

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

**REBUTTAL IN SUPPORT OF
EMERGENCY PETITION
FOR DECLARATORY ORDER**

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: July 16, 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.*

**REBUTTAL IN SUPPORT OF
EMERGENCY PETITION FOR DECLARATORY ORDER**

The Town of Winchester’s reply is significant, first and foremost, for what it does not say. The Town does not mention that, three days after the Town told this Board by letter that “there is no emergency requiring the Board’s immediate action,” because “no petition for a ... preliminary injunction [has yet] been filed ... and Petitioners remain free to serve ... Winchester” (Ex. A (letter of July 3, 2013)), the Town filed precisely such a motion seeking a “preliminary injunction” to “cease rail operations” (Ex. B at 1, 6 (“Motion for Preliminary Injunction”)). And whereas the Town assured this Board that it would “be filing [its] Reply to the Emergency Petition” “on or before July 22, 2013,” ostensibly to obtain a ruling from this Board before seeking an injunction, the Town’s motion for an injunction asks for exactly the opposite—namely, that the state court enter the “injunction ... unless and until a tribunal of competent jurisdiction finds and rules that the private track is preempted.” Ex. B at 6. Thus, while assuring this Board that there is “no emergency” requiring an immediate decision, the Town is pressing forward to “cease rail operations” until this Board rules.

To justify a state-court injunction, moreover, the Town is relying on informal communications with Board employees. In its motion, the Town cited a confidential e-mail from the Rail Customer & Public Assistance Program (RCPA), stating that “if a track is truly ‘private track’

then neither its construction, nor its operation is subject to STB jurisdiction.” Ex. B. at 3. The Town did not mention that the e-mail also stated: “[I]t would be best to reserve judgment until more facts are known,” and “[n]either RCPA employees nor the parties to an informal matter before the RCPA shall disclose any informal dispute resolution communication.” *Id.* at Ex. 6 at 2. Nor did the Town attempt to justify quoting these communications in violation of Board rules.

Equally disturbing is that the Town continues to try to slow proceedings before this Board to forestall a ruling here before the July 22 injunction hearing in state court. Aware that “[t]he Town has now moved for an injunction,” late last week three rail carriers (CSX Transportation, Inc., Housatonic Railroad Co., and Norfolk Southern Railway Company, joined by the Massachusetts Railroad Association) sought leave to file an amicus brief supporting Pan Am because the “issue presented is one of great ... significance to railroads and their customers.” Ex. C at 2; *see also* Ex. D at 3. The next day, the Town sent a letter to this Board advising of its intent to respond to the amicus brief by July 31—well after the state court will have ruled.

Despite the Town’s desire for a ruling after July 22, we respectfully ask that, in light of the Town’s pending motion, the Board issue a preemption order (if necessary, at first without an opinion) ***before July 22***. As a “tribunal of competent jurisdiction,” an order of this Board in favor of Pan Am would moot the Town’s motion, which seeks relief only until such a tribunal “finds ... preempt[ion].” Ex. B at 6. Before the injunction hearing, the Board should so find.

ARGUMENT

A. The Town offers essentially no answer to our showing that regulation of the Yard and Tighe’s track are expressly and impliedly preempted.

Express preemption. As to express preemption, the Town states that, “[t]o qualify for federal preemption under section 10501(b), the activities must constitute ‘transportation’ and must be performed by, or under the auspices of, a ‘rail carrier.’” Reply 5 (citing *City of Alexan-*

dria, Virginia, STB Finance Docket No. 35157 (Feb. 17, 2009) (emphasis added); *id.* at 6 (quoting additional decisions for the same proposition). As the ICCTA states, “[t]he jurisdiction of the Board over ... transportation by rail carriers ... is exclusive.” 49 U.S.C. § 10501(b). Yet the Town cannot explain why its declaration that the “freight yard” may not be used as such, and its command that “all rail traffic to the warehouse” “cease and desist” does not constitute impermissible regulation of “transportation ... performed by, or under the auspices of, a rail carrier.” Indeed, it is indisputable that Pan Am operates in the Yard and on Tighe’s side track as a rail carrier, and therefore those operations are subject to the jurisdiction of the Board.

In fact, in its motion for a preliminary injunction in state court, the Town states: “There is no debate in the instant matter that Pan Am is a rail carrier.” Ex. B at 3. And as we have shown, the “activities” here unquestionably qualify as “transportation,” which includes “a locomotive, car ... yard, property, facility ... or equipment of any kind related to the movement of ... property ... by rail ... and ... services related to that movement, including ... delivery ... [and] transfer in transit.” 49 U.S.C. § 10102(9); *see* Pet. 8-9. That should be the beginning and end of this case.

Protesting, the Town insists: “*Tighe* is not a rail carrier. *It* does not hold itself out as rendering common carrier railroad service. *Tighe’s* handling of the rail cars on its private track is not performed by, or under the auspices of a rail carrier, and, therefore the preemption provision of 49 U.S.C. § 10501(b) does not obtain.” Reply 6 (emphasis added). There are at least three independent problems here.

First, Tighe does not “handle[] .. rail cars.” The only party handling rail cars is Pan Am, as shown in the Town’s original order (still in effect), which declares the “freight yard” “not allowed” because of “the sound of the severe jarring and squealing of the freight cars, the idling of

the locomotives and coupling and recoupling of the freight cars” “*being used by Pan American Railways, Inc., for freight service.*” Pet. Ex. B at 2 (emphasis added). Thus, the Town is well aware that it seeks to regulate transportation provided by Pan Am as a common carrier, and that Tighe merely unloads rail cars delivered by Pan Am on behalf of other shippers. By itself, that requires preemption, because the activity at issue here is “performed by, or under the auspices of, a ‘rail carrier.’” Reply 5-6.

Second, it is irrelevant that some of this activity occurs on “Tighe’s ... track” for an independent, reason. That is, “transportation” includes “movement of property ... by rail, *regardless of ownership.*” 49 U.S.C. § 10102(9) (emphasis added). The Town has no answer.

Third, the Town glosses over the vesting in the Board of “exclusive” jurisdiction over “the operation of ... spur, industrial ... switching, or side tracks.” 49 U.S.C. § 10501(b)(2). This provision does not distinguish between side tracks owned by a rail carrier and those owned by a non-rail carrier, which shows that Board jurisdiction extends to privately owned side tracks.

Here, the Town does not deny, nor can it, that the tracks next to Tighe warehouse are side tracks. Pet. 8-10. Yet, the Town insists that “[t]he side track ... must be of a rail carrier.” Reply 4. That is incorrect. For this proposition, the Town points to 49 U.S.C. § 10906, which it says “exempts side track from the Board’s jurisdiction ... when it is that of ‘a rail carrier providing transportation subject to the jurisdiction of the Board under this part.’” Reply 4. What the Town neglects to include is the end of the sentence. Here is the quotation in context, with the omitted portion in bold:

“[A] rail carrier providing transportation subject to the jurisdiction of the Board under this part *may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.* The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

§ 10906 (emphasis added). This provision does not require that the side track “*must* be of a rail carrier”; it says a rail carrier “*may* enter into arrangements for the joint ownership or joint use of ... side tracks.” To get the result it wanted, the Town changed “may” to “must.”

