

DM 99-078

CONSERVATION LAW FOUNDATION

Petition to Preserve Railroad Line

Order Denying Motion for Rehearing

O R D E R N O. 23,349

November 22, 1999

On September 27, 1999, the Commission issued Order No. 23,306, dismissing on jurisdictional grounds the petition of Conservation Law Foundation (CLF) requesting 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 petition invoked RSA 365:24-a and concerned certain tracks that were removed by the City in connection with its project to expand the Manchester Airport.

In our order of dismissal, we concluded that our authority over the trackage in question is preempted by the relevant provisions the federal ICC Termination Act of 1995 (ICCTA), 9 U.S.C. § 10501(b). We further determined that, even if preemption did not stay our hand, we lack the authority under the statute invoked by CLF to provide the requested relief - an order requiring the restoration and preservation of the Manchester Airport railroad track for future rail use, including a directive that the City dig a \$20 million plus tunnel under the runway. In that regard, we noted that the legislature has

divested us of the kind of plenary authority over railroads that we retain over the regulated utilities of the state.

In its rehearing motion, CLF seeks to distinguish the authorities relied upon in our order by pointing out that the City is not a railroad. Thus, CLF contends, we incorrectly determined that asserting jurisdiction here under RSA 365:24-a would implicate the federal Surface Transportation Board's "exclusive" jurisdiction over "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). According to CLF, although the federal authorities have exercised their authority under section 10501(b) to permit the Boston and Maine Railroad to abandon the line in question, we can and should force the City to restore it.

In our opinion, CLF has not demonstrated good reason for rehearing. See RSA 541:3. In its rehearing motion, CLF essentially relies on its previously made arguments and restates its strongly held view that our failure to assert jurisdiction here would reward the unlawful destruction of a railroad line and encourage others to misbehave similarly. It is unnecessary to reconsider our decision regarding preemption because we have previously determined that, applying principles of statutory

construction to the applicable New Hampshire law, we lack the jurisdiction to entertain CLF's request. Accordingly, since CLF has presented no new arguments that compel a result different from that reached in our original order, its motion for rehearing will be denied.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Conservation Law Foundation for rehearing of Order No. 23,306 is DENIED.

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

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary