

SERVICE DATE – JULY 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> On remand from a decision of the U.S. Court of Appeals for the First Circuit, the Board determines that certain activities performed at a rail-truck transloading facility in Upton, Mass., are services related to the movement of property by rail and thus are within the statutory definition of “transportation” in 49 U.S.C. § 10102(9).

Decided: July 28, 2017

SUMMARY

In 49 U.S.C. § 10501(a), Congress has given the Board jurisdiction over “transportation by rail carrier.” Section 10501(b) expressly provides that, where the Board has jurisdiction over “transportation by rail carriers,” which includes the carriers’ rail facilities, 49 U.S.C. § 10102(9)(A), that jurisdiction is “exclusive,” and state and local laws are generally preempted.

This case involves the operation of a rail facility in Upton, Mass. (Upton Facility), used to transload wood pellets from rail cars to trucks. Believing that the Board’s exclusive jurisdiction over rail transportation preempted its zoning laws, the Town of Upton declined to apply those laws and other local regulations to certain activities performed at the Upton Facility, a bulk transloading facility, by Grafton Upton Railcare (GU Railcare) on behalf of the Grafton and Upton Railroad (G&U), a licensed rail carrier. Diana Del Grosso and six other Upton residents living near the rail facility<sup>2</sup> (Petitioners) asked the Board to declare that its jurisdiction did not preempt the application of the town’s ordinances to G&U’s wood pellet operations. On December 5, 2014, the Board issued a decision in this docket (December 2014 Decision) finding that certain disputed activities at the Upton Facility—the vacuuming, screening, bagging, and palletizing of the wood pellets—constituted transportation-related activities on behalf of G&U

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba.

that came within the Board’s jurisdiction. The Board reasoned that these activities facilitated rail transportation by allowing the pellets to be transported more efficiently in bulk form in rail hopper cars, rather than in bags in boxcars. Having concluded that the activities in question constituted “transportation,” the Board therefore found that preemption applied under 49 U.S.C. § 10501(b).<sup>3</sup> Petitioners filed a petition for judicial review in the United States Court of Appeals for the First Circuit.

To come within the Board’s jurisdiction, an activity must be both part of rail transportation and performed by, or under the auspices of, a rail carrier.<sup>4</sup> On judicial review, the court affirmed the Board’s decision that the Upton Facility was operated by or on behalf of a “rail carrier.” Del Grosso v. STB, 804 F.3d 110, 113 (1st Cir. 2015) (Del Grosso). However, the court determined that the Board had applied the wrong standard in concluding that the activities under review were part of “transportation.” Id. at 118-119. Parsing the statutory language defining “transportation” at 49 U.S.C. 10102(9) and applying it to the facts of this case, the court stated that the Board should have focused on whether the activities at the Upton facility facilitated the transloading—i.e., the physical movement of the pellets from rail car to truck—rather than on the efficiency of the rail movement generally. Id. at 119. Accordingly, the court remanded the matter to the Board to reexamine the transportation issue.

On remand, the parties submitted additional evidence and argument, including argument on whether repelletizing and shrink-wrapping, activities not discussed in the original proceeding, qualified as “transportation” under 49 U.S.C. § 10102(9). As explained below, the Board concludes that all the disputed activities in question are “transportation.” Bagging, palletizing, and shrink-wrapping satisfy the court’s transloading test: they facilitate the transfer of the pellets from the hopper rail cars to the trucks. The other services—vacuuming, screening, and repelletizing—clearly meet the statutory definition of rail “transportation” because they remedy the problems of dust and broken pellets caused by the rail movement and restore the product to its original condition when the rail journey began. Therefore, these activities are “related to” the movement of the pellets by rail.<sup>5</sup>

## BACKGROUND

G&U, a licensed rail carrier that began operating in 1873, operates a 16.5-mile rail line between North Grafton, Mass., and Milford, Mass., which connects at each end with lines owned

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<sup>3</sup> The parties made no arguments concerning whether preemption would apply if the activities constituted transportation by rail carrier.

<sup>4</sup> See N.Y. & Atl. Ry. v. STB, 635 F.3d 66 (2d Cir. 2011); Hi Tech Trans, LLC—Pet. for Declaratory Order—Newark, N.J., FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003). A “rail carrier” is “a person providing common carrier railroad transportation for compensation . . . .” 49 U.S.C. § 10102(5).

