

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**April 10, 2018**

---

In the Matter of  
Pan Am Railways, Inc. &  
Boston and Maine Corporation

---

OADR Docket Nos. 2017-025, 2017-026  
Northfield & Buckland, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

Pan Am Railways, Inc. and Boston and Maine Corporation (“the Railroad”) filed these consolidated appeals to challenge two separate Notices of Demand for Payment of Stipulated Penalties (“Demands”) issued by the Massachusetts Department of Environmental Protection’s Western Regional Office (“DEP”). The Demands arise out of DEP’s claims that the Railroad violated an Administrative Consent Order With Penalty (ACOP-WE-13-4003, “ACOP”) in the towns of Buckland and Northfield, Massachusetts. The ACOP was executed following numerous incidents of waste piles of railroad ties catching fire alongside the Railroad’s tracks in Massachusetts. The ACOP bars the Railroad from staging railroad track ties adjacent to the tracks (1) in excess of 365 days or in a manner that would (2) present a fire hazard or (3) threaten the safety of emergency response personnel. The Demands alleged the Railroad violated each of these requirements in Buckland and Northfield, but they only seek stipulated penalties for the temporal violations and only for 30 days of violations--\$30,000 for each site, for a total of \$60,000. The Railroad generally denied the allegations, claiming that it complied with the

ACOP with respect to the Buckland location and was generally inhibited from complying at the Northfield location because its resources had to be deployed to upgrade existing tracks in the area.

After holding an evidentiary adjudicatory hearing, I recommend that DEP's Commissioner issue a Final Decision affirming the Demands. An overwhelming preponderance of the evidence demonstrates that the Railroad egregiously violated the ACOP at both locations. Not only did the Railroad fail to remove staged ties within 365 days, it also staged the ties in a manner that created a fire hazard and threatened the safety of emergency response personnel. Although the Railroad made a conclusory testimonial denial of the allegations, it failed to come forward with any evidence of compliance with the ACOP—in fact, it has no standard operating procedure, protocol, practice, or documentation to show that it had been complying with the ACOP prior to the alleged violations. Not only did the Railroad fail to comply with the ACOP at the Northfield location, it flagrantly violated the ACOP by stockpiling hundreds (if not thousands) of creosote treated waste ties in a pile adjacent to the rail line, without a single fire break in the pile. Creosote is used as a wood preservative that typically contains toxic chemicals; it is flammable and in a fire it can create toxic fumes requiring firefighters to wear special breathing apparatuses. It is difficult to extinguish creosote fires with water, often leading to the need for chemical suppressants, which can further adversely impact the surrounding environment.<sup>1</sup> The foreseeable result in Northfield was a large fire that was eventually extinguished by the collective efforts of firefighters from Massachusetts, Vermont, and New Hampshire.

---

<sup>1</sup> <https://www.atsdr.cdc.gov/phs/phs.asp?id=64&tid=18>;  
[https://www.atsdr.cdc.gov/sites/KerrMcGee/docs/Creosote%20Health%20Effects%20\(Tronox\).pdf](https://www.atsdr.cdc.gov/sites/KerrMcGee/docs/Creosote%20Health%20Effects%20(Tronox).pdf)  
<https://www.ncbi.nlm.nih.gov/pubmed/18558221>

## **THE BURDEN OF PROOF**

In an adjudicatory proceeding involving DEP's enforcement of an ACOP, DEP has the burden of proving the elements of its case by a preponderance of the evidence. See 310 CMR 5.36(2) and (3) (involving penalties). "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

## **BACKGROUND**

The ACOP was executed in March 2013 following DEP's prior enforcement actions against the Railroad for its allegedly "unauthorized disposal, abandonment or discarding of . . . railroad ties and the associated fire hazard potential." Hall, Buckland PFT<sup>2</sup>, p. 2. The ties were generated when the Railroad removed them from its rail lines and deposited them adjacent to rail

---

<sup>2</sup> "PFT" is the acronym for pre-filed testimony.

lines at various places throughout Massachusetts. Hall, Buckland PFT, p. 2. The enforcement actions were brought pursuant to laws governing solid waste disposal, including G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014. ACOP, ¶¶ 4.E – 4.F.

The ACOP memorialized certain events leading to its entry: In May 2005, the Deerfield Fire Department complained to DEP about two separate brush fires in April 2005 along the railroad tracks owned and managed by the Railroad in Deerfield. ACOP, ¶ 4.A. “The brush fires spread to and engulfed railroad ties discarded and abandoned at these locations, increasing the difficulty in extinguishing the fires, and contributing to conditions of air pollution and exposing first responders to increased health and safety risks from chemicals used to treat the fires.” ACOP, ¶ 4.A.

In addition, several piles of “what appeared to be abandoned and discarded railroad ties” were found along the rail tracks in Charlemont, on the upper banks of the Deerfield River. ACOP, ¶ 4.C. In 1999, the Massachusetts Department of Conservation and Recreation complained to DEP about “thousands of creosote-treated railroad ties discarded along approximately 7.5 miles of tracks operated by [the Railroad] within the watershed of the Wachusett Reservoir, “a designated Zone 1 water supply in the Towns of West Boylston and Sterling, Massachusetts.” ACOP, ¶ 4.D. Pursuant to the ACOP, the Railroad negotiated in 2013 to pay a fine of \$59,746.50 to DEP, with \$10,000 of that amount suspended pending the Railroad’s compliance for one year. ACOP, ¶ 13.

At issue in these appeals, are the ACOP provisions governing the Railroad’s management of railroad ties that were removed from the railroad bed and left adjacent to the tracks as part of track maintenance. In general, the ACOP required the Railroad to remove these used and scrap ties from the rail line right of ways (“ROW”) in Massachusetts within one year (365 days) from

the time they were removed from the tracks. See ACOP “Disposition” Paragraph 9, EMS Amendment and ENV SOP 032 attached to the ACOP. The specific ACOP provisions at issue include the following:

9.A. . . . [The Railroad] shall cease the unauthorized disposal, abandonment or discarding of railroad ties . . . by implementing and adhering to Section 5.1.9 of [the Railroad’s] EMS and Paragraphs 1-3 of [the Railroad’s] ENV-SOP-032, the provisions of which are expressly incorporated herein . . . .”

C. By no later than September 1, 2013, [the Railroad] shall survey all of its track [in Massachusetts] for the purpose of appropriately dating used and scrap rail ties staged along its tracks in accordance with ENV-SOP-032. All ties so marked shall be dated with the month and year upon which they were removed from rail service in accordance with ENV-SOP-032.

D. By no later than October 1, 2013, [the Railroad] shall be in full compliance with the Solid Waste Management Regulations, Section 5.1.9 of their EMS, and ENV-SOP-032.

EMS Amendment 5.1.9, titled “Railroad cross Ties,” which was incorporated into the ACOP, provides in relevant part the following: “Used and scrap ties shall upon removal for service, be allowed to remain along the rail line where they were removed for a period of up to one year (365 days) provided they are managed in a manner that is compliant with ENV-SOP-032.”

EMS-SOP-032 provides in relevant part the following:

Removed ties shall either be taken directly off-site for disposal or may be temporarily staged along the railroad right of way (ROW) or terminal facility for a period not to exceed 365 days. Staged rail ties shall be managed in accordance with the follow criteria:

1. Scrap and used ties shall not be placed along the track in locations or quantities that would pose a fire hazard or threat to emergency response personnel.

2. At the time of staging, all used ties shall be marked blue; all other ties shall be considered scrap. . . .

4. Every 1,000 linear feet of railroad track, one (1) tie shall be visibly painted with month and year removed, with a minimum of one (1) tie so painted for all projects. All ties/piles located in-

between the dated piles shall be considered removed on the same date unless otherwise dated.

5. Staged ties shall be removed from along the ROW by no later than 365 days of the date from which the ties were initially staged. Scrap ties shall be removed and directly transported for offsite disposal or recycling at an appropriately permitted facility. Used ties may be removed to a [designated storage area] for additional storage pending reuse.

6. Routine Track Inspection Patrols shall inspect scrap and used ties staged along the railroad ROW to ensure conformity with [the preceding provisions].

Since execution of the ACOP there have been “fires involving significant quantities of rail ties . . . along the rail lines owned and/or operated by the [Railroad] . . . .” Hall PFT, p. 2. This includes fires in Athol on May 8, 2015, Buckland on April 19, 2015, and Holyoke on November 24, 2015. Hall PFT, p. 2. As a consequence, DEP arranged with the Railroad for DEP staff person Charles Clines to ride on a railcar and inspect the rail lines for staged rail ties. Hall PFT, p. 3. Clines performed those inspections in May 2015. His inspections documented in detail many large piles of railroad ties located close to and along the Railroad’s tracks in Massachusetts.

