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

re: Docket No. 35749, Boston and Maine Corporation and Springfield Terminal Railroad Company--Petition for Declaratory Order

Dear Ms. Brown:

Attached for filing in the subject proceeding is the Reply of the Town of Winchester, Massachusetts, and James A. Johnson III, Chairman of the Town of Winchester Board of Selectmen to the Petitioners' Emergency Petition for Declaratory Order, filed July 1, 2013.

A copy of the Reply has been served by me upon Petitioners by e-mailing a copy to their attorney, Gordon A. Coffee, Esq., at gcoffee@winston.com.

If you have any question concerning this pleading or if I otherwise can be of assistance, please get back to me.

Sincerely yours,


Fritz R. Kahn

att.

cc: Gordon A. Coffee, Esq.

SURFACE TRANSPORTATION BOARD

Docket No. FD 35749

BOSTON AND MAINE CORPORATION and
SPRINGFIELD TERMINAL RAILWAY COMPANY

v/

TOWN OF WINCHESTER, MASSACHUSETTS, WINCHESTER BOARD OF
SELECTMEN, WINCHESTER BUILDING DEPARTMENT, WINCHESTER ZONING
BOARD OF APPEALS, RICHARD HOWARD, JAMES A. JOHNSON III, DOUGLAS
MARMON, JENNIFER WILSON, FORREST FONTANA, LANCE GRENZEBACK,
DONNA PATALANO, LAWRENCE BEALS, RICHARD SAMPSON JR. JON
GYORY, JOAN LANGSAM, NIGEL HAIG GALLAGHER and JOHN A. WILE--
DECLARATORY ORDER

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

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TOWN OF WINCHESTER and
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OF THE TOWN OF WINCHESTER
BOARD OF SELECTMEN

Due and dated: July 10, 2013

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and JAMES A. JOHNSON III, CHAIRMAN OF THE
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Respondents, the Town of Winchester, Massachusetts, and James A. Johnson III,
Chairman of the Town of Winchester Board of Selectmen, pursuant to 49 C.F.R. §
1104.13(a) and the Board's decision served July 3, 2012, reply to the Petitioners'
Emergency Petition for Declaratory Order, filed July 1, 2013,¹ and respectfully ask that it
be denied for the following reasons:

A.

Tighe's track is private track.

The subject of the controversy between the Petitioners and Respondents is a track
adjacent to the warehouse opened late in 2011 by Tighe Logistics Group ("Tighe") on a

¹ Naming as respondents the individuals who had acted in their official capacities as
members of the Town of Winchester's agencies is altogether inappropriate, and, as it
relates to them, Petitioner's Emergency Petition for Declaratory Order should be
dismissed.

parcel of land at 43 Holton Street in Winchester which Tighe leased from JG Holt Limited Partnership ("Holt"). The site is located in a Light Industrial (IL) District as set forth in the Town of Winchester Zoning By-Law, which does not enumerate railroad operations among the permitted uses of the property. By its Amended Decision After Remand, filed June 25, 2013, the Board of Appeal of the Town of Winchester, citing STB Finance Docket No. 34952, *Devens Recycling Center, LLC - Petition for Declaratory Order*, served January 10, 2007 ("*Devens decision*"), determined that the track located on the Holt property was private track and that Holt does not have the benefit of preemption as set forth in 49 U.S.C. § 10501(b). The Board of Appeal ordered Holt and its agents and contractors immediately to cease and desist all rail traffic to the warehouse located at 43 Holton Street.²

Petitioners' pleading is as significant for what it fails to say as for what it says. Petitioners do not allege that it was they who constructed the track in question. Petitioners do not allege that it is they who own the track. To the contrary, as Exhibit A to their Petition, Petitioners attach a copy of Tighe's press release of October 1, 2011, in which Tighe announced that it was Tighe which "has reactivated the facility's rail siding." Moreover, at page 10 of their Petition, Petitioners acknowledge that it is Tighe which owns the track. That certainly would seem to make the track private track.

In its *Devens decision*, the Board held, "Private track is typically built by a shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve the public at large." Petitioner try to escape the

² Contrary to the Petitioners' misrepresentations throughout their Petition, the Town of Winchester Board of Appeal's cease and desist order, filed June 25, 2013, does not relate to the entire Montvale Yard or any track other than Tighe's track adjacent to Tighe's warehouse at 43 Holton Street. See page 4 of Exhibit B to Petitioners' Petition.

import of the rationale of the Board's *Devens decision* by noting, at page 16 of its Petition, that Tighe isn't a shipper. Tighe's facility is a warehouse which receives freight from numerous shippers. There's no denying, however, that Tighe's facility is the consignee of the shipments, and it is neither logical nor reasonable to believe that a private track cannot be built by a consignee as it can by a shipper. The track in question serves only the Tighe warehouse, and the track is used solely to move the shipments consigned to the Tighe warehouse. There is no holding out by Tighe to have the track serve the public at large. It is Tighe's private track.

