

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

Docket No. 2015-01

---

In re: )  
SEA-3, INC., )  
Request for Exemption )

---

**OBJECTION OF COUNSEL FOR THE PUBLIC TO SEA-3’S CONTESTED  
MOTION TO STRIKE TESTIMONY CONCERNING RAILROAD ISSUES**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby objects to Sea-3, Inc.’s Contested Motion to Strike Testimony Concerning Railroad Issues (the “Motion to Strike”). The Motion to Strike should be denied because the testimony and public comment letters are germane to the proceeding and admissible in accordance with RSA 541-A:33, and because the Motion to Strike is not timely.

1. Sea-3 argues that “issues concerning the railroad should be excluded because they are preempted.” Consequently, Sea-3 asks that documents and testimony that include “reference to the preempted railroad issues” should be struck from the record. Among the documents Sea-3 seeks to strike are 13 letters of public comment and 9 prefiled testimonies. Sea-3, however, has already litigated and lost the preemption argument so there is no basis for striking “reference to... railroad issues”.
2. Sea-3 is not a rail carrier and is not in the business of transportation by rail. As a result, the preemption argument is not one that it can make. *See* Sea-3, Inc. –Petition for Declaratory Order, Surface Transp. Brd., docket number FD

35853, *Decision*, dated March 17, 2015, at 6-7 (“STB Decision”). Having already had a ruling squarely against it on the same facts and virtually the same questions, Sea-3 is precluded from litigating them again here. *See Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999) (“collateral estoppel may preclude the relitigation of findings by an administrative board”); *Cutter v. Town of Durham*, 120 N.H. 110, 111 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328-29 (1979) (“Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or ‘a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.’ ...collateral estoppel precludes a plaintiff from relitigating identical issues by merely ‘switching adversaries’”). It is not the regulation of a railroad or transportation by rail for the Committee to consider the health, safety and environmental impacts of increased rail traffic in making a decision on whether to grant *Sea-3* an exemption from the Committee’s certification process. STB Decision, at 7 (“Portsmouth may apply non-discriminatory regulations to protect public health and safety, but only provided that its regulations do not have the effect of foreclosing or unduly restricting Pan Am’s ability to conduct operations ... or otherwise unreasonably burden interstate commerce.”) As the Surface Transportation Board held, Sea-3 is not a railroad and its operation is not transportation by rail. STB Decision, at 6.

3. Pursuant to RSA 541-A:33 the rules of evidence do not apply in this case. RSA 541-A:33, II (“The rules of evidence shall not apply in adjudicative proceedings.”) Thus, Sea-3’s arguments grounded in the rules of evidence carry little weight.
4. “Any oral or documentary evidence may be received....” RSA 541-A:33, II. Exclusion of irrelevant and duplicative evidence is permitted but not mandatory. Typically the Committee admits everything and “gives it the weight that it is due.” Testimony and public comment that in some way reference the railroad is not irrelevant to this proceeding. No one has asked the Committee to regulate the railroad or its transportation by rail; Counsel for the Public only asks that Sea-3 not be exempted from having to obtain a certificate of site and facility for its proposed expansion. The questions remaining about the railroad principally concern non-preempted issues regarding public health and safety involving grade crossings and, significantly, first responders, training, coordination, equipment, and overall readiness. That those issues involve a railroad is only incidental; they are primarily about propane and whether existing laws and programs adequately deal with those issues. The FRA does not fight propane fires. The FRA does not equip, train or regulate local fire departments. The FRA sets minimum standards but does not build, maintain or improve grade crossings. The FRA does not regulate releases of hazardous substances into the waters or wetlands of the State from trains, track or bridges. The FRA does not protect visitors to the Great Bay Discovery Center should a propane incident occur near that facility. These are

all local concerns about which little or no regulation by any other body that has been involved so far exists. These are issues which the Newington process did not address and instead put off for future administrative consideration.

5. At the October 14, 2015 tech session the Applicant's witnesses and the Town's witnesses made clear that little in the Town's program to permit the expansion concerned first response anywhere but Newington. Those witnesses also made clear that the Town has never inspected the facility, that Sea-3 has never had a comprehensive fire safety study of the entire facility, that all of the review so far is a high level plan sheet review, and that due to its small town size Newington's fire department would be fully dependent upon a regional mutual aid response to nearly any type of situation at Sea-3.<sup>1</sup> It was also shown that no one in the Newington Fire Department and perhaps no one in the mutual aid community has experience with fighting a propane fire, whether at the facility or on a tank car somewhere along the track, beyond the size of a small residential or business supply tank. Newington Fire Chief Head said that he did not think the regional haz mat team had seen a tank car in 10 years. Sebago Report, p. 57.

6. Thus, the evidence that Sea-3 seeks to strike as preempted is not about the railroad. It is instead about how the various communities will respond to an incident on the railroad or at the facility in situations that are not covered under the FRA , are not covered under Newington's laws or processes, and

---

<sup>1</sup> Before the Sebago Report there had never been a study of the rail operation itself. Sea-3 opposed the Study and the Town refused to do one after erroneously concluding that its ability to do so was preempted.

may not be covered anywhere else. Sea-3's Motion to Strike should be denied because it could have the effect of preventing the Committee from having a full and true disclosure of facts, necessary for the Committee to complete its mission of protecting public health and safety. *See Appeal of Sutton*, 141 N.H. 348, 351-52 (1996).

7. Moreover, the public comment should not be struck regardless of relevance because public comment is not subject to the limitation on irrelevant, immaterial, or unduly repetitious evidence.
8. While the rules of evidence do not apply in this case, in keeping with Sea-3's efforts in the Motion to Strike, those rules would dictate that Sea-3's Motion to Strike is not timely. The testimony and public comment have all been on the record for weeks and, in some cases, many months. The time to object to evidence is "at the time it is offered or the earliest opportunity after the reason for objection becomes apparent." *Broderick v. Watts*, 136 N.H. 153, 168 (1992). Moreover, the time for objecting to the jurisdiction of the Committee (which the Motion to Strike clearly implies) is "at the earliest practicable opportunity, after the party has become aware of the facts" on which the objection is based, or the objection "will be held to have been waived." *Warren v. Glynn*, 37 N.H. 340, 343 (1858). Sea-3 has been aware of its objections to the evidence and the Committee's jurisdiction to hear it and could have pursued appropriate redress with a definitive ruling from the Committee and interlocutory appeals long before now. Sea-3 has not protected its rights and has thus waived them.

Respectfully submitted this 2nd day of November 2015.

COUNSEL FOR THE PUBLIC

By his attorneys

JOSEPH A. FOSTER  
ATTORNEY GENERAL



---

Peter C.L. Roth  
Senior Assistant Attorney General  
Environmental Protection Bureau  
33 Capitol Street  
Concord, New Hampshire 03301-6397  
Tel. (603) 271-3679

**Certificate of Service**

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.



---

Peter C.L. Roth