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Via Electronic Filing

October 24, 2016

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20024

RE: Diana Del Grosso, et al - Petition for Declaratory Order
Finance Docket No.: 35652

Dear Sir/Madam:

Enclosed please find Petitioners' Opening Statement on Remand. Kindly docket and file same. The document has also been emailed to the STB today.

If you have any questions or require any other information, please let me know. Thank you for your consideration.

Very truly yours,



Mark Bobrowski

cc: Atty. Howard (via email only)
Atty. Hocky (via email only)
Atty. Morgan (via email only)
Upton Development Group (via first class mail)
First Colony Development Company (via first class mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

**OPENING STATEMENT OF PETITIONERS
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA**

ON REMAND FROM THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

Mark Bobrowski
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Attorney for Petitioners

Date: October 24, 2016

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SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

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BACKGROUND

1. On December 5, 2014 (2014 STB Decision), the Surface Transportation Board (Board) ruled on the Petition for Declaratory Order filed by Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (collectively, the Petitioners). The 2014 STB Decision is Exhibit 1, hereto.

2. In particular, the Petition for Declaratory Order claimed that the operation of a wood pellet facility located in the yard of the Grafton & Upton Railroad (the G&U) in Upton, Massachusetts, did not constitute “rail transportation” preempted by Section 49 U.S.C. § 10501(b).

3. The 2014 STB Decision concluded, in part, that vacuuming, screening, bagging, and palletizing the wood pellets constituted "transportation" and not "manufacturing" because, although those activities were "not essential" to transporting wood pellets by rail, they

"facilitate[d]" such transportation by making it "more efficient." This was so because the activities allowed the G&U to transport the pellets by hopper cars rather than boxcars. (2014 STB Decision, p. 6)

4. Petitioners appealed the 2014 STB Decision to the U.S. Court of Appeals for the First Circuit (First Circuit) arguing, in part, that because the bulk wood pellets need to undergo screening, vacuuming, repelletizing, bagging, palletizing, and shrink wrapping to complete the wood pellet manufacturing process, the facility is engaged in "manufacturing". Petitioners claimed that this manufacturing is not integrally related to rail transportation. Preemption under Section 49 U.S.C. § 10501(b) therefore is not applicable.

5. There is no doubt that "repelletizing" has occurred at the Upton wood pellet facility since 2012. Supplemental Verified Statement of Michael J. Polselli, February 22, 2012, para. 5, Exhibit 2, hereto.

6. "Repelletizing" refers to taking incompletely manufactured wood pellet "fines" that are gathered during the wood pellet screening process, and using that recovered material to manufacture better pellets. It is an industry-standard step that occurs during wood pellet processing. By any definition, it constitutes manufacturing, assembly, and fabrication.

7. The Board submitted a Brief to the First Circuit, rejecting the Petitioners' claim that wood pellet activities at the Upton Facility constitute manufacturing. The Board argued that "the pellets themselves are not changed" and that activities at the Upton Facility "allows more

efficient rail operations.” The Board also maintained that, in reaching its 2014 STB Decision, “it reasonably weighed the evidence the parties presented to it about manufacturing.”

8. On October 16, 2015 (2015 Remand), the First Circuit vacated and remanded part of the 2014 STB Decision for further proceedings. The First Circuit ruled that “the Board’s efficiency rationale goes beyond the statute and is beside the point.” 2015 Remand, at p. 15. The First Circuit stated that “the proper focus of the Board should have been on the question of whether the activities - vacuuming, screening, bagging, and palletizing - facilitated the physical movement of ‘passengers or property’ (here the transfer of the pellets from rail to truck), rather than cost efficiency.” *Id.*, pp. 15-16. Accordingly, a remand was required “to determine whether the vacuuming, screening, bagging, and palletizing facilitated the transloading of the pellets from the railcars to the trucks or was done solely for another, unrelated purpose.” 2015 Remand, p. 18. The 2015 Remand is Exhibit 3.

9. The First Circuit did not consider the Petitioner’s argument that “repelletizing” constitutes manufacturing because Petitioners did not raise this issue before the Board. However, the First Circuit did “not preclude the Board from considering this issue on remand.” 2015 Remand, at p. 19.

ARGUMENT

I. THE TRANSLOADING OF WOOD PELLETS AT THE UPTON FACILITY IS NOT “INTEGRAL TO THE PHYSICAL MOVEMENT OF GOODS.”

The First Circuit rejected the Board’s “efficiency rationale” saying that it “would result in a vast regulatory gap in which state and local regulation would be eliminated simply because the facilities were economically connected to rail transportation.” *Id.* at p. 16 (footnote omitted). Instead, the First Circuit instructed the Board to examine whether the transloading of the wood pellets at the Upton facility is “integral to the physical movement of goods” (2015 Remand, at p. 14).

In *NE Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway*, STB Finance Docket No. 34797 (June 29, 2007)(*NE Transrail*), the Board applied the “integrally related” test.

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. The term “transportation” has been defined broadly to include all of the related facilities used and services related to the movement of property by rail, including “receipt, delivery,” “transfer in transit,” “storage,” and “handling” of the property. Thus, intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation that would come within the Board’s jurisdiction. However, manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term “transportation.” (Footnotes omitted)

Petitioners submit that the wood pellet facility in the Upton yard fails this test. For example, www.oxforddictionaries.com defines “integral” as “necessary to make a whole complete; essential or fundamental.”¹ Rail transportation is not integral to the manufacturing of finished wood pellets at the Upton facility.

¹ This definition is consistent with other online definitions of “integral” sampled below:

Petitioners have identified at least eleven (11) facilities that bag and palletize wood pellets that are remote from a rail siding, including:

1. Two Rivers Timber Instant Heat Wood Pellets: Addison, New York;
2. Northeast Wood Products LLC-ThermaGlo Wood Pellets: Peebles, Ohio;
3. German Pellets: Woodville, Texas;
4. Barefoot Pellet Company: Troy, Pennsylvania;
5. Vermont Wood Pellet Company: North Clarendon, Vermont;
6. Lignetics: Sand Fork, West Virginia;
7. Lignetics: Stonge, Maine;
8. Lignetics: Kenbridge, Virginia;
9. Fiber Energy Products: Mountain View, Arkansas;
10. Lee Energy Solutions: Crossville, Alabama;
11. Energex American, Inc.: Mifflintown, Pennsylvania; and
12. Northeast Pellets LLC: Ashland, ME; and
13. New England Wood Pellet: Jaffrey, New Hampshire

Petitioners obtained affidavits from local officials stating that the pellet facility is not served by rail in several of these communities. These affidavits are grouped as Exhibit 4. Petitioner Diana Del Grosso also has provided Supplemental Affidavit in which she summarizes her internet research regarding the of the location several of the above-listed facilities. See Exhibit

www.merriam-webster.com – “very important and necessary.”

www.dictionary.cambridge.org/us - “necessary and important as a part of a whole or contained within it.”

In short, if rail transportation is not essential to the operation of the above-listed facilities, it is not essential to the operation of the Upton facility. The pellets (or the raw materials to make pellets) can be delivered to a facility by truck, or barge, or train, and then trucked or shipped to a location outside the yard (if arriving by rail) for manufacturing. Consequently, none of the above-listed facilities manufacture wood pellets in a rail yard. As Mr. Polselli, the manager of Grafton Upton Railcare LLC, says in his Supplemental Verified Statement, Exhibit 2 at para. 7:

Some of the potential new customers will be shipping the pellets out in bulk and will not require bagging. The pellets will still be placed into the silos for temporary storage, but then will be loaded directly into trucks.

In other words, the location of a pellet manufacturing facility within the Upton yard is merely a matter of convenience, not necessity. This is not “rail transportation.”

II. THE WOOD PELLET FACILITY IN THE UPTON YARD IS MANUFACTURING UNRELATED TO RAIL TRANSPORTATION.

Without any “integral” relation to rail transportation, the G&U’s wood pellet facility in Upton is simply manufacturing subject to local zoning regulations.

In the 2014 STB Decision, at p. 6, the Board used *NE Transrail* to analyze whether the Upton pellet facility changed “the nature or physical composition of the commodity being transported” so as to constitute “manufacturing or commercial transaction.”

[T]he activities at the Upton Facility facilitate the movement of wood pellets by rail and do not change them into another product. The pellets are packaged differently, as was the MSW in *NE Transrail*, but the pellets themselves are not changed—in contrast, for example, to shredding the product at issue, or cutting and welding it (as in *Town of Milford*).

Petitioners disagree. The G&U has now admitted that repelletizing has been part of the manufacturing process in Upton since 2012. The “pellets themselves” are changed.

“Repelletizing” refers to the process of taking incompletely manufactured wood pellet “fines” that are gathered during the wood pellet screening process, and using that recovered material to manufacture better pellets. As Mr. Polselli reported in his Supplemental Verified Statement, Exhibit 4 at para. 6, after screening, the broken pellets are “pressed together” – repelletized.

This is an industry-standard step that occurs during wood pellet processing. By any definition, it constitutes manufacturing, assembly, and fabrication.²

In *NE Transrail*, the Board noted that the wrapping and baling of the construction debris “are not the sort of activities that would have value for any other purpose, as upon delivery, any wrapping would be removed and the bales would be broken up.” The bagging process in Upton – especially repelletization - does add value. Without repelletization, the broken fines would be screened and discarded.

Thus, the “pellets in, pellets out” argument offered by the G&U and adopted by the Board in the 2014 STB Decision is plainly wrong. Broken pellets are being manufactured into

² Wood pellet manufacturing is acknowledged as an industrial activity. See the North American Industry Classification System, Item 321999:

321999 All Other Miscellaneous Wood Product Manufacturing

The U.S. industry comprises establishments primarily engaged in manufacturing wood products (except establishments operating sawmills and preservation facilities; establishments manufacturing veneer, engineered wood products, millwork, wood containers, pallets, and wood container parts; and establishments making manufactured homes (i.e., mobile homes) and prefabricated buildings and components).

NAICS and its predecessor, the Standard Industrial Classification Manual, are routinely cited by the courts to define manufacturing. See, e.g., *Coop. Agronomy Services v. South Dakota Dept. of Revenue*, 668 N.W.2d 718 (S. Dakota 2003); *Edwards v. Allen*, 216 S.W.3d 278(Tenn. 2007); *BMC Enterprises, Inc. v. City of Mt. Juliet*, 273 S.W.3d 619 (Tenn. Ct. App. 2008).

marketable pellets via repelletization.³ The pellets are improved and made into a more valuable consumer product. Before processing, they were in bulk and inaccessible to the retail marketplace. After the manufacturing process - including screening, vacuuming, repelletizing, bagging, palletizing and shrink-wrapping - they are a different product from that arriving in bulk.

CONCLUSION

For the above-stated reasons, the Petitioners request the Board to rule on remand that the G&U's wood pellet facility in Upton, Massachusetts is not preempted under 49 U.S.C. §10501(b).

Petitioners,
By their attorneys,

DATE: October 24, 2016


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³ Fines are the smallest, dust-like particles produced in the pelleting process. They also occur in breakdown during shipping and handling. The production standard is intended to assure hard pellets that withstand handling. Excessive fines represent loss of usable fuel and cause performance and maintenance problems. They are also a source of irritation for appliance owners when the dust escapes into the home during pouring from the bag into the hopper. The fines are less likely to burn because they are easily blown away from the flame by combustion air. Fines cause performance problems, including loss of fuel feeding if they build up on the sides of the hopper and reduce the opening size to the fuel delivery system. Additionally, fines can increase the need for maintenance by filling ash traps prematurely and by jamming augers. See Exhibit 6, page 6
www.hearthstonestoves.com/assets/files/document_library/ResidentialPelletFuel.pdf.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 1

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Date: October 24, 2016

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SERVICE DATE – DECEMBER 5, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision finds that certain operations conducted at a bulk transloading facility in the Town of Upton, Mass. constitute “transportation by rail carrier” and that, therefore, federal preemption applies to those operations.

Decided: December 4, 2014

By petition for declaratory order filed on August 1, 2012, seven residents of the town of Upton, Mass. (Town)—Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners)—request that the Board find that the Town’s local zoning laws and other regulations are not preempted with respect to certain activities performed at a bulk transloading facility (the Upton Facility) located in the Town. The activities are performed by a third-party transloader, Grafton Upton Railcare, LLC (GU Railcare),² on property owned by Upton Development Group, LLC (UDG). GU Railcare asserts that it performs these operations on behalf of the Grafton & Upton Railroad Company (G&U). Petitioners allege that the wood pellet packaging services provided at the facility are not integrally related to rail transportation, and that the bulk transfer terminal activities are not being conducted by a rail carrier. We find that federal preemption applies to these activities as performed by GU Railcare.

BACKGROUND

G&U reports that it was incorporated in 1873 and has been in continuous operation since that time. G&U states that its line extends approximately 16.5 miles between North Grafton, Mass., where it connects and interchanges with CSX Transportation, Inc. (CSX), and Milford,

¹ 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).

² GU Railcare is a newly formed affiliate of a family of companies involved in the transportation of bulk commodities and related services conducted on behalf of its principal, Ronald Dana.

Mass., where it also connects with a line of CSX. UDG owns approximately 33 acres of property that are immediately adjacent to the original G&U yard in Upton. In July 2008, UDG entered into a long-term lease of the property to G&U, which included an option to purchase. The lease affords G&U the right to use the property for rail transportation purposes and to make investments and improvements for rail operations at its discretion. With its acquisition and control of the property through the lease and option to purchase, G&U states that it developed a plan for expanding its existing yard by improving the property and turning it into a larger rail-to-truck transload facility. As a result, a number of yard tracks that accommodate railcars handling bulk materials (both dry and liquid) were constructed, as well as a wood pellet transloading facility that could receive wood pellets shipped in bulk in hopper cars. G&U states that it has exercised its option to purchase the property, but has not yet elected to close on the purchase transaction because certain environmental remediation work required of UDG by the Massachusetts Department of Environmental Protection (MDEP) has not yet been completed.

On August 1, 2012, Petitioners filed the instant petition for declaratory order requesting that the Board find that certain operations conducted by GU Railcare at the transload facility are not part of G&U's rail transportation and therefore not subject to federal preemption.³ G&U filed a reply in opposition to the petition on August 21, 2012, asserting that there is no controversy or dispute to be resolved, that preemption applies here, and that there is no need to institute a declaratory order proceeding. On January 24, 2013, the Board instituted a declaratory order proceeding (pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721) and established a procedural schedule.⁴

Petitioners argue that preemption does not apply here because the transloading services provided at the Upton Facility are neither integrally related to transportation, nor performed by, or under the auspices of, a "rail carrier." G&U responds that GU Railcare is providing transportation-related services at the Upton Facility on the railroad's behalf and the Town's zoning and other regulations are therefore preempted.⁵

³ Petitioners also sought discovery to obtain, among other things, the contractual agreements G&U has with its customers and any other documents that would help to ascertain the degree of control G&U has over the transloader performing services at the Upton Facility.

⁴ The January 24th decision denied requests the parties had made for discovery, pointing out that Petitioners had access to the documents underlying the transaction. On February 13, 2013, Petitioners filed a petition for reconsideration of that determination, which the Board denied in a decision served on May 8, 2013.

⁵ Letters supporting G&U's position were filed by the American Short Line and Regional Railroad Association (ASLRRRA), Frank S. DeMasi, and Massachusetts State Representative George N. Peterson, Jr. Letters supporting Petitioners' actions here were filed by Massachusetts State Senator Michael O. Moore and the Citizens of Upton (Citizens). Although these filings were not timely filed, we will accept them in the interest of compiling a more complete record. See City of Alexandria, Va.—Petition for Declaratory Order, FD 35157, slip (continued...)

PRELIMINARY MATTERS

Motion to Dismiss the Petition. G&U argues that this petition for declaratory order should be dismissed for two reasons.⁶ First, G&U argues that Petitioners lack standing because they fail to provide factual support for the allegation that they have been aggrieved. Petitioners respond that they have, in fact, alleged specific injury as a result of operations conducted at the Upton Facility, including such problems as glare, light intrusion, noise, dust, diminution of property values, and truck noise.

The Board is not bound by the strict requirements of standing that govern judicial proceedings. See James Riffin—Petition for Declaratory Order, FD 34501 (STB served Feb. 23, 2005). Petitioners are Town residents located near the bulk transloading facility and have an interest in understanding whether state and local or federal laws govern. Accordingly, G&U's motion to dismiss for lack of standing is denied.

G&U also argues that the petition for declaratory order should be dismissed because Petitioners failed to exhaust potential administrative remedies under Massachusetts law involving zoning and land use before coming to the Board. Petitioners respond that they are not required to exhaust such state law remedies, citing 49 C.F.R. § 1117.1 (a “party seeking relief not provided for in any other rule may file a petition for such relief”). We agree. G&U cites no statutory provision or Board regulation requiring a party to exhaust state law remedies before seeking a declaratory order from the Board. Moreover, the courts have held that the Board's view of the reach of federal preemption under 49 U.S.C. § 10501(b)—the issue Petitioners raise here—is entitled to great weight because the agency is interpreting the scope of its governing statute and addressing issues involving interstate commerce. See Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 642-43 (2d Cir. 2005) (citing CSX Transp., Inc. v.

(...continued)

op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “(i)n the interest of compiling a full record”); Denver & Rio Grande Ry. Historical Found.—Petition for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012). We will also reject Petitioners' claim that ASLRRRA needed to file a petition to intervene, as the Board specifically sought comments from all interested parties in its January 24, 2013 Decision.

⁶ On August 21, 2012, a motion to dismiss was filed on behalf of GU Railcare; Dana Transport, Inc.; Dana Rail Care; Liquid Transport Company; International Equipment Leasing, Inc.; and Suttles Truck Leasing, LLC (herein collectively referred to as the Dana Companies). (According to the Dana Companies, Dana Rail Care is not a separate legal entity; rather, it is a trade name of Dana Container, Inc. (DCI).) In light of our disposition set forth below—which finds that GU Railcare is performing transportation-related activities on behalf of G&U, and which does not order any of these entities to do or refrain from doing anything—we need not reach the issues raised in this motion to dismiss.

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Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996))). In any event, issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided by the Board or the courts in the first instance. See 14500 Ltd. LLC—Pet. for Declaratory Order, FD 35788 (STB served June 5, 2014) (citing Mid-America Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599, slip op. at 3 (STB served June 6, 2005)). Accordingly, G&U's motion to dismiss for failure to exhaust administrative remedies is denied.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). In this case, Petitioners ask that the Board resolve the uncertainty regarding the scope of the Board's jurisdiction over the Upton Facility's operations. We find it appropriate for the Board to issue a declaratory order addressing the preemption issues presented here.

The federal preemption provision contained in § 10501(b) bars the application of most state and local laws to railroad operations that are subject to the Board's jurisdiction. Section 10501(b) expressly provides that the "jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive." Section 10501(b) also explicitly states that "the remedies provided under [49 U.S.C. §§ 10101-11908] are exclusive and preempt the remedies provided under Federal or State law."⁷

Because the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a), to be subject to the Board's jurisdiction and qualify for federal preemption under § 10501(b), the activities at issue must be "transportation," and must be performed by, or under the auspices of, a "rail carrier."⁸ The term "transportation" is defined expansively to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery," "transfer in

⁷ Even where § 10501(b) preemption applies, there are limits to its scope. Overlapping federal statutes are to be harmonized with each statute given effect to the extent possible. Moreover, states retain police powers to protect the public health and safety on railroad property so long as state and local regulation do not unreasonably interfere with interstate commerce. See Green Mountain, 404 F.3d at 643.

⁸ See Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, N.J. (Hi Tech), FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation" 49 U.S.C. § 10102(5).

transit,” “storage,” and “handling” of property. 49 U.S.C. § 10102(9). Whether a particular activity constitutes transportation by rail carrier under § 10501(b) is a case-by-case, fact-specific determination.

The Board’s jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, or the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third-party’s operations.⁹ Based on the record in this case, including the affidavits and documents contained in the parties’ submissions, we conclude that GU Railcare is performing transportation-related activities on behalf of G&U at the Upton Facility. Therefore, these activities qualify for federal preemption under § 10501(b). Our analysis follows.

Activities Conducted at the Upton Facility. As noted, the term “transportation” is broadly defined in the Interstate Commerce Act to encompass the facilities used for and services related to the movement of property by rail, expressly including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Citing this language, the Board has explained that, generally, “intermodal transloading operations . . . are part of rail transportation that would come within the Board’s jurisdiction.” New England Transrail—Construction, Acquis. & Operation Exemption—in Wilmington & Woburn, Mass. (NE Transrail), FD 34797, slip op. at 6 (STB served July 10, 2007). The Board has distinguished these types of loading and unloading operations from “manufacturing and commercial transactions that occur on the property owned by a railroad that are not part of or integral to the provision of rail service,” which are not embraced within the term “transportation.” Id. at 10. Activities constitute manufacturing or commercial transactions if they change the nature or

⁹ Compare Green Mountain, 404 F.3d at 640, 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier qualified for preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967) (An agent undertaking the obligations of a common carrier (i.e. performing services as part of the total rail service contracted for by a member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation); and Ass’n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C. 2d 280, 290-95 (1992) (so long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad is deemed to hold itself out to the public) with Town of Milford, Mass.—Petition for Declaratory Order (Town of Milford), FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the carrier, but the transloading services were not being offered as part of common carrier services offered to the public); Hi Tech, slip op. at 5-7 (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order (Town of Babylon), FD 35057, slip op. at 5-6 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services to customers directly).

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physical composition of the commodity being transported. See Town of Milford, slip op. at 1-2 (cutting and welding of steel not transportation).

An activity may be “integrally related” to rail transportation if it facilitates rail transportation even if it is not absolutely essential for the cargo to be transported by rail. Thus, in NE Transrail, the Board found that baling and wrapping of municipal solid waste (MSW) at a truck-to-rail transloading facility was integrally related to rail transportation even though some MSW arrived at the facility in intermodal containers and some arrived pre-baled. NE Transrail, slip op. at 13-14. The process of wrapping and baling, the Board explained, allowed a wider variety of rail cars to be used. Id. at 14. On the other hand, the Board found that another activity performed at the same facility—the shredding of construction and demolition (C&D) debris—was not integrally related to rail transportation because it was done for the purpose of extracting valuable materials that the railroad could resell. Id. at 14-15.

Here, the parties dispute whether the vacuuming, screening, bagging, and palletizing of wood pellets at the Upton Facility is more like the baling and wrapping of MSW or the shredding of C&D debris that occurred in NE Transrail. We find that these activities are akin to the baling and wrapping of MSW. Although not essential to transporting wood pellets by rail, performing these activities at the Upton Facility facilitates rail transportation by making it more efficient. As G&U explains, the activities performed at the Upton Facility allow the wood pellets to be transported in hopper cars, which can accommodate about 20 more tons of pellets than the boxcars that otherwise would be used. G&U Reply, V.S. Moffett 3-4. Were these activities performed at the manufacturing facility, the wood pellets would have to be transported in boxcars, in which case each pallet containing 50 40-pound bags would have to be blocked and braced in order to limit movement within the boxcar. The blocking and bracing materials would consume space and weigh about 4,000 pounds per boxcar, leaving less capacity for the wood pellets themselves. Id.

Petitioners argue that the screening, vacuuming, and bagging of the wood pellets are like the shredding operation in NE Transrail in that they change nature of the product by converting it from a mass of bulk wood pellets that cannot be sold to consumers to a bagged product that is consumer and retailer friendly. Petition 14-15. The critical point for the Board’s analysis, however, is that the activities are “integrally-related” to transportation. As noted above, the activities at the Upton Facility facilitate the movement of wood pellets by rail and do not change them into another product. The pellets are packaged differently, as was the MSW in NE Transrail, but the pellets themselves are not changed—in contrast, for example, to shredding the product at issue, or cutting and welding it (as in Town of Milford).

Petitioners argue that the wood pellets are not bagged to facilitate their movement by rail, as the pellets can be bagged either before or after rail movement. Petition 14. Instead, they argue, the wood pellets are bagged so the consumer can carry them from the store to the car, from the car to the house, protect them while stored at the house, and load them into the stove. Id. Although the bagging of the pellets may produce some value to the consumer, G&U has

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demonstrated that bagging them at the Upton Facility facilitates rail transportation by permitting a more efficient use of hopper cars. For that reason, the bagging of the pellets qualifies as a service “related to” the movement of property by rail. NE Transrail, slip op. at 14.¹⁰

Petitioners argue that the activities at the Upton Facility constitute manufacturing because one of the wood pellet manufacturers describes these types of activities on its website as part of its manufacturing process. Petition 16. We do not find this dispositive, however, as the record also contains a verified statement from another manufacturer stating that the manufacturing process is “fully completed” prior to shipment by rail in hopper cars. G&U Reply, V.S. Middleton 3. Moreover, as discussed earlier, even if the process at the Upton Facility also benefits the product’s end user, G&U has demonstrated that it allows for far more efficient rail transportation.

