

Wood Pellet Facility/Manufacturing: Federal Appellate Court Addresses Surface Transportation Board Preemption Decision



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The United States Court of Appeals for the First Circuit (“Court of Appeals”) addressed in an August 6 opinion whether certain activities involving wood pellets qualified as “transportation by rail carrier” under the Interstate Commerce Commission Termination Act (“ICCTA”). See *Del Grosso v. Surface Transportation Board*, No. 17-1794, 2018 WL 3725493.

Neighbors of an Upton, Massachusetts wood pellet facility (“Facility”) argued that the ICCTA did not preempt local regulation of its “manufacturing” activities.

The ICCTA grants the Surface Transportation Board (“STB”) exclusive jurisdiction over transportation by rail carriers in the United States. The statute defines “transportation” to encompass both facilities and equipment, “related to the movement of passengers or property, or both, by rail”. Further, “transportation” includes, “services related to that movement.”

Local ordinances on laws subject to STB jurisdiction are preempted by the ICCTA.

Petitioners, Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (“Petitioners”) sought Court of Appeals review of an STB order addressing local preemption. They claimed that certain activities associated with a certain transloading Facility did not qualify as transportation by rail carrier.

The Facility subject to the petition was owned by Grafton & Upton Railroad Company (“G&U”). It is a rail-to-truck transloading facility that transloads a variety of commodities in bulk, including wood pellets. Wood pellets are used as home-heating fuel in wood-burning stoves. G&U has no facilities in the New England area.

The wood pellets are damaged in the long rail travel from the manufacturers to the facilities. About 5%-10% of the wood pellets arrive at G&U broken primarily because of the rail-transportation process. G&U created a regimen that attaches a hose to the arriving hopper cars. It sucks out the pellets, extracting the dust. After discarding the dust, the pellets are screened to separate the broken and unbroken pellets. The broken pellets are then re-pressed to create new pellets. The pellets are then placed in bags, stacked in a pelt, shrink-wrapped to keep out moisture, and moved to the staging area.

In a prior decision the Court of Appeals held the STB must determine whether the vacuuming, screening, bagging, and palletizing facilitated the transloading of pellets from the rail cars to the trucks was solely done for an unrelated purpose.

The Court of Appeals in its subsequent August 6th opinion declined to review the conclusions STB reached on remand.

The Petitioners had argued that bagging, palletizing, shrink-wrapping, vacuuming, screening, and repelletizing are terms related to the manufacture of wood pellets. The Court of Appeals disagreed. It concluded these activities do not change the nature or physical composition of pellets being shipped in bulk. Further, they do not produce a different product from arrival.

The Petitioners also attempted to argue that the activities added value to the wood pellets. However, the fact that an activity adds value to the consumer was deemed to not exclude it from constituting transportation. Such activities were held to not create a new product. Instead they restored the product to its original condition.

The Court of Appeals ruled these activities constitute transportation. As a result, the ICCTA preempted any state and local zoning laws.

A [copy of the opinion](#) can be found here.