when an agency adopts an interpretation that conflicts with its previous position.

Finally, the Court did not address MBA's last argument that the DOL's 2010 opinion was a rule instead of an interpretation. The Court stated that neither the district court nor the D.C. Circuit Court considered the issue, and MBA did not dispute the issue in its opposition brief to certiorari. Thus, MBA waived the argument.

Accordingly, the Court reversed the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Brian Davis

Grosso v. Surface Transp. Bd., 804 F.3d 110 (1st Cir. 2015) (holding that (1) the Board's ruling that the ICCTA preempted local zoning laws regulating wood pellet transloading facility was entitled to *Skidmore*, not *Chevron*, deference; (2) in determining whether vacuuming, screening, bagging, and palletizing of wood pellets constituted "transportation", the proper question for the Board was whether the activities facilitate the movement of passengers or property, not concerns of economic efficiency; and (3) the Board's denial of petitioners' request for discovery was appropriate).

In 2011, Grafton & Upton Railroad Company ("G&U"), a licensed rail carrier, completed construction of a wood pellet transloading facility that received wood pellets from hopper railcars, then vacuumed, screened, bagged, and palletized pellets for transfer onto trucks. Prior to G&U's completion of the facility, it entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC ("GU Railcare), which provided that GU Railcare would operate the transloading services on behalf of G&U.

Petitioners Diana del Grosso, et al. ("petitioners"), neighbors of the transloading facility, petitioned the Surface Transportation Board ("Board") for a declaratory order that local zoning laws regulating the activities at G&U's transloading facility were not preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). Petitioners argued that such activities did not constitute "transportation" and GU Railcare was not a "rail carrier" under the ICCTA and that local zoning laws were therefore not preempted by the statute. The Board concluded that local zoning laws were preempted by the ICCTA and denied petitioners' request for discovery.

On appeal, the Board and G&U asserted that the Board's finding of preemption is entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v.*

NRDC, Inc., 467 U.S. 837, 843 (1984), held that "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Following *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009), however, the courts of appeals have unanimously held that federal agencies are not entitled to *Chevron* deference on the question of preemption. Instead, where a federal agency has not been granted specific authority from Congress to pre-empt state law, the agency is entitled only to *Skidmore* deference, which allows the court to defer to the agency provided the agency's interpretations of the state law's impact on the federal regulatory scheme are persuasive. *Skidmore v. Swift & Co.*, 65 S. Ct. 161, 164 (1944). Because the Board was not given any direct authority from Congress, the First Circuit applied *Skidmore* deference to the Board's decision on preemption.

The court next considered the primary issue of whether the activities at G&U's transloading facility constituted "transportation" by "rail carrier," and thus whether ICCTA would preempt local zoning laws. The Board concluded that the transloading activities were "transportation" because they allowed G&U to transport wood pellets in hopper railcars, which have the capacity for substantially more pellets than the boxcars that must otherwise be used in the absence of such activities. Here, the court rejected the Board's cost efficiency rationale on the grounds that it would result in regulatory gaps wherein state and local regulation would be eliminated solely because the facilities were economically connected to rail transportation. Additionally, the court found the Board's interpretation of "transportation" under the ICCTA to be unpersuasive because it did not adhere to general jurisprudence that interpretations of "transportation" must relate to facilitating the movement of passengers or property. The court concluded that although the wood pellets were being transloaded from trucks to railcars, remand is required to determine whether the vacuuming, screening, bagging, and palletizing of the pellets *facilitated* the loading of the pellets onto the trucks.

Lastly, the court addressed petitioners' claim that the Board erred in denying discovery, which petitioners claimed was necessary in determining whether G&U's transloading activities were being conducted by a "rail carrier" pursuant to the ICCTA. Generally, a court will not revisit a lower court's discovery order if it has not substantially prejudiced the injured party. The Board concluded that the transloading agreement and the lease between G&U and GU Railcare was sufficient to make a showing of whether G&U's transloading activities were being performed by a "rail carrier." Because the petitioners failed to refute the Board's reasoning here and did not prove the decision resulted in manifest injustice, the

court found no basis to overturn the Board's decision that the transloading activities were conducted by a "rail carrier."

Accordingly, the Board's decision that G&U's transloading activities constituted "transportation" based on concerns of economic efficiency was vacated and remand was required to determine whether the transloading activities facilitated the physical movement of pellets onto the trucks.

Robert Blank

Industria y Distribuction de Alimentos v. Trailer Bridge, 797 F.3d 141 (1st Cir. 2015) (holding that a fee charged by the Puerto Rico Ports Authority to shipping operators for the scanning of incoming cargo did not violate the dormant Commerce Clause and was not an unconstitutional burden on the flow of interstate commerce).

In 2011, the Puerto Rico Ports Authority ("PRPA") created Regulation No. 8067, which required the scanning of all incoming non-bulk cargo into the port of San Juan. The PRPA intended this regulation to allow for better identification of unreported taxable goods and improve upon existing security measures. The PRPA equipped three shipping operators at the port with scanning technology, and all importers and shipping operators who used the port were charged an Enhanced Security Fee ("ESF") to cover the costs of the scanning procedures. Twenty-nine importers and the three shipping operators filed suit seeking injunctive relief from scanning requirements and the ESF, alleging the regulations violated the dormant Commerce Clause. The District Court held that the scanning procedures were permissible. However, the ESF as enforced against the twenty-nine importers who were not provided with scanning technology, violated the dormant Commerce Clause. The three shipping operators provided with the scanning technology (the "Plaintiffs") appealed.

The Plaintiffs' complaint asserted that the ESF violated the dormant Commerce Clause because the ESF was excessive, the port operators received no benefit from it, and the burden on interstate commerce outweighed the benefit to the PRPA.

The Appellate Court reviewed the lower court's factual findings and legal conclusions de novo. In accordance with *Evansville–Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707 (1972), the court held that the ESF was a user fee and a user fee is constitutional if it: "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discrimi-