COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2022-P-0541

Plymouth, ss.

CHAD MARSH, Appellee

v.

MASSACHUSETTS COASTAL RAILROAD LLC & another,
Appellants

Appeal Under The Doctrine Of Present Execution From
Denial Of A Motion To Dismiss and
Motion For Reconsideration

APPELLANTS' BRIEF FOR
MASSACHUSETTS COASTAL RAILROAD, LLC and
CHRIS P. PODGURSKI

Date: 07/12/2022

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

REGULATIONS:

OTHER AUTHORITIES:

STATEMENT OF ISSUES.

1. Whether the Superior Court erred in not dismissing plaintiff's state prevailing wage claims under M.G.L. c. 149, §§ 27 and 27F against defendants Massachusetts Coastal Railroad, LLC ("MCR") and its principal based on the doctrine of federal preemption, which entity was a railroad registered and regulated by the U.S. Surface Transportation Board ("STB") of the U.S. Department of Transportation under the Interstate Commerce Commission Termination Act, 49 U.S.C.A. § 10101 ("ICCTA") involving railroad track services rendered by MCR pursuant to a License and Operating Agreement ("LOA") with MassDOT.

2. Assuming no federal preemption, whether the Superior Court erred in not dismissing plaintiff's claims based on immunity from liability for failure by plaintiff to allege and show compliance with the mandatory statutory requirements for a violation of M.G.L. c. 149, § 27, where MCR's work was not performed on a public works project that was competitively bid nor awarded; MassDOT never requested the setting and establishment of prevailing wage rates; the Department of Labor ("DOL") never classified and established such rates nor furnished such rates to MassDOT; and MassDOT never advertised, posted, and included such wage rates in its LOA.

STATEMENT OF CASE.

Plaintiff worked as a laborer/equipment operator for MCR from 2019 to 2021, including the South Coastal Rail Project to restore commuter rail service between Boston and Southeastern Massachusetts under a LOA pursuant to M.G.L. c. 6C, § 44 between MCR and MassDOT for railroad track improvements. Plaintiff's amended complaint was: Count I for violations of the Wage Act, M.G.L. c. 149, § 148; Count II for violations of the Overtime Act, M.G.L. c. 151, § 1A; and Counts III and IV for violations of the Prevailing Wage Act, M.G.L. c. 149, § 27F. Liability under Counts I and II was predicated on an alleged prevailing wage rate never requested by MassDOT and never established by DOL. (RA 21).[1]

The Superior Court (Glenny, J.) denied Defendants' Motion To Dismiss and as to federal preemption (RA 45, 47) and held that "MCR has not demonstrated as a matter of law that Marsh's wage and hour-related claims have the effect of managing or governing transportation as to be expressly preempted under § 10501(b) of the ICCTA"; and "§ 10501(c) did not expressly preempt state laws regulating the employment relationship." The Court held that "MCR has failed to persuade this Court that Marsh's claims for violation of the Wage Act, Overtime

[1] "RA" refers to the Record Appendix.

Act and Prevailing Wage Act are impliedly preempted by the federal permissive regulation over the railway industry"; and that despite a MassDOT opinion letter that the prevailing wage rate was not required of a railroad contractor for a railroad project, it "does not establish as a matter of law that Marsh cannot prevail" since the DOL and not MassDOT administers the prevailing wage act." As to plaintiff, the Court inconsistently held that "Marsh has not demonstrated that his wage and hour claims are exempt from the Board's jurisdiction and potential ICCTA preemption." (RA 8).

Defendants filed a motion for reconsideration (RA 161) arguing that the Court misread the plain and expansive language of the ICCTA § 10510(c) as to preemption in order to hold that there was no express preemption, since section (c) "is not a preemption provision but rather, simply states that the Board does not have exclusive federal jurisdiction over the employment dealing of local governmental authorities." (RA 18).

Defendants filed a timely notice of appeal under the doctrine of present execution, (RA 222, 225), with the case stayed pending this appeal. (RA 4). All issues herein are questions of law that are reviewed *de novo. CP 200 State, LLC v. CIEE, Inc.,* 488 Mass. 847, 848 (2022).

STATEMENT OF FACTS.

MCR is a rail freight and logistics services railroad operating in Massachusetts and Southern New England with a network of rail lines along with performing track and related railroad work. MCR operated under 49 C.F.R. 1150.21 and was registered with and governed by the STB, USDOT No. 2173558. (RA 47-48). That Board was charged by Congress with the economic regulation of various modes of surface transportation, primarily railroads and freight rail and lines as the successor to the Interstate Commerce Commission. MCR had an LOA with MassDOT, which was not competitively advertised nor bid and awarded to the lowest bidder. (RA 126, 133).

Plaintiff was employed as a laborer who operated equipment of MCR. The Amended Complaint alleged that plaintiff was paid by MCR $15.00 per hour and later $23.00 and $24.80 per hour. (RA 9). Although plaintiff alleged, without the setting of a prevailing wage rate by DOL, that the prevailing wage rate was $63.00/hour, which the Court adopted (RA 9)[2], there were no allegations that MassDOT requested the establishment of prevailing wages; that DOL classified or established such rates; that DOL furnished such rates to MassDOT;

[2] Since DOL never established this rate, any statement by the Court that this was the prevailing wage rate was erroneous and without any basis.

and that MassDOT advertised, posted, and included those rates in the LOA, which were statutory requirements for the establishment of a violation of the prevailing wage rate statute per M.G.L. c. 149, § 27. Plaintiff never alleged either specific or general compliance with the prevailing wage rate statute. Mass. R. Civ. P. 9(c).

Although plaintiff alleged that the work of MCR was for a "public project," plaintiff never alleged that the MassDOT or DOL classified that project as a public project or determined it to be a public works project. Amongst documents submitted, defendants produced a copy of a ruling from MassDOT Highway Division dated May 1, 2015, finding that "The MassDOT General Counsel's office has found that prevailing wage is not required when a railroad owner or a railroad owner's subcontractor is relocating railroad property to accommodate a MassDOT construction project." (RA 72). As to that opinion, reference was made by MassDOT to M.G.L. c. 6C, § 44 as to the relocation of a "utility" or "utility facility" "as defined under federal law" which definitions did not include railroad property in addition to citing the ruling of the Federal Highway Administration that prevailing wage rates do not apply to railroads or railroad projects.[3]

[3] For reimbursable utility and railroad work on Federal-aid projects, if the work is to be accomplished by a contract let by a utility or railroad, the provisions of 49 C.F.R. 23 and the required contract

(RA 72). Although the Court disregarded that opinion as not being made by the DOL, as the proper agency, (RA 8), the Court never held that DOL, as the proper agency, established that this was a public project for which prevailing wage rates were to be applicable and as to which it established and set a prevailing rate after a request from MassDOT that was advertised, posted and included in the LOA.

In its Memorandum of Decision ("Memorandum"), the Court denied the motion to dismiss holding that defendants were not entitled to dismissal based on the express preemption of the ICCTA; and that plaintiff's claims were not impliedly preempted by the federal government's pervasive regulation over railroads. (RA 8). The Court denied a motion for reconsideration stating that "§ 27F of the prevailing wage act voids a contract in violation of the statute even if the contract does not incorporate that wage"; and "Because Marsh alleges that he is an equipment operator covered by § 27F, the defendants have not established clear error in the court's refusal to dismiss Count III." (RA 18).

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provisions of 23 C.F.R. 633 do not apply to these contracts.

SUMMARY OF ARGUMENTS.

The doctrine of present execution is applicable to this appeal. (pp. 14-18).

Pursuant to the commerce and supremacy clauses of the federal constitution, the interstate commerce commission termination act preempted explicitly, implicitly, and by conflict preemption the state prevailing wages provisions as to railroads and railroad construction for track and relocation work. (pp. 18-48).

The work performed by MCR was not work on a public works project nor ever determined to be for a public works project. (pp. 48-50).

If not preempted, defendants were immunized from liability in the absence of any alleged or actual violations of M.G.L. c. 149, § 27 or 27F. (pp. 50-52).

If not preempted, any alleged failure to comply with M.G.L. c. 149, § 27 as to the prevailing wage requirements did not void the loan. (pp. 52-57).

ARGUMENT.

I. THIS INTERLOCUTORY APPEAL IS WARRANTED AND APPROPRIATE UNDER THE DOCTRINE OF PRESENT EXECUTION.

Under the present execution doctrine, an immediate appeal of an interlocutory order is allowed if the order will interfere with rights in a way that cannot be remedied on appeal from the final judgment. *Maddocks*

v. Ricker, 403 Mass. 592, 598 (1988). See *Roche v. Boston Safe Deposit and Trust Co.*, 391 Mass. 785, 791 (1984) (doctrine applies where appeal from final judgment would be futile unless challenged order vacated by prompt entry of appeal in the appellate court); and *Massachusetts Federation of Teachers, AFT, AFL-CIO v. School Committee of Chelsea*, 409 Mass. 203, 204 n.2 (1991) ("… This exception applies only to decisions which resolve issues that are "collateral)."

The denial of a motion to dismiss "based on immunity from suit enjoys the benefit of the present execution rule because it is a final order." *Kent v. Commonwealth*, 437 Mass. 312, 317 (2002) and *Shapiro v. City of Worcester,* 464 Mass. 261 (2013). The right to immunity from suit would be effectively "lost as litigation proceeds past motion practice." *Marcus v. City of Newton*, 462 Mass. 148, 151–153 (2012).

The doctrine of federal preemption to pay state prevailing wage rates would provide immunity from suit for defendants, which is collateral to the merits of this suit. Under federal preemption, federal law displaces state law, and/or the authority of a particular forum over all others to hear particular claims law, rendering state statutory and regulations unenforceable under state law.

If federal preemption were not applicable, the issue as to applicability and enforcement of the state

prevailing wage law is dependent upon whether defendant is immune from suit in the absence of any showing of any violation of the statute, including the failure of MassDOT to request DOL to establish and set a rate, the establishment and setting of such a wage rate by DOL, and the posting of such wage rates and inclusion in an LOA, the absence of which immunizes a contractor from suit. Both M.G.L. c. 149, § 27 and § 27F provide that:

> An employee claiming to be aggrieved by a violation of this section may in 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. (emphasis added).

If there has never been compliance with those statutory requirements, there cannot be any violation of the statute thereby giving immunity from liability.

Since the Legislature mandated that **only** DOL (and not a Court) set and establish prevailing wage rates after a request by MassDOT, the circumvention of allowing Courts to set and establish that rate raises a significant question about the separation of powers provisions (Article 30 of the Declaration of Rights) as to interference by one department of government with the functions of another, which would be difficult to undo on appeal from a final Judgment. An appeal under

the doctrine of present execution may lie where the inevitable adverse impact on judicial efficiency outweighs the intrinsic harm suffered by an aggrieved party denied an immediate appeal. See *Abuzahra v. City of Cambridge*, Appeals Court No. 21-P-225 (June 21, 2022).

In cases that are fully briefed, an Appellate Court may nevertheless comment on the merits of the defendants' arguments, when the issues have been fully briefed, questions concerning the parameters of liability are recurrent, and the Court's discussion may be instructive in future cases. *Landry v. Massachusetts Port Authority*, 89 Mass. App. Ct. 307, 310 (2016) (after determining defendant city and port authority were not entitled to interlocutory appeal from denial of their motions for summary judgment under the doctrine of present execution, Court addressed city's arguments because the claim had been briefed fully by the parties, questions concerning the parameters of liability for a defect in or upon a public way under M.G.L. c. 84, §§ 15, 18, and 19, are recurrent, and addressing it would be in the public interest). *Marcus v. City of Newton*, 462 Mass. 148, 153 (2012) (after determining city is not entitled to an interlocutory appeal from the denial of its motion for summary judgment under the doctrine of present execution, Court addressed city's arguments "because the claim has been

briefed fully by the parties, it raises a significant issue concerning the proper interpretation of the recreational use statute and addressing it would be in the public interest.").

II. THE ICCTA PREEMPTED PLAINTIFF'S CLAIMS AS TO STATE PREVAILING WAGES, SINCE THE STB HAS EXCLUSIVE JURISDICTION OVER RAILROADS, ESPECIALLY AS TO CONSTRUCTION, EMPLOYMENT, AND PROVISIONS RELATED TO DEALINGS BETWEEN EMPLOYERS AND EMPLOYEES WHICH EFFECT THE MANAGEMENT AND OPERATION OF RAILROADS.

A federal statute may preempt state law when it explicitly or by implication defines such an intent or when a statute actually conflicts with federal law or stands as an obstacle to the accomplishments of federal objectives. *Roma, III, Ltd. v. Board of Appeals of Rockport,* 478 Mass. 580, 586 (2018). State preemption analysis is similar to federal analysis to determine the intent to preclude local action. *Id.* at 588. The critical question is whether Congress intended federal law to supersede state law. *Id.* To determine the intent of preemption, a Court must focus on the statutory language, which contains the best evidence of Congress' preemptive intent. *Chambers v. RDI Logistics, Inc.,* 476 Mass. 95, 100 (2016).

Congress and the Courts long have recognized a need to regulate railroad operations at the federal level since after the Civil War. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). A number

of federal laws are controlling as to railroads, but three are commonly found to preempt state regulated railroad activities which are the ICCTA, the Federal Railroad Safety Act, and the Federal Railroad Labor Act. The state issues not preempted by federal law are limited to land use. The general principal arising from the statutory and case law is that, if a railroad is engaged in transportation-related activities, including track work, federal law will preempt state attempts to regulate. *Fayard v. Ne. Vehicle Servs., LLC*, No. CV 07-40006-FDS, 2007 WL 9805540, at *2 (D. Mass. July 30, 2007), *aff'd*, 533 F.3d 42 (1st Cir. 2008) ("It is clear from the face of the statute that, in enacting the ICCTA, Congress intended the remedies set forth therein to be exclusive, and further intended those remedies to preempt state law claims touching on the subject of railroad regulation."). See *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003) ("[I]n enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads.").

The STB has exclusive jurisdiction over railroads that explicitly preempt state regulation under 49 U.S.C.A. § 10501:

> (a)(1) Subject to this chapter, **the Board has jurisdiction over transportation by rail carrier that is--**
> **(A) only by railroad; …**

> (2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--
>
> (A) a State and a place in the same or another State as part of the interstate rail network; …
>
> (b) The jurisdiction of the Board over--
>
> (1) **transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and**
>
> (2) the **construction**, acquisition, **operation**, abandonment, or discontinuance of spur, industrial, team, switching, or side-tracks, or facilities, **even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, 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.**
>
> (c)(1) In this subsection--
>
> …
>
> (2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over--
>
> (A) public transportation provided by a local government authority[4];
>
> …
>
> **(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--**
>
> …
>
> **(iii) employment,** retirement, annuity, and unemployment systems **or other provisions related to dealings between employees and employers.** (emphasis added).[5]

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[4] This is why the MBTA, and other regional transportation authorities are specifically exempted from the ICCTA regulation.

[5] As to preemption, see 49 U.S.C. § 10502 and 49 U.S.C. § 11321.

The ICCTA preempts state regulation, i.e., "those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation." *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150, 157-158 (4th Cir. 2010). The ICCTA preempts state regulation of matters directly regulated by the STB, such as the construction, operation, employment relations, and abandonment of rail lines. *Emerson v. Kansas City S. Ry. Co.,* 503 F.3d 1126 (10th Cir. 2007); and *Friberg v. Kansas City S. Ry. Co.,* 267 F.3d 439 (5th Cir. 2001). Whether a state regulation is preempted requires an assessment as to whether the action would have the effect of preventing or unreasonably interfering with railroad transportation or work. *Emerson, Id.*

Railroads in this country are highly regulated by the federal government. "Railroads have been subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R. Co.,* 455 U.S. 678, 687 (1982). Indeed, "[p]erhaps no industry has a longer history of pervasive federal regulation than the railroad industry." *R.J. Corman R.R. Co. Memphis Line v. Palmore*, 999 F.2d 149, 151 (6th Cir. 1993). "Without doubt, Congress has undertaken the regulation of almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *Logan*

v. Union Pac. R.R. Co., No. 2:17-CV-0394-TOR, 2018 WL 2976099, at *3 (E.D. Wash. 2018).

COMMERCE CLAUSE AS TO PREEMPTION. Railroads are instrumentalities of interstate commerce over which Congress has authority to regulate even purely intrastate matters. *City of Auburn v. U.S. Government*, 154 F.3d 1025 (9th Cir. 1998); and *CSX Transp., Inc. v. Georgia Public Service Com'n,* 944 F. Supp. 1573 (N.D. Ga. 1996). State regulation of in-state segments of interstate railroad can violate the Commerce Clause because national uniformity is indispensable to the operation of an efficient and economical national railway system, and the effect of one state's regulation can place a substantial burden on the interstate movement of goods. *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017).

Congress is authorized, under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 to regulate instrumentalities of interstate commerce, or means of interstate commerce, such as railroads. *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018). A railroad that takes any part in interstate traffic is an instrumentality of interstate commerce. *Chicago & N. W. Ry. Co. v. Davenport*, 205 F.2d 589 (5th Cir. 1953).

As stated in *Kettle Black of MA, LLC v. Commonwealth Pain Mgmt. Connection, LLC.,* No. 21-P-175,

2022 WL 1817965, at *2 (Mass. App. Ct. June 3, 2022) as to the commerce clause:

> **We thus look to the scope of Congress's commerce clause power, which is well established as broad. (citation omitted). The commerce clause extends beyond activities within the flow of interstate commerce, and … "'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice … subject to federal control.'"** (citations omitted). (emphasis added).

PREEMEPTION. The doctrine of federal preemption is based on Article VI, Clause 2 of the Constitution that federal law "shall be the supreme Law of the Land." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

EXPLICIT PREEMPTION. This preemption occurs where Congress included explicit statutory language signaling its intent to preempt state law, as expressly indicating that states are barred from supplementing these provisions. State law is preempted where the structure and purpose of the federal legal scheme at issue indicate a clear, albeit implicit, intent to preempt state law. "Such intent may be expressed either explicitly, in the language of a statute, or implicitly, through passage of a statutory scheme that extensively occupies the field or where the purpose and objectives of federal law would be frustrated by state

law." *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 27 (1st Cir. 1995).

The Court in *Massachusetts Ass'n of Health Maint. Organizations v. Ruthardt*, 194 F.3d 176, 179–180 (1st Cir. 1999) offered guidance on the proper approach to statutes that include explicit preemption language and explained that although an express preemption clause may indicate congressional intent to preempt "at least some state law," Courts must "identify the domain expressly pre-empted by that language." Two presumptions determine the scope of an express preemption clause. First, the assumption that preemption will not lie absent evidence of a clear and manifest congressional purpose must be applied not only when answering the threshold question of whether Congress intended *any* preemption to occur, but when measuring the reach of an explicit preemption clause. Second, while the scope determination must be anchored in the text of the express preemption clause, Congressional intent is not to be derived solely from that language but from context as well acknowledging as "relevant" data as to "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing Court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law" explaining that, in

such circumstances, a Court "must examine the [act's] language against the background of its legislative history and historical context."

As to specific statutory authority for preemption, § 10501(b) of the ICCTA states:

> [t]**he jurisdiction of the [Surface Transportation] Board over (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; … is exclusive.** Except as otherwise provided in this part, **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.** (emphasis added).

The concluding sentence of § 10501(b) is an unmistakable statement of Congress's intent to preempt state laws touching on the substantive and economic aspects of rail transportation. As Courts have stated, "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Georgia Public Service Comm'n,* 944 F. Supp. at 1581; and *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 215 F.3d 195, 202, 204-205 (1st Cir. 2000) ("The last sentence of § 10501(b) plainly preempts state law;" and "[t]he thrust of the [ICCTA] is to federalize these disputes….").

Since exclusive jurisdiction over "construction" "employment" and "other provisions related in dealings between employees and employers" rests solely with the STB, it is explicit that Congress intended such dealings, which include wages and wage rates, to be preempted by federal law. Otherwise, there would not be any uniformity as to wages and other employment practices and laws for railroads with the result that each state could enact individual wage rates or other employment laws interfering with the operating in interstate commerce of railroads leading to chaos, confusion, and interference with the operations of railroads. Coupled with the overwhelming and pervasive regulation of railroads in all phases of their operation and with construction and employment confirm the explicit preemption over all phases and operations as to construction, employment, and employment relations.

ICCTA preempts state laws that may reasonably be said to have the effect of "managing or 'governing' rail transportation." *Norfolk Southern Railway Company v. City of Alexandria,* 608 F.3d 150, 157-158 (4th Cir. 2010). In *Grafton & Upton R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 238 (D. Mass. 2004) the Court stated:

> The plain language of the ICCTA compels a contrary conclusion.

> The statutory language indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation. *See* 49 U.S.C. § 10102(6)(A), (C). Indeed, the ICCTA defines "transportation" as including, in addition to the movement of locomotives and railcars, "services related to that movement, including … interchange of passengers and property." (emphasis added).

The ICCTA's legislative history makes plain Congress's intent to shield railroads from state regulation while at the same time lessening federal regulation of the railroad industry. Legislative History, H.R.Rep. No. 104-311, at 96 (1995), U.S. Code Cong. & Admin. News 1996, P. 793 stating "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." *Pejepscot Industrial Park, Inc. v. Maine Central* Railroad *Co.,* 215 F.3d at 202 (1st Cir. 2000); and *Englehard Corp. v. Springfield Terminal Railway Co.,* 193 F. Supp. 2d 385 (D. Mass. 2002).

The ICCTA preempts state regulation of matters directly regulated by the STB, such as the construction, operation, rates, employment relations

of rail lines. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); and *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001). "The relevant question under the ICCTA is whether … a dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010). "What matters is the degree to which the challenged regulation burdens rail transportation…." *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097–1098 (9th Cir. 2010). Whether a state regulation is preempted requires an assessment of whether the action would have the effect of preventing or unreasonably interfering with **railroad transportation activities**. *Emerson, Id.* "Rail transportation" is broadly construed where ICCTA preempts local regulations on matters pertaining to rail transportation. *Norfolk Southern Railway Co. v. City of Alexandria, Id.*

To suggest that prevailing wages do not have the effect of managing or governing rail transportation and have a "remote or incidental impact on rail transportation" as held by the Superior Court in this case was not only without any authority, but plainly wrong. It is inconceivable that Congress would have inserted into the words of the statute "**construction**,

employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers" if it only had a remote and incidental impact on rail transportation. The federal government codified other laws for railroads dealing with employment, including minimum wages, retirement benefits, hours of service, safety acts, and collective bargaining rights indicating the importance of employment matters and wages for the operation and management of railroads.[6]

If prevailing wages were required in Massachusetts for railroad workers, that would permit a state official to determine wage rates for railroad workers for all railroads using or involved with tracks and for all companies working on rail tracks that would substantially increase the payment of wages the amounts for wages for railroad employees, the cost of wages and benefits and overhead impacting railroad rates, charges, services and operations that would affect the management or governance of a railroad thereby interrupting the centralization of rail transportation by having compliance with fifty different wage rates under fifty different jurisdictions by fifty different

[6] One law as to employment is the Federal Railroad Labor Act, 45 U.S.C. § 151 with the purpose to avoid any interruption of interstate commerce by providing for the prompt disposition of disputes between carriers and their employees.

state rules.[7] Notwithstanding the foregoing, the Court concluded without any authority or basis that "MCR has not demonstrated that Marsh's wage and hour related claims have the effect of managing or governing transportation to be expressly preempted…." (RA 11).

The Court in *Massachusetts Ass'n of Health Maint. Organizations v. Ruthardt*, 194 F.3d 176, 179–180 (1st Cir. 1999) offered guidance on the proper approach to statutes that include explicit preemption language. First, there must be evidence of a clear and manifest congressional purpose showing whether Congress intended *any* preemption to occur, but also when measuring the reach of an explicit preemption clause. Second, while the scope determination must be anchored in the text of the express preemption clause, congressional intent is not to be derived solely from that language but from context as well acknowledging as "relevant" data as to "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business and the law" explaining that, in such circumstances, a court "must

[7] A railroad could be Amtrak, whose stock is owned by the federal government. It is inconceivable that Congress would have allowed individual States to impose any labor rates on Amtrak or any other major railroad.

examine the [act's] language against the background of its legislative history and historical context."

In its Memorandum, the Court concluded, without any basis or citation of authority, that "subsection (c) is not a preemption provision but rather, simply states that the Board does not have exclusive federal jurisdiction over the employment dealings of local governmental authorities" and that "This Court does not construe § 10501(c) to establish the express preemption of state laws regulating the employment relationship." (RA 12). Nowhere in the language of that statute is there any such language. A plain reading of that subsection states that a local governmental authority "is subject to applicable laws of the United States" meaning that the laws of the United States are applicable over those of local governmental authorities and that the laws of the United States preempt local governmental authority. That coupled with the language in § 10501(b) of the ICCTA 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**" and the pervasive regulation of railroads make evident the preemption of federal law over state law.

An examination of the laws in Massachusetts shows no regulation or laws for railroads as to wages, safety, representation of employees for collective

bargaining, **construction, employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.** The fact that MCR was registered only with the STB shows the intent to require federal regulation over MCR to the exclusion of state control. Since federal laws for railroads regulate laws as to employment matters including minimum wages, working hours, overtime hours, and collective bargaining, it would be inconsistent to argue that only prevailing wages were to be exempt from federal regulation.

"Rail transportation" is broadly construed to effectuate the purposes of the ICCTA, where ICCTA preempts local regulations pertaining to rail transportation. *Norfolk Southern Railway Co. v. City of Alexandria,* 608 F.3d 150 (4th Cir. 2010). Wages and employment matters not only pertain to rail transportation, but contrary to the statement of the Court "have the effect of managing or governing transportation." To suggest that wages do not affect the managing or governing of railroads is preposterous as common knowledge coupled with the federal government's enactment of labor and employment laws for railroads shows the opposite.

The ICCTA evinces a clear intent by Congress to assume complete jurisdiction, to the exclusion of the states over the regulation of railroad operations,

Emerson, Id., and an intent to completely occupy economic regulation. *Cedarapids, Inc. v. Chicago, Central & Pacific R. Co., Id.* Its purpose is to prevent the development of a patchwork of state regulations affecting the railroad industry as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry. *City of Cayce v. Norfolk Southern Ry. Co.*, 391 S.C. 395 (2011). A state regulation is categorically or facially preempted under the ICCTA if it would directly conflict with exclusive federal regulation of railroads. *CSX Transportation, Inc. v. City of Sebree*, 924 F.3d 276 (6th Cir. 2019). The ICCTA preempts all state laws that may reasonably be held to have the effect of managing or governing rail transportation. *Delaware v. Surface Transportation Board*, 859 F.3d 16 (D.C. Cir. 2017). The Act preempts any state regulation that interferes with or frustrates railroad operations, transportation-related activities, or interstate commerce. *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094 (9th Cir. 2010). The field of railroad regulation, including activities related to but not directly involving railroad transportation, is preempted by the ICCTA and is broad in scope. *Grafton and Upton R. Co. v. Town of Milford, Id.*

This case is similar to *Bay Colony Railroad Corporation v. Town of Yarmouth*, 470 Mass. 515 (2015), where the SJC held that enforcement of a state statute as to transportation of waste was preempted by the Federal Aviation Administration Authorization Act ("FAAA"), which the Court held was "purposefully expansive" and preempted state laws having a connection to "carrier rates, routes or services" even if the effect was "only indirect" and whether the law was consistent or inconsistent with federal regulation. Like the express preemption in § 10501(b) of the ICCTA, the Court found similar language in the FAAA act to be preemptive. The Court held the FAAA act to be "purposefully expansive" with words "having a connection with, or reference to carrier rates, routes or services." Similarly, the language 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"** and the granting exclusive jurisdiction of the STB over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" and **safety; the representation of employees for collective bargaining; and employment, retirement, annuity, and**

unemployment systems or other provisions related to dealings between employees and employers" coupled with language these remedies are exclusive and preempt state laws that are subject to the laws of the United States show a clear and unambiguous in their preemption of state laws. As stated by the Court, "Congress' purpose was to avoid States direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id.* at 518.

While the Court in that case acknowledged that regulation of local waste was a traditional exercise of the State's police powers, the Court held that the Act "regulates the operation of motor vehicles by railroad companies" that Congress did intend to regulate and preempt "because the restriction is an economic regulation relating to railroads and motor carrier services rather than a public health regulation relating to the transport of waste." *Id.* at 521. In the case at bar, the regulation of wages by DOL for prevailing wages is an economic regulation relating to railroads that effects and concerns transportation by rail carriers and the remedies provided with respect to rates, classifications, rules, interchange, and other operating rules, practices, routes, services, and facilities of rail carriers, which Congress expressly preempted from state law.

In *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95 (2016), the SJC held that the FAAA act preempted a state independent contractor statute designed to protect workers and grant them benefits and rights of employment. The Court found the FAAA to be "purposely expansive" and to preempt any state laws "having a connection with, or reference to carrier rates, routes or services" to be preempted. *Id.* The Court stated that "preemption occurs at least where State laws have a significant impact related to Congress' deregulatory and preemption related objectives." *Id.* The Court held that the independent contractor state statute "constitutes an impermissible significant impact on motor carriers that would undercut Congress' objectives in passing the FAAA … and also forms part of an impermissible patchwork of State laws due to its uniqueness." *Id.* The Court noted that changing the rules requiring independent carriers to deliver rather than done by railroad workers would "likely have a significant, indirect, impact on motor carriers' services by raising the costs of providing those services." *Id.* The Court held that such policies "contravenes the objectives of Congress … by substituting its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide" in addition to contravening "the

congressional objective of preventing a patchwork of state service determining laws." *Id.* Like prevailing wage rates, the Court noted that "Very few states have enacted such a test" as to regulating the classification of workers which "undercuts Congress' intent to prevent a patchwork of State service determining laws, rules and regulations" and "suggests that Congress did not intend to allow such provisions to stand as a 'type of preexisting and customary manifestation of the State's police power.'" *Id.*

In *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385 (D. Mass. 2002) involving the alleged nonpayment by two railroads of "car mileage allowances" authorized under state law and generated by the movement of privately owned tank cars over a stretch of the railroads' railway track, the Court held that the state-law contractual claims were preempted by 49 U.S.C.A. § 10501(b) of the ICCTA because Congress had chosen to occupy the transportation field insofar as car mileage allowances were concerned by creating an exclusive federal remedy for their nonpayment. **The Court reasoned that the concluding sentence of 49 U.S.C.A. § 10501(b) was an unmistakable statement of Congress's intent to preempt state laws touching on the substantive aspects of rail transportation.** The Court noted that with respect to car mileage allowances, federal law directed the STB to establish

rates of compensation for the use by a rail carrier of third-party freight cars and to establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnished a service related to or an instrumentality used in the transportation or service. Noting that the interplay of remedial statutes and regulation of railroads led to the conclusion that Congress had occupied the field of car mileage allowances so completely as to preempt any state-law remedy.

FIELD PREEMPTION: As to field preemption, the Court in the within case held that "it does not clearly appear that Congress intended to foreclose the enforcement of State wage and hour requirements" notwithstanding "the pervasive regulation of railroads." This was an acknowledgement by the Court of the "pervasive regulation of railroads." The Court cited the cases of *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246 (1994) construing the Federal Railway Labor Act where the Court held that a state lawsuit by aircraft mechanic, alleging retaliatory discharge because of whistleblower activities, was not preempted by dispute resolution provisions of Railway Labor Act (RLA); since discharge claims were independent of collective bargaining agreement because the RLA preempted state law only as to claims involving

interpretation or application of collective bargaining agreements.

That case predated the ICCTA and construed the RLA and found no preemption, since the claims were independent of a collective bargaining agreement, which Act covered collective bargaining. Second, unlike the within case, the preemption in the case at bar is not independent of the ICCTA, but to the contrary is due to the express preemption as to **construction, employment … or other provisions related to dealings between employees and employers** and clearly related to **employment practices, services**, and facilities of such carriers; and the **operation** of railroads. Rejecting the "pervasive pre-emption" of all issues touching on the employment relationship, the Supreme Court held that the RLA's mandatory grievance procedures do not preempt causes of action to enforce rights and obligations independent of a collective bargaining agreement. In doing so, the Court adopted the same standard for ordinary preemption under both the RLA and the LMRA: a state law claim is preempted only if its resolution requires the interpretation of the collective bargaining agreement, but not if the claim turns on questions that can be resolved without interpreting the agreement. Because complete preemption was not an issue in the case, the Court did not engage in any inquiry into congressional intent nor discuss

the standard for complete preemption. In the case at bar, the specific language of the ICCTA vests exclusive jurisdiction with the STB and mandates that local government is subject to the applicable laws of the United States.

The other case cited by the Court of *Terminal Railroad Association v. Brotherhood of Railroad Trainmen,* 318 U.S. 1 (1942) was similarly decided many years prior to the ICCTA, where the Court determined that a state requirement that all trains have cabooses (for the "health, safety, and comfort of the rear switchmen") was not preempted by the Boiler Inspection Act, the Safety Appliance Act, the Interstate Commerce Act, or the RLA. The Court held that the question is whether by examining Congress's expansive regulation of the railways and the preemptive force of particular laws, it can be said that Congress has manifested its intent that states be precluded from enacting and enforcing overtime provisions against the railroads. As to the case at bar, in specifically stating that exclusive jurisdiction lies with the STB and that states are subject to the applicable laws of the United States, Congress in enacting the ICCTA manifested an intent preempting employment and dealings between employers and employees when it involves the services, management and operations of railroads. Another case cited by the Court, *Payne v. Tri State Careflight LLC,*

2016 WL 63962 (D. N.M. 2016) had nothing to do with preemption of federal law and merely dealt with local laws that may have conflicted with one another.

Congress's expansive and pervasive regulation of the railways and the preemptive force of particular laws, especially the ICCTA, demonstrate the intent to preempt state wage laws. There has been a long history of pervasive congressional regulation over the railway industry where federal laws have touched on nearly every aspect of the railroad industry.

As stated in *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d at 388–390 (D. Mass. 2002) as to field preemption in the regulation of railroads the Court stated:

> Although States retain the police powers reserved by the Constitution, **the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.** (emphasis added).

In *Bay Colony R.R. Corp. v. Town of Yarmouth,* 470 Mass. 518–519, the Court stated:

> The preemptive scope of the act's preemption clause is "purposefully expansive." *Massachusetts Delivery Ass'n v. Coakley,* 769 F.3d 11, 18 (1st Cir.2014). **The act preempts State laws "'*having a connection with, or reference to,*' carrier 'rates, routes, or services,'" even if the "law's effect on rates, routes, or services 'is only**

> **indirect,'" and irrespective of "whether [the] law is 'consistent' or 'inconsistent' with [F]ederal regulation"** (citations omitted). Congress' purpose was to avoid "a State's direct substitution of its own governmental commands for competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." (emphasis added).

An example of field preemption was in *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008). In that case, the Court found that the Illinois Minimum Wage Law (IMWL) was preempted as applied to railroads, based on Congress' pervasive action to regulate railroads joined with Congress' intentional inaction regarding regulation of railroad overtime wages, under doctrine of field preemption, and the Illinois Department of Labor (IDOL) was barred from investigating interstate railroad employees' allegations of overtime violations under IMWL and from enforcing IMWL against a railroad. The Court noted "The long history of pervasive congressional regulation over the railway industry is undeniable, and the Supreme Court has observed that, "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." As concluded by the Court, "Accordingly, Congress's intent to leave the matter of wages subject to private negotiations, particularly when placed against the backdrop of Congress's pervasive regulation of the railways and its clear intent that much of this regulation allow for no state supplement, leads us to

conclude that Illinois's overtime regulations, as applied to interstate railways, are preempted." *Id.* at 765.

In *Wisconsin Central, Ltd. v. Shannon*, *Id.*, the Court held that Congress had occupied the field of railway regulation and the state overtime wage laws were preempted, even though minimum wage laws typically fell within the state's police powers. *Id.* at 765. It reasoned that "Congress's expansive regulation of the railways and the preemptive force of particular laws" demonstrated the intent to preempt state overtime laws. *Id.* at 763. There was an "undeniabl[y]" "long history of pervasive congressional regulation over the railway industry," in which federal "laws have touched on nearly every aspect of the railway industry, including property rights, shipping, labor relations, hours of work, safety, security, retirement, unemployment, and preserving the railroads during financial difficulties." *Id.* at 762 (internal footnotes omitted).

In *Sumlin v. BNSF Ry. Co.*, No. EDCV172364JFWKKX, 2018 WL 2723458, at *7 (C.D. Cal. 2018) in deciding a dispute between a state's rest period laws as to railway employees, the Court found such state laws preempted and contrary to the Congressional uniformity of federal regulation of railroads stating:

> **Because California's rest period laws require employers to compensate employees for missed rest periods, the Court concludes that the laws**

> interfere with Congress' intent to leave compensation determinations to labor agreements. … In addition, applying California's rest period laws to train employees would "encroach on a legislative area viewed by Congress as most appropriately governed by uniform legislation." (citation omitted) ("The Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system … the efficient operations of the interstate rail system.") (internal citation omitted). "… To allow individual states … to circumvent … any of the … elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operations of the interstate rail system.") Accordingly, the Court follows the Sixth Circuit's reasoning and concludes that "the congressional purpose behind the Adamson Act and Congress's longstanding decision to regulate railroads on a national level make it reasonable to infer that Congress has impliedly preempted the area" of regulation for compensation for rest breaks for train employees. (emphasis added). *Id.* at 154.

CONFLICT PREEMPTION: Even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted to the extent it conflicts with federal law. "Conflict preemption" may arise in two circumstances: 1) when it is impossible to comply with both federal and state law or 2) when state law stands as an obstacle to achieving the objectives of the federal law. *Telecommunications Regulatory Bd. of P.R. v. CTIA-Wireless Ass'n,* 752 F.3d 60, 64 (1st Cir. 2014); *Sawash v. Suburban Welders Supply Co.,* 407 Mass. 311, 316 (1990); and *Boston Housing Authority v. Garcia,* 449 Mass. 727, 732 (2007) "State law also must

yield when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"; and *Devaney v. Zucchini Gold, LLC*, 489 Mass. 514, 519 (2022) (recovery under the [state] wage act "actually conflicts" with the FLSA in that doing so "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."),

As stated, "State law, including municipal regulations, can be preempted by an act of Congress if the State law 'conflicts with federal law or would frustrate the federal scheme, or [if] the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Roberts v. Sw. Bell Mobile Sys., Inc.*, 429 Mass. 478, 486 (1999). "State law must give way to Federal law, however, where Congress has explicitly withdrawn the power of the State to regulate the subject matter, (citation omitted); has implicitly withdrawn that power "by creating a regulatory system so pervasive and complex that it leaves 'no room' for the states to regulate," or to the extent that it is impossible to comply with both. (citation omitted). State law must yield when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boston Housing Authority v. Garcia*, 449 Mass. 727, 733 (2007). "[F]ederal

statutes and regulations properly enacted and promulgated can nullify conflicting [S]tate or local actions" (citation omitted). *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007). Conflicts between Federal and State laws are governed by the principles of preemption. *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368 (1986); and *Roma, III, Ltd. v. Board of Appeals of Rockport,* 478 Mass. 580, 587 (2018). The ICCTA eliminated the former dual scheme of interstate regulation by the Federal government and intrastate regulation by the state government of railroads.

Under the Federal Prevailing Wage Act 21 U.S.C. 113, known as the Davis Bacon and Related Acts ("DBRA"), all laborers and mechanics employed for construction work on federally aid public projects are to be paid rates not less than those prevailing wage rates as determined by the Secretary of Labor, including a group of statutes generally identified as the DBRA. Such rates apply on federal contracts for construction, alteration and repair of federal public buildings or public works.

But the federal government determined that a railroad is not subject to prevailing wage rates, which conflicts with any state prevailing wage statute. This was articulated in a Memorandum dated June 26, 2008, from the U.S. Department of Transportation, Federal

Highway Administration, Director, Office of Program Administration, in which he stated that for railroad and utility relocation or adjustment projects that "23 U.S.C. 113 requirements do not apply to work performed by railroads, utility companies or work performed by a contractor engaged by a railroad or utility company." By federal law, a railroad performing such work is exempt from the DBRA wage requirements and in particular the payment of prevailing wage rates. (RA 66). That ruling was confirmation of previously rulings by the Federal Highway Administration on May 15, 1985, that Davis Bacon wage rates (and EEO) requirement are not applicable to "utility let contracts and railroad let contracts because the work to be accomplished is for accommodations of Federal-aid highway projects which benefit the public and not the utilities or railroads." (RA 70). The Federal Highway Administration ruled on September 18, 1985, that for such projects other mandated federal requirements do not apply to railroads. (RA 71).

It follows that if railroads, which are regulated by federal law, are exempt from federal prevailing wage rates, then railroads ought to be exempt from state prevailing laws with any such state requirement conflicting with federal law. Any contrary position would destroy the national unity for railroads and subject railroads to fifty different wage rates and

open the door to fifty rules and regulations involving prevailing wage rates. It is inconceivable that the Federal Government would expressly exempt railroads from prevailing wage rates only to permit individual states to impose prevailing wage rate requirements contrary to the concept of uniformity for railroad operations.[8]

III. THE WITHIN PROJECT WAS NOT A PUBLIC WORKS PROJECT.

Public works projects involve the construction, reconstruction, alteration, remodeling, or repair of any public work costing in excess of $50,000, which projects **must** be publicly bid and awarded pursuant to M.G.L. c. 30, § 39M. Public works are defined to specifically include public roadways, bridges, highways, sewers, water mains, and airports, **but railroads are not included nor mentioned**. M.G.L. c. 30, §§ 39G, 39M. *Modern Cont'l Constr. Co. v. City of Lowell*, 391 Mass. 829 (1984); and *J. D'Amico, Inc. v. City of Worcester*, 19 Mass. App. Ct. 112 (1984). Public works projects must be awarded to the lowest responsible and eligible bidder on the basis of competitive bidding. M.G.L. c. 30, § 39M(c). The LOA

[8] If a public project were a federal project, but with local workers performing work, under federal law, they would not have to be paid a prevailing wage rate; but if the Court were correct under state law, they would have to be paid a prevailing wage rate, which is mind boggling.

with MCR was not competitively advertised and bid, was not awarded to a low bidder, and was not a public project requiring the inclusion of prevailing wage rates, which were omitted by MassDOT, a factor noticeably missing and omitted by the Court herein.

Public roadways, bridges, highways, sewers, water mains, and airports are constructed for the direct use and benefit by the public. However, railroad tracks and related items are constructed for the direct use by railroads only. While Massachusetts owns the land, the tracks are part of an interstate network used by railroads that operate both in interstate commerce and in Massachusetts. Whereas Massachusetts regulates and controls its public works projects, railroad tracks are completely and solely regulated by the federal government.

Relocating railroad tracks for a MassDOT construction project is not a "utility" or "utility facility" as defined under M.G.L. c. 6C, § 44 (applicable to MassDOT) and does not include railroad property, which statute, if it were a utility or utility facility under M.G.L. c. 6C, § 44 specifically requires the utility owner to pay prevailing wages for utility relocation. The exclusion of MassDOT's contract for relocating railroad property for a construction project as not being a utility or utility facility is clear evidence as to inapplicability of a prevailing

wage requirement for the within LOA. If the Legislature intended to mandate a prevailing wage rate only in utility contracts of MassDOT and since the work under the LOA was not utility work, it can only mean that the Legislature intended to limit a prevailing wage rate for utility work and not for railroad track and relocation work.[9]

IV. IN THE ABSENCE OF NONCOMPLIANCE WITH M.G.L. C. 149, §§ 27 OR 27F, THERE CANNOT BE ANY VIOLATIONS OF THAT STATUTE WHICH IMMUNIZED DEFENDANTS FROM LIABILITY.

It was undisputed in this case that plaintiff never alleged nor complied with the applicable statute as to claimed violations of the prevailing wage statutes, M.G.L. c. 149, § 27 and 27F, the absence of which immunizes defendants from any liability. As to the determination of the prevailing wage, the formula is set in M.G.L.A. c. 149, § 26, which determination is made by DOL and not by a Court. Of note is the delegation by the Legislature of the exclusive authority given to DOL to determine and set the schedule of wage rates for bids on every public works project.[10] A Court is required to give deference to

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[9] *Expressio unius est exclusio alterius* aptly applies here. This maxim of statutory interpretation literally means that the expression of one thing is the exclusion of the other.

[10] DOL was given the function to determine prevailing wage rates, a function that a Judge is not

DOL's obligation to determine rates subject to the prevailing wage laws. *Niles v. Huntington Controls, Inc.*, 92 Mass. App. Ct. 15 (2017). In the absence of any determination by DOL, a Court does not have jurisdiction nor authority to make that administrative determination and substitute its decision for that of DOL. "In reviewing a regulation, a court cannot "substitute [its] judgment as to the need for a regulation, or the propriety of the means chosen to implement the statutory goals, for that of the agency, so long as the regulation is rationally related to those goals." *Massachusetts Fed'n of Tchrs., AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 772 (2002). "This deferential approach "is necessary to maintain the separation between the powers of the Legislature and administrative agencies and the powers of the judiciary." (citation omitted).[11] Plenary review of administrative regulations "would have an unhealthy tendency to substitute the court for the agency as policymaker." (citation omitted). Administrative agencies possess expertise in their areas of specialization, and "[r]egulations are good indicators of an agency's interpretation of a statute it is charged with administering." *Id.* at 772.

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in a position to determine nor authorized by the Legislature to make such a decision.

[11] See *Abuzahra v. City of Cambridge*, *Id.*

Since the prevailing wage statutes require the agency undertaking work to request of DOL the setting of a prevailing rate to be included in the agency's contract competitively bid and awarded, both MassDOT and DOL are necessary parties to the process and procedure, the absence of which from this case makes them a necessary party as the proper and necessary parties needed for a determination of the prevailing wage rate as mandated by the Legislature.

V. THE COURT ERRONEOUSLY HELD THAT THE FAILURE TO COMPLY WITH M.G.L. C. 149, §§ 27 AND 27F VOIDED THE CONTRACT EVEN WITHOUT COMPLIANCE WITH THE PREVAILING WAGE REQUIREMENTS.

In its Memorandum denying the motion for reconsideration, the Court stated that "However, § 27F of the prevailing wage act voids a contract that is in violation of the statute … and that under § 27F, an employer must ensure that its employees receive prevailing wage even if the contract does not incorporate that wage." That holding is predicated upon there being a violation of § 27F, which like § 27 cannot be determined without DOL having established that rate after a request from an agency in addition to the other predicates in the statute.

The Court's reliance on § 27F was erroneous. M.G.L. c. 149, § 27F is entitled **"Wages of operators of rented equipment; agreements; penalty; civil action"** and in this case there was no evidence that

plaintiff operated "rented equipment." That statute states "No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works … unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the operators of said trucks, vehicles or equipment." Plaintiff was simply not an operator of rented equipment. Even if it applied to plaintiff as an operator of rental equipment, there was no request by MassDOT and no determination by DOL that such rates applied, which are the mandatory predicates for a violation in this case.

The correct statute in this case was M.G.L. c. 149, § 27 entitled "List of jobs; classification; schedule of wages; penalty; civil action" stated that "Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder." Under § 27 that same provision was not stated in the statute and omitted therefrom. "[T]he omission of particular language from a statute is deemed deliberate where the Legislature included [*the*] *omitted language in related or similar statutes.*" *Commonwealth v. Johnson*, 482 Mass. 830, 835 (2019). "If the Legislature intentionally omits

language from a statute, no court can supply it." *Donis v. Am. Waste Servs., LLC,* 485 Mass. 257, 266 (2020).

This case is controlled by *McGrath, III v. ACT, Inc., et al.,* 2008 Mass. App. Div. 257 (2008), which held that the prevailing wage statute did not apply to a private employer which performed heating, ventilation and air conditioning work at a municipal building, where there had been no request by the municipality to establish a prevailing wage rate. As stated by the Court:

> Section 27 of G.L. c. 149 spells out the duties of parties involved in the procedure establishing public "prevailing" wage jobs. …. **The onus is on the public bodies and the Department of Labor ("DOL"). Before a public body (here, a municipal customer) awards a public works contract, it must submit to DOL a list of the jobs upon which workers such as mechanics and laborers are to be employed and to request DOL to determine the rate of wages to be paid on each job.** *Id.* **DOL, pursuant to G.L. c. 149, § 26, must then determine those wages and furnish the public body with a schedule of them, which schedule must appear in advertising or bid solicitations, and is made part of any project contract.** *Id.* § 27. The uncontroverted evidence here is that none of ACT's municipal customers adhered to any aspect of these statutory mandates. (emphasis added).

The Court in *McGrath, III v. ACT, Inc.* rejected the argument of plaintiff that cited the case of *Perlera v. Vining Disposal Serv., Inc.,* 47 Mass. App. Ct. 491 (1999) that held that the prevailing wage law applies even when a contract fails to recite that it so applies since an employer must ensure that its

employees performing on public projects receive the prevailing wage rate. The Court in *McGrath, III v. ACT, Id.* correctly distinguished that case since that case dealt specifically with trash collectors on public projects covered by M.G.L. c. 149, § 27F. As stated in *McGrath, III v. ACT, Id.* nothing in *Perlera* even with a generous reading, persuades this Division that could be stretched to cover McGraths work. The Court stated that "although the Legislature mandated the voiding of nonconforming contracts and afforded aggrieved employees substantial remedies, it did so in § 27F, § 27G (employees of moving contractors), and § 27H (employees of cleaning and maintenance contractors), and not generally in c. 149. McGrath's situation is not among those covered in these sections."

In *Tomei v. Corix Utilities (U.S.) Inc.,* No. CIV.A. 07-CV-11928DP, 2009 WL 2982775, at *12 (D. Mass. 2009) the Court stated:

> **For public works projects subject to § 27, the public body awarding the contract is required to submit a list of jobs to the Massachusetts Department of Labor ("DOL"), and the DOL is required to furnish a schedule of prevailing wages to the public body.** *See McGrath v. ACT, Inc.,* No. 08-ADMS-40018, 2008 WL 5115057, at *2 (Mass.App.Div. Nov.25, 2008). When a rate schedule is furnished, the public body "shall incorporate said schedule in the advertisement or call for bids" and "[s]aid schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract." Mass.

> Gen. Laws ch. 149, § 27. **However, where a municipality fails ever to request a prevailing wage rate schedule from the DOL, or the DOL fails to furnish such a schedule, there is no duty on a private employer to solicit or otherwise establish prevailing wage rates on its own. *See McGrath,* 2008 WL 5115057, at *2 (emphasizing that "[t]he onus is on the public bodies and the Department of Labor").** (emphasis added).

See *Andrews v. Weatherproofing Techs., Inc.,* 277 F. Supp. 3d 141, 153–154 (D. Mass. 2017):

> **The onus is on the public body/municipality to set the prevailing wage rate not the private employer. Where there has been no request by the public body/municipality to set a prevailing wage rate for contracted work the MPWA does not apply.** *See McGrath v. Inc.*, 2008 Mass.App.Div. 257 (2008); *Cf. Andrews v. First Student, Inc.*, No. 10-11053-RGS, 2011 WL 3794046 (D.Mass. Aug. 26, 2011)(**where municipality fails to request and obtain prevailing wage rate schedule from the Massachusetts Department of Labor and Workforce Development's Division of Occupational Safety before awarding contract under Mass.Gen.L. ch. 71, § 7A, employer is not obligated to pay prevailing wage)…. Simply put, there is no evidence in the record to support a finding that either Plaintiff was not paid prevailing wages on any job to which *for which a prevailing wage was set.* Summary Judgment shall enter for WTI on this claim.** (emphasis added).

See also *Cocchi v. Morais Concrete Service, Inc.,* 2015 Mass. App. Div. 49 where the Court stated:

> A city, town, or municipal contract for public works in violation of G.L. c. 149, § 27F is void as against public policy in accordance with the specific language of that statute…. **However, unlike § 27F, G.L. c.149, § 26 does not specifically state that a contract made in violation of its terms is void. If a statute does not expressly declare a contract made in**

> **violation of it void, and it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that the statute was intended to be directory and not prohibitory of the contract. (citations omitted).** Consistent with this rule is the general principle that "[c]ourts do not go out of their way to discover some illegal element in a contract or impose hardship upon the parties beyond that which is necessary to uphold the policy of the law." (emphasis added).

CONCLUSION.

Defendants respectfully request that this Court vacate the denial by the Superior Court of Defendants' Motion To Dismiss Amended Complaint, with the further Order to remand the case to the Superior Court with an Order to allow said motion to dismiss for the reasons stated herein.

Respectfully submitted,

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By their Attorneys,

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Dated: 07/12/2022

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

1-11-22

10

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT
2183CV00597

CHAD MARSH

vs.

~~MASSACHUSETTS~~ COASTAL RAILROAD LLC & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Chad Marsh filed this lawsuit against his former employer, Massachusetts Coastal Railroad LLC ("MCR"), alleging violations of the Wage Act, G.L. c. 149, § 148, the Overtime Act, G.L. c. 151, § 1A, and the Prevailing Wage Act, G.L. c. 149, § 27F. For the reasons discussed below, Defendants' Motion to Dismiss Amended Complaint is **DENIED**.

BACKGROUND

The following facts are taken from the Amended Complaint and are assumed to be true for purposes of this motion. MCR is a railroad company specializing in integrated freight and logistics services that completes public works projects throughout Massachusetts. MCR hired Marsh in 2019 as an equipment operator. His responsibilities included operating boom trucks, backhoes, loaders, and tampers at MCR job sites. Marsh resigned from his employment with MCR on June 28, 2021.

During Marsh's employment, MCR entered into numerous public works projects within the meaning of G.L. c. 149, § 27F and Marsh worked on these projects. One such project was

[1] P. Chris Podgurski

cc: RB AN 1-12-22

the South Coast Rail project to restore commuter rail service between Boston and Southeastern Massachusetts by the end of 2023. MCR entered into a Standard Contract with the Massachusetts Department of Transportation for 2020-2021 Capital Repairs and Improvements and Limited Services Support for the Southeastern Massachusetts Rail Lines.

MCR initially paid Marsh $15 per hour but later increased the rate to $23 and then $24.80 per hour. At the relevant times, the prevailing wage for this work was $63 per hour. Marsh performed more than 40 hours of work in multiple workweeks. MCR miscalculated Marsh's overtime pay by using his regular hourly rate rather than the prevailing wage rate.

MCR agreed to pay Marsh paid time off ("PTO") each year, accruing at a rate of 3.44 hours per weekly pay period. When Marsh resigned on June 28, 2021, he had 125.77 of accrued but unused PTO worth $3,119.10. Marsh also performed eight hours of work that day for which he was not compensated, or $198.40 in wages. MCR failed to pay Marsh these amounts on the next regular pay date. MCR paid Marsh $3,119.10 on July 8, 2021.

Marsh filed this action on July 23, 2021. Count I of the Amended Complaint alleges violation of the Wage Act, G.L. c. 149, § 148. Count II alleges violation of the Overtime Act, G.L. c. 151, § 1A. Counts III and IV allege violation of the Prevailing Wage Act, G.L. c. 149, § 27F.

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain factual allegations which, if true, state a recognized cause of action or claim and plausibly suggest, not merely are consistent with, an entitlement to relief. Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021). MCR contends that all counts of Marsh's Amended Complaint fail to state claims for

relief because they are preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 et. seq. ICCTA abolished the Interstate Commerce Commission and gave the Surface Transportation Board ("Board") exclusive jurisdiction over transportation by rail carrier. 49 U.S.C. § 10501(a). See Emerson v. Kansas City S. Ry. Co., 503 F.3d 1126, 1132 (10th Cir. 2007) (ICCTA establishes exclusive federal scheme of economic regulation and deregulation for railroad transportation).

The court starts with the assumption that a federal statute does not supersede the historic police power of the States unless that is the clear and manifest intent of Congress. Wyeth v. Levine, 555 U.S. 555, 565 (2009); Emerson v. Kansas City S. Ry. Co., 503 F.3d at 1129. See also Bay Colony R.R. Corp. v. Yarmouth, 470 Mass. 515, 518 (2015) (critical question in preemption analysis is Congressional intent).

Express Preemption

Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. Emerson v. Kansas City S. Ry. Co., 503 F.3d at 1129. The court focuses on the plain wording of ICCTA's preemption clause, which states in relevant part:

> The jurisdiction of the Board over (1) transportation[2] by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive. Except as otherwise provided in this part, the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

[2] Transportation is defined as "services related to [the] movement [of passengers or property by rail], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9). Although expansive, this definition does not encompass everything relating to railroads. Emerson v. Kansas City S. Ry. Co., 503 F.3d at 1129.

49 U.S.C. § 10501(b). This provision is an unmistakable statement of intent to preempt state laws touching on the substantive aspects of rail transportation. Engelhard Corp. v. Springfield Terminal Ry. Co., 193 F.Supp.2d 385, 389 (D. Mass. 2002). ICCTA preempts those state laws that have the effect of managing or governing rail transportation but not those laws that have only a remote or incidental impact on rail transportation. Norfolk S. Ry. Co. v. Alexandria, 608 F.3d 150, 158 (4th Cir. 2010). ICCTA has been found to preempt zoning, environmental, and other permitting laws, as well as nuisance and negligence claims arising from key aspects of railroad operation. See Norfolk S. Ry. Co. v. Alexandria, 608 F.3d 150, 160 (4th Cir. 2010) (ICCTA preempts local hauling permit ordinance); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643-644 (2d Cir.), cert. den., 546 U.S. 977 (2005) (ICCA preempts application of state environmental and land use laws); Friberg v. Kansas City Ry. Co., 267 F.3d 439, 444 (5th Cir. 2001) (ICCTA preempts negligence claim based on train's blocking of road); CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F.Supp. 1573, 1585 (N.D. Ga. 1996) (ICCTA preempts scheme requiring approval for railroad agency closing); Grafton & Upton R.R. Co. v. Milford, 337 F.Supp.2d 233, 238-239 (D. Mass. 2004) (ICCTA preempts application of Wetlands Protection Act and town zoning bylaws to proposed railroad interchange). In the view of this Court, MCR has not demonstrated as a matter of law that Marsh's wage and hour-related claims have the effect of managing or governing transportation so as to be expressly preempted under § 10501(b) of the ICCTA.

MCR also argues that there is express preemption under § 10501(c). That section states, in relevant part:

> (2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over --

> (A)Mass transportation provided by a local government authority; or
>
> (B)A solid waste rail transfer facility . . .
>
> (3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority . . . is subject to applicable laws of the United States related to –
>
> (i) safety;
>
> (ii) the representation for collective bargaining; and
>
> (iii) *employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.*

49 U.S.C. § 10501(c) (emphasis added). Each part of § 10501 has a clear purpose: section (a) defines the scope of the Board's jurisdiction, section (b) explains when that jurisdiction is exclusive and preempts other law, and section (c) carves out exceptions to the jurisdictional grant in section (a). New York & Atlantic Ry. Co. v. Surface Transp. Bd., 635 F.3d 66, 72 (2d Cir. 2011). Thus, subsection (c) is not a preemption provision but rather, simply states that the Board does not have exclusive federal jurisdiction over the employment dealings of local governmental authorities. This Court does not construe § 10501(c) to establish the express preemption of state laws regulating the employment relationship. Accordingly, MCR is not entitled to dismissal of Marsh's complaint based on express preemption under ICCTA.

Exemption From ICCTA

Marsh contends that his claims are exempt from ICCTA under § 10501(c)(2), which states: "Except as provided in paragraph (3), the Board does not have jurisdiction under this part over (A) mass transportation provided by a local government authority." Mass transportation means "transportation by a conveyance that provides regular and continuing general or special transportation to the public." 49 U.S.C. § 5302(a)(7). In relevant part, a local government authority means a political subdivision of a state, an authority of at least one state or political subdivision of a state, or a person or entity that contracts with the local governmental authority to

provide transportation services. 49 U.S.C. § 5302(10); 49 U.S.C. § 10501(c)(1). The MBTA and DOT arguably fall within this definition, as does MCR by entering into the Standard Contract for 2020-2021 Capital Repairs and Improvements and Limited Services Support for the Southeastern Massachusetts Rail Lines.

Marsh cites a declaratory judgment opinion in which the Board concluded that commuter rail service provided by the Massachusetts Bay Commuter Railroad Company for the MBTA constitutes mass transportation that is excepted from the Board's jurisdiction under 49 U.S.C. § 10501(c)(2). See Massachusetts Bay Commuter R.R. Co., LLC, 2003 WL 21359920 at *2 (Surface Transp. Bd. June 4, 2003). He argues that because MCR worked on the repair and improvement contract for the commuter rail, that work falls outside the Board's jurisdiction and there can be no preemption under ICCTA. See Grosso v. Surface Transp. Bd., 804 F.3d 110, 117 (1st Cir. 2015) (Board's determination on issue of ICCTA preemption is entitled to deference to extent its interpretation is persuasive). Cf. Emerson v. Kansas City S. Ry. Co., 503 F.3d at 1130 (court looks to Board's interpretation of ICCTA's preemptive scope, as Board is uniquely qualified to determine whether state law is preempted).

However, the Board's conclusion in the cited opinion appears to rest on the determination that the MBCRC was a "rail carrier" as defined by 49 U.S.C. § 10102(5), "a person providing common carrier railroad transportation for compensation," because it contracted to operate the commuter rail for the MBTA. See Massachusetts Bay Commuter R.R. Co., LLC, 2003 WL 21359920 at *2 (Surface Transp. Bd. June 4, 2003). Although MCR performed repair and improvement work on the commuter rail project, it does not itself provide common carrier railroad transportation or mass transportation as a local government authority. Thus, Marsh has

not demonstrated that his wage and hour claims are exempt from the Board's jurisdiction and potential ICCTA preemption.

Field Preemption

MCR contends that even if the enactment of ICCTA does not expressly preempt Marsh's claims, they are barred by the doctrine of field preemption. Field preemption does not require a conflict between federal and state law; rather, it is implied when the scope of a statute indicates that Congress intended federal law to exclusively occupy a field. Wisconsin Central Ltd. v. Shannon, 539 F.3d 731, 762 (7th Cir. 2008); Emerson v. Kansas City S. Railway Co., 503 F.3d at 1129. Although preemption is not to be lightly presumed, state law must give way to federal law where Congress has created a regulatory system so pervasive and complex that it leaves no room for the states to regulate. Boston Hous. Auth. v. Garcia, 449 Mass. 727, 733 (2007); Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999).

Wages, including the prevailing wage and overtime, are an area traditionally left to state regulation. Wisconsin Central Ltd. v. Shannon, 539 F.3d at 763; Frank Bros., Inc. v. Wisconsin Dept. of Transp., 409 F.3d 880, 886 (7th Cir. 2005). However, two circuits have concluded that field preemption precludes the states from enforcing wage and hour laws where railroads are concerned. See J. Corman R.R. Co. v. Palmore, 999 F.2d 149, 151 (6th Cir. 1993); Wisconsin Central Ltd. v. Shannon, 539 F.3d at 764-765 (both concluding that field preemption bars claims for violation of state overtime act). Those courts noted the undeniable long history of pervasive congressional regulation over the railway industry, with federal laws governing property rights, shipping, labor relations, hours of work, safety, security, retirement, and unemployment. See J. Corman R.R. Co. v. Palmore, 999 F.2d at 151; Wisconsin Central Ltd. v. Shannon, 539 F.3d at 762. Those courts then inferred from the Adamson Act, a federal enactment which established

an eight-hour day for railroad employees but left wages to private negotiation after a temporary freeze, that Congress intended for railroads and their employees to negotiate overtime free from state regulation. Wisconsin Central Ltd. v. Shannon, 539 F.3d at 765.

However, the Sixth and Seventh Circuit decisions appear to be inconsistent with the holding of the U.S. Supreme Court in Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994). In that case, the Supreme Court analyzed the Federal Railway Labor Act ("FRLA"), which provides a comprehensive framework for resolving labor disputes involving railroads. Id. at 252. The Court concluded that the FRLA governs only disputes over contractually-defined rights and does not preempt state law rights that exist independent of a collective bargaining agreement. Id. at 260 (concluding that FRLA did not preempt retaliatory discharge claim under state whistleblower act). MCR correctly notes that this case does not involve a collective bargaining agreement. Nonetheless, in analyzing FRLA, the Supreme Court emphasized that preemption of employment standards within the traditional police power of the state should not be lightly inferred, and found no clear and manifest congressional purpose to broadly preempt the employment protections extended by States independent of a negotiated labor agreement. Id. at 252, 255-256. See also Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 6-8 (1942) (concluding that FRLA does not regulate wages, hours, or working conditions but rather, simply provides a means for bargaining over those issues).

Notwithstanding the pervasive federal regulation of railroads, it does not clearly appear that Congress intended to foreclose the enforcement of State wage and hour requirements. "[T]he Supreme Court does not consider the aggregate federal labor regulation for railroad and airline workers to rise to a level that suggests congressional intent to occupy the field." Payne v. Tri-State Careflight, LLC, 2016 WL 6396214 at *19 (D.N.M. 2016) (finding no field preemption

of state claims for overtime and other unpaid compensation). MCR has failed to persuade this Court that Marsh's claims for violation of the Wage Act, Overtime Act, and Prevailing Wage Act[3] are impliedly preempted by the federal government's pervasive regulation over the railway industry.

State Law Grounds

MCR further contends that Counts III and IV fail to state plausible claims for relief because this case does not involve a public works project under G.L. c. 149, § 27F. The Prevailing Wage Act does not define "public works" and the meaning of the phrase is elastic, depending on the particular statute at issue. Perlera v. Vining Disposal Serv., Inc., 47 Mass. App. Ct. 491, 493-494, rev. den., 430 Mass. 1108 (1999). However, the core concept involves the creation, maintenance, or repair of public improvements having a nexus to land, such as buildings, roads, sewerage or waterworks facilities, bridges, or parks. Id. at 494. MCR cites a May 1, 2015 Department of Transportation, Highway Division opinion letter stating that a prevailing wage is not required when a railroad or railroad contractor is relocating property for a construction project. However, the Department of Labor administers the Prevailing Wage Act and that is the agency whose interpretation of the statute is entitled to deference. Teamsters Joint Council No. 10 v. Director of Dept. of Labor and Workforce Develop., 447 Mass. 100, 109 (2006); Niles v. Huntington Controls, Inc., 92 Mass. App. Ct. 15, 21 (2017). The Department of

[3] There is no merit to MCR's argument that Marsh's prevailing wage claim is barred because the Federal prevailing wage statute does not include railroads. See Frank Bros., Inc. v. Wisconsin Dept. of Transp., 409 F.3d 880, 895-897 (7th Cir. 2005) (concluding that state's decision to require prevailing wage for category of workers excluded by Congress from Davis-Bacon Act does not create conflict preemption).

Transportation's opinion does not establish as a matter of law that Marsh cannot prevail on Counts III and IV of the Amended Complaint.[4]

Finally, there is no merit to MCR's argument that Count I fails to state a claim for violation of the Wage Act because a plaintiff may not recover under that statute for failure to pay the prevailing wage in violation of G.L. c. 149, § 27F. See Donis v. American Waste Serv., LLC, 485 Mass. 257, 269 (2000). A careful reading of Count I reveals that it alleges Wage Act violations based on failure to pay Marsh for certain hours of work, failure to pay overtime, and failure to pay for accrued but unused PTO. Marsh's claims for prevailing wages properly are pled as separate counts. Accordingly, MCR has not established its entitlement to dismissal of the Amended Complaint.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion to Dismiss be **DENIED**.

Brian S. Glenny
Justice of the Superior Court

DATED: January 11, 2022

A TRUE COPY ATTEST
Clerk of Courts

[4] Moreover, the substance of the DOT opinion letter concerns whether a railroad is a "utility" under G.L. c. 6C, § 44, which requires utility owners to pay the prevailing wage for utility relocation.

5-4-22

17

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

BROCKTON DIV. SUPERIOR COURT
CIVIL ACTION NO. 2183CV00597

CHAD MARSH

vs.

MASSACHUSETTS COASTAL RAILROAD LLC & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION UNDER SUPERIOR COURT RULE 9D AS TO DENIAL OF THEIR MOTION TO DISMISS

A motion to reconsider pursuant to Superior Court Rule 9D calls upon the broad discretion of the motion judge. *Commonwealth* v. *Charles*, 466 Mass. 63, 84 (2013); *Audubon Hill S. Condo. Ass'n* v. *Community Ass'n Underwriters of Amer., Inc.*, 82 Mass. App. Ct. 461, 470 (2012). If there is no material change in circumstances, such as newly discovered evidence or a development of relevant law, a judge is not obliged to reconsider a case, issue, or question of law after it has been decided, absent a particular and demonstrable error in the original decision. *Charles*, 466 Mass. at 83-84; *Littles* v. *Commissioner of Corr.*, 444 Mass. 871, 878 (2005).

With respect to the issue of preemption, defendants' motion for reconsideration cites the same case law and reiterates the arguments asserted in their initial motion to dismiss. The Court (Sullivan, J.) has stayed this case while the defendants pursue an interlocutory appeal; therefore, any error in the analysis will be remedied by the Appeals Court. Accordingly, the Court, in its discretion, declines the defendants' invitation to alter its original decision.

[1]P. Chris Podgurski

With respect to the prevailing wage claim, the defendants cite the recent case *Rego* v. *Allied Waste Serv. of Mass., LLC*, 100 Mass. App. Ct. 750, 753 (2022), for the proposition: "Like § 27, § 27F provides that '[s]aid rates of wages shall be requested of said commissioner by said public official or public body, and shall be furnished by the commissioner in a schedule.' G.L. c. 149, § 27F."[2] The defendants argue that Marsh's prevailing wage claim should be dismissed because MassDOT never requested the Commissioner to set prevailing wage rates for the contracts at issue, citing *McGrath* v. *ACT, Inc.*, 2008 Mass. App. Div. 257, 258 (private employer had no duty with respect to prevailing wage under § 27 where municipality did not request that prevailing rate be established for contract work).

However, § 27F of the prevailing wage act voids a contract that is in violation of the statute, and there is authority for the proposition that under § 27F, an employer must ensure that its employees receive the prevailing wage even if the contract does not incorporate that wage. See *Perlera* v. *Vining Disposal Serv., Inc.*, 47 Mass. App. Ct. 491, 492-493, rev. den., 729 N.E.2d 469 (1999); *McGrath* v. *ACT, Inc.*, 2008 Mass. App. Div. at 259-260. See also *Andrews* v. *Weatherproofing Tech., Inc.*, 277 F.Supp.3d 141, 153 n.6 (D. Mass. 2017) (§ 27F requires payment of prevailing wage even if rate was not properly set). Because Marsh alleges that he is an equipment operator covered by § 27F, the defendants have not established clear error in the court's refusal to dismiss Count III. The prevailing wage claim is more appropriately resolved at a later stage of the proceedings. See *O'Leary* v. *New Hampshire Boring, Inc.*, 176 F.Supp.3d 4, 10-11 (D. Mass. 2016) (to survive motion to dismiss, prevailing wage complaint need not allege that public official designated project as prevailing wage project, commissioner issued wage rate

[2]Notably, the *Rego* case does not represent any change in the substantive law applicable to this matter.

schedule, or schedule was included in bid solicitation; whether prevailing wage act applies may be resolved on summary judgment).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion For Reconsideration Under Superior Court Rule 9D As To The Denial Of Their Motion to Dismiss be **DENIED**.

Brian S. Glenny
Justice of the Superior Court

DATED: May 4, 2022

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 27

§ 27. List of jobs; classification; schedule of wages; penalty; civil action

Effective: August 8, 2008
Currentness

The commissioner shall prepare, for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed, including the transportation of gravel or fill to the site of said public works or the removal of surplus gravel or fill from such site. The commissioner shall classify said jobs, and he may revise such classification from time to time, as he may deem advisable. Prior to awarding a contract for the construction of public works, said public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job. Each year after the awarding of the contract, the public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices and laborers are to be employed and shall request that the commissioner update the determination of the rate of wages to be paid on each job. The general contractor shall annually obtain updated rates from the public official or public body and no contactor[1] or subcontractor shall pay less than the rates so established. Said rates shall apply to all persons engaged in transporting gravel or fill to the site of said public works or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators. The commissioner, subject to the provisions of section twenty-six, shall proceed forthwith to determine the same, and shall furnish said official or public body with a schedule of such rate or rates of wages as soon as said determination shall have been made. In advertising or calling for bids for said works, the awarding official or public body shall incorporate said schedule in the advertisement or call for bids by an appropriate reference thereto, and shall furnish a copy of said schedule, without cost, to any person requesting the same. Said schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract. Any person engaged in the construction of said works shall cause a legible copy of said schedule and subsequent updates to be kept posted in a conspicuous place at the site of said works during the life of the contract. An apprentice performing work on a project subject to this section shall maintain in his possession an apprentice identification card issued pursuant to section 11W of chapter 23. The aforesaid rates of wages in the schedule of wage rates shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans as provided in said section twenty-six, and such payments shall be considered as payments to persons under this section performing work as herein provided. Any employer engaged in the construction of such works who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in said construction. Whoever shall pay less than said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner, and whoever, for himself, or as representative, agent or officer of another, shall take or receive for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any part or portion of the wages, including payments to health and welfare funds and

pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall also be deemed to be employers of the employees of any corporation within the meaning of sections 26 to 27B, inclusive.

Offers of restitution or payment of restitution shall not be considered in imposing such punishment.

When an investigation by the attorney general's office reveals that a contractor or subcontractor has violated this section by failing to pay said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner, or that a contractor or subcontractor has, for himself, or as representative, agent or officer of another, taken or received for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any portion of the wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, the attorney general may, upon written notice to the contractor or subcontractor and the sureties of the contractor or subcontractor, and after a hearing thereon, order work halted on the part of the contract on which such wage violations occurred, until the defaulting contractor or subcontractor has filed with the attorney general's office a bond in the amount of such penal sum as the attorney general shall determine, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner.

An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Credits

Amended by St.1935, c. 461; St.1955, c. 180; St.1956, c. 606, § 2; St.1960, c. 401, § 2; St.1964, c. 609, §§ 2, 3; St.1967, c. 296, §§ 4, 5; St.1973, c. 625, §§ 1, 2; St.1983, c. 394; St.1987, c. 284, § 1; St.1987, c. 559, § 9; St.1993, c. 110, § 173; St.1998, c. 236, § 6; St.2002, c. 357, § 3; St.2008, c. 80, § 1, eff. July 12, 2008; St.2008, c. 303, §§ 21, 22, eff. Aug. 8, 2008.

Notes of Decisions (32)

Footnotes

1 So in enrolled bill; probably should read “contractor”.

M.G.L.A. 149 § 27, MA ST 149 § 27

Current through Chapter 76 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 27F

§ 27F. Wages of operators of rented equipment; agreements; penalty; civil action

Effective: July 12, 2008
Currentness

No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the operators of said trucks, vehicles or equipment. Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder. Said rates of wages shall be requested of said commissioner by said public official or public body, and shall be furnished by the commissioner in a schedule containing the classifications of jobs, and the rate of wages to be paid for each job. Said rates of wages shall include payments to health and welfare plans, or, if no such plan is in effect between employers and employees, the amount of such payments shall be paid directly to said operators.

Whoever pays less than said rates of wages, including payments to health and welfare funds, or the equivalent in wages, on said works, and whoever accepts for his own use, or for the use of any other person, as a rebate, gratuity or in any other guise, any part or portion of said wages or health and welfare funds, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C.

An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Credits
Added by St.1960, c. 795. Amended by St.1987, c. 559, § 11; St.1993, c. 110, § 177; St.1998, c. 236, § 8; St.2008, c. 80, § 2, eff. July 12, 2008.

Notes of Decisions (22)

M.G.L.A. 149 § 27F, MA ST 149 § 27F
Current through Chapter 76 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Alvin S. Nathanson, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier at size 12 point, 10½ characters per inch, and contains 50, total non-excluded pages prepared with Microsoft Word 2013.

/s/ Alvin S. Nathanson
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Dated: 07/12/2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on July 12, 2022, I have made service of this Brief and Appendix upon the attorney of record for each party by the Tyler Host Electronic Filing system on:

Raven Moeslinger
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