

Laura Schaefer  
158 6<sup>th</sup> St.  
Del Mar, CA. 92014

Shirli Weiss  
551 Stratford Court  
Del Mar, CA. 92014

301197

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### Citizen's Response to Amtrak's Submission

**Re: Docket No. FD 36433 North Coast Transit District—Petition for Declaratory Order**

#### Introduction

On October 19, 2020, Amtrak belatedly filed a letter in support of the North County Transit District's Petition, missing the STB's October 5, 2020 deadline, and claiming lack of notice. This is despite the fact that Amtrak is a member of the Association of American Railroads, which submitted an opposition to Respondents City of Del Mar's and California Coastal Commission's requests for an extension. *See Order, North Coast Transit District—Petition for Declaratory Order, STB Doc. No. 36433 (September 23, 2020, Order setting October 5, 2020 deadline for interested parties to file a response to the Petition).*

In light of Amtrak's belated filing, and in the interests of justice, Laura Schaefer and Shirli Weiss respectfully submit this letter in response to the October 19, 2020 letter filed by Amtrak and request that the Surface Transportation Board consider its contents and enter it into the record.

#### Argument

##### **1. The Single Case Cited by Amtrak Does Not Support Its or NCTD's Position**

Amtrak cites the Board's decision in North County San Diego Transit Development Board – Petition for Declaratory Order, FD No. 34111, in support of its request that the Board declare that NCTD's tentative and ill-defined future fencing activity will be exempt from all state and local law, including generally applicable property law, construction and building codes and public safety laws. That case, however, involved the City of Encinitas' attempt to require NCTD to obtain an advance permit and preclearance to construct a new passing track for use in railroad transportation. This Board held that Encinitas' permitting requirement was preempted by section 10501(b) of the ICC Termination Act (ICCTA) because that section expressly grants the Surface Transportation Board the exclusive jurisdiction to regulate rail transportation with respect to "rates, classifications, rules ..., practices, routes, services, and facilities," and "the construction,

acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." The construction of a railroad passing track falls squarely within that definition.

Here, erection of a fence to prevent trespassing on railroad land is not "transportation by rail carrier" and does not fall within the rail transportation activities, services or facilities subject to the Board's exclusive jurisdiction. Rather, NCTD is just like any other landowner that wishes to put up a fence to keep trespassers off its property. NCTD's ownership of property near railroad tracks does not transform a fence around that property into rail transportation subject to ICCTA preemption.

Moreover, NCTD is not seeking simply to avoid a permitting or preclearance requirement, it apparently seeks much broader exemption from all state and local law, including generally applicable, non-discriminatory laws that have little or no effect on rail transportation. What NCTD and Amtrak are seeking, essentially, is exemption from all state and local laws that apply to all citizens, businesses, and property owners—without regard for any nexus to rail transportation--simply because they are rail carriers. This is not, and never has been, the law. Numerous cases have held that reasonable, generally applicable state and local building codes and public health and safety requirements that do not burden rail transportation are not preempted by ICCTA.

Section 10501(b) does not preempt all traditional state police powers over public health, safety, and welfare. Unless it is the clear and manifest purpose of Congress to substitute its law for that of the states, a presumption against pre-emption is employed out of respect for federalism and to give effect to the historic role of the states as the primary regulators of matters of health and safety. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (pre-emption cases "start with the assumption that the historic police powers of the States were not to be superseded' . . . "consistent with both federalism concerns and the historic *primacy of state regulation of matters of health and safety*"; see also, *CSX Transportation, Inc. v. City of Plymouth*, 92 F. Supp. 2d 643 (E.D.Mich. 2000) (a state has the authority to regulate the railroads on local, as opposed to national, safety issues); *Burlington N. & Santa Fe Ry Co. v. Dept. of Transp.*, 227 Ore. App. 468, 472-73, 206 P.3d 261 (noting that the ICCTA does "not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads"); *Okla. Corp. