park, 559 F.3d at102 (quoting 49 U.S.C. § 10501(b)).

ICCTA broadly 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). "Rail carrier" is defined as a "person providing common carrier railroad transportation for compensation[.]" 49 U.S.C. § 10102(5).[10]

[10] In its June 29, 2016 and June 28, 2017 Orders, the District Court concluded that the Railroad's transloading activities constitute "transportation by a rail carrier" for purposes of 49 U.S.C. § 10501. (JA-332-37, JA-381-83). Because the Town did not appeal these Orders after partial final judgment was entered on August 21, 2017, it has waived appellate review of these determinations.

Moreover, ICCTA's express preemption clause entirely eliminated state regulation of interstate rail transportation, and the STB's jurisdiction over "transportation by rail carriers" was made "exclusive." 49 U.S.C. § 10501(b); see also Island Park, 559 F.3d at 102 (characterizing Section 10501(b) as an "express pre-emption clause").[11] "Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." CSX Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34662, 2005 WL 584026, *9 (STB Mar. 14, 2005) (hereafter "CSX Transp.").

Thus, Congress has long taken steps to ensure that the requirements of the federal government, not the states or local entities, should govern rail transportation.

C. No Presumption Against Preemption

The Town urges this Court to take a "cautious approach" to preemption in the area of "historic police powers." (Br. at 16-17). However, a "presumption against preemption" is inapplicable where state regulation touches upon areas historically subject to federal regulation. United States v. Locke, 529 U.S. 89, 90 (2000). Regulation of railroads is such a field that has been, and is, very heavily regulated by federal law. City of Auburn, 154 F.3d at 1029 (refusing to apply

[11] Given this historical and legal backdrop, the Town is simply mistaken when it suggests in its principal brief that the regulation of rail transportation is within the States' "historic police powers" and is a field "which the States have traditionally occupied." (Br. at 16-17) (internal citation omitted).

presumption against federal preemption in railroad case); see Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F. 3d 525, 532 (5th Cir. 2012) (noting history of significant federal presence in regulation of railroads in determining that transloading qualifies as transportation by a rail carrier). Thus, there is no presumption against the application of ICCTA preemption. Id.

D. The Scope of ICCTA Preemption Is Broad And Is Not Limited To "Economic" Regulations

As numerous courts—including this Court—have recognized, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than Section 10501(b) of ICCTA. Green Mountain, 404 F.3d at 645 (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)); City of Auburn, 154 F.3d at 1030. 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, 559 F.3d at 102 (quoting N.Y. Susquehanna and W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)).

The Town asserts that the scope of ICCTA preemption is limited to state and local regulations which are "economic" in character, asserting that ICCTA's "focus was *primarily economic* and its goal was to promote the growth, stability, and economic viability of the railroad industry by reducing federal *economic*

regulations." (Br. at 14-16) (emphasis supplied). Based upon this premise, the Town asserts that ICCTA "does not preempt municipal laws governing non-economic aspects of the railroad industry." Id. at 15.

This Court and other Circuit courts reject such an artificial distinction between "economic" and "environmental" regulations in the ICCTA context. Green Mountain, 404 F.3d at 644 (citing City of Auburn, 154 F.3d at 1031 with approval).[12] In an opinion cited approvingly by this Court, the Ninth Circuit explained:

> [G]iven the broad language of § 10501(b)(2), . . . the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

City of Auburn, 154 F.3d at 1031 (cited by Green Mountain, 404 F.3d at 644).

Rather than classifying a state regulation as "economic" or "environmental," "[w]hat matters is the degree to which the challenged regulation burdens rail transportation, *not* whether [the regulation] is styled as 'economic' or 'environmental.'" N.Y. Susquehanna, 500 F.3d at 252 (emphasis supplied); see

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[12] The Town draws another strained and artificial distinction between "pre-construction" and "post-construction" police powers. (Br. at 17-18). This Court has never drawn such a distinction and there is no reason to do so here. Rather, since Green Mountain, the touchstone of this and other courts' ICCTA analysis has been whether the challenged regulation "interfere[s] with railroad operations." Island Park, 559 F.3d at 106 (discussing Green Mountain).

CSX Transp., 2005 WL 584026, at *7 ("[T]he Courts that have examined [ICCTA] have uniformly concluded [that] any notion that the statutory preemption section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice.").

Thus, the law of this Circuit for the past thirteen years has been that, given the broad language of Section 10501(b), any distinction between "economic" and "environmental" in the ICCTA context is "not useful." Green Mountain, 404 F.3d at 644. The Town did not address, let alone distinguish, this Court's prior rejections of its argument. The Town provides no basis for this Court to depart from its well-settled precedent.

E. Local Police Power Is Subject To ICCTA Preemption

States and municipalities "are not free to impose any requirements that they wish on a railroad in the name of police power." CSX Transp., 2005 WL 584026, at *8. The case law in this area is well settled, and the scope of ICCTA is not in debate. See id. (STB decision finding local operational limits on movements of hazardous materials were preempted by ICCTA); City of Auburn, 154 F.3d at 1031; Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 160 (4th Cir. 2010) (affirming order that municipality's attempt to regulate an intermodal ethanol facility under the guise of "police powers" interfered with railroad operations and was therefore preempted).

Thus, in order for a local regulation to survive the preemptive effect of ICCTA, it must not "(1) discriminate against rail carriers or (2) unreasonably burden rail carriage." Id. This Court further recognized that although "local bodies retain *certain* police powers" in the face of ICCTA preemption, they do so to the extent that "the regulations protect public health and safety, are settled and defined, can by obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." Green Mountain, 404 F.3d at 643 (emphasis supplied). As the STB has stated, States and municipalities "cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce." CSX Transp., 2005 WL 584026, at *8.

This Court has described the types of local regulations that may avoid preemption under Section 10501(b): "[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements[.]" Green Mountain, 404 F.3d at 643; see also CSX Transp., 2005 WL 584026, at *8 ("[C]ourts have found it permissible for a state to maintain traditional regulation of roads and bridges so long as no unreasonable burden is imposed on a railroad or to apply state and local requirements such as *building and*

electrical codes so long as they do so without discrimination." (emphasis supplied)). The Town's ordinance cannot meet these requirements.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE STORAGE ORDINANCE IS PREEMPTED BY ICCTA

In its December 7, 2017 Opinion and Order, the District Court concluded that the Storage Ordinance "does not fit within the police power exception to preemption" because "(1) it discriminates against the Railway and (2) the significant burden it places on the Railway outweighs the Town's inconclusive and overstated public health and safety concerns." (SA-3). The District Court's preemption analysis was correct and should be affirmed in its entirety.