On June 13, 2017, about two years after Clines’ inspection of the rail lines, a large fire occurred adjacent to tracks in Northfield, engulfing part of a large pile of rail ties in flames. Fire departments from 11 towns in Massachusetts, New Hampshire, and Vermont responded to the fire, along with DEP staff. The rail tie pile that caught fire was approximately 1,500 feet long and 8 to 12 feet high. The fire burned approximately 220 feet of the pile. The pile contained no fire breaks.

Three days later, on June 16, 2017, DEP received a complaint from Terry Estes of the Buckland Board of Health, stating that the Town was concerned about fire hazards associated

with a large rail tie pile along the tracks in Buckland. Clines Buckland PFT, p. 3; Hall PFT, pp. 3-4.

In response, Clines investigated both the Northfield and Buckland locations on June 19, 2017. Based upon those investigations and Clines prior 2015 investigations, DEP determined that the Railroad had violated the ACOP with respect to the Northfield and Buckland rail piles. As a consequence, it issued a Notice of Demand For Payment of Stipulated Penalty for each site pursuant to paragraph 20 of the ACOP (“the Demands”). That provision provides in relevant part the following: “[I]f [the Railroad] violates any provision of this Consent Order, [the Railroad] shall pay stipulated penalties to the Commonwealth in the amount of one thousand dollars (\$1,000) per day for each day, or portion thereof, each such violation continues.” ACOP, ¶ 20 (emphasis added).

For the Northfield pile and fire, DEP determined that there had been three violations of the ACOP: rail ties had been staged along the rail line: (1) longer than 365 days and in a manner that (2) posed a fire hazard, and (3) created a threat to emergency response personnel. Demand for Stipulated Penalties (Northfield), ¶ 10. The Demand sought stipulated penalties for only one of the violations and for only 30 days of noncompliance, or \$30,000.

For the Buckland rail pile, DEP also determined that there had been three violations of the ACOP: rail ties had been staged along the rail line: (1) longer than 365 days and in a manner that (2) posed a fire hazard and (3) created a threat to emergency response personnel. Demand for Stipulated Penalties (Buckland), ¶ 10. The Demand sought stipulated penalties for only one of the violations and for only 30 days of noncompliance, or \$30,000.

Both Demands notified the Railroad of its right to an adjudicatory hearing if it contests DEP’s: (1) “determination that [it] failed to comply with the Consent Order” or (2) “calculation

of the amount of the stipulated” penalty. Demand, ¶ 13. DEP determined that “[w]hile the non-compliance consisted of many hundreds of days, [DEP] determined that 30 days is a reasonable amount of days to penalize the [Railroad] for these violations provided the Petitioners bring the Site into compliance with the ACOP.” Hall Buckland PFT, pp. 4-5.

DEP issued the Demands following a period of time after entry of the ACOP during which DEP had numerous contacts with the Railroad in an attempt to achieve greater compliance with the ACOP. These attempts were mostly unsuccessful, i.e. the railroad was generally not responsive. Hearing, File<sup>3</sup> 1, 1:07.

The Railroad appealed both Demands here, to the Office of Appeals and Dispute Resolution. In addition to contesting DEP’s determination that the Railroad failed to comply with the ACOP the Railroad also argued that DEP failed to consider the penalty factors in G.L. c. 21A § 16 and 310 CMR 5.25 in determining the penalty amount to demand. I previously determined, however, pursuant to the decision in Empire Recycling, that the Railroad was barred from challenging DEP’s consideration of the penalty factors. In sum, the Railroad waived that right and agreed to the penalty amount when it entered the ACOP. See Matter of Empire Recycling, LLC, Docket No. 2015-017, Recommended Final Decision (January 27, 2016), adopted by Final Decision (February 12, 2017). Indeed, here, the ACOP provided that the Railroad reserved the rights to “contest” DEP’s “determination that it failed to comply with” the ACOP “and/or . . . the accuracy of [DEP’s] calculation of the amount of the stipulated . . . penalty.” ACOP, ¶ 20. In addition, the stipulated penalty provision above unequivocally requires that the Railroad “shall pay” the stipulated amount, and the ACOP states that the Railroad “waives, its right to an adjudicatory hearing before DEP on, and judicial review of, the

---

<sup>3</sup> “File” refers to the recorded audio files of the adjudicatory hearing—File 1 is from the first part and File 2 is from the second part. The time notations that follow are approximate locations on the files where the testimony can be found.



issuance and terms of [the ACOP] and to notice of any such rights of review.” ACOP, ¶¶ 13 and 20. Therefore, the only issues to be adjudicated in this appeal are whether the Railroad violated the terms of the ACOP with respect to Buckland and Northfield as alleged in the Demands for those sites.

DEP presented pre-filed written testimony from the following witnesses who were cross examined at the adjudicatory hearing:

1. Charles Clines. Clines is employed in DEP’s Western Regional Office (“WERO”) as an Environmental Engineer IV - Solid Waste Section. He has worked for the agency in the Solid Waste Section since 1995. His job duties and responsibilities include office and field supervision of and participation in permitting, compliance, and enforcement activities relating to the Massachusetts Solid Waste Statutes and Regulations (M.G.L. c. 21H; M.G.L. c. 111, §150A and §150A½, and the regulations at 310 CMR 16.000 and 310 CMR 19.000), including conducting inspections, reviewing permit applications, issuing approvals, and evaluating cases that warrant the assessment of administrative penalties. No educational background information was provided.
2. Daniel Hall. Hall has been employed with DEP in its Solid Waste section for approximately 26 years. He has served as the Solid Waste Section Chief for DEP’s Western Region since 2000. Previously, he was employed with an environmental compliance and consulting firm for 2 years. Hall holds BS degrees in environmental health and technology and biology and an AS degree in environmental science.
3. Terry Estes. Estes serves on the Board of Health, Buckland, Massachusetts.

The following witness testified for the railroad and was cross examined at the adjudicatory hearing:

1. William Wallace. Wallace is employed with Pan Am Railways as its Chief Engineer of Track Structures. He has been employed in the engineering department since 2010. His duties generally include operational maintenance for the entire railroad and oversight of maintenance and installation of track, bridges, buildings, and ballast. No educational background information was provided.

## **DISCUSSION**

### **I. The Railroad Violated The Terms Of The ACOP At The Buckland Site**

***DEP's Evidence and Argument.*** Clines inspected the Railroad's tracks from Deerfield to North Adams on May 18 and May 19, 2015. Clines Buckland PFT, p. 2. He documented rail tie piles in terms of their general location using a handheld GPS device. The size of each tie pile was noted. Photographs were taken when possible and not precluded by the line of sight or speed of the rail car on which he was riding. Clines Buckland PFT, p. 2. Clines plotted the rail tie pile locations on aerial photographs using the Massachusetts Geographic Information System (MassGIS). Clines Buckland PFT, p. 3, Attachment 2. The rail tie report contains the plotted GPS locations on aerial maps, a spreadsheet correlating GPS points with photograph numbers, as well as a descriptor of estimated rail tie pile size and other general comments. Id.

Clines testified that during his May 19, 2015, inspection he observed that "waste rail ties were piled at many locations along the track including a location north of the "Trolley Museum" at 14 Depot Street in the village of Shelburne Falls in Buckland, MA ("Buckland location"). Clines Buckland PFT, p. 3. The ties were approximately 20 feet from the rail lines. Hearing, File 1, 1:01. The Buckland location was noted to be a medium sized pile, and was designated as

“GPS point 059” in the survey and on the MassGIS aerial photographs included in the survey.

The pile at the Buckland site contained approximately 100 to 500 ties during the May 18 and 19 inspection. Hall PFT, p. 4.

About two years later, in 2017, DEP responded to the complaint by Terry Estes of the Buckland Board of Health, stating that the Town was concerned about the presence of a relatively large rail tie pile. Clines Buckland PFT, p. 3. Estes had contacted DEP after learning about the June 13, 2017 rail tie fire in nearby Northfield. Hall PFT, pp. 3-4. There was concern that the ties at the Buckland location presented a similar fire hazard. Hall PFT, pp. 3-4.

On June 19, 2017, Clines responded to Estes’ complaint and inspected the Buckland location with Estes. Estes showed Clines a pile of ties on the northwest portion of the Buckland location and described several other piles located elsewhere along the tracks in the town. Clines Buckland PFT, p. 3, Attachment 3. Clines testified that the “rail tie pile [he] observed and photographed at the [Buckland location] on June 19, 2017 as shown in Attachment 3 was at the same location [he] observed a rail tie pile [during his] May 19, 2015 [inspection].” During the May 19, 2015, inspection Clines “was unable to capture a photograph of the rail ties” at the Buckland location because the railway vehicle on which he was performing the inspection and which was being driven by a railroad employee was moving too swiftly. Clines Buckland PFT, p. 3. However, Clines corroborated his May 19, 2015, observations of the rail tie pile at the Buckland location with Google Earth photographs dated September 2011 and May 2014. Clines Buckland PFT, p. 3, Attachment 4. Those photographs document that in September 2011 and May 2014 there were similarly large piles of ties adjacent to the tracks and between a dirt and gravel turn off from Depot Street in the Buckland location. Hearing, File 1, 44:00.

