IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:18-cv-02453-RBJ

ROCK & RAIL LLC, a Colorado limited liability company

Plaintiff/Counterclaim Defendant,

v.

INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a Colorado nonprofit corporation, ROCKIN S RANCH LLC, a Colorado limited liability company, JOHN CUMMINGS, an individual, DAVID KISKER, an individual, GARY OPLINGER, an individual, WOLFGANG DIRKS, an individual, and JAMES PIRAINO, an individual,

Defendants/Counterclaim Plaintiffs.

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants/Counterclaimants Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (the "Neighborhood Defendants"),[1] by and through their undersigned counsel, respectfully submit this Motion for Partial Summary Judgment and state as follows in support thereof:

LOCAL RULE 7.1(a) CERTIFICATION

Pursuant to D.C.COLO.LCivR 7.1(a), counsel for all parties conferred regarding the substance of this motion via teleconference on January 31, 2020. Plaintiff opposes this motion.

INTRODUCTION

Now that discovery has closed in this matter, the Neighborhood Defendants respectfully ask the Court to enter summary judgment on their First Counterclaim [ECF No. 16, at 21-22], which asks the Court to confirm that federal preemption under the Interstate Commerce

---

[1] As set forth in ECF No. 78, all parties have stipulated to the dismissal of Defendant Motherlove Herbal Company.

Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101, *et seq.*, does not apply to the concrete manufacturing operation[2] that Plaintiff Rock & Rail LLC ("Rock & Rail") has continued to conduct at the Highway 34 Facility (the "Facility"[3]) in defiance of Weld County zoning law and a final judgment from the Colorado Court of Appeals.

The undisputed evidence confirms that all of these non-rail industrial improvements and operations relate to "manufacturing activities and facilities which are not integrally related to the provision of interstate rail service." *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 247 (3d Cir. 2007) (quoting *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 247 (1941)). Under well-settled law, the mere fact that such operations may be undertaken by a railroad does not place them within the jurisdiction of the Surface Transportation Board (the "STB") and, in turn, cannot be used to evade state and local regulation. *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017) (noting that that every Circuit Court of Appeals has confirmed that ICCTA preemption "does not encompass everything touching on railroads").

Here, the undisputed evidence confirms that any of Rock & Rail's railroad operations[4] at the Facility are wholly separate from the non-rail industrial improvements that it uses to

---

[2] As detailed below, this non-rail operation includes the following improvements and operations: (1) the concrete batch plant; (2) the delivery and storage of concrete ingredients that are delivered to the Facility by truck; (3) the storage of ready-mix concrete trucks; (4) the concrete washout pit; (5) the concrete slump/testing area; and (6) the concrete recycling area.

[3] As used herein (and as discussed in more detail below), the "Facility" is defined to include all of those improvements that were constructed at the Highway 34 facility by Martin Marietta Materials, Inc. ("MMM") and have been operated by Rock & Rail since its acquisition of the Facility in September 2018.

[4] The Neighborhood Defendants dispute that any of Rock & Rail's operations at the Facility are subject to ICCTA preemption because Rock & Rail is only unloading its own materials at the Facility and thus has never acted as a "common carrier" as is required to invoke ICCTA preemption relating to "transportation by a rail carrier." 49 U.S.C. §§ 10102(5), 10501(a)(1). However,

manufacture concrete. The rail-delivered aggregate that Rock & Rail uses to feed its concrete batch plant is already unloaded from rail to haul truck at the Facility before it is then delivered to the concrete batch plant by truck. Rock & Rail has not produced any evidence that the collocation of Rock & Rail's concrete batch plant with its railroad operations is a matter of railroad necessity. Rather, this collocation is purely a matter of economic efficiency and convenience. Both courts and the STB have repeatedly rejected similar efforts to expand the scope of the ICCTA to evade the application of state and local regulation to such non-rail operations. Here, as confirmed by the Colorado Court of Appeals, it is undisputed that Rock & Rail's non-rail operations at the Facility have violated local law for more than a year. There is no justification for Rock & Rail's continued, open defiance of applicable law.

