

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

237559

STB FINANCE DOCKET 35853

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January 20, 2015
Part of
Public Record

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

**MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR LEAVE TO FILE COMMENTS AS AMICUS CURIAE**

Norfolk Southern Railway Company (“NS”) respectfully moves for leave to file the accompanying comments as *amicus curiae* in support of Sea-3, Inc. In support of this Motion, NS submits that it is a rail carrier that participates in the transportation of freight for Sea-3. NS further submits that the preemption issue presented is not difficult to decide but that this case reflects a trend of localities attempting to regulate the rail customer in an effort to evade preemption under 49 U.S.C. 10501. The statute as well as Board and court precedent are clear, however, that such efforts are still preempted.



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Railway Co.*

Dated: January 20, 2015

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**COMMENTS OF AMICUS CURIAE
NORFOLK SOUTHERN RAILWAY COMPANY**

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**COMMENTS OF AMICUS CURIAE
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“NS”) hereby submits these amicus comments in this proceeding in support of Sea-3, Inc. The City of Portsmouth, New Hampshire, is attempting to regulate rail commerce, and that attempt is preempted by 49 U.S.C. 10501. NS has an interest in this case because Sea-3 is an existing customer of NS. Further, NS submits these comments to highlight the fact that attempts to regulate the flow of commerce on rail and to regulate rail operations at shipper facilities is en vogue in localities. They are equally preempted under the long-standing law and precedent that are designed to protect rail commerce and the unreasonable interference by localities with interstate commerce.

In a recent decision, the Board succinctly summarized the concepts related to preemption under Section 10501.

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” The preemption provision of the Act, as broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over

“transportation by rail carriers” is “exclusive.” The statute defines “transportation” expansively to encompass “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.” Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 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.

The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b).

When examining state or local action affecting rail transportation, preemption under § 10501(b) may be categorical or “as applied.” It also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.

Other state or local actions may be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case.

U.S. Environmental Protection Agency—Petition for Declaratory Order, STB Finance Docket 35803 (Dec. 30, 2014) (citations omitted).

The concepts summarized in this decision are now firmly-rooted to protect the flow of interstate commerce by rail. As a result, municipalities and localities have attempted to circumvent the breadth of Section 10501 by attempting to regulate rail transportation indirectly by applying regulations to shippers and shipper facilities. The Board and courts have wisely recognized that such attempts are also preempted.

For example, the Board has recently addressed the attempts by cities to evade preemption through the application of regulations to the shipper rather than directly on

the railroad. In *Boston and Maine Corp. and Springfield Terminal Ry. Co. –Petition for Declaratory Order*, the Board declared that the contested municipal zoning ordinance that was being applied to the shipper facility was preempted because it seeks to constrain the provision of common carrier service.

In any event, the dispute between the parties regarding the nature of the track immediately adjacent to the warehouse is not dispositive. Even if we assume this track is private track (which we need not decide here), this does not permit the Town to deprive Tighe of its federal right to receive common carrier rail service over the track. As previously noted, Tighe has rights provided by federal law to ask for and receive common carrier rail service from Pan Am, a rail carrier providing service subject to the Board’s jurisdiction. Thus, even if we construed the Town’s action narrowly as directed solely at Tighe, and solely at a short piece of allegedly private track located adjacent to the warehouse, there remains a fundamental conflict between the Town’s regulation and the rights of Tighe and Pan Am to request and provide, respectively, common carrier rail service under the Interstate Commerce Act. That conflict must be resolved in favor of federal law. Otherwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act.

Boston and Maine Corp. and Springfield Terminal Ry. Co. –Petition for Declaratory Order, STB Finance Docket 35749 (July 19, 2013) (citations omitted). The local ordinance in the *Boston and Maine* case was designed to prevent rail traffic to the shipper warehouse altogether. In this case, Portsmouth is attempting to use local regulations to limit the amount of rail traffic. Allowing Portsmouth to seek regulation of railroad operations under the cover of local laws is contrary to the correct rationale in *Boston and Maine* that local regulation cannot impede common carrier rail service – whether provided over private track or at a privately-owned shipper facility.

The proper scope of preemption under Section 10501 has been similarly resolved by federal courts to prevent indirect local regulation of freight rail transportation. In

Norfolk S. Ry. v. City of Alexandria, the City attempted to evade the scope of the federal preemption statute by regulating the trucks that would use the rail carrier's transload facility. 608 F.3d 150, 158-60 (4th Cir. 2010). The court held otherwise. Specifically, the court held that the city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier's transload facility.

In sum, the courts and the Board have seen the developing trend and steadfastly held that preemption under Section 10501 still applies. The attempt by the City to use land use or other restrictions to prevent the development of additional rail infrastructure – track and unloading spots – at Sea-3 is a clear attempt by a locality to regulate facilities related to the movement of property by rail and to prevent the provision of expanded rail service related to the movement of that property by rail. Thus, the application of law to the facts in this case is really rather straightforward. “State or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.” *U.S. Environmental Protection Agency—Petition for Declaratory Order*, STB Finance Docket 35803 (Dec. 30, 2014) (citations omitted). States and localities cannot interfere – directly or indirectly -- with freight rail transportation. NS respectfully submits that the attempts by the City of Portsmouth to indirectly regulate rail transportation are preempted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", written over a horizontal line.

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Counsel to Norfolk Southern Railway Co.

Dated: January 20, 2015

Certificate of Service

I hereby certify that on this 20th day of January 2015 I caused a copy of the foregoing **“Motion of Norfolk Southern Railway Company for Leave to File Comments as Amicus Curiae”** and the **“Comments of Amicus Curiae Norfolk Southern Railway Company”** to be served electronically upon all parties on the service list for this proceeding by first class mail or more expeditious method of delivery.


