



SHAINES & McEACHERN, PA
Attorneys at Law

September 18, 2015

VIA E-MAIL AND U.S. MAIL

Martin Honigberg, Chairman
NH Site Evaluation Committee
NH Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: SEA-3, Inc. ("SEA-3")
Request for Exemption
NHSEC No. 2015-01

Dear Chairman Honigberg:

Enclosed for filing in connection with SEA-3, Inc.'s Request for Exemption please find the original and two copies of SEA-3, Inc.'s Objection to Great Bay Stewards' Contested Motion for Site Inspection. An electronic version of the enclosed document is being delivered via email to Jane Murray at the Department of Environmental Services and Jody Carmody, Docket Supervisor at the Public Utilities Commission.

I certify that copies of the within filing have been sent to the parties identified on the SEC's Service List last updated June 11, 2015.

Very truly yours,

SHAINES & McEACHERN, P.A.

By: 

Alec L. McEachern

ALM/jm

Enclosures

cc: SEA-3, Inc.
Michael Iacopino, Esq.
Jane Murray, NHDES (via Email)
Jody Carmody, NHPUC (via Email)

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

DOCKET NO. 2015-01

**SEA-3, INC.'S OBJECTION TO GREAT BAY STEWARDS'
CONTESTED MOTION FOR SITE INSPECTION**

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and respectfully objects to the Great Bay Stewards' Contested Motion for Site Inspection. In support of its Objection, SEA-3 states as follows:

INTRODUCTION

Great Bay Stewards ("GBS") has requested that the Subcommittee conduct a site inspection of the Great Bay Discovery Center located at 89 Depot Road, Greenland, NH ("Discovery Center"), pursuant to N.H. Code Admin. R. Site 202.13, as part of this proceeding. The subject of this proceeding is the Applicant's property located at 190 Shattuck Way in Newington, NH, which is located approximately 6 miles, straight-line distance, from the Discovery Center. The Committee should deny GBS' Motion because the relevant administrative regulation, N.H. Code. Admin. R. Site 202.13, allows inspections of sites which are the subject of a hearing but not distant, remote locations such as the Discovery Center. Additionally, the proffered railroad-related reason for GBS' request is federally preempted. Particularly given the conclusions in the recent Sebago Technics Report, allowing the inspection would expend administrative resources on an issue that has been resolved in SEA-3's favor. This Objection addresses those points in turn.

APPLICABLE LEGAL STANDARDS

At issue is N.H. Code Admin. R. Site 202.13, which provides that:

The committee or subcommittee, as applicable, and public counsel shall conduct a site visit of any property which is the subject of a hearing if requested by a party, or on its own motion, if the committee or subcommittee determines that the site visit will assist the committee or subcommittee in reaching a determination in the hearing.

ARGUMENT

A. GBS' Requested Site Inspection Is Not Allowed by the Regulations.

By its terms, N.H. Code Admin. R. Site 202.13 provides that the subcommittee shall conduct a site visit of any property which is the subject of a hearing. The Code does not provide for site inspections of properties that are not the subject of a hearing. The Discovery Center is not the subject of a hearing. The subject of the hearing in this proceeding is SEA-3's site, 190 Shattuck Way in Newington, NH, which is six miles removed from the Discovery Center. At a distance of six miles from the subject site, the Discovery Center lacks proximity and is not eligible for a site inspection under Rule 202.13.

Conducting a site inspection of a remote location that is not the subject of this proceeding would run contrary to established law requiring administrative agencies to adhere to their enabling legislation and related administrative regulations. See In re Union Tel. Co., 160 N.H. 309, 317, 999 A.2d 336, 343-44 (2010) (quoting Attitash Mt. Service Co. v. Schuck, 135 N.H. 427, 429, 605 A.2d 1067 (1992)) ("The law of this State is well settled that an administrative agency must follow its own rules and regulations, and that an agency's interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations."). Here, ordering a site inspection of such a remote location would fail to appreciate the plain meaning of N.H. Code Admin. R. Site 202.13.

B. The Purpose of GBS' Proposed Site Inspection Is to Further a Federally Preempted Issue.

GBS' only proffered rationale for the requested site visit is to demonstrate the proximity of the Discovery Center to the rail line owned and operated by Pan Am Railways. To the extent that GBS' proximity to the rail line is even relevant in this matter, which is denied, the topic is preempted by federal law.¹

The railroad-related interests that GBS asserts are not before the Committee. The Proposed Intervenor seeks to prevent or prohibit expanded use of the railway. Federal preemption precludes consideration of that issue by this Committee.

i. Background—Federal Preemption of Railroad Transportation Issues.

By federal statute, the Surface Transportation Board exercises exclusive jurisdiction 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” 49 U.S.C. § 10501(b) (hereinafter “10501(b)"). Section 10501(b) expressly states that the STB's jurisdiction is “exclusive” and “[e]xcept 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.” *Id.* “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 (S.T.B. July 19, 2013) (hereinafter “Boston and Maine”).

¹ While the SEC has held the issue of federal preemption in abeyance until the time of the final hearing, SEA-3, Inc. respectfully asserts that federal law preempts economic, environmental and safety regulation of railroad operations and that the SEC is without power to regulate the claimed negative impacts of railroad traffic upon the Discovery Center. SEA-3, Inc., incorporates by reference its earlier briefing on the issue of federal preemption.

Upon its enactment, the Interstate Commerce Commission Termination Act (“ICCTA”):

broadened the express preemption provision of the Interstate Commerce Act to the point that “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by our statute, at 49 U. S. C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad’s traffic should be routed is preempted.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005).

Pursuant to § 10501(b)’s preemption provisions, state and local entities are prohibited from deciding matters regulated by the STB. As the STB has explained:

In interpreting the reach of 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements including building permits, zoning ordinances, and environmental and land use permitting requirements are preempted.

Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Based on § 10501(b)’s broad reach, any state or local law that allows a non-federal entity to restrict or prohibit a federal rail carrier’s operations is preempted, regardless of whether the state or local law is expressly directed at the carrier’s operations. For example, in Norfolk Southern Ry Co. v. City of Alexandria, the Fourth Circuit Court of Appeals ruled that a city ordinance regulating third party truckers travelling to Norfolk Southern’s transloading facility to pick up ethanol was preempted as an impermissible attempt to regulate transloading operations at the facility. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010) (citing Green Mtn. R. R.

Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)). The ruling demonstrates that local governments cannot indirectly regulate interstate commerce by regulating third parties.

The New Hampshire Supreme Court has upheld an administrative ruling that § 10501(b) preempts the New Hampshire Public Utilities Commission's state statutory authority to decide whether removal of rail track was not consistent with the public good. In re Conservation Law Found., 147 N. H. 89, 95, 782 A.2d 909, 913 (2001). The Court observed: "It has been noted that 'it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" Id., 147 N. H. at 92 (quoting CSX Transp., Inc. v. Georgia Public Serv. Com'n, 944 F.Supp. 1573, 1581 (N.D.Ga.1996)).

ii. ICCTA's Preemption Provision Applies to SEA-3 and Pan Am.

ICCTA's broad preemption provision covers both SEA-3 and Pan Am. "The statute defines 'transportation' expansively to encompass any property, facility, structure or equipment 'related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.'" Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013) (quoting 49 U.S.C. § 10102(9)). Pursuant to 49 U.S.C. § 11101, SEA-3 has the legal right to receive common carrier rail service from Pan Am because Pan Am is a "rail carrier providing transportation or service subject to the jurisdiction of [the STB]" 49 U.S.C.A. § 11101(a) (West) (conferring rights to common carrier rail service); Boston and Maine, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013) (identifying Pan Am as a common rail carrier). SEA-3 is therefore entitled to receive LPG rail cars from Pan Am over the Newington Branch.

iii. The Proposed Intervenor's Claims Are Preempted by ICCTA.

GBS' interest in this matter is limited to concerns about use of the railroad. See Motion to Intervene ¶¶ 3-4; Letter of Proposed Intervenor. GBS alleges it will be impacted because

railroad traffic will increase. Id. GBS wants to prevent rail traffic from increasing. However, any attempt to impede a federal carrier's railroad operations is preempted by § 10501(b), regardless of whether the specific claims are directly related to railroad operations.