STATEMENT OF UNDISPUTED MATERIAL FACTS[5]

1. Rock & Rail is a subsidiary of non-railroad MMM [ECF No. 30, ¶ 47].

2. The Facility was originally constructed by MMM pursuant to a Use by Special Review ("USR") Permit issued by Weld County. (Plaintiff's July 15, 2019 Responses to Defendants' First Set of Discovery Requests, at 3 (attached hereto as **Exhibit A-1**[6]).) As part of its proposal for the USR Permit, MMM specifically described the proposed Facility as an

because this issue involves potentially disputed issues of material facts, the Neighborhood Defendants have elected to reserve it for trial.

[5] The Neighborhood Defendants are mindful of the Court's guidance regarding the use of exhibits in support of a motion for summary judgment (Practice Standards, at p. 3) and have made a conscious effort to limit the number of exhibits attached to this Motion. Although the material facts that bear on the present issue are admittedly somewhat involved, all of these facts derive from information obtained from Rock & Rail (and/or MMM) and are therefore undisputed.

[6] All of the supporting materials attached to this Motion for Partial Summary Judgment have been authenticated as set forth in the Affidavit of Mark E. Lacis (attached hereto as **Exhibit A**.)

"aggregate transloading facility with concrete batch plant . . . operations as well" and specifically noted that the proposed Facility would be used for the "production" of concrete. (Martin Marietta Materials USR Application and Questionnaire, at Bates No. 000174 (attached hereto as **Exhibit A-2**).)

3. MMM spent more than $54 million to construct the Facility. (Plaintiff's Supplement to Interrogatory 1 (attached hereto as **Exhibit A-3**). Of that, MMM spent more than $5.5 million to construct a ready-mix concrete batch plant at the Facility. (*Id.*) Weld County charged (and MMM paid) more than $23,000 in "Manufacturing/Industrial" fees related to the building permit that MMM received to construct the concrete batch plant. (Weld County Permit No. BCR16-0094, at 3 (attached hereto as **Exhibit A-4**).)

4. MMM built the Facility with full knowledge that the USR Permit that it needed to construct and operate the Facility was subject to judicial review in state court. (Dec. 21, 2015 Letter from C. White to B. Barker (attached hereto as **Exhibit A-5**).) In doing so, MMM expressly acknowledged that if the USR was overturned through the state court appeal process, MMM could be forced to remove the Facility. (*Id.*)

5. In an Opinion dated November 22, 2017, the Colorado Court of Appeals reversed Weld County's decision approving MMM's USR Permit. (Opinion, *Cummings et al. v. Weld Cnty. Bd. of Cnty. Comm'rs, et al.*, Case No. 17CA0463, at *5-9 (Colo. App. Nov. 22, 2017) (unpublished) (attached hereto as **Exhibit A-6**).)

6. Following the state court decision, the Facility was illegal under Weld County zoning law. (Relevant Excerpts of Nov. 7, 2019 Rule 30(b)(6) Depo. of Weld County, Colorado, at 161:9-165:8 (attached hereto as **Exhibit A-7**);

7. Thereafter, in or around August 2018, MMM transferred the Facility to Rock & Rail for $10.00. (Aug. 20, 2018 Bill of Sale, at Bates No. 0000064 (attached hereto as **Exhibit A-8**).) At the time, counsel for MMM and Rock & Rail acknowledged that the transfer was precipitated by the state court decision and further claimed that the transfer would allow Rock & Rail "to exercise its right to commence operations at the Hwy. 34 facility, as it is authorized to do under ICCTA." (Sept. 25, 2018 Letter from W. Forman to M. Freeman et al., at 2 (attached hereto as **Exhibit A-9**).)

8. Rock & Rail then began operating the Facility, including the newly constructed concrete batch plant and other industrial operations to support the production of concrete at the Facility. (*See generally* Plaintiff's Dec. 5, 2019 Response to Defendants/Counterclaimants' Amended Interrogatories, at 3-7 (attached hereto as **Exhibit A-10**).)

9. The Facility's train offloading, conveyor system, and long-term storage yard (in the southeast of the Facility) are physically separated from the concrete batch plant operations (in the northwest of the Facility). (Depo. Ex. 24 (attached hereto as **Exhibit A-11**).)

10. Rock & Rail receives aggregate by rail at the Facility by unloading it from train cars using a gravity-fed unloading facility. (Relevant Excerpts of Dec. 11, 2019 Rule 30(b)(6) Depo. of Rock & Rail, at 95:20-98:21 (attached hereto as **Exhibit A-12**).) The aggregate is then moved using a conveyor system and radial stackers which places the aggregate into piles. (*Id.* at 144:9-145:22, 148:14-151:2.)