<sup>5</sup> “Transportation” includes services “related to” the movement of passengers or property, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange. 49 U.S.C. § 10102(9)(B).

by another rail carrier, CSX Transportation, Inc. Over several years starting in 2008, G&U expanded an existing rail yard at Upton, Mass. into a larger rail-truck transload facility, i.e., the Upton Facility. (Reply 2-3.)

Among the commodities that G&U transloads at the Upton Facility is wood pellets. Wood pellets are used in other countries to generate electricity. In New England, they are used by residential customers in stoves for home heating purposes. Wood pellets are manufactured from various forms of wood, such as roundwood, chips, and sawdust. (Reply 4.) The roundwood is chipped into small uniform pieces and combined with the chips and sawdust. (*Id.*) The material is dried to a uniform moisture content, pulverized to a uniform fiber mass, steamed, and pressed through a die to form uniform-sized pellets. (*Id.*) After cooling, the newly formed pellets are moved through a screening process to remove dust and pieces of pellets that have not been fully formed, all of which is referred to as “fines.” (*Id.* at 5.) The fines are recycled through the foregoing process. According to the undisputed evidence in the record, wood pellets loaded into rail hopper cars in bulk form at the production site typically contain less than 1% fines, and, in some cases, much less. (*Id.*, V.S. Bassett 2 (“[A]t the end of the manufacturing process, wood pellets loaded into railcars at the production site, in bulk form, typically contain less than 1% of fines.”); Reply, V.S. Roecker 2 (“When the fully manufactured pellets are loaded into rail hopper cars for shipment, almost all of the fines have been removed, but approximately 0.1-0.2% of the pellets are fines as measured at the outlet of the screening process.”).)

G&U serves as the last rail link in the transportation chain that delivers wood pellets from their manufacturing origins in places like Georgia and the Pacific Northwest to the retail market in Massachusetts. Two-thirds of the wood pellets that are shipped to the Upton Facility for transloading are manufactured by two producers: Pinnacle Renewable Energy (Pinnacle), located in British Columbia, Canada, and Georgia Biomass, LLC, located in Georgia. (Reply, V.S. Polselli 2.) These manufacturers export most of their wood pellet production in bulk to Europe and Asia for electricity generation. (Reply 5.) Georgia Biomass only sells its pellets in bulk by rail; it has no facilities for bagging. (*Id.* at 5-6.) Pinnacle sells almost all of the pellets it produces to foreign customers for use in the generation of electricity. Pinnacle sells only about 1% of its pellet production in bags, and these bagged pellets are shipped only short distances to destinations in the Pacific Northwest. (*Id.* at 6.)

The normal cross-country handling of hopper cars in railroad switching yards and the vibration and pounding of hopper cars moving over thousands of miles of track causes some pellets to degrade or break into smaller pieces. (Reply, V.S. Polselli 3.) Moreover, the friction from the jostling of the rail cars creates dust. Between about 5% and 10% of the wood pellets that arrive in Upton are broken, primarily as a result of the rail transportation. (Reply, V.S. Polselli 3.) Broken pellets and wood dust decrease the efficiency of the wood pellets for the ultimate residential users and can cause damage to home pellet-burning stoves. (*Id.* at 4.)

G&U attaches a vacuum hose to the bottom of the rail cars upon arrival at the Upton Facility. The hose sucks the wood pellets through a system that removes dust created by the rail transit and delivers them to silos, where they are temporarily stored. Any dust that is collected is disposed of as waste. Broken pellets are separated by screens from unbroken pellets, pressed together or “repelletized” to reform pellets by running them through a small die, and moved by

conveyor to the silos. (*Id.* at 3-4.)<sup>6</sup> When ready for further movement, the pellets are moved from the silos by conveyor, automatically bagged in 40-pound bags, and stacked 50 bags to a pallet, which are then shrink-wrapped. The pallets are then moved to a staging area where they are stored until they are transloaded onto trucks for final delivery to the customer, such as Home Depot. (Supp. Reply, V.S. Polselli 2-3., Feb. 25, 2013.)

#### The December 2014 Decision.

While the Upton Facility was under construction, the Town of Upton considered whether federal preemption under § 10501(b) barred the application of its zoning ordinances to the facility. The Town obtained a legal opinion from its counsel, which concluded that the activities at the facility, including the handling of the wood pellets, were exempt from local regulation under § 10501(b). The Town declined to seek a Board determination on the issue.

On August 1, 2012, however, Petitioners filed a petition for declaratory order requesting that the Board find that certain operations conducted at the Upton Facility were not part of G&U's rail transportation and therefore not subject to federal preemption. On January 24, 2013, the Board instituted a declaratory order proceeding, and the parties subsequently submitted their evidence and arguments.

In the December 2014 Decision, slip op. at 1, 5-8, the Board issued a declaratory order concluding that the vacuuming, screening, bagging, and palletizing of the wood pellets were "transportation" and not "manufacturing" because those activities "facilitate[d]" such transportation by making it "more efficient." The Board explained that the transloading activities allowed G&U to transport the wood pellets in hopper cars rather than boxcars, thereby accommodating twenty more tons of pellets per rail car. *Id.* at 6. The Board also distinguished the activities in question from manufacturing and commercial transactions because the activities did not "change [the] nature of the product," even though some of the activities, such as bagging, "[might] produce some value to the consumer." *Id.* Thus, based on the record, the Board concluded that the activities at the Upton Facility constitute "transportation" by "rail carrier" qualifying for federal preemption under § 10501(b). *Id.* at 5.<sup>7</sup>

#### The Court's Decision.

On judicial review of the December 2014 Decision in Del Grosso, the court determined that the Board had relied on an erroneous standard in concluding that the activities at the Upton Facility were a part of "transportation." Del Grosso, 804 F.3d at 113. The court reasoned that, rather than focusing on whether the wood pellet activities enhanced the efficiency of the rail movement, the Board should have focused on whether those activities facilitated the physical

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<sup>6</sup> The Upton Facility does not have the type of drying, pulverizing, or steaming equipment used by Pinnacle or Georgia Biomass in their manufacturing plants. (Reply, V.S. Polselli 3.)

<sup>7</sup> The Board also determined that GU Railcare, the party operating the Upton Facility, was performing transloading activities on behalf of G&U. *Id.* at 8.

movement of “passengers or property,” or more specifically here, the transfer of the pellets from rail to truck. Id. at 119. Thus, the court held that, under the circumstances, a remand was required “to determine whether the vacuuming, screening, bagging, and palletizing facilitated the transloading of the pellets from the railcars to the trucks or was done solely for another, unrelated purpose.” Id. at 120.<sup>8</sup>

#### Proceedings on Remand.

In their opening statement on remand, Petitioners assert that the activities at the Upton Facility constitute manufacturing and are unrelated to rail transportation. (Opening 7.) Petitioners disagree with the Board’s conclusion in the December 2014 Decision, slip op. at 6, that “[t]he activities at the Upton Facility facilitate the movement of wood pellets by rail and do not change them into another product.” (Opening 7-8.) Petitioners note that, before processing, the wood pellets are shipped in bulk and inaccessible to the retail marketplace. (Id. at 9.) Therefore, Petitioners assert, after the activities that take place at the Upton Facility, the pellets are a different product from that arriving in bulk. (Id.) Petitioners also argue that the bagging process at the Upton Facility, especially repelletization, adds value to the product because, without repelletization, the broken pieces would be screened and discarded instead of being pressed together, or repelletized, and made into a more marketable consumer product. (Id. at 8.) According to Petitioners, repelletization is an industry-standard step that occurs during wood pellet processing, and by any definition “constitutes manufacturing, assembly, and fabrication.” (Id.)

Petitioners also contend that the activities at the Upton Facility are not integrally related to the physical movement of the goods. (Id. at 5.) Petitioners identify 11 facilities that bag and palletize wood pellets remote from a rail siding. (Id. at 6.) Petitioners argue that, if rail transportation is not essential to the operation of those 11 facilities, it cannot be essential to the operation of the Upton Facility. (Id. at 6-7.) Petitioners note that the pellets (or the raw materials to make pellets) can be delivered to a facility by truck, barge, or train, and then trucked or shipped to a location outside the yard (if arriving by rail) for manufacturing. (Id. at 7.) Without an “integral” relation to rail transportation, Petitioners maintain that G&U’s wood pellet facility in Upton is simply manufacturing subject to local zoning regulations. (Id.)

G&U filed a reply, asserting that all of the “pellet bagging activities”—temporary storage, vacuuming, screening, repelletizing, bagging and palletizing the pellets—that take place at the Upton Facility are a part of transportation because they are services that facilitate the physical transfer of the pellets from rail hopper cars to the trucks provided by the local distributors and are not being done solely for another unrelated purpose.<sup>9</sup> (Reply 10-11.) G&U

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<sup>8</sup> The court rejected Petitioners’ claim that the Board erred in not considering the facility’s “repelletization” process—a matter not raised before the Board. The court took no view on Petitioners’ argument, but noted that it would not preclude the Board from considering this issue on remand. Id.

<sup>9</sup> Petitioners do not dispute that temporary storage is part of “transportation.” See Pets. Reb. 3, Jan. 9, 2017

argues that “transportation” includes more than simply the movement of railcars or transferring commodities from one mode to another. It notes that activities such as sampling commodities, testing for quality and moisture content, weighing, mixing, and blending, spot repair of vehicles and installation of tires and batteries come within the Board’s jurisdiction—and are not considered “manufacturing”—if the facts show that the activities are part of “transportation by rail carrier” because they facilitate the physical transfer of the commodities from railcars to trucks.<sup>10</sup> (*Id.* at 13-24.)

Petitioners filed a rebuttal, claiming that the activities at the Upton Facility are not essential to the physical transfer of the pellets from rail cars to trucks. G&U filed a surreply arguing that the Board’s procedures generally do not allow parties to file a “reply to a reply” and that Petitioners’ rebuttal should be rejected. The Board will accept G&U’s surreply filing in the interest of compiling a more complete record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “(i)n the interest of compiling a full record”).

## DISCUSSION AND CONCLUSIONS

The issue presented now is whether six activities occurring at the Upton Facility—vacuuming, screening, repelletizing, bagging, palletizing, and shrink-wrapping—fall within the statutory definition of rail “transportation.” In establishing the Board’s jurisdiction, Congress defined the term “transportation” broadly to include: (1) “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” 49 U.S.C. § 10102(9)(A); and (2) services “related to” that movement, including “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers or property,” 49 U.S.C. § 10102(9)(B).<sup>11</sup> Whether a particular activity constitutes transportation by rail carrier under § 10501(b) is a case-by-case, fact-specific determination. Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015).

As discussed below, the Board concludes that all of the activities at issue fall within the expansive definition of “transportation” in § 10102(9). Specifically, the record here shows that the bagging, palletizing, and shrink-wrapping at the Upton Facility facilitate the physical

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<sup>10</sup> G&U cites Borough of Riverdale—Petition for Declaratory Order, FD 33466 (STB served Sept. 9, 1999); New England Transrail—Constr., Acquis. & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797 (STB served July 10, 2007); and Green Mountain Railroad v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

<sup>11</sup> Congress has long recognized a need to regulate rail operations at the federal level to avoid state and local regulation from interfering with interstate commerce. City of Auburn v. United States, 154 F.3d 1025, 1029 (9<sup>th</sup> Cir. 1998). Indeed, “transportation” has been defined broadly to encompass handling and services related to the physical movement of property by rail since the Hepburn Act of 1906, Pub. L. No. 59-337, § 1, 34 Stat. 584. The statutory wording changed slightly in 1978, but the change was not intended to be substantive. Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466.

movement of the pellets from the rail cars to the trucks and thus satisfy the First Circuit's test for what constitutes transloading. Those activities also qualify as "handling," which § 10102(9)(B) expressly identifies as a "service related to [the rail] movement" that is part of "transportation." Moreover, under § 10102(9)(B), "transportation" activities are not limited to transloading, but rather encompass "services related to [the rail] movement." The vacuuming, screening, and repelletizing performed at the Upton Facility satisfy the statutory definition because they remedy problems (i.e., wood dust and broken pellets) caused directly by the movement of the pellets by rail to the Upton Facility. Based on the record here, none of the activities at issue are "manufacturing and commercial transactions," which are not embraced within the term "transportation." New England Transrail, FD 34797, slip op. at 10.

