

STB FINANCE DOCKET NO. 33971

JOINT PETITION FOR DECLARATORY ORDER  
BOSTON AND MAINE CORPORATION  
AND TOWN OF AYER, MA

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*Decided October 3, 2001*

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In denying a petition for reconsideration by the Town of Ayer, the Board indicates that its preemption analysis under 49 U.S.C. 10501(b) is not based on whether certain Federal environmental statutes are properly administered or on the motivation of local body, but whether the local regulation unduly burdens or unreasonably interferes with interstate commerce.

BY THE BOARD:

We instituted a declaratory order proceeding on December 22, 2000, upon court referral,<sup>1</sup> to address the extent to which regulation by the Town of Ayer, MA (Town or Ayer) of the proposed construction and operation of an automobile unloading facility (New Facility) by Boston and Maine Corporation, Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. (collectively, Guilford) is preempted by 49 U.S.C. 10501(b),<sup>2</sup> as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA).

In *Pet. For Declaratory Order — Boston & Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500 (2001) (*May Decision*), we explained that the Town's

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<sup>1</sup> This matter was referred to us by the United States District Court for the District of Massachusetts by order dated Oct. 19, 2000, in *Boston and Maine Corp. et al. v. Town of Ayer et al.*, Case No. 99-CV-12606 JLT. The court asked that we "evaluat[e] the right of the defendants, if any, to regulate the plaintiffs' proposed development off Willow Road in the Town of Ayer \* \* \* [to] assist this Court in determining the rights, duties, and obligations of the parties."

<sup>2</sup> That provision reads in relevant part:

The jurisdiction of the Board over \* \* \* transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and \* \* \* the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

application of its Planning Board permit process,<sup>3</sup> its “noisome trade” ordinance, and the pre-approval process of its Conservation Commission are preempted under section 10501(b) to the extent that the Town may not preclude Guilford from constructing and operating the New Facility or attach conditions to its approval that would unduly restrict the railroad’s operations or unduly burden interstate commerce. We provided general observations for the court regarding the kinds of conditions that might be reasonable in particular circumstances.

On May 21, 2001, Ayer filed a petition seeking reconsideration of our determination that the permitting process, noisome trade ordinance, and approval process of the Conservation Commission are preempted. Ayer also requests reconsideration of our analysis concerning certain of the 36 conditions that it would have imposed on Guilford, but only if our analysis constituted factual findings.<sup>4</sup> It did not.<sup>5</sup>

Guilford replied on June 11, 2001. Guilford argues that the petition for reconsideration should be denied in all respects, because our preemption analysis was correct. Guilford Reply at 5. Guilford also requests clarification with respect to certain aspects of our discussion of the 36 conditions. Guilford Reply at 9-17. However, because we read Guilford’s request, like the Town’s, to be directed to factual findings as opposed to general guidance, we need not further discuss its request as to the 36 conditions either.

The Association of American Railroads (AAR) filed comments on June 11, 2001. AAR agrees that, under ICCTA, the preemption analysis of local regulation, whether based on Federal law or local police powers, is focused on “whether the imposition of the local restriction prevents a railroad from conducting its operations or unreasonably burdens interstate commerce.” AAR Comments at 4. AAR submits that whether a Federal environmental statute or a local land use requirement unduly restricts a carrier from performing operations, or unreasonably burdens interstate commerce, is a fact-bound question.

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<sup>3</sup> On August 26, 1999, the Planning Board identified 36 conditions that Guilford would need to meet for a permit or certificate of approval for the New Facility.

<sup>4</sup> Ayer’s petition specifically states that it does *not* seek reconsideration of the Board’s decision with respect to the conditions “to the extent the Board was simply providing guidance and not making factual findings.” Reconsideration Petition at 9.

<sup>5</sup> While we used some of the 36 conditions in this case as examples, we specifically stated that we did so only to “provide general guidance for the court as to the reasonableness of the types of conditions” communities may or may not impose. *May Decision* at 501. *See also, May Decision* at 510 (“we will offer some general observations regarding the kinds of restrictions that might be reasonable in individual circumstances”).