A. The Storage Ordinance Interferes With Railroad Operations

Extensive evidence from the November 1-2, 2017 evidentiary hearing and prior evidentiary hearings supports the District Court's finding that the storage ordinance "would have a severe impact on the Railway's operations at the [Transloading Facility]." (SA-20).

1. Enforcement Would Result In Closing the Transloading Facility And Placing The Railroad In Breach Of A Customer Contract

The Railroad's president, Mr. Wulfson, testified that the Railroad cannot operate the Transloading Facility and comply with the quantity and duration limitations in the Storage Ordinance. With respect to the 72-hour limitation on sodium chloride storage, Mr. Wulfson testified that it is impossible to

move/distribute all of the salt shipped through the Transloading Facility within 72 hours of receiving each rail shipment:

> The [salt] mine has no capability to put [salt] into storage somewhere and then put it back on a rail car. They load directly into rail cars. So those rail cars have to be available for the mine to run efficiently and they need to run the mine year-round to…cover the demands that they have contracted for.
>
> [The Railroad's] goal is to move these [rail cars transporting salt] as quickly as possible and…[t]he only way we can physically do that is by having our storage facility at the front line where it's needed.
>
> THE COURT: It's not realistic to say whenever a…train arrives, whether it's 10 trains or 50 trains, that you immediately take the salt out, get it into trucks, send it out? That's realistically impossible?
>
> MR. WULFSON: That's realistically impossible during most of the [winter] in April, for instance, after winter is gone and everyone's salt sheds are empty we might be able to do that for a week or two or maybe three until…those other facilities started to fill up, and then once that filled up we have no place to bring it after that.

(JA-193-94/48:18-49:25).

Mr. Wulfson explained that up to 200,000 tons of salt goes through the Transloading Facility per season, more than double the 80,000 short-term storage capacity. (JA-195/56:11-14). The Railroad cannot unload this salt directly onto trucks for immediate delivery. (JA-194/49:16-25). It is also impossible to transload this quantity per season and limit the short-term storage to 550 tons as required by the Storage Ordinance. Mr. Wulfson further testified that the road salt

crosses several state lines—stopping in rail yards in and around Ithaca, New York; Sayre, Pennsylvania; Binghamton, Mechanicsville, and Hoosick Junction, New York; and Rutland and Burlington, Vermont—before arriving at the Transloading Facility. (JA-202/84:1-22).

The Railroad also cannot move the stored salt out of the Town within 72 hours. (JA-203/85:14-15). First, the Railroad does not have any other location to accommodate the short-term storage of this salt. Second, the salt belongs to the Railroad's customer, Cargill. Cargill, not the Railroad, schedules the delivery of salt by rail to the Transloading Facility and pays the Railroad to "[t]ransload in Shelburne and store" the salt. (JA-203/85:20-22). Cargill does not pay the Railroad to unload the salt and transport it to a different storage location in Vermont pending delivery by truck. Mr. Wulfson explained that scenario would not be possible: "[e]veryone else's salt sheds are full, and even if we had a place to put it, I don't know that I could do it economically." (JA-203/85:16-19). Accordingly, the Railroad's operations and that of a major freight shipper would be substantially impacted and vastly reduced if the Town can require the Railroad to empty the Transloading Facility every 72 hours.

The Storage Ordinance would also place the Railroad in immediate breach of its 15-year, multi-million-dollar Salt Storage and Handling contract with

Cargill.[13] (JA-195/53:19-22). At the evidentiary hearing in April 2017, well prior to enactment by the Town of its Storage Ordinance, Mr. Wulfson explained the need for increased short-term storage capacity to meet Cargill's needs and the critical winter salt demands:

> MR WULFSON: [The Burlington Shed] would hold about 45,000 tons [of salt] and it wasn't enough…storage so that we could hold enough to make it through winter without unloading salt in the winter. The primary objective of increasing our storage ability is for us to be able to unload the majority of the winter's needs in the summertime when it's most efficient, and it also affords our customer to be able to use their cars somewhere else in the middle of the winter. So that's what we're trying to accomplish.
>
> Q: And fair to say Cargill is an important client for the Railroad?
>
> MR WULFSON: Absolutely. Yes.
>
> Q: And so providing this transload facility is important to satisfy the needs of your major customer?
>
> MR WULFSON: Yes.

[13] The Town argues that the Railroad's Salt Storage and Handling contract with Cargill is a mere "side venture" and should have no impact on the preemption analysis. (Br. at 35). The Town supports this argument with the incongruous analogy between Cargill—a rail customer with a handling contract—and a "Six Flags [sic] amusement park…." Id. The Town's argument conveys a gross misunderstanding of railroad operations. This argument is also foreclosed by the District Court's non-appealable partial final judgment. Following two evidentiary hearings, the District Court properly rejected the Town's argument that seasonal/short-term salt storage at the Transloading Facility is not transportation. (JA-383). "In fact, the Second Circuit has found that storage of salt for winter uses constitutes transportation within the meaning of ICCTA." Id. (citing Green Mountain, 404 F.3d at 640).

(JA-105/539:17-540:7). Mr. Wulfson reiterated this point at the November 1-2, 2017 hearing. He further explained that Cargill required the increased short-term storage capacity so that Cargill could honor its own commitments to customers and avoid a shortage of road salt during the Vermont winter. (JA-195/53:19-54:6). In fact, the Railroad's ability to provide short-term storage of up to 80,000 tons of road salt in connection with the transloading process was the basis for the long term (15-year) contract, as opposed to a year-to-year contract:

> Q: How important is it – for the purpose of obtaining the freight business from Cargill is it to Vermont Rail to have this [Shelburne] transload facility?
>
> MR. WULFSON: It's a necessity and in our old contract that I had with Cargill it was a year-to-year contract…. [U]nder this new facility I now have a 15-year deal with [Cargill] guaranteeing the Railroad that we'll have a revenue stream for that amount of time and probably further….

(JA-106/543:23-544:11). Thus, under the Storage Ordinance, the Railroad would be forced to reduce critical customer storage to a mere fraction of its overall capacity—a fact which would significantly interfere with the Railroad's operations and ability to satisfy existing obligations to transload customers.

The Storage Ordinance's prohibition on storage of diesel fuel in excess of 2,000 gallons also directly interferes with rail transportation.[14] (JA-199/69:17-21).