11. None of the aggregate is immediately used or loaded into trucks. (*Id.* at 162:19-166:18.) Instead, the piles of rail-delivered aggregate are held as inventory to either: (i) supply the Facility's concrete batch plant "depending on construction demand" (Ex. A-10,

at 5); or (ii) be sold to MMM (or MMM's customers) to supply other ready-mix concrete manufacturing operations in Northern Colorado. (Ex. A-12, at 87:13-93:2.) In either scenario, the rail-delivered aggregate first comes to rest in storage piles fed by the radial stackers before the aggregate is then eventually loaded into haul trucks. (*Id.* at 161:9-162:24; Relevant Excerpts of Dec. 19, 2019 Depo. of T. Theiler,[7] at 29:24-35:16 (attached hereto as **Exhibit A-13**).) Whether these haul trucks are then used to deliver aggregate within the Facility (to supply the concrete batch plant) or trucked offsite (to supply MMM's other offsite operations (or customers)) is solely dependent on the needs of MMM, which dictates concrete production at the Facility and coordinates sales of raw aggregate from the Facility to MMM's third-party customers. (Ex. A-12, at 83:20-85:2, 162:19-163:21.) There is nothing about this aggregate or the rail deliveries that are made to the Facility that require that the raw aggregate be kept onsite and processed through the concrete batch plant rather than being hauled offsite by truck (and, in fact, much of it is trucked off site as raw aggregate). Indeed, nothing about the aggregate changes during rail transit prior to its delivery to the Facility. (*Id.* at 142:13-21.)

12. Because the rail-delivered aggregate is stockpiled at the Facility, Rock & Rail's ability to make concrete at the Facility is not dependent upon the regular arrival of trains delivering aggregate. (*Id.* at 90:16-93:2.) Once or twice per week, aggregate that has been transported to the Facility by rail is loaded into haul trucks and moved from the long-term storage yard to the concrete batch plant-side of the Facility to supply the concrete batch plant. (*Id.* at 162:19-24.)

[7] Mr. Theiler is a "Ready Mix Loader Operator" who currently works to operate the Facility's concrete batch plant. (Ex. A-10, at 3.)

13. None of the Rock & Rail employees who participate in the train unloading operations at the Facility have any involvement with the concrete batch plant (and vice versa). (Ex. A-13, at 31:22-32:8; Relevant Excerpts of Dec. 19, 2019 Depo. of D. Ensrud,[8] at 37:3-38:9 (attached hereto as **Exhibit A-14**); Relevant Excerpts of Dec. 12, 2019 Depo. of M. Carmona,[9] at 38:6-40:1 (attached hereto as **Exhibit A-15**).) In fact, Rock & Rail has organized itself into two different business units at the Facility: (1) an "aggregate business unit" which unloads the trains and uses the conveyor system to stockpile aggregate inventory in the storage yard; and (2) a "ready mix business unit" which operates and maintains the concrete batch plant and loads concrete mix into ready-mix trucks. (Ex. A-12, at 126:5-130:10.)

14. All of the employees who work in Rock & Rail's "ready mix business unit" at the Facility were previously employed by MMM and worked at other MMM concrete batch plants in Northern Colorado where no railroad facilities were present. (Ex. A-15, at 30:23-38:13; Ex. A-14, at 17:15-27:3.) In fact, of the approximately "ten to twelve" concrete batch plants that MMM currently operates in Northern Colorado, none of those concrete batch plants are collocated with any rail operations. (Relevant Excerpts of Dec. 10, 2019 Depo. of J. Sharn,[10] at 59:6-68:4 (attached hereto as **Exhibit A-16**).) All of the aggregate that is used to supply MMM's other concrete batch plants is delivered by truck. (*Id.*)

---

[8] Mr. Ensrud is a "Ready Mix Batchman" who currently works to operate the Facility's concrete batch plant. (Ex. A-10, at 3.)

[9] Mr. Carmona is a "Ready Mix Operator" who currently works to operate the Facility's concrete batch plant. (Ex. A-10, at 3.)

[10] Mr. Sharn currently works as a Director of Natural Resources for MMM and has worked continuously for MMM since 1997. (Ex. A-16, at 13:17-15:4.)