As evident from the forgoing, federal law preempts state and local entities from resolving GBS' concerns with rail use and LPG rail traffic:

[A]ny permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 7 (S.T.B. May 3, 2005). As noted above, if GBS has safety concerns regarding the Newington Branch rail line, it must address those concerns to the Federal Railroad Administration, which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act (“FRSA”).

Since GBS seeks a site inspection for the sole purpose of arguing railroad-related interests, which are preempted, the Committee should deny the Motion for Site Inspection.

C. Public Counsel's Safety Study Dispels Any Railroad Arguments.

To the extent the Subcommittee considers the railroad issues, GBS' proposed site inspection is unnecessary in light of the recent Sebago Technics report, which was filed with the Subcommittee on September 17, 2015. Pages 2-3 of the Sebago Technics Report demonstrate that the rail line has been inspected and there are no issues with them. For example, the Sebago Technics Report includes the following conclusions:

2. A site inspection of the Portsmouth and Newington Industrial Tracks did not reveal any conditions which would render them out of compliance with the requirements for Class 1 track under the Federal Track Safety Standards. There was evidence of recent significant track facilities improvements, i.e. new crossties and ballast; and the rails themselves had been inspected by an independent agency in 2014 and 2015.
3. Pan Am's Bridge Management Records revealed that inspections were being conducted annually, and that underwater inspections had been performed within the past three years. No structural deficiencies were noted.
4. A review of the train accident records for the Portsmouth and Newington Industrial Tracks from 1999 through 2014 indicated that there had not been a reportable train accident on these two rail lines in the last fifteen years.
5. A site inspection of the railroad tracks within the Sea 3 Terminal was made and did not reveal anything out of compliance with Class 1 railroad safety standards. There was evidence of recent maintenance work on these tracks, but no official inspection records were available. As such, it is our recommendation that Sea 3 initiate a formal annual rail inspection program.
6. Meetings were conducted on August 18, 2015 with Pan Am Railway officials, and, on September 3, 2015, with SEA-3 officials to review their Hazard Materials Programs and Procedures. As a result of those meetings, it appears that both entities were in compliance with the USDOT Hazardous Materials Regulations.

It would be a waste of administrative resources to organize and conduct a site inspection of a locale six miles distant from SEA-3's site to observe a railroad segment that Sebago Technics has determined to be in compliance with applicable safety standards.

CONCLUSION

The Committee should deny GBS' Motion for Site Inspection because the Discovery Center that GBS wants the subcommittee to inspect is located approximately six miles from the site which is the subject of this proceeding. Further, GBS' proffered railroad-related reason for the site inspection is federally preempted. Lastly, in light of the Sebago Technics Report, it would be an improvident to expend further resources to view GBS' remote site for an issue that has been studied and resolved. The Subcommittee should deny GBS' request.

Respectfully submitted,

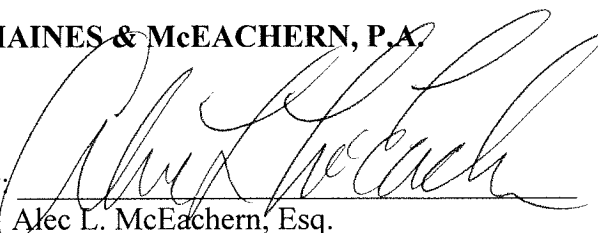
SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

Dated: September 18, 2015

By:



Alec L. McEachern, Esq.

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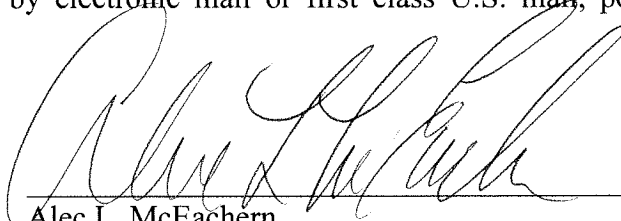
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CERTIFICATE OF SERVICE

I certify that I have this 18th day of September, 2015, provided copies of the foregoing pleading to all parties to the proceeding by electronic mail or first class U.S. mail, postage prepaid.



Alec L. McEachern