[14] The amendment to Section 6.0(D) of the Storage Ordinance (JA-404) pertains to "actively operating" railcars and does not alleviate this interference.

While a single tank car can hold upwards of 34,500 gallons, the fuel tank of a locomotive holds as much as 3,600 gallons of diesel fuel. (JA-199/69:25-70:6, JA-201/79:17-18). Accordingly, the 2,000-gallon limitation improperly seeks to regulate and dictate the size and type of railroad equipment that can enter the Transloading Facility. This limitation on fuel storage, purportedly for the protection of health and safety, is also entirely inconsistent with the Storage Ordinance's exemption for pre-existing fuel filling stations or private on-site fueling of vehicles, equipment, or vessels. Such facilities may store unlimited quantities of fuel in proximity to a school or waterway. (JA-402).

Furthermore, in certain circumstances federal law mandates that the Railroad set out railcars at a location off the main line, such as a side track, in the event of certain mechanical issues.[15] See e.g. 49 U.S.C. § 20303 ("Moving Defective and Insecure Vehicles Needing Repairs"). The Railroad does not have the ability to guarantee repair within 72 hours, particularly if the railcar is owned and controlled by a customer. (JA-202/81:17-82:3).[16] Thus, in this scenario, compliance with

[15] A side track is a siding that is connected to the main rail line but is not used to run the train through the main line. (JA-199/70:16-18).

[16] Other than the placarding requirements of certain railcars that would identify its contents, federal law generally prohibits the Railroad from publicly disclosing the nature and quantity railcar contents. See 49 U.S.C. § 11904 (Unlawful disclosure of information).

federal law (placing a fully loaded railcar on a side track in Town) would place the Railroad in violation of the Storage Ordinance.

Although the Railroad may not presently handle ammonia, chlorine, or hydrogen chlorine at the Transloading Facility, the Storage Ordinance would prohibit the Railroad from ever storing such substances in excess of 34,500 gallons, which is the precise limitation established by the U.S. Department of Transportation in 49 C.F.R. § 179.13 for tank car capacity and gross weight. By applying federal railroad quantities for a single tank car to the entire Transloading Facility, the Town is interfering in interstate commerce and the Railroad's common carrier obligations. This is precisely the type of local interference ICCTA was intended to prevent. See CSX Transp., 2005 WL 584026, at *9 ("Section 10501(b) is intended to prevent a patchwork of local regulations from unreasonably interfering with interstate commerce."); see also H.R. Rep. No. 104-311, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808 (noting the need for "uniformity" of federal standards for railroads and the risk of "balkanization" from state and local regulation).

2. The District Court Appropriately Accorded No Weight to the Town's Rail Industry Expert And That Determination Is Entitled To Deference

The Town does not dispute the conclusion that the Storage Ordinance would force the Railroad to abandon transloading of lawful commodities in Shelburne.

Instead, the Town argues that the Railroad should relocate its salt facility to another town despite expending $5.5 million to build the Transloading Facility prior to the enactment of the Storage Ordinance. (JA-203/87:1-6). In support of this argument at the evidentiary hearing, the Town introduced expert testimony from Mr. Gary Hunter. (SA-21). Mr. Hunter opined that the Railroad could comply with the Storage Ordinance by (i) acquiring property in a different town (Ferrisburgh, Vermont) and relocating the facility there; or (ii) by unloading the salt into trucks and storing it in another town. (JA-298/463:11-464:17, JA-302/478:15-22, JA-305/489:13-490:13). Mr. Hunter's opinion was not credible or supported by the evidence and the District Court was entitled to accord it no weight.[17]

The District Court is permitted "just as a jury would be, to believe some parts and disbelieve other parts of the testimony of any given witness. [The Second Circuit] is not allowed to second-guess the court's credibility assessments." Diesel Props S.r.l., 631 F.3d at 52 (internal citation omitted); Pope v. Cty. of Albany, 687 F.3d 565, 581 (2d Cir. 2012) ("A factfinder may certainly consider the bases for an expert's opinion and may accord the opinion less, or even no, weight if the record suggests that the bases are defective, incomplete, or questionable.").

[17] The Town argues in its principal brief that the District Court disregarded Mr. Hunter's opinion "simply because he is not from Vermont." (Br. at 55). There is no support for this charge.

The District Court correctly concluded that Mr. Hunter's opinion "is not realistic. In listening to Mr. Hunter's testimony, it was apparent he lacked familiarity with the particularities and needs of the Vermont region, the Town, and the Railway."[18] (SA-22). For one, the Railroad had explored other locations, but selected the Shelburne Property for operational efficiency, location, and safety giving due consideration to the effects of truck traffic leaving the facility.[19] (JA-204/89:4-16, JA-76/952:18-953:10).

Moreover, with respect to Mr. Hunter's suggestion that another facility could be built, Mr. Wulfson testified:

> *I don't see that that's possible*…. [I]f I was to do that, number one, I don't know where it would be done. Number two, it certainly couldn't be done in time to comply with this ordinance; and, number three, *I might be out of business by the time I tried to build another five and a half million dollar facility to take care of the one that I just built.*

(JA-203/88:11-17) (emphasis supplied).

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[18] Mr. Hunter was not familiar with ICCTA or the Court's prior rulings. (JA-303/483:7-8, JA-304-05/488:4-489:8).

[19] The Town of Ferrisburgh is south of Shelburne Village. Mr. Wulfson testified that 85% of traffic from the Transloading Facility would travel north of the Transloading Facility to access Interstate 89. If the facility were located south of Shelburne Village, it would significantly increase truck traffic in a densely populated portion of the Town. (JA-204/89:5-16). Mr. Hunter did not analyze the comparative effects of truck traffic associated with the Shelburne Property versus an alternative site in Ferrisburgh. (JA-305/490:8-19).

The District Court was also entitled to disregard Mr. Hunter's assumption that 80,000 tons of salt could be stored in other sheds. Mr. Wulfson testified repeatedly that there were no other sheds in the area, and certainly none that could accommodate this tonnage. (JA-203/85:7-19). Furthermore, the cost to purchase and build new sheds was not economically feasible after the Railroad already incurred $5.5 million to construct the Transloading Facility. There was no evidence that the Railroad could sustain a loss of this magnitude, rebuild, and continue to operate.

Moreover, the suggestion that a town may enact after-the-fact regulations, which foreclose operations that are part of rail transportation, is precisely the type of local interference preempted by ICCTA. See e.g., CSX Transp., 2005 WL 584026, at *8. If this were the case, nothing would prevent other towns on the rail line from enacting similar prohibitions on road salt or other commodities handled by the Railroad.

3. The Storage Ordinance Regulates "Transportation" As Defined By ICCTA

The Town argues that the Storage Ordinance "does not manage or govern rail transportation…only…duration and quantity of hazardous materials that may be stored…." (Br. at 16). This argument fails to acknowledge the broad statutory language of ICCTA, Second Circuit and other case law, and the final non-appealable Declaratory Judgment.

The term "transportation" is defined expansively to include "movement of passengers or property, or both, by rail" as well as "services relating to that movement, *including…storage*, handling and interchange of…property." 49 U.S.C. § 10102(9) (emphasis supplied). Accordingly, the services regulated by the Storage Ordinance constitute "transportation" by a "rail carrier" for the purposes of ICCTA preemption. (See e.g., JA-388). This issue is not properly on appeal, given that this finding was made in both the June 29, 2016 and June 28, 2017 Orders and is subject to final judgment. Having decided not to appeal, the Town is barred from further challenging that conclusion.[20]

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[20] The Town's reliance on Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) and Grosso v. Surface Transportation Board, 804 F.3d 110 (1st Cir. 2015) are unavailing. Florida East Coast Ry. concerns a zoning ordinance on a *non-railroad lessee* of a railroad right-of-way for *non-rail* transportation purposes and stands for the unremarkable proposition that state and local regulation is allowed when the activities in question do not constitute "transportation by rail carrier" and therefore fall outside the scope of STB exclusive jurisdiction. The Town relied on this case to oppose the Declaratory Judgment that ICCTA preemption applies to the Transloading Facility. The District Court specifically rejected this reliance in the June 28, 2017 Order. (JA-378). Thus, that case has no bearing in this appeal.

Grosso is similarly inapposite. Grosso concerns whether certain activities related to the handling of wood constitute "transportation" within the meaning of Section 10501(b). 804 F.3d at 113. (JA-383). Grosso *does not* undermine established precedent that activities at rail to truck transloading facilities that are part of rail transportation qualify for federal preemption. Nor does Grosso address the "police power" exception to ICCTA preemption. Id. Moreover, the Town's brief failed to disclose that on remand from the First Circuit, the STB again determined (after obtaining additional evidence) that the activities the Court found had not been adequately linked to rail transportation are in fact "related to" "'the movement

Finally, the Town's narrow reading of Section 10501(b) is contradicted by Green Mountain, in which this Court concluded that the storage of salt for winter use constitutes "transportation" within the meaning of ICCTA. 404 F.3d at 640. To the extent the Town believes otherwise, that argument was waived and is contrary to the statute and court precedent.

B. The Storage Ordinance Discriminates Against The Railroad[21]

"[F]or a state regulation to pass muster, it must address state concerns generally, without targeting the railroad industry." N.Y. Susquehanna, 500 F.3d at 254. The evidence at the November 1-2, 2017 hearing amply supports the District Court's finding that the purpose and effect of the Storage Ordinance was discriminatory in at least three respects: (1) it was enacted in response to litigation; (2) it regulates the Railroad's salt sheds but not the Town's salt shed; and (3) its key provisions lack scientific basis or support.

1. The Storage Ordinance Was Enacted In Response To The June 28, 2017 Opinion and Order

For over a year, the Railroad requested that the Town comply with the Court's June 29, 2017 Opinion and Order and identify the police powers it intended to enforce. The Town did not respond. On July 24, 2017, the Railroad

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of…property…by rail' and therefore part of 'transportation' under [ICCTA]." Grosso-Petition for Declaratory Order, 2017 WL 3268605, *9 (STB July 28, 2017). A second appeal is pending. Docket No. 17-1794 (1st Cir.).

[21] SA-17-20.

filed the Motion to Enforce. The Town requested an extension of time until August 9, 2017 to file its response to the Motion—the day after the Town Selectboard's meeting. (SA-6). The Town enacted the Storage Ordinance on August 8, 2017. (SA-6).

As Gary von Stange, Chair of the Selectboard testified:

> Clearly the precipitating factor in this case…. Certainly this litigation has impacted the passage of the hazardous materials ordinance….

(JA-311/515:24-516:9).

John Kerr, Vice Chair of the Selectboard at the time the Storage Ordinance was enacted, testified that the first time he learned that such an ordinance would be drafted was during an executive session on July 11, 2017. (JA-256/295:23-296:15). Mr. Kerr would not disclose who requested that the Storage Ordinance be drafted on grounds of attorney-client privilege. (JA-257/297:1-12). As of that date, litigation had been underway for over a year, and the Court had enjoined the Town from interfering in the construction of the facility. The Town was also aware that construction had been largely completed at a cost of $5.5 million to the Railroad.

Selectboard member Dr. Joshua Dein testified that the first he heard about an ordinance regulating "hazardous substances" was in August 2017. (JA-252/280:12-15). As far as Dr. Dein was concerned, the Storage Ordinance was not

under consideration until July 2017. (JA-252/280:18-22).

Selectboard member Dr. Colleen Parker also testified that the first she heard about a request to draft the ordinance was in late July 2017. (JA-309/505:7-12). Former Selectboard member Toni Supple, who served from 2013 to 2016, testified that during her tenure, there had been no request of the Town's attorney to draft a hazardous substances ordinance, nor could she recall a hazardous substances ordinance ever being an agenda item for the Selectboard's discussion. (JA-255/289:5-17). While she recalled issues pertaining to rail car storage in executive session, she testified that those discussions never extended to sodium chloride. (JA-255/290:16-22).

No current or former Selectboard member testified that the regulation of sodium chloride was discussed any time before the June 28, 2017 Order.[22]

[22] The Town argues that it amended the Storage Ordinance in response to public input. (Br. at 42). The amendments, however, do not reflect the Railroad's comments. Immediately upon learning of the Town's plans to enact the Storage Ordinance, the Railroad submitted a letter to the Selectboard and the Town manager, Mr. Joseph Colangelo, notifying the Town of its concerns. (JA-981). The Town was further placed on notice of the impact of the Storage Ordinance on Railroad operations by the Railroad's September 1, 2017 Motion for Preliminary Injunction *and* the District Court's findings supporting the Temporary Restraining Order. (JA-390). Despite this notice, the amended Storage Ordinance enacted on October 24, 2017 did not increase the quantity limitation for sodium chloride and did not meaningfully increase the limit on storage duration. (JA-401-09). Thus, one can infer that the Town was well aware that its Storage Ordinance would "likely cause the complete shutdown of the Railway's transloading facility." (JA-392).