15. The concrete batch plant is an Erie Strayer MBP-11C, which is capable of "producing" up to 288 cubic yards of concrete per hour. (Ex. A-12, at 23:21-26:24.) The concrete batch plant at the Facility is the only concrete batch plant that Rock & Rail owns and operates. (*Id.*) Rock & Rail's concrete batch plant has the ability to produce hundreds (if not thousands) of custom types of concrete at the Facility. (*Id.* at 181:22-182:13.)

16. In the state pollution permits that MMM has filed with the Colorado Department of Public Health & Environment (CDPHE) on behalf of Rock & Rail (under a Management Services Agreement), MMM has described the concrete batch plant to be part of the "[o]utdoor **manufacturing** and processing" operations at the Facility. (Relevant Excerpt of Stormwater Management Plant, Permit No. COR901285, at Bates No. R&R0000220 (emphasis added) (attached hereto as **Exhibit A-17**).) The CDPHE air pollution standards that apply to the concrete batch plant at the Facility are those limits that CDPHE places on the "**[p]roduction** of concrete." (Construction Permit No. 16WE0688, at Bates No. R&R0000107 (emphasis added) (attached hereto as **Exhibit A-18**).)

17. To make a batch of concrete at the Facility, Rock & Rail first stages the components needed to make concrete in storage bins that are located to the immediate south of the concrete batch plant at the Facility. (Ex. A-13, at 25:20-31:3.) These storage bins hold aggregate, sand, river rock, and pea gravel. (*Id.*) Fly ash, cement, and other additives are also stored in tanks near the concrete batch plant for use in the production of concrete. (Ex. A-14, at 59:15-60:5.) Of the materials used to make concrete (aggregate, sand, river rock, pea gravel, fly ash, cement, additives, and water), only the aggregate arrives at the Facility by rail. (*Id.*; Ex. A-12, at 61:25-62:2, 65:2-68:13; Ex. A-13, at 36:9-41:4.) However, even aggregate is sometimes

delivered to the site by truck, and Rock & Rail has manufactured batches of concrete using the concrete batch plant which used only materials that were delivered to the Facility by truck (*i.e.*, none of the materials used to manufacture those batches of concrete at the Facility arrived at the Facility by rail). (Ex. A-15, at 40:23-43:5; Ex. A-14, at 47:3-48:17.)

18. Rock & Rail estimates that 50 percent of the ingredients used to manufacture concrete at the Facility arrive at the Facility by truck (and not train). (Ex. A-12, at 66:13-20.) Rock & Rail's production of concrete is not directly dependent on the delivery of aggregate by train—rather, Rock & Rail produces concrete based on the needs of its customers and stockpiles aggregate so that it can manufacture concrete on days when it is not receiving aggregate by train. (*Id.* at 162:19-166:18.)

19. Once Rock & Rail adds water to cement within the concrete batch plant, it has irreversibly started the process of making concrete. (*Id.* at 176:3-178:11.) Rock & Rail has described this process as a "chemical reaction" which will generate heat once all of the ingredients (including the aggregate, the water, and the dry cement) are first combined in the Facility's concrete batch plant. (*Id.*) In general, once the Facility's concrete batch plant has manufactured a batch of concrete, "it must be delivered within 90 minutes." (Ex. A-10, at 6.)

20. Rock & Rail maintains and operates numerous other aspects of the Facility for the sole purpose of supporting the concrete batch plant operations. These additional components include a ready-mix washout pit (used to wash out the concrete batch plant and MMM ready-mix concrete trucks), overnight storage of MMM ready-mix trucks, a ready-mix "slump pit" (that MMM uses to test the quality and consistency of the manufactured concrete), and an area for recycling hardened concrete. (Ex. A-12, at 166:19-168:25; 184:2-186:17.) These additional

components are solely for the benefit of MMM, which to date is the only entity that has ever purchased the concrete that has been manufactured at the Facility. (*Id.* at 119:19-120:22.) None of these additional operations at the Facility support any rail delivery or unloading operations at the Facility.

21. Between November 2018 and May 31, 2019, Rock & Rail manufactured more than 67,570 cubic yards of concrete using the Facility's concrete batch plant. (*Id.* at 198:20-199:19.) As of December 2019, all of the concrete that Rock & Rail has manufactured at the Facility has been sold to MMM. (*Id.* at 198:20-199:19.) There is no evidence that Rock & Rail has operated the Facility any differently than MMM (a non-railroad) had previously intended (prior to the state court decision and the transfer to Rock & Rail).

LEGAL STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Only disputes over material facts can create a genuine issue for trial and preclude summary judgment. *Faustin v. City & County of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). "Substantive law governs what facts are material and what issues must be determined. It also sets the standard of proof and identifies the party with the burden of proof." *Xtreme Coil Drilling Corp. v. Encana Oil & Gas (USA), Inc.*, 2010 U.S. Dist. LEXIS 98188, at *4-5 (D. Colo. Sept. 19, 2010).

ARGUMENT

1. Rock & Rail's Concrete Manufacturing Operation Is Not Integrally Related to Transportation by a Rail Carrier and Is Therefore Not Preempted by the ICCTA and Remains Subject to Local Zoning Law and the Final Judgment of the Colorado Court of Appeals.

On November 22, 2017, the Colorado Court of Appeals issued an opinion in the underlying state court litigation confirming that Weld County unlawfully approved MMM's construction of the Facility. Nevertheless, following MMM's transfer of the Facility to its wholly-owned subsidiary, Rock & Rail has operated and continues to operate all aspects Facility, including the concrete batch plant without any lawful authority under Weld County zoning law. Rock & Rail claims that the concrete batch plant and all supporting improvements and operations are not subject to local zoning law by virtue of ICCTA preemption.

It is well-settled that ICCTA preemption does not apply to activities that fall outside the ICCTA's definition of railroad "transportation." *Town of Milford, MA – Petition for Declaratory Order*, STB Finance Docket No. 34444, 2004 WL 1802301, at *2 (Aug. 11, 2004); *see also Delaware*, 859 F.3d at 18 ("Notwithstanding the 'expansive' definition of transportation, all of the circuits have concluded that it does not encompass everything touching on railroads." (Internal quotation omitted).). In particular, "**manufacturing activities and facilities not integrally related to the provision of interstate rail service** are not subject to [the STB's] jurisdiction or subject to federal preemption." *New York Susquehanna & W. Ry. Corp.*, 500 F.3d at 247 (emphasis added) (quoting *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 247 (1941)); *see also New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA*, STB Finance Docket No.

34797, 2007 WL 1989841, at *6 (STB June 29, 2007) ("[M]anufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term 'transportation'."); *see also Town of Milford*, 2004 WL 1802301, at *2 (finding that the STB has no jurisdiction over "steel fabrication activities").

Rock & Rail has suggested throughout this litigation that the concrete batch plant does not "manufacture" concrete because the finished product does not harden into concrete until it has been removed from the Facility and installed at a final location. This argument, however, ignores the fact that the process of making concrete unquestionably begins in the concrete batch plant when a chemical reaction is triggered by mixing all of the components of concrete. By Rock & Rail's own admission, the industrial process that begins in the concrete batch plant will result in concrete approximately 90 minutes after all of the ingredients of concrete have been mixed together in the concrete batch plant. Irrespective of where the concrete might finally set, the operation of the concrete batch plant is unquestionably "undertaken to create a new product [concrete] for sale to customers" and not simply "to facilitate [rail transportation]." *Cf. New England Transrail, LLC*, 2007 WL 1989841, at *9; *see also New York Susquehanna & W. Ry. Corp.*, 500 F.3d at 249 (suggesting that evidence that a challenged activity "creates value independent of the transloading process" (emphasis added) may be dispositive proof that the activity goes beyond mere "transportation").

Rock & Rail has also argued that the concrete batch plant is simply one more step in transporting raw aggregate from railcars to ready-mix concrete trucks. But Rock & Rail is not simply selling aggregate to its customers—it is selling (and charging a premium for) produced

ready-mix concrete. This argument is further fatally undermined because the aggregate has already been transported within the Facility by haul truck before it ever reaches the concrete batch plant. Indeed, some of the haul trucks that are loaded with rail-delivered aggregate leave the Facility when Rock & Rail and MMM sell and deliver raw aggregate from the Facility to MMM (or MMM's customers). In other words, once the rail-delivered aggregate is loaded from the conveyor fed stockpiles into haul trucks, the process of transloading aggregate from train to truck is complete. A physically separate and stand-alone $5.5 million concrete batch plant—which is a highly specialized piece of industrial equipment capable of making thousands of different types of concrete—is not needed to transload aggregate from rail to truck. *New England Transrail, LLC*, 2007 WL 1989841, at *10 (finding that a waste shredder was not subject to ICCTA preemption because "a shredder is not required to pack into rail cars material that has arrived at its facility packed into trucks").

It is further undisputed that the decision as to whether the haul trucks that are loaded at the radial stacker piles are then taken off site or moved within the Facility to feed the concrete batch plant is solely a question of Rock & Rail's economic and other business interests and is completely divorced from the earlier transportation by rail. The fact that the railed aggregate is loaded into haul trucks before it ever reaches the concrete batch plant is definitive proof that the batch plant is not integral to the process of transloading aggregate from rail to truck and instead, represents a separate processing facility that is wholly separate from rail transportation. *See Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, STB Finance Docket No. 33466, 1999 WL 715272, at *7 (STB 1999) (explaining that "corn processing

plant" is not subject to Board jurisdiction if it "is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose").

The undisputed evidence also confirms that the Facility was designed and constructed to be operated by a non-railroad, MMM. Now, the concrete batch plant is operated by former MMM employees who previously worked at other MMM facilities that were not served by rail, and there is no evidence that Rock & Rail has operated the concrete batch plant in a manner that is different from what was proposed by MMM. And as part of its proposal to construct the Facility, MMM described the concrete batch plant as distinct from any rail operations at the Facility and explained that the Facility would be used for the "production" of concrete. It is undisputed that Weld County charged MMM (and MMM paid) more than $23,000 in "Manufacturing/Industrial" fees for the building permit that MMM needed to construct the concrete batch plant. And in filings with the CDPHE, MMM repeatedly confirmed that the concrete batch plant is used for manufacturing concrete.

As confirmed by <u>all</u> of MMM's concrete batch plant operations in Colorado (none of which are collocated with a train offloading facility), a concrete batch plant is not necessary to transload aggregate from trains <u>and</u> a train offloading facility is not needed to operate a concrete batch plant. Rather, the collocation of the concrete batch plant with the Facility's rail operations is solely a matter of economic expediency for Rock & Rail. This economic justification, however, ignores the well-settled principle that "the ICCTA does not preempt all state and local regulation of activities that has any efficiency-increasing relationship to rail transportation." *Del Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118-19 (1st Cir. 2015) (rejecting a similar economic efficiency argument because this "efficiency rationale would result in a vast regulatory gap in which state

and local regulation would be eliminated simply because the facilities were economically connected to rail transportation”).

While there are some narrow circumstances where additional processing of rail-delivered materials may be appropriate as activities that are integrally related to “transportation” under the ICCTA, none of those circumstances apply to Rock & Rail’s Facility. Most notably, the relationship between the concrete batch plant and the rail operations at the Facility is plainly distinguishable from the wood pellet transloading facility at issue in *Del Grosso v. Surface Transportation Board*, 898 F.3d 139 (1st Cir. 2018). In *Del Grosso*, the First Circuit affirmed STB’s decision that “vacuuming, screening, and repelletizing” at a transloading facility was covered by the ICCTA because—under the unique circumstances of that case—the process of transporting wood pellets by rail necessarily caused some pellets to break down in transit and thus necessitated “repelletizing” as part of the transloading process at the rail delivery site. *Id.* at 149 (“But [the rail carrier] repelletizes **to remedy problems** (dust and broken pellets) to the already-completed pellets—**problems chiefly caused by the movement of pellets by rail (as we have been at pains to stress)**.” (Emphasis added.)).

Here, in contrast, it is undisputed that nothing about the aggregate changes when it is transported by rail. And yet again, the reality that a concrete batch plant is not integral to the transportation of aggregate by rail at the Facility is undeniably confirmed by the fact that Rock & Rail regularly sells raw aggregate from the Facility to MMM which is then removed from the site without any processing through the concrete batch plant.

The absence of any direct connection between the Facility’s concrete batch plant and the Facility’s rail operations is further highlighted by the fact that Rock & Rail can (and actually has)

used the Facility's concrete batch plant to manufacture batches of concrete without using any aggregate that was delivered to the Facility by rail. Even when Rock & Rail does manufacture concrete using rail-delivered concrete, the process of manufacturing concrete at the Facility is only possible because approximately 50 percent of the ingredients needed to manufacture concrete are delivered to the Facility by truck.

Here, of the many industrial components that make up the Facility originally proposed by MMM, only the rail spur, loop track, and offloading/conveyor facility have any plausible relationship to rail transportation. The concrete batch plant, and all other supporting facilities (including the delivery and storage of materials brought to the Facility by truck, the storage of MMM ready-mix trucks, the concrete washout pit, the concrete slump pit, and the concrete recycling area) are wholly divorced from any rail transportation operations at the Facility. All of these other non-rail, industrial facilities rely at least in part on materials that are delivered to the Facility by truck and only interact with the aggregate that is delivered to the Facility by rail after it has first been previously moved from train to radial stacker pile to haul truck before the aggregate is then driven across the Facility and placed in a new pile where it can then be used to eventually feed the concrete batch plant. The aggregate is then combined in a chemical reaction with numerous other products that are delivered to the Facility by truck, which causes a chemical reaction and results in a completely new (and improved) product—concrete. This new product is then loaded into ready-mix concrete trucks and finally removed from the Facility. This manufacturing process is not integrally related to rail transportation.[11]

---

[11] This conclusion is further confirmed by the fact that Rock & Rail's own proffered expert in this matter—a railroad attorney with more than forty years of practice experience with and before the STB (and/or its predecessor, the Interstate Commerce Commission)—is not aware of a single

"Mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state and local regulation." *In re Vermont Railway*, 769 A.2d 648, 654 (Vt. 2000). Here, it is undisputed that—without a valid USR—Weld County zoning law prohibits the operation of a concrete batch plant and other supporting industrial operations at the Facility, which is zoned for exclusively agricultural use. Because Rock & Rail's concrete manufacturing operation is completely separate from any rail operations at the Facility, enforcement of this local zoning law will neither unreasonably burden rail transportation nor discriminate against railroad operations. *See New York Susquehanna and Western Ry. Corp.*, 500 F.3d at 253.

There is no genuine issue of material fact that the Facility's concrete batch plant and all supporting, non-rail improvements and operations are beyond the reach of ICCTA preemption. Accordingly, the Court can and should immediately enter declaratory relief confirming that these otherwise unlawful improvements and operations remain illegal under applicable Weld County zoning law.

CONCLUSION

WHEREFORE, the Neighborhood Defendants respectfully request that the Court enter declaratory relief confirming that Rock & Rail's non-railroad operations and improvements at the Facility (including (1) the concrete batch plant; (2) the delivery and storage of concrete ingredients that are delivered to the Facility by truck; (3) the storage of ready-mix concrete trucks; (4) the concrete washout pit; (5) the concrete slump/testing area; and (6) the concrete recycling area) are not subject to ICCTA preemption and are therefore illegal under Weld County zoning

---

instance where the either the STB or the ICC found that it had jurisdiction over a concrete batch plant. (Relevant Excerpts of Jan. 21, 2020 Depo. of L. Gitomer, at 72:4-73:16 (attached hereto as **Exhibit A-19**.)

law. Consistent with the Court's equitable authority to enforce its order and to fashion an appropriate remedy, the Neighborhood Defendants further respectfully request that the Court enjoin Rock & Rail from engaging in any operations at the Facility that are illegal under Weld County zoning law.

Respectfully submitted this 7th day of February 2020.

s/Mark E. Lacis
Mark E. Lacis
James R. Silvestro
IRELAND STAPLETON PRYOR & PASCOE, PC
717 17th Street, Suite 2800
Denver, CO 80202
Telephone: (303) 623-2700
mlacis@irelandstapleton.com
jsilvestro@irelandstapleton.com

Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2020, I electronically filed the foregoing **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

Brian J. Connolly
Bill E. Kyriagis
Otten Johnson Robinson Neff & Ragonetti PC
Suite 1600 | 950 17th Street
Denver, Colorado 80202
bconnolly@ottenjohnson.com
bkyriagis@ottenjohnson.com

H. Wyane Phears
Martin Marietta Materials, Inc.
2710 Wycliff Rd.
Raleigh, North Carolina 27607
Wayne.phears@martinmarietta.com

/s/ Mark E. Lacis
Mark E. Lacis