The Town also does not quote the next sentence, which provides that “the Board does not have authority under this chapter over ... operation ... of ... side tracks.” *Id.* The key language here is “under this chapter.” Chapter 109 of Title 49 is entitled, “Licensing.” Thus, the Board has no licensing authority over side tracks. But the Board does have “exclusive” jurisdiction over the “operation of ... side tracks” under Chapter 105 (namely, section 10501(b)). This case is not about licensing, but operation. Thus, the Town’s regulation is expressly preempted.

The Board has repeatedly drawn this distinction between authority to license (which the Board lacks as to side tracks) and jurisdiction over rail carriers and side track operations (which is vested exclusively in the Board). As the Board held in *New York City Economic Development Authority*, “section 10501(b) preemption applies even in cases—such as the construction of switching and spur track, as involved here—where the Board lacks licensing authority.” 2004 WL 1585810, at *7 (S.T.B. July 15, 2004). So, too, in *Fletcher Granite*: “As several courts have held, this statutory preemption applies even in cases involving the construction of ancillary tracks and facilities under section 10906, even though the Board does not have licensing authority over such matters and therefore does not conduct its own environmental review.” *Fletcher Granite Co.*, 2001 WL 729418, at *2 (S.T.B. June 25, 2001). And likewise, in *Boston and Maine Corporation*: “[S]tatutory preemption applies even in cases—such as the construction of ancillary facilities under section 10906, as involved here—where we lack licensing and conditioning authority.” 2001 WL 458685, at *4.

The Town is thus mistaken to say that, under *New York City Economic Development*, side track must be “built to be used” by a rail carrier, which must have “already ... obtained the authority from the Board to operate” on the track. Reply 5. Not so. Although the landowner there sought a declaration that it could *construct* side track without a Board license, nothing in the decision suggests that the side track had to be built by a rail carrier, or that that a rail carrier requires special Board authority to *operate* on a side track. Which makes sense because, as we have just shown, sections 10906 and 10102(9) make crystal clear that no such licensing authority is required for a rail carrier to *operate* over side tracks. As to “operation,” ownership is irrelevant; “the jurisdiction of the Board ... is exclusive.” 49 U.S.C. § 10501(b)(2).

That is why *New York City Economic Development* itself says “preemption applies even in cases ... where the board lacks licensing authority.” 2004 WL 1585810, at *7. And it is why this Board there found “that the construction project [at issue] does not require agency authorization pursuant to 49 U.S.C. 10906; *and* that federal preemption applies pursuant to 49 U.S.C. 10501(b).” *Id.* at *8 (emphasis added). So too here—because Pan Am is operating as a common carrier, not as Tighe’s exclusive contract operator. Pet. 14-17 (collecting authorities).

In short, the regulations here are expressly preempted three times over. The Town cannot avoid that, “under this broad preemption regime, state and local regulation cannot be used to veto or unreasonable interfere with railroad operations.” *Boston and Maine Corp. and Town of Ayer*, 2001 WL 458685, at *5 (S.T.B. May 1, 2001).

Implied preemption. The Town also lacks any coherent response to the law of implied preemption. The Town does not dispute that “[s]ection 10501(b) of the ICCTA may preempt state regulations, actions, or remedies as applied, based on the degree of interference the particular state action has on railroad operations.” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533

F.3d 321, 332 (5th Cir. 2008). Nor does the Town dispute that the “degree of interference” here as to Tighe’s track is entire—given that the Town has ordered that “all rail traffic to the warehouse” “immediately cease and desist.” Pet. Ex. B at . The Town says the “cease and desist order, filed June 25, 2013, does not relate ... to the entire Montvale Yard or any track other than Tighe’s track” (Reply 2 n.2); however, that order was merely tacked onto a decision of the Town’s zoning board “determin[ing]” that the use of the “freight yard ... is not allowed.” Pet. Ex. B at 2. That decision has never been revoked. The Town’s decisions are thus interfering with the use of the entire Yard where, as we have shown, Pan Am is indisputably engaged in railroad operations. Pet. 4-5, 8-9, 11. The orders are therefore impliedly preempted.

Notably, the Town fails to distinguish *City of Alexandria*, where the Fourth Circuit tracked the reasoning of this Board in striking down a local ordinance far more clever than the Town’s orders here. Pet. 13-14. That was a “transloading” situation, says the Town; and here Pan Am does not transload: “Petitioners do nothing but bring the rail cars to the Tighe warehouse. They do not even unload the cars.” Reply 4. That is precisely the point. At least in *City of Alexandria*, the Town attempted to cloak its attack on the railroad by regulating trucks that received freight brought by the railroad. Here, the Town has shown zero interest in Tighe’s trucks. Instead, it has skipped the pretense and is directly banning use of the “freight yard” and “rail traffic.” This is a far easier case than *City of Alexandria*.

B. The Town invites the Board to adopt a definition of “private track” that runs headlong into the plain text of the ICCTA and this Board’s decisions.

To avoid preemption, the Town erroneously insists that Tighe’s track is “private track.” According to the Town, “Petitioners do not allege that it was they who constructed the track in question. ... Petitioners acknowledge that it is Tighe which owns the track. That would certainly seem to make the track private track.” Reply 2. Not so. “Private tracks constitute a narrow,

limited category of rail operations,” which must be “operated in a manner that does not constitute common carriage.” *B. Willis, C.P.A., Inc.*, 2001 WL 1168090, at *2 (S.T.B. Oct. 1, 2001). Conversely, exclusive Board “jurisdiction ... does not extend to wholly private rail operations conducted over private track, even when such operations are conducted by an operator that conducts common carrier operations elsewhere, if it operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner.” *Devens Recycling Ctr., LLC*, 2007 WL 61948, at *2 (S.T.B. Jan. 10, 2007).

In direct contrast, here there is no contractual arrangement between Pan Am and Tighe for Pan Am to provide exclusive service to Tighe as a contract switcher; and therefore Pan Am is operating on Tighe’s side track and in the Yard as a common carrier. This case is therefore directly analogous to *New York City Economic Development* and *Fletcher Granite*, discussed above, where the Board found jurisdiction over side tracks operated by a rail carrier.

Indeed, the Town here concedes that Pan Am is a common carrier. Ex. B at 3. What the Town seems to be disputing is whether Pan Am is a common carrier on the Tighe track. That Pan Am may not own that piece of track does not preclude it from being a common carrier on the track. “The principal test [for whether a carrier is a common carrier] is whether there is a bona fide holding out coupled with the ability to carry for hire.” *Hanson Natural Res. Co.*, 1994 WL 673712, at *14 (S.T.B. Nov. 15, 1994). That is what Pan Am does here—holding out Tighe warehouse as a delivery point on its system map. Pet .2-3.

The Town ignores that Pan Am identifies Tighe warehouse as part of its system and asserts that “[t]here is no holding out *by Tighe* to have the track serve the public at large.” Reply 2 (emphasis added). But even assuming that mattered, Tighe does hold out the warehouse on its website as “one of the largest of its kind on the Pan Am Railways system.” Pet. Ex. A. The

Town offers no evidence to contradict these public pronouncements of Pan Am and Tighe that Tighe's track and warehouse are available for common carriage.

The Town further cannot reasonably dispute that Pan Am lacks an “exclusive[] ... contractual arrangement” with Tighe. Instead, the Town alleges that “Petitioners may not have entered into a written agreement with Tighe to use the track in question exclusively to serve the Tighe warehouse, *but they are bound by such an understanding no less.*” Reply 3 (emphasis added). Here again, this is false. Pet. 2. And the Town's naked assertion of an “understanding” does not create a disputed factual issue. Unlike Pan Am, the Town has filed no verification supporting its assertions as required under this Board's modified procedures. 49 C.F.R. §§ 1112.2 (“A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties”; “[i]n this part, a statement responding to an opening statement is referred to as a ‘reply’”); *see* Board Decision of July 3, 2013 at 1 (“the Board will consider this matter under the modified procedure rules”; “Replies are due by July 10”). There is no genuine dispute, therefore, that Pan Am lacks an exclusive contractual arrangement with Tighe.

Undeterred, the Town insists that the Pan Am logically *must* have an exclusive agreement with Tighe because Pan Am “can serve no other consignee on the private track.” Reply 3. But that is often the case with a side track; it does mean the track is not “held out for common carriage.” *B. Willis, C.P.A., Inc.*, 2001 WL 1168090, at *2. And it does not mean that track operations are subject to local law. For example, the track in *New York City Economic Development*, was “a stub-ended track, built predominantly for the purpose of serving one shipper located at the end of the track.” 2004 WL 1585810, at *6. Yet, as this Board held, “section 10501(b) preemption applies even in cases—such as the construction of switching and spur track, as involved here—where the Board lacks licensing authority.” *Id.* at *7. In the present case, Tighe is

not even the shipper; as the Town concedes, Tighe is the “consignee of the shipments” delivered by a common carrier. Reply 3. The same was true in *Fletcher Granite*, where the side track was built to serve one entity, but would be operated by a common carrier. Not only has the Town failed to show that Tighe and Pan Am formed the “exclusive[] ... contractual arrangement” necessary to create private track, the record overwhelmingly shows the track is anything but private. *Devens Recycling*, 2007 WL 61948, at *2; *J.P. Rail, Inc.*, 2008 WL 163415, at *4 (S.T.B. Jan. 17, 2008); *B. Willis, C.P.A., Inc.*, 2001 WL 1168090, at *2. .

At bottom, the Town wants all side tracks to be private if not owned by rail carriers. That is not the law. Regardless of who owns it, side track is not private if used for common carriage. *B. Willis, C.P.A., Inc.*, 2001 WL 1168090, at *2; *N.Y. City Econ. Dev. Corp.*, 2004 WL 1585810, at *7; *Fletcher Granite Co.*, 2001 WL 729418, at *3. And that is the situation here.

CONCLUSION

The Town of Winchester is flouting the ICCTA and the exclusive jurisdiction of this Board with an express ban on use of a “freight yard” and “rail traffic.” And it is attempting to enforce the latter ban with a preliminary injunction, all while suggesting to this Board that it is doing no such thing. The hearing on the injunction is to occur the week of July 22. The Town concedes that its motion will be moot when “a tribunal of competent jurisdiction finds and rules that the [ban] is preempted.” Ex. B at 6. In light of the lack of merit to the Town’s position, as shown above, the Board should moot the injunction motion by issuing an order (if necessary, at first without an opinion) granting Pan Am’s petition in its entirety before July 22.

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
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: July 16, 2013

VERIFICATION

I, Robert Culliford, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on July 16, 2013.



Robert B. Culliford

STATEMENT REGARDING SERVICE

I hereby certify that on this 16th day of July, 2013, I have served Defendants 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*

EXHIBIT A

LAW OFFICES
FRITZ R. KAHN, P.C.
1919 M Street, NW (7th fl.)
Washington, DC 20036

July 2, 2013

VIA ELECTRONIC FILING

234502

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

ENTERED
Office of Proceedings
July 3, 2013
Part of
Public Record

re: FD 35749, Boston and Maine Corporation and Springfield Terminal
Railway Company v. Town of Winchester, Massachusetts, etc.

Dear Ms. Brown:

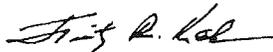
Please be advised that the Town of Winchester, Massachusetts, and the James A. Johnson, III, Chairman of the Town of Winchester Board of Selectmen, pursuant to 49 C.F.R. § 1104.13(a), on or before July 22, 2013, by their counsel, Mark Bobrowski, Esq., and myself, will be filing their Reply to the Emergency Petition for Declaratory Order filed by Boston and Maine Corporation and Springfield Terminal Railway Company, filed July 1, 2013.

Contrary to the Petitioners' assertion, there is no emergency requiring the Board's immediate action, for the no petition for a temporary restraining order or preliminary injunction as yet has been filed with the Middlesex Superior Court, and Petitioners remain free to serve the Tighe Logistic Group in Winchester as they have been doing.

A copy of this letter is being served by e-mail upon counsel for Petitioners, Gordon A. Coffee, Esq., at gcoffee@winston.com.

If you have any question concerning the foregoing or if I otherwise can be of assistance, please let me know

Sincerely yours,


Fritz R. Kahn

cc: Gordon A. Coffee, Esq.

EXHIBIT B

BLATMAN, BOBROWSKI & MEAD, LLC

ATTORNEYS AT LAW

9 Damonmill Square, Suite 4A4
Concord, MA 01742
Phone: 978-371-3930
Fax: 978-371-3828

MARK BOBROWSKI
mark@bbmatlaw.com

NEWBURYPORT OFFICE
30 Green Street
Newburyport, MA 01950
Phone: 978-463-7700
Fax: 978-463-7747

By courier
July 5, 2013

Earl W. Duval
Duval & Klasnick, LLC
20 Olde Coach Road
North Reading, MA 01864

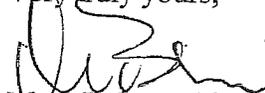
RE: JG Holt Limited Partnership v. Winchester Board of Appeals, et al
Super. Ct. C.A. No.: 2012-3512

Dear Attorney Duval:

Please find enclosed the Board's Motion for Preliminary Injunction forwarded to you pursuant to Superior Court Rule 9A. Kindly respond within the appropriate time.

Thank you for your consideration.

Very truly yours,



Mark Bobrowski

cc: S. Busher
L. Malloy

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

MIDDLESEX, SS

C.A. No.: 2012 - 3512

THE JG HOLT LIMITED PARTNERSHIP,)
)
Plaintiff)
)
v.)
)
DONNA PATALANO, RICHARD)
SAMPSON, JR., NIGEL HAIG GALLAGHER,)
LAWRENCE BEALS, JOAN LANGSAM,)
and ALBERT J. STRETER, as they are)
members of the WINCHESTER BOARD OF)
APPEAL, and LORRAINE MALLOY and)
SUSAN BUSER,)
)
Defendants)
)

MOTION FOR
PRELIMINARY
INJUNCTION

DEFENDANT'S MOTION FOR A PRELIMINARY INJUNCTION
AND REQUEST FOR A HEARING

INTRODUCTION AND PROCEDURAL HISTORY

The Defendant, the Winchester Board of Appeal ("Board"), seeks declaratory and preliminary injunctive relief to enforce an order requiring the Plaintiff to cease and desist all rail traffic to the warehouse located at 43 Holton Street, Winchester ("Town"), pending determination of a claim for federal preemption now before the Surface Transportation Board ("STB") on the Emergency Petition for Declaratory Order submitted July 1, 2013, by Boston and Maine Corporation and Springfield Terminal Railway Company, STB Finance Docket No: 35749.

The Plaintiff is the owner of land located at 43 Holton Street in Winchester (the "Subject Property"). The Subject Property is located in a Light Industrial ("IL") District as set forth in the Winchester Zoning By-law. Tighe Logistics Group ("Tighe") operates a warehouse on the Subject Property. A warehouse is an allowed use in the IL District. See Exhibit 1.

In November of 2011, Tighe reopened it's Winchester distribution facility having "reactivated the facility's rail siding." See Exhibit 2. The restart of rail service was done without the knowledge of the Town's officials and did not comply with local regulations. First, the use of the Subject Property for a rail terminal is not allowed. See Exhibit 1. Second, the reactivation of rail service would trigger site plan approval as a new use of the premises. See Exhibit 1. This is not intended to be an exclusive list of such violations.

The neighborhood quickly mobilized to protest the reactivation, largely because most of the rail company's deliveries - in this case performed by Pan Am Railways, Inc. ("Pan Am") - took place in the dead of night. See Exhibit 3. Pan Am admits that night-time deliveries are necessary because commuter rail dominates the main track during regular hours. See Exhibit 3.

Two of Tighe's neighbors, Susan Busher and Lorraine Malloy, ultimately commenced a zoning enforcement action against Tighe and the Plaintiff by filing a written request with the Building Commissioner pursuant to G.L. c. 40A, s. 7. The Building Commissioner denied this enforcement request on April 13, 2012. Ms. Busher and Ms. Malloy then filed a timely appeal with the Board. After a hearing, the Board reversed the decision of the Building Commissioner with regard to the Subject Property. The Board ruled that "the Subject Property was "being used as a freight yard which is not allowed as of right in an IL District...." See Exhibit 4. However, the Board did not issue a cease and desist order at that time.

The Plaintiff filed a timely appeal with the Superior Court. After consultation with Special Town Counsel, the Plaintiff filed a Motion for Remand with the Superior Court, assented to by the Board. The reason for the agreed-upon remand was that neither Tighe, nor the Plaintiff, nor Pan Am sent a representative to the Board during the public hearing. As a result, the Board's decision did not consider the possible preemption of the rail activity pursuant to 49 USCS § 10501 (b) on the Subject Property because the record was silent on point.

The Board opened a public hearing to consider possible preemption. 49 USCS 10501 (b) states:

(b) The jurisdiction of the Board 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, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive.

There is no debate in the instant matter that Pan Am is a rail carrier. The issue before the Board on remand was whether the side track serving the Subject Property was preempted under statute. Tighe, Pan Am, and the Plaintiff readily admit that Tighe, *and not any railroad*, owns the track immediately next to the warehouse. See Exhibit 5, page 3. Pan Am has no fee, easement, or lease in the track. Pan Am asserts that it is entitled to operate on the track solely based on the preemption offered by 49 USCS 10501(b). See Exhibit 5.

The neighbors contacted the STB during the course of the hearing after remand. Exhibit 6 is an email from Michael H. Higgins of the STB to Ryan Hess, a neighbor of the Subject Property. Mr. Higgins concludes that if the track is “private” then its operation is subject to STB jurisdiction. In other words, such operations are not preempted, and are thus subject to applicable local regulations. He cites for this proposition *Devens Recycling Center, Petition for Declaratory Order*, STB Finance Docket No. 34952 (2007)(*Devens*), discussed below. A copy is attached as Exhibit 7.

After considering this information, and that submitted at the hearing by Tighe and Pan Am, the Board closed the public hearing on June 18, 2013. The Board voted to amend its earlier decision to include an order to the Plaintiff and its agents and contractors to “immediately cease and desist all rail traffic to the warehouse located at 43 Holton Street.” See Exhibit 8, filed with the Town Clerk and this Court on June 24, 2013.

ARGUMENT

In order to obtain a preliminary injunction, the Board must demonstrate a likelihood of success on the merits of its claim and that the risk of irreparable harm to the movant outweighs any similar risk of irreparable harm to the nonmoving party caused by the issuance of the injunction. *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). It is important to note in the instant matter that the Board does **not** have to show that it will suffer

irreparable harm in the absence of an injunction. Rather, in an action such as this when a government agency is seeking to enjoin the violation of laws that it is empowered to enforce, the

standard of requiring a demonstration of immediate irreparable harm, employed in civil litigation as a condition precedent to the granting of injunctive relief, is not a prerequisite to the allowance of an injunctionWhen the government acts to enforce a statute or make effective a declared policy of [the Town], the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.

Commonwealth v. Mass CRINC, 392 Mass. 79, 90 (1983) (citations and quotations omitted).

Thus, before issuing the preliminary injunction, “a judge is required to determine that the requested order promotes the public interest or, alternatively, that the equitable relief will not adversely affect the public.” *Id.* at 89. For the reasons that follow, the Board has satisfied the prerequisites for the preliminary relief it seeks.

I. THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS OF THE BOARD’S FINDING THAT THIS IS “PRIVATE TRACK” IN VIOLATION OF THE WINCHESTER ZONING BY-LAW AND THE CEASE AND DESIST ORDER.

In order to warrant the granting of a preliminary injunction, there must be a finding by the Court that there is a substantial likelihood of success on the merits. *Commonwealth v. County of Suffolk*, 383 Mass. 286, 289 (1981). “A complaint must show not merely a grievance but a violation of a legal right which belongs to the plaintiff and which the defendant has breached.” *Donnelly v. Suffolk University*, 3 Mass. App. Ct. 788 (1975)(rescript). In this case, that showing is beyond dispute.

The Board seeks to enforce its Zoning By-Law and the order of June 24, 2013 to cease and desist. Under Winchester’s Zoning By-Law, uses not allowed are expressly prohibited. See Exhibit 1, s. 3.1.1. The Use Table, also included in Exhibit 1, nowhere lists a “rail yard” as a permitted use. Thus, the use is prohibited. The rail yard did not obtain site plan approval as a new use of the premises. See Exhibit 1, s. 9.5.1.3.

