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August 12, 2013

VIA ELECTRONIC FILING

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

re: Docket No. FD 35749, Boston and Maine Corporation and Springfield
Terminal Railway Company v. Town of Winchester, *et al.*--
Petition for Declaratory Order

Dear Ms. Brown:

Attached for filing in the subject proceeding is the Petition for Reconsideration of the Town of Winchester, Massachusetts, and James A. Johnson III, Chairman of the Town of Winchester Board of Selectmen.

The Payment Form with the credit card information in payment of the \$250 filing fee was faxed to the Board earlier today.

Copies of this letter and its attachment are being served by me upon each party of record by e-mailing them to its counsel.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

att.

cc: John Heffner, Esq.
Andrew C. Nichols, Esq.
Robert A. Wimbish, Esq.

SURFACE TRANSPORTATION BOARD

Docket No. FD 35749

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

v.

TOWN OF WINCHESTER, *et al.* --
PETITION FOR DECLARATORY ORDER

PETITION FOR RECONSIDERATION OF THE TOWN OF WINCHESTER,
MASSACHUSETTS, and JAMES A. JOHNSON III, CHAIRMAN OF THE
TOWN OF WINCHESTER BOARD OF SELECTMEN

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TOWN OF WINCHESTER, MASSACHUSETTS,
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TOWN OF WINCHESTER BOARD OF SELECTMEN

Dated: August 12, 2013

SURFACE TRANSPORTATION BOARD

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TOWN OF WINCHESTER BOARD OF SELECTMEN

Respondents, the Town of Winchester, Massachusetts, and James A. Johnson III, Chairman of the Town of Winchester Board of Selectmen, pursuant to 49 C.F.R. § 1115.3(b)(2), petition for reconsideration of the Board's Decision, served July 19, 2013, on the ground that it manifested material error, and in support thereof Respondents state, follows:

I.

The decision violated the Younger abstention doctrine.

Petitioners, hereinafter referred to as "Pan Am", filed their Emergency Petition for Declaratory Order of July 1, 2013, to have the Board block the hearing before the Superior Court of Middlesex County of the Winchester Board of Appeal's Motion for Preliminary Injunction, tentatively scheduled to be heard on July 22, 2013, and the Board by its Decision of July 19, 2013, sought to do just that. The Motion was heard by the Court on July 31, 2013, and the following day was denied by it as moot based on the

Board's Decision. The Board's action was a clear violation of the Younger abstention doctrine.

That very emergency which Pan Am alleged necessitated the Board's prompt action was the July 22, 2013, prospective hearing date before the Superior Court, and the Board acted on the last preceding business day to grant Pan Am's request. Pan Am's purpose to secure the Board's Decision to preempt the Town of Winchester's enforcement of its Zoning By-Law before the Superior Court could hear the Board of Appeal's Motion for Preliminary Injunction is set out at pages 2 and 6 of Pan Am's Emergency Petition for Declaratory Order. The Board's Decision denied Pan Am's motion to file rebuttal, the CSX Transportation, Inc. and other rail parties' motion to participate as *amicus curiae* and the concerned parties' notice of intent to participate as *amicus curiae* lest the Petitioners exercise their right to reply, pursuant to 49 C.F.R. § 1104.13(a), and thus delay the issuance of the Board's Decision beyond the July 22, 2013, potential hearing date. The Board's effort to intrude upon the Superior Court's litigation does impermissible violence to the Younger abstention doctrine.

The Younger abstention doctrine is derived from the decision of the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). In its simplest terms, the doctrine declares that the federal judiciary shall not interfere with litigation pending before a state court. As the Supreme Court said, 401 U.S. at 43, "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." And, again, it said, 401 U.S. at 45, "[I]t has been perfectly natural for our cases to repeat time and time again that the

normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."

At least two earlier Supreme Court cases which were a prelude to the promulgation of the Younger abstention doctrine dealt with railroads. In *Railroad Commission of Texas v. Pullman Co. et al.*, 312 U.S. 496 (1941), the Supreme Court reversed and remanded a district court decision which had enjoined enforcement of a Texas Railroad Commission order requiring sleeping cars operated on lines within the state to be manned by Pullman conductors.. Referring to the state court's jurisdiction to review the Commission's action, the Supreme Court concluded, 312 U.S. at 501, "In the absence of any showing that these obvious methods of securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

In *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), the Supreme Court reversed the judgment of the district court which had affirmed an order of the Alabama Public Service Commission disallowing the discontinuance of two of the railroad's passenger trains. Quoting from its *Pullman* decision, the Supreme Court said, 341 U.S. at 350, "Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case.'" Quoting from its decision in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-298 (1943), the Supreme Court concluded, 341 U.S. at 350-351 "This withholding of extraordinary relief by courts having authority to give it is not denial of the jurisdiction which Congress has conferred on the federal

courts. . . On the contrary, it is but a recognition. . . that a federal court of equity. . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . "

In *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350 (1989), the Supreme Court reversed the judgment of the Court of Appeals for the 5th Circuit which had affirmed a district court decision which had enjoined New Orleans' collection of an assessment against the utility on the ground of preemption by the Federal Energy Regulatory Commission. At the same time that the FERC instituted its federal court proceeding, the utility had brought an action in state court to overturn New Orleans' assessment. The Supreme Court held, 491 U.S. at 369, "For Younger purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in midprocess would demonstrate a lack of respect for the State as sovereign. . . 'A] necessary concomitant of Younger is that a party wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court [citation omitted].'"

Massachusetts' judicial system allows a party dissatisfied with the ruling of the Superior Court on a motion for preliminary injunction to file an interlocutory appeal to a single justice of the Appeals Court. *See*, G.L. c 231, s. 118. ¹ Thus, the state appellate remedies have not been exhausted, and, until they have been, the Younger abstention doctrine forbids federal intrusion. If a federal court must abstain from interfering with state court litigation, a federal administrative agency, such as the Board, is barred as well.

¹ The Board noted in Finance Docket No. 34662, *CSX Transportation, Inc. -- Petition for Declaratory Order*, served March 14, 2005, that state courts can find preemption pursuant to 49 U.S.C. § 10501(b) as well as federal courts. *See, Village of Ridgefield Park v. New York, Susquehanna & W. Ry.*, 750 A.2d 57 (N.J. 2000).

II.

The Board lacks the jurisdiction to interfere with a state court proceeding.

The Board is an administrative agency, and as such it can exercise only such authority as has been delegated to it by the Congress. That is such a basic and well-established principle that it warrants only cursory discussion.

Well over a hundred years ago, the Supreme Court invalidated the Interstate Commerce Commission's prescription of railroad rates because the Congress as of then had not enacted legislation conferring upon the agency the requisite jurisdiction. In *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.* 167 U.S. 479, 510 (1897), the Supreme Court declared, "[I]t would be strange if an administrative body could by any mere process of construction create for itself a power which the congress has not given it." It added, 167 U.S. at 511, "[C]ongress has not conferred upon the commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the commission, it did not intend to secure the same result indirectly . . ."

More recently, in referring to another administrative agency, the Supreme Court in *Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corp, et al.* , 529 U.S. 120, ___ (2000), said, "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, as well as the agency, must give effect to the unambiguous expressed intent of Congress [citations omitted]'."

In *State of Michigan v. Environmental Protection Agency*, 268 F.3d 1075, ____ D.C. Cir 2001), the U.S. Court of Appeals for the D.C. Circuit declared, "EPA is a federal agency--a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. 'It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.' Thus, if there is no statute conferring authority, a federal agency has none [citation omitted]."

The same, of course, can be said of the Board. If the authority has not been conferred upon it, the Board has none. The Board is empowered to exercise only such authority as been delegated to it, and totally lacking is the jurisdiction to exercise any control over state judicial proceedings.

The Board is free to enter an order advising the Superior Court of its views as to the scope of the preemption provision of 49 U.S.C. § 10501(b). See Docket No. FD 35625, *City of Milwaukie--Petition for Declaratory Order*, served March 25, 2013; Finance Docket No. 34776, *National solid Wastes Management Association, et al.--Petition for Declaratory Order*, served March 10, 2006; Finance Docket No. 34052, *Green Mountain Railroad Corporation--Petition for Declaratory Order*, served May 28, 2002. It, however, cannot endeavor to have the Superior Court avoid hearing the Town of Winchester Board of Appeal's Motion for Preliminary Injunction. The Board clearly sought to do just that, although, as it turned out, the Court heard the Motion for Preliminary Injunction on July 31, 2013, and the following day denied it based on the Board's Decision.

III.

The Board failed to explain its departure from its precedents.

In its Decision endeavoring to curtail the litigation before the Superior Court of Middlesex County the Board committed the further material error of laws of failing to explain its departure from its consistent precedents. The Board has always said that for there to be preemption under the provision of 49 U.S.C. § 10501(b) there needed to be "transportation" that is performed by, or under the auspices of a "rail carrier".

In its Decision in STB Finance Docket No. 35157, *The City of Alexandria, Virginia--Petition for Declaratory Order*, served February 17, 2009, the Board stated, "[T]o qualify for federal preemption under section 10501(b), the activities must constitute 'transportation' and must be performed by, or under the auspices of, a 'rail carrier' [footnotes omitted]."

In its Decision in STB Finance Docket No. 35057, *Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order*, served September 26, 2008, the Board declared, "[T]o come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute 'transportation' and must be performed by, or under the auspices of, a 'rail carrier' [citation omitted]".

In its Decision in STB Finance Docket No. 35036, *Suffolk & Southern Rail Road LLC--Lease and Operation Exemption--Sills Road Realty, LLC*, served August 27, 2008, the Board stated, "to come within the Board's jurisdiction, an activity must constitute

transportation and must be performed by, or under the auspices, of a rail carrier. See 49 U.S.C. 10501(a) [citations omitted]."

In its Decision in STB Finance Docket No. 34797, *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--in Wilmington and Woburn, MA*, served July 10, 2007, the Board said, "To come within the Board's jurisdiction and thus be covered by the section 10501(b) preemption, an activity must constitute 'transportation' and must be performed by, or under the auspices of, a 'rail carrier' [footnote omitted]."

In its Decision in Finance Docket No. 34444, *Town of Milford, MA -- Petition for Declaratory Order*, served August 12, 2004, the Board said, "To come within the Board's jurisdiction and the scope of Federal preemption, an activity must be both 'transportation' and 'by rail carrier' under section 10501."

The Board did not disagree that Tighe was not a rail carrier. It, however, chose to ignore the fact that the track adjacent to Tighe's warehouse at 43 Holton Street had been rehabilitated by Tighe and was owned by Tighe. The Board declared, "[T]he nature of the track immediately adjacent to the warehouse is not dispositive." Yet the Board concluded that the entire property at 43 Holton Street, the Tighe warehouse and its track adjacent to the warehouse, were exempt from the Town of Winchester's Zoning By-Law by virtue of the preemption provision of 49 U.S.C. § 10501(b). In coming to that conclusion the Board ignored its consistent line of precedents that to be preempted the entity in question must be a "rail carrier".

"[A]n agency changing its course must supply a reasoned analysis . . . [citation omitted]." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57

(1983); "An agency acts arbitrarily and capriciously if it 'reverse[s] its position in the face of precedent it has not persuasively distinguished [citation omitted].'" *New York Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir 2004). *Accord*, *Louisiana Pb. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).

The Board's Decision is fatally flawed for the material error of law of departing from its precedents without offering a reasoned basis for doing so.

Respectfully submitted,

TOWN OF WINCHESTER, MASSACHUSETTS,
and JAMES A. JOHNSON III, CHAIRMAN OF THE
TOWN OF WINCHESTER BOARD OF SELECTMEN

By their attorneys,

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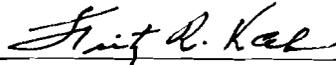
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Dated: August 12, 2013

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Petition for Reconsideration upon each party of record by e-mailing a copy to its counsel.

Dated at Washington, DC, this 12th day of August, 2013.



Fritz R. Kahn