

DM 99-078

CONSERVATION LAW FOUNDATION

Petition to Preserve Railroad Line

Order of Dismissal for Lack of Jurisdiction

O R D E R    N O.    23,306

September 27, 1999

**APPEARANCES:** Thomas F. Irwin, Esq. and Nancy L. Girard, Esq. for Conservation Law Foundation; Thomas I. Arnold III, Esq. for the City of Manchester.

**I.    PROCEDURAL HISTORY**

On May 20, 1999, the Conservation Law Foundation (CLF) filed with the New Hampshire Public Utilities Commission (Commission) a petition invoking RSA 365:24-a and seeking a determination that the removal of certain railroad tracks and associated equipment by the City of Manchester (City) should be prohibited as inconsistent with the public good. The tracks in question are located at the City's airport and have already been removed as part of the airport's ongoing runway expansion project. Accordingly, CLF also seeks an order determining that the removal of the tracks was unlawful and requiring the City to restore them.

CLF has also pressed its case in two other fora. On the same day it filed its petition with the Commission, it also petitioned the New Hampshire Department of Transportation (DOT) for a declaratory ruling under RSA 367:46-a, which authorizes DOT to investigate the "reasonableness" of the removal of certain

railroad tracks. The following day, CLF also filed a civil action in the Superior Court, seeking to enjoin the further removal of the tracks in question. The court denied the request for such relief without ruling on the merits of CLF's claims. Proceedings before DOT are ongoing, with a final hearing scheduled for November 17-18, 1999.

On July 2, 1999, the federal Surface Transportation Board (Board) entered an order approving the proposed abandonment by Boston and Maine Corporation of a 5.78-mile railroad line that includes the trackage at issue here. Pursuant to 49 CFR § 1152.29(e)(2), on August 18, 1999 Boston and Maine Corporation filed a notice with the Board that it had exercised the authority granted by the Board and had fully abandoned the line in question as of August 4, 1999.

Meantime, the Commission conducted a prehearing conference on August 17, 1999 and, pursuant to notice, heard argument concerning the issue of the Commission's jurisdiction to rule on CLF's petition. Thereafter, the parties were given an opportunity to brief the jurisdictional issue on or before September 7, 1999. The Commission also granted a previously filed request by the New Hampshire Railroad Revitalization Association for status as a limited intervener in the proceeding.

## II. POSITIONS OF THE PARTIES AND STAFF

### A. Conservation Law Foundation

Relying on legislative history, CLF contends that the regulatory scheme set out in RSA 365:24-a remains viable and was not impliedly repealed when the Legislature vested DOT with comparable functions relating to railroad lines. CLF further takes the position that its petition raises no federal preemption issues because the Board has approved abandonment of the rail line, thus ending federal jurisdiction over the matter. Additionally, CLF contends that the Commission's statutory authority to forbid the removal of a rail line necessarily implies the Commission may order restoration of a line removed without permission, lest the statute be interpreted in a manner that rewards non-compliance. CLF further takes the position that to prohibit the destruction of the rail line crossing the airport would not constitute an unconstitutional taking of property without just compensation because such an order would be consistent with the public good and would not substantially destroy the economic value of the realty. Finally, CLF urges the Commission to act because it believes that, notwithstanding wide-reaching regulatory oversight of the airport expansion project on both the federal and state levels, no other government agency has authority to conduct the inquiry described in RSA 365:24-a.

**B. City of Manchester**

At the hearing, the City of Manchester took the position that the current state of New Hampshire law reflects the Legislature's intention to divest the Commission of the responsibility for regulating railroads. The City further indicated that it wished the opportunity to conduct further research before taking a position on federal preemption. However, the City did not file a brief by the September 7, 1999 deadline set by the Commission.

**C. New Hampshire Railroad Revitalization Assoc. and Staff**

Neither the New Hampshire Railroad Revitalization Association nor Staff have taken a position on the issues raised at the prehearing conference.