### Bagging, Palletizing, and Shrink-Wrapping.

The First Circuit read the Board's December 2014 Decision as suggesting that any activities at rail facilities that had "any efficiency-increasing relationship to rail transportation" would be subject to § 10501(b) preemption and found that rationale too broad. Del Grosso, 804 F.3d at 118-19. The court noted that, under the statute, "transloading typically involves 'receipt, . . . storage, handling, and interchange' or 'transfer in transit' of goods." Id. at 118. Therefore, the court directed the Board, in making its jurisdictional determination on remand, to focus on whether the activities at the Upton Facility "facilitated the transloading of the pellets from the railcars to the trucks or was done solely for another, unrelated purpose." Del Grosso, 804 F.3d 120. "Facilitate" means "to make easier" or "to help bring about."<sup>12</sup>

Here, the record shows that the bagging, palletizing, and shrink-wrapping of the bagged pellets make it easier to load the pellets onto the trucks. As G&U explains, wood pellet distributors, the customers of G&U, arrange for the movement of the pellets in bulk rail hopper cars from manufacturing plants located in the Pacific Northwest and Georgia to G&U's bulk transloading facility. (Reply 5.) When the pellets arrive in bulk in rail hopper cars, they cannot be directly transloaded into the trucks that arrive at the yard to pick them up. (Reply, V.S. Polselli 2 ("[T]o pick up the wood pellets with their trucks (whether flatbed or trailer vans), the distributors need the wood pellets to be bagged and shrink-wrapped on pallets.")). Accordingly, the pellets are moved from the rail cars to storage silos and then loaded in 40-pound bags that are ultimately placed on pallets that are shrink-wrapped to keep out moisture. (Reply 8.) The pallets are held temporarily until the arrival of flatbed trucks or trailer vans provided by distributors to pick up and deliver the wood pellets. (Id. at 6, 8, 12.) Because the wood pellets are shipped by rail in bulk and the mode of truck transport secured by distributors (i.e., flatbed trucks or trailer

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<sup>12</sup> <https://www.merriam-webster.com/dictionary/facilitate>; see also <http://www.dictionary.com/browse/facilitate> ("to make easier or less difficult; help forward (an action, a process, etc.)"); <https://en.oxforddictionaries.com/definition/facilitate> ("Make (an action or process) easy or easier"). The First Circuit's analysis is consistent with the consensus definition of facilitate. See Del Grosso, 804 F.3d 119-120 (noting that the holding in New England Transrail that baling and wrapping are considered transportation because they permit the carrier to use a wider variety of rail cars for the movement of goods is not contrary to the court's transloading test).

vans) cannot accommodate the wood pellets in bulk form, the bagging, palletizing, and shrink-wrapping of the wood pellets come within the broad term rail “transportation.” These activities allow the pellets to be transported in hopper cars, “facilitate[] the transloading of the pellets from the railcars to the trucks” that G&U’s customers use, and are not done “solely for another, unrelated purpose.” Del Grosso, 804 F.3d at 120. The First Circuit expressly “affirm[ed] the Board’s decision that the facility was operated by a ‘rail carrier.’” Id. at 113.

Petitioners argue that the activities performed at the wood pellet facility are not “essential” to the provision of rail service. Noting that there are facilities that bag and palletize wood pellets remote from a rail siding, Petitioners argue that conducting those same activities at the Upton Facility cannot facilitate rail operations and must be “manufacturing” rather than “transportation.” (Opening 5-7.) In further support of their claim that bagging constitutes manufacturing, Petitioners refer to a business plan for a proposed wood pellet plant, which they say, identifies bagging as a part of the manufacturing process. (Rebuttal 3.)

The Board disagrees. First, “[a]n activity may be ‘integrally related’ to rail transportation if it facilitates rail transportation even if it is not absolutely essential for the cargo to be transported by rail.” December 2014 Decision at 6; see also New England Transrail, slip op. at 13-14 (baling and wrapping municipal solid waste at a transload facility found to be part of “transportation” even though some municipal solid waste arrived at the facility in intermodal containers). Second, many activities that occur at rail facilities also can occur at non-rail facilities. See, e.g., N.Y. & Atl. Ry. (affirming a Board decision finding a facility performing rail activities was outside the Board’s jurisdiction). Petitioners’ logic would render all such activities outside Board jurisdiction, even where, as here, those activities are provided by a rail carrier and clearly support rail operations. Third, although the business plan cited by Petitioners on rebuttal identifies bagging as part of the “warehouse/delivery” segment of the overall pellet manufacturing process, the Board does not find this dispositive, as the record in this proceeding also contains verified statements from wood pellet manufacturers stating that bagging is not part of the manufacturing process. (Supp. Reply, V.S. Murray 3, Feb. 25, 2013 (“Bagging is not part of the manufacturing process.”); Reply, V.S. Middleton 3, Aug. 21, 2012 (“The manufacturing process has been fully completed . . . when the [unbagged] pellets leave British Columbia.”).) Although bagging may be necessary for the pellets to be sold at retail, “the fact that the activity adds value to the consumer . . . does not bar it from being transportation.” Del Grosso, 804 F.3d at 120 n.5. Here, bagging is also part of the transload process because it is necessary to transfer the pellets to the trucks that the distributors use to transport the pellets from the Upton Facility.<sup>13</sup>

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<sup>13</sup> Petitioners also contend that bagging is part of the wood pellet manufacturing process because Viridis Merchants, Inc., a distributor of wood pellets and former customer of G&U, listed unbagged pellets as “raw materials” in its bankruptcy filings. (Rebuttal 4-5.) As a distributor, Viridis bought wood pellets in bulk, bagged them, and sold them to retailers. (Resp. 2-3, Mar. 9, 2017.) From its perspective, unbagged pellets were its “raw materials.” But from the perspective of wood pellet manufacturers such as Georgia Biomass and Pinnacle, raw materials are wood pieces, wood chips, and sawdust (Reply, V.S. Bassett 1 & V.S. Roecker 1), none of which G&U processes at the Upton Facility into wood pellets.

Consistent with judicial precedent, including Supreme Court precedent, the bagging, palletizing, and shrink-wrapping of the bagged pellets at the Upton Facility also come within the Board's jurisdiction because the statutory definition of "transportation" broadly includes "handling" and other "services related to [rail] movement." 49 U.S.C. § 10102(9)(B). "Handling" involves "coordination and integration of operations such as un-packing, re-packing, packaging, and movement of materials or goods over short distances."<sup>14</sup> The bagging activities at the Upton Facility constitute a form of packaging. Palletizing and shrink-wrapping of the bagged wood pellets are also steps in the "handling" process at the Upton Facility—and therefore make up part of "transloading" when conducted by or under the auspices of a rail carrier—because these activities aid in the temporary storage of the bagged pellets and facilitate the loading of the commodity into, or onto, trucks. Del Grosso, 804 F.3d at 118. See S. Pac. Term. Co. v. ICC, 219 U.S. 498, 526-27 (1911) (concluding that the sacking of ground cotton seed meal, following rail movement and before loading onto ships, was an incident of the transshipment of the product subject to the agency's regulation as part of interstate commerce); Balt. & Ohio R.R. v. United States, 15 F.Supp. 674, 676 (N.D.N.Y. 1936) (distinguishing between the creation of an article of commerce, which breaks the continuity of a movement for purposes of determining the agency's jurisdiction, and the packing and bailing of an existing one, which does not);<sup>15</sup> cf. Texas v. United States, 866 F.2d 1546 (5th Cir. 1989) (storing carpet at warehouse for two to three months, during which time some of the carpet was cut, did not break the continuity, and hence the interstate nature, of a movement), aff'g Armstrong World Indus., Inc.—Transp. Within Tex.—Pet for Declaratory Order, 2 I.C.C.2d 63, 74 (1986) ("Nor does cutting the carpet at the service center alter the character of the commerce. The carpet moving from the service center is the identical carpet moving to it from out-of-State.").

#### Vacuuming, Screening, and Repelletizing.

Under the statute, "transportation" is not limited to transloading activities. Rather, "transportation" embraces both "the movement of passengers or property, or both, by rail" and "services related to that movement." 49 U.S.C. § 10102(9)(B) (emphasis added). The statute gives a non-exhaustive list of services that qualify as "transportation." As the First Circuit noted, some of these activities—receipt, storage, handling, interchange, transfer in transit—make up what is generally referred to as "transloading." Del Grosso, 804 F.3d at 118. But the statute on its face also includes other examples of activities—refrigeration, icing, and ventilation—that do not necessarily facilitate the physical movement of goods between rail cars and trucks, but that nevertheless qualify as "transportation." Accordingly, Congress made clear that the statutory definition of "transportation" services is not limited to transloading activities, but encompasses more broadly services "related to [the rail] movement" as well. 49 U.S.C. § 10102(9)(B).

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<sup>14</sup> <http://www.businessdictionary.com/definition/handling.html>; see also <https://www.merriam-webster.com/dictionary/handling> ("the packaging and shipping of an object or material").

<sup>15</sup> Similarly, the ICC has supervised carrier charges for packing under its authority over "transportation." Elliot Co. v. Chi., R.I. & P. Ry., 160 I.C.C. 683, 684 (1930); Victor Rubber Co. v. Detroit, T & I. R. Co., 178 I.C.C. 145 (1931).

Based on the facts presented here, the vacuuming, screening, and repelletizing of the wood pellets that take place at the Upton Facility are all services related to the rail movement because they remedy damage caused by that movement. The record demonstrates that, after the manufacturing process but before shipment by rail, less than 1% of the pellets shipped by Georgia Biomass or Pinnacle consist of partially-formed pellets. (Reply 5.) However, when the pellets are unloaded at the Upton Facility, approximately 5-10% are broken. (Id. at 7.) Additionally, the dust and partial pellets created by the breakage, if left within the product, would cause the wood pellets to burn much less efficiently. (Id. at 8.) In other words, the rail shipment of the pellets causes damage that degrades both the quality and quantity of the shipped pellets. Screening the pellets to separate out the pieces broken during transport, vacuuming the product to remove dust generated during transport, and repelletizing fragments broken in transport are steps to mitigate the degradation of the pellets directly resulting from the rail movement. As such, vacuuming, screening, and repelletizing are activities, or services, directly “related to” the rail transportation of the pellets.

As noted, whether a particular activity constitutes “transportation by rail carrier” under § 10501(b) is a case-by-case, fact-specific determination. Padgett, 804 F.3d at 108. Services “related to” rail transportation, within the meaning of § 10102(9)(B), must be provided either during rail transit or reasonably contemporaneously with the rail movement. Thus, for example, refrigeration of perishable commodities at a rail transloading facility while they are awaiting transfer to trucks or while services related to transportation are being performed plainly would be part of “transportation.” Green Mountain, 404 F.3d at 640, 642 (involving transloading and temporary storage of bulk salt, cement, and non-bulk foods). The continuity of the rail/truck movement distinguishes the services performed here from ostensibly similar services that would likely not be considered transportation. Thus, refrigeration of the same goods at a retail market (even if somehow done by the rail carrier after delivery to the customer) likely would not be embraced within the term “transportation” because in that situation the refrigeration typically would not be considered part of, or integral to, the provision of rail service. Similarly, vacuuming, screening, and repelletizing of wood pellets performed after the pellets had been transported by truck to a non-transload facility likely would be too far removed from the rail movement to qualify as a service “related to that movement.” Compare Ass’n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C. 2d 280, 290-95 (1992) (services that are part of the total rail common carrier service that is offered to the public comes within the Board’s jurisdiction) with Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over transloading services that were not being offered to the public as part of common carrier services), and Hi-Tech, slip op. at 5-7 (no Board jurisdiction over truck-to-truck transloading prior to commodities being delivered by rail).

Contrary to Petitioners’ claims, the vacuuming, screening, and repelletizing performed at the Upton Facility to remedy damage caused by the rail movement do not constitute wood pellet manufacturing. As the record shows, beginning with wood, wood chips, and sawdust, the manufacturing process for the wood pellets at issue here involves chipping the wood into small uniform pieces and combining them with wood chips and sawdust; drying the material to a uniform moisture content; pulverizing the wood into a uniform fiber mass; steaming the fiber mass; and pressing the material through a die to form uniform sized pellets. (Reply 4-5.) In

contrast, G&U performs no chipping, drying, pulverizing, or steaming. It presses broken pellets, not pulverized fiber material, through a die. (*Id.* at 7.) Although both G&U and the manufacturers screen and vacuum the pellets, G&U's operation is intended not to create new pellets but merely to restore broken pellets to the size they were when they left the manufacturer. (Reply, V.S. Polselli 4.) In short, G&U is not making a new product out of raw materials; it is merely fixing damage to a product caused by the rail movement.<sup>16</sup>

In sum, the bagging, palletizing, and shrink-wrapping of the wood pellets at the Upton Facility comes within the broad statutory definition of "transportation" at § 10102(9) because it facilitates the transloading of the pellets from rail cars to trucks, and is not done solely for another, unrelated purpose. Bagging, palletizing, and shrink-wrapping also are part of the "handling" of property at a rail facility. The screening, vacuuming, and repelletizing of the wood pellets are activities "related to" "the movement of . . . property . . . by rail" and therefore part of "transportation" under 49 U.S.C. § 10102(9). Because all the activities are performed by or under the auspices of a rail carrier, they are within the Board's jurisdiction under 49 U.S.C. § 10501(a).<sup>17</sup>

It is ordered:

1. G&U's March 9, 2017 surreply is accepted in the interest of compiling a more complete record.
2. This proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller. Board Member Miller dissented in part with a separate expression.