II. THE BOARD HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS ASSERTION THAT THE PLAINTIFF’S ACTIVITIES ON THE SUBJECT PROPERTY ARE NOT FEDERALLY PREEMPTED.

The Plaintiff makes no claim of compliance with local laws, but rather claims that these laws are simply not applicable to it. That, however, has yet to be determined.

In order to qualify for the preemption, the Plaintiff must show that its side track is within the STB's jurisdiction. The *Devens* STB decision makes this unlikely. *Devens* was a Massachusetts limited liability company, not a rail carrier. It planned to build 1462 feet of track from the main line owned by the Boston and Maine to its property line and another 820 feet of track on its private property. *Devens* would retain ownership of the track. There were no plans to allow any other shippers to use any part of the track. The facts of the instant matter are squarely in line with *Devens*.

The STB concluded that "it is clear that the track at issue would be private track, which is not covered by the Interstate Commerce Act ..." Exhibit 7, at p. 2 . . .

As past cases make clear, where, as here, track is built to meet a shipper's own transportation needs and there is no holding out of the possibility for any other shipper to obtain service, the track is private track. Neither the construction of such track nor the wholly private operations over it are subject to the jurisdiction of the Board. This is so even when such operations are conducted by an operator such as Boston and Maine that conducts common carrier rail operations elsewhere

The STB noted in *Devens* that the term "private track" is not defined in the statute. *Id.* at 2. Thus, the Board believes that this is a case of first impression. The STB cases cited by the Petitioners in Exhibit 5 stand for the proposition that a customer may consent to a common carrier using private track and the carrier can rely on this consent. None of the cases, however, explore a situation where the common carrier's entry onto private track runs counter to the rules and regulations of a municipality seeking to enforce its authority.

III. FAILURE TO ISSUE THE INJUNCTION WILL HARM BOTH THE PUBLIC INTEREST AND THE INTERESTS OF THIRD PARTIES.

When a court is considering the question of whether to issue a preliminary injunction in a dispute that involves a public entity, "the court also should consider the risk of harm to the public interest." *Biotti v. Board of Selectmen of Manchester*, 25 Mass. App. Ct. 637, 640 (1988). In this case, the public interest is served by halting rail operations to the Tighe facility until the issue of preemption can be determined by the STB. Allowing the Plaintiff to continue

operations in violation of local law will do great harm to the neighbors of the facility. The Board fully expects the private Defendants in this matter to provide the Court with ample evidence in this regard.

WHEREFORE, the Board respectfully requests that the Court:

1. Declare that the use of the Subject Property is an illegal use in violation of the requirements of the Winchester Zoning By-law;
2. Declare that the Board's order to cease and desist is valid and enforceable unless and until some tribunal finds and rules that the private track will be covered by the doctrine of preemption;
3. Enter an injunction requiring the Plaintiff to cease rail operations and abide by the terms of the Board's cease and desist order unless and until a tribunal of competent jurisdiction finds and rules that the private track is preempted;
4. Retain jurisdiction until the STB acts on the pending Petition; and
5. Enter such other relief as is just and equitable.

DATE: July 5, 2013

Defendant Board of Appeal of Winchester,
By its attorney,



Mark Bobrowski, BBO #546639
Special Town Counsel
Blatman, Bobrowski & Mead, LLC
9 Damon Mill Square, Suite 4A4
Concord, MA 01742
978.371.3930
Mark@bbmatlaw.com

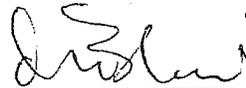
CERTIFICATE OF SERVICE

I, Mark Bobrowski, hereby certify that I served a copy of the attached Motion by courier to:

Earl W. Duval
Duval & Klasnick, LLC
20 Olde Coach Road
North Reading, MA 01864

Lorraine Malloy
25 Baldwin Street
Winchester, MA 01890

Susan Busher
35 Baldwin Street
Winchester, MA 01890



Mark Bobrowski

DATE: July 5, 2013

EXHIBIT 6



Grey theme active

- [Inbox](#)
- [Compose](#)
- [Address Book](#)
- [Options](#)
- [Help](#)
- [Log Out](#)

mark@bbmatlaw.com

Read Message - Inbox

[Previous](#) [Next](#)

From: ryan hess <hessry@hotmail.com> [Add to Address Book](#) [Add to Whitelist](#)

To: mark <mark@bbmatlaw.com> [\(Added to Address Book\)](#)

Sent: 18 Apr '13 10:53

Subject: RE: Informal Response -- -- RE: Pan Am Ry. Operations

Encoding: USA / Western European (ISO-8859-1)

[-T](#) [T](#) [+T](#)

-
-
-
-

- [Delete](#)
- [Print View](#)
- [Source](#)
-
- [Download](#)
- [Show Headers](#)
- [Mark as Unread](#)

Mark-

I know you are obligated to tell the Town however could we discuss prior to informing Tighe/Pan Am? I do not think you or I owe them anything in terms of a response, they certainly have not been forthcoming.

The reason to delay is that my sense is that they will try to workaroud this, and I would prefer to be one step ahead in their attempts to do so.

Thank you,
Ryan

> From: mark@bbmatlaw.com
 > To: hessry@hotmail.com
 > Subject: Re: FW: Informal Response -- -- RE: Pan Am Ry. Operations
 > Date: Thu, 18 Apr 2013 10:11:51 -0400

>
 >
 > Most interesting news. Give me a few days to inform the Town and PanAm/Tighe so we can process this....
 >

> > -----Original Message-----
 > > From: ryan hess <hessry@hotmail.com>
 > > To: mark@bbmatlaw.com <mark@bbmatlaw.com>
 > > Subject: FW: Informal Response -- -- RE: Pan Am Ry. Operations
 > > Sent: 18 Apr '13 01:45

> > Mark-
 > > I received the below response from Mike at the STB.