## DISCUSSION AND CONCLUSIONS

Nothing has been presented by Ayer to indicate material error in our *May Decision*. Nor have new evidence or changed circumstances been shown. Therefore, after careful review of our *May Decision* and consideration of the subsequent filings, we will deny the petition for reconsideration.

Ayer argues that its actions were undertaken to enforce Federal statutes — specifically, the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* (SDWA) and the Clean Water Act, 33 U.S.C. 1311 *et seq.* (CWA) — and thus are not preempted. But, as we explained in the *May Decision* at 509, local communities may not hold up or defeat a railroad's right to construct facilities used in railroad operations simply by invoking the SDWA or the CWA.

Ayer asserts that we erred in finding that its application of the SDWA and the CWA in this case was a pretext. Ayer points out that we do not have the expertise or authority to determine whether its activities were properly undertaken pursuant to the SDWA and the CWA, and it argues that consideration of the motivation of a local body is irrelevant.

The Town's arguments miss the point. Our preemption analysis does not hinge upon whether the Town was properly administering the SDWA and the CWA or on the Town's motivation. Rather, the point is that such laws cannot be applied without regard to the impact on interstate commerce. As we explained in *Friends of the Aquifer, et al. — Petition for Declaratory Order*, 5 S.T.B. 880 (2001) at 885 (emphasis added), citing the *May Decision* at 508,

[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, *unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.*

In other words, valid regulation by state and local governments under Federal statutes is permitted to the extent that it does not unduly burden or unreasonably interfere with interstate commerce. *See Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517, 523 (6th Cir. 2001). But simply invoking Federal environmental statutes does not overcome section 10501(b).<sup>6</sup> Rather, where section 10501(b) and a Federal environmental statute are both involved, the Federal

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<sup>6</sup> Otherwise, as AAR observes, under Ayer's analysis "all a locality need do to shut the door on a preemption analysis by the Board is to allege that its requirements are necessitated by the SDWA or the CWA." AAR Comments at 5.

statutes need to be harmonized. The severity of the likely environmental impacts should be weighed against the severity of the transportation impacts of compliance to determine whether, and how, the various Federal statutes can be accommodated. This is a case-specific and fact-specific determination. One must look at the objective effects (*i.e.*, all of the facts and circumstances) to determine whether the local body's regulation, as applied, unduly burdens or unreasonably interferes with interstate commerce. *May Decision* at 508-09.

In this case, Guilford began seeking local approval for construction in November 1997, and filed a site approval application with the Planning Board in May 1998. Guilford agreed to comply with the substance of Ayer's ordinances addressing aquifer protection and incorporated the recommendations of Ayer's environmental consultant in making its final plans to protect against pollutant leaks and degradation of water quality. Moreover, in accordance with a state conservation law, Guilford filed a notice of intent with the Conservation Commission in April 1998. However, no decision has been issued by the Conservation Commission. In August 1999, the Planning Board issued a decision making its approval subject to 36 conditions, at least some of which appear to be the sort of conditions that would be unduly restrictive, as explained in our *May Decision*. Finally, in November 1999, the New Facility was determined to be a "noisome trade" that could be flatly prohibited by the Town. *May Decision* at 503, 510.

Based on the nature of the obstacles that the Town has attempted to place in Guilford's path, which are described more fully in the *May Decision*, it appears that, while Guilford tried to accommodate the Town's concerns, the Town has failed to accommodate Guilford's right to conduct its rail operations, which includes the right to construct and maintain appurtenant facilities. The Town cannot flatly prohibit construction of the New Facility, nor can it impose conditions that are so onerous as to preclude or unduly restrict railroad operations. Therefore, the Town's noisome trade ordinance and Planning Board and Conservation Commission processes are preempted to the extent they unduly restrict the railroad's operations or unreasonably burden interstate commerce.

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

*It is ordered:*

1. Ayer's petition for reconsideration is denied.
2. This proceeding is discontinued.
3. This decision is effective November 4, 2001.

4. A copy of this decision will be served on:  
United States District Court, District of Massachusetts  
(Attn: District Judge Joseph L. Tauro)  
(RE: Case No. 99-CV-12606 JLT)  
United States Courthouse 1 Courthouse Way - Suite 2300  
Boston, MA 02210.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and  
Commissioner Burkes.