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BOARD MEMBER MILLER, concurred in part and dissented in part with a separate expression.

Today's decision further expands the scope of the ICC Termination Act's preemption provision, 49 U.S.C. § 10501(b), concluding that the process of repelletizing is transportation and thus functionally unregulated. Section 10501(b) should not be used as a sword—freeing rail

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<sup>16</sup> This is clearly distinguishable from a situation where the Board has found that fabrication activities that are unrelated to fixing damage caused by the rail movement are outside its jurisdiction. See Town of Milford, FD 34444, slip op. at 1-2 (cutting and welding of steel not transportation).

<sup>17</sup> As noted, the parties treated the answer to the "transportation" dispute as conclusive of the preemption question. Thus, there is no separate controversy over preemption for the Board to resolve here.

carriers from regulatory restraints that would apply to any other entity engaging in precisely the same economic activity—but rather as a shield against unreasonable interference with interstate commerce, as was intended by Congress. Because in this case § 10501(b) is being used as a sword, and because I believe that repelletizing clearly constitutes manufacturing rather than transportation, I respectfully dissent in part.

As the Board has explained on numerous occasions, the purpose of the § 10501(b) rail carrier preemption provision is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. See, e.g., *Wash. & Idaho Ry.—Petition for Declaratory Order*, FD 36017, slip op. at 4 (STB served Mar. 17, 2017) (citing H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08). As the Board has also explained, allowing state and local regulation of activities that are part of the manufacturing process do not subvert this purpose and do not qualify for § 10501(b) preemption because they are not part of rail transportation. See, e.g., *New Eng. Transrail—Constr., Acquis. & Operation Exemption—in Wilmington & Woburn, Mass. (NET)*, FD 34797, slip op. at 10 (STB served July 10, 2007). For example, in *NET*, slip op. at 15, the Board concluded that the carrier had failed to meet its burden of demonstrating that the shredding activities in question were part of rail transportation, because it had not shown that shredding “was...required to pack into rail cars material that [had] arrived in its facility packed into trucks” and because “the record indicate[d] that shredding is a common practice in the landfill and waste management businesses.”

Similarly, I do not believe that the carrier in this case has met its burden of demonstrating that the process of repelletization is required to transload the wood pellets from rail cars to trucks, and has not adequately refuted the record evidence demonstrating that the process is common practice in the wood pellet manufacturing industry. As the decision explains, in order to come within the Board’s jurisdiction and qualify for federal preemption, “an activity must be...part of rail transportation.” *Supra* p. 2. On this record, I find it difficult to conclude that pressing broken pieces of wood through a die is “part of rail transportation,” or that the preemption of state and local regulation of such activities is required to avoid a patchwork of regulation from unreasonably interfering with interstate commerce. While the decision asserts that the process constitutes some sort of “spot repair,” and thus is a service “related to” rail transportation rather than manufacturing,<sup>1</sup> I do not believe that the record adequately demonstrates that the problem of “fines” necessarily results from the transportation of the wood pellets via rail car.<sup>2</sup> Even if one were to believe the questionable factual assumptions presented by the carrier here, the decision’s “spot repair” test casts too wide a net, in that it would allow rail carriers to repair, for example, automobiles or televisions purportedly damaged in transit, or even the repelletization of pharmaceuticals, while preventing states and localities from regulating such activities.

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<sup>1</sup> Repair of transported items is not included in the statutory list of services “related to” the movement of passengers or property by rail.

<sup>2</sup> The decision’s preemption determination in this respect is premised on a factual conclusion based on what it characterizes as the “undisputed evidence in the record.” *Supra* p. 3. It is hard to imagine how the Petitioners could have refuted the factual evidence presented by the carrier, given that the Petitioners were twice denied discovery in this case.

The need for federal preemption to protect against a patchwork of regulation affecting railroads as they pass through various jurisdictions is clear, as are the serious consequences for interstate commerce that would result from a contrary conclusion. However, I remain concerned that extending preemption to include activities whose only real relationship to rail transportation is the fact that they are conducted by rail carriers will continue to encourage carriers to engage in such ancillary business activities simply because their involvement brings the protection of preemption. Because I believe that repelletization is properly considered manufacturing, I respectfully dissent from the portion of today's decision concluding that it is part of rail transportation.