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BEFORE THE
SURFACE TRANSPORTATION BOARD

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February 10, 2015
Part of
Public Record

STB FINANCE DOCKET 35853

SEA-3, INC. V. CITY OF PORTSMOUTH, NEW HAMPSHIRE
EMERGENCY PETITION FOR DECLARATORY ORDER

MOTION OF PROPANE GAS ASSOCIATION OF NEW ENGLAND
FOR LEAVE TO FILE COMMENTS AS AMICUS CURIAE

Propane Gas Association of New England ("PGANE") moves for leave to file the accompanying comments as *amicus curiae* in support of SEA-3, Inc. In support of this Motion, PGANE submits that it is a trade association representing nearly 675 members who sell propane or propane related appliances and equipment in six New England states. PGANE further submits that attempts by the City of Portsmouth to limit transportation of liquefied propane gas over railroad tracks within the city is preempted by 49 U.S.C. § 10501, which gives the Surface Transportation Board exclusive jurisdiction over transportation by rail carriers and expressly preempts state law remedies. SEA-3 consents to the relief sought by this Motion. Despite a good faith effort, PGANE was unable to obtain the consent of the City of Portsmouth.

Dated: 2/10, 2015


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CERTIFICATE OF SERVICE

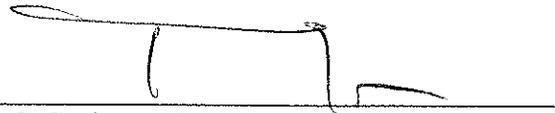
I hereby certify that on this 10 day of February, 2015, I have served the Motion for Leave to File Comments as Amicus Curiae, by United States Mail, to the following parties.

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I. STATEMENT OF FACTS.

Propane Gas Association of New England (“PGANE”) is a not-for-profit trade association representing nearly 675 members who sell propane or propane related appliances and equipment in all six New England states. PGANE’s members include nearly 450 company locations involved in the storage, distribution, retail sale and delivery of propane to residential and business customers throughout New England. For these reasons PGANE and its members have a vital interest in this proceeding.

Propane has been an important fuel and energy source for New England for many years. Propane is non-toxic, and is not damaging to soil or water ecosystems. As a clean burning fuel source, propane plays a key role in minimizing the contribution of greenhouse gases to the environment.

According to PGANE’s statistics, nearly 1.25 million homes and businesses in New Hampshire use propane which is almost 20% of the total homes and businesses in the region. The propane supply in New England comes either by truck from New York, by rail or by ship

from foreign countries. (The Jones Act of 1912 prohibits moving goods from one American port to another unless the ship is built, crewed and flagged in the United States; no such ship currently exists to PGANE's knowledge.) Therefore, imported propane comes from Northwest Europe or Northern Africa to the United States. In the winter of 2013-2014, the United States imported approximately 87 million gallons. The use of propane is growing steadily due to its ecological advantages as stated above and because of its affordability.

There are only two facilities in New England with any significant propane storage capabilities: one is in Providence, RI which has a capacity of 17 million gallons and the other is the SEA-3 facility in Newington, NH (with a capacity of 28 million gallons). Historically, approximately one-third of all propane sold in New England has been sold at the SEA-3 facility, due to its strategic location serving Maine, New Hampshire, Massachusetts and Vermont.

As stated in SEA-3's Emergency Petition for Declaratory Order ("the Petition") submitted to the Surface Transportation Board, the SEA-3 facility currently contains three rail berths but this rail capacity is insufficient to the current market demands. See Petition, at page 6. SEA-3 applied to the Town of Newington's Planning Board for site plan approval in order to increase the rail capacity by constructing five new rail unloading berths. Id. On May 19, 2014, after an extensive planning board process, the Newington Planning Board unanimously voted to approve SEA-3's application. Petition at page 10 and Exhibit G. The City of Portsmouth appealed that decision both at the municipal level and in the New Hampshire state court system. As is well-documented in the Petition, "Portsmouth's sole objective is to block LPG rail car service from traveling through Portsmouth." Petition at page 12.

II. STATEMENT OF LAW.

The Interstate Commerce Act (“the Act”) vests jurisdiction of railroad matters exclusively in the Surface Transportation Board (“Board”) and expressly preempts state and local remedies, 49 U.S.C. § 10501(b) (“§ 10501(b)"). “The Interstate Commerce Act is ‘among the most pervasive and comprehensive of federal regulatory schemes.’ Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), expressly provides that the jurisdiction of the Board over ‘transportation by rail carriers’ is ‘exclusive.’ 49 U.S.C. § 10501(b). . . . Section 10501(b) expressly provides that ‘the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.’ Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” Boston and Maine Corporation and Springfield Terminal Railroad Company - Petition for Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 9, 2013).

It is important to note that the Act defines “transportation” extremely broadly in order to accomplish the Act’s goals; the term “transportation” includes “a locomotive, car . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” as well as “services relating to that movement.” Further, the Act defines “railroad” broadly as well, to include a switch, spur, track, terminal, terminal facility, freight depot, yard or ground, used or necessary for transportation. US Environmental Protection Agency – Petition for Declaratory Order, Finance Docket No. 35803 (S.T.B. December 30, 2014). Therefore, the Act covers the expansion of SEA-3’s terminal in Newington.

State and local attempts at regulating railroad operations are defined as either “categorical” or “as applied”. Regardless of how they are defined, each is prohibited. Categorical actions are attempts by a state or locality to impose requirements that “could, by their nature, deny a rail carrier’s ability to conduct rail operations”. *Id.* at 7. These actions take the form of either permitting requirements or preclearance requirements, such as building permits, environmental permits, or zoning ordinances. Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 642-643; CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 3 (S.T.B. May 3, 2005). “As applied” actions are state and local laws or regulations of general applicability, that when applied to rail operations, unreasonably burden or interfere with rail operations. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)

It is clear that the purpose of the Act and the decisions regarding implementation of the Act have one overriding goal: to protect the flow of interstate commerce by rail, and to avoid and prevent local regulation – whether direct or indirect – of interstate rail commerce. In this case, the City of Portsmouth by its appeal of the Newington approval is seeking to interfere with that goal. Portsmouth attempts to block SEA-3’s transportation of LPG across tracks within the City of Portsmouth by (1) seeking to overturn the decision of Planning Board or, (2) by requiring a study of the risks and hazards of transporting LPG through Portsmouth. See Petition, at Exhibit H.

As to the former, Portsmouth indicated that its objections to the approval did not relate to the “site plan itself but to the operational changes that will be implemented as a result of the site improvements.” *Id.* at 6. In short, Portsmouth is seeking to block the transportation of LPG over the rails contained within the city. This effort is expressly and unequivocally preempted under § 10501 (b), for the reasons stated above. In CSX Transportation, Inc. – Petition for

Declar. Order, Finance Docket No. 34662 at 1 (S.T.B. May 3, 2005), the Board declared that “in enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad’s traffic should be routed”.

Portsmouth’s alternative ground for seeking to control railroad operations is also preempted. By asking for a study of the risks and hazards of transporting propane, the City is seeking an impermissible preclearance requirement that, for the reasons stated above, the Board and federal courts have long held are preempted. See Joint Petition for Declaratory Order - Boston & Maine Corporation and Town of Ayer, MA, Finance Docket No. 33971, May 1, 2001, aff’d by B & M Corp. v. Town of Ayer, 191 F.Supp 2d 257 (D. Mass. 2002).

It is important to note that Portsmouth is not even the host or operative municipality. In this case, that honor goes to the Town of Newington. Newington is where the SEA-3 facility is located, and it is Newington’s Planning Board which approved the site plan submitted by SEA-3. Portsmouth, which abuts Newington, is merely one of many New Hampshire municipalities through which the railroad runs in order to reach Newington. Portsmouth’s position, if adopted, would mean that not just a “host municipality” such as Newington, but all municipalities through which the railroad runs, could seek to deny a rail carrier’s ability to conduct rail operations or otherwise interfere with interstate commerce. Portsmouth’s position would significantly expand the patchwork of conflicting local regulation over rail operations that Congress sought to eliminate by enacting and enforcing the Interstate Commerce Act. Norfolk S. Ry. – Petition for Declar. Order, Finance Docket No. 35701, at 6 and n. 14 (S.T.B. Nov. 4, 2013).

The well-established preemption principles of § 10501(b) apply in this case and Portsmouth's efforts to intrude upon the exclusive jurisdiction of the Board and to apply state and local remedies must fail and should be rejected by this Board.

Respectfully submitted,



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Dated: February 10, 2015

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I hereby certify that on this 10 day of February, 2015, I have served the Comments of Amicus Curiae, Propane Gas Association of New England, by United States Mail, to the following parties.

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