Based on the record viewed as a whole, we conclude that the activities at the Upton Facility constitute services related to the movement of property by rail and thus fall within the statutory definition of “transportation.”

The Relationship between G&U and GU Railcare. Next, we must determine whether GU Railcare is performing transloading activities on behalf of G&U, which is a rail carrier. In conducting this analysis, the Board has typically considered the following: whether the rail carrier holds out transloading as part of its service; whether the rail carrier is contractually liable for damage to the shipment during loading or unloading; whether the rail carrier owns the transloading facility; whether the transloader invoices and collects the transloading fees and is compensated for its services by the carrier or the shipper; the degree of control retained by the rail carrier over the transloader; and other terms of the contract between the rail carrier and the transloader. See City of Alexandria, Va.—Petition for Declaratory Order (City of Alexandria), FD 35157, slip op. at 2-3 (STB served Feb. 17, 2009); accord Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010).

Petitioners assert that G&U does not hold out itself or GU Railcare as its transloading contractor in marketing the Upton Facility, but rather holds out Dana Transport (another of the Dana Companies) as providing transloading and additional services at the facility. Petitioners allege that it is GU Railcare, rather than G&U, that establishes the transloading rates for services performed at the Upton Facility. Further, Petitioners allege that the Terminal Transloading Agreement (Agreement) between G&U and GU Railcare includes authorization for GU Railcare to develop, as its own customers, G&U customers that tender traffic at the Upton Facility.

¹⁰ In NE Transrail the Board noted that “baling and wrapping [of MSW] are not the sort of activities that would have value for any . . . purpose” other than facilitating rail movement. NE Transrail, slip op. at 14. The Board, however, did not make the absence of any incidental value a prerequisite to finding an activity related to the movement of property by rail.

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Petitioners argue that G&U and GU Railcare have the same type of relationship as existed between the New York and Atlantic Railway Company (NYAR) and Coastal Distribution L.L.C. (Coastal) in Town of Babylon, which the Board concluded was insufficient to trigger preemption. There, according to Petitioners, the railroad was simply the “shipper” that Coastal used in its waste disposal business. Here, Petitioners assert that G&U is being used in much the same way by the Dana Companies (i.e., GU Railcare) to facilitate their trucking and other businesses.

In reply, Respondents state that GU Railcare is operating on behalf of G&U and that GU Railcare’s operations are, and have been marketed as, an integral part of the transportation performed by G&U, which is a licensed rail carrier. G&U states that it constructed the tracks and transloading facility and is responsible for maintenance of the tracks and switches. G&U claims that the parties’ Agreement supports its interpretation because here, as in City of Alexandria, the Agreement provides that G&U will hold itself out to the public as a common carrier by rail, offering to provide linehaul transportation, transloading, storage, and other specified transportation services with respect to bulk commodities and other commodities; G&U has the right to cancel the Agreement, for any reason, on short notice; GU Railcare will, as directed or requested by G&U, perform all activities required to transload commodities from rail cars to trucks at the terminal; GU Railcare pays no rent or other fees to the rail carrier for use of the facility and is strictly prohibited from using the facility for any purposes or activities other than transloading for customers of G&U and from conducting any independent business there for its own account; GU Railcare does not coordinate transloading services for a shipper, but, rather, a shipper must contact G&U’s marketing department to arrange for terminal services; and GU Railcare’s sole compensation is derived from its transloading services.¹¹

Based on the Agreement and other record evidence, we find that GU Railcare is acting on behalf of G&U. This case differs significantly from Town of Babylon. In that proceeding, the entity performing the transloading built the facility and, under its agreement with the railroad, assumed responsibility for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. The transloader was also entitled to charge a loading fee for its transloading services—a fee in addition to the rail freight transportation charge payable to the railroad and over which the railroad had no control. And for use of the facility, the transloader paid the railroad a usage fee for every loaded railcar (inbound or outbound). Moreover, the transloader was permitted to enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which the railroad disclaimed any liability.

¹¹ G&U also points out that its Tariff 5000-A states that the Upton Facility is operated by G&U through a “subcontract” with GU Railcare, the terminal operator, and that GU Railcare will perform the terminal services for, and under the auspices of, G&U.

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Here, in contrast, and similar to the facts presented in City of Alexandria, the record demonstrates that G&U constructed the tracks and transloading facility and is responsible for maintenance of the tracks and switches. G&U also offers and markets transloading services as part of its total transportation package. G&U Reply, V.S. Delli Priscoli 4. Further, GU Railcare is prohibited from using the facility for any purpose or activity other than transloading for customers of G&U and cannot conduct any independent business there for its own account. Additionally, GU Railcare's sole compensation is derived from its transloading services. Id., V.S. Gordon 4. Finally, GU Railcare pays no rent or other fees to the rail carrier for use of the facility. G&U Supp. Reply, V.S. Gordon 2. All of these factors support the conclusion that GU Railcare is acting on G&U's behalf.

Petitioners correctly note that the billing, payment, and compensation procedures implemented here differ from those in City of Alexandria in that GU Railcare invoices and collects charges from customers (which, according to GU Railcare, is done on behalf of G&U), and GU Railcare's sole compensation for its transloading services performed at the Upton Facility is the amounts invoiced and collected by it. Moreover, it is GU Railcare, and not G&U, that establishes the transloading rates for services performed at the Upton Facility. But G&U explains that GU Railcare bills and collects transloading fees from customers because the railroad lacks the necessary personnel. G&U adds that GU Railcare acts only on its behalf and that rates for transloading are established by G&U in its tariff so that any decision to adjust the rates is ultimately made by the railroad.

Typically, billing, payment, and compensation arrangements are not handled by the transloader, but rather by the rail carrier. See, e.g., City of Alexandria. Here, however, the record demonstrates that G&U has ultimate control over its billing, payment, and compensation arrangements. Further, G&U has overall control of its pricing, as the transloading rates charged to shippers are established by G&U in its tariff and any decision to adjust a rate is ultimately made by the railroad.

Petitioners also argue that, instead of G&U performing the transloading through GU Railcare, it is actually Dana Transport that conducts the transloading, and that Dana Transport is directly offering these services to customers. Petitioners rely on a reference from the G&U website which states that the Upton Facility ““benefits from the on-site [third-party logistics] trucking and transload services of industry-respected provider Dana Transport.”” Petition 21 (quoting Exhibit 22)). There is abundant evidence in the record that Dana Transport provides trucking and other third-party logistics services to shippers at the Upton Facility. But the fact that Dana Transport provides these services does not resolve the issue before us—whether or not Dana Transport (rather than GU Railcare) provides transloading services. Based on our consideration of all of the record evidence, we are satisfied that this single, undated website reference to Dana Transport providing transload services does not overcome the other evidence, much of it sworn, establishing that GU Railcare—and only GU Railcare—is currently performing transloading at the Upton Facility, and that it is doing so on behalf of G&U. See, e.g., G&U Reply in Opposition to Petition, V.S. Dana 2 (“All of the freight is transloaded by GU

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Railcare.”) & 5 (“Other than the transloading services being performed by GU Railcare, no Dana Companies are performing rail car services . . . at the Upton railyard.”); id., V.S. Polselli (“GU Railcare is responsible for performing all transload services to or from rail cars moved to or from the Upton railyard.”); G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R. § 1117.1, V.S. Polselli (“[A]ll of the transloading at the Upton rail yard is handled by GU Railcare as the agent for G&U. No other Dana Company provides any transloading services at the G&U rail yard.”).¹²

Petitioners next suggest that because G&U does not assume liability or responsibility for the transloading activities, they are not being conducted on G&U’s behalf. Petition 25-26. In support, Petitioners point to G&U’s 2011 Service Terms and Guidelines, which states that G&U’s “liability for loss or damage to property or delay in transfer or shipment shall be that of a warehouseman only.” Petition, Exhibit 25 at 110. G&U’s attempt to limit its liability to its customers does not change the relationship between G&U and GU Railcare into something other than that of principal and agent. In any event, G&U abolished the 2011 Service Terms and Guidelines as of May 2012, and replaced them with a tariff, the current version of which omits this language. G&U Reply in Opposition to Petition 28 n.9.¹³

Petitioners also argue that the Agreement allows GU Railcare to develop, as its own customers, G&U customers that tender traffic at the Upton Facility. According to Petitioners, this provision is inconsistent with City of Alexandria where, in that case, the operator did not market, and had no right to market, the transload facility. Petitioners’ Reply 8-9 (filed May 20, 2013). The provision in question provides:

Contractor shall not use the Terminal other than for the purposes set forth in this Agreement, and shall not use the Terminal for purposes of engaging in any other activities or independent businesses for its own account. Contractor may solicit customers of Railway to use services provided by Contractor at the Terminal, including,

¹² The record also shows that another Dana Company (DCI) previously provided transloading services at the Upton Facility, but that it did so only temporarily and prior to the execution of the Agreement and the formation of GU Railcare. G&U’s witnesses state that DCI provided these services on behalf of and under the control of G&U, that this transloading was performed on the basis of an informal understanding that formation of GU Railcare and the Agreement would soon be finalized, and that the work was performed in a manner that was consistent with the terms and conditions of the Agreement as executed. G&U Supp. Reply 17-18, Supp. V.S. Delli Priscoli 3-4, Supp. V.S. Dana 2-3. Petitioners present nothing that contradicts this testimony. Thus, this evidence does not demonstrate that GU Railcare is not now providing transloading services as the agent of G&U.

¹³ Petitioners do not dispute that a new tariff has superseded the 2011 Terms and Guidelines nor do they explain why the old tariff is relevant. See Petitioners’ Reply 4-6 (filed May 20, 2013).

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but not limited to, bagging pellets at the packaging facility located at the Terminal, but such services may be provided only after or before such customer ships a Commodity by rail over the line of Railway.

Agreement § 1.C. Thus the Agreement does not permit GU Railcare to develop G&U customers as its own customers. Indeed, the first sentence quoted above specifically prohibits such conduct. To the extent GU Railcare does any marketing, it will do so on behalf of G&U.

Finally, Petitioners argue that certain actions by Dana Companies other than GU Railcare show that the transloading activities at the Upton Facility are not being performed under the auspices of a rail carrier.¹⁴ However, the relevant issue with regard to whether preemption applies to the activities of GU Railcare is whether GU Railcare's transloading activities are part of rail transportation. Therefore, we will not address Petitioners' argument with respect to the alleged activities by other companies that are not part of GU Railcare's transloading activities.

Based on all of the information provided by the parties, including the rights and obligations set forth in the Agreement, we find that GU Railcare's transloading activities at the Upton Facility are sufficiently under the control of G&U to make them part of G&U's rail transportation. Consequently, we conclude that GU Railcare is performing transportation activities at the Upton Facility on G&U's behalf and that, therefore, federal preemption applies here.

GU Railcare is not a sham. Citing GWI Switching Services, L.P.—Operation Exemption—Lines of Southern Pacific Transportation Co. (GWI Switching Services), FD 32481 (STB served Aug. 7, 2001), Petitioners argue that the formation of GU Railcare is a sham. Specifically, Petitioners question whether GU Railcare was established for “legitimate and substantial business reasons,”¹⁵ suggesting that it was set up solely to qualify the transloading services for preemption and to avoid local regulation. According to Petitioners, because the Dana Companies had transloading expertise and a presence at the Upton Facility prior to GU Railcare's formation, there was no reason to establish a new transloading company. Petitioners further claim that GU Railcare is not sufficiently independent of the other Dana Companies to warrant a finding that GU Railcare is actually performing the activities at the Upton Facility.

¹⁴ Petition 20-25. Specifically, Petitioners state that: (1) one of the pellet manufacturers allegedly has entered into a “partnership” with one of the Dana Companies; (2) trucks owned by one of the Dana Companies are loaded with pellets for shipment to their final destination; (3) some of the Dana Companies allegedly store their trucks at the Facility, and “it is probable that the Dana Companies are paying a fee for storage at the Upton Facility”; and (4) some Dana Companies provide non-transload services at the Facility and thus likely have entered into contractual relationships with the users of those services. Id.

¹⁵ Petitioners' “Reply to Reply” 12.

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G&U responds that it is permissible to structure a transloading arrangement to meet the preemption standards established by the Board and the courts. Moreover, according to G&U, the real issue here is not whether G&U is sufficiently independent from the other Dana Companies but, rather, whether GU Railcare is sufficiently independent from shippers and receivers at the Upton Facility. See City of Alexandria. In that regard, G&U states that there is no relationship between GU Railcare and any customers using the transloading services, and that none of the Dana Companies is a shipper, receiver, or owner of freight transloaded at the Upton Facility.