DEP further corroborated the continuous presence of railroad ties at the Buckland location. Sam Bartlett, President of the Buckland Trolley Museum, confirmed to Clines during the June 19, 2017, inspection that “there was a pile of ties at the Site in 2015.” Bartlett added that after a December 2016 derailment “the ties and debris from the derailment were added to the existing tie pile that [Clines] observed at the Site on [his] May 19, 2015 survey.” Clines Buckland PFT, p. 4.

DEP also provided corroborating testimony from Estes. He testified that he views the Buckland location “virtually every day when [he is] at work.” Estes PFT, p. 1. He testified that in December 2016 there were approximately 500 rail road ties stored at the Buckland location. He testified that the ties had been stored there for approximately 3 years prior to that time. He “know[s] this because [he] pass[es] this location at least daily driving to the Town Hall and other locations in Buckland and Shelburne. The number of ties and the location of the ties did not change to [his] knowledge at any time in the two years prior to the derailment [in December 2016].” Estes PFT, p. 1. In addition, he has “kept track of the railroad ties, locations, and numbers for the last 20 years thru various ownership and name changes of the railroad. [He has] done this because of the hazards to public health, and especially the local fire departments that have had to put out the fires along the tracks.” Estes PFT, p. 2. The ties contain creosote, a wood preservative containing hazardous chemicals that can leach into the nearby Deerfield River and create dangerous fumes when burned. Hearing, File 1, 21:00. Once ties soaked with creosote catch fire, the fire can only generally be extinguished with a chemical foam, which can also be harmful to the environment. Hearing, File 1, 22:00.

Estes has also been aware of fires along the tracks as an ongoing problem because the town must regularly allocate money to its fire department to fight fires along the tracks. Hearing,

File 1, 9:11. The pile at the Buckland location is particularly dangerous because of the close proximity of houses and businesses. Hearing, File 1, 23:00. After the December 2016 derailment Estes saw that additional railroad ties were added to the Buckland location. “These railroad ties were in addition to the railroad ties that were stored at that location prior to the derailment.” Estes PFT, p. 2. In July 2017, after Estes’ complaint, the railroad ties were removed from the Buckland location. Estes testified that “Many of these ties, or ones that look just like them, were moved to locations approximately 150 to 300 feet further east. There are piles on both sides of the tracks totaling as many ties as were in the [Depot Street location]. They were simply put out of sight of the previous location.” Estes PFT, p. 2. Estes testified that there are piles of ties every 100 to 200 feet in the town along the railway that have been in those locations for approximately 10 years, and “never been touched.” Hearing, File 1, 14:00. Estes has attempted to contact railroad officials on number of occasions regarding the piles of ties, but his attempts have been largely ignored. Hearing, File 1, 25:00.

The Railroad argues that little weight should be attached to Estes’ testimony because it is uncorroborated by photographs or other documentation and Estes did not view the Buckland location 24 hours a day, 7 days a week, i.e., there were times when he was not present to observe whether the Railroad was removing the ties. Railroad Closing Brief (Buckland), p. 4. I disagree with the Railroad. Estes testified to his almost daily direct observations of the ties, which are a priority for him based upon his position with the Board of Health. His testimony was very credible.

Based upon the above evidence, Clines concluded that “the rail ties were stored at the Site for more than 365 days and that the fire hazard concern on the part of Town of Buckland was valid.” Clines Buckland PFT, p. 4.

Hall agreed with Clines' assessment and conclusion. Hall PFT, p. 4. He also testified that the ties were stored in a manner that "posed a fire hazard or threat to emergency response personnel." Hall PFT, p. 4. For approximately 20 years part of Hall's duties has involved trying to address the problem of rail ties accumulating along the tracks. It is a repeated problem with fire departments because of the creosote contained in the rail ties. When fire department personnel handle a fire involving rail ties they must wear special breathing equipment, known as a self-contained breathing apparatus: Hearing, File 1, 1:12. The creosote also makes it difficult to extinguish the fires. The fires generally occur when sparks from the trains cause the brushfires which ignite the piles of ties. Hearing, File 1, 1:15. If piles get larger than 10 to 20 ties, they become a significant fire hazard because their size makes it more difficult to put the fire out. The pile has to be broken apart to put out. Hearing, File 1, 1:16. Fire departments have generally stated that any pile adjacent to the tracks is a fire hazard. Hearing, File 1, 1:18. The Buckland location also created a fire hazard because of the nearby proximity of houses and buildings. *Id.*

***Railroad's Response.*** Wallace testified that the "waste rail ties observed during the June 19, 2017 DEP inspection have not been staged along the rail line longer than the 365 day time period proscribed in the Consent Order." Wallace PFT, ¶ 4 (emphasis in original). He generally testified that since the May 19, 2015, DEP survey by Clines, the Railroad has engaged in "continuous efforts to clean and further maintain the rail line in the [Buckland location] and surrounding areas." Wallace PFT, ¶ 4. He added that the ties from the December 2016 derailment were placed along the Railroad's "right of way" for "immediate removal." He stated that those ties and "additional ties from other projects" proximate to the area were removed by July 11, 2017, with the exception of about 100 ties which were purposely left for use by the

Shelburne Falls Trolley Museum, as requested by the museum's Board of Directors. Wallace PFT, ¶¶ 5-6. He concluded that all of the ties identified in June 2017 were from the December 2016 derailment.

While Wallace believes that there were no rail ties at the Buckland location longer than 365 days, I attach no weight to his testimony. He never personally observed the ties being removed from the site prior to July 2017. He has no records or other evidence of them being removed prior to that time. Although Wallace believes he would have seen the tie pile prior to December 2016 while travelling by in a rail car, his testimony was ambiguous and not persuasive. He admitted that the Railroad presently has no systematic way of knowing what rail ties are picked up at any particular time from the ROW. Hearing, File 2, 16:30 – 23:00; 29:00; 38:00; 43:00; 48:00; 1:20. The Railroad has no practice, protocol, or records to show when rail ties are placed or removed from anywhere on the ROW. Hearing, File 2, 16:30 – 23:00; 43:00. Wallace had no personal knowledge of the rail tie pile at the Buckland location other than the placement of rail ties there after the derailment of December, 2016. *Id.* Wallace has no way of knowing whether ties are left out longer than 365 days unless he travels the tracks and personally observes them. Hearing, File 2, 29:00; 38:00. The only actual documentation provided by the Railroad is from operations performed in July 2017, after Clines site visit in June 2017. *See e.g.* Exhibit B to Railroad's Pre-Hearing Statement.

Although the Railroad is required to date the ties as they are removed from the tracks, there was no evidence of compliance with that requirement. Hearing, File 2, 43:00. Wallace testified that he does not know the dates on the ties that were removed from the Buckland location. Hearing, File 2, 1:20. In fact, he stated that he was not aware that any of the ties

removed from the Buckland location had any dates on them whatsoever. Hearing, File 2, 1:20-23.

In addition, ties in piles are not segregated according to the dates that they were set aside for staging. Hearing, File 2, 34:00; 42:00. So a pile will have ties that were removed at different dates. *Id.* He testified that the ties are dated as they come out and then later removed but he has no personal knowledge, procedure, or protocol for knowing whether that actually occurs. Hearing, File 2, 43:00.

***Conclusion.*** I find that rail ties were staged at the Buckland location longer than 365 days. I reach this conclusion based upon the unequivocal, credible, and consistent testimony from Clines and Estes. Estes daily observations of a tie pile at the Buckland location were compelling, particularly when considered alongside of Clines' testimony, investigation, and corroborating photographs of a large rail tie pile at the Buckland location at various times.

There is no evidence of the absence of ties at that location, other than after the ties were indisputably removed in July 2017 and Wallace's unsupported conclusory statement that rail ties were not allowed to remain at the Buckland location for longer than 365 days.

I also find that the rail ties were stored in a manner that posed a fire hazard and a threat to emergency response personnel. Hall testified that he has extensive experience in dealing with rail tie fires and that fires are a "recurring issue" along the rail ROW. Hearing, File 1, 1:13:00 – 1:14:10; 1:18. He testified that even small piles of 10 – 20 ties can be a fire hazard. Hearing, File 1, 1:16:00 – 1:17:00. He testified that, based upon his experience and information given to him from local fire chiefs, the cause of fires along the rail road ROW is generally sparks generated by a passing train. Nearby rail ties and brush provide fuel for the fire, and thus a fire hazard. The threat to emergency personnel arises from the smoke emissions, which contain



chemicals from the creosote preservatives in the ties. As a consequence, emergency response personnel must wear special protective equipment to avoid inhalation of the chemical fumes.

Hearing, File 1, 15:15:20- 1:18:20; Hall Northfield PFT, p. 3.

The Railroad's witness, Wallace, offered no evidence to show how the ties were placed along the track in a manner that was not a fire hazard or threat to emergency response personnel. When asked how the Petitioners would place ties along the track so as not to "pose a fire hazard or threat to emergency response personnel," Wallace responded "not sure". Hearing, File 2, 31:00 – 32:00. When asked about the quantity of ties that could safely be placed along the ROW so as not to cause a fire hazard, Wallace responded that the Railroad did not have an acceptable "safe" number. Hearing, File 2, 33:00 – 33:20.

For the above reasons, the stipulated penalty demand for the Buckland locations should be affirmed. In fact, DEP could have exercised its discretion to demand substantially larger penalties but for unknown reasons decided against that.

## **II. The Railroad Violated The Terms Of The ACOP At The Northfield Site**

***DEP's Evidence and Argument.*** Clines inspected the Railroad's tracks from Northfield to Springfield on May 27, 2015. As with his other 2015 inspection involving the track in Buckland, he rode in a railcar with Railroad staff. Rail tie piles locations were documented using a handheld GPS device. The size of each tie pile was noted and, where line of sight and time allowed, a photograph of each rail tie pile was taken. Clines Northfield PFT, p. 2, Attachment 2. Clines later plotted the rail tie pile locations on aerial photographs using MassGIS, along with a spreadsheet correlating GPS points with photograph numbers and a general description of estimated rail tie pile size. Id.

During his May 27, 2015, survey Clines observed waste rail ties piled at many locations along the track, including a location just west of the “Mitchell” and “Lane” gravel bank in Northfield (the “Northfield location”). The location of that pile was assigned the survey report location of GPS point 077. Other large piles were viewed to the south at GPS locations 084, 121, 138, 157 and smaller tie piles were viewed at several locations north and south of GPS location 077. The photographs provided by Clines indicate substantial volumes of waste railroad ties in many piles along the railway tracks. The photographs numbered 01 to 28 show the presence of waste rail road ties at the Northfield location and in the vicinity of that location. Clines Northfield PFT, p. 2, Attachment 2.

Clines conducted a follow-up inspection on June 19, 2017, in response to the June 13, 2017, fire at the Northfield location. At the site, he “viewed a tie pile approximately 1500 feet long, north to south and 8 to 15 feet high. The pile was located 10 to 20 feet west of the railroad tracks.” Clines Northfield PFT, p. 3. The fire occurred in a southern part of the pile. The ties did not have any visible markings of dates when they were removed or stored. At the site, Clines learned from Michael Wright, Director of Rail America, a company retained to monitor removal of the ties, that the large pile of ties at the Northfield Site had been “consolidated to the Site from piles previously located elsewhere along the track.” Clines PFT, p. 4, Attachment 3.

Hall testified that the Northfield Site fire was responded to by eleven 11 fire departments from 3 different states. Rail tie fires present particular hazards to first responders because of the wood preservatives used in the manufacturing of the rail ties. Hall Northfield PFT, p. 3. The Northfield location was also a fire hazard particularly because of its size and as evidenced by the substantial fire department resources required to put it out. Hearing, File 1, 1:20.

Clines concluded that “[b]ased upon [his] observations of the Site on May 27, 2015, and June 19, 2017, and [his] conversation with Mr. Wright, . . . the waste rail ties stored at the [Northfield location] had been stored in a manner that presented a fire hazard and had been stored at the Site for more than 365 days from the date they were removed from service.” Clines Northfield PFT, p. 4; accord Hall Northfield PFT, p. 4.

***Railroad’s Response.*** Wallace testified in response that since Clines May 2015 inspection the Railroad has “engaged in continuous efforts to clean and further maintain the rail line [at the Northfield Site] and the surrounding areas.” Wallace Northfield PFT, ¶ 6, ¶ 12. Wallace added: “However, it must be noted that construction to improve MassDOT’s Connecticut River Main Line is ongoing, further complicating railroad operations and [the Railroad’s] efforts to engage in waste tie removal per the Consent Order.” Wallace Northfield PFT, ¶ 7. Wallace then elaborated upon work required for the Connecticut River Main Line improvement project, including the removal of additional rail ties. Id. at ¶¶ 8-9. The Railroad argues that this work presented an “operational difficult[y]”, which should absolve it of liability for the violations. Railroad Closing Brief (Northfield), pp. 2, 3-5.

Wallace added that the Railroad was consolidating waste and excess rail ties to a “pile along the rail line right of way at the [Northfield Site].” Id. at ¶ 10. This was done to facilitate removal of ties. Id. at ¶ 11. The location was chosen because it was remote, “with the intent that the likelihood for potential harm would be reduced.” The Railroad was in the process of creating a plan to remove the ties when the fire occurred. Id. at ¶ 10. That removal plan was implemented within days after the fire, and the remaining ties were removed shortly afterwards. Id. at ¶ 10.

Wallace concluded his pre-filed testimony by adding: The Railroad is “aware of [its] duties and responsibilities under the Consent Order and have sought to conduct railroad operations and construction in accordance with these regulations since the Consent Order’s effective date in 2013. [The Railroad’s] efforts to facilitate more efficient excess and waste tie removal demonstrates the [Railroad’s] intent to mitigate safety and fire hazards to the areas in and around the [Northfield Site].” Wallace Northfield PFT, ¶ 14.

**Conclusion.** I find that rail ties were staged at the Northfield location longer than 365 days and they were stored in a manner that posed a fire hazard and threat to emergency response personnel. This conclusion is based upon a number of factors. First and foremost, the Railroad does not deny that the ties were stored in the Railroad ROW longer than 365 days or in a manner that posed a fire hazard and threat to emergency response personnel. In fact, Wallace testified that he has no knowledge of what dates were on the ties that were staged at the Northfield location. He also admitted that he has no personal knowledge whether any of the ties were actually dated. Hearing, File 2, 1:20-23.

Second, the Railroad’s only defense to the penalty demand for the Northfield location is that the Railroad was very busy implementing a substantial rail line upgrade. That assertion, however, fails as a matter of law. Nowhere in the ACOP is there a provision that would allow the Railroad to assert such defense. Likewise, I am not aware of any body of law that would support such defense, and the Railroad has not pointed to one.

Third, the Railroad’s own position further undermines its defense. The Railroad admits that it continued to add ties to the pile at the Northfield location in an attempt to consolidate ties for removal. That endeavor, however, created a larger pile of ties that consequently increased the fire hazard and threat to emergency personnel. Thus, not only did the Railroad not comply

with the ACOP, it did the opposite and increased fire hazards and threats to emergency personnel. In fact, instead of “directly transporting” the ties from the ROW to an offsite location after being staged for no more than 365 days, the ties were consolidated in the ROW. The Railroad admitted that there is no authorization in the ACOP or the SOP for this method of handling the ties and they were staged in direct contravention of the SOP and ACOP. Hearing, File 2, 40:00; 1:11. Wallace also admitted that he was not familiar with the state fire marshal regulations governing storing of rail ties. Hearing, File 2, 40:00.

For all the above reasons, the penalty demand for the Northfield location should be affirmed. In fact, DEP could have exercised its discretion to demand substantially larger penalties but for unknown reasons decided against that.

### **CONCLUSION**

For all the above reasons, I recommend that DEP’s Commissioner issue a Final Decision affirming the Notices of Demand for Stipulated Penalties issued to the Railroad with respect to both the Buckland and Northfield locations.

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party

shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: 4/10/18



\_\_\_\_\_  
Timothy M. Jones  
Presiding Officer

**SERVICE LIST**

In The Matters Of:

Pan Am Railways, Inc. and Boston and  
Maine Corporation

Docket Nos. 2017-025, 026

File Nos. 00002703, 00002704  
Northfield & Buckland

**Representative**

**Party**

Robert B. Burns  
Pan Am Railways, Inc. and Boston and  
Maine Corporation  
1700 Iron Horse Park  
North Billerica, MA 01862  
[rburns@panam.com](mailto:rburns@panam.com)

PETITIONER

MacDara Fallon  
MassDEP Office of General Counsel  
One Winter Street  
Boston, MA 02108  
[MacDara.Fallon@state.ma.us](mailto:MacDara.Fallon@state.ma.us)

DEPARTMENT

Cc:  
Daniel Hall  
MassDEP Western Regional Office  
436 Dwight Street  
Springfield, MA 01103  
[Daniel.Hall@state.ma.us](mailto:Daniel.Hall@state.ma.us)

DEPARTMENT

Date: April 10, 2018

