Second Circuit Derails Municipal Ordinance Targeted at Railway Operations

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Municipalities and other local governments do not have free rein when it comes to regulating the environment, and the Second Circuit’s recent decision in Vermont Railway, Inc. v. Town of Shelburne is a clear reminder of that fact.

Federal and state governments tend to take the lead on environmental regulation. But municipalities are increasingly getting in the game, encouraged by community members to address their environmental concerns. They are facing a significant challenge. Where municipalities themselves choose to regulate (as opposed to just enforcing state or federal regulations), they must draft laws that fit within the complex web of pre-existing laws. If they do not, litigants can argue that the municipal regulations are preempted.

That’s what happened in Town of Shelburne.

There, the Second Circuit held that the municipal ordinance imposed burdens on rail activity that did not meaningfully protect public health and safety and was preempted by Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§ 10101 et seq.

Some background on this case: Shelburne, Vermont, has around seven thousand residents and sits on the shores of Lake Champlain. Tourism is a major industry. There are thriving breweries, vineyards, and even a teddy bear factory. In late 2015, community members felt that the pastoral calm of the town was disturbed when Vermont Railway purchased land to construct a very large—able to store 80,000 tons of road salt—rail-to-truck transloading facility.

The court record demonstrates that Shelburne’s government opposed these operations from their outset. Vermont Railway initially filed federal litigation to halt the transloading facilities based on the town’s zoning code. That litigation failed after a Vermont federal district court held that the planned transloading facility’s activities constituted “transportation by rail carrier,” as that term is used in the ICCTA. But the court left a window open for Shelburne, stating that it “reserve[d] judgment on the question of whether the ICCTA preempts other zoning regulations derived from the town’s police powers that relate to the operation of the Railway’s proposed facility.” The court indicated that the town could review individual regulations to assess whether they fell within the police powers exemption to exclusive ICCTA jurisdiction.

After the decision, the town likely determined that Shelburne’s government opposed these operations from their outset. Vermont Railway’s operations. So, within months after the court’s initial decision, the town passed an ordinance that it contended fell within ICCTA’s police powers exception. The ordinance prohibits the storage of substances above certain quantities within 250 meters of a school or waterway, including prohibiting 550 tons of sodium chloride, also known as road salt. After a Vermont district court again found the ordinance preempted and issued an injunction permanently enjoining its enforcement, the Town of Shelburne appealed to the Second Circuit.

The Second Circuit agreed with the district court that the police powers exception did not apply. Its analysis focused on two of the factors the town used to establish the scope of regulation in its ordinance, which were the quantity of materials stored and the proximity of the storage facility to schools or waterbodies:
• **Quantity of Materials Stored:** The town’s ordinance used the quantity of materials stored as a trigger mechanism for local regulation. When the court reviewed the ordinance, the court noted that the town’s pre-existing facility held 550 tons of sodium chloride; Vermont Railway’s facility held 80,000 tons. The ordinance sought to use the town’s facility as a cap. The Second Circuit held that doing this targeted future development and brought the ordinance outside of the town’s permissible ICCTA police powers.

• **Proximity to Schools or Waterways:** The ordinance precluded relevant storage facilities from being located within 250 meters of a school or waterway. Waterways are generally regulated by other statutes, most notably the federal Clean Water Act. The Second Circuit noted both that Vermont Railway’s facility was operating under appropriate federal CWA permits and also that there was nothing particularly hazardous about the storage of road salt in contrast to the use of road salt for the purpose of de-icing roads, driveways, and sidewalks which the ordinance permitted. Accordingly, the town failed to demonstrate that its ordinance fell within ICCTA’s police powers exception.

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