UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION TO ENJOIN TAKING AND ENFORCEMENT OF CONSERVATION COMMISSION ORDER

The defendants, the Town of Hopedale, the Hopedale Select Board and its members, and the Hopedale Conservation Commission and its members (collectively "Hopedale" or the "Town"), submit this consolidated opposition to the Grafton & Upton Railroad Company *et al.*'s (collectively "GURR's") motions to enjoin Hopedale's exercise of eminent domain power over 130.18 acres of forestland ("the Forestland"), and to enjoin Hopedale's enforcement of a Conservation Commission Order ("Con. Comm. Order") that GURR cease and desist from working in a protected area of the Forestland near the Mill River.

The motions for preliminary injunction fail at the threshold. This Court does not have subject matter jurisdiction over Counts I and VI of the Verified Complaint ("Complaint"), the

only claims on which GURR bases its motions for injunctive relief. Those two Counts, as denoted in their headings, Complaint at pp. 18, 23, are based on preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101 *et seq*. But as GURR acknowledges, ICCTA vests exclusive jurisdiction over such claims with the Surface Transportation Board ("STB"), and expressly states that "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." 49 U.S.C. § 10501(b). As the First Circuit has recognized, "nothing suggests that Congress intended to create rights for railroads apart from the STB statutory scheme." *Boston & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 18-19 (1st Cir. 2003). There is therefore no basis for federal jurisdiction over GURR's claims here. *Infra* pp. 7 to 9.

But even if GURR could state an affirmative federal claim in this Court under ICCTA, GURR's motion for injunctive relief fails. GURR flat out ignores its ability to seek to invalidate the taking under G.L. c. 79, never attempts to argue that it has inadequate remedies at law, and has therefore failed to meet its burden of demonstrating irreparable harm. Once Hopedale takes the property, GURR could defend against the taking on preemption grounds in state court. G.L. c. 79, § 18. GURR could also petition the STB to seek the same result. 5 U.S.C. § 554(e). As important, Hopedale will not make any changes to the Forestland while GURR challenges the taking. Affidavit of Diana Schindler ("Schindler Aff."), ¶¶ 3-7. And even once this litigation is concluded, Hopedale must preserve the land for conservation purposes under Article 97. *Id.* ¶¶ 3-4. A mere transfer of title to the Forestland, which will not result in any physical changes, and which is subject to potential invalidation under G.L. c. 79 or an STB proceeding, does not constitute irreparable harm. *Infra* pp. 9 to 13.

Nor does GURR have a likelihood of success on the merits. GURR must show that the

taking would result in unreasonable interference with its rail operations, but the Special Town Meeting authorization explicitly forbade Hopedale from taking any property that GURR uses for its rail operations. GURR argues that its virtually complete destruction of the Forestland, and its newly-hatched future plans for every square inch of the site, somehow justify the relief it seeks, but it fails to come forward with any evidence about the likelihood of those plans coming to fruition. Perhaps this is because GURR dramatically expanded its proposed development on July 8, 2022, only days before filing its Complaint, and since then has refused to provide the Town access to the Forestland so the Town could assess whether GURR's alleged plans for the Forestland are feasible. Affidavit of David S. Mackey ("Mackey Aff.") ¶¶ 4-8, Ex. A. And even if those future plans were likely, GURR fails to introduce specific facts that show each building would be "integrally related" to its ability to provide rail operations. GURR cannot show that ICCTA would preempt the taking here. *Infra* pp. 13 to 19.

The last two factors, the balance of the hardships and the public interest, also favor denying the injunction. Denial of the injunction will result in a transfer of title, which GURR can readily seek to invalidate. The Forestland will remain undisturbed in the interim. On the other hand, GURR makes no attempts to address the harm to the Town if the injunction is granted, simply repeating its argument on its likelihood of success, that "the Town has no right to take GURR's land." Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction to Enjoin Taking ("GURR Taking Memorandum") at 20. But the Town is already suffering concrete harm. An injunction would enable GURR to complete its devastation of the Forestland, including "harvesting" any remaining trees on the property (which GURR says will be complete by the end of August), and then grading and preparing the land for what it claims will be a massive rail facility. This will not just harm, but obliterate, the Town's interest in conserving the

Forestland long before this case reaches final judgment. Denying the motions for preliminary injunction is, in this case, the best means to preserve the *status quo*. *Infra* pp. 19 to 20.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a core and routine exercise of municipal authority: a town's exercise of its eminent domain powers under G.L. c. 79 to acquire land for conservation purposes. This dispute poses a wrinkle, in that the property to be acquired is purportedly *owned* by a railroad, though not yet *used* by it for railroad purposes. Despite the fact that Town Meeting did not authorize Hopedale to take any of the Forestland currently in use for railroad operations, GURR asserts that ICCTA preempts Hopedale's ability to take any of GURR's land. Complaint ¶ 96.

GURR purports to hold title to the Forestland, but that ownership is currently the subject of ongoing litigation in state courts. *See Town of Hopedale v. Trustees of 140 Realty Trust*, Case No. 2022-P-0433 (Mass. App. Ct.); *Reilly v. Arcudi*, Case No. 2022-P-0314 (Mass. App. Ct.); *see also* Complaint ¶¶ 37-54. GURR acquired nominal title to the Forestland through what Superior Court Judge Karen Goodwin described as a "flagrant violation" of state law. *See* Memorandum and Order on Motion to Preserve Status Quo, *Reilly v. Town of Hopedale*, Case No. 2185-cv-00238, Dkt. No. 72 (attached hereto as Ex. A, at p. 4). Title to the Forestland is by no means settled. Despite these ongoing disputes—or, perhaps, precisely because of these disputes—GURR has been "working feverishly" to clear 100 acres of Forestland, which protects Hopedale's water supply, in order to build a railyard. GURR Taking Memorandum at 4; Affidavit of Becca Solomon ("Solomon Aff.") ¶¶ 2-19.

On June 21, 2022, Hopedale's Select Board met and voted to call a Special Town Meeting. Complaint ¶ 94. The Special Town Meeting Warrant sought authorization for a taking of "up to 130.18 acres, more or less, located at 364 West Street," for the purpose of "land conservation," such that the acquisition was being made "to maintain and preserve said property

and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission." *See* Town of Hopedale Special Town Meeting Warrant, ECF 1-4, at p. 1; Complaint ¶ 65. The article explicitly limited the Board from taking title "to any portions of the Property that are currently in use by the Railroad for railroad operations purposes or transloading facilities." *Id.*

The Special Town Meeting met on July 11, 2022, and overwhelmingly voted, with several hundred citizens in favor and only two against,[1] to authorize the Select Board to spend up to $3.9 million to acquire land at 364 West Street through eminent domain. Complaint ¶ 70. On July 14, 2022, the Select Board noticed a meeting for July 19, to consider and vote on the proposed order of taking as authorized by Special Town Meeting. *See* ECF 1-6; Complaint ¶ 72. Also on July 14, the Hopedale Conservation Commission (through its Chair) sent GURR an Enforcement Order, which included a cease-and-desist order for violating state and local wetlands laws in an attempt to limit, by whatever means possible, the further destruction of 364 West Street. Complaint ¶ 125; ECF 1-4.

On July 18, GURR filed its Complaint, in which GURR alleges that it "anticipates" that its "business will continue to grow year after year" (Complaint at ¶ 20), with rosy "projections" consistent with "pre-pandemic state economic estimates" (*id.* at ¶ 21). It has "agreements" that are "being finalized" to service unnamed "current and new customers that are in need of transloading of products." *Id*. at ¶ 33. GURR speculates, "[u]pon information and belief," that an industry trade group is working with the State Legislature and Governor's office to create certain rail partnerships which may, if enacted, be a good fit for future development of the

[1] *See* https://townhallstreams.com/stream.php?location_id=56&id=46514.

property. *Id*. at ¶ 32.

In support of its future plans, GURR repeatedly claims it will need all of the Forestland for its proposed development. As evidence, GURR points to a "preliminary plan" that was revised on July 8, 2022, just days before GURR filed this Complaint and two weeks after Special Town Meeting regarding the taking was announced. *See* Affidavit of Michael Milanoski, ECF 6 ("Milanoski Aff.") ¶ 62; ECF 1-2 (original draft date of June 2021 and revision date of July 8, 2022 in lower right-hand corner).

Hopedale officials had never seen or heard of such a massive proposal and had previously understood the development to be of a much more limited nature. *See* Affidavit of Edward J. Burt ("Burt Aff.") ¶ 17. That understanding came from GURR's own submissions to the Massachusetts Department of Transportation for funding, where GURR attached a proposed site plan with half the number of buildings and a dramatically smaller footprint. Burt Aff. ¶ 17 and Ex. 5. GURR does not acknowledge this timeline or the dramatically different proposals in its papers. Instead, GURR includes a series of photographs of other facilities in other towns, showing what will happen to an area of Hopedale that the Town has identified as critical to its current and future water supply. *See* Affidavit of Michael Milanoski, ECF 30 ("Second Milanoski Aff.") ¶¶ 10-17; Solomon Aff. ¶¶ 3-19; Burt Aff. ¶¶ 3-16. GURR boasts that it has been working "feverishly" to accomplish this recently devised plan, mostly by clear-cutting (or "harvesting" in GURR's words) the Forestland. GURR Taking Memorandum at 4.

On July 19, the Court (Saylor, J.) held a hearing on the Motions for Temporary Restraining Order, and granted the motion to restrain the taking and denied the motion to restrain the enforcement of the Con. Comm. Order. ECF 18. Judge Saylor recognized that the case involves "complex issues of the intersection of federal and state and local laws—powers that

necessarily can't be easily reconciled," that the case raised "complex questions…as to which the answers are, by no means, clear to me," and that this Court "is going to have to think long and hard about this and how to address the competing statutory framework and by implication the competing values." July 19, 2022 Hearing Transcript (attached hereto as Ex. B) at 28, 31 and 33. He characterized the relief that he provided as, "by its nature, very temporary, very preliminary," and noted that he would "leave it" to this Court "to sort out these issues, which, again, as I see, are complex." *Id.* at 34-35.

ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Over GURR's Claims.

GURR's motions fail because it cannot establish subject matter jurisdiction. GURR's motions for preliminary injunction solely rely on Counts I and VI of its Complaint, which claim that Hopedale's planned taking and the Con. Comm. Order are preempted by ICCTA, 49 U.S.C. § 10501(b). GURR Taking Memorandum at 6-7; *see* Complaint, Count I at p. 18 ("ICA Preemption 49 U.S.C. § 10101 *et seq.*); Count VI at p. 23 (same). GURR cannot identify any jurisdictional basis for Counts I and VI. Section 10501(b)'s very text reflects that the STB has "exclusive" jurisdiction over claims brought under ICCTA. Section 10501(b) does not create, and in fact disclaims, any cause of action in federal court. In *Board of the Selectmen of the Town of Grafton v. Grafton & Upton Railroad Co.*, 2013 WL 2285913, at *10 (D. Mass. 2013), Judge Hillman analyzed this same statutory section in a case involving this same railroad and was "unable to formulate a single scenario where Section 10501(b) would provide an actionable cause of action giving rise to complete preemption." *Id.* at *10. He explained that § 10501(b) "confers exclusive jurisdiction on the STB" for such claims, but "does not create a coextensive federal cause of action analogous to the regulations at issue." *Id*; *see Town of Ayer*, 330 F.3d at 18-19 ("[N]othing suggests that Congress intended to create rights for railroads apart from the

STB statutory scheme."); *Fayard v. Northeast Vehicle Services, LLC.*, 533 F.3d 42, 49 (1st Cir. 2008) (rejecting railroad's attempt to remove state nuisance claim to federal court under ICCTA). GURR's jurisdictional basis is self-defeating: it touts the STB's exclusive jurisdiction, GURR Taking Memorandum at 6, but nevertheless grounds its motions on a non-existent, federal cause of action under ICCTA. *See Town of Grafton*, 2013 WL 2285913, at *10 & n.6.

Counts I and VI of GURR's Complaint also reference the Declaratory Judgment Act, Complaint at pp. 18, 23, but that statute does not create federal jurisdiction. *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 (1st Cir. 1996) ("[T]he Act neither provides nor denies a jurisdictional basis for actions under federal law, but merely defines the scope of available declaratory relief.") (citation and quotation omitted). GURR seeks to use a defense (i.e., preemption) to make an affirmative claim under the Declaratory Judgment Act, which it cannot do. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 329 (5th Cir. 2008) ("A plaintiff cannot evade the well-pleaded complaint rule by using the declaratory judgment remedy to recast what are in essence merely anticipated or potential federal defenses as affirmative claims for relief under federal law."). Similarly, GURR cannot establish jurisdiction by styling Counts I and VI as "preemption" claims. Complaint ¶¶ 14, 98, 139. The Supremacy Clause is simply a "rule of decision" and therefore "silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-25 (2015). Finally, GURR cites §§ 1331 and 1337(a) as potential jurisdictional hooks, Complaint ¶¶ 14-15, but the more specific language of § 10501 governs this dispute. *Pejepscot Industrial Park, Inc.* v. *Maine Central R. Co.*, 215 F.3d 195, 200 n.3 (1st Cir. 2000) (rejecting jurisdiction under the federal question statute, § 1331, or the

Commerce Clause, § 1337, when ICCTA applies).[2]

To be clear, the Town does not agree that § 10501(b) governs this dispute. The proposed taking does not interfere with railroad operations, and to the extent GURR claims it does, GURR has a remedy at law under G.L. c. 79, § 18, to seek to invalidate the taking, where GURR could raise preemption. *Fayard*, 533 F.3d at 49 ("Where the state claim is left intact, federal interests are still largely protected: nothing prevents a preemption defense from being asserted, albeit in state courts."). The STB has approved of this exact procedural scenario. *See Grafton & Upton R. Co.*, Petition for Declaratory Order, FD 36518, 2021 WL 5122255, at *2 (S.T.B. Nov. 3, 2021) (agreeing, in a case involving this same railroad, that state courts are the proper place to decide state property law issues). Under either scenario, federal jurisdiction is unavailable: if § 10501(b) governs this dispute, as GURR asserts, then jurisdiction and remedies lie exclusively with the STB; if § 10501(b) does not govern this dispute, then this is an eminent domain challenge that must be brought in state court. GURR cannot establish subject matter jurisdiction and so the Court should deny the preliminary injunction.

B. <u>GURR Cannot Meet Its Burden to Show Irreparable Harm.</u>

As the First Circuit recently explained, a party "cannot demonstrate irreparable harm without showing that they have inadequate remedies at law." *Together Employees* v. *Mass. General Brigham Inc.*, 32 F.4th 82, 85 (1st Cir. 2022). This is in keeping with the longstanding

[2] GURR does not reference equity jurisdiction, but it is the only other potential jurisdictional basis. *See Ex Parte Young*, 209 U.S. 123 (1908). However, GURR cannot rely on this theory either, because that doctrine is a "judge-made remedy" that is "subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327. Section 10501(b) of the ICCTA provides such an express limitation: the STB has "exclusive" jurisdiction over claims about "transportation" by railroads and the "remedies provided" by ICCTA are "exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). Because GURR seeks relief under § 10501, it must bring its claim in the STB and is limited to ICCTA remedies.

rule that courts cannot create a remedy through equity when one is available through the law. *Infusaid Corp. v. Intermedis Infusaid, Inc.*, 739 F.2d 661, 668 (1st Cir. 1984). GURR has made no effort to show that it has inadequate remedies at law.

In a proceeding under G.L. c. 79, § 18, GURR can assert ICCTA preemption as a defense to invalidate the taking. *See Fayard*, 533 F.3d at 49; *Eastside Community Rail, LLC*, Acquisition and Operation Exemption, Docket No. FD 35692, 2022 WL 696819, at *3 (S.T.B. Mar. 7, 2022) (railroad's argument "in the state appellate court that federal preemption under [§ 10501(b)] bars the state courts from ruling on state property law issues concerning [railroad property] . . . is clearly incorrect"); *Grafton & Upton R.R. Co.*, Petition for Declaratory Order, Docket No. FD 36518, 2021 WL 5122255, at *2 and n.4 (S.T.B. Nov. 3, 2021) (rejecting GURR's argument that preemption issues associated with property owner's efforts to preserve easements over GURR's tracks cannot be heard in state court). GURR fails to mention the remedies available under G.L. c. 79, much less explain why its remedial structure is inadequate. *See Abuzahra* v. *City of Cambridge*, 486 Mass. 818, 823 (2021) (citing c. 79, § 18 as the mechanism for a property owner to invalidate a taking); *Whitehouse* v. *Town of Sherborn*, 11 Mass. App. Ct. 668, 673 (1981) (noting that c. 79 provides an "exclusive statutory remedy for takings made thereunder"). If the Town takes the Forestland under c. 79, GURR can seek to invalidate the taking under the same statute. In fact, c. 79 provides a way for GURR to have the dispute resolved "with as little delay as possible." G.L. c. 79, § 34 (allowing for requests for a speedy trial). In the alternative, of course, GURR could seek relief in the STB.

The First Circuit has addressed this precise issue. *In Porto Rico Tel. Co. v. Puerto Rico Telecomms. Co.*, 189 F.2d 39 (1st Cir. 1951), the plaintiff brought suit in federal court seeking an injunction against a taking because it violated federal law. The First Circuit reasoned that

"federal courts are particularly cautious not to intervene by injunction, except upon a clear showing of irreparable injury, where, as here, the exercise of sovereign power by a state or territory is involved in the proceeding sought to be enjoined . . . These principles have been specifically applied to condemnation proceedings." *Id.* at 41. The Court ultimately denied injunctive relief, concluding that Puerto Rico law provided "a plain, adequate and complete remedy," *id.* at 44, and that an injunction was inappropriate. *See N. Cal. Power Agency* v. *Grace Geothermal Corp.*, 469 U.S. 1306 (1984) (expressing skepticism that plaintiff could show irreparable injury from taking where it "had a plain and adequate remedy at law through the process offered under California's eminent domain laws"); *Goadby* v. *Phila. Elec. Co.*, 639 F.2d 117, 122-123 (3d Cir. 1981) (reversing preliminary injunction against taking of right of way for high voltage transmission lines, on the grounds that state law provided adequate means to challenge taking); *Brinkmann v. Town of Southold, N.Y.*, 2021 WL 4295398, at *4 (E.D.N.Y. Sept. 20, 2021) (denying preliminary injunction against eminent domain for lack of irreparable harm where plaintiff failed to avail itself of remedies available under state condemnation law).

Courts have been especially reluctant to grant injunctive relief for takings, where, as here, there is an adequate remedy available in state court, and the governmental entity taking the property has no immediate plans to conduct work on or alter the property *See, e.g., Stand Together Against Neighborhood Decay, Inc.* v. *Bd. of Estimate of City of N.Y.*, 690 F. Supp. 1192, 1199-1200 (E.D.N.Y. 1988) (denying motion to enjoin condemnation for failure to show irreparable harm prior to commencement of construction, because "title...can be returned whence it came by order of the Court."); *Action for Rational Transit* v. *West Side Highway Project*, 517 F. Supp. 1342 (S.D.N.Y. 1981) (denying motion to enjoin taking for failure to show irreparable harm, as plaintiffs may prevail on the merits of challenge to taking "prior to the commencement

of actual construction").

Following the taking here, Hopedale will take no steps to disturb the property until all challenges to the taking have been fully litigated. Schindler Aff. ¶¶ 3-7. Even following GURR's exhaustion of legal remedies, Hopedale has committed to preserve the site for conservation purposes, leaving it in its natural state, and cannot alter this intention without complying with Article 97, that is by holding another Town Meeting *and* obtaining permission from two thirds of the Massachusetts Legislature. Under these circumstances, GURR cannot show irreparable harm from a transfer of title when GURR has ample means to challenge the taking under G.L. c. 79.

Despite the availability of an adequate remedy and the fact that the site will not be touched if the Town owns it, GURR argues that the taking would cause it "to lose incalculable revenues, customer relationships, and financing." GURR Taking Memorandum at 17. The Complaint is laden with messages of hope fit for an investment brochure, not measures of irreparable harm necessary to strip Hopedale of its governmental power of eminent domain. GURR "anticipates" its "business will continue to grow year after year" and its "projections" are consistent with the "expectations and estimates" of Massachusetts. Complaint ¶¶ 20-21. It claims, without any specifics, to have "agreements" that are "being finalized" to service unnamed "current and new customers that are in need of transloading of products." *Id*. ¶ 33. In perhaps its most speculative allegation, GURR supports the claim of future railroad success at the Site by alleging, "[u]pon information and belief," that an industry trade group is working with the State Legislature and Governor's office to create certain rail partnerships which may, if enacted, be a good fit for future development of the property. *Id*. ¶ 32.

GURR argues that this financial harm "would no doubt be very substantial and

immeasurable" and that it "*may* lose existing customers and would lose *unknowable* revenue from current and new customers." GURR Taking Memorandum at 18 (emphasis added). "Future speculative harms do not warrant the extraordinary relief of a preliminary injunction." *Reading Blue Mtn. & N.R.R. Co.* v. *UGI Utils., Inc.*, Case No. 3:11-cv-2182, 2012 WL 251960 at *4 (M.D. Pa. Jan. 25, 2012). GURR cannot rely on hypothetical, vague harms; it must introduce facts and evidence about this specific property. *Franks Inv. Co.* v. *Union Pac. R.R. Co.*, 593 F.3d 404, 415 (5th Cir. 2010) (rejecting preemption under ICCTA because the railroad made generalized claims about impact of railroad crossings, rather than introducing evidence about the four specific crossings at issue). Here, GURR alleges that economic harms can be irreparable "where they threaten the existence of the movant's business or where they reflect incalculable losses of revenue and harm to goodwill," but then does not introduce any facts that show the existence of its business is threatened or that it would be impossible to calculate losses to revenue or goodwill.

The District Court in *Stand Together* rejected the plaintiffs' speculative claims of irreparable harm from a taking in similar circumstances. *Stand Together*, 690 F. Supp. at 1199. As that court recognized, even if the taking prevented the plaintiffs from expanding their stores, opening restaurants, or building office buildings, they could "regain title" and then "be free to resume their deferred dreams at a cost of nothing more than lost profits and increased costs." *Id.* Such economic damages do not equal irreparable harm. *Id.* And the transfer of title that precipitates such harms is not an irreparable harm when courts have "the power, quite literally, to repair it" by invalidating the taking. *Id.* GURR has an adequate remedy under c. 79, any harms from delay in its developments are purely economic, and it has therefore failed to show irreparable harm sufficient to justify injunctive relief.

C. GURR Cannot Show ICCTA Likely Preempts This Taking.

GURR cannot show that it is likely to succeed on the merits of its preemption claim. This alone should result in the denial of its motions. *See, e.g.*, *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012). GURR argues that the Town's planned taking would "completely displace" GURR from the Forestland and is therefore preempted. GURR Taking Memorandum at 11-14. But GURR fails to apply the correct legal standards, does not acknowledge the explicit limitations of the potential taking, and fails to explain how ICCTA applies to this hypothetical proposed development.

The First Circuit has emphasized that "not all activities connected with rail transportation are considered 'transportation' under ICCTA," and that the statute's preemptive reach "does not encompass everything touching on railroads." *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir. 2015). Preempted activities "are all related to the physical movement of 'passengers or property'." *Id.* at 119. Relevant here, ICCTA preempts eminent domain proceedings "if they have the effect of unreasonably burdening or interfering with rail transportation." *Franks*, 593 F.3d at 414; *Bayou Dechene Reservoir Comm'n v. Union Pac. R.R Corp.*, Case No. 09-0429, 2009 WL 1604658, *2 (W.D. La. June 8, 2009) (collecting decisions from courts and the STB for this standard). ICCTA does not categorically preempt eminent domain actions[3]; "interference with rail transportation must always be demonstrated." *Id.* The STB has been crystal clear: "neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible." *Lincoln Lumber Co.*, Petition for Declaratory Order, FD 34915, 2007 WL 2299735, at *2-3 (S.T.B. Aug. 10, 2007) (rejecting

[3] GURR asserts categorical preemption based on the acreage being taken, GURR Taking Memorandum at 10, but does not cite any cases or any evidence in the record for this conclusion. As stated herein, courts and the STB have used an "as applied" standard.

preemption for "routine, non-conflicting uses" on railroad property); *see Benton v. CSX Transp.*, Case No. 19-109, 2021 WL 3099502, at *3 (E.D. Pa. July 21, 2021) (noting that "particularly expansive claims" of ICCTA preemption "have been criticized and rejected by courts").

Special Town Meeting explicitly limited its eminent domain authorization to conform to this standard. ECF 1-4 (forbidding the Board from taking any land that is "currently in use by the Railroad for railroad operations purposes or transloading facilities"). Curiously, GURR fails to acknowledge this limitation and does not argue about the true nature of the proposed taking. Instead, GURR repeatedly asserts that the taking will "completely displace" the railroad from the Forestland. GURR Taking Memorandum at 11-14. In fact, the Town is explicitly forbidden from doing anything of the sort. GURR will continue operating its current track and will continue to own all the property it needs for current rail operations and transloading facilities.