> > I view it as an near complete win in our zoning efforts versus Tighe/Pan Am
 > > however would like to get your thoughts prior to my ciruclating to the

P

> > other petitioners. It would be great to get your general thoughts on how
> > this affects our case as well as the potential circumventing tactics Tighe
> > might take (e.g. transferring the land to Pan AM).
> >
> > I look forward to your thoughts.
> >
> > Ryan
> >
> >
> > > Subject: Informal Response -- -- RE: Pan Am Ry. Operations
> > > To: hessry@hotmail.com
> > > From: Michael.Higgins@stb.dot.gov
> > > Date: Tue, 16 Apr 2013 15:49:57 -0400
> > >
> > > Ryan,
> > >
> > > I apologize for the long delay in getting back to you. As I mentioned, my
> > > office previously briefly consulted with the town's attorney, Mark
> > > Bobrowski, about Federal preemption issues, related to Pan Am Railways'
> > > operations near Winchester, MA. However, Mr. Bobrowski inquired generally
> > > about rail activities on track owned by Pan Am, rather than track
> > > constructed by Tighe Logistics on Tighe Logistics' own property.
> > >
> > > I am providing two cases that I believe may be instructive with regard to
> > > your questions about operations on the property of Tighe Logistics, which
> > > is not a railroad. Based on these cases and assuming sufficiently
> > > analogous factual circumstances, it may be the case that Tighe Logistics'
> > > track would be considered "private track" that is outside of, and not
> > > subject to STB jurisdiction. Indeed, the Board has stated that "[s]tate
> > > and local regulation is fully applicable to private track." STB Finance
> > > Docket No. 35036, Suffolk & Southern Rail Road LLC -- Lease and Operation
> > > Exemption -- Sills Road Realty, LLC, at n. 1 (Served Nov. 2007).
> > >
> > > To respond briefly to your questions, below: (1) if a track is truly
> > > "private track" then neither its construction, nor its operation is
> > > subject
> > > to STB jurisdiction. Thus, Federal preemption would not displace State
> > > and
> > > local regulation; (2) again, if a private property owner is constructing
> > > what is in fact "private track" then Federal preemption would not
> > > displace
> > > State and local laws, including zoning laws, as relevant to that
> > > construction; (3) with regard to this question, it would be best to
> > > reserve
> > > judgment until more facts are known. As the attached cases hold, a
> > > shipper
> > > that constructs private track can contract for rail service with a common
> > > carrier railroad, but operations on that track remain private and not
> > > subject to STB jurisdiction. See STB Finance Docket No. 34952, Devens
> > > Recycling Ctr., -- Petition for Declaratory Order, at 2 (Served Jan. 10,
> > > 2007). However, a shipper, generally speaking, has a fairly unfettered
> > > right to request rail service from a railroad. A local jurisdiction,
> > > generally speaking, could not prohibit a shipper from seeking rail
> > > service.
> > >
> > > My office would be happy to discuss this matter further, once you have
> > > had
> > > a chance to review the cases, and we would be happy to have a follow-up
> > > call with town officials and/or counsel. Please feel free to contact me
> > > at
> > > your convenience.
> > >

> > > Finally, please note that all of our guidance is informal and is not
> > > binding on the STB in the case of a formal proceeding.
> > >
> > > Best regards,
> > > Mike Higgins
> > >
> > >
> > > Michael H. Higgins
> > > Surface Transportation Board
> > > Office of Public Assistance, Governmental Affairs and Compliance
> > > Rail Customer and Public Assistance Program
> > > (202) 245-0284 (Direct)
> > > (See attached file: Devens.pdf)(See attached file: H&M Int'l.pdf)
> > >
> > > PLEASE NOTE: Opinions expressed by employees of the Rail Customer &
> > > Public
> > > Assistance Program (RCPA) of the Surface Transportation Board (Board) are
> > > theirs alone, and do not represent opinions of, or by, the Board or its
> > > Commissioners or Directors. Formal opinions of the Board may only be
> > > obtained via a formal proceeding. Positions taken by RCPA employees might
> > > not be followed by the Board should a formal proceeding be initiated; and
> > > spoken or written comments may be withdrawn by the Board at its
> > > discretion.
> > > All matters discussed with RCPA employees are confidential and subject to
> > > the same confidentiality provisions as administrative dispute resolutions
> > > pursuant to 49 C.F.R. 1109.3 and 5 U.S.C. 574. Except as specifically set
> > > forth in 5 U.S.C. 574, neither RCPA employees nor the parties to an
> > > informal matter before the RCPA shall disclose any informal dispute
> > > resolution communication.
> > >
> > >
> > >
> > > From: ryan hess <hessry@hotmail.com>
> > > To: "Michael.Higgins@stb.dot.gov" <michael.higgins@stb.dot.gov>
> > > Date: 04/03/2013 12:41 PM
> > > Subject: RE: Pan Am Ry. Operations
> > >
> > >
> > >
> > > Mike-
> > > Thank you for the follow-up and I appreciate it is on your radar screen.
> > >
> > > I talked to Mr. Bobrowski prior to our discussion and my understanding is
> > > that he received guidance on one of the three questions we talked about.
> > > Specifically the first one listed below, which you and I also discussed.
> > > It is my understanding that neither the second or third were discussed.
> > >
> > > a. Does exemption apply to a railroad operating on
> > > private property?
> > > b. Prior to a railroad operating on site, and thus prior
> > > to interstate commerce, does a private property owner
> > > have the right to lay railroad tracks against zoning
> > > laws?
> > > c. Does a private property owner, again prior to any rail
> > > service being requested by a customer, have the right to
> > > invite a railroad operator onto their property against
> > > local zoning laws?
> > >
> > > These are just the dimensions that occurred to me, we are all
> > > quite open to more dimensions.
> > >

> > > Thank you
> > > Ryan
> > >
> > >
> > >
> > > Subject: Pan Am Ry. Operations
> > > To: hessry@hotmail.com
> > > From: Michael.Higgins@stb.dot.gov
> > > Date: Wed, 3 Apr 2013 11:42:50 -0400
> > >
> > >
> > > Ryan,
> > >
> > > I apologize for the delay in getting back to you. I've learned that the
> > > town's attorney (Mr. Bobrowski) received guidance from my office as to
> > > the
> > > Pan Am Ry. situation. I want to discuss internally the information that
> > > you provided to me, and the guidance that our office previously
> > provided
> > to
> > > Mr. Bobrowski. It may be the case that there are additional dimensions
> > > that warrant further consideration.
> > >
> > > Unfortunately, my section chief is out of the office this week, and I
> > > won't
> > > have the opportunity to sit down with him until early next week.
> > >
> > > In any event, I wanted to touch base and let you know that Winchester
> > is
> > > still on my radar screen.
> > >
> > > Mike
> > >
> > >
> > > Michael H. Higgins
> > > Surface Transportation Board
> > > Office of Public Assistance, Governmental Affairs and Compliance
> > > Rail Customer and Public Assistance Program
> > > (202) 245-0284 (Direct)
> > >
> > >
> > > Opinions expressed by employees of the Rail Customer & Public
> > Assistance
> > > Program (RCPA) of the Surface Transportation Board (Board) are theirs
> > > alone, and do not represent opinions of, or by, the Board or its
> > > Commissioners or Directors. Formal opinions of the Board may only be
> > > obtained via a formal proceeding. Positions taken by RCPA employees
> > might
> > > not be followed by the Board should a formal proceeding be initiated;
> > and
> > > spoken or written comments may be withdrawn by the Board at its
> > > discretion.
> > > All matters discussed with RCPA employees are confidential and subject
> > to
> > > the same confidentiality provisions as administrative dispute
> > resolutions
> > > pursuant to 49 C.F.R. 1109.3 and 5 U.S.C. 574. Except as specifically
> > set
> > > forth in 5 U.S.C. 574, neither RCPA employees nor the parties to an
> > > informal matter before the RCPA shall disclose any informal dispute
> > > resolution communication.

EXHIBIT C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35749

**Boston and Maine Corp., et al. v. Town of Winchester, et al. –
Petition for Declaratory Order**

234528
ENTERED
Office of Proceedings
July 11, 2013
Part of
Public Record

**MOTION TO PARTICIPATE AS *AMICUS CURIAE* OF
CSX TRANSPORTATION, INC.;
HOUSATONIC RAILROAD COMPANY, INC.;
MASSACHUSETTS RAILROAD ASSOCIATION; AND
NORFOLK SOUTHERN RAILWAY COMPANY**

Peter J. Shultz
Paul R. Hitchcock
John P. Patelli
Mark Hoffmann
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
8 Davis Road West
PO Box 687
Old Lyme, CT 06371
(860) 434-4303

Robert A. Wimbish
Counsel for Massachusetts Railroad Association
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20037
(202) 663-7820

John M. Scheib
Greg E. Summy
Maquiling Parkerson
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

Counsel for Amici

Dated: July 11, 2013

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35749

**Boston and Maine Corp., et al. v. Town of Winchester, et al. –
Petition for Declaratory Order**

**MOTION TO PARTICIPATE AS *AMICUS CURIAE* OF
CSX TRANSPORTATION, INC.;
HOUSATONIC RAILROAD COMPANY, INC.;
MASSACHUSETTS RAILROAD ASSOCIATION; AND
NORFOLK SOUTHERN RAILWAY COMPANY**

CSX Transportation, Inc.; Housatonic Railroad Company, Inc.; Massachusetts Railroad Association; and Norfolk Southern Railway Company (collectively, “Amici”) hereby move to participate as *amicus curiae* based on their interests in the matters that are the subject of the above-captioned proceeding. As stated in the brief that Amici submit with this motion, the issue presented is one of great legal and policy significance to railroads and their customers. Amici are particularly interested in this proceeding because the outcome of this matter will shape state and local involvement in and regulation of the provision of common carrier rail service to customers located within the Commonwealth of Massachusetts (where the impact of the Board's decision will be felt most immediately), and ultimately to rail-served customers throughout the nation.

Respectfully submitted,



Robert A. Wimbish
Counsel for Massachusetts Railroad Association
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20037
(202) 663-7820

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Mark Hoffmann
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
8 Davis Road West
PO Box 687
Old Lyme, CT 06371
(860) 434-4303

John M. Scheib
Greg E. Summy
Maquiling Parkerson
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

Counsel for Amici

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that on this date I served by first class mail, postage prepaid, a copy of the foregoing motion to participate as *amicus curiae* in STB Docket No. 35749, *Boston and Maine Corp., et al. v. Town of Winchester, et al.* – *Petition for Declaratory Order* on all parties of record.

R. A. Wimbish

Dated: July 11, 2013

EXHIBIT D

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35749

**Boston and Maine Corp., et al. v. Town of Winchester, et al. –
Petition for Declaratory Order**

**AMICUS CURIAE BRIEF OF
CSX TRANSPORTATION, INC.;
HOUSATONIC RAILROAD COMPANY, INC.;
MASSACHUSETTS RAILROAD ASSOCIATION; AND
NORFOLK SOUTHERN RAILWAY COMPANY**

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Mark Hoffmann
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
8 Davis Road West
PO Box 687
Old Lyme, CT 06371
(860) 434-4303

Robert A. Wimbish
Counsel for Massachusetts Railroad Association
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20037
(202) 663-7820

John M. Scheib
Greg E. Summy
Maquiling Parkerson
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

Counsel for Amici

Dated: July 11, 2013

234529
ENTERED
Office of Proceedings
July 11, 2013
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35749

**Boston and Maine Corp., et al. v. Town of Winchester, et al. –
Petition for Declaratory Order**

**AMICUS CURIAE BRIEF OF
CSX TRANSPORTATION, INC.;
HOUSATONIC RAILROAD COMPANY, INC.;
MASSACHUSETTS RAILROAD ASSOCIATION; AND
NORFOLK SOUTHERN RAILWAY COMPANY**

“What a state cannot do directly, it also cannot do indirectly.”¹

Rail transportation cannot occur without tracks at the origin and at the destination. The common carriers in the national rail system operate over many tracks. Some tracks are owned by common carrier railroads; and some tracks are owned by private parties but over which common carrier railroads operate. Why certain tracks are owned by common carrier railroads and why others are owned by other parties is sometimes known but often long-forgotten to history. Yet all of these tracks are essential to allow freight to move across and around the United States.

The goal of the federal preemption of other laws that regulate rail transportation is to prevent the balkanization of the rail system and to ensure that other laws do not prevent railroad operations. Section 10501(b) of Title 49 expressly preempts these laws.

¹ 520 S. Michigan Ave. Assocs., Ltd. v. Shannon, 549 F. 3d 1119, 1129 (7th Cir. 2008).

The Town of Winchester, Massachusetts (the "Town"), is engaged in little more than an effort to shut down rail operations. The record demonstrates that:

- The original plan was to order all rail activity to cease and desist at the yard that, among other tracks, included a single spur owned by a rail-served warehouse – Tighe Logistics Group ("Tighe"). To that end, the Town announced last year that the freight yard could not be used because of the noise caused by the trains of Boston and Maine Corporation/Springfield Terminal Railway Company (collectively "Pan Am").
- The Town received legal advice that its plan to shut down all rail operations in the freight yard "looks to [its lawyer], on an initial call, to be preempted situation."
- The Town's Zoning Board of Appeals (the "ZBA") acknowledged, on the basis of legal advice, that the ban on all freight yard activity "may be pre-empted by federal statute."
- Based on this advice, the Town and the ZBA realized that the original plan to order all rail activity in the rail yard to cease was preempted. So they had to devise a new plan to achieve their goal of shutting down rail operations at Tighe.
- The ZBA issued a decision ordering Tighe to "cease and desist all rail traffic to the warehouse" on the track that Tighe owned. The Town has now moved for an injunction to enforce the ZBA's decision and order.

The Town's first efforts were – without question – preempted by Section 10501(b). So, instead, the Town has embarked on a novel attempt to shut down rail operations by focusing solely on who owns a small piece of track that is necessary to complete the rail transportation of the freight from the origin to the destination. The Town ignores the fact that the track is a facility that is necessary for Tighe to receive service from a common carrier railroad. The Town is simply trying to do indirectly that which it could not do directly – shut down rail operations provided by a common carrier railroad to customers making use of Tighe's warehouse services.

The issue presented by this case is one that is critical to freight operations and rail service to customers. Amici are currently seeing a trend. More states and localities are

attempting to enact regulations or ordinances similar to the one the Town advances here in efforts to shut down indirectly certain rail operations. Recognizing the broad preemptive power of Section 10501(b), they are regulating rail facilities owned by third parties – such as is the case with Tighe’s track – which are necessary for the movement of freight by rail.