**III. COMMISSION ANALYSIS**

The statute invoked by CLF provides as follows:

I. No person shall tear up and remove or cause to be torn and removed any railroad track, tie, switch or diamond or any track-related structure, except for routine or emergency maintenance and replacement, from any railroad line, including but not limited to lines which are in active service, embargoed, petitioned or to be abandoned and abandoned, but excluding private spur, industrial, and storage tracks, without notice to the commission and such notice to the public as the commission may direct. Upon receipt of such notice, the commission shall conduct a public hearing to determine whether the proposed action is consistent with the public good, and may by order forbid the proposed action.

II. Any person who violates the provisions of this section or any order of the commission issued pursuant to this section shall be guilty of a class B

felony if a natural person or guilty of a felony if any other person.

RSA 365:24-a. This provision, enacted in 1977, see 1977 N.H. Laws 598:8, formerly existed alongside a similarly worded provision that enjoined any "railroad," as opposed to any person, from the unauthorized removal of certain rail lines, see former RSA 365:24, repealed by 1989 N.H. Laws 36:2. RSA 367:46-a, also applicable to railroads as distinct from persons and vesting DOT with jurisdiction over such matters, was enacted in 1989 and is obviously the successor to former RSA 365:24.

Twenty years ago, former RSA 365:24 provided the First Circuit Court of Appeals with an occasion to consider the constitutional implications of the Commission's statutory authority over railroad abandonment and the subsequent dismantling of railroad tracks. See *In re Boston & Maine Corp.*, 596 F.2d 2 (1<sup>st</sup> Cir. 1979). The court concluded that the Commission "was without jurisdiction by virtue of federal preemption." *Id.* at 5. Specifically, the court determined that language in the then-applicable Interstate Commerce Act, former 49 U.S.C. § 1(18), vested the Interstate Commerce Commission with exclusive authority to regulate both the discontinuation of rail service and any ensuing abandonment of railroad property. See *id.* at 5-6.

Congress has since repealed the Interstate Commerce Act, abolished the Interstate Commerce Commission and replaced it

(at least for purposes relevant to the present discussion) with the Surface Transportation Board (Board). See ICC Termination Act of 1995, Pub. L. 104-88 (1999), codified in relevant part as 49 U.S.C. § 10501 *et seq.* Under the statute, the Board is explicitly vested with "exclusive" jurisdiction over, *inter alia*, "transportation by rail carriers . . . and facilities of such carriers" as well as "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." 49 U.S.C. § 10501(b) (noting that remedies provided in statute "preempt the remedies provided under . . . State law"). To our knowledge every court that has considered whether the ICC Termination Act has the same broad preemptive effect on nonfederal regulatory agencies as its predecessor has answered that question in the affirmative. See *City of Auburn v. United States*, 154 F.3d 1025, 1033 (9th Cir. 1998) (concluding that state environmental regulators had no jurisdiction over reopening of rail line); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D. Minn. 1998) (enjoining city from interfering with demolition of railroad buildings); *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288, 1296 (D. Mont. 1997) (preempting authority of Montana Public Service Commission); *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944

F.Supp. 1573, 1581 (N.D.Ga. 1996) (holding that state regulation of railroad agency closings expressly preempted). This view is by no means exclusive to federal courts. See, e.g., *25 Residents of Sevier County v. Arkansas Highway & Transp. Comm'n*, 954 S.W.2d 242, 244 (Ark. 1997) (Congress staged "preemptive strike" against state-level economic regulation of railroads including jurisdiction over agency station discontinuations); *Georgia Pub. Serv. Comm'n v. CSX Transp., Inc.*, 484 S.E.2d 799, 801-02 (Ga. App. 1997) (noting that "Congress' efforts to deregulate railroads, in part by wresting their control from the states, culminated in the ICC Termination Act"); *In re Burlington Northern R.R. Co.*, 545 N.W.2d 749, 751 (Neb. 1996) (similar); see also *Village of Ridgefield Park v. New York, Susquehanna and Western Ry. Corp.*, 724 A.2d 267, 276-77 (N.J. Super. Ct. 1999) (municipality's request for injunction against railway nuisance "a matter at least for the primary jurisdiction of the responsible agency, the [Surface Transportation Board], if not ultimately one of total federal preemption"). As the federal district court for the Northern District of Georgia noted in reviewing 49 U.S.C. § 10501(b), "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp.*, 944 F.2d at 1581. These authorities leave us convinced that, were we to assert jurisdiction under RSA 365:24-a and grant the relief

requested by CLF, a court of competent jurisdiction would conclude that our authority to do so is preempted by federal law.

