Town of Upton
Board of Selectmen Informational Meeting
Grafton & Upton Railroad
June 18, 2009

Report from Town Counsel

I. Regulation of Railroads

a. Introduction

49 U.S.C. §10501(b), as broadened by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"), preempts (i.e. precludes) local and state regulation of rail transportation facilities. ICCTA abolished the Interstate Commerce Commission ("ICC") and gave exclusive jurisdiction over "transportation by rail carrier" to the federal Surface Transportation Board ("STB"). 49 USC §10501(b) states that "the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Courts and the STB itself have interpreted these exclusivity provisions to mean that state and local regulation of rail transportation is generally preempted and that rail facilities are not subject to the requirements of local zoning and land use law. See Flynn v. Burlington Northern Santa Fe Corp., 98 F.Supp. 2d 1186 (E.D. Wash. 2000) ("Flynn"); Borough of Riverdale—Petition for Declaratory Order--New York, Susquehanna & Western Ry., STB Financial Docket No. 33466 (Sept. 10, 1999) ("Riverdale I"); Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000). State and local agencies may apply and enforce those laws and regulations that involve the exercise of local police powers in the interests of health or safety, as long as such regulation is non-discriminatory, does not serve as a "prior restraint" to bar the location and construction of rail transportation facilities, and does not unreasonably affect or interfere with rail transportation.

b. Definitions

i. **"Transportation"** includes:

> "(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)]

ii. **"Rail carrier"** means "a person providing common carrier rail transportation for compensation . . . ." [49 U.S.C. §10102(5)]

iii. **"Railroad"** includes:

> "(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
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> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
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> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." [49 U.S.C. §10102(6)]

c. Surface Transportation Board ("STB")

The STB is a federal economic regulatory agency that Congress created in the ICCTA as the successor agency to the ICC and charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers. The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission.

In accordance with 49 U.S.C. §10501(b), the STB has exclusive jurisdiction over:

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, of facilities, even if the tracks are located, or intended to be located, entirely in one State . . . .

Many rail construction projects are outside of the STB's regulatory jurisdiction, even though state and local regulation is preempted. For example, railroads do not require authority from the STB to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track. See Riverdale I at 5; Nicholson v. ICC, 711 F.2d 364, 368-70 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984). More information about the STB can be found at the agency's website: http://www.stb.dot.gov.

d. Railroad Immunity From Local and State Regulation – "Preemption"

> "The statutory language [of the ICCTA] indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation."
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> Grafton and Upton Railroad Co. v. Town of Milford, 337 F.Supp.2d 233, 238 (D. Mass. 2004).

Where the STB has jurisdiction over rail transportation, that jurisdiction is "exclusive" and state and local laws and regulations are generally preempted. 49 U.S.C. §10501(b). To come within the preemptive scope of 49 U.S.C. §10501(b), the railroad's activities "must be integrally related to the railroad's ability to provide rail transportation services." Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192, slip op. at 3 (Nov. 20, 2002) ("Hi Tech I") (emphasis added); see also Riverdale I at 9. In Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647 (N.D. Ga. 1997), the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. It found that "[a] city may not . . . attempt to regulate land use and planning via local laws when Congress' intent to preempt such local laws is clear and manifest." Id. at 7 n.6. Similarly, other courts have viewed the preemption provisions broadly. See CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations"); Burlington N. Santa Fe Corp. v. Anderson, 959 F.Supp. 1288, 1294-95 (D. Mont. 1997) (the preemption provisions in ICCTA show an intent to occupy the entire field of regulation).

The STB has found that transloading activities are generally within the broad definition of transportation. See, e.g., Hi Tech II at 5-6; Green Mountain Railroad Corp. – Petition for Declaratory Order, STB Finance Docket No. 34052 (May 28, 2002) (cement transloading facility); Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971 (May 1, 2001) ("Ayer") (automobile unloading facility). In addition, the Third Circuit Court of Appeals also held that "transloading" is "transportation" under the federal statute. New York Susquehanna & Western Ry. Corp. v. Jackson, 500 F.3d 238 (3rd Cir. 2007) ("Jackson"). The court defined "transloading" as "[t]ransferring bulk shipments from the vehicle/container of one mode to that of another at a terminal interchange point." Id. at 242 n.1 (citing U.S. Dep't of Transp., Fed. Highway Admin., Freight Prof'l Dev. Prog., Freight Glossary).

In the Stampede Pass line of cases, the STB found that state and local permitting or preclearance requirements, including environmental requirements, are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations. See King County, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, STB Finance Docket No. 33095 (Sept. 25, 1996), clarified, Cities of Auburn and Kent, WA – Petition fro Declaratory Order – Burlington Northern Railroad

Company – Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997) ("Stampede Pass"). In reviewing the matter, the Ninth Circuit agreed and rejected the argument that statutory preemption was limited to "economic" regulations. City of Auburn v. U.S., 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) ("City of Auburn").

Finally, the STB also determined in the Stampede Pass cases that 49 U.S.C. §10501(b) does not nullify the STB's own obligation to follow the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 et seq. ("NEPA") and related federal environmental laws where applicable. See 49 CFR 1105.1. The STB noted that, where STB authorization is required, state and local governments can participate in the STB's environmental review process under NEPA and related laws. The STB has also held that Congress did not intend §10501(b) to preempt federal environmental statutes such as the Clean Air Act, the Clean Water Act or the Safe Drinking Water Act. See Ayer at 9; Stampede Pass at 8 and n.14; Riverdale I at 7.

e. Extension of Immunity to Associated Businesses

Whether a particular activity constitutes "transportation by rail carrier" under §10501(b) is a case-by-case, fact-specific determination. In Hi Tech Trans., LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket No. 34192 (Aug. 14, 2003) ("Hi Tech II"), the STB rejected the proposition that "any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier." Instead, the STB stated that "the jurisdiction of this agency may extend to certain activities and facets of rail transloading facilities, but that any such activity must be closely related to providing direct rail service." Id.

To come within the preemptive scope of §10501(b), activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier. Hi Tech II at 5. In High Tech II, the STB found that a shipper bringing cargo by truck and loading it onto rail cars at a transloading facility was not within the jurisdiction of the STB and thus not preempted, where the shipper was not a licensed rail carrier and the shipper's agreement with the rail carrier expressly disclaimed any agency or employment relationship. The STB acknowledged that the shipper's transloading activities at the site were within the broad definition of transportation; however, to be preempted, the transportation activities must be performed by a rail carrier.

In Jackson, 500 F.3d 238, the Third Circuit held that the transloading activity involved constituted transportation by rail carrier (and was therefore subject to federal preemption), even where the railroad hired a loading company to unload trucks bringing materials to the site, oversee its storage, and load it onto rail cars. It stated: "It is undisputed that operations of the facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and interchange of rail cargo, which the [ICCTA] explicitly defines as 'transportation.'" Id. at 247. With respect to the state's argument, based on language from STB decisions interpreting the statute, that the operations were not "integrally" or "closely" related to providing rail service, the court opined that the STB decisions were merely distinguishing "manufacturing," which is not sufficiently related to transportation by rail, and "transloading," which is. Id. at 247-48. The court concluded that "whatever the legal effect of the Board's adverb 'integrally' (which we suspect is minimal or none),

transloading qualifies as transportation." Id. at 248. Finally, the court examined the contracting agreement between the railroad and the company it hired to operate the transloading facility and found that the activities were performed "by rail carrier" because "(1) the rail carrier owned (or leased) the land and built the transloading facilities, (2) shippers pay the rail carrier to load their freight, and (3) the rail carrier does not disclaim liability for the loading process." Id. at 249.

II. Permissible State and Local Regulation

a. Activities Not Preempted by ICCTA

The STB has determined that manufacturing activities and facilities not "integrally related" to the provision of interstate rail service are not subject to the STB's jurisdiction or federal preemption, but are instead subject to local and state regulation to the same extent as if they were located on non-railway property. Riverdale I at 9.

Similarly, in Hi Tech I, the STB determined that the transportation of construction and demolition debris from construction sites by truck to a truck-to-rail transloading facility was not within the STB's jurisdiction and therefore was not preempted by ICCTA. The STB found that the movement of trucks carrying such debris over public roads to the transload facility was not part of "transportation by rail carrier" or "integrally related to rail transportation services" and could therefore be regulated locally.

Likewise, in Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), the Court held that a distribution center for aggregate construction materials located on property leased from a railroad was not shielded from local zoning by the ICCTA. Notwithstanding that the materials were supplied to the distribution center via the adjacent rail line, the Court found that the distribution activities "serve no public function and provide no valuable service to the [railroad]." Id. at 1336. The interstate functioning of the railroad industry and federal railroad policy objectives were not impeded or frustrated by local zoning regulations of general applicability enforced against a private entity leasing property from a railroad for non-rail transportation purposes. Id. at 1331.

b. Permissible Regulation

Decisions interpreting the ICCTA make clear that zoning and other land use regulations cannot serve as a "prior restraint" to bar the location and construction of rail transportation facilities. Those decisions leave some room for local (and state) regulation, justified on the basis that an activity does not qualify as "rail transportation" despite physical proximity and economic relationship to rail facilities, or that the regulation involves the exercise of local police powers in the interests of health or safety and does not unreasonably affect or interfere with rail transportation. City of Auburn, 154 F.3d 1025; Hi Tech I at 3, n.6. Whether a state or local regulations is permissible depends on whether the regulation: (1) is not unreasonably burdensome to rail carriage; and (2) does not discriminate against rail carriage. Jackson, 500 F.3d 238.

In Stampede Pass, the STB expressed its view that not all state and local regulations that affect railroads are preempted, and that localities retain certain police powers to protect public health and safety. The STB gave the following examples of state and local regulation that would not be preempted:

> [E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Stampede Pass at 9-10.

This means that although local entities may apply non-discriminatory regulations to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. Riverdale I at 8. Furthermore, local entities cannot require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause. Id. The STB has also opined, however, that local authorities can take actions that are necessary and appropriate to address any genuine emergency on railroad property, and that railroads are not exempt from certain local fire, health, safety and construction regulations and inspections, so long as the local authorities do not require the obtaining of permits as a prerequisite to construction or improvement of railroad facilities. Id. at 8-9.

Similarly, in Flynn, 98 F.Supp.2d 1186, the court recognized Congress' intent in the ICCTA to preempt local permitting requirements with respect to railroad operations, but found that the railroad would have to comply with local codes for electrical, building, fire, and plumbing, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce. In addition, in Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000), the court held that, while the locality could not require permits prior to construction, the railroad must notify the local government when undertaking an activity that would, for another entity, require a permit. See also Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Ry. Corp., STB Finance Docket No. 33466, slip op. at 3 (Feb. 23, 2001).

Moreover, in Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (Nov. 28, 2000), the STB determined that rail facility operators and communities may enter into voluntary agreements for conditions on construction and operation, and such agreements are enforceable as a matter of contract law, notwithstanding the ICCTA. In the

STB's view, by entering into a voluntary agreement, the operator has admitted that the conditions would not unreasonably interfere with its operations.

In a local case involving the Town of Ayer, Joint Petition for Declaratory Order: Boston and Maine Corp. and Town of Ayer, STB Finance Docket No. 33971 (May 1, 2001) ("Ayer"), the STB found that state and local regulation was permissible where it does not "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce." In an appellate proceeding arising out of this matter, Boston and Maine Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003), the First Circuit Court of Appeals discussed the STB's decision in Ayer, noting that the STB had provided the following three guidelines for permissible state and local regulation:

(1) Non-discriminatory enforcement of local requirements such as building and electrical codes (other than pre-construction requirements) generally are not preempted.

(2) A town may seek enforcement of voluntary agreements a railroad has entered into with a town.

(3) Section 10501(b) should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes.

In addition, the First Circuit listed examples of the types of conditions the STB had determined to be reasonable in Ayer, including requirements that railroads:

(1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit;

(2) use state or local best management practices when they construct railroad facilities;

(3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied;

(4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and

(5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

The STB further stated that the inquiry into whether a particular federal environmental statute, local land use restriction or other local regulation is being applied so as to no unduly restrict the railroad from conducting its operations is a fact-bound question and, therefore, situations must be reviewed on an individual basis. A municipality cannot use a statute or

regulation to discriminate against the railroad or as a pretext for frustrating or preventing a particular activity.

Essentially, the question is whether the local or state regulation would frustrate Congress' intent in enacting ICCTA, which was to free railroads from regulation in order to continue to promote growth in the industry. Boston & Maine Corp. v. Town of Ayer, 206 F.Supp.2d 128, 131 and n.15 (D. Mass. 2002) (citing H.R. REP. NO. 104-311, at 1, 82-96 (1995)).

III. Municipal Litigation vs. Railroads in Massachusetts

i. **Town of Ayer** – Joint Petition for Declaratory Order: Boston and Maine Corp. and Town of Ayer, STB Finance Docket No. 33971 (May 1, 2001).

This case involved the expansion of a facility where automobiles were delivered by rail and transferred to trucks for transport to dealers. The STB ruled that the ICCTA preempted all local pre-approval processes, including Planning Board site-plan approval of projects within an aquifer protection district, Conservation Commission review under the State Wetlands Protection Act and a determination by the Town Board of Health that the facility would be prohibited by local ordinance as a "noisome trade" or nuisance. The STB stated that "state and local regulation cannot be used to veto or unreasonably interfere with railroad operations", and therefore held that "preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." Id. at 8. The STB also stated that non-discriminatory enforcement of health and safety requirements, such as building and electrical codes, is permissible as long as it does not "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce." Id. at 9.

ii. **Town of Milford** – Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444 (Aug. 11, 2004).

In this case, the G&U owned a rail yard in Milford which it intended to lease to Boston Railway Terminal Company ("BRT"). BRT, which is not a rail carrier, proposed to build and operate a transloading and steel fabrication facility on unused property within the yard. Under the proposed plan, G&U would transport rail cars carrying steel to the site (and move the empty cars back after they were unloaded), and BRT would be responsible for offloading the steel and hauling it by truck to customers, sometimes first performing some fabrication work, such as cutting and welding, onsite. The STB determined that it did not have jurisdiction over steel fabrication activities, which are not within the definition of "railroad transportation," and did not have jurisdiction over rail/truck transloading activities that were not performed by a rail carrier, or on behalf of a rail carrier, that holds itself out to offer those services to the public.

With respect to BRT's proposed transloading activities, the STB found that, although they would fall within the statutory definition of transportation, these activities would not be preempted by federal law because they were not offered by a rail carrier, either directly or through its agent. The STB found that G&U's involvement was limited to transporting rail cars

and leasing surplus property to BRT; BRT's planned activities would thus not be considered "integrally related" to G&U's rail carrier service.

In District Court proceedings arising out of the same matter, Grafton and Upton Railroad Co. v. Town of Milford, 337 F.Supp.2d 233, 238 (D. Mass. 2004), the District Court granted a preliminary injunction to G&U to prevent the Town of Milford from taking any action to enforce its zoning bylaw and from otherwise attempting to prevent, delay, or prohibit G&U's proposed development of the rail yard. The court also held that the STB should, in the first instance, determine the precise scope of the ICCTA preemption over state environmental regulations and local zoning bylaws.

IV. Miscellaneous Questions/Issues

a. *Who regulates materials transported by rail and stored in warehouses and storage yards associated with railroads?*

b. *What is the role of the Board of Selectmen in dealing with railroad issues?*

c. *What is the role of the Board of Health in dealing with railroad issues?*

The STB has jurisdiction over all activities deemed "transportation by rail carrier." This requires that activities fall within the definition of "transportation" and that they are performed by a "rail carrier" or an agent or employee of a rail carrier. STB has no jurisdiction over activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services, even if the site is owned by a rail carrier. Hi Tech II at 5. As stated above, state and local authorities may regulate rail yard activities as long as the regulation: (1) is not unreasonably burdensome to rail carriage; and (2) does not discriminate against rail carriage. New York Susquehanna and Western Ry. Corp. v. Jackson, 500 F.3d 238 (3rd Cir. 2007). The Town may also enforce (in a non-discriminatory manner) local building, fire and electrical codes, voluntary agreements a Town has entered into with the Town, and may play a role in implementing federal environmental statutes, where applicable. See Ayer.

d. *What determines the railroad has control of site and proof that railroad has control of site?*

"Control" is defined by 49 U.S.C. §10102(3) as: "when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means."

With respect to the property at issue, this is a fact-bound determination requiring review of all agreements pertaining to the ownership, leasing, use and operation of the property.

e. *Local assessment and taxation on the railroad; local assessment and taxation on warehouse and storage yards associated with the railroad*

49 U.S.C. 11501 provides:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

Definitions for 49 U.S.C. 11501:

- **"Assessment"** means valuation for a property tax levied by a taxing district;
- **"Assessment jurisdiction"** means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;
- **"Rail transportation property"** means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and
- **"Commercial and industrial property"** means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

f. *What is the railroad's responsibility for the safety, welfare and impacts for abutting neighborhoods?*

The railroad is governed by federal law regarding safety and environmental issues. In Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000), the court found that §10501(b) precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility because such action would infringe on the exclusive jurisdiction of the STB. Citizens may file formal complaints with the STB, whose duty it is to investigate and determine whether the railroad is in compliance

with the applicable federal laws and regulations. More information about the STB can be found at the agency's website: http://www.stb.dot.gov.

g. *What is the legal distance from the track a home owner can put up a fence? How many feet from the center of the tracks?*

We are not aware of any limitation on a private party's use of his or her own property which happens to abut a railroad. The private property owner would be subject to zoning requirements as to the setback for a fence.

h. *Railroad Leases/Tenants*

Fact-bound determination – a lease from a railroad does not automatically invoke preemption. There still must be "transportation by rail carrier," as defined by 49 U.S.C. and interpreted by the courts and STB. See Florida East Coast Ry. Co. (lease does not transform activity into rail transportation); NY Susquehanna v. Jackson for analysis re: lessee/RR relationship.

i. *"Penetrating new markets"*

New railroad construction requires a license and environmental review by STB (per 49 U.S.C. 10901) unless it is merely continuation or expansion of an existing railroad and no new markets are being served (49 U.S.C. 10906). The concept of "penetrating new markets" does not have anything to do with the analysis of whether there is "transportation by rail"; it is involved only in the determination of whether a license must be obtained from STB.

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