Based on the record before us, we reject Petitioners' argument that GU Railcare is a sham. A rail carrier that chooses to provide transloading services may perform them itself, or it may engage another party to perform them on its behalf. G&U has pursued the latter option. In this case, we conclude that G&U and GU Railcare are parties to a transloading agreement that is consistent with Board preemption precedent.¹⁶ The fact that the parties appear to have modeled their relationship on the one approved in City of Alexandria does not support a finding that GU Railcare is a sham. Nor does the mere creation of GU Railcare, when other Dana Companies already had prior transloading experience, indicate subterfuge.¹⁷

On March 27, 2014, Petitioners filed a supplemental pleading in support of their allegations that GU Railcare is a sham. Petitioners state that they have recently gained access to new, critical information that is relevant to this proceeding. They allege that, on December 18, 2013, a reported spill of 100 gallons of liquid styrene, a hazardous material, occurred at the Upton Facility, as indicated on a MDEP Release Log Form. Petitioners claim that the spill occurred during rail-to-truck transloading operations and involved a Dana Company road tanker vehicle. As pertinent here, Petitioners also claim that documents prepared by MDEP and Clean Harbors Environmental Services (Clean Harbors) identified a Dana Company, DCI, as the responsible party and operator. Petitioners contend that these documents make clear that GU Railcare is set up solely to obtain preemption for ongoing, independent Dana corporate family operations at the Upton Facility.

In an April 16, 2014, response, G&U states that employees of GU Railcare were transloading styrene from rail-to-truck when a GU Railcare pump malfunctioned. G&U adds

¹⁶ GWI Switching Services, cited by Petitioners, does not support their position. That case involved a noncarrier subsidiary seeking an exemption to become a carrier, and one key issue was whether labor protection (among other things) would apply on the basis that the noncarrier was sufficiently independent of its parent and carrier affiliates. Here, that labor protection issue is not present, and that case is not otherwise relevant to the facts presented in this proceeding.

¹⁷ Ronald Dana, the owner of the various Dana Companies, states that it has been his "practice to have different companies for different types of operations and locations. This serves to help insulate existing successful businesses from the risks of new business." G&U Supp. Reply, Supp. V.S. Dana 2.

that GU Railcare's terminal manager, Michael Polselli, promptly called MDEP and the Upton Fire Department to report the incident and shortly thereafter contacted Clean Harbors to conduct the necessary cleanup and remediation.¹⁸ G&U notes that, on the day of the spill, an MDEP representative issued a Notice of Responsibility correctly listing G&U as the responsible party. See G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R. § 1117.1, V.S. Delli Priscoli Exhibit A.

G&U acknowledges that some (but not all) subsequent documents related to the spill referred to DCI as the responsible party, but argues that those references were merely clerical errors that probably resulted from confusion during the emergency and from Clean Harbors' past invoicing practices with other Dana Companies. *Id.* at 4. In a verified statement, Mr. Polselli states that, when he contacted Clean Harbors to arrange for the cleanup, he indicated that he was calling on behalf of G&U. *Id.*, V.S. Polselli 3. Mr. Polselli's claim is consistent with MDEP's Release Log Form, which lists G&U as the reporting organization, and specifically states that Mr. Polselli called "representing the Grafton and Upton Railroad." Petition to Supp. the Reply Pursuant to 49 C.F.R. § 1117.1, Exhibit 1 at 2. Nevertheless, Mr. Polselli says, Clean Harbors treated his call as being made on behalf of Suttles Truck Leasing, one of the Dana Companies.¹⁹ Clean Harbors, however, determined that the cost of performing the remediation work would exceed the credit limit of Suttles Truck Leasing, and unilaterally picked DCI, another Dana Company, with which it had worked elsewhere, as its "customer" because DCI had sufficiently high credit limits to satisfy Clean Harbors that it could provide emergency services on credit. Without consulting Mr. Polselli about the proper entity for which the work was being performed, Clean Harbors then drafted various documents either on behalf of DCI or listing DCI as the responsible party, actions to which Mr. Polselli did not object because he was focused on getting the spill cleaned up quickly and properly. G&U Reply to Petition to Supplement the Reply Pursuant to 49 C.F.R. § 1117.1, V.S. Polselli 3-5.

G&U admits that these errors should have been corrected sooner, but argues that they were inadvertent and did not affect the substance of its relationship with GU Railcare. Lastly,

¹⁸ The fact that Mr. Polselli serves both as regional manager of DCI and terminal manager of GU Railcare is not an indicator that G&U lacks sufficient control over the transloading operations conducted at the Upton Facility. See, e.g., Iowa, Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, LLC, FD 34117, slip op. at 11 (STB served July 22, 2002) (shared management is common among affiliated carriers and does not detract from their financial and operational independence).

¹⁹ Mr. Polselli suggests that Clean Harbors may have done this because GU Railcare had never previously had a spill at the Upton Facility, whereas Mr. Polselli had previously worked with Clean Harbors regarding a matter related to a small spill by Suttles Truck Leasing at another facility.

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G&U states that the errors have subsequently been reported to MDEP and Clean Harbors and have been corrected. Petitioners have not disputed G&U's explanation.

After reviewing Petitioners' supplement and G&U's reply, we find G&U's explanation of events credible and, accordingly, that the references to DCI as the responsible party were errors. The record, viewed as a whole, demonstrates that GU Railcare, and not DCI, is performing transloading activities at the Upton Facility, and that GU Railcare is doing so on G&U's behalf. Accordingly, we reject Petitioners' allegations that the G&U-GU Railcare relationship is a sham.

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

It is ordered:

1. G&U's request to dismiss the petition on grounds of standing and failure to exhaust state administrative remedies is denied.
2. The Board accepts into the record all of the late-filed letters submitted by interested parties.
3. The petition for declaratory order is granted to the extent discussed above.
4. This proceeding is discontinued.
5. This decision is effective on its service date.

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 2

Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
Attorney for Petitioners

Date: October 24, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH,
CHERYL HATCH, KATHLEEN KELLY, ANDREW
WILKLUND, AND RICHARD KOSIBA--
PETITION FOR DECLARATORY ORDER

**SUPPLEMENTAL VERIFIED STATEMENT OF
MICHAEL J. POLSELLI**

1. My name is Michael J. Polselli, and I am the New England Regional Manager for the Dana Companies. In my capacity as New England Regional Manager, I am responsible for the management and operation of Grafton Upton Rail Care, LLC ("GU Rail Care"), and the transloading activities at the Upton railyard of Grafton & Upton Railroad ("G&U"). I have reviewed the Petition filed in the above-captioned proceeding by certain residents of the town of Upton, and the Response of the Petitioners dated September 10, 2012. I submitted a Verified Statement in support of the Reply of Grafton and Upton Railroad dated August 20, 2012. I am providing this Supplemental Verified Statement in support of the Supplemental Reply being filed by G&U.

2. In this Supplemental Verified Statement, I wanted to provide additional information regarding the transloading activities at G&U's Upton railyard.

3. Currently there are approximately 16 customers utilizing G&U transloading services at the Upton railyard. During calendar year 2012, there were 895 railcars transloaded in the railyard – 701 of those cars were inbound tank cars of bulk

liquids of various types that were unloaded, 44 of those cars were inbound covered hoppers of wood pellets that were unloaded, and 150 of those cars were outbound tank cars that were loaded with bulk liquids. Twenty different bulk liquids are transloaded in Upton.

4. G&U has been handling the transloading of wood pellets since December 2011. It current handles transloading of wood pellets for two customers who ship pellets to Upton from seven different manufacturing plants across North America. Discussions are underway with three additional wood pellet customers who would ship for the 2013-2014 heating season.

5. As previously described, the transloading of wood pellets involves the use of a hose to remove them from the rail cars. GU Rail Care attaches a vacuum hose to the bottom of the cars which sucks the wood pellets through a system that removes dust, and then into silos which provide temporary storage of the wood pellets until they are ready to be loaded onto trucks. Since December 2012, broken pellets (sometimes referred to as "fines"), are separated by screens from unbroken pellets as the pellets are moved by conveyor to the silo, pressed together, and moved into the silos. Additional dust is removed from the wood pellets before they are bagged. Any dust that is collected is disposed of as waste. There is no cleaning or washing or processing of the pellets. There is no "manufacturing" involved in the transloading process – the structure and content of the pellets are not changed from when they left the factory.

6. Currently, all of the wood pellets are moved from the silos by a conveyor, automatically bagged in 40 pound bags and stacked 50 to a pallet. The pallets are shrink-wrapped so that they will be ready for truck transportation, and then moved to a staging

area to be stored until they are loaded in trucks for final delivery by the customer. The bagging and shrink-wrapping are merely part of the unloading and temporary storage provided by G&U for the customers.

7. Some of the potential new customers will be shipping the pellets out in bulk and will not require bagging. The pellets will still be placed into the silos for temporary storage, but then will be loaded directly into trucks.

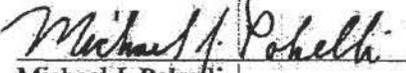
8. Dana Transport continues to handle approximately 25% of the truck loads at the yard, with other carriers or customers handling the other 75%.

9. The Pctitioners (in particular Ms. Del Grosso) allege that there were two Dana tank cars (DNAX 130007 and DNAX 130014) loaded with methyl cyanide stored for an extended period of time on yard tracks near her property, and that the storage would have violated local ordinances if they applied. These allegations are wrong in a number of ways. The tank cars are owned by Dana Container, Inc., but are under a long term lease to an unaffiliated customer Purification Technologies, Inc. of Chester, CT. The tank cars never were loaded with methyl cyanide, but rather were used to ship acetronitrile which is a high purity inert liquid. The cars arrived loaded in Upton on March 14, 2012, and were transloaded into outbound tanker trucks by March 21, 2012. They were moved as empty cars from the active liquid transloading tracks onto G&U's Upton storage track near Depot Street on March 21, 2012. They were stored empty by G&U until January 30, 2013, while waiting for customer directions as to where to send the cars. As with all liquid tank cars in the yard, these cars were handled in accordance with FRA requirements.

VERIFICATION

I, Michael J. Polselli, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Supplemental Verified Statement.

Executed on February 22, 2012.


Michael J. Polselli

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 3

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Date: October 24, 2016

United States Court of Appeals For the First Circuit

No. 15-1069

DIANA DEL GROSSO;
RAY SMITH; JOSEPH HATCH; CHERYL HATCH;
KATHLEEN KELLEY; ANDREW WILKLUND; RICHARD KOSIBA,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES,

Respondents,

GRAFTON & UPTON RAILROAD COMPANY,

Intervenor.

PETITION FOR REVIEW OF A FINAL ORDER OF THE SURFACE
TRANSPORTATION BOARD

Before

Torruella, Selya, and Dyk,*
Circuit Judges.

Mark Bobrowski, with whom Blatman, Bobrowski & Mead LLC was on brief, for petitioners.

Erik G. Light, Attorney, Surface Transportation Board, with whom William J. Baer, Assistant Attorney General, Robert B. Nicholson and Shana Marie Wallace, Attorneys, Department of Justice, Craig M. Keats, General Counsel, and Evelyn G. Kitay, Deputy General Counsel, were on brief, for respondents.

James E. Howard, with whom John A. Mavricos, Jonah M. Temple, Christopher Hays, Wojcik & Mavricos LLP, Linda J. Morgan, and Nossaman, LLP, were on brief, for intervenor.

*Of the Federal Circuit, sitting by designation.

October 16, 2015

DYK, Circuit Judge. Diana del Grosso, et al. ("petitioners") petitioned the Surface Transportation Board ("Board") for a declaratory order that state and local regulations of a facility owned by Grafton & Upton Railroad Company ("G&U") were not preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), Pub L. No. 104-88, 109 Stat. 803. The Board held that state and local regulations were preempted because the facility was part of "transportation by rail carrier." 49 U.S.C. § 10501(a)(1). We affirm the Board's decision that the facility was operated by a "rail carrier." But because the Board relied on an erroneous standard in concluding that the activities at the facility were a part of "transportation," we vacate and remand.

I.

Under the ICCTA, the Board has jurisdiction over "transportation by rail carrier." Id. Where the Board has such jurisdiction, it is exclusive. Whether or not the Board is exercising its regulatory authority over the transportation, state and local¹ laws governing such transportation are generally preempted. See id. § 10501(b) ("[T]he remedies provided under this

¹ In a companion case decided today, Padgett v. Surface Transportation Board, No. 14-2067, slip op. at 7 (1st Cir. Oct. 16, 2015), we confirm that preemption applies to local as well as state regulations.

part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."); Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 157 (4th Cir. 2010); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005); City of Auburn v. U.S. Gov't, 154 F.3d 1025, 1030 (9th Cir. 1998); see also Borough of Riverdale – Petition for Declaratory Order, STB Finance Docket No. 33466, 1999 WL 715272, at *4 (S.T.B. Sept. 9, 1999) (preemption even where rail construction project outside Board's regulatory authority). Such preemption is not limited to state and local economic regulation of rail transportation. See N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); Green Mountain, 404 F.3d at 644-45; City of Auburn, 154 F.3d at 1031. But see Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1337-39 (11th Cir. 2001).

