

234747

ENTERED

Office of Proceedings

September 3, 2013

Part of Public

Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35749

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

v.

TOWN OF WINCHESTER, MASSACHUSETTS, WINCHESTER BOARD OF SELECTMEN,
WINCHESTER BUILDING DEPARTMENT, WINCHESTER ZONING BOARD OF
APPEALS, RICHARD HOWARD, JAMES A. JOHNSON III, DOUGLAS MARMON,
JENNIFER WILSON, FORREST FONTANA, LANCE GRENZEBACK, DONNA
PATALANO, LAWRENCE BEALS, RICHARD SAMPSON JR., JON GYORY, JOAN
LANGSAM, NIGEL HAIG GALLAHER and JOHN A. WILE. —
DECLARATORY ORDER

OPPOSITION TO PETITION FOR RECONSIDERATION

Gordon A. Coffee
Andrew C. Nichols
Christine M. Waring
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

Robert B. Culliford
Boston and Maine Corporation
Springfield Terminal Railway Co.
Iron Horse Park
North Billerica, MA 01862
(978) 663-1126

*Counsel for Petitioners Boston and
Maine Corporation and Springfield
Terminal Railway Company*

Dated: September 3, 2013

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35749

**BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

v.

TOWN OF WINCHESTER, MASSACHUSETTS, *ET AL.*

OPPOSITION TO PETITION FOR RECONSIDERATION

Last month, this Board declared that the Town of Winchester’s zoning decision banning use of a freight yard used by a rail carrier for rail transportation “directly conflicts with the most fundamental ... rights and obligations provided by federal law” and is “plainly preempted.” *Boston and Maine Corporation and Springfield Terminal Railway Co.*—Pet. for Decl. Order, FD 35749, at 4 (STB served July 19, 2013). During proceedings on the petition, which was treated as an emergency given the Town’s stated plan to seek a state-court injunction enforcing its zoning decision, the Town did not object to this Board’s exercise of its exclusive jurisdiction. To the contrary, the Town assured the Board that “no petition for a ... preliminary injunction [has yet] been filed” and the Town would “be filing [its] Reply to the Emergency Petition.” Rebuttal Ex. A (letter of July 3, 2013). And the Town did indeed file its Reply, offering several arguments for denying Pan Am’s petition—none asserting that the Board should abstain.

The Town also went ahead and sought injunctive relief in state court, contrary to its earlier representation to the Board that it would not do so. But in its motion, the Town asked that the state-court injunction remain in force “until a tribunal of competent jurisdiction” rules. *Id.* (Ex. B at 6) (Motion of July 5, 2013). That “tribunal” was this Board. When this Board promptly ruled, the state court dismissed the Town’s motion as moot (Pet. 1-2), per the Town’s request.

Now, having lost on the merits, the Town wants to wipe the slate clean. According to the Town, “[t]he Board’s action was a clear violation of the *Younger* abstention doctrine,” because it “intrude[d] upon” the state-court injunction proceeding. Pet. 2. Thus, the Town faults this Board for not deferring to an injunction proceeding the Town assured the Board would not be pursued, and that the Town (having broken its promise and filed the injunction proceeding anyway) told the state court would be mooted once this Board ruled. This argument is astounding, both equitably and legally. The Town cites no authority for the proposition that *Younger* applies to federal agencies. And even if it did, the doctrine can be waived (*e.g.*, *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 517 (1st Cir. 2009) (“Contrary to defendants’ contention, abstention is a waivable defense.”); *Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986) (same))—and was waived here because it is raised for the first time on reconsideration. Moreover, there is nothing to abstain *from* because the state-court proceeding was dismissed as moot when the Board ruled—which is precisely what the Town requested.

Nor is there any substantive basis for reconsideration. According to the Town, this Board failed to “supply a reasoned analysis” and acted “arbitrarily and capriciously” because it did not “persuasively distinguish[]” its precedent. Pet. 8-9. The Board did not need to “distinguish” its precedent; it followed that precedent. “As the federal courts and the Board have stated repeatedly, where a local regulation conflicts with the rights and obligations contained in the Interstate Commerce Act, federal law will preempt the local regulation.” Docket No. 35749, at 4 (collecting decisions). Applying these myriad decisions, the Board held that the Town’s declaration that the “freight yard” at issue may not be used as such, and its command that “all rail traffic to the warehouse” “cease and desist” were direct attacks on the Interstate Commerce Act that also conflict with the purposes and objectives of that Act, which is to prevent a “patchwork of conflicting

local regulations” of interstate rail transportation. *Id.* at 3-4 (citing *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 158-60) (4th Cir. 2010)). That was exactly right.

Lacking any merit, the petition to reconsider should be denied.

Respectfully submitted,

/s/ Andrew C. Nichols

Gordon A. Coffee
Andrew C. Nichols
Christine M. Waring
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

Robert B. Culliford
Boston and Maine Corporation and
Springfield Terminal Railway Co.
Iron Horse Park
North Billerica MA 01862
978-663-1126

*Counsel for Petitioners Boston and
Maine Corporation and Springfield
Terminal Railway Company*

Dated: September 3, 2013

STATEMENT REGARDING SERVICE

I hereby certify that on this 3rd day of September, 2013, I have served Respondent in this proceeding with this document by United States Mail as follows:

Richard Howard
James A. Johnson III
Douglas Marmon
Jennifer Wilson
Forrest Fontana
Lance Grenzeback
Town of Winchester
Board of Selectmen
2nd Floor, Town Hall
71 Mt. Vernon Street
Winchester, MA 01890

Mark Bobrowski
Special Counsel
Town of Winchester
9 Damonmill Square, Ste. 4A4
Concord, MA 01742

Fritz R. Kahn
1919 M. Street, NW (7th Fl.)
Washington, DC 20036

John A. Wile
Town of Winchester
Zoning Enforcement Officer
Building Department
Lower Level, Town Hall
71 Mt. Vernon Street
Winchester, MA 01890

Donna Patalano
Lawrence Beals
Richard Sampson Jr.
Jon Gyory
Joan Langsam
Nigel Haig Gallaher
Town of Winchester
Zoning Board of Appeals
Winchester Town Hall
71 Mt. Vernon Street
Winchester, MA 01890

/s/ Andrew C. Nichols
Andrew C. Nichols

*Counsel for Petitioners Boston and Maine
Corporation and Springfield Terminal
Railway Company*