Petitioners further seek to distinguish their situation from that considered by the Board in the *Devens decision* by contending, at pages 15-16 of their Petition, that Devens had entered into a contractual arrangement with the Boston & Maine to use the track exclusively to serve the track's owner. To be sure the Petitioners may not have entered into a written agreement with Tighe to use the track in question exclusively to serve the Tighe warehouse, but they are bound by such an understanding no less. Boston & Maine could serve no other shipper on the private track, and Petitioners can serve no other consignee on the private track. Petitioners may hold themselves out to serve any and all shippers throughout the territories they serve just as the Boston & Maine held itself out to serve any and all shippers in the territories it served. When it came down to the track in question, however, Boston & Maine could operate on the track only to serve Devens, just as the Petitioners can operate on the track only to serve Tighe. As the Town of Winchester Board of Appeal correctly concluded, the track at 43 Holton Street is private track.

Petitioners cannot seek to have the track be anything other than Tighe's private track by likening the situation to the transloading operations considered by the Board in STB Finance Docket No. 35157, *The City of Alexandria, Virginia--Petition for Declaratory Order*, served February 17, 2009, effectively affirmed in *Norfolk Southern Railroad Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), cited by Petitioners at page 13 of their Petition. Petitioners do nothing but bring the rail cars to the Tighe warehouse. They do not even unload the rail cars. Tighe does that while the cars sit on its private track.

B.

The track is not side track.

As an alternative argument, Petitioners maintain that the track in question is side track. The side track, however, must be of a rail carrier, and the track adjacent to the Tighe warehouse is that of Tighe and not the Petitioners. 49 U.S.C. § 10906, exempts side track from the Board's jurisdiction over its operation when it is that of "a rail carrier providing transportation subject to the jurisdiction of the Board under this part". Tighe is not such a rail carrier. 49 U.S.C § 10501(b) does not add anything to the definition of side track but simply confers exclusive Board jurisdiction over side track but only for "the remedies provided under this part with respect to regulation of transportation." As the Board noted in STB Finance Docket No. 35057, *Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order*, served September 26, 2008, "[W]hile section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over 'transportation by rail carrier.'" And that, of course, brings us back to 49 U.S.C.

§ 10906 and a rail carriers ability to operate on its side track without the need for securing the Board's authorization.

Petitioners, at page 10 of their Petition, cite *Pace v. CSX Transp*, 613 F.3d 1066, 1068 (11th Cir. 2010), which confirms that the side track must be that of a rail carrier. ("Because it is CSX's construction and operation of the side tracks in this case which give rise to Plaintiffs' claims, those claims are expressly preempted by the ICCTA.") At pages 14-15 of their Petition, Petitioners cite the Board's decision in STB Finance Docket No. 34429, *The New York City Economic Development Corporation--Petition for Declaratory Order*, served July 15, 2004, for "[t]he fact that the track owner . . . is not itself a rail carrier is not relevant." Petitioners fail to recognize that in that proceeding the side track or spur was built to be used by Consolidated Rail Corporation, CSX Transportation, Inc. and the Norfolk Southern Railway Company, which already had obtained the authority from the Board to operate on the spur.

C.

Service on the track is not preempted.

The thrust of the Petitioners' Petition is that the rendition of service on Tighe's track adjacent to its warehouse is subject to the preemption provision of 49 U.S.C. § 10501(b). The Board's decisions are to the contrary.

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

In its decision in STB Finance Docket No. 35057, *Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order*, served September 26, 2008. the Board declared:

[W]hile section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over "transportation by rail carrier." Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier" [citation omitted].

In its decision in STB Finance docket No. 35036, *Suffolk & southern Rail Road LLC--Lease and Operation Exemption--Sills Road Realty, LLC*, served August 27, 2008, the Board stated, "to come within the Boar's jurisdiction, an activity must constitute transportation and must be performed by, or under the auspices, of a rail carrier. See 49 U.S.C. 10501(a) [citations omitted]."

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

Tighe is not a rail carrier. It does not hold itself out as rendering common carrier railroad service. Tighe's handling of the rail cars on its private track is not performed by, or under the auspices of a rail carrier, and, therefore the preemption provision of 49 U.S.C § 10501(b) does not obtain.

WHEREFORE, the Town of Winchester, Massachusetts, and James A. Johnson III, Chairman of the Town of Winchester Board of Selectmen, respectfully request that the Petitioners' Emergency Petition for Declaratory Order be denied.

Respectfully submitted,

The Town of Winchester, Massachusetts, and
James A. Johnson III, Chairman of the Town of
Winchester Board of Selectmen

By their attorneys,

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Due and dated: July 10, 2013

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Reply on Petitioners by e-mailing a copy to their attorney, Gordon A. Coffee, Esq., at gcoffee@winston.com.

Dated at Washington, DC, this 10th day of July, 2013.



Fritz R. Kahn