In order for an activity to count as "transportation by rail carrier," it has to be both "transportation" and operated by a "rail carrier." Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 530 (5th Cir. 2012). "Transportation" is a broad category that includes any "property, facility, instrumentality, or equipment" connected to "movement . . . by rail," as well as various "services related to that movement." 49 U.S.C. § 10102(9)(A)-(B). Whether an activity is conducted by a "rail carrier" is a case-by-case factual determination based on,

inter alia, how much control a rail carrier is exercising over the activity. See Tex. Cent., 669 F.3d at 530-31 (internal quotation marks, citations omitted). The Board routinely grants declaratory orders as to whether particular activities are preempted, but the ICCTA does not delegate to the Board the determination of whether state and local law is preempted. See 49 U.S.C. § 10501(b).

II.

Here, G&U is a licensed rail carrier that began operations in 1873. It owns a railroad line that extends from North Grafton, Massachusetts, to Milford, Massachusetts. Upton is a town located between Grafton and Milford. In 2008, G&U decided to expand its rail yard in Upton and develop it into a rail-to-truck transloading facility. As a part of that plan, G&U undertook to build a wood pellet facility that would receive wood pellets in bulk from hopper railcars and transfer them, after some processing and bagging, onto trucks. G&U also entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC ("GU Railcare"), a part of Dana Companies, a group of companies with extensive experience in transloading bulk materials. GU Railcare was neither owned nor operated by G&U. GU Railcare was to operate the transloading services on behalf of G&U.

By the fall of 2011, G&U finished the wood pellet facility. At the facility, a vacuum hose is attached to hopper railcars carrying wood pellets in bulk and sucks the pellets

through a system that removes dust from the pellets. The pellets are then moved to silos for temporary storage. Additional dust is then removed from the pellets, and the pellets are conveyed from the silos, placed in forty-pound bags, and stacked onto pallets, fifty bags to a pallet. The pallets are then shrink-wrapped and stored until they are loaded into trucks for final delivery to retail stores.

The Upton Board of Selectmen concluded that the activities at the facility were preempted by the ICCTA, 49 U.S.C. § 10501(b), and did not seek to regulate them. However, on August 1, 2012, petitioners, who live near the facility, sought a declaratory order from the Board that the wood pellet activities were not part of "transportation by rail carrier" under 49 U.S.C. § 10501(b) and that state and local regulations were therefore not preempted. Petitioners complained that the transloading operations caused them harms such as exposure to excess glare, light intrusion, noise, and diminution of property values, and that such harms would be prevented by enforcement of Upton's zoning by-laws, which, for example, restrict a building's height and require special permits for manufacturing facilities, which permits could limit noise and above-ground storage. See, e.g., Town of Upton Zoning By-Law, § 4.2 Table C (height restrictions); id. § 3.1.3 Table A & n.6 (special permit requirements). The petitioners mounted a two-pronged attack on the railroad's claim of preemption.

First, they argued that the wood pellet transloading operations were not "transportation" under the ICCTA because they were manufacturing activities. Second, they argued that GU Railcare was not a "rail carrier" under the statute.

With respect to the second issue, petitioners requested discovery of documents regarding the construction, financing, operation, management, and ownership of the facility in order "to determine the real relationship" between G&U, GU Railcare, and Dana Companies. On January 23, 2013, the Board initiated a declaratory order proceeding but denied the discovery request by petitioners, noting that petitioners had access to G&U's transloading agreement with GU Railcare and its lease agreement for the rail yard, and that G&U had also not explained why discovery or additional documents were needed.

On February 13, 2013, petitioners requested reconsideration of the Board's denial of discovery. Petitioners argued mainly that there was new evidence that "raises significant questions" regarding G&U. The evidence was that G&U was involved in a separate litigation with the town of Grafton, Massachusetts, over a proposed propane transloading facility,² and that evidence as to the relationship between G&U and the operator of the other facility could shed light on the relationship between G&U and the

² This other case is also being decided today. See Padgett v. Surface Transp. Bd., No. 14-2067, slip op. at 3 (1st Cir. Oct. 16, 2015).

Dana Companies. On May 7, 2013, the Board denied reconsideration. It concluded that the various agreements already submitted were sufficient to determine the issue of whether the activities were being conducted by a "rail carrier," noting that the Board "is guided [on that issue] by the terms of the agreements between the railroad and the transloader." It also concluded that the relationship between G&U and a third party involving a different transloading facility was not relevant.

On December 5, 2014, the Board issued a declaratory order. After concluding that the petitioner had standing to raise the preemption issue, the order declared that the Board had exclusive jurisdiction over the transloading activities in G&U's facility because they constituted "transportation" by "rail carrier." The Board concluded that the vacuuming, screening, bagging, and palletizing of the wood pellets were "transportation" and not "manufacturing" because, although those activities were "not essential" to transporting wood pellets by rail, they "facilitate[d]" such transportation by making it "more efficient." This was so because the activities allowed G&U to transport the pellets by hopper cars rather than boxcars. The Board also distinguished the activities in question from manufacturing and commercial transactions because they did not "change [the] nature of the product," even though some of the activities, such as bagging, "may produce some value to the consumer." The Board also

determined that GU Railcare was acting on behalf of G&U in performing the transloading activities, and so a "rail carrier" was doing the transporting. It finally determined that GU Railcare was not a sham set up simply to avoid state and local regulations.

The petitioners sought judicial review. We have jurisdiction pursuant to 28 U.S.C. § 2342. Under the Administrative Procedure Act ("APA"), we will not set aside the Board's determinations unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or are "unsupported by substantial evidence." See 5 U.S.C. § 706(2). The APA requires the agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); see also Granite State Concrete Co. v. Surface Transp. Bd., 417 F.3d 85, 91 (1st Cir. 2005).

III.

In this court, both the Board and the railroad argue that the Board's decision on the issue of preemption is entitled to Chevron deference. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). We disagree.

In Wyeth v. Levine, 555 U.S. 555 (2009), the Supreme Court explained that "agencies have no special authority to

pronounce on pre-emption absent delegation by Congress," noting that the Court had never "deferred to an agency's *conclusion* that state law is pre-empted." Id. at 576-77 (emphasis in original). Rather, "[w]here . . . Congress has not authorized a federal agency to pre-empt state law directly, the weight this [c]ourt accords the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness"; that is, the agency's decision is entitled only to Skidmore deference. Id. at 556 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

Contrary to the Board's suggestions, nothing in City of Arlington v. FCC, 133 S. Ct. 1863 (2013), undermines Wyeth. City of Arlington concerned only whether an agency's interpretation of the scope of its jurisdiction is entitled to Chevron deference, did not even mention Wyeth, and, as the Court explicitly noted, "ha[d] nothing to do with federalism," id. at 1873, which animates the Court's preemption jurisprudence, see, e.g., Wyeth, 555 U.S. at 565; Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

Following Wyeth, the courts of appeals have been unanimous in concluding that Chevron deference does not apply to preemption decisions by federal agencies. See Seminole Tribe of Fla. v. Stranburg, No. 14-14524, 2015 WL 5023891, at *13 (11th Cir. Aug. 26, 2015) ("[D]eference to an agency's ultimate conclusion of federal preemption is inappropriate."); Steel Inst. of N.Y. v. City of New York, 716 F.3d 31, 39-40 (2d Cir. 2013) ("We do not defer to

an agency's legal conclusion regarding preemption"); In re Universal Serv. Fund Tel. Billing Practice Litig., 619 F.3d 1188, 1200 (10th Cir. 2010) ("An agency's conclusion that state law is preempted is not necessarily entitled to deference."); see also St. Louis Effort for AIDS v. Huff, 782 F.3d 1016, 1024 (8th Cir. 2015); Do Sung Uhm v. Humana, Inc., 620 F.3d 1134, 1155-56 (9th Cir. 2010). The Fifth Circuit in Franks Investment Co. v. Union Pacific Railroad Co., 593 F.3d 404 (5th Cir. 2010), has held in particular that Chevron deference to the Surface Transportation Board on the question of preemption is inappropriate, holding that "the [Board's] decision regarding the preemptive effect of the ICCTA and the test it uses to determine preemption are not binding on us." Id. at 413-14 (citing Wyeth). We agree that the Board is not entitled to Chevron deference on the issue of preemption.³

³ We do not decide whether, if Congress does give express authority to an agency to determine the scope of preemption, Chevron deference would apply. See Medtronic, 518 U.S. at 495-96 (citing Chevron and giving "substantial weight" to an agency's pronouncement on a preemption issue where there was an express preemption provision in the organic statute and Congress explicitly granted agency authority to exempt state regulations from preemption); see also City of New York v. FCC, 486 U.S. 57, 63-64 (1988).

Here, in contrast to statutes where Congress has delegated authority to an agency to pronounce on the scope of preemption, see Wyeth, 555 U.S. at 576 n.9 (listing examples), the Board's organic statute simply states that its remedies are exclusive and have preemptive effect. See 49 U.S.C. § 10501(b). The Board's general authority to issue a declaratory order is derived from the APA. See 49 U.S.C. § 721(b)(4); 5 U.S.C. § 554(e).

This does not mean that the Board's preemption decision earns no deference. We apply Skidmore deference, which allows us to defer to the Board in so far as we find the Board's interpretations persuasive. See Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46, 55 (1st Cir. 2014). We also defer to the Board's factual determinations, such as whether there are efficiency gains connected to the choice of railcars in transportation. Such determinations need only be supported by substantial evidence and a "'rational basis' . . . in the facts on the record." See Granite, 417 F.3d at 91-92 (citation omitted); Ross Express, Inc. v. United States, 529 F.2d 679, 681 (1st Cir. 1976).

IV.

The primary issue on appeal is whether the activities at the transloading facility at the conclusion of a rail journey – that is, the vacuuming, screening, bagging, and palletizing of the wood pellets – constitute rail "transportation," and thus are not subject to otherwise applicable state and local regulations.

Section 10501 of the ICCTA vests the Board with "exclusive" jurisdiction over "transportation by rail carriers" and the "construction, acquisition, operation, abandonment, or discontinuance of . . . facilities." 49 U.S.C. § 10501(b). "Transportation" covers "a . . . facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," 49 U.S.C. § 10102(9)(A), as well as

"services related to that movement, including receipt, delivery, elevation, transfer in transit, . . . storage, handling, and interchange of passengers and property," 49 U.S.C. § 10102(9)(B).

It is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities. Transloading, performed at the "starting or ending point of the rail component of the movement," New Eng. Transrail, STB Finance Docket No. 34797, 2007 WL 1989841, at *1 (S.T.B. Jun. 29, 2007), involves transferring bulk shipments from one type of vehicle to another at an interchange point. See N.Y. Susquehanna, 500 F.3d at 242 n.1. In the language of the statute, transloading typically involves "receipt, . . . storage, handling, and interchange" or "transfer in transit" of goods. 49 U.S.C. § 10102(9)(B). Such activities are generally preempted. See N.Y. Susquehanna, 500 F.3d at 247-49 (waste transloading from trucks to railcars headed to landfills); Tex. Cent., 669 F.3d at 530 (transloading of hydraulic fracking sand, including offloading sand from railcars to silos and loading onto trucks); Norfolk, 608 F.3d at 154, 158 (transfer of bulk shipments of ethanol from railcars onto surface tank trucks); Green Mountain, 404 F.3d at 640, 645 (unloading of bulk salt and cement arriving by rail to load onto trucks for local distribution or to temporarily store pending distribution).

In short, as a general matter, "intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials" are a part of transportation. New Eng. Transrail, 2007 WL 1989841, at *6; see also, e.g., Tex. Cent., 669 F.3d at 530; Green Mountain, 404 F.3d at 642. That such transloading activities are integral to the physical movement of goods, and thus "transportation," is an "indisputable point." Tex. Cent., 669 F.3d at 530.