2. The Storage Ordinance Targeted the Railroad's Salt Sheds And Exempted The Town's Salt Shed Without Justification

In addition to the timing of the enactment, the Storage Ordinance's restrictions on road salt apply *only* to storage at the Railroad's Transloading Facility. (SA-20). There are only two salt storage facilities in Shelburne—the Railroad's Transloading Facility and the Town's shed. The Town drafted the storage limitation on sodium chloride at the precise capacity of the Town's shed. Mr. Goodrich, the Town's Highway Superintended testified:

> THE COURT: What is the maximum amount that you can have in [the Town's salt shed]?
>
> MR. GOODRICH: Probably 550 or so….
>
> THE COURT: okay.
>
> MR. GOODRICH: 550 ton[s].

(JA-246/254:3-12). The Town did not offer any evidence to explain the basis for the 550-ton threshold or refute the obvious implication that this limit was set to discriminate against the Railroad. Accordingly, its argument that the Storage Ordinance is "one of general applicability" is meritless.

Finally, with regard to pollution, evidence at the hearing showed that the Town's salt shed and salt use posed a greater risk than storage at the Railroad's Transloading Facility. Mr. Nelson testified:

> In my opinion the town salt shed poses a greater risk because there's no design, there's no implementation of a design, there's no monitoring, there's no maintenance,

> there's no reporting. So unlike the railroad's facility, which is regulated under the multi-sector permit, the town's facility is not regulated and no one to my knowledge, certainly no one from the State that I'm aware of, is overseeing it to ensure that it's not resulting in undue water pollution.

(JA-229/191:21-192:3; see also JA-247/257:10-25, 259:12-20).

Mr. Goodrich also testified that the Town spreads hundreds of pounds of road salt *per mile* in the Shelburne. (JA-246/255:22-25) The Town's use of road salt on its roads is without regard for proximity to waterways or schools.

C. The Storage Ordinance Does Not Promote Health And Safety

The District Court heard ample evidence to find that the Town's clear impetus for enacting the Storage Ordinance was its desire to shut down the Transloading Facility by restricting the Railroad's short-term storage of road salt, which is a necessary part of efficient operations at a rail-to-truck transloading facility. To accomplish this, the Town without justification classified sodium chloride, calcium chloride, magnesium chloride, and potassium chloride—salt compounds—as "Hazardous Substance." The evidence at the hearing supports the District Court's conclusion that there was no "reasonable basis for classifying road salt as a hazardous substance that is harmful to public health and safety and attempting to regulate it as such." (SA-22).

1. The Town's Designation Of Sodium Chloride As a "Hazardous Substance" Lacks Scientific Basis

Sodium chloride is not a hazardous or toxic substance under CERCLA or Vermont law, nor is it recognized as such by the Environmental Protective Agency ("EPA"), the Federal Railroad Administration ("FRA"), or the Pipeline and Hazardous Materials Safety Administration ("PHMSA").[23] See 40 C.F.R. § 302.4; 10 V.S.A. § 6602(16). It is neither flammable, explosive, or volatile. (JA-217/141:15-21). And it is not considered a corrosive, reactive, or toxic substance as those characteristics are defined by the Vermont Agency of Natural Resources. (JA-294/446:20-25).

In fact, the Town's expert witness, Mr. John Diego, testified that he is not aware of *any* other regulation, federal or state, classifying sodium chloride as a hazardous substance. (JA-291/436:3-7). Nor has the Town identified any other local ordinance or legislation defining sodium chloride as a hazardous substance. Moreover, because the EPA does not classify sodium chloride as hazardous, Mr. Diego testified that he would not have classified it as such in the Storage Ordinance. (JA-294/447:1-448:4).

2. The Storage Ordinance Does Not Protect Against Adverse Environmental Impacts

The Town's expert conceded that storage of road salt does not equate to an adverse environmental impact:

[23] The FRA and PHMSA regulate the transportation of hazardous materials.

> Q: So storing sodium chloride, regardless of the quantity you store it in, as long as there's no release it is not causing an environmental impact, correct?
>
> MR. DIEGO: I would agree with that. Yes.

(JA-292/437:18-21). The Town did not introduce any evidence to the contrary.[24] Thus not only is sodium chloride not a hazardous material, it is not hazardous *waste* and is not a risk to health and safety merely by virtue of being stored in large quantities for a period of time. (JA-292/437:5-10). Accordingly, the District Court properly concluded that "the Town [did] not put forward any convincing evidence that the storage duration or storage quantities of road salt are dangerous to public health and safety." (SA-23).

Furthermore, the Town's argument that the Storage Ordinance protects against chloride pollution is wholly inconsistent with the express exemption in the Amended Storage Ordinance permitting the release of salt on Town roads and

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[24] "The Town has highlighted various articles demonstrating environmental concerns with the spreading of road salt on roads, but there has been *a total dearth of convincing information as to how the storage itself is dangerous*." (SA-24) (emphasis supplied).

The Town states in its brief that Selectboard Vice Chair Kerr "conducted independent research by reviewing studies from New Hampshire and Minnesota regarding environmental effects of road salt…." (Br. at 47). First, Mr. Kerr was *not* qualified as an expert witness, and although an engineer by trade, does not have a relevant background in hazardous materials, storage of sodium chloride, stormwater, etc. (JA-259/305:13-16) (THE COURT: "He's not rendering an opinion about sodium chloride…and in fact I don't think he's qualified to do that. As a result I don't think that the articles frankly have any bearing.").

other paved surfaces for anti-icing and de-icing purposes. (JA-402). The Town's longstanding and extensive practice of spreading hundreds of pounds of road salt *per mile* on roads and along waterways is the single greatest "release" of sodium chloride in Shelburne. This deliberate practice fully undercuts the Town's arguments in this appeal. (JA-246/255:22-5, SA-22-24).

3. There Was No Evidence That The Storage Ordinance Protects The Town From "Catastrophic Events"

The Town argues without citation that (a) "[t]he longer dangerous chemicals are present at a site, the greater the risk is over time of fire, explosion or release…"; and (b) the Storage Ordinance protects school children from "railroad disasters." (Br. at 44, 48). Both suggestions are wholly without merit or evidentiary support. No evidence or expert opinion was introduced at the November 1-2, 2017 hearing concerning so-called "railroad disasters" or regarding any scientific connection between duration of storage and propensity for fire or explosion. Nor did the Town provide evidence of any scientific basis for prohibiting the storage of so-called hazardous substances within 250 meters of school.

Furthermore, even if the Storage Ordinance could be construed to "commendably seek to enhance public safety," it must be analyzed in terms of impact on the Railway's operations. "[If it] unreasonably burden[s] rail carriage [it] cannot escape ICCTA preemption under the police power exception." Norfolk

S. Ry. Co., 608 F.3d at 160 (local ordinance regulating intermodal ethanol facility preempted by ICCTA); CSX Transp., 2005 WL 584026, at *8 (local "Terrorism Prevention in Hazardous Materials Transportation Emergency Act" limiting movement of explosives, flammable gasses, and poisonous materials by rail within 2.2-mile radius of U.S. Capitol Building preempted by ICCTA.).

4. The Transloading Facility Is Professionally Engineered And Subject To Ongoing Monitoring By DEC

The Railroad has taken appropriate steps to protect the environment and minimize any adverse impact resulting from its operations. Since the project's inception in 2015, VHB has provided environmental consulting and design services to the Railroad. As a result, the salt sheds and Transloading Facility are professionally engineered and subject to rigorous environmental construction and stormwater permitting and ongoing monitoring under the MSGP and SWPPP.

As the record shows, Mr. Nelson oversaw the Railroad's preparation of the SWPPP and MSGP[25] application to DEC and communications with the U.S. Army Corps of Engineers ("USACOE").[26] DEC, in turn, consulted with the Department of Fish and Wildlife and other State agencies to solicit input on the plans for the facility and study the impact, if any, on endangered species, water quality,

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[25] State authorities are authorized to issue the MSGP as a federal designee of the EPA. (JA-218/148:8-13).

[26] The USACOE determined that a Department of the Army permit was not required as the construction had no impact on jurisdictional wetlands.

wetlands, and other protected interests. A public hearing was convened. Town representatives, members of the public, and Mr. Torizzo provided comments. Mr. Nelson, who has worked as a water resource scientist for over three decades in Vermont, opined that the level of review and scrutiny by State regulators during this process was "extraordinary." (JA-219/151:15-16). Following that extensive, multi-agency review, the SWPPP was approved and the MSGP authorization to discharge stormwater was issued by DEC in November 2016. Despite having the opportunity to do so, the Town did not appeal that authorization. (SA-11).

The Railroad thereafter implemented and complied with the SWPPP and submitted its first annual report to DEC in October 2017. As Mr. Nelson testified, the SWPPP mandates extensive groundwater and surface water monitoring that goes "above and beyond what was normally required for this kind of sector[.]" (JA-219/149:10-11). A series of monitoring wells were installed in strategic locations on-site. The SWPPP further requires the Railroad to observe certain BMPs and to make any necessary adjustments to its operations based upon the performance of those BMPs, as informed by the ongoing water quality monitoring data.

During the November 1-2, 2017 evidentiary hearing, the Town claimed that monitoring data from monitoring wells ("MW") 301 and 306 supports Town

regulation of the Transloading Facility. The Town repeats that claim in this appeal.

VHB's monitoring and investigation found temporarily elevated levels in MW 301 resulted from minor spillage during the transloading process:

> MR: NELSON: [A]s the trucks go up the ramp [of the truck scale] if there's a little bit of salt that's on the edges of the truck, as it's going up that ramp some of the grains spill off. We're not talking about a lot here, but there's…some spillage in that area just because of the nature of the activity that's occurring on that part of the site….

(JA-222/163:8-14). Mr. Nelson explained that elevated levels in MW 306 were the result of incidental spillage during the transfer from rail car to truck in the transloading process. (JA-223/166:17-21). With respect to storage, Mr. Nelson testified as follows:

> Q: The sodium chloride that was found in [MW 301 and 306] did it come from the sodium chloride that was stored in those sheds?
>
> MR. NELSON: It did not.
>
> Q: It's not the storage, correct?
>
> MR. NELSON: That's correct….

(JA-223/168:10-15).

As a result of the monitoring required by the SWPPP, the Railroad detected these results early on and addressed the issue. (JA-220-21/156:3-158:20, SA-12). As Mr. Nelson testified, far from illustrating any infirmity in the facility's design

or in the SWPPP, this episode illustrates that the SWPPP is a "living document" whose BMPs and rigorous monitoring increase the Railroad's transparency and enable it to prevent potential problems through early detection and response. (JA-221/159:18-160:12). There is, in short, scant basis for the Town's concern about any environmental impact caused by the Transloading Facility. Furthermore, the District Court had good reason to "question[] the Town's sensitivity to the environmental impact of road salt …." (SA-24). "It is unclear why this likely minor spillage would be regulated while the extensive and deliberate release of road salt throughout the town for de-icing of roads would be exempted." (SA-24).

The Town proffered Mr. Torizzo to repeat criticisms of the proposed SWPPP that he had made in formal comments to DEC in October 2016 opposing the Railroad's application for MSGP approval. The DEC rejected his comments:

> Q: And the upshot of DEC's review of your comments was they basically did not adopt or accept your criticisms. Isn't that fair to say?
>
> MR. TORRIZO: . . . I think there was one that we agreed maybe they did take, but, yeah, by and large they did not.

(JA-280/391:12-17). Mr. Torizzo conceded that his opinions at the November 1-2, 2017 evidentiary hearing simply repeated his October 2016 criticisms, which had been considered and rejected by DEC in issuing the MSGP. (JA-281/393:5-11).

D. The District Court Correctly Held That Sections 1950.1 & 1950.2(A) Of The Performance Standards Were Preempted By ICCTA

In the proceedings below, the Town represented that it was prepared to enforce its "Performance Standards" (SA-47-53) against the Transloading Facility. These Performance Standards are part of the Town's Zoning Bylaws. (JA-186/20:23-24). As the District Court observed in its December 7, 2017 Opinion and Order, the Town did not "identif[y] any violations of its Zoning Bylaws or Subdivision Regulations" by the Railroad, but instead "merely attached numerous provisions without any mention of how the transloading facility is in violation of any particular provision." (SA-27).

In response to the Town's representations, the Railroad challenged the enforcement of the Town's Performance Standards and argued that the Town had failed to identify "with specificity" (JA-345) which of these standards it intended to enforce against the Railroad, as the Court had previously ordered. The Railroad further argued that the Performance Standards could not be enforced against the Railroad consistent with ICCTA and with Green Mountain because they were an inextricable part of the Town's zoning-related permitting process and unreasonably burdened Railroad operations.

At the November 1-2, 2017 evidentiary hearing, the Town did not present any evidence that would justify the enforcement of the Performance Standards. The Performance Standards were simply admitted as an exhibit without further discussion. (JA-312/520:5-11, JA-313/522:5-8). The District Court thereafter

permanently enjoined Sections 1950.1 and 1950.2(A) of the Town's Performance Standards because they were "extremely similar" to the Storage Ordinance (SA-27) and declined to issue a ruling regarding the remainder of the Performance Standards.[27]

The District Court correctly held that Sections 1950.1 and 1950.2(A) of the Performance Standards were preempted by ICCTA because they were functionally indistinguishable from the Storage Ordinance given their prohibition of the "[s]torage of flammable liquids, with the exception of propane gas and gasoline/diesel fuel in containers of six gallons or less, in residential areas[.]" (SA-28). Because of this similarity, the District Court concluded that these two subsections "could be enforced to prohibit the same activities the Town intended to prohibit with the Storage Ordinance, and their enforcement would place the same significant burden on the Railway." (SA-28). This conclusion was entirely appropriate, as the Town can hardly regulate rail transportation through zoning enforcement actions if it cannot directly regulate rail transportation through ordinances enacted by its Selectboard. Cf. Int'l Paper Co. v. Ouellette, 479 U.S.

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[27] In its principal brief, the Town did not address the validity of the Performance Standards. Thus, the Town has either waived this issue or chosen not to appeal this part of the judgment below. Furthermore, the STB has held that "state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements are categorically preempted as to any facilities that are an integral part of rail transportation." Washington & Idaho Railway—Petition For Declaratory Order, STB Finance Docket No. 36017, at *4 (STB Mar. 15, 2017) (citing cases).

481, 495 (1987) (holding that the Clean Water Act preempted common-law nuisance suit filed under Vermont law where the source of the alleged injury was located in New York, and rejecting the proposition that "Vermont and other States could do indirectly what they could not do directly").[28]

Moreover, as the District Court observed, many of the Performance Standards "relate to the pre-construction review process that the Court has already found to be preempted"—a ruling that the Town did not appeal. (SA-27 n.18). For these reasons, the District Court's judgment with respect to Sections 1950.1 and 1950.2(A) of the Performance Standards should be affirmed.

III. THE TOWN'S OTHER ICCTA ARGUMENTS ARE WAIVED AND ARE INCONSISTENT WITH ICCTA'S TEXT AND LEGAL PRECEDENT

The Town offers two other arguments for why a narrower construction of ICCTA's preemption provision is warranted in this appeal. (Br. at 14-28). First, the Town argues the Court's Order "expands a 'regulatory gap' in the ICCTA." (Br. at 19). Second, the Town urges this Court to interpret ICCTA's definition of "transportation" in light of other federal statues containing the term "transportation." (Br. at 26-29). Not only are these premises flawed and

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[28] See also CSX Transp., 2005 WL 584026, at *8 (holding District of Columbia regulation of transporting hazardous materials preempted and stating that "[r]egulating when and where particular products can be carried by rail . . . would not have merely incidental effects on rail operations . . . but would constitute direct regulation of a railroad's activities").

inconsistent with ICCTA's text and this Court's precedent, the arguments have no bearing on the issues in this appeal. The scope of the definition of "transportation" in ICCTA—and whether operations at the Transloading Facility constitute "transportation" for ICCTA preemption—was conclusively determined by the June 29, 2016 and June 28, 2017 Orders, and the August 21, 2017 Partial Final Judgment Order. (JA-389). The Town waived an appeal of these issues. Notwithstanding this waiver, the Railroad will address each argument in turn.

A. No "Regulatory Gap" Exists With Respect To Rail Transportation Of Hazardous Substances

The Town argues that this Court should interpret Section 10501(b) so as to avoid creating a perceived "regulatory gap" in ICCTA where railroads "are free to conduct operations without regard to any federal, state, or local law." (Br. 19). The Town relies on Grosso v. Surface Transportation Board, 804 F.3d 110 (1st Cir. 2015), in which the First Circuit vacated a declaratory order by the STB that state and local regulations of a railroad company's wood pellet facility were preempted by ICCTA. In Grosso, the First Circuit concluded that the STB had incorrectly applied an "efficiency rationale" to determine that the railroad company's vacuuming, screening, bagging, and palletizing wood pellets constituted "transportation" and "fail[ed] to relate the wood pellet facility's activities to the physical 'movement of passengers or property,' as opposed to cost efficiency." Id.

at 118-19. The First Circuit commented that the STB's "efficiency rationale would result in a vast regulatory gap" and remanded for further agency proceedings.

The Town's reliance on Grosso is unavailing in this appeal. The Town previously urged the District Court to adopt the reasoning set forth in Grosso when it argued that the Railroad's transloading activities did not constitute "transportation" within the meaning of ICCTA. The District Court considered this argument and rejected it, concluding that Grosso was inapposite in view of the factual dissimilarities between the Railroad's operations and the operations under review in Grosso. (JA-381, 383 n.11). Partial final judgment was entered on the District Court's Orders. (JA-389). The Town had the opportunity to appeal the District Court's partial final judgment that the Railroad's transloading activities constituted "transportation" by a "rail carrier" and it did not do so. The Town's "regulatory gap" argument is therefore waived.

Even if the Town's "regulatory gap" argument was available in this appeal, the Railroad's regulatory obligations are far from undefined. Indeed, it scrupulously adheres to a raft of federal statutes and regulations. See, e.g., 49 U.S.C. § 5103(a) (Hazardous Materials Transportation Act ("HMTA") providing regulatory authority to the Secretary of Transportation to designate a material as hazardous "when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health

and safety or property"); 49 C.F.R. § 171.1 (stating that under the HMTA, the Secretary of Transportation is directed "to establish regulations for the safe and secure transportation of hazardous materials in commerce"); 49 U.S.C. § 20101 (Federal Railroad Safety Act of 1970 ("FRSA")); 49 U.S.C. § 5701 (Sanitary Food Transportation Act of 1990); 49 U.S.C. § 20701 (Locomotive Inspection Act); 49 U.S.C. § 20501 (Signal Inspection Act); 49 U.S.C. § 21101 (Hours of Service Act); 49 U.S.C. § 20901 (Accident Reports Act).

For these reasons, rail transportation of hazardous substances is thus highly regulated by several federal agencies, not simply the STB. See also 49 CFR Subtitle B ("Other Regulations Relating to Transportation"). It is therefore not the case that the judgment below creates any "regulatory gap" with respect to rail transportation generally or with respect to the transportation of "hazardous substances" specifically.

B. This Court Need Not Interpret ICCTA In Light Of Other Federal Statutes

Despite the foregoing well-established body of law in this Circuit interpreting ICCTA, the Town argues that the scope of ICCTA preemption should

be construed similarly to the HMTA and the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501 (the "FAAAA"). (Br. at 24-29).[29]

The Town cites no court cases interpreting the HMTA in its principal brief. Rather, it argues—for the first time in this litigation[30]—that the District Court should have relied on an agency interpretation of the HMTA by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") with respect to Los Angeles County and California regulations applicable to the handling of hazardous materials by the end-user consignee *after* delivery by the railroad. (Br. at 25). The Town quotes heavily from the PHMSA decision and then abruptly concludes that "[t]his Court should be guided by PHMSA's interpretation of its own regulation and its determination that federal preemption does not disallow local regulation of hazardous materials once they have ceased being in transit." (Br. at 26).

The Railroad submits that the Town's appeal to PHMSA deference bears absolutely no connection to this dispute. The STB—not the PHMSA—is the federal agency which is statutorily charged with administering ICCTA. The

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[29] The Town provides no explanation for why it chose to analogize ICCTA to the HMTA and the FAAAA, nor does it cite any cases in which a court has compared these statutes.

[30] The Town introduced the PHMSA's interpretation as Exhibit O (JA-999) at the November 1-2 evidentiary hearing, but this document was not the subject of any testimony or argument by the Town. (JA-297/460:5-11, 463:19-20) (identifying and admitting this document through Mr. Hunter without further testimony).

HMTA was not relied upon by the District Court to support its judgment below. In interpreting ICCTA, this Court owes no deference to an agency interpretation of an entirely different statute that is not at issue in this case.

The Town's analogy of ICCTA to the FAAAA fares no better. It relies solely on the Supreme Court's 2013 decision in Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251 (2013). Despite the fact that Dan's City did not involve ICCTA and had nothing to do with railroad operations, the Town apparently perceives a compelling similarity between the FAAAA and ICCTA because both statutes represented a deregulatory effort by Congress and contain preemption provisions which use the word "transportation." (Br. at 27-28).

The similarities end there. In Dan's City, the Court held that the preemption provision of the FAAAA did not preempt a motor vehicle owner's suit for damages under New Hampshire law against a tow truck company which had towed and disposed of the owner's car without his knowledge. 569 U.S. at 266. To state the holding of Dan's City is to understand that it is inapposite to this case. Moreover, to the extent the Town seeks to engraft the Supreme Court's analysis of the term "transportation" in the FAAAA onto ICCTA, it waived this argument by not raising it below and by not appealing the District Court's partial final judgment on that issue.

Because this Court's ICCTA jurisprudence is well-developed and provides the rule of decision governing this appeal, this Court need not undertake the analysis advanced by the Town. The precedents of this Court sufficiently establish that the judgment below should be affirmed.

IV. THE DISTRICT COURT'S PERMANENT INJUNCTION DID NOT CONSTITUTE AN ABUSE OF DISCRETION

The law governing a district court's issuance of a permanent injunction is well-developed. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate:"

> (1) that is has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); see also Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 422-23 (2d Cir. 2013) (analyzing eBay factors and affirming permanent injunction of Vermont statute which was held to be preempted by the federal Atomic Energy Act).

The District Court did not abuse its discretion in concluding that the Railroad would suffer an irreparable injury if the Town were able to enforce the Storage Ordinance. The evidence showed that enforcement of the Storage

Ordinance would result in the closure of the Transloading Facility (a multi-million-dollar capital investment by the Railroad) and the Railroad placed in immediate breach of its contract with Cargill. (JA-195/53:19-22, JA-203/87:5-6, SA-26). See Entergy, 733 F.3d at 423 (finding irreparable harm where enforcement of Vermont statute would "shut down Vermont Yankee").

Second, the Railroad would not have an adequate remedy at law for these irreparable injuries. A suit for damages against the Town would arguably be barred by municipal immunity under Vermont law. See Hillerby v. Town of Colchester, 706 A.2d 446, 447 (Vt. 1997) (recognizing municipal immunity). Even if not barred by immunity, a suit for damages would not constitute an adequate remedy at law because "the right to continue a business . . . is not measurable entirely in monetary terms." Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.) (affirming temporary injunction). The closure of the Transloading Facility would result in devastating financial consequences for the Railroad and the interests of the shipper that are difficult to quantify and foresee. See Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 38 (2d Cir. 1995) (identifying the "unfairness" that would result from "denying an injunction to a plaintiff on the ground that money damages are available, only to confront the plaintiff at a trial on the merits with the rule that damages must be based on more than speculation").

Third, the balance of the hardships decidedly favors the Railroad. As explained above, the Railroad would stand to suffer irreparable harm from the enforcement of the Storage Ordinance. By comparison, based upon the District Court's findings of fact, the Storage Ordinance would not meaningfully advance the rationales offered by the Town, such as environmental protection and public safety, for which it offered, *at best*, scant justification. (SA-24, 26).

Finally, the public interest would not be disserved by the injunction. Indeed, the injunction serves the public interest by ensuring that a sufficient supply of road salt is available during the winter season to promote safe winter road conditions for the travelling public and the more than one hundred towns and municipalities that rely on access to this road salt supply. As the District Court concluded on December 7, 2017, "in the absence of this injunction, the public would likely be at much greater risk because of the serious impact the Storage Ordinance would have on this winter's road salt operations." (SA-26).

Based upon the foregoing, "[e]ach of the[] four factors is clearly satisfied here." Entergy, 733 F.3d at 423. The District Court therefore did not abuse its discretion in issuing a permanent injunction.

CONCLUSION

For the foregoing reasons, Appellee Vermont Railway, Inc. respectfully submits that the District Court's January 2, 2018 judgment should be affirmed.

May 31, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a)(4) because this brief contains 13,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Jennifer E. McDonald

CERTIFICATE OF SERVICE

I certify that on May 31, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Jennifer E. McDonald