

Surface Transportation Board Assists Court in Addressing "Preemption" Issue Involving Automobile Unloading Facility near Ayer, MA, Aquifer

Surface Transportation Board (Board) Linda J. Morgan announced today that the Board has issued a decision addressing "preemption" issues in a case in which the Town of Ayer, Massachusetts (Ayer), is at odds with The Boston and Maine Corporation, Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. (collectively, "Guilford"). The matter was referred to the Board by the United States District Court for the District of Massachusetts.

The controversy between Guilford and Ayer revolves around Guilford's proposed construction and operation of a facility in Ayer that Guilford will use to unload, temporarily store, and transfer automobiles to trucks for distribution to New England. The new facility is located within a "Heavy Industry District" but is near an aquifer providing drinking water for Ayer and nearby Littleton, MA (the towns). Guilford initially sought local approval for construction in 1997. In August 1999, the Ayer Planning Board issued a certificate of approval for the new facility, but made the permit subject to 36 separate conditions. Shortly thereafter, other local agencies sought to regulate the facility. In particular, the Ayer Board of Health determined that auto unloading facilities are a "noisome trade" that could be prohibited within town limits, and the Conservation Commission began a pre-approval process.

Congress has long provided that state and local railroad regulation is preempted to a significant extent, that is, that federal rather than state or local law applies to railroad construction and other activities. Congress broadened the preemption provision of the law in the Staggers Rail Act of 1980, and further in the ICC Termination Act of 1995 (ICCTA) to such an extent that the courts have found most state and local regulation of transportation and transportation facilities to be preempted. Therefore, Guilford went to federal district court for a declaration that federal law preempted the local laws that Ayer and its agencies sought to apply. The court stayed its proceedings in October 2000, and referred the matter to the Board for guidance on the extent to which Ayer could regulate Guilford's facility.

In its decision, the Board disagreed with the towns' argument that the federal Safe Water Drinking Act (SWDA) and the Clean Water Drinking Act (CWDA) give Ayer the authority to regulate the new facility. The Board concluded that Ayer is using those federal statutes "as a pretext to do what Congress expressly precluded: interfere with interstate commerce by imposing a local permitting or environmental process as a prerequisite to the railroad's ability to conduct its operations." The Board noted that the Massachusetts Department of Environmental Protection has recently concluded that, with the mitigation system proposed by Guilford, the new facility poses no threat to the local water supply. Moreover, the Environmental Protection Agency, which was given detailed information about the project, "has expressed no concerns about it," and Guilford has agreed to comply with the substance of the Ayer ordinances addressing aquifer protection, and has incorporated the recommendations of Ayer's contractor in making its final plans to protect against pollutant leaks and degradation of water quality. As Ayer's actions do not appear needed to carry out the SWDA or the CWDA, the Board expressed the view that Ayer's Planning Board permit process, the "noisome trade" ordinance, and the Conservation Commission's pre-approval process are all preempted under the broad statutory preemption provision and the several court cases interpreting it.

Finally, as not all state and local regulation affecting railroads is preempted, the Board offered some general guidance regarding the kinds of restrictions that might be reasonable in individual circumstances. The Board, like some of the courts that have addressed the question, suggested a pragmatic approach on the part of communities and cooperation on the part of railroads to reach reasonable solutions to state and local concerns that do not unreasonably interfere with interstate commerce. Examples of solutions that might be reasonable include conditions requiring railroads to (1) share their plans with the affected community when they are undertaking an activity for which another entity would be required to obtain a permit; (2) use "best management practices" when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns;

and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

This case now will go back to the federal district court for final resolution. The district court's referral order to the Board was issued in *Boston and Maine Corp., et al. v. Town of Ayer, et al.*, Case No. 99-CV--12606 JLT.

The Board's decision was issued today in *Joint Petition for Declaratory Order--Boston and Maine Corporation and Town of Ayer, Mass.*, STB Finance Docket No. 33971. A printed copy of that decision is available for a fee by contacting **D~To-D~ Office Solutions, Room 405, 1925 K Street, NW, Washington, DC 20006, telephone (202) 756-1649**, or via Da_To_Da@Hotmail.com. The Board's decision in Finance Docket No. 33971 also is available for viewing and downloading via the Board's Website at www.stb.dot.gov.

###