Petitioners argue that the activities here do not constitute traditional transloading operations, but rather constitute manufacturing, and that state and local regulations are not preempted. In its decision, the Board did not focus on whether the activities facilitated transloading of the pellets from rail to truck. Instead, the Board concluded that the transloading activities here were "transportation" because the vacuuming, screening, bagging, and palletizing of the wood pellets allowed G&U to transport the pellets in hopper railcars, which accommodate twenty more tons of pellets than boxcars. "Were these activities performed at the manufacturing facility," the Board reasoned, "the wood pellets would have to be transported in boxcars, in which case each pallet containing 50 40-pound bags would have to be blocked and braced in order to limit movement within the boxcar." That in turn "would consume space and . . . leav[e] less capacity for the wood pellets themselves."

We think that the Board's efficiency rationale goes beyond the statute and is beside the point. While "transportation" is "an extremely broad category," Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co., 215 F.3d 195, 199 (1st Cir. 2000), not all activities connected with rail transportation are considered "transportation" under the statute. The definition of "transportation" in the statute, "[w]hile certainly expansive, . . . does not encompass everything touching on railroads." Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1129 (10th Cir. 2007). Thus, "manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term 'transportation.'" New Eng. Transrail, 2007 WL 1989841, at *6. In particular, the ICCTA does not preempt all state and local regulation of activities that has any efficiency-increasing relationship to rail transportation. Rather, Subsection (A) of the definition "focuses on *physical* instrumentalities 'related to the movement of passengers or property,'" while Subsection (B) focuses on "'services related to *that* movement.'" Emerson, 503 F.3d at 1129-30 (emphases added) (quoting 49 U.S.C. § 10102(9)). The statute is clear on its face that the preempted activities are all related to the physical movement of "passengers or property."

Here, the proper focus of the Board should have been on the question of whether the activities – vacuuming, screening,

bagging, and palletizing – facilitated the physical movement of "passengers or property" (here the transfer of the pellets from rail to truck), rather than cost efficiency. The questionable nature of the Board's rationale is revealed by a simple example. Under the Board's rationale, the transloading facility would be exempt from regulation if it had been constructed and operated by the rail carrier at the ultimate destination at a retail store. Under the Board's reasoning, the retail facility would be exempt because postponing the bagging and other operations would have made it feasible to transport the pellets more efficiently in hopper cars. We think that sweeps too far. The Board's efficiency rationale would result in a vast regulatory gap in which state and local regulation would be eliminated simply because the facilities were economically connected to rail transportation.⁴

Courts and the Board have rejected interpretations of "transportation" that go beyond facilitating the movement of "passengers or property." In New England Transrail, the Board held that state and local regulation of shredding of construction debris that had arrived at a transloading facility from trucks – before

⁴ Nor would the Board be able to regulate such facilities. See Joint Petition for Declaratory Order – Bos. & Me. Corp. & Town of Ayer, MA, STB Finance Docket No. 33971, 2001 WL 458685, at *4 (S.T.B. Apr. 30, 2001) ("Railroads are not required to obtain Board approval . . . to build or expand facilities that are ancillary to a railroad's operations unless the activity is part of a larger project subject to our jurisdiction (such as construction of a new rail line).").

being loaded onto railcars – was not preempted because such activity did not constitute "transportation." This was so because the shredding was not necessary to load the debris onto railcars. See New Eng. Transrail, 2007 WL 1989841, at *9-10 (noting that "a shredder is *not required* to pack into rail cars" the debris that had arrived from trucks. (emphasis added)). In Emerson, 503 F.3d at 1129-32, the Tenth Circuit similarly rejected an interpretation of "transportation" that would preempt state tort law governing a railroad's dumping of old railroad ties into a wastewater drainage ditch. The court held that the dumping did not relate to "movement of passengers or property" under the ICCTA, 503 F.3d at 1130, and the interpretation would entail the Board's jurisdiction over the railroad's dumping a "dilapidated engine in the middle of Main Street" simply because "disposing of unneeded railroad equipment [would be] cost-conscious," id. at 1132. Here, the Board's interpretation is defective because it fails to relate the wood pellet facility's activities to the physical "movement of passengers or property," as opposed to cost efficiency.

New England Transrail is not to the contrary. The Board held that baling and wrapping of solid waste arriving at a transloading facility from trucks constituted "transportation," noting that such baling and wrapping "permits a wider variety of rail cars to be used." New Eng. Transrail, 2007 WL 1989841, at *9. But there preemption was appropriate because the baling and

wrapping was necessary to transload the waste from trucks to railcars. The Board expressly found that "baling and wrapping are not the sort of activities that would have value for any other purpose."⁵ Id. Here, while the wood pellets are being transloaded from railcars onto trucks, there has been no Board finding that the vacuuming, screening, bagging, and palletizing facilitated the loading of the pellets onto the trucks.

Under these circumstances, a remand is required to determine whether the vacuuming, screening, bagging, and palletizing facilitated the transloading of the pellets from the railcars to the trucks or was done solely for another, unrelated purpose.

V.

Two collateral issues remain. First, petitioners contend that the Board erred in not considering the facility's "re-pelletization" of the wood pellets. Re-pelletization, a process which, according to G&U, began around December 2012, involves screening broken pellets from unbroken pellets, pressing them together into new pellets, and moving the new pellets into silos for storage. Petitioners argue that such a process, because it transforms the nature of the product, constitutes manufacturing and

⁵ While the fact that the activity adds value to the consumer (or the railroad) does not bar it from being transportation, it is equally clear that merely adding value does not support a claim that the activity is transportation. See New Eng. Transrail, 2007 WL 1989841, at *10.

not rail transportation. But whether or not it does constitute manufacturing – a matter on which we take no view – petitioners did not raise this issue before the Board, and it is thus not properly before us. See Commonwealth of Mass., Dep't of Pub. Welfare v. Sec'y of Agric., 984 F.2d 514, 523 (1st Cir. 1993) ("In the usual administrative law case, a court ought not to consider points which are not seasonably raised before the agency." (citing United States v. L.A. Trucker Truck Lines, Inc., 344 U.S. 33, 37 (1952))). However, we do not preclude the Board from considering this issue on remand.

Second, while petitioners do not ask for judicial review of the Board's determination that G&U was operating the facility and that GU Railcare was acting on behalf of G&U in performing the transloading activities, they do argue that the Board erred in denying discovery, which they claim was necessary to determine whether the transloading activities were being performed by a "rail carrier." We see no error.

We generally do not intervene in a lower tribunal's discovery order unless it was plainly wrong and resulted in substantial prejudice to the aggrieved party. See Modern Cont'l/Obayashi v. Occupational Safety & Health Review Comm'n, 196 F.3d 274, 281 (1st Cir. 1999) (appellate court will "intervene in such matters only upon a clear showing of manifest injustice, that is, where the lower court's discovery order was plainly wrong and

resulted in substantial prejudice to the aggrieved party" (citation omitted)); see also Trailways Lines, Inc. v. Interstate Commerce Comm'n., 766 F.2d 1537, 1546 (D.C. Cir. 1985) ("[T]he conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance and will not, barring the most extraordinary circumstances, warrant the Draconian sanction of overturning a reasoned agency decision.").

As petitioners seem to concede, the Board's regulations permit discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a [Board] proceeding," 49 C.F.R. § 1114.21(a)(1), but they do not require such discovery, id. ("Parties *may* obtain discovery" (emphasis added)). Any such discovery must still be "relevant to the subject matter involved," id., and the Board need not order discovery "where the dispute involves a legal issue and where the record is sufficient to resolve the controversy without discovery." Md. Transit Admin. – Petition for Declaratory Order, STB Finance Docket No. 34975, 2008 WL 4281987, at *5 (S.T.B. Sept. 17, 2008). Here, other than petitioners' initial barebones request for discovery to determine the "real" relationship between G&U, GU Railcare, and Dana Companies, petitioners failed to show a need for any specific documents. The Board concluded that the transloading agreement and the lease would suffice to determine whether the relationship between GU Railcare and G&U was such that the transloading

activities were being performed by a "rail carrier" and that G&U's involvement in a litigation with separate parties involving separate contracts was not relevant evidence to reopen its discovery decision. In this proceeding, petitioners fail to explain why any of this is incorrect, let alone why the Board's decision resulted in manifest injustice. There is no basis to set aside the Board's decision that the activities in question were conducted by a "rail carrier."

CONCLUSION

We vacate and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

All parties shall bear their own costs.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 4

Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
Attorney for Petitioners

Date: October 24, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

AFFIDAVIT OF DIANA DEL GROSSO

I, Diana Del Grosso, on personal knowledge, do hereby depose and state the following:

1. I own the property located at and reside at 15 Depot Street, Upton, Massachusetts (the "Del Grosso Property"). I have owned this property for approximately nine years, and I have been a resident of Upton since 1994. I am a Petitioner in the above-captioned mater.
2. The New England Wood Pellet wood pellet manufacturing facility is located in Jaffrey, New Hampshire.
3. I am familiar with the location of the New England Wood Pellet wood pellet manufacturing facility.
4. I observed The New England Wood Pellet wood pellet manufacturing facility on October 22, 2016 and can confirm it is not served by any direct rail service. It is not located in a rail yard.

I declare that the foregoing is true and correct. Signed this 24th day of October, 2016, under the pains and penalties of perjury.



Diana Del Grosso

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

AFFIDAVIT OF CARLA S. WESLEY

From: Carla Wesley
Date: October 23, 2016 at 9:41:23 PM EDT
To: Diana
Subject: RE: Wood Pellets

I, Carla S. Wesley, on personal knowledge, do hereby depose and state the following:

1. I serve as the Fiscal Officer of Meigs Township, Adams County, Peebles, Ohio.
2. There is a wood pellet manufacturing facility located in Meigs Township.
3. I am familiar with the location of the facility, located on Measley Ridge Road.
4. The wood pellet facility is not located or served by any direct rail service.

I declare that the foregoing is true and correct. Signed this 23rd day of October, 2016, under
The pains and penalties of perjury.
Carla S. Wesley

Signed via email

Carla S. Wesley

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35652

PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER

AFFIDAVIT OF DANNY R. WHITE

DANNY R. White

I, _____, on personal knowledge, do hereby depose and state the following:

1. I serve as the Fire Chief in the Town/City of Crossville, AL.
2. The Leo Energy wood pellet manufacturing facility is located in Crossville, AL.
3. I am familiar with the location of the Leo Energy wood pellet manufacturing facility.
4. The Leo Energy wood pellet manufacturing facility is not served by any direct rail service. It is not located in a rail yard.

I declare that the foregoing is true and correct. Signed this 21th day of October, 2016, under the pains and penalties of perjury.

Danny R White
Typed name

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 5

Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
Attorney for Petitioners

Date: October 24, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

SUPPLEMENTAL AFFIDAVIT OF DIANA DEL GROSSO

I, Diana Del Grosso, on personal knowledge, do hereby depose and state the following:

1. I own the property located at and reside at 15 Depot Street, Upton, Massachusetts (the "Del Grosso Property"). I have owned this property for approximately nine years, and I have been a resident of Upton since 1994. I am a Petitioner in the above-captioned matter.
2. In early October of 2016, I researched various wood pellet manufacturing facilities online after obtaining their addresses from <http://biomassmagazine.com/plants/view/3282>, an industry website.
3. The Biomass Magazine website lists "plants" and has a "pellet producers list" link to more than 100 pellet manufacturers. When a manufacturer is selected, a detailed satellite map shows the location of the facility. Rail and/or road access is clearly viewable as applicable.
4. I obtained the affidavits set forth as Exhibit 4 by calling local officials and discussing the Petition for a Declaratory Order with them. The local officials kindly agreed to assist our case. I also personally observed one of the facilities as indicated on the corresponding affidavit, also set forth as Exhibit 4.
5. I researched many pellet manufacturer facilities online including Two Rivers Timber Instant Heat Wood Pellets: Addison, New York; Northeast Wood Products LLC- ThermaGlo Wood Pellets: Peebles, Ohio; German Pellets: Woodville, Texas; Barefoot Pellet Company: Troy, Pennsylvania; Vermont Wood Pellet Company: North Clarendon, Vermont; Lignetics: Sand Fork, West Virginia; Lignetics: Stonge, Maine; Lignetics: Kenbridge, Virginia; Fiber Energy Products: Mountain View, Arkansas; Lee Energy Solutions: Crossville, Alabama; Energex American, Inc.: Mifflintown, Pennsylvania; Northeast Pellets LLC: Ashland, ME; and New England Wood Pellet: Jaffrey, New Hampshire. I also contacted the fire departments corresponding to each of these facilities and confirmed through conversation with them that the associated facility is not on rail or directly served by rail. I also reviewed satellite images of all of these facilities, some of

which are attached. Based on this, I concluded that none of the facilities in the above list are located on rail lines or in rail yards.

6. My random review of facilities on the “pellet producers list,” including many of the larger producing facilities, shows many facilities with no connection to rail lines or siting in a rail yard.

