

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35749

BOSTON AND MAINE CORPORATION AND  
SPRINGFIELD TERMINAL RAILROAD COMPANY—  
PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> This decision declares that certain zoning decisions issued by the Town of Winchester, Mass., which would ban freight rail transportation to a warehouse in the Town, are preempted by federal law.

Decided: July 19, 2013

The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, Pan Am), filed a petition for declaratory order on July 1, 2013 (Petition), pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, requesting that the Board declare that 49 U.S.C. § 10501(b) preempts actions taken by the Town of Winchester, Mass. (the Town or Winchester), to ban certain rail transportation conducted by Pan Am. On July 10, 2013, the Town replied. For the reasons discussed below, we hold that the Town's actions are preempted.

BACKGROUND

This proceeding involves two railroad tracks adjacent to a warehouse in Winchester operated by Tighe Logistics Group (Tighe). The two tracks lie between the warehouse and a rail line over which Pan Am operates.<sup>2</sup> Pan Am, a rail common carrier, states that the track immediately next to the warehouse is owned by Tighe, and the other is held by Pan Am under an exclusive freight rail easement from the Massachusetts Bay Transportation Authority. Pan Am states that it provides common carrier rail transportation from its main line over these two tracks to the warehouse, where cargo is stored before continuing transportation to distribution centers and, ultimately, to retail customers.<sup>3</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Pan Am notes that the area between the warehouse and the main line, where the two tracks are located, historically has been known as Montvale Yard.

<sup>3</sup> See Pet. 2-3, 16.

Residents living near these tracks filed a complaint with the Town's zoning authorities relating to the use of the tracks, in particular the noise of trains coupling and switching at night.<sup>4</sup> In August 2012, the Town's Zoning Board of Appeal (ZBA) held that the area around the tracks "is being used as a freight yard which is not allowed" under municipal zoning laws.<sup>5</sup> Pan Am states that Tighe appealed this decision to state court, but that the parties jointly moved to remand the proceeding to the ZBA for consideration of the preemption issue.<sup>6</sup> On June 25, 2013, the ZBA submitted to the Town an amended decision after remand, directing that all rail traffic to the warehouse "immediately cease and desist."<sup>7</sup> Pan Am thereafter filed its petition for declaratory order with the Board on July 1, 2013.

Pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board, by decision served on July 3, 2013, instituted a declaratory order proceeding to resolve the controversy over whether application of the Town's zoning laws is preempted under 49 U.S.C. § 10501(b). In light of the Town's alleged intent to seek a state court injunction to enforce its cease and desist order as early as the week of July 22, 2013, the Board adopted an expedited procedural schedule, with replies to the Petition due by July 10, 2013. The Town filed a reply on July 10, 2013, arguing that the track immediately adjacent to the warehouse is private track that is not subject to the Board's jurisdiction, and does not qualify for federal preemption, because that track is owned by Tighe and is used solely to move shipments consigned to Tighe's warehouse.

On July 11, 2013, CSX Transportation, Inc., Housatonic Railroad Company, Inc., Massachusetts Railroad Association, and Norfolk Southern Railway Company (collectively, Railroad Parties) submitted a motion to participate as amicus curiae, together with an amicus curiae brief. Permitting these parties to file an amicus brief and allowing the Town an opportunity to reply would prevent the expedited resolution of this proceeding.<sup>8</sup> Therefore, we will deny the motion to participate as amicus curiae and will not accept the amicus brief into the record. On July 16, 2013, Pan Am submitted a motion for leave to file rebuttal, together with a rebuttal pleading. Also on July 16, 2013, Adrian & Blissfield Rail Road, Bay Coast Railroad, Clayton Sand Company, Cleveland Commercial Railroad, Coos Bay Rail Link, Iowa Pacific Holdings, LLC, and Massachusetts Coastal Railroad, LLC (collectively, Concerned Parties) submitted a notice of intent to participate as amicus curiae. The Concerned Parties submitted an amicus curiae brief on July 18, 2013. For the same reasons we are denying the Railroad Parties' motion, we will deny both Pan Am's motion for leave to file and the Concerned Parties'

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<sup>4</sup> Pet., Ex. B at 1-2. It appears that Pan Am operates trains over these two tracks at night because of commuter rail operations in the area during the day. See Pet., Ex. C at 8, 10.

<sup>5</sup> Pet., Ex. B at 2.

<sup>6</sup> Pet. 5.

<sup>7</sup> Pet., Ex. B at 4 (Amended Decision After Remand).

<sup>8</sup> See Bos. & Me. Corp.—Pet. For Declaratory Order, FD 35749, slip op. at 1-2 (STB served July 3, 2013).

notice of intent to participate, and we will not accept Pan Am's rebuttal pleading or the Concerned Parties' amicus brief into the record.

## DISCUSSION AND CONCLUSIONS

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), expressly provides that the jurisdiction of the Board over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). The statute defines “transportation” expansively to encompass any property, facility, structure or equipment “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).<sup>9</sup> Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.

In interpreting the reach of § 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997); CSX Transp., Inc.—Pet. for Declaratory Order (CSXT), FD 34662 (STB served Mar. 14, 2005), reconsideration denied (STB served May 3, 2005); Joint Pet. for Declaratory Order—Bos. & Me. Corp. (Town of Ayer), FD 33971 (STB served May 1, 2001), reconsideration denied (STB served Oct. 5, 2001). While federal law permits “the continued application of laws having a more remote or incidental effect on rail transportation,” it preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation.” N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007).

Applying these well-established preemption principles, we find the Town's actions here preempted by § 10501(b). The Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable

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<sup>9</sup> The historical context behind the term “regardless of ownership or an agreement concerning use” is described in Florida East Coast Railway v. City of West Palm Beach, 266 F.3d 1324, 1333-36 (11th Cir. 2001).

request. See 49 U.S.C. § 11101.<sup>10</sup> The Town's orders prohibiting all rail traffic to the warehouse conflict with the federal right of Tighe to request common carrier service and the federal obligation of Pan Am, a rail common carrier, to provide that service, as well as the Board's exclusive jurisdiction over that service. 49 U.S.C. § 10501(b)(1). As the federal courts and the Board have stated repeatedly, where a local regulation conflicts with the rights and obligations contained in the Interstate Commerce Act, federal law will preempt the local regulation. City of Auburn, 154 F.3d at 1031; City of Austell, 1997 U.S. Dist. LEXIS 17236, at \*19-22; CSXT, slip op. at 8-9; Town of Ayer, slip op. at 8-11. The Town's zoning decision holds that use of the Montvale Yard as a freight yard is not allowed pursuant to municipal zoning laws, and its order requires all rail traffic to the warehouse "to immediately cease and desist."<sup>11</sup> Such an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service. The Town's actions are therefore plainly preempted by § 10501(b).

The Town's principal argument in support of its attempt to stop all interstate freight rail service to the warehouse is that the track immediately adjacent to the warehouse is private track, and therefore, the Town argues, federal preemption should not apply to local regulations directed at this track.<sup>12</sup> Pan Am contests the Town's categorization of the track as private track.<sup>13</sup>

As an initial matter, the Town's zoning decision and its cease and desist order are not limited to the allegedly private track. Instead, the zoning decision by its terms applies to the entire property at 43-45 Holton Street, on which the two tracks are located,<sup>14</sup> and the cease and desist order applies by its terms to "all rail traffic to the warehouse."<sup>15</sup>

In any event, the dispute between the parties regarding the nature of the track immediately adjacent to the warehouse is not dispositive. Even if we assume this track is private track (which we need not decide here), this does not permit the Town to deprive Tighe of its federal right to receive common carrier rail service over the track. As previously noted, Tighe has rights provided by federal law to ask for and receive common carrier rail service from Pan Am, a rail carrier providing service subject to the Board's jurisdiction. Thus, even if we construed the Town's action narrowly as directed solely at Tighe, and solely at a short piece of allegedly private track located adjacent to the warehouse, there remains a fundamental conflict between the Town's regulation and the rights of Tighe and Pan Am to request and provide,

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<sup>10</sup> These federal rights and obligations include, for example, the right of a shipper to require a carrier, under certain circumstances, to construct and operate a switch connection to connect the shipper's private side track with the interstate network. See 49 U.S.C. § 11103.

<sup>11</sup> Pet., Ex. B at 2, 4 (Decision No. 3639 & Amended Decision After Remand).

<sup>12</sup> Reply 1-4; Pet., Ex. B at 4 (Amended Decision After Remand).

<sup>13</sup> See Pet. 14-17.

<sup>14</sup> Pet., Ex. B at 2 (addressing the warehouse property at 43-45 Holton Street).

<sup>15</sup> Id. at 4 (Amended Decision After Remand).

respectively, common carrier rail service under the Interstate Commerce Act. That conflict must be resolved in favor of federal law. Accord Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158-60 (4th Cir. 2010) (city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier's transload facility). Otherwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act.

Accordingly, we find that the Town's zoning decision and cease and desist order are preempted by federal law.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for declaratory order is granted as discussed in this decision.
2. The Railroad Parties' motion to participate as amicus curiae is denied and their amicus brief is not accepted into the record.
3. Pan Am's motion for leave to file rebuttal is denied and its rebuttal pleading is not accepted into the record.
4. The Concerned Parties' notice of intent to participate is denied and their amicus brief is not accepted into the record.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.