These efforts are misguided, and clearly preempted. These tracks may – in many instances – be properly classified as “spur, industrial, team, switching, or side tracks, or facilities.” Regulations affecting the operation of these tracks are preempted by Section 10501(b)(2).

Section 10102(9)(A) makes clear that “transportation” includes any “yard, property, facility, instrumentality . . . related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. 10102(9)(A). This phrase – “regardless of ownership” has never been implicated by any case decided by the Board. But, its meaning is clear.² No matter who owns the yard, property, facility, or instrumentality, if it is used by a “rail carrier,” then Section 10501(b)(1) preemption applies.

The Town’s logic is flawed. In *V&S Ry, LLC – Petition for Dec. Order*, the Board said: “When an entity [1] conducts private carriage [2] on its own private track,

² Where the statute’s language is clear there is no need to look beyond the statute. *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 441 n.2 (5th Cir. 2001) (finding that “the plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent”).

such track is not a rail line subject to the Board's jurisdiction.”³ Here, the warehouse is not conducting any carriage, and the track is essential for the railroad to comply with its common carrier obligation to serve customers that ship by rail to or from Tighe.

This situation is also different than *Devens Recycling Center, LLC—Petition for Dec. Order*, which further addressed private track. There, the Board said:

Under the statute, the Board has jurisdiction over transportation by rail carrier, 49 U.S.C. 10501(a)(1), and the term ‘rail carrier’ is defined as ‘a person providing common carrier railroad transportation for compensation,’ 49 U.S.C. 10102(5). The agency's jurisdiction, however, does not extend to *wholly private rail operations conducted over private track*, even when such operations are conducted by an operator that conducts common carrier operations elsewhere, if it operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner.”

STB Finance Docket No. 34952 (STB served Jan. 10, 2007) (emphasis added). In this case, again, the operations are not wholly private. Pan Am’s operations – like those of railroads in so many other situations – are to comply with its common carrier obligation; they are not private operations performed pursuant to something akin to a switching agreement that a customer might enter into with a private operator.

Finally, this case falls squarely in the middle of the spectrum of preemption cases addressing attempts to regulate rail operations. On one end of the spectrum are the cases involving regulations that are directed at or affect a railroad. For example, any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that

³ And even if an entity were to satisfy both prongs of the test stated in *V&S Rwy LLC*, preemption may still – and should – apply in order to prevent the ability of localities indirectly to shut down rail operations in contravention of Congress’s desire not to have state and local regulations interfere with rail operations.

the Board has authorized is facially preempted.⁴ *CSX Transp., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (May 3, 2005). State or local regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines, railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service – are also facially preempted. *Id.* For state or local actions that affect railroads and are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.⁵ *Id.*

On the other end of the spectrum are cases that hold that regulation of the activity of non-railroads that has the effect of regulating rail operations is also preempted. For example, the United States Court of Appeals for the Fourth Circuit considered whether an ordinance of the City of Alexandria imposing permitting requirements that restricted the

⁴ See e.g., *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (City of Auburn) (environmental and land use permitting categorically preempted); *Green Mountain R.R. v. State of Vermont*, No. 04-0366, slip op. at 13-20 (2d Cir. Apr. 14, 2005) (Green Mountain I) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)).

⁵ *Dakota, Minn. & E.R.R. v. State of South Dakota*, 236 F. Supp.2d 989, 1005-08 (S. S.D. 2002), *aff'd* on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads); *Borough of Riverdale – Petition for Declar. Order – The New York Susquehanna & W. Ry.*, STB Finance Docket No. 33466, slip op. at 7-8 (STB served Sept. 10, 1999), (noting that whether the section 10501(b) preemption precluded application of a local requirement for a 25-foot landscaped buffer between residential zones and a transportation facility presented a fact-bound question); *Joint Pet. for Decl. Order – Boston & Maine Corp. & Town of Ayer, MA*, STB Finance Docket No. 33971, slip op. at 9-13 (STB served May 1, 2001), *aff'd*, *Boston & Maine Corp. v. Town of Ayer*, 206 F. Supp.2d 128 (D. Mass. 2002), *rev'd solely on attys' fee issue*, 330 F.3d 12 (1st Cir. 2003) (Dist. Pet. at 3) (explaining the types of measures that might be permissible – i.e., conditions requiring railroads to share their plans with the community, when they are undertaking an activity for which a non-railroad entity would require a permit, or to comply with local codes for electrical, building, fire, and plumbing).

number of trucks leaving a rail transload station was preempted. The Court held that such requirements were preempted:

Several courts have recognized that requiring a rail carrier to obtain a locally issued permit before conducting rail operation – generally referred to as “permitting” or “preclearance” requirements – will impose an unreasonable burden on rail transportation. Here, for example, the City has the power to halt or significantly diminish the transloading operations at the facility by declining to issue haul permits or by increasing the restrictions specified therein. As a result, the ordinance entails “extended open-ended delays” based on the City’s issuance of the permits, and issuance of the permit necessarily requires “the exercise of discretion” by the City. The ordinance and permits are thus preempted.

Norfolk S. Ry Co. v. City of Alexandria, 608 F.3d 150, 160 (4th Cir. 2010) (citations omitted). The Court further agreed with Norfolk Southern that the haul permits had the effect of regulating rail traffic:

Norfolk Southern maintains that “by asserting the power to determine if, when, and at what conditions trucks may enter or leave the facility, the City’s actions do directly regulate the facility.

...

Put simply, we agree with the district court that the ordinance and permit regulate ethanol transloading at the facility.

Id. at 168.

This case “splits the uprights.” Although it is not a garden-variety preemption case involving a regulation of railroads or rail operations, the Town’s regulation is aimed more at rail activity than the truck permits in *City of Alexandria*. Indeed, the regulation is aimed at the use of track. It only tries to create a distinction based on ownership – a distinction not allowed by Section 10102(9)(A).

In short, this case represents the first opportunity for the Board to address attempts by states and localities to do indirectly what they cannot do directly. To protect and preserve a national rail system, regulations such as these were preempted by Section

10502(b), which – after being broadened by Congress in 1995 – makes it “difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). And the Board should so find.

Respectfully submitted,



Robert A. Wimbish
Counsel for Massachusetts Railroad Association
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, D.C. 20037
(202) 663-7820

Peter J. Shultz
Paul R. Hitchcock
John P. Patelli
Mark Hoffmann
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

Edward J. Rodriguez
General Counsel
Housatonic Railroad Company, Inc.
8 Davis Road West
PO Box 687
Old Lyme, CT 06371
(860) 434-4303

John M. Scheib
Greg E. Summy
Maquiling Parkerson
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657

Counsel for Amici

Dated: July 11, 2013

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that on this date I served by first class mail, postage prepaid, a copy of the foregoing *amicus curiae* brief offered in connection with STB Docket No. 35749, *Boston and Maine Corp., et al. v. Town of Winchester, et al.* – *Petition for Declaratory Order* on all parties of record.

R. A. Wimbish

Dated: July 11, 2013