



FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35749]

Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order

The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, Pan Am), filed a petition for declaratory order on July 1, 2013 (Petition), requesting that the Board declare that 49 U.S.C. 10501(b) preempts actions taken by the Town of Winchester (the Town) to ban certain rail transportation conducted by Pan Am. For the reasons discussed below, a declaratory order proceeding will be instituted and an expedited procedural schedule will be adopted.

The Petition requests that the Board find that the Town is preempted from enforcing a zoning decision and an order, each of which would prevent Pan Am from providing freight rail transportation to a warehouse in the Town. According to Pan Am, it provides common carrier rail transportation to the warehouse, through the Montvale Yard, on behalf of shippers, and it holds out this transportation service to the public. The zoning decision states that the Montvale Yard “is being used as a freight yard which is not allowed” pursuant to municipal zoning laws.<sup>1</sup> The order requires all rail traffic to the warehouse “to immediately cease and desist.”<sup>2</sup>

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<sup>1</sup> Pet., Ex. B at 2.

<sup>2</sup> Id. at 4 (Amended Decision After Remand).

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. Here, a controversy exists as to whether enforcement of the Town's zoning laws is preempted under 49 U.S.C. 10501(b). Therefore, a declaratory order proceeding will be instituted, and the Board will consider this matter under the modified procedure rules at 49 CFR pt. 1112.

Pan Am states that the Town has announced plans to seek a state court injunction to enforce its cease and desist order, with a hearing on the motion to be set for the week of July 22, 2013. Pan Am further states that the Town rejected a request to hold state court proceedings in abeyance to allow Pan Am's Petition to be considered by the Board. In a letter filed July 3, 2013, the Town indicates that it will reply to the Petition on or before July 22 and asserts that "there is no emergency requiring the Board's immediate action" because no petition for a temporary restraining order or preliminary injunction "as yet has been filed" with the state court. But there remains a cease and desist order issued by the Town that purports to ban all rail transportation to the warehouse. Moreover, the Town does not dispute Pan Am's assertion that the Town had announced plans to seek state court action on the schedule Pan Am claims, nor does it commit to refraining from these actions or consenting to abeyance of the state court proceedings. Therefore, an expedited procedural schedule will be adopted, with replies to the Petition due by July 10, 2013.

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

It is ordered:

1. A declaratory order proceeding is instituted.
2. Replies to the Petition are due by July 10, 2013.
3. This decision is effective on its service date.

Decided: July 3, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig

Clearance Clerk

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