GURR focuses much of its argument on the number of acres being taken. GURR Taking Memorandum at 11-14. Preemption does not depend on the number of acres or what percentage of the property is being taken. Instead, the "preemption inquiry focuses on the degree to which the challenged regulation burdens rail transportation." *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 103 (2d Cir. 2009) (citation omitted); *see also Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85 (2012) (collecting cases for the rule that ICCTA focuses on regulations that restrict the operation of a railroad, while it permits laws with a more "remote or incidental" effect). If GURR can operate its tracks "as usual," then it cannot show unreasonable interference and thus cannot show a likelihood of success on the merits. *Reading Blue Mtn.*, 2012 WL 251960, at *2-3; *Dist. of Columbia v. 109,205.5 Sq. Feet of Land*, Case No. Civ A 05-202 (RMU), 2005 WL 975745, at *3-4 (D.D.C. Apr. 21, 2005) (rejecting preemption for easement over railroad property because the railroad maintained access to signal equipment and for

maintenance). GURR simply fails to carry its burden on this point. *Franks*, 593 F.3d at 415 (rejecting preemption where the railroad only showed that "all railroad crossings affect rail transportation" without showing that the four specific crossings in that case unreasonably interfere with its rail operations). It points to no evidence that, given the explicit limitation by the Special Town Meeting, the Town will be unreasonably interfering with its operations.

GURR relies on *Norfolk* and focuses on the 18.86 acres taken in that case. GURR Taking Memorandum at 11-12; *Norfolk S. Ry. Corp.*, Petition for Declaratory Relief, FD 35196, 2010 WL 691256 (S.T.B. Feb. 26, 2010). The acreage did not matter to the STB, which properly focused on how the city's taking would interfere with the railroad's operations. *Id.* at *5. Similarly, GURR cites *Buffalo Southern Railroad*, but the municipality there sought to take "the entire parcel of land," which included a track spur and transloading facilities, all of which Hopedale is explicitly forbidden from taking. GURR Taking Memorandum at 13-14; *Buffalo S. R.R. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006). GURR must show unreasonable interference and its references to acreage are simply irrelevant.

GURR next argues that it has future plans that should preempt any taking, GURR Taking Memorandum at 11, 15, but GURR must also show that these plans are likely to come to fruition. *See Girard*, 134 Ohio St. 3d at 91 (noting that while it is "acceptable and sometimes necessary" to consider a railroad's future plans, "it is also necessary to consider whether it is likely that the railway company's plans will come to fruition" (citation omitted)). GURR relies heavily on two STB decisions, *Norfolk* and *Lincoln*, to justify its "future preemption" argument. The court in *Girard* succinctly explained why those cases do not save GURR: "Both *Lincoln* and *Norfolk S.* stand for the principle that a locality cannot justify an eminent-domain action over a rail line or right-of-way merely because the line is not currently being used. This principle does not extend

to an undeveloped parcel of land containing no rail line and no right-of-way." 134 Ohio St. 3d at 91.

Indeed, if GURR's reading were correct, a railroad could deprive any state or local government entity of its eminent domain authority simply by claiming it has its sights set on future development. And that is precisely what GURR does here. GURR offers a site plan with 22 proposed buildings, without any description of which companies will fill those buildings, if those companies would be part of the railroad operations, or how likely it is that those buildings will even be built. Under GURR's argument, it could propose plans, receive preemption, and then be immune from local regulation even if that property is never actually developed.

Further, it is unclear how long GURR has even had these alleged plans. A tiny notation at the bottom right-hand corner of the site plan says that it was drafted on May 21, 2021, and then revised on July 8, 2022. ECF 1-2; Second Milanoski Affidavit at p. 21. The July 8 revision came two-and-a-half weeks after the Board voted to call Special Town Meeting. GURR introduces no evidence about when it first proposed these plans or how realistic they are.[4] A prior version of this plan showed a much more limited undertaking, which was itself merely a hypothetical development. Given that the revision came shortly before GURR filed its Complaint, and the paucity of evidence to support the likelihood that these plans will actually happen, GURR cannot use these speculative, litigation-fueled plans to preempt a taking.

Even if GURR shows it will construct these buildings, that does not end the inquiry. GURR must also show that the activities in these buildings would be "integrally related" to railroad operations. *See Hi Tech Trans, LLC*, Petition for Declaratory Relief, FD 34192, 2002

[4] The Town requested that GURR allow its appraisers to visit the Forestland, to see if this amount of land is buildable, but GURR has refused the request. *See* Mackey Aff., ¶¶ 4-8, Ex. A.

WL 31595417, at *3 (S.T.B. Nov. 20, 2002). These "integrally related" activities must be part of GURR's "ability to provide transportation services" and cannot just be some activity that economically benefits from being near a railroad. *Id.*; *Grafton & Upton R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, 178-79 (D. Mass. 2006). GURR was also the plaintiff in *Town of Milford* and argued there that the ICCTA preempted regulation of a company that planned to move its operations to GURR's railyard. 417 F. Supp. 2d at 176. Both the STB and Judge Gorton rejected that argument. Judge Gorton closed his decision by pointing out that a company is not suddenly covered by ICCTA preemption simply by moving its operations from elsewhere to a railyard. *Id.* at 178-79; *Grosso*, 804 F.3d at 118-19 ("In particular, the ICCTA does not preempt all state and local regulation of activities that has any efficiency-increasing relationship to rail transportation."). If an entity does not benefit from preemption elsewhere in the Commonwealth, it does not receive such preemption simply by moving to GURR's property.

Similarly, GURR has made no showing that any of its prospective tenants would have activities "integrally related" to GURR's ability to provide rail transportation services. Mr. Milanoski mentions a number of new customers that allegedly want transloading services, listing the commodities to be transloaded: beer/wine, steel, lumber, aggregates (gravel, sand, minerals), appliances, plastics, biofuels, wood pellets, debris, and FDA-approved liquids. Second Milanoski Aff. ¶ 20. GURR does not, however, explain why these materials (which do not merit ICCTA preemption on their own) are "integrally related" to rail transportation operations just because they are offloaded and stored near a train. *See Grosso*, 804 F.3d at 118-19 ("Thus, manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term 'transportation'."). GURR needs more than speculation and argument—it needs "specific facts"

to show that any taking would interfere with rail operations. *See Reading Blue Mtn.*, 2012 WL 251960, at *2-3.

GURR has a steep hill to climb. It must show unreasonable interference with its rail operations, but it does so by relying on future plans that are speculative, without any evidence that those proposed activities would be integrally related to GURR's ability to provide rail transportation services. GURR has not done so and its motions should be denied.

