

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35749

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**BOSTON AND MAINE CORPORATION, *et al.* v.
TOWN OF WINCHESTER, *et al.* –
PETITION FOR DECLARATORY ORDER**

AMICUS CURIAE BRIEF OF
Adrian & Blisfield Rail Road
Bay Coast Railroad
Clayton Sand Company
Cleveland Commercial Railroad
Coos Bay Rail Link
Iowa Pacific Holdings, LLC
Massachusetts Coastal Railroad, LLC

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Dated: July 18, 2013

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INTRODUCTION

On July 3, 2013, the Board served a decision instituting a declaratory proceeding at the request of Petitioners Boston and Maine Corporation and its subsidiary Springfield Terminal Railroad Company (collectively “Pan Am”) to address the issue of whether federal law preempts a town zoning decision prohibiting Pan Am from providing freight rail service. That decision set July 10, 2013, as the deadline for filing replies to the Petition. Subsequently, CSX Transportation, Inc. (“CSXT”), Housatonic Railroad Company, Inc., Massachusetts Railroad Association (“MRA”), and Norfolk Southern Railway Company (“NSR”) (collectively, the “MRA Parties”) jointly filed an *amicus* brief in support of Pan Am. On July 16, 2013, Adrian & Blissfield Rail Road Company, Bay Coast Railroad, Clayton Sand Company, Cleveland Commercial Railroad Company, LLC, Coos Bay Rail Link, Iowa Pacific Holdings, LLC, and

Massachusetts Coastal Railroad, LLC (hereafter “the Concerned Parties”) filed a letter with the Board seeking leave to file a joint *amicus* brief of their own. The Concerned Parties file this brief strongly supporting the positions taken by Pan Am and MRA.

STATEMENT OF INTEREST

The protagonists in this proceeding are Petitioner Pan Am and the Respondents, the Town of Winchester, MA (“the Town”) and some of its citizens. This proceeding involves the Town’s enforcement of a zoning board decision banning Pan Am from providing rail service at railroad facilities owned by or serving a warehouse operated by Tighe Logistics Group (Tighe”) in Winchester. The facts have been discussed in previous filings made by Pan Am and the Town and need not be repeated here.

The Concerned Parties include four independently-owned short line railroads, a short line railroad holding company [Iowa Pacific Holdings, LLC] along with its subsidiary the Massachusetts Coastal Railroad, LLC, and a railroad shipper [Clayton Sand Company] that owns a railroad line over which common carrier railroad service will soon be provided. The Concerned Parties wish to submit their views from the unique perspective that short line railroads bring to the transportation industry as carriers that specialize in providing the local pick up and delivery function at the beginning or end of a rail journey. Moreover, many short

lines operate over railroad lines and rights of way owned by third parties that are not common carriers and provide common carrier service inside shipper facilities.

The individual parties represented here include:

Adrian & Blissfield Rail Road (“ADBF”). ADBF is a small Class III short line railroad headquartered in Westland, MI. Established in 1991 to serve customers on track formerly operated by the Lenawee County Railroad Company (“LCRC”), ADBF operates about 20 miles of light density track principally between Adrian and Riga, MI,¹ that was originally part of the New York Central System and later the Penn Central Transportation Company. LCRC initially operated the subject line as a designated operator for the State of Michigan after the United States Railway Association’s *Final System Plan* did not include the line in the network to be operated by Consolidated Rail Corporation (“Conrail”) and did not designate it for conveyance to a “profitable” railroad. Ultimately the State acquired the line, ADBF bought the line and succeeded to LCRC’s operations, and new management took over in 2003.

Today ADBF handles a wide variety of agricultural and manufactured goods traffic connecting with Canadian National Railway and NSR. In addition, ADBF management controls a second small short line railroad, the Jackson & Lansing

¹ The Company has three other very short affiliated railroads that operate in other parts of Michigan as well as the Jackson & Lansing Railroad Company noted above.

Railroad Company, that leases and operates a 47 mile long NSR-owned branch line connecting those cities and interchanging with both NSR and CSXT.

Bay Coast Railroad (“BCR”). BCR is an independently-owned small Class III railroad that connects the NSR Delmarva Branch at Pocomoke City, MD, with Cape Charles, VA, and then by car float operated by the railroad with both NSR and CSXT at Norfolk, VA.² This 80 mile long line historically formed part of the Pennsylvania Railroad’s clearance-free route between the Northeast and Norfolk, VA, permitting it to move extra-dimensional loads avoiding the busy electrified, high speed passenger route between New York and Washington. As with the ADBF, BCR’s line was not included in the Conrail System, was identified as a “designated operator” railroad to be subsidized by state and local interests, and, after a succession of operators, was acquired by present management in 2006. The track, right of way, and facilities are owned by the Accomack-Northampton Transportation District Commission, a political subdivision of the State of Virginia.

Clayton Sand Company (“Clayton”). Clayton is a small family owned company engaged in the extraction and sale of sand and other aggregate products. In 1985 it acquired a 13 mile long line of railroad between Lakewood and Woodmansie, NJ, that Conrail had obtained permission to abandon from the

² BCR interchanges with CSXT through the Norfolk Portsmouth Belt Railway.

former Interstate Commerce Commission. Initially, Clayton had contracted with a now defunct short line railroad operator to provide it with a noncommon carrier service using the track as a “private railroad.” Subsequently, Clayton engaged an STB-regulated short line railroad, New Jersey Seashore Lines, Inc., to operate its line as a common carrier line of railroad holding out to serve the public. The line is in the process of being rehabilitated to serve Clayton’s needs as well as those of any other customers that might materialize. The line connects only with the Conrail Shared Assets Organization.

The area around Clayton’s line, like that of several other New Jersey railroads, lies within the boundaries and jurisdiction of an environmental regulatory agency known as the New Jersey Pinelands Commission (“the Commission”). The Commission believes that it can require railroads within its boundaries to seek agency permission before undertaking certain activities such as alterations to track and facilities and right of way maintenance (application of herbicides). Clayton is currently engaged in a discussion over certain physical improvements with Commission personnel which Clayton believes will have a favorable outcome.

Cleveland Commercial Railroad Company, LLC (“CCR”). CCR is another small independently-owned Class III short line railroad headquartered in the Cleveland suburb of Glenwillow, OH. Currently, CCR operates three track

segments totaling over 35 miles. Of these, CCR leases and operates two stub-ended track segments in northern Ohio owned respectively by the Wheeling & Lake Erie Railroad and NSR. More recently, a CCR subsidiary, the Cleveland Harbor Belt Railroad, entered into an agreement with the Port of Cleveland to operate terminal trackage connecting with both NSR and CSXT located at the Port's facility along the waterfront in downtown Cleveland.

Coos Bay Rail Link ("Coos"). Coos is a Class III short line railroad selected by the Oregon International Port of Coos Bay ("the Port"), a public agency in the State of Oregon, to operate a 133 mile stub-ended line of railroad owned by the Port and acquired from the Central Oregon & Pacific Railroad after a contentious feeder line proceeding. Coos is one of two short lines owned by American Railroad Group Transportation Services, LLC, the other being in Arizona. The Port has invested substantial funds in rehabilitating this deteriorated line and both Coos and the Port heavily are involved in rebuilding the traffic levels that this once robust branch line enjoyed. Forest products constituted the historical traffic base for this line. Coos's only direct connection is with the Union Pacific Railroad.

Iowa Pacific Holdings, LLC ("IPH"). Established in 2001, IPH is a short line holding company that owns directly or indirectly nine Class III railroads located across the country including in the Northeast, Midwest, Southwest, and Far West. IPH-owned railroads are primarily stub-ended operations that provide the

“retail” pick up and distribution function for which short lines are best known.

Thanks to vigorous marketing and locations serving the needs of energy-related customers, several of IPH’s subsidiaries have enjoyed major traffic increases since their acquisition by IPH from the previous owners. Several of these carriers enjoy revenues exceeding \$5 million annually. Connecting carriers include BNSF Railroad Company, CP Rail, CSXT, and Union Pacific Railroad Company. Lines operated by IPH subsidiary railroads include a mixture of trackage owned by the short line carriers themselves, trackage owned by Class I carriers and leased to the short lines, and public agency-owned and leased trackage and handle a very diverse mix of traffic.

Massachusetts Coastal Railroad, LLC (“Mass Coastal”). IPH subsidiary Mass Coastal is a Class III railroad serving Cape Cod and southern Massachusetts that IPH acquired in 2012 as a result of its purchase of an 80% interest in Cape Rail, Inc., a short line holding company. As relevant here, Mass Coastal holds the exclusive right to provide freight service on a series of stub-ended lines of railroad owned by and leased from Massachusetts’ state department of transportation. Mass Coastal’s service is focused heavily on the retail needs of customers handling inbound building products, food stuffs, retail goods, and propane gas and outbound waste products moving to a town-operated recycling facility. Mass Coastal operates over about 100 miles of track connecting with CSXT.

ARGUMENT

From the perspective of the Concerned Parties, the precise issue is whether railroad service furnished by a common carrier railroad is entitled to federal preemption from state or local law where the track or facilities served are *not* owned by the railroad. This ownership could take the form of a private track owned by a rail shipper (as Clayton's line had previously been before New Jersey Seashore Lines obtained Board authority to provide common carrier service over it), industry-owned track for common carrier service as is now the case with Clayton, track owned by some other noncarrier, or track owned by a public agency such as a port authority (the Port of Cleveland or the Oregon International Port of Coos Bay), a state transportation department, a commuter rail authority, or a municipal, regional, or county agency. The Town and its supporters would have the Board believe that the *only* track that is entitled to enjoy federal preemption is that owned by a rail carrier and not some other entity. In so arguing, these Respondents ignore both the law and the way that a substantial amount of rail transportation is conducted.

The Concerned Parties have reviewed the filings submitted in this proceeding and endorse the legal argument and precedent asserted by Pan Am and the MRA Parties. Simply stated, 49 U.S.C. §10102(9) (A) defines "transportation" as including a whole series of railroad assets and facilities "regardless of

ownership or agreement concerning use.” Board precedent such as The New York City Economic Development Corporation -- Petition for Declaratory Order, FD 34429, STB served July 15, 2004, clearly states the fact that the track owner is not itself a railroad and the fact the track is outside the Board’s licensing authority as a spur is irrelevant. Slip op. at 8. What is significant is the service being provided over the subject track.

Freight railroad transportation is a “24-7” business. Freight moves on the national rail system on a continuous basis because shippers and ultimately the general public require that type of service. If trains had to stop when the “sun goes down,” food wouldn’t reach consumers in a timely fashion, manufactured goods like appliances wouldn’t reach distribution centers and retailers in time to meet customer needs, and power plants might run out of coal or oil needed to generate electricity, among other examples. Because the average person probably doesn’t think about rail service absent grade crossing interactions and passenger train service, he or she may not realize that the rail system is a *network* with many moving parts. Just like a person’s circulatory system, the rail network consists of a series of major arteries that Class I railroads own and operate that either feed or are fed by many smaller vessels that consist of secondary and branch lines. Class II regional railroads and Class III short line railroads today operate and frequently own some of these former Class I railroad branches. In many cases trackage

owned by private parties such as rail shippers like Tighe forms the beginning and end of this distribution network. To restrict a carrier like Pan Am from providing common carrier rail service to such privately-owned facilities whether via a siding, a yard, or some other track configuration, necessarily affects the rail network by causing a potential back up of traffic flows to or from other routes.

The Pan Am – Town dispute has another important dynamic. The subject trackage lies along a line of the Massachusetts Bay Transportation Authority (“MBTA”) over which commuter rail service is provided. As the Town’s own counsel conceded, the reason why Pan Am’s operations are restricted in terms of schedule is to permit the MBTA to provide a socially necessary and reliable commuter rail service during daylight hours. Pan Am Petition at 4 and Ex. C at 10. Prohibiting Pan Am from serving Tighe has the potential effect of denying that customer rail service altogether. Requiring Pan Am to serve them and other freight customers during the day could adversely affect reliable passenger service. Any Board ruling denying preemption for Pan Am could have adverse national consequences as an increasing number of cities in the United States are turning to commuter rail service as an efficient, reliable, and affordable way to move passengers to their jobs. Imagine if zoning authorities around the country could implement similar restrictions forbidding railroads from providing service at customer locations. That could effectively divert substantial traffic volumes from

energy-efficient, environmentally-friendly rail service to trucks on city streets in such major commuter rail markets as New York, Philadelphia, Chicago, Los Angeles, Washington, D.C., and San Francisco as well as Boston.

While the Concerned Parties are a diverse lot, they share several common characteristics. Most of their lines are stub-ended branches acquired at some time in the past from a major carrier. And most of their service like that of Pan Am to Tighe consists of providing a local “pick up and delivery” function for the end user, the ultimate customer. Frequently, those customers own and maintain the tracks and facilities necessary for their rail service. In some cases the serving railroad provides common carrier service to a warehouse or distribution facility similar in nature to that operated by Tighe. Certain Concerned Parties have addressed preemption issues where a unit of local government has attempted to exert its authority over some aspect of rail service provided on either its line of railroad or on the facilities of a customer.

There is one other point warranting the Board’s attention. In many cases short line railroads including those among the Concerned Parties are creating markets for rail service by assisting with the establishment of new rail-served warehouses and transload facilities. The track at these facilities may or may not be owned by a railroad. The fact that a railroad is providing common carrier service

at these facilities should be the determinant as to whether there is federal preemption.

CONCLUSION

The Board should look beyond the narrow question of whether rail service to the Tighe facility is entitled to preemption and should recognize instead that this is an industry-wide issue. It should grant Petitioner Pan Am's relief to enable it to continue the rail service *status quo* rather than capitulating to the Town's desire to minimize the perceived "nuisance" of rail operations to the townspeople. But the Board should also consider the long term policy ramifications of allowing local communities to interfere with the free flow of both freight and passengers in interstate commerce.

Respectfully submitted,



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Certificate of service

I hereby certify that I mailed a copy of the above *Amicus* brief in the above-captioned proceeding to all parties of record by either email transmission or first class US Mail on July 18, 2013.



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