

**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

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“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 a 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,

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

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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