I declare that the foregoing is true and correct. Signed this 22nd day of October, 2016, under the pains and penalties of perjury.



Diana Del Grosso

German Pellets GmbH German Pellets Texas

[Back to list](#)

Location: Woodville TX

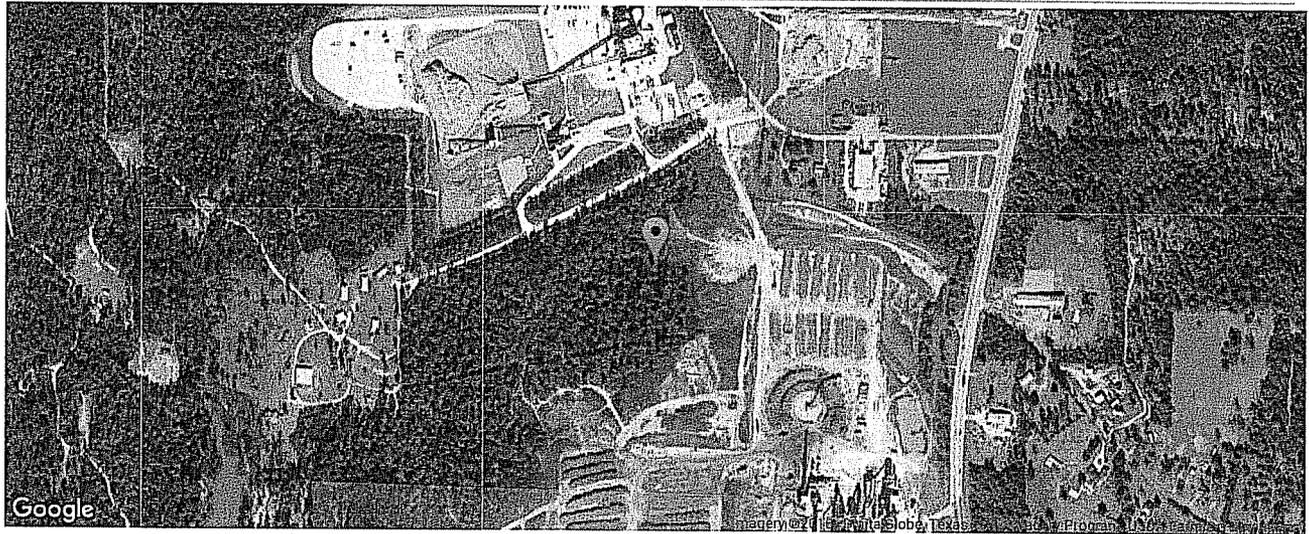
Exporting: Yes

Plant Status: Existing

Feedstock: Hardwood and Softwood

Capacity: 551155

Website:



Two Rivers Timber Instant Heat Wood Pellets Addison, New York

iPad 1:58 PM instantheatwoodpellets.com 40%

[Home](#)
[Our Products](#)
[Pricing & Availability](#)
[What Are Wood Pellets](#)
[Advantages of Pellets](#)
[Maps and Directions](#)
[Pellet Mill](#)
[Company History](#)
[About Raw Materials](#)
[Contacts Us](#)
[Calendar](#)

DIRECTIONS

INSTANTHEAT WOOD PELLETS INC. is located on the western outskirts of Addison NY. We are 13 miles north of the PA-NY state border. To reach our factory outlet from U.S. Route 15, take the Addison exit and then travel west about 8 miles on State Route 417 through Addison. We are located on the western edge of town.

Use the map below to locate INSTANTHEAT WOOD PELLETS, INC



Fast, friendly customer service representatives are just a phone call away!

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

EXHIBIT 6

Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
Attorney for Petitioners

Date: October 24, 2016

Residential Pellet Fuel Information

Understanding Pellet Fuel Production, Standards, Performance, and Use



Residential Pellet Fuel

(Excerpt from "Pellet Hearth Systems Reference Manual Second Addition" December 2008)

In much of the world, the concept of home is linked directly to the ability to maintain a heated environment in winter months. With the energy crisis of the 1970's came the first notice that the source of that heat and comfort had to be scrutinized. The realization of limitations and eventual shortages for finite, irreplaceable, fossil fuels spurred a new interest in renewable, and therefore sustainable, alternative fuel sources.

Almost simultaneously, the issue of waste surfaced. The habits of our throwaway society not only resulted in costly waste of valuable energy resources, but also in a crisis in disposal space and methods. The development of residential pellet fuel responds to both the call for renewable biomass sources of home heating fuels and waste stream reduction.



NORTH AMERICAN PELLET MILLS

1. PELLET PRODUCTION

As forest products companies produce lumber, plywood, and other goods, they create wood and bark residues that contain energy. In the form of sawdust, bark, and chips, these residues are bulky and vary greatly in moisture content. The process of pelletizing reduces their bulk by compression and increases their combustion manageability by controlling consistency. Originally produced for industrial and institutional use, pellets entered the residential fuel market with the introduction of the first home pellet appliances in the mid-1980's.

1.1 RAW MATERIALS

Although a wide variety of materials, including sawdust and wood scraps from hard and soft woods, shells and nut hulls, agricultural by-products, paper, and cardboard, is pelletized for use as fuel, residential pellets are primarily wood-based residues. Corn, because of its natural similarity to pellets, is used in some specially designed residential appliances. Because corn combustion differs from wood pellet combustion, corn should not be burned alone or mixed with wood pellets unless the appliance is specifically designed for corn combustion.

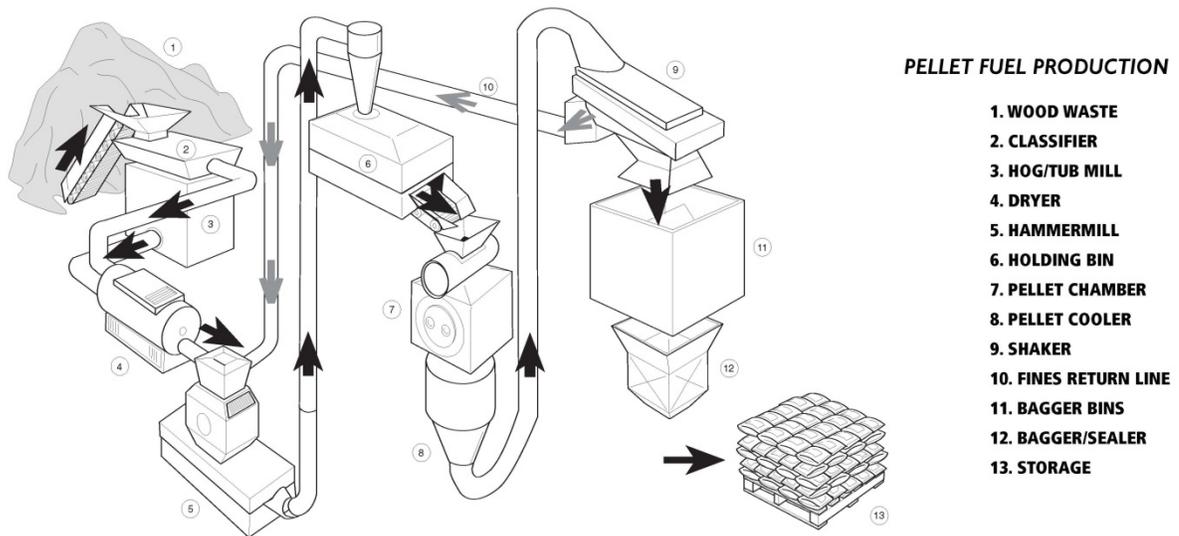
Because ash content and other factors presently limit or prevent the practical use of other agricultural and paper products in most residential appliances. Increasing competition for forest industry by-products and reduction in logging in some areas are a growing concern of pellet manufacturers. Pellet appliance design, however, is responding to fuel manufacturers' predictions of future shortages of premium grade fuel with research and development aimed at greater ash tolerance.

The amount of residues available from processing logs varies depending on factors such as log size, timber species, lumber dimensions, moisture content, and processing machinery. Typically, 5 to 10% of the original material is available for pellet fuel conversion. The raw materials may be received at the pellet processing plant as residues from kiln dried lumber or as residues from freshly processed (green) wood in which the weight of moisture may exceed the dry material weight. Heating, or caloric, value of finished pellets ranges from 7,000 to over 9,000 Btu (British thermal units) per pound (at 5% moisture), with resinous species (such as pines and fir) having slightly higher gross caloric values than non-resinous species (hardwoods) and bark. Average Btu content of pellets as received by the consumer is 8,300 Btu per pound at 5% moisture.

Softwoods, hardwoods, and blends of different species are used as raw materials and known as feed stock. Where hardwoods are generally the preferred species for cordwood appliances because of their higher Btu content and lower emissions, pellets from softwoods generally have slightly higher caloric value and lower ash content than pellets produced from hardwoods, particularly hardwoods containing bark. Resins in softwoods that are more difficult to burn in a cordwood appliance are not a problem in pellet appliances, which regulate the air for combustion and provide precise, gradual fuel feed in small amounts.

Raw material particle size ranges from fine sawdust to large chips that must be ground to uniform size. Careful handling of raw materials before the pelletizing process is important in reducing unwanted foreign materials.

1.2 MANUFACTURING PROCESS



The production of pellet fuel begins with the raw materials, or feed stock. Contaminants must be removed by using magnets to remove iron and classifiers to remove stones and non-magnetic metals. Classifiers, also known as scalpers, are devices which employ air flow to move and separate the lighter wood particles from heavier unwanted materials. Storage facilities and methods for managing feed stock materials are determined by the moisture content of the materials; dry materials must be protected from the elements, and green materials must be processed in timely fashion to prevent microbiological deterioration. After storage, feed stock is pulverized and screened into small uniform pieces by hammer mills and grinders and conveyed to holding bins or silos. A cyclone process of swirling air collects the lighter fines, or dust, for use as dryer fuel.

In the case of green materials, the next step is the drying process. The most commonly used type of dryer is the rotary dryer, a large revolving drum (some more than 10 feet in diameter and 40 feet long) which continually lifts and tumbles the material through a hot gas stream. The drying process is regulated by a variable rate feed screw and by control instruments which measure and match heat input to demand. Uniform moisture is also achieved by the larger, wetter, heavier particles moving more slowly through the drum than finer, drier, lighter particles. Dryers are often fired by using a portion (about 8 to 10%) of the feed stock, mainly the fines, or smallest particles (also known as wood flour). The drying process generally reduces incoming moisture content (wet basis, see following) of 40-45% to 6-10%.

MOISTURE CONTENT

Fuel moisture content has a dramatic effect on efficiency: wood at 50% moisture has a heating value of 4,000 Btu/lb., at 20% the heating value is 6,200 Btu/lb., and oven dry wood delivers up to 8,600 Btu/lb. One of the advantages of pellet fuel is its high Btu content (about 8,000 Btu/lb.) and consistently low moisture content, usually between 6-10%, calculated on the wet basis.

Because there are two methods for determining wood moisture content (M.C.), the wet basis and the dry basis, the concept can be confusing. The pellet fuel industry universally uses the wet basis when describing residential pellet feedstock and fuel. The dry basis is used primarily in labs and technical situations. The following M.C. calculations demonstrate the difference in the two methods.

In the dry basis, the wood is weighed wet, then dried to an oven dried condition. The oven-dried weight is subtracted from the wet wood weight to determine the weight of the lost water. Moisture content is then calculated by dividing the weight of the water by the weight of the oven dry wood. In the wet basis, the weight of the water is divided by the weight of the wet wood.

Example: A quantity of wood weighs 10 pounds. It is dried to oven-dry condition, and then it weighs 8 pounds. What is its wet basis M.C.?

Weight of the wet wood (10 lbs.) - weight of the oven dried wood (8 lbs.) = weight of the water (2 lbs.)

$$\frac{\text{Weight of water} \quad (2)}{\text{Weight of wet wood} \quad (10)} = .20 \text{ M.C. (Wet Basis)}$$

The dry basis used in labs follows the same procedure but divides the weight of the water by the weight of the dried wood.

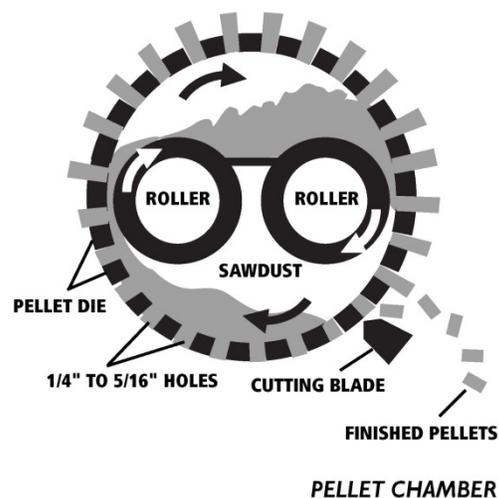
Weight of wet wood minus weight of dried wood = weight of water

10 - 8 = 2 (pounds of water).

$$\frac{\text{Weight of water} \quad (2)}{\text{Weight of dried wood} \quad (8)} = .25 \text{ M.C. (Dry Basis)}$$

The dry basis moisture content is thus 25%, while the wet basis moisture content of this same quantity of wood is 20%. Customers are more likely to understand and relate to wet basis percentages since dry basis figures can exceed 100%. Pellet industry standards use the wet basis.

The dried materials are conveyed to the conditioning chamber where steam may be added to lubricate the materials and to help soften the natural lignens that act as a bonding agent to hold the pellets together. The materials (feedstock) go next to the pelleting chamber where they are extruded, or pressed, through thousands of 1/4 to 5/16" diameter holes in a steel die 1.5 to 3.5 inches thick. This extrusion process heats the newly formed pellets to temperatures approaching 250° F. The hot, still soft pellets are conveyed to a cooler to achieve room temperatures and hardening. Dust and loose fines are shaken off and recycled as the pellets proceed to be bagged.



2. FUEL STANDARDS

The importance of consistent fuel and quality controls became apparent in the early years of residential pellet appliances. Fuel characteristics are crucial factors in appliance performance and maintenance. The Fiber Fuels Institute (FFI) and the Association of Pellet Fuel Industries (APFI) adopted national standards recognizing acceptable criteria for these characteristics in 1991. FFI and APFI have now merged into one association, the Pellet Fuel Institute (PFI). Voluntary fuel quality certification is the responsibility of the pellet manufacturer. Not all pellet fuels carry the voluntary PFI guaranteed analysis, even though some packaging may be marked "Premium." End users may have to rely on experienced retailers in choosing appropriate fuel.

2.1 CRITERIA

PFI standards establish two grades of fuel, Premium and Standard. The following chart indicates that the only difference between the two grades is inorganic ash content. Table 1 outlines the fuel grade standards. However, each of the six criteria is important, because understanding them clarifies appliance performance and maintenance.

<i>Criteria</i>	<i>Premium Grade</i>	<i>Standard Grade</i>
<i>1. Bulk density/cu. ft.</i>	<i>Not less than 40 lbs.</i>	<i>Not less than 40 lbs.</i>
<i>2. Dimensions</i>	<i>Diameter 1/4-5/16"</i>	<i>Diameter 1/4-5/16"</i>
<i>3. Fines</i>	<i>Not more than .5% by weight shall pass 1/8" screen</i>	<i>Not more than .5% by weight shall pass 1/8" screen</i>
<i>4. Sodium (salts)</i>	<i>Less than 300 parts per million</i>	<i>Less than 300 parts per million</i>
<i>5. Inorganic ash</i>	<i>Less than 1%</i>	<i>Less than 3%</i>
<i>6. Length</i>	<i>Maximum 1 1/2"</i>	<i>Maximum 1 1/2"</i>

Understanding the rationale for each of the criteria begins the process of understanding appliance performance and maintenance.

2.1.1 DENSITY

The density, or weight per cubic foot, reflects the amount of solid material packed into the pellet and therefore has a relationship to the heat content of the fuel. In the same number of auger turns, higher density fuel delivers more Btu content than a low density fuel. Additionally, lower density fuel burns faster and may affect low burn settings. Wide variations can require appliance adjustment, particularly in the case of excessively low density fuel which could cause the fire to go out. Density is also important as a gauge that adequate pressure and bonding have produced hard pellets that can withstand shipping and handling.

2.1.2 DIMENSIONS

Pellet diameter is another factor that affects stove performance. The 1/4-5/16 inch standard reflects the common die size for residential fuel in the Americas. Industrial pellets can range as large as 1/2" in diameter and are unacceptable in residential appliances. The most common size for residential appliances is 1/4"; in fact, some appliance manufacturers report problems with some varieties of 5/16" pellets. Apparently, unusually hard pellets of this size may not cut easily when caught between parts of the feeding mechanism and may cause feeding jams. It is therefore important to

know whether an appliance manufacturer specifies the size of pellets to be used in a specific appliance.

2.1.3 FINES

Fines are the smallest, dust-like particles produced in the pelleting process. They also occur in breakdown during shipping and handling. The production standard is intended to assure hard pellets that withstand handling. Excessive fines represent loss of usable fuel and cause performance and maintenance problems. They are also a source of irritation for appliance owners when the dust escapes into the home during pouring from the bag into the hopper. The fines are less likely to burn because they are easily blown away from the flame by combustion air. Fines cause performance problems, including loss of fuel feeding if they build up on the sides of the hopper and reduce the opening size to the fuel delivery system. Additionally, fines can increase the need for maintenance by filling ash traps prematurely and by jamming augers.

2.1.4 SODIUM

The presence of excessive salt, specifically water soluble inorganic sodium, can cause severe damage from corrosion in appliances and venting systems. The sources of salt contamination include logs that have been floated in salt water, plywood, and particleboard. Manufacturers now test to ASTM E776, standard for sodium extraction. Additionally, the presence of trace amounts of alkaline salts can increase clinkering, due to a reduced ash melting point for silica.

2.1.5 INORGANIC ASH

Ash is the term for the various noncombustible minerals that remain after combustion. Ash content is the basis for determining fuel grade since all other criteria are identical for both premium and standard grade. Later discussion of appliance design and maintenance requirements will indicate clearly how crucial this fuel characteristic is. On one hand, fused ash, or clinkers (see discussion under 3.1.1 Combustion below), can block combustion air inlets and affect performance adversely. On the other, fly ash that is blown from the fire chamber can accumulate on heat exchangers and in the venting system with problematic results. Simply put, ash content is the main factor determining the frequency of appliance maintenance. In some appliances, that frequency can make the use of higher ash fuels impractical. Predictions of premium quality low ash fuel shortages are consequently a growing concern that appliance manufacturers are addressing in appliance design.

Appliance sensitivity to ash content varies with design, venting system design, and recommended maintenance frequency. Even within the allowed 1% ash content of premium grade pellets, there are noticeable performance variations in some appliances. Changing from a .25% ash content fuel to a .75% ash content fuel can cause troublesome performance and maintenance in some appliances. Manufacturer's fuel recommendations and individual ongoing experience with locally used fuels are important for appliance adjustment and customer satisfaction. Some biomass and corn burning appliances have been introduced to deal with the 1-3% ash produced from these fuels. A fuel stirring/aeration device may be incorporated to mix the ash with the fuel and to increase fuel efficiency.

2.1.6 LENGTH

Excessively long pellets can cause bridging, the condition of pellets getting stuck across the fuel delivery entrance of the hopper. The effect is that of a log jam, with fuel unable to feed past the blockage. Long pellets may also cause auger jams. Finally, long pellets deliver inconsistent amounts of fuel. Dramatic variations in fuel feed rates in turn causes performance problems since combustion air settings deliver a volume of air based on expectations of consistent amounts of fuel. PFI standards call for maximum pellet length of 1 1/2 inches. In spite of this standard, some appliances will bridge with this length pellet and can be difficult to diagnose. The appliance manufacturer should be consulted regarding their recommendations for maximum pellet length.

2.2 LABELING

PFI Fuel Standards recommend that manufacturers identify their product with a guaranteed analysis and parameters included in the label (example below).

GUARANTEED ANALYSIS	
<i>Grade:</i>	<i>xxx</i>
<i>Type of Material:</i>	<i>xxx</i>
<i>Ash:</i>	<i>x%</i>
<i>Fines:</i>	<i>x%</i>
<i>Chlorides:</i>	<i>x ppm</i>

3. EFFECTS ON PERFORMANCE AND MAINTENANCE

When compared to cordwood on a one to one basis, pellets offer some distinct advantages. Pellets are more consistent and predictable in moisture and BTU content. They are more compact, so they require less storage space. They are cleaner, easier to handle, and they burn cleaner. However, these characteristics have to be put into the perspective of the appliances they burn in to have real meaning. Pellet fuels narrow the wide variables of cordwood fuels, but pellet appliances, as mechanical, electrical based systems, also have a narrower range of fuel tolerance than wood stoves. Understanding the effects of fuel characteristics in pellet appliances is essential for optimum performance, adequate maintenance, and overall customer satisfaction.

3.1 PERFORMANCE

As will be discussed later, different appliance designs have different fuel requirements and tolerances. For now, we can look broadly at some effects of using unsuitable or impure fuel.

3.1.1 COMBUSTION

A direct effect of fuel quality on combustion that is not included in the PFI Standards is silica content. Silica is essentially sand or dirt that is naturally in the bark of the tree or that enters the feed stock in the handling process. In the combustion process, silica is heated to fusion temperatures, melts, and solidifies as it is cooled. The result is clinkers, solid chunks of lava like material. The effect on combustion occurs if the clinkers stay in the grate area and block incoming combustion air.

Analysis of silica content is impractical because of the variations in growing conditions and because of the significant effect on fusion temperatures of small amounts of trace elements. The normal melting point of silica, 2,700° F., is reduced to 1,500° F. in the presence of minute amounts (1/4%) of alkaline salts (sodium chloride or potassium chloride). This reduction in the melting point promotes ash fusion at lower temperatures and increases clinkering. Combustion temperatures in the burn pot/grate area vary widely with appliance design, so fuel with silica may cause clinkering problems in a stove with high combustion chamber temperatures and not in another appliance that operates with lower temperatures.

Ash content has indirect effects on combustion. Excessive ash content, if not maintained properly, can restrict or block burn pot air holes and/or the venting system and result in poor combustion due to inadequate combustion air.

Improper pellet density can also have a direct effect on combustion by causing an abnormal feed rate. Low density pellets may feed too little combustible fuel and may cause the fire to go out, while excessively high density pellets can be difficult to start in automatic ignition appliances or they can

overfeed the stove, causing high temperatures or smothering the fire. Most appliances now have simple adjustment mechanisms to overcome these difficulties. Proper adjustment of fuel to air settings for the particular fuel must be made for maximum performance as the appliance owner changes the fuel source to one with different density.

Bridging and blockage or auger jamming caused by unsuitable pellet diameter or length, or by excessive fines, indirectly affects combustion by depriving the combustion chamber of fuel.

3.1.2 HEAT TRANSFER

Fly ash gradually builds up on heat exchanger tubes or fins. The coating of ash acts as an insulator and prevents proper transfer of heat to the convection air passing through the tubes into the home. The frequency of cleaning heat exchangers is determined in large part by the ash content of the fuel.

3.1.3 MECHANICS

High ash and fines content can build up on impellers and affect blower motor durability. Jamming from excessive fines or improper pellet size can affect auger durability.

3.2 MAINTENANCE

Using a fuel that is not suited for a particular appliance increases the frequency of maintenance. Clinkers from high silica content fuel (or from lowered ash fusion temperatures brought about by the presence of alkaline salts) must be removed before they block combustion air, affect performance, or cause other maintenance needs. High ash and/or fines in fuel necessitate more frequent cleaning of the burn pot/grate, ash storage areas, heat exchangers and venting system. The systems and components of pellet appliances are interdependent and sensitive to proper maintenance. Simple maintenance tasks, left unattended, can become a need for total system maintenance as well as a source of owner frustration. The frequency of component replacement is also increased by the lack of regular, properly performed maintenance.

4. SUMMARY

- 🔥 Residential pellet fuel is recovered biomass products processed to be of uniform size, density, moisture content, and ash content.
- 🔥 Feed stock is separated from unwanted contaminants, pulverized into small pieces, dried, compressed, cooled, and bagged in the pellet manufacturing process.
- 🔥 PFI standards for density, dimensions, fines, sodium and ash are voluntarily complied with by pellet manufacturers. Recommended labeling includes an analysis of these factors.
- 🔥 Ash content, the primary maintenance factor, is the only difference in composition between standard (up to 3%) and premium (less than 1%) grades of fuel in PFI standards.
- 🔥 The fuel quality standards include characteristics that affect performance, maintenance, durability, and customer satisfaction. Another factor not included in the standards is silica content, the primary cause of clinkering.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO.: 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA
FOR DECLARATORY ORDER**

CERTIFICATE OF SERVICE

I, Mark Bobrowski, attorney for the Petitioners, hereby certify that I served a copy of Petitioners' Opening Statement on Remand via e-mail to:

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A handwritten signature in black ink, appearing to read 'Mark Bobrowski', written in a cursive style.

Mark Bobrowski