D. The Balance of Hardship and Public Interest Tip Decidedly in Hopedale's Favor.

The last two factors, balance of the hardships and the public interest, merge when the government is the party opposing a preliminary injunction. *Does 1-6 v. Mills*, 16 F.4th 20, 37 (1st Cir. 2021). GURR ignores the harms to Hopedale, GURR Taking Memorandum at 20, simply claiming "the Town has no right to take GURR's land." *Id.* This hardly satisfies GURR's burden to show the balance of hardship tips in its favor. In fact the hardship to the Town from the grant of the injunction will be extreme. The most obvious harm, of course, is the near-complete devastation of the Forestland. *See Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."). Nothing reflects this better than the photos of the "harvesting" of the forest attached to Mr. Milanoski's affidavit. Second Milanoski Aff. ¶ 22, pp. 17-19. That work will apparently be complete by the end of August. *Id.* In addition, Hopedale has outlined the serious risks to its public water supply caused by GURR's development. Burt Aff. ¶ 3; Solomon Aff. ¶¶ 7-9. The Forestland is hydrologically connected to Hopedale's public water supply, and contributes to and protects that water supply. Burt Aff. ¶ 3. Industrial development like GURR's leads to less groundwater and greater risk of contamination. *Id.* Diminished public water supply already threatens development in the Town. *Id.* ¶ 4. Significantly, the loss of the

Forestland will vastly increase the stormwater burden on the Town, resulting, according to the EPA, in approximately $1 million in additional cost to the Town to address contamination. *Id.* ¶ 13. Clear-cutting trees and further industrial development will result in water quality changes to Hopedale, an increased risk of flooding and drought, and threats to Hopedale's water supply and infrastructure. Solomon Aff. ¶¶ 7-18. Finally, with respect to the public interest, the citizens of Hopedale have spoken. They have voted overwhelmingly, with only two dissenting votes, *supra* p. 5, n.1, to acquire the Forestland. *See Hagopian v. Dunlap*, 480 F. Supp. 3d, 288, 299-300 (D. Mass. 2020) (finding injunctive relief contrary to the will of a majority of voters "would undermine rather than safeguard the most relevant public interest").

In contrast, as described above, the hardship to GURR from denial of the injunction would result, at worst, in a delay of its plans. GURR fails to allege, much less introduce evidence, that any of its alleged contracts with new customers will not be available after this dispute is resolved. To the contrary, GURR alleges that rail transportation will continue to grow, so it could resume its development once this case is resolved because the property would remain undisturbed by Hopedale. The balance of hardships overwhelmingly favors denying the motions for a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should deny GURR's motions. GURR fails to establish jurisdiction or carry its burden on any prong of the preliminary injunction standard to enjoin the Town from taking the Forestland or enforcing the Con. Comm. Order.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

By their attorneys,

/s/ David S. Mackey

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Dated: August 4, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 4th day of August, 2022.

/s/ Sean Grammel
Sean Grammel

Exhibit A

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION NO. 21CV00238

ELIZABETH REILLY and others,[1]

Plaintiff,

v.

TOWN OF HOPEDALE and others,[2]

Defendants.

MEMORANDUM AND ORDER ON MOTION TO PRESERVE STATUS QUO

Before the court is the plaintiffs' motion to "preserve the status quo" and prevent the defendants, Grafton & Upton Railroad ("Railroad") and related persons and entities from removing trees and otherwise altering property designated as protected forestland. Considering the motion as one for injunctive relief pending appeal under Mass. R. Civ. P. 629(c), the court reluctantly **DENIES** the motion.

BACKGROUND

The court briefly summarizes the factual and procedural background of this dispute about 130.18 acres of protected forestland. At some point before the events giving rise to this lawsuit, the City of Hopedale ("Hopedale" or "City") designated and taxed 130.18 acres owned by One Hundred-Forty Realty Trust ("Trust") as forestland ("Forestland") under G. L. c. 61 ("Chapter 61"). Chapter 61 provides a tax benefit to an owner of forest land. In return for the benefit, the

[1] Carol J. Hall, Donald D. Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Shannon W. Fleming, and Janice Doyle.
[2] Louis J. Arcudi, III, Brian Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust.

Entered and Copies Mailed 5/16/22

owner must offer the municipality in which the land is located the right of first refusal before selling the land for residential, industrial, or commercial purposes. G. L. c. 61, § 8. The municipality's right of first refusal may only be assigned to a non-profit entity that agrees to maintain at least 70 percent of the land as forestland. *Id.*

On July 9, 2020, the Trust notified Hopedale it intended to sell to the Railroad 155.24 acres of land, which included the Forestland as well as 25.06 acres of wetlands.[3] On October 21, 2020, Hopedale notified the Railroad and the Trust that it was moving forward with its option to buy the Forestland. Three days later, Hopedale convened a town meeting, and residents voted to appropriate the money necessary to exercise the option. On November 2, 2020, Hopedale recorded in the county's land records notice of its decision to exercise its right of first refusal and buy the Forestland.

In the meantime, the Railroad purported to buy the Trust's "beneficial interest" in the Forestland and began clearing trees. Hopedale sued the Railroad in Land Court, seeking to stop the clearing and effectuate its acquisition of the Forestland. In February 2021, Hopedale and the Railroad settled the Land Court litigation with an agreement for Hopedale to buy approximately 40 acres of the Forestland for $587,500 and waive its Chapter 61 rights. On March 3, 2021, the plaintiffs, more than ten taxpaying citizens of Hopedale ("Taxpayers"), challenged the settlement in the instant lawsuit. The Taxpayers also sought a preliminary injunction to stop the Railroad from clearing trees, which the court allowed.

On November 4, 2021, the court decided cross-motions for judgment on the pleadings. The court decided the first count in favor of the Taxpayers, holding that Hopedale lacked authority to buy the smaller piece of land because the purchase was not approved by City voters.

[3] The wetlands portion of the property is not relevant to this decision.

The court decided in favor of the Railroad and Hopedale on the second count, concluding that the Taxpayers did not have standing to compel Hopedale to exercise its Chapter 61 rights. The court also found for Hopedale on the request in the third count for a declaratory judgment that the Forestland was protected parkland. The court enjoined further clearing by the Railroad for 60 days to give Hopedale time to decide whether it would (1) seek town meeting approval to acquire the smaller parcel; or (2) take further steps to exercise its purchase option for the entire parcel. The Taxpayers appealed the court's decision. The appeal is pending.

The following relevant actions have taken place between November 4, 2021, and today:

- Voters at town meeting rejected the City's proposal to buy the smaller piece of land.
- The Land Court denied the City's motion to reopen the judgment of dismissal filed after the parties settled the case. The Land Court also denied the City's motion to enjoin further clearing and rejected the Taxpayer's effort to intervene in the case.
- The City appealed the Land Court decision and asked the Court of Appeals to enjoin the Railroad from cutting down trees. The Court of Appeals denied the City's motion. The City has withdrawn its appeal of the Land Court decision.[4]
- The Railroad has continued to clear trees.

DISCUSSION

A court addressing a request for injunctive relief pending appeal must balance the risk of irreparable harm to the parties in light of each party's likelihood of success on the merits. See *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 710 (1990). See also *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 606, 616–17 (1980).

[4]The Taxpayers have said they plan to appeal the Land Court's denial of their motion to intervene.

See also *Spence v. Reeder*, 382 Mass. 398, 422 (1981) (in emergency eviction procedure, "the issuance or denial of a stay of execution pending appeal ... is a discretionary one for the judge"). "Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction." *Packaging Industries*, 380 Mass. at 617, n.12. In addition, in certain cases such as this one, the court must also consider "the risk of harm to the public interest." *Brookline v. Goldstein*, 388 Mass. 443, 447, 447 N.E.2d 641 (1983).

The court begins its discussion with the Railroad's acquisition of a "beneficial interest" in the Forestland. In this court's view, this action by the Railroad was a flagrant violation of Chapter 61. However, the Taxpayers' lawsuit does not put that issue before the court. Rather, the court must decide whether the Taxpayers have a likelihood of succeeding in their challenge to the legality of the Settlement Agreement. Unfortunately, the court's answer to that question is "no."

First, while G. L. c. 40, § 53 gives the Taxpayer's standing to sue to prevent the illegal expenditure of money,[5] it does not give them the right to compel the town to exercise its option to buy the Forestland. Second, the court is not persuaded that the Taxpayers have a likelihood of proving that the Settlement Agreement was an illegal assignment of the City's Chapter 61 rights. Rather, by settling the case, the City decided to forgo its Chapter 61 option, which the statute plainly allows it to do. G. L. c. 61, § 8. Cf. *Russell v. Town of Canton*, 361 Mass. 727, 731 (1972) (a town meeting vote cannot compel a municipality to take property by eminent domain). Since the City is not required to exercise the option, even though authorized to do so, a mandamus action cannot succeed.

[5] Indeed, the Taxpayers were successful in that effort in Count 1 of their complaint.

It is true that a lesser showing of likelihood of success is required when, as here, the irreparable harm is great. See *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (court conducts "sliding scale analysis" where "the predicted harm and the likelihood of success on the merits [are] juxtaposed and weighed in tandem"). However, there must be some likelihood of success on the merits. The court cannot in good conscience find that likelihood of success here.

In the court's view, the actions of the Railroad were wrong. In addition, there appears to be grounds to rescind the Settlement Agreement. This case, however, does not present an opportunity for this court to address those issues.

ORDER

For the above reasons, it is **ORDERED THAT** the plaintiff's Motion for a Preliminary Injunction is **DENIED**.

Dated: May 5, 2022

Karen Goodwin
Associate Justice, Superior Court

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, et al., Plaintiffs, v. TOWN OF HOPEDALE, et al, Defendants.	Civil Action No. 4:22-cv-40080-ADB

BEFORE THE HONORABLE F. DENNIS SAYLOR, CHIEF DISTRICT JUDGE

MOTION HEARING BY VIDEOCONFERENCE

Tuesday, July 19, 2022
11:01 a.m.

John J. Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts

Robert W. Paschal, RMR, CRR
Official Court Reporter
rwp.reporter@gmail.com

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P R O C E E D I N G S

(In open court at 11:01 a.m.)

THE DEPUTY CLERK: Court is now in session in the matter of Grafton & Upton Railroad Company, et al., versus Town of Hopedale, et al., Civil Action Number 22-40080.

Participants are reminded that photographing, recording, and rebroadcasting of this hearing is prohibited and may result in sanction.

Would counsel please identify themselves for the record, starting with the plaintiff.

MR. KEAVANY: Good morning, Your Honor. Donald Keavany on behalf of Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, in their capacities as trustees of One Hundred Forty Realty Trust, and I'm here with my colleague Drew DiCenzo.

THE COURT: Good morning.

MR. MACKEY: Good morning, Your Honor. David Mackey. I'm here with my colleagues, Mina Makarious and Sean Grammel from Anderson & Kreiger. We are representing the Town of Hopedale, its select board, and the conservation commission.

THE COURT: All right. Good morning.

MR. MACKEY: Good morning.

THE COURT: All right. This is a hearing on plaintiffs' emergency motion for a temporary restraining

to cease its tree-clearing on the site while it presumably challenges the validity of the taking under Chapter 79. During that period of time, the Town will not make any alterations on the property.

If the railroad ultimately prevails on this remedy provided to it under state law Chapter 79 to invalidate the taking, all the railroad will have suffered is delay, and that does not justify a temporary restraining order.

Your Honor, one other thing I would like to say, if -- if, for whatever reason, the Court did decide to grant the TRO against the taking, then to preserve, to truly preserve the status quo, it should at the same time enter an order preventing the railroad from continuing to work on the property pending the resolution of the case.

If the Court didn't make relief reciprocal in that fashion, then the railroad would conclude its deforestation of the property; and at the end of the day, depending on how the Chapter 79 case goes, this would be property that the Town acquires, but property that's been irreparably damaged by the railroad's activities.

So thank you, Your Honor, for your --

THE COURT: All right.

MR. MACKEY: -- attention.

THE COURT: All right. Thank you.

All right. I'm going to rule. Again, I'm an

emergency judge asked to address an emergency motion, and I'm going to only address the request for a temporary restraining order. And the basic concept here is whether I should restrain the Hopedale select board from taking some action tonight or at any point in the next 14 days that cannot be undone as a practical matter before a preliminary injunction hearing can be held, at which the issues can be considered in more detail and hopefully with a better informed judge.

This is a complex dispute, as I see it, involving an unusual legal framework, one that certainly I don't deal with on a regular basis, if at all. I've not had the benefit to read the relevant cases or to think about this with any depth at this stage. And, obviously, there's quite a bit of history here extending over multiple years and including prior litigation.

Again, at first blush, at least as I see it, it does involve complex issues of the intersection of federal and state and local laws -- powers that can't necessarily be easily reconciled -- the regulation of interstate commerce and rail transportation against the interests of local community and -- communities in preserving open space and conservation land and similar values.

It is a four-part standard. As counsel have recognized, I'm to consider the likelihood of success on the merits, whether immediate irreparable harm will occur if the

TRO is not issued, the balance of equities between the parties, and the public interest.

To begin, and maybe to state the obvious, we need transportation facilities, including rail facilities, which are, generally speaking, more energy efficient than trucking, which is the realistic alternative. NIMBY-ism -- that is, "not in my backyard" -- NIMBY-ism is a real issue nationwide and one of the reasons that our transportation system is so broken compared to, let's say, that of Europe or other countries.

And at the same time, obviously, open space is precious. It's dwindling. It's also environmentally important. Forestland is particularly precious. You know, a forest that took 50 or 100 or 200 years to grow can be destroyed in a matter of hours. And I am deeply sympathetic to the preservation of conservation land and open space and the issues that -- collateral issues such as increased traffic that such a facility like this would create.

There's no easy answer to any of this. It is not clear to me that everything the Town has done here is completely appropriate. I'm not sure how you can do a taking without an appraisal, if that's the facts.

The extent of the Town's ability to take land like this by eminent domain is not clear to me. A pipeline easement is one thing. I -- it seems to me that it would be

obviously permissible, or a grade crossing.

It seems equally obvious to me that a town can't simply take rail property to interfere with ongoing rail operations. The Town of Sharon or Attleboro couldn't condemn the main line between Boston and Providence in order to stop rail operations, no matter how good their motives were.

And the question here is more complicated: Can the Town limit a railroad effectively to its footprint as it existed in 1873, or whatever, and prevent it from ever expanded or expanded to some degree? Railroads obviously are not limited to mainline operations. They need yards. And in the modern world in which most shipping is down by container, they need offloading facilities.

I don't pretend to know the answer to any of those questions. And with time, the answer may be clear to me, but right now I don't have that time or have not had that time to think about it clearly.

So there is at least an issue here. And to be clear, the Town is not trying to mitigate the impact. It's trying to stop it altogether. And this all may be a question of degree. The Town has some powers with railroad property, but, obviously, limited powers. I think everyone agrees they couldn't take the main line just to prevent all rail operations.

As to whether money damages can adequately

compensate the railroad, that too is unclear to me. As a general proposition, the property is considered unique, and often money damages are not adequate to compensate the property owner.

This is an usual type of property. We're not taking about building a gas station or a Walmart. It's a railroad that is heavily regulated by the federal government. And there are, again, complex questions here that -- as to the which the answers are, by no means, clear to me.

And it's also unclear to me whether, because of this peculiar context, whether the value is limited to the land itself -- that is, the land as it normally would be appraised for eminent domain purposes -- or does the future income stream of the railroad from this facility come into play? I don't have any idea what the answer to that question is.

As far as irreparable harm, what the railroad says is that there's going to be a vote tonight. The railroad is assuming that it's going to be unfavorable to it. As I hear what they said, the issue is not the vote so much as the subsequent recording of any taking. They say, at that point, the railroad no longer owns the property, and that is the immediate irreparable harm.

Among the difficult issues here, as Mr. Mackey has pointed out, what exactly is it that I would need to do to

preserve the status quo to keep things on hold pending a hearing on the merits?

Preventing the railroad from doing further work on the property, may be a good idea, but at least in the posture of the case now, and the case is 24 hours old, there is no cross-claim or cross-motion to stop that. And it's not clear to me I would have the power to do that, at least in the current posture of the case.

So it seems to me that, under the circumstances here -- and, again, this is a TRO. This is a temporary restraining order situation, not a preliminary injunction situation, pending the availability of the assigned district judge to hold whatever hearing may be necessary, and that may be the form of a mini trial with witnesses and experts and the benefit of some careful thinking about the laws of interstate commerce regulation of railroads, the ability of local governments to take properties by eminent domains, how those powers may clash here.

It seems to me that there is a sufficient likelihood of success on the merits and a sufficient issue of immediate irreparable harm that some temporary relief may be appropriate, but I'm going to make it as limited as possible.

And what I'm going to do -- and this is for 14 days at max -- is I'm going to restrain the Town from recording anything that reflects a taking by eminent domain pending a

preliminary injunction hearing on the merits. And, again, that hearing, you know, could be Monday of next week. I mean, this is a very temporary thing.

The railroad says that that's the moment at which everything changes dramatically, and that may well be true. I don't know. I'm not prejudging the case. I don't know if it's good or bad that I'm not going to be the judge who is ultimately going to decide this, because there are a variety of difficult issues here.

But whoever -- well, Judge Burroughs is going to have to resolve this -- is going to have to think long and hard about this and how to address the competing statutory framework and by implication the competing values.

And for what it's worth, I think the balance of equities are more or less equal. And it's not at all clear to me what the public interest is here. The public interest, obviously, weighs or points in both directions. As I said, open space is -- is precious. Forestland is precious. That -- obviously, there is a public interest in preserving open land.

And at the same time, there is a public interest in transportation facilities, which, again, cannot be frozen. Some expansion of transportation facilities is inevitable in a modern society. Or maybe, to put an exclamation point on that, all of us buy products that are manufactured in other

countries, like Asia, and that come to us in containers. And that has to be offloaded somewhere. It doesn't mean it has to be offloaded in Hopedale, but obviously there's a public interest in modern transportation facilities.

So that's what I'm going to do. I'm not going to issue any kind of written opinion. I'm going to make this as narrow and as temporary as possible. I'm not going to restrain the vote that the board of select -- or the select board, rather, can do whatever it does tonight.

And if the vote is unfavorable to the railroad and if they vote to make a taking pending the expiration of my TRO by its own terms or a preliminary injunction pointing in a different direction, that taking cannot be recorded at the registry of deeds. And that's how the status quo will be preserved.

If, in fact, the Town counterclaims and seeks to prevent further work on the property to preserve whatever trees or whatever it is remains on the property, again, that may be a good idea, but as I see it right now, I don't have the power to do that in the current posture of the case. But, obviously, that would preserve the status quo as well if it comes to that.

So that's what I'm going to do. And, again, this is, by its nature, very temporary, very preliminary. And I'll leave it to Judge Burroughs to sort out these issues,

which, again, as I see, are complex. All right?

Mr. Keavany, anything further in that regard?

MR. KEAVANY: No, Your Honor, other than we did brief the second TRO with respect to a Con Comm enforcement order that was served on us on Thursday as well. I won't spend any time on that, other than I can certainly rest on the papers.

But it clearly falls under the air STB case, and it's a preclearance requirement that they're imposing, which is, again, preempted by the ICCTA. And so their meeting tonight, I'm not asking you to enjoin their meeting, but if they're going to attempt -- I do think a TRO is appropriate, if they take, to enjoin any enforcement of that order that was served on us on Thursday.

THE COURT: All right. That's not clear to me. I think the way to preserve that status quo is to leave that where it is.

MR. KEAVANY: Thank you.

THE COURT: And, again, Judge Burroughs can take that up in due course.

Mr. Mackey?

MR. MACKEY: No, Your Honor, nothing further. Thank you.

THE COURT: All right. Thank you. It -- under emergency circumstances, it was well briefed and argued. And

we will stand in recess. Thank you.

(Court in recess at 11:56 a.m.)