In arguing to the contrary, CLF relies on the U.S. Supreme Court's decision in *Hayfield Northern R.R. Co. v. Chicago and North Western Trans. Co.*, 467 U.S. 622 (1984). At issue in *Hayfield Northern* was whether a state could exercise its traditional eminent domain power over a railway line that had been abandoned with the approval of the Interstate Commerce Commission. Noting that, absent post-abandonment conditions attached by the regulators, authorization of the abandonment brought the federal "regulatory mission to an end" under the then-applicable statute, the Court concluded that pre-emption was not a bar to an exercise of eminent domain by the state. *Id.* at 633. However, the Court went on to say, "[t]his does not mean that in the post-abandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment. *Id.* at n. 11 (citing, *inter alia*, *Boston & Maine Corp.*, 596 F.2d at 5-7). Accordingly, while we agree with CLF that federal authorization for the abandonment of the rail line in question does not somehow place the realty beyond the reach of any state regulation, *Hayfield Northern* only reinforces our view that we are without authority to undo an abandonment that has been explicitly authorized by the Surface Transportation Board.



We therefore conclude that RSA 365:24-a does not confer jurisdiction on the Commission to consider the CLF petition. We need not delineate the precise contours of our rights and obligations under the statute. It suffices to conclude that, whatever authority RSA 365:24-a vests in the Commission, it does not include the power to revisit railroad line abandonment issues that have been explicitly decided by the Surface Transportation Board. Moreover, even if preemption did not stay our hand, we are not persuaded by CLF's argument that RSA 365:24-a confers jurisdiction upon the Commission to grant the relief it seeks in this case.

CLF is requesting that the Commission order the restoration and preservation of the Manchester Airport railroad track for future rail use, including an order that the City dig a \$20 million plus tunnel under the runway. CLF argues that RSA 365:24-a implicitly authorizes the Commission to take such action and that a contrary interpretation of the statute would undermine the powers delegated to the Commission by the legislature and would essentially reward violators of the statute.

Given that the Commission's plenary jurisdiction over railroads was transferred to the Department of Transportation in 1985, see Laws of 1985, Chapter 402:2, IV, it would be improper for us to infer the authority beyond the strict letter of RSA 365:24-a, II to implement such an extensive and comprehensive plan of remediation. We have no ongoing statutory responsibility

for the general supervision of railroads. Cf. RSA 374:3 (conferring power of "general supervision of all public utilities and the plants owned, operated or controlled by the same" on Commission). Because railroads are no longer public utilities within our general jurisdiction, we do not have authority to hear and redress complaints lodged against them under Chapter 365, even if the City of Manchester could be construed as being a "railroad" for the purposes of applying the statute. We have no ratesetting jurisdiction over the railroads. We have no staff to audit or oversee railroad activities. Our only authority with respect to railroads and former railroad facilities is that contained in RSA 365:24-a, II. In this light, we are not persuaded by CLF's contention that declining to assert jurisdiction in these circumstances amounts to an abdication of responsibility in a manner that encourages non-compliance. Rather, we acknowledge that whatever role in the regulation of the state's railroads remains vested in the Commission, it is at most an extremely narrow one that does not encompass the circumstances of this case.

In light of this determination, we need not address the other issues discussed by CLF in its oral presentation or its brief.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the within Petition of the Conservation Law Foundation to preserve the railroad line on the property of the Manchester Airport is dismissed.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of September, 1999.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary