

WINSTON & STRAWN LLP

SUITE 718, CHINA WORLD OFFICE 1  
1 JIANGUOMENWAI AVENUE  
BEIJING 100004, CHINA

WETSTRAAT/RUE DE LA LOI 82  
1000 BRUSSELS, BELGIUM

100 NORTH TRYON STREET  
CHARLOTTE, NORTH CAROLINA 28202

35 WEST WACKER DRIVE  
CHICAGO, ILLINOIS 60601

GRAND-RUE 23  
1204 GENEVA, SWITZERLAND

42ND FLOOR, BANK OF CHINA TOWER  
1 GARDEN ROAD  
CENTRAL, HONG KONG

1111 LOUISIANA, 25TH FLOOR  
HOUSTON, TEXAS 77002

1700 K STREET, N.W.  
WASHINGTON, D.C. 20006

+1 (202) 282-5000

FACSIMILE +1 (202) 282-5100

www.winston.com

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON, EC2Y 9HU, UK

333 SOUTH GRAND AVENUE  
LOS ANGELES, CALIFORNIA 90071

26, VALOVAYA STREET, 9TH FLOOR  
115054, MOSCOW, RUSSIAN FEDERATION

200 PARK AVENUE  
NEW YORK, NEW YORK 10166

ONE RIVERFRONT PLAZA, SUITE 730  
NEWARK, NEW JERSEY 07102

40-48 RUE CAMBON, CS 71234  
75039 PARIS CEDEX 01, FRANCE

101 CALIFORNIA STREET  
SAN FRANCISCO, CALIFORNIA 94111

UNIT 1802  
18TH FLOOR, AZIA CENTER  
1233 LUJIAZUI RING ROAD  
SHANGHAI, CHINA 200120

Andrew C. Nichols  
(202) 282-5755  
anichols@winston.com

ENTERED  
Office of Proceedings

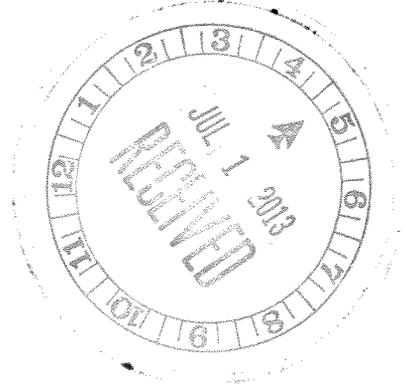
JUL - 1 2013

Part of  
Public Record

July 1, 2013

**VIA HAND DELIVERY**

Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001



FD 35749

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

Dear Ms. Brown:

Enclosed for filing are an original and ten copies of a Petition for Declaratory Order and a check for \$1,400 to cover the filing fee. Please date-stamp the extra copy of this pleading and return it to us. Thank you.

Sincerely,

Andrew C. Nichols

ACN/cw  
Enclosure

FILE RECEIVED  
JUL - 1 2013  
SURFACE  
TRANSPORTATION BOARD

FILED  
JUL - 1 2013  
SURFACE  
TRANSPORTATION BOARD

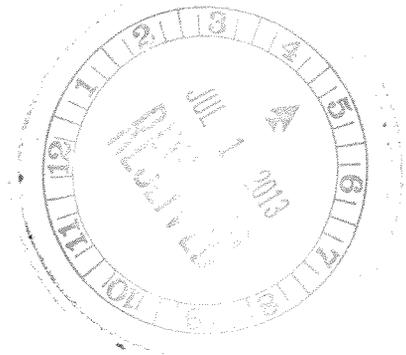
**FILED**

JUL -1 2013

**SURFACE  
TRANSPORTATION BOARD**

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 AP-  
PEALS, RICHARD HOWARD, JAMES A. JOHNSON III, DOUGLAS MARMON, JEN-  
NIFER 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

234492

**EMERGENCY PETITION  
FOR DECLARATORY ORDER**

ENTERED  
Office of Proceedings  
JUL -1 2013  
Part of  
Public Record

**FILE RECEIVED**  
JUL -1 2013  
**SURFACE  
TRANSPORTATION BOARD**

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) 663-1029

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

Dated: July 1, 2013

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**FINANCE DOCKET NO. \_\_\_\_\_**

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

**v.**

**TOWN OF WINCHESTER, MASSACHUSETTS, ET AL.**

---

**EMERGENCY PETITION FOR DECLARATORY ORDER**

Pursuant to 5 U.S.C. § 554 and 49 U.S.C. § 721, the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”), rail carriers under the Interstate Commerce Commission Termination Act (49 U.S.C. §§ 10101–16106), petition for an emergency declaratory order that the Town of Winchester’s regulation of, and attempt to ban, Pan Am’s rail transportation activities are preempted by the Act, 49 U.S.C. § 10501(b).

**INTRODUCTION**

This emergency petition involves an attempt by a town to ban rail transportation by a rail carrier. Pan Am provides common carrier service to a warehouse in the Town of Winchester, Massachusetts. Neighbors of the warehouse dislike the sound of Pan Am’s freight trains, especially when the trains switch and couple in the yard by the warehouse at night. The neighbors convinced the Town’s zoning board to overrule the Town’s zoning enforcement officer and construe a local ordinance to prohibit the trains—effectively regulating them out of existence. The Town further rejected the legal judgment of the special counsel the Town hired to consider whether it was legal to prohibit the trains. Special counsel correctly opined that the prohibition appeared “to be a preempted situation” and cautioned that, if Pan Am challenged the prohibition, “you wouldn’t have a lot of bullets in your gun.”

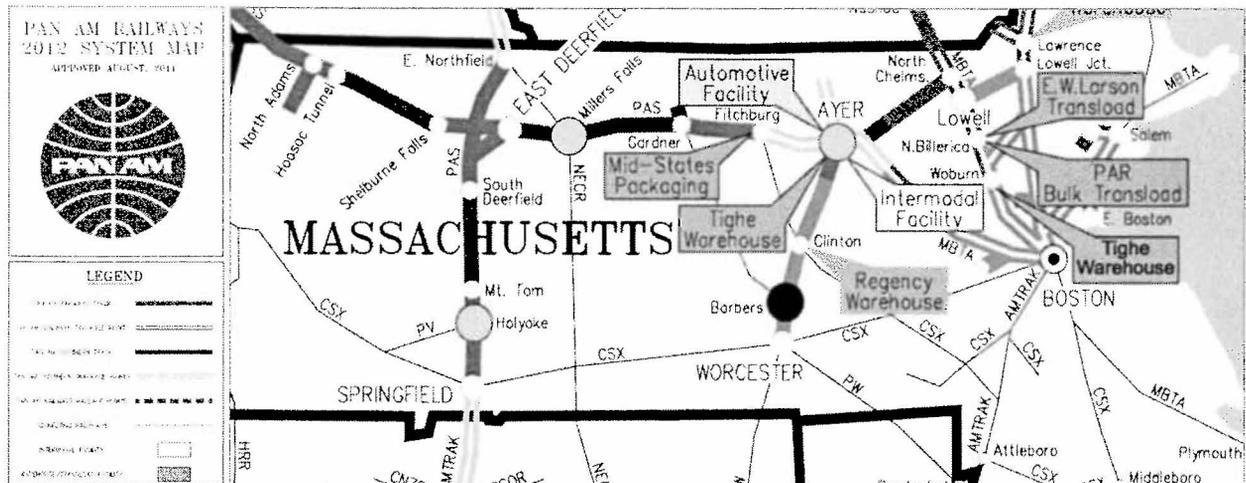
As it did with the zoning enforcement officer, the Town ignored special counsel and forged ahead to ban the trains from operating. Last week, the Town ordered that “*all rail traffic to the warehouse*” “*cease and desist.*” The Town further announced plans to move for a state-court injunction enforcing that order, with a hearing on the motion to be set for the week of July 22. Counsel for the Town would not agree to defer state-court proceedings to allow this Board to consider the legality of the Town’s actions.

To prevent enforcement of these improper orders, Pan Am requests that this Board declare the original regulation, and recent ban, preempted. And given the threat that its service will be interrupted, Pan Am asks that the Board consider this Petition an emergency.

### **BACKGROUND**

*The Common Carrier.* Plaintiff Pan Am is a common carrier with a principal place of business in North Billerica, Massachusetts. As a common carrier, Pan Am serves shippers sending cargo into the Commonwealth of Massachusetts. One recipient of cargo carried by Pan Am is Tighe (pronounced “TIE”) Logistics Group in Winchester, Massachusetts. Tighe’s facility includes a large warehouse where cargo is received by rail, stored, and sent out again by truck and occasionally by rail.

Pan Am does not conduct rail operations in the Town pursuant to an exclusive arrangement with Tighe. Indeed, although Pan Am and Tighe coordinate in marketing the distribution center for public service, Tighe is not the shipper. Rather, as a common carrier, Pan Am transports goods on behalf of shippers who choose to send their cargo to the Tighe warehouse for delivery to distribution centers and, ultimately, retail customers. Consistent with this use, the warehouse is held out in marketing as a delivery point on Pan Am’s system map:



See <http://panamrailways.com/Maps/Map.pdf>. For its part, Tighe holds out the warehouse as “one of the largest of its kind on the Pan Am Railways system.” Ex. A ([www.tighe-co.com/tighe-logistics-group-to-open-new-rail-served-facility.html](http://www.tighe-co.com/tighe-logistics-group-to-open-new-rail-served-facility.html)). Since the warehouse opened, it has received freight via Pan Am from a number of different shippers.

**The Yard.** Tighe’s warehouse sits alongside a rail line, which Pan Am has rights to use. In between the warehouse and the rail line sits a rail yard known for many years as the Montvale Yard. The Yard is comprised of, among other things, two siding tracks, where trains pull off the main line to unload cargo, avoid other trains, and rearrange cars. The Yard is not owned by a single entity. The track immediately next to the warehouse is owned by Tighe. The other track is held by Pan Am under an exclusive freight easement from the Massachusetts Bay Transportation Authority. Pan Am alone operates trains in the Yard. When trains arrive in the Yard, Tighe Logistics is responsible solely for unloading trains, and for reloading the cargo on trucks and occasionally on trains.

**The Regulation.** In April 2012, after residential neighbors of the Yard complained about the sound of Pan Am’s trains, the Town of Winchester’s Acting Zoning Enforcement Officer investigated and determined that the current use of Tighe’s facility—including use of Tighe’s track

to receive Pan Am's trains—was allowed as of right under the Winchester Zoning By-Laws. Ex. B at 1. The neighbors appealed to the Town's Zoning Board of Appeals, or "ZBA," which, in June 2012, held a public hearing on use of the Yard. *Id.*

A month later, the use of the Yard was considered by the ruling body of the Town, the Board of Selectmen. *See* Ex. C (meeting minutes). At that meeting, the attorney for the Town addressed whether the Town permissibly could regulate rail activities at the Yard. As noted in the meeting minutes, "Town Counsel explained that he ha[d] asked Special Land Use Counsel ... to review the [impending] [ZBA] action in the context of the Federal Preemption Doctrine relating to rail activity." *Id.* at 5. According to the Special Counsel, who also spoke at the meeting, the reason Pan Am delivers at night is that "commuter rail dominates the track during daylight hours." *Id.* at 10. In any event, Special Counsel testified that, "it looks to him, on an initial call, to be a preempted situation." *Id.* at 7.

In its decision issued in August 2012, the ZBA found that the residential neighbors presented "uncontroverted testimony and other evidence" concerning the "sound" of "freight trains" "being used by Pan American Railways, Inc.":

that a railroad siding located on the property is being used by Pan American Railways, Inc., for freight service, that freight trains have begun accessing the siding located at the property between the hours of 12:30 A.M. and 3:00 A.M., and that the sound of the severe jarring and squealing of the freight cars, the idling of the locomotives and coupling and re-coupling of the freight cars has caused a severe hardship to the residential neighbors.

Ex. B at 2. According to the ZBA, "[a]fter the public hearing, the [ZBA] was advised by special town counsel that Respondent's activity may be pre-empted by federal statute but because Respondent JG Holt Limited Partnership failed to appear and present any evidence the Board is unable to consider the question at this point." *Id.* The ZBA did not explain why Holt's presence was necessary to determine whether federal law would preempt a regulation of Pan Am's use of

the Yard. Nonetheless, the ZBA made the “determination” that the Tighe facility “is being used as a freight yard which is not allowed ... pursuant to ... the By Law[s].” *Id.* Thus, the ZBA attempted to regulate the “freight yard” out of commission by declaring it inconsistent with local zoning law.<sup>1</sup>

Tighe appealed the ZBA’s decision to the Superior Court. The Town did not answer but the parties instead jointly moved to remand to reconsider whether the decision was preempted by the ICCTA. The Superior Court remanded for that purpose. Pan Am was not a party to the Superior Court proceedings.

***The Ban.*** Two weeks ago, the ZBA held another hearing concerning use of the Yard. Despite the earlier opinion of Special Land Use Counsel that banning the trains was likely preempted, and despite the testimony of Pan Am showing that it serves Tighe as a common carrier, on June 24 the ZBA determined to move forward with regulating use of the Yard. Ex. B at 4. Thus, the ZBA affirmed its earlier decision declaring that “freight service” at the Tighe “railroad siding” was “not allowed” under Town zoning laws allegedly forbidding the “freight yard.” *Id.* at 2.

The ZBA evidently concluded that enforcement of the earlier decision as drafted would have regulated the entire Yard out of commission and been unquestionably preempted. Thus, the ZBA added the following statement to its earlier decision—namely, that Tighe “cease and desist all rail traffic to the warehouse” on Tighe’s “private track”:

After remand from Middlesex Superior Court ... the Board finds that this matter is controlled by the ruling of the Surface Transportation Board in *Devens Recycling Center, LLC – Petition for Declaratory Matter* [sic], STB Finance Docket No. 34952 (2007). ***The track located on the property of the Plaintiff is “private***

---

<sup>1</sup> The ZBA decision refers to J.G. Holt Limited Partnership, but the operator of the warehouse is Tighe Logistics Group.

*track” and the Plaintiff does not have the benefit of preemption as set forth in 49 USCS § 10501 (b).*

*The Board, acting under authority granted by G.L. c. 40A, s. 14, hereby orders the Plaintiff and its agents and contractors to immediately cease and desist all rail traffic to the warehouse located at 43 Holton Street.*

Ex. B. at 4. (emphasis added). In other words, when it came to enforcement of its earlier decision, the ZBA narrowed the scope of its reach to Tighe’s track alone.

The ZBA did not explain how thus narrowing its decision could avoid preemption. It made no effort to determine how an order banning “all rail traffic” on the allegedly “private track” could avoid interfering with Pan Am’s rail transportation activities in the rest of the Yard, much less address the sound of the trains in the rest of the Yard. Nor did the ZBA explain how Tighe’s track qualifies as a “private track” given that, among other things, it is used by Pan Am as a common carrier and is publicly marketed by both Tighe and Pan Am.

Nonetheless, the Town decided to press forward, leaving the original regulation on the books and informing Tighe that it intends to seek an injunction enforcing the ZBA’s order in state court. Even though the Town’s legal position relies solely on the decision of this Board in *Devens Recycling*, the Town rejected Tighe’s request to hold state-court proceedings in abeyance to allow Pan Am’s petition to be considered by this Board. Instead, the Town plans to set the injunction for argument the week of July 22, three weeks away, thus requiring this emergency petition.<sup>2</sup>

---

<sup>2</sup> Although this petition references the actions of the Town, Pan Am also petitions against certain Town agencies and officials acting in their official capacity. Respondent Board of Selectmen is the governing body of the Town; respondent Building Department administers the Town’s zoning ordinances through its Zoning Enforcement Officer; and respondent ZBA hears appeals from decisions of the Zoning Enforcement Officer. Respondents Richard Howard, James A. Johnson III, Douglas Marmon, Jennifer Wilson, Forrest Fontana, and Lance Grenzeback comprise the Board of Selectmen. Respondents Donna Patalano, Lawrence Beals, Richard Sampson Jr., Jon Gyory, Joan Langsam, and Nigel Haig Gallaher comprise the ZBA. Respond-

## ARGUMENT

Under the ICCTA, “remedies ... with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). Moreover, “[t]he jurisdiction of the Board over ... transportation by rail carriers ... and ... the ... operation ... of spur, industrial ... switching, or side tracks, or facilities ... is exclusive.” *Id.* at § 10501(b)(2). By their terms, and as interpreted by this Board and the courts, these statutes preempt the Town’s attempt to ban Pan Am from providing rail service to the Tighe warehouse. As this Board has long held, railroads are “exempt from traditional permitting and zoning ordinances,” and a “state court” is “precluded ... from adjudicating common law nuisance claims involving noise ... pollution ... because to do so would infringe on the Board’s exclusive jurisdiction.” *Boston and Maine Corp. and Town of Ayer*, 2001 WL 458685, at \*5 (S.T.B. May 1, 2001). *Infra* 7-14. The Town’s newest theory—that part of the Yard is “private track” and thus exempt from federal preemption even while being used for common carriage—finds no support in this Board’s uniform precedent. *Infra* 14-17.

### **I. Federal law preempts the Town’s attempt to regulate the “freight yard” and its purported ban on “all rail traffic to the warehouse.”**

Under the Constitution, “the Laws of the United States shall be the supreme Law of the Land.” U.S. Const. art. VI. Because federal law is supreme, “state law that conflicts with federal law is without effect.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation omitted). Federal preemption of state law can be express where “Congress [has] define[d] explicitly the extent to which its enactments pre-empt state law.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). Alternatively, preemption can be implied where state law “actually conflicts

---

ent John A. Wile serves as the Zoning Enforcement Officer. Pan Am is willing to dismiss the Board of Selectmen, Building Department, ZBA, and individual respondents should they consent to be bound by any orders of the STB entered against the Town.

with federal law.” *Id.* at 79. This “occurs when it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Emerson v. Kan. City Southern R.R. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quotation omitted). Under the ICCTA, the Town’s regulation and ban are expressly and impliedly preempted.

**A. The Town’s regulation and ban are expressly preempted.**

As noted, “remedies provided” under the ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). “Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations.” *Boston and Maine Corp. and Town of Ayer*, 2001 WL 458685, at \*5. That is precisely what the Town has done here. By declaring that the “freight yard” may not be used as such, and commanding that “all rail traffic to the warehouse” “cease and desist,” the Town has used “local regulation ... to veto ... railroad operations.” *Id.* The neighbors of the Yard received “remedies” with “with respect to regulation of rail transportation” that were “exclusive” to federal law.

Here is why. Under the ICCTA, “[t]ransportation’ includes” the following:

(A) a locomotive, car, vehicle ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

*Id.* at § 10102(9). Moreover, the ICCTA vests in the Board “exclusive” jurisdiction over “transportation by rail carriers ... and ... the ... operation ... of ... *side tracks*.” *Id.* at § 10501(b)(2) (emphasis added).

These descriptions capture Pan Am’s activity on both “side tracks” in the Yard. *Id.* On both side tracks, the Board seeks to regulate Pan Am’s “locomotive, car, vehicle ... or equipment ... related to the movement of property ... by rail.” *Id.* at § 10102(9)(A). Likewise, on both side tracks, the Board seeks to regulate Pan Am’s “services related to that movement, including ... delivery ... [and] transfer in transit.” *Id.* at § 10102(9)(B). The ZBA’s decision eliminates any doubt on this score—it refers to Pan Am’s use of the siding “for freight service” and as a “freight yard,” and refers to use of the Tighe side track for “rail traffic.” By issuing remedies with respect to these core elements of “rail transportation,” the ZBA’s decision is “preempt[ed]” by “exclusive” federal remedies.

Federal courts routinely hold that preemption applies to far more modest attempts to provide remedies with respect to rail transportation. For example, in *Friberg v. Kansas City Southern Railway Co.*, the Fifth Circuit held that the ICCTA preempted common law negligence claims and the Texas Anti-Blocking Statute, which “prohibit[ed] railroad officers ... from willfully allowing a standing train to block a street, highway, or railroad crossing for more than five minutes.” 267 F.3d 439, 441 n.2 (5th Cir. 2001). “[T]he trial court, in finding no preemption, delved into the legislative history of the ICCTA. We respect that effort, but find 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.*” *Id.* (emphasis added). “Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad like those imposed by the Texas Anti-Blocking Statute, nor does *the all-encompassing language of the ICCTA’s preemption clause* permit the federal statute to be circumvented by allowing liability to accrue under state common law, where that liability

arises from a railroad’s economic decision such as those pertaining to length, speed, or scheduling.” *Id.* at 444 (emphasis added).

Likewise, the Eleventh Circuit rejected a state-law nuisance claim “alleging that the operation of [a] side track caused an increase in noise and smoke due to the traffic on the track and made [plaintiffs’] land virtually unusable.” *Pace v. CSX Transp.*, 613 F.3d 1066, 1068 (11th Cir. 2010). As in *Friberg*, the court found express preemption: “[T]he language of section 10501(b) plainly conveys Congress’s intent to preempt all state law claims pertaining to the operation or construction of a side track.” 613 F.3d at 1069; *accord Maynard v. CSX Trans., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (“Because of their essential role, side tracks are a vital part of CSX’s railroad operations. Because it is CSX’s construction and operation of the side tracks in this case which give rise to Plaintiffs’ claims, those claims are expressly preempted by the IC-CTA.”). In their sweeping language and application to both state statutes and common law, *Friberg* and *Pace* confirm that the ZBA’s decision here is preempted.

Contrary to the ZBA’s amended order, it is irrelevant to express preemption principles that Tighe owns one of the tracks. The reason is that Tighe’s track is a “side track[],” and “‘transportation’ includes” “a ... yard, property, facility ... or equipment of any kind related to the movement of ... property ... by rail, *regardless of ownership.*” *Id.* at §§ 10501(b)(2), 10102(9)(A) (emphasis added). Thus, it does not matter whose side tracks Pan Am is using; the critical fact is that it is acting as a rail carrier engaged in rail transportation. Accordingly, like the ZBA’s declaration that the “freight yard” cannot be used as such, the ZBA’s ban on “all rail traffic to the warehouse”—presumably meaning the track owned by Tighe—is a remedy “with respect to regulation of rail transportation” on “side tracks.” 49 U.S.C. § 10501(b). The ban is thus expressly preempted.

**B. The Town’s regulation and ban are impliedly preempted.**

In addition to its express preemption provision, the ICCTA provides that “[t]he jurisdiction of the Board over ... transportation by rail carriers ... and ... the ... operation ... of spur, industrial ... switching, or side tracks, or facilities ... is exclusive.” 49 U.S.C. § 10501(b). “Section 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). Here, the “degree of interference” is 100%. The Town has declared that the “freight yard” may not be used as such and ordered that “all rail traffic to the warehouse” “immediately cease and desist.” Ex. B at 4.

These flat-out bars easily trigger preemption. After all, conflict preemption is required where state interference is merely *potential* or *partial*. See *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (locality preempted from condemning a strip of land along a bike path right of way because the land was used “to move freight, store lumber, unload railroad cars, and stage unloaded freight for further movement into shipper facilities,” and the carrier might later develop the land, such that “it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses”) (quotation marks omitted); *Harris County, Tex. v. Union Pacific R.R. Co.*, 807 F. Supp. 2d 624, 632 (S.D. Tex. 2011), *overruled on other grounds*, 2012 WL 4339075 (S.D. Tex. Sept. 20, 2012) (locality preempted from condemning land because that would force the railroad to use smaller, lower-capacity trains and limit future development). By contrast, here it is flatly “impossible for [Pan Am] to comply with both state and federal requirements.” *Emerson*, 503 F.3d at 1129. In this situation, state law must yield.

That is true even though the Town seeks to abate a perceived nuisance. Parties often attempt to circumvent the ICCTA by labeling lawsuits as nuisance actions, but courts routinely declared such actions to be preempted. See *Kiser v. CSX Real Prop., Inc.*, 2008 WL 4866024, at

\*2, 4 (M.D. Fla. 2008) (preempting nuisance claim based on “overflow of light, vibrations, and noise”) (citation omitted); *Rushing v. Kan. City Southern Ry. Co.*, 194 F. Supp. 2d 493, 500 (S.D. Miss. 2001) (preempting nuisance suit “to enjoin the Defendant from operating its switch yard in the manner it currently employs in an attempt to eliminate the damaging vibrations” that were damaging plaintiff’s property); *Guckenburg v. Wis. Central Ltd.*, 178 F. Supp. 2d 954, 956 (E.D. Wis. 2001) (preempting nuisance suit based on “coupling and uncoupling of trains, squealing of wheels, braking noises, slamming of cars, switching direction of train travel, flying switches of railroad cars, idling locomotive diesel engines and other similar incidents”); *see also Middlesex County Health Dept. v. Consol. Rail Corp.*, 2009 WL 62444, at \*3 (D.N.J. Jan. 9, 2009) (preempting suit seeking to enforce health code “concern[ing] railcars, the fumes they emit when idling and the tracks they travel,” since “[a]ll of these areas are under the umbrella of federal regulatory authority”). Here, the Town has declared that the Yard may not be used as a freight yard, and has banned use of one track entirely. These steps are plainly preempted.

Nor can the Town escape preemption by pointing to its decision to enforce only the ban of “all rail traffic” on Tighe’s track, as if the Town merely meant to regulate Tighe and not Pan Am. For one thing, that would ignore the Town’s declaration that the rest of the Yard may not be used for freight, which plainly covers Pan Am. It also would elevate form over substance. The “rail traffic” the Town ordered to “cease and desist” from using Tighe’s track *is traffic by Pan Am*. Thus, the ban interferes with Pan Am’s railroad operations on that track by stopping them outright. By purporting to accomplish this goal by enforcing its order only against Tighe, the Town is using Tighe’s supposed “private track” “as a pretext to do what Congress expressly precluded”—interfere with rail operations. *Boston and Maine Corp. and Town of Ayer*, 2001 WL 458685, at \*6. That is impermissible.

This is a much easier case than *Norfolk Southern Railroad Co. v. City of Alexandria*, in which the Fourth Circuit followed the lead of this Board and struck down a local ordinance far less egregious than the ZBA's decision here. In *Norfolk Southern*, the railroad delivered (highly combustible) ethanol to its own transloading facility, and the ethanol was transported out of the rail facility by third-party trucks. 608 F.3d 150, 154 (4th Cir. 2010). The City passed an ordinance regulating the third-party *trucks* removing the ethanol from the facility—including by limiting the number of trucks that could service the facility each day. *Id.* at 155 n.3. The rail carrier filed suit in federal court for declaratory and injunctive relief holding the regulations preempted. The district court agreed, and in a parallel proceeding this Board found the regulations preempted. *Id.* at 155-56.

On appeal, the City argued that it “regulates only the trucks leaving the Facility, not the transloading process itself, and that ‘delivery, and therefore transportation, is complete upon transloading.’” *Id.* at 159. The Fourth Circuit rejected this argument because “the record reveals the substantial practical implications of the City’s enforcement actions,” such as the fact that the limit on the number of trucks which could leave the facility could cause a backlog in rail traffic and “ripple” through the carrier’s “rail system.” *Id.* at 158-59. Further, the court found that while “the Ordinance and Permit commendably seek to enhance public safety, they unreasonably burden rail carriage and thus cannot escape ICCTA preemption under the police power exception,” because “the City has the power to halt or significantly diminish the transloading operations at the Facility.” *Id.* at 160.

Pan Am faces a much less ambiguous situation here as to Tighe’s track. As in *Norfolk Southern*, the ZBA is not directly regulating Pan Am, but instead purports to regulate a third party (Tighe) that is “an integral part of the railroad’s provision of transportation by rail carrier.” *Id.*

at 159 n.11 (quotation marks and brackets omitted). In so doing, however, the decision has the “practical implication[]” of requiring that Tighe “cease and desist all rail traffic to the warehouse”—evidently meaning to stop Pan Am’s trains from coming onto Tighe’s track. At least in *Norfolk Southern*, the facility could send out some ethanol trucks each day, which would allow some trains to run. Here, the ZBA’s decision effectively bars *all* trains from serving Tighe.

In short, “[w]hat a state cannot do directly, it also cannot do indirectly.” *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1129 (7th Cir. 2008); *see also State of Kansas ex rel. Todd v. United States*, 995 F.2d 1505, 1510 (10th Cir. 1993) (“Kansas concedes its law is preempted with respect to FCIC direct insurance policies, but then seeks to regulate the FCIC reinsured policies by the back door. What Kansas cannot do directly, it is, in essence, trying to do indirectly.”). The Town cannot ban Tighe from receiving Pan Am’s trains, when it could not ban Pan Am from sending those trains in the first place.

In sum, the Town’s regulation and ban are impliedly preempted—and, as shown above, expressly preempted as well.

**II. The Town’s ban cannot be justified by labeling the track owned by Tighe as “private,” and purporting to regulate only that track.**

The Town’s most recent justification for shutting down Pan Am’s rail operations is that “[t]he track located on the property of [Tighe] is ‘private track’” under this Board’s decision in *Devens Recycling* and hence “Plaintiff does not have the benefit of preemption.” Ex. B at 4. This is wrong for a host of reasons.

As a threshold matter, the Town seems to assume that Tighe’s track must be “private track” because it is not owned by a rail carrier. That is mistaken. “The Board has exclusive jurisdiction over rail transportation, including ‘the ... operation ... of .. side tracks’”; and “*the fact that the track owner ... is not itself a rail carrier is not relevant.*” *N.Y. City Econ. Dev. Corp.*,

2004 WL 1585810, at \*7 (S.T.B. July 15, 2004) (emphasis added; citation omitted). Nor does the question whether track is “private” turn on whether the track is privately owned. After all, Pan Am holds property rights in the other track in the former Montvale Yard, but not even the Town suggests that makes Pan Am’s track “private track.” The question, instead, is: What is done on the track and by whom?

As this Board has stressed, “[p]rivate 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). That cannot be said here. To the contrary, Pan Am indisputably offers “common carriage” service on Tighe’s track—as shown by Pan Am’s holding out “Tighe Warehouse” as a destination on Pan Am’s system map. *Supra* 3; see generally *Hanson Natural Res. Co.*, 1994 WL 673712, at \*14 (S.T.B. Nov. 15, 1994) (“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.”). Tighe, too, holds out the warehouse to the public as “one of the largest of its kind on the Pan Am Railways system.” Ex. A. That means all rail service to Tighe’s warehouse is regulated exclusively by this Board, whether the service occurs on track owned by Pan Am or Tighe.

By contrast, in *Devens Recycling*, this Board concluded that the track was to be used only by the railroad, Boston and Maine Corporation, which would “enter into an agreement” to serve only the builder, Devens Recycling. *Devens Recycling Ctr., LLC*, 2007 WL 61948, at \*1 (S.T.B. Jan. 10, 2007). In so doing, Devens Recycling did not grant to Boston and Maine “the right to provide service over the track to any other shipper.” *Id.* at \*3. Rather, according to the Board, the only shipper was Devens Recycling; the track was effectively created for Devens Recycling to serve itself. In light of these attributes, the question was how to classify the track for permit-

ting purposes, because 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.” *Id.* at \*2; accord *J.P. Rail, Inc.*, 2008 WL 163415, at \*4 (S.T.B. Jan. 17, 2008) (finding track not “private track” because railroad “has not shown that it will be operating the Line exclusively to serve the owner of the track pursuant to a contractual arrangement”) (internal citation omitted).

By those standards, the track was private, because the Board found it was “built to meet a shipper’s own transportation needs”—in that case, Devens Recycling—“pursuant to a contractual agreement” with the railroad. It was thus irrelevant that Boston and Maine conducted common carrier operations elsewhere. That made sense, because such “wholly private operations” are not “subject to the jurisdiction of the Board.” *Devens Recycling*, 2007 WL 61948, at \*3.

Here there are no such “wholly private operations,” and Pan Am has no exclusive contract with Tighe to meet Tighe’s “own transportation needs.” *Id.* Rather, Pan Am holds itself out as a common carrier serving anyone desiring to ship to Tighe warehouse, as publicly shown on Pan Am’s system map and in Tighe’s marketing materials. And Pan Am, in fact, sends freight to Tighe on behalf of third-party shippers. Thus, it cannot be said that Tighe refused to allow Pan Am “to provide service over the track to any other shipper.” By Tighe’s own design and wish, the track is used by *numerous* other shippers—third parties who utilize Pan Am to send their goods *to* Tighe, and from there on to distribution centers and consumers.

This is nothing like a “wholly private operation.” “Private track is typically built by a shipper (or its contractors) to serve only that shipper, moving the shipper’s own goods, so there is no ‘holding out’ to serve the public at large.” *Id.* (quoting *B. Willis, C.P.A., Inc.*, 2001 WL

1168090, at \*2). Here, the track is held out to the public-at-large by both Pan Am and Tighe, such that *any* shipper can move its own goods on the track. The track is therefore regulated exclusively by the Board. *Compare B. Willis, C.P.A., Inc.*, 2001 WL 1168090, at \*2 (finding no exclusive Board jurisdiction because the track owner “has not ... granted [the railroad] rights to ... provide service over the line to any other shipper”).

There is a still deeper flaw in the notion that Tighe’s track is “private.” That is, Tighe’s track is indisputably part of the former Montvale Yard and an essential component of the Yard as used by Pan Am today—and thus it is “part of the national rail system.” *V&S Ry., LLC*, 2012 WL 2865884, at \*7 (S.T.B. 2012). To see this, one need look no further than the ZBA’s original decision, still in effect, which locates the source of the “severe jarring and squealing of the freight cars, the idling of the locomotives and coupling and recoupling of the freight cars” in the “freight yard”—not merely on Tighe’s track. Ex. B at 2. The only reason the Town amended its decision to focus on Tighe’s track—but not the rest of the Yard—was that it thought it could eliminate the noise from the Yard indirectly that way. Tighe’s track is not the source of the noise; it is the lever by which the Town hopes to end the noise. In thus using the Tighe track to attack Pan Am’s operations in the Yard, the Town reveals that Tighe’s track is not the source of the problem, but that it is an integral piece of the composite Yard. *Compare V&S Ry., LLC*, 2012 WL 2865884, at \*7 (finding tracks to be private where there was no argument that they “should somehow be considered part of the [common carrier] Line”). Accordingly, because the Yard is part of the national rail system, so must be Tighe’s track.

### **CONCLUSION & REQUESTED RELIEF**

By relying on zoning laws to declare that a freight yard may not be operated as such, and to order that “all rail traffic to the warehouse” “cease and desist,” the Town seeks to regulate and ban rail transportation by a rail carrier. If that were the solution to train noise, every town in

America would eliminate such noise in short order. That is why, as this Board has long held, railroads are “exempt from traditional permitting and zoning ordinances,” and a “state court” is “precluded ... from adjudicating common law nuisance claims involving noise ... pollution ... because to do so would infringe on the Board’s exclusive jurisdiction.” *Boston and Maine Corp. and Town of Ayer*, 2001 WL 458685, at \*5. The Town’s regulation and ban—the latter of which it intends shortly to enforce with an injunction—should be declared preempted, post haste.

Because the Board has broad authority under 5 U.S.C. § 554 and 49 U.S.C. § 721(a) to issue a declaratory order to eliminate a controversy or remove uncertainty, Pan Am requests that the Board promptly issue an order:

- (a) declaring that the Town’s regulation of the Yard as inconsistent with the Town’s zoning laws is preempted;
- (b) holding that the Town’s order that “all rail traffic to the warehouse” “cease and desist” is preempted; and
- (c) granting such further relief as the Board may deem proper.

Respectfully submitted,



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  
Pan Am Railways, Inc.  
Iron Horse Park  
North Billerica MA 01862  
978-663-1029

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

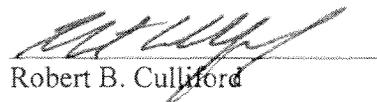
Dated: July 1, 2013

**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 June 28, 2013.

  
Robert B. Culliford

## STATEMENT REGARDING SERVICE

I hereby certify that on this 1<sup>st</sup> 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, and  
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

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, and  
Nigel Haig Gallaher  
Town of Winchester  
Zoning Board of Appeals  
Winchester Town Hall  
71 Mt. Vernon Street  
Winchester, MA 01890



Andrew C. Nichols

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





Our Company Affiliations & Resources News Careers Locations Contact Us



<< Back to News

10/01/2011

Winchester, MA – Tighe Logistics Group has announced that it will be re-opening its Winchester, MA. distribution center and has reactivated the facility's rail siding. The facility was opened in response to a growing demand for quality distribution space in the greater Boston area capable of handling significant rail volume. Tighe's President & CEO John Tighe says, "The facility will add significantly to our capacity and will help attract new rail served business into the area." Tighe has been working actively with Pan Am Railways and Norfolk Southern to market the facility and already has several large shippers interested in utilizing the facility.

The high bay facility, with thirty-one truck shipping and receiving doors and twelve rail doors, is slated to officially open November 1, 2011. At 200,000 square feet, the distribution center will be one of the largest of its kind on the Pan Am Railways system.



Aerial photograph of facility



Track work underway



RECEIVED AND FILED

TOWN OF WINCHESTER 12 AUG 16 AM 9:00  
BOARD OF APPEAL

Decision No. 3639

TOWN CLERK

TOWN OF WINCHESTER

**Name of Petitioner:** Lorraine Malloy and Susan Busher

**Application For:** Appeal under Section 9.3.3(3) of the Town of Winchester Zoning By-Law in accordance with Chapter 40A, §§ 8 and 15 of the Massachusetts General Laws from the April 13, 2012 decision of the Building Commissioner/Zoning Enforcement Officer ("ZEO") regarding the use of the properties located at 35R Holton Street, 43 Holton Street and 43 Baldwin Street. The properties are located in the IL (Light Industrial) zoning district and contain 137,055 square feet of land more or less (31-39 Holton Street/43 Baldwin Street) and 6.6 acres (43 Holton Street)

**Date of Hearing:** June 19, 2012

**Board of Appeal:** Donna Jalbert Patalano, Richard L. Sampson, Jr., and Albert J. Sreter.

**Decision:** Granted with regard to 43 Holton Street and Denied with regard to 35R Holton Street and 43 Baldwin Street

**Vote of the Board:** Unanimous

**Facts:**

Respondent, JG Holt Limited Partnership owns the property located at 43-45 Holton Street, Respondent, George D. Whitten owns the property located at 31-39 Holton Street/ 43 Baldwin Street. The properties are located in the IL (Light Industrial) zoning district and contain 137,055 square feet of land more or less (31-39 Holton Street/43 Baldwin Street) and 6.6 acres (43-45 Holton Street). The premises at 35 Holton Street is leased by CBS Exotic Stones, the premises at 35R Holton Street is leased by P&R Partners Construction, the premises at 43 Baldwin Street is leased by J.W. Noble Construction and the premises at 43 Holton Street is currently vacant.

On March 30, 2012, Petitioner Lorraine Malloy filed a letter of complaint with the ZEO, regarding the use of the premises at 35R Holton Street, 43 Holton Street and 43 Baldwin Street. On April 13, 2012, the ZEO issued a letter containing a determination that the use of the premises in question is allowed as of right pursuant to Section 3.0 of the Winchester Zoning By-Law, specifically: 35R Holton (Group V(1) & (3)); 43 Holton (Group V(1)); and 43 Baldwin (Group IV (10) & Group V(2)). Petitioners appeal said determination.

**Discussion:**

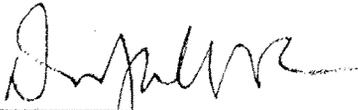
Pursuant to Section 9.3.3(3) of the By-Law, in accordance with Massachusetts General Laws Chapter 40A, §§8 and 15, this Board has jurisdiction to hear and decide appeals of decisions by the ZEO. The Board's authority extends to appeals of decisions involving alleged errors of law and alleged errors of fact. In this case, Petitioners claim that ZEO, John A. Wile erred in determining that the current uses of the premises are allowed as of right. For the reasons that follow, we affirm Mr. Wile's determination with regard to the premises at 35R Holton Street

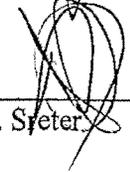
and 43 Baldwin Street and reverse Mr. Wile's determination with regard to the premises at 43 Holton Street.

Petitioners allege that the ZEO's determination was flawed because the property is beyond the scope allowed by the Zoning By Laws in an IL district. In support of their position Petitioners advised the Board of activities conducted at the two properties and provided photographs of current condition at the location. Attorney Mark Vaughn representing the Respondent George D. Whitten informed the Board that both properties at 31-39 Holton Street/ 43 Baldwin Street were built in 1969 and have consistently been used as a contractor's yard and assembly plant since that time and that the uses depicted in the photographs and complained of by the Petitioners were allowed as of right in an IL district, we concur. Evidence presented at the time of the hearing confirmed that 35R Holton Street is occupied by Wolfgang Lacrosse (50%) and CBS Exotic Stone – Brazilian Granite Wholesale and PNR Partners Contracting (50%) and 43 Baldwin Street is occupied by JW Noble Construction. All of these tenants conduct allowed activities pursuant to section 3.0 of the By-Law. The Board noted that Respondent George D. Whitten agreed to remove any remaining barbed wire at the property and make sure that nothing would be allowed to block access to the fire lanes located on the property.

Petitioners also advised the Board of activities conducted at 43-45 Holton Street and provided photographs. No one appeared on behalf of the Respondent, JG Holt Limited Partnership. Petitioners presented uncontroverted testimony and other evidence that the building at 43 Holton Street (also known as 45 Holton Street) is currently advertised for lease by the Tighe Logistics Group, that a railroad siding located on the property is being used by Pan American Railways, Inc., for freight service, that freight trains have begun accessing the siding located at the property between the hours of 12:30 A.M. and 3:00 A.M., and that the sound of the severe jarring and squealing of the freight cars, the idling of the locomotives and coupling and re-coupling of the freight cars has caused a severe hardship to the residential neighbors. The Board notes that despite having been properly notified, Respondent failed to appear at the hearing to inform the Board as to its version of the facts at issue. After the public hearing the Board was advised by special town counsel that Respondent's activity may be pre-empted by federal statute but because Respondent JG Holt Limited Partnership failed to appear and present any evidence the Board is unable to consider this question at this point. The Board therefore reached a decision based solely on the information presented by Petitioners at the hearing. Based upon this information, it is the determination of the Board that the premises at 43-45 Holton Street is being used as a freight yard which is not allowed as of right in an IL district pursuant to section 3.0 of the By Law. Therefore, the ZEO's determination with regard to 35R Holton Street and 43 Baldwin Street is affirmed and the ZEO's determination with regard to 43 Holton Street is reversed.

Board of Appeal

  
\_\_\_\_\_  
Donna Jalbert Patalano

  
\_\_\_\_\_  
Albert J. Syeter

  
\_\_\_\_\_  
Richard L. Sampson, Jr

8/16/12  
\_\_\_\_\_  
Date of Decision

RECEIVED AND FILED

13 JUN 25 PM 1:20

**TOWN OF WINCHESTER  
BOARD OF APPEAL**

**Decision No.: 3639**

TOWN CLERK  
TOWN OF WINCHESTER

**AMENDED DECISION AFTER REMAND**

**Name of Petitioners:** Lorraine Malloy and Susan Busher

**Application For:** Appeal under Section 9.3.3(3) of the Town of Winchester Zoning By-law from the April 13, 2012 decision of the Building Commissioner regarding the use of property located at 43 Holton Street in the Light Industrial (IL) District.

**Date of Hearings after Remand:** After republishing notice and sending certified mail to all parties in interest, the Board opened a public hearing on February 26, 2013, continued said hearing from time to time, and closed the hearing on June 18, 2013.

**Board of Appeal:** Richard L. Sampson, Lawrence M. Beals, Joan E. Langsam

**Amendment:** The following paragraph is hereby added to the Board's decision of August 16, 2012, at the conclusion of the section marked "Discussion".

After remand from the Middlesex Superior Court in *JG Holt Limited Partnership v. Winchester Board of Appeal*, Civil Action No.: 2012-3512, the Board finds that this matter is controlled by the ruling of the Surface Transportation Board in *Devens Recycling Center, LLC - Petition for Declaratory Matter*, STB Finance Docket No. 34952 (2007). The track located on the property of the Plaintiff is "private track" and the Plaintiff does not have the benefit of preemption as set forth in 49 USCS § 10501 (b).

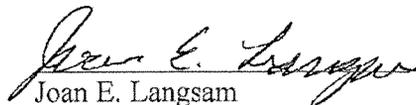
The Board, acting under authority granted by G.L. c. 40A, s. 14, hereby orders the Plaintiff and its agents and contractors to immediately cease and desist all rail traffic to the warehouse located at 43 Holton Street.

This Amended decision was filed with the Winchester Town Clerk and the Middlesex Superior Court on June 25, 2013.

**Board of Appeal**

  
\_\_\_\_\_  
Lawrence M. Beals

  
\_\_\_\_\_  
Richard L. Sampson, Jr.

  
\_\_\_\_\_  
Joan E. Langsam

6/24/13  
\_\_\_\_\_  
Date of Decision





**TOWN OF WINCHESTER  
BOARD OF SELECTMEN MEETING  
Monday, July 16, 2012**

**Record**

Chairman James A. Johnson, III called the meeting to order at 6:30 PM in the Board of Selectmen Meeting Room located in Town Hall. Present were Selectman Forrest N. Fontana, Selectman Douglas Marmon and Selectman Jennifer N.S. Wilson; Vice Chairman Thomas R. Howley was present and participated in Public Session. Also present were Town Manager Richard C. Howard, Town Counsel Wade M. Welch, and for Public Session, Comptroller Brian J. Keveny.

**Pan Am Briefing on Rail Service at Tighe Warehouse Site**

**Present:** Town Counsel Wade M. Welch; Special Counsel Mark Bobrowski; Cynthia Scarano, Executive Vice President, PanAm Railways; John Tighe, Tighe Industries; Attorney Earl W. Duval, Duval & Klasnick, LLC; and Attorney Robert Culliford, Senior Vice President and Counsel for PanAm Railways

Town Counsel Welch provided background on this issue that first came to the Board's attention last October. At that time, the Holton Street neighborhood brought forward their concerns about the activities at the Tighe Trucking Warehouse, 43 Holton Street. A representative from PanAm Railways was invited to meet with the Board and subsequently, the Zoning Enforcement Officer was asked by abutters to make a determination about whether the activities at Tighe Trucking and their relationship to the rail activity at 43, 39R Holton Street and 43 Baldwin Street were in violation of the Town's Zoning ByLaw. The Zoning Enforcement Officer opined that the activities were allowed as of right in an IL district. The abutters appealed to the Zoning Board of Appeal in a timely fashion, and on June 19<sup>th</sup>, the Zoning Board of Appeal reversed the Zoning Enforcement Officer's opinion as to 43 Holton Street, upholding him on the other two locations; 43 Holton Street is the Tighe Trucking location.

Town Counsel explained that he has asked Special Land Use Counsel Mark Bobrowski to review the Zoning Board of Appeal action in the context of the Federal Preemption Doctrine relating to rail activity. Attorney Bobrowski has accepted this charge as approved by both the Board of Selectmen and the Town Manager, and has been at work reviewing the situation. Attorney Bobrowski has been invited by the Town Manager to brief the Board this evening on the status of his review. Also invited was Cynthia Scarano and other representatives of PanAm Railways, along with the attorney for Mr. Tighe. Town Counsel also noted that notice of the briefing this evening was provided to Lorraine Malloy and Susan Busher. Ms. Malloy had requested an update from the Town Manager via email on July 9<sup>th</sup>.

Lorraine Malloy informed the Board that it is her understanding from the ZBA meeting that since Mr. Tighe or any representative for Mr. Tighe chose not to appear at any of the formal hearings, he is not allowed to address the Town of Winchester through an appeal, but has to go to Superior Court. Chairman Johnson explained that this is one of the reasons for the meeting this evening, e.g., so that Special Land Use Counsel can bring the Board up to speed on this matter, and allow everyone to hear Attorney Bobrowski's conclusion first-hand. Chairman Johnson informed the audience that the discussion this evening is not a public hearing therefore no public comments would be accepted.

**Monday, July 16, 2012**  
**Board of Selectmen Meeting**

Attorney Bobrowski informed the Board that he has reviewed the file and made some initial inquiries. He explained that rail transportation in the United States is governed by the ICCTA [Interstate Commerce Commission Termination Act of 1996] that established the Surface Transportation Board, a little known agency that regulates the Nation's rail business. In this endeavor, under section 10501B of the Act there is a Federal preemption from local regulations from municipalities, counties, State governments, of rail activities to the extent that it is transportation, a defined term, by a rail carrier, also a defined term. Transportation typically includes things like storage, handling, other aspects of transportation, not just getting the railcar there, but off-loading the merchandise. Attorney Bobrowski indicated that there are a series of cases at the STB that interpret the term 'transportation'. He informed the Board that he does not feel that "transportation" is the issue in this instance, because he has not heard about anything happening at the Tighe facility that would be considered manufacturing thereafter or processing thereafter.

Attorney Bobrowski referenced the term 'by a rail carrier', where the key question relates to whether the off-loading of the goods at the site is being done under the control and authorization of the railroad. He explained that for preemption under the ICCTA to apply, it cannot be a trucking company doing this, dominating fees and tariffs, or setting their own rates. It all has to be done under the auspices of the railroad itself. He explained that this is a part of an intricate analysis. The questions that courts have used to analyze this have been shared with PanAm so that they can be addressed this evening.

The nine questions are as follows:

1. Whether the transloader is involved in the delivery of rail cars from the point of origin to the facility;
2. Whether the transloader was involved in the delivery to the final destination;
3. Whether the transloader was offering services to customers directly;
4. Whether the transloader pays any fees for the use of the facility;
5. Whether the transloader has separate contractual relationships with customers for other arrangements at the facility;
6. Whether the marketing of the facility involves the transloader;
7. Whether the transloader has any contractual relationships relating to the facility with any of the shippers;
8. Whether the transloader sets, invoices for, or collects transloading fees charged to the shipper; and
9. Whether the railroad assumes liability or responsibility for transloading activities.

Attorney Bobrowski explained that the railroads know their business and structure their paperwork to take advantage of this. The key is whether the transloaders are involved in the delivery of rail cars from the point of origin to the facility; the transloader in this case would be Tighe, and the question is whether they are involved in obtaining merchandise from a distant point and arranging for rail cars to come to Winchester. Attorney Bobrowski noted that these are technical questions and the answers are not known unless they are provided to the Town, or the Town obtains the paperwork that provides the information:

- a. whether the transloader was involved in delivery to the final destination;
- b. whether the transloader (Tighe) is offering services directly to customers through advertising that this is a service that Tighe offers;
- c. whether the transloader pays fees for use of the facility and to the extent that they do not, this indicates more of a contractual relationship, and is precisely what the STB has in mind, e.g.,

that the transloader should be a contractor of the railroad, not someone equal to or dominating the railroad;

- d. whether the transloader has separate relationships with customers, e.g., is the transloader soliciting business or is this being done under the auspices of the railroad;
- e. whether the marketing of the facility involves the transloader, e.g., is the railroad doing the advertising or is it the transloader.

Attorney Bobrowski informed the Board that the transloader should not be the tail that wags the dog! He explained that the relationship between PanAm and Tighe, with PanAm being the larger entity, as well as the ratio of PanAm resources versus Tighe's resources, suggests that the relationship is appropriate.

- f. whether the transloader has any contractual relationships relating to the facility with any of its shippers;
- g. whether the transloader sets invoices or collects transloading fees charged to the shipper should be the job of the railroad and its tariff, it should not be the job of the transloader;
- h. whether the railroad assumes liability or responsibility for transloading activities.

Attorney Bobrowski indicated that this is basically a score sheet and to the extent that the answer is 'yes', it tips in favor of the finding that there is no preemption, and to the extent that the answer is 'no' to the way that the questions are framed, it tips in favor of transportation by a rail carrier, preempted activity under the Surface Transportation regulations. Attorney Bobrowski indicated that in reviewing the questions, it is typical that some discovery would have to be taken or be provided with sufficient information to make the determination that preemption occurred. He explained that the questions are highly technical and often litigated at the STB.

Attorney Bobrowski informed the Board that looking at this situation as a satellite, looking at the relative capacity of PanAm and the relative capacity of Tighe, it looks to him, on an initial call, to be a preempted situation.

Bob Culliford, Senior Vice President and General Counsel for PanAm Railways, informed the Board that he feels it would be helpful to explain how the process actually works. He noted that the location has historically been known as "Montvale Yard". There has always been freight service through this yard and this will continue. The actual placing of the rail cars, moving the rail cars and bringing the train to the Tighe facility is all done by the railroad; Tighe does not have anything to do with this, Tighe simply unloads the rail cars. Attorney Culliford explained that the rail cars are ordered by customers from locations throughout the United States; a bill of lading is issued to PanAm and PanAm becomes a contract carrier that is obligated to bring the cars to the warehouse in Winchester; Tighe has no involvement in this either. He informed the Board that the issue appears to be the operation on the sidetrack, which is operation by the railroad. The railroad strongly believes that use of the siding to serve a customer and transportation under Interstate Commerce would preempt any attempt to prevent PanAm from performing this function. Attorney Culliford stated that PanAm has had experience with this statute going back as far as 2001 and has litigated with multiple entities, including the Town of Ayer, Massachusetts; in the majority of instances PanAm has been successful. He noted that PanAm is confident that the scope and breadth of the statute and the terms defined therein give PanAm the right to continue to serve Tighe Warehouse, supported by a court of law that would support the position that any local regulation of that service would be preempted.

Cynthia Scarano, Executive Vice President of PanAm Railways, recalled that she attended a public informational session held by the Town Manager on March 1, 2012. She informed the Board that she feels that Attorney Culliford has answered all of the questions about interstate commerce, however she would be happy to answer any questions related to marketing.

**Monday, July 16, 2012**  
**Board of Selectmen Meeting**

Attorney Bobrowski indicated that at the present time, he is "googling" the companies involved to see what it is that is being advertised, how that advertising is being done, the types of satellite companies and affiliates listed, how the companies are operating under different names, how business is being solicited from customers, how they are advertising themselves to customers, all of which is at the heart of the preemption. If the railroad is in charge, the activity is preempted, assuming that it is transportation. If the railroad is the smaller entity and the off-loader is a huge company, then it may simply be a matter of convenience where the transloader has purchased the railroad in order to enhance their business; a rail carrier is the only entity that can enjoy the preemption.

Chairman Johnson referenced the term "Montvale Yard", noting that the area has two or three spurs and it is his understanding that trains are being brought into the yard to be off-loaded or on-loaded onto freight cars; the area is not being used to stage to go to another location where off-loading or on-loading would be done. Attorney Culliford indicated that at this time this is not being done, however the capacity is there to be able to do that. Chairman Johnson questioned whether under Federal regulations this area could be used as a "rail yard". Attorney Culliford noted that the tracks are owned by the Massachusetts Bay Transportation Authority, but PanAm is the owner of an exclusive easement to provide freight rail services over the tracks.

Chairman Johnson explained that one of the concerns expressed is the timing of the freight deliveries, which are generally very late in the evening and last for about an hour. He noted that it is extremely noisy and loud; there is clanging and banging during the connecting of the cars, and there is what he feels to be excessive use of horns for signaling purposes. He asked if there is a way to mitigate this for the neighbors in the direct path of this, as there are homes located within several hundred feet of the tracks. He informed PanAm that in polite terms, this is a nuisance situation for the neighborhood.

Cynthia Scarano explained that there is a commuter service that runs through this area so PanAm's window for servicing customers is not like a truck service. The trains are prepared for local service in the Lawrence yard, and the train comes to Winchester to service customers in this area; a five to six hour window is needed to come down to serve the customers that entails dropping off the load and picking up empty cars. Ms. Scarano noted that the whistle question has arisen previously and indicated that there is no reason to whistle in this area other than that Section 49 requires that the railroad is required to whistle if there is a trespasser on the line or another train in the area, which would not be the case, therefore the whistle must be blown because someone is on the tracks.

Chairman Johnson informed Ms. Scarano that he disagrees with her last statement, explaining that he has a business located in this general area and the other day a train pulled in during the daytime hours. The train was on site for approximately one hour and during that time he heard several whistles or horns that were quite loud. He noted that he did not see anyone on the track in his area, nor did he see any trains go by, but the whistle was loud with a 'toot' or two. The Chairman indicated that there appears to be no visible reason for this, according to what Ms. Scarano just explained. The Chair further noted that he has been in this area at 5 AM and has heard a whistle. Ms. Scarano explained that the only time there would be a whistle is if there was an MBTA train on the track and PanAm employees were at the Tighe Warehouse. The Chairman stressed that there have been no trains on the track when he has heard the whistle, and to him, it seems like the whistle is blown out of protocol.

Attorney Culliford informed the Board that staff has talked with all transportation managers and other than for the reasons that Ms. Scarano has mentioned, do not know why this is happening, but will certainly try to figure it out. Chairman Johnson suggested that supervisory personnel visit the area when the train is on the site, without the conductors knowing it. Ms. Scarano informed the Board that she will look at the black box that is on the locomotive and will be able to make a determination.

Selectman Fontana pointed out that the purpose of the meeting this evening is a debriefing for the Board on the legal research done by Attorney Bobrowski, as well as providing an opportunity for the Board to ask questions of PanAm. He asked where Tighe fits into the scope of the issue. Town

Manager explained that Mr. Tighe was asked to attend as it is his site that is the subject of the Zoning Board of Appeals decision. Attorney Bobrowski will be assisting the Zoning Board of Appeals in making sure that they understand the ramifications of whether this is a rail yard operation versus preemptive activity. Attorney Bobrowski noted that the Zoning Board of Appeal has been fully briefed and further informed the Board that representatives from Tighe are present this evening, suggesting that they join the group assembled at the table.

Selectman Fontana asked if Tighe would be able to do off-loading or loading at another location as quality of life for the neighborhood is important.

John Tighe, President of Tighe Warehouse and Distribution was present with his counsel, Earl Duval from Duval & Klasnick, LLC. Mr. Tighe informed the Board that Tighe Warehousing and Distribution operates three distribution centers in Massachusetts. Tighe Trucking Incorporated runs trucking throughout New England and Tighe has a freight brokerage business that runs non-asset based transportation throughout the United States. He explained that this would involve moving a shipment from point "A" to point "B", and if Tighe does not service those points, Tighe would locate another trucker that would make the delivery.

In response to Selectman Howley's question concerning what goes on at the Holton Street location during a typical week, Mr. Tighe explained that they have customers that ship inventory by both rail and truck, the inventory is received into the facility and the merchandise is eventually shipped out based upon instructions either by truck or rail. Mr. Tighe informed the Board that Tighe has facilities in Mansfield, Woburn, and Ayer, a total of four including Winchester.

In response to Selectman Fontana's request for information relative to the current state of Tighe's business, the growth being seen, and the phenomenon for using rail; whether business is growing, as well as the dynamics of what is happening, Mr. Tighe indicated that Tighe has some new customers that are asking to do business, some shipping in by rail; other facilities are currently full and the Winchester facility has capacity. He explained that some is new business and some is from the existing customer base. Mr. Tighe informed the Board that his company has no input on the mode, but simply requests that the items be shipped and Tighe will handle the product from that point forward; the decision to ship by rail, truck, intermodal or ocean is entirely up to the shipper based upon economics of their business.

Attorney Bobrowski asked if Tighe owns the property on which the Winchester warehouse is located and was informed that Tighe Warehousing and Distribution does not own the building but rather a family trust owns the building. The family trust owns the land under the building as well. Attorney Bobrowski asked if there is a lease relationship with PanAm at the Winchester location. Mr. Tighe explained that Tighe owns its own property and PanAm owns their property. Attorney Culliford explained that there is a historical agreement that allows PanAm to operate over the portion of the rail that is on Tighe's property; the agreement is in the process of being updated at this time, and should be complete soon.

Selectman Fontana requested clarification about whether Tighe has the option to locate customers who might want rail service. Attorney Bobrowski asked if Tighe is doing the trans-loading at the site and was informed by Mr. Tighe that his company is unloading the box cars. Attorney Bobrowski asked if there is a contract with the railroad for this work and was informed by Mr. Tighe that there is not, all contracts are with shippers; there are no contracts with the railroad. Attorney Culliford explained that PanAm is a common carrier and has a legal obligation to move freight that is offered under interstate commerce. A shipper can go to the railroad with a request to move freight, accept the rate, and provide a bill of lading; if the destination is Tighe Warehouse, Winchester, MA, PanAm is obligated to move the freight to that location.

**Monday, July 16, 2012**  
**Board of Selectmen Meeting**

Attorney Bobrowski informed the Board that there is no doubt in his mind that what is happening at the Tighe location is transportation, which involves not just getting the merchandise to the location, but storing and warehousing it, the logical extension. Cynthia Scarano noted that her job is to get more customers to use the rail. She explained that PanAm works with the customer to get where they need to be located.

Selectman Fontana asked if the same issue would result, irrespective of Tighe, if another business took over the lease from the trust, or another business opened up along the PanAm rail line. Attorney Bobrowski explained that if it relates to transportation by a rail carrier, that is permissible; if the operation is fixing merchandise so that it can be transported, that is considered to be transportation, however shredding was rejected by the STB because the merchandise can be shipped in large pieces. He explained that a big trucking company dictating to the rail line is not preempted by the STB because the railroad has to be in control of the off-loading at the location.

Selectman Fontana pointed out that if the Board's request is to help mitigate the noise issue, e.g., horns, whistles, the loading of plates and pallets, who can be asked to work with the Board and the residents to try to make the situation better for the parties concerned. Attorney Bobrowski indicated that both could be asked, and both are present this evening. He also noted that to the extent that the work is preemptive, the Board does not have a lot of ammunition. He indicated that because the commuter rail dominates the track during daylight hours, the likely response is that off-loading must occur at night. He suggested that this is a matter of courtesy and good citizenship rather than railroad or local law.

Chairman Johnson asked if there is any way to lessen the noise, as well as whether there are Federal monies available for buffers and a reduction of the negative impact. He recalled that previously, when the area was run by Tighe as a busy warehouse, the company was receptive to the neighborhood and tried to keep the noise down whenever possible. PanAm Executive Vice President Cynthia Scarano explained that the Town can go through the Metropolitan Planning Organization and look for things like APU (Auxiliary Power Units) that would lessen the impacts by shutting the locomotive down and eliminating the idling. She noted that this is dependent upon money that is available. Town Manager Howard noted that the idling of the cars seems to be the issue. Ms. Scarano noted that PanAm will help with the grant application, but the application must be made by the Town. APUs are provided to the critical areas, depending upon the grant application. Ms. Scarano informed the Board that the situation in Winchester does not meet the definition for idling noise. She explained that the crew does not leave the train and the noise is a part of their work. An idling locomotive would be parked and left unattended. She explained the difference between idling and the switching operation.

Town Manager Howard questioned whether there is a way to help with the noise related to the switching operation, remediating some of the noise for the neighborhood. Ms. Scarano pointed out that an APU unit would not be helpful in this instance. In response to Town Manager's question about the banging and clanging that goes on, Ms. Scarano explained that PanAm does not own the box cars, the customer does.

Attorney Bobrowski informed the Board that if members are satisfied that this issue relates to transportation by a rail carrier, the question then becomes one of working with the railroad to try to mitigate what can be mitigated because at this point, there is no legal component.

Referencing the issues, Vice Chairman Howley asked if there is an agreement to off-load merchandise and if there is, he would like to know what the agreement looks like. Attorney Bobrowski explained the score-card approach, with all nine questions equally weighted. He indicated that the answers to all nine questions should be known, with the ultimate test measuring whether or not the railroad is in control of the yard. PanAm Attorney Culliford informed the Board that Attorney Bobrowski is referencing a line of cases that analyzed whether preemption under the ICCTA is applicable when off the rail cars and not a part of the train any longer. He explained that it is his belief that because

PanAm is operating a train on the siding, preemption would still occur over the local regulations regardless of who is doing the removal or who has the agreement.

Vice Chairman Howley pointed out that there seems to be a line being drawn in terms of the business model and once the car is on site, there is another entity responsible for what will happen. He suggested that providing some remediation for the neighbors would not be a bad idea.

Chairman Johnson asked what can be done, jointly or individually, to try to mitigate the noise situation for the neighborhood. He noted that for many years the rail line was dormant, but is now coming back to life. Ms. Scarano informed the Board that she will look at the black box on the train to make sure that the horn is not being used indiscriminately. Selectman Fontana summarized that he believes the key issues relate to engine idling, horns, loading / unloading of freight cars. Town Manager agreed that the three top noise drivers relate to the horn, engine idling, and car clanging. He explained that the feedback that he has been receiving from the neighborhood indicates that the activities being conducted at the warehouse have not been problematic at this point in time. Town Manager suggested that it would be a good thing if Mr. Tighe informed the railroad that he would prefer not to receive shipments at 2 AM or 3 AM, and while unrealistic to expect an earlier delivery, a preferred designated hour for receipt of a delivery would be a good thing to be communicated.

Town Manager indicated that it would also be a good thing to continue discussing sound mitigation measures, e.g., sound barriers along the section of rail line that are similar to those along the highway to mitigate traffic noise occurring in residential areas. He noted that there is a stretch along the Orange Line from Wellington Station to Medford Street in Malden, where a barrier is erected along the edge of the neighborhood. The barrier protects the rail line activity from the neighborhood in Medford. Town Manager explained that the barrier runs the entire length and has proved to be successful for the neighborhood. He suggested that this may have been installed by the MBTA rather than the rail carrier. He indicated that he would attempt to bring the MBTA to the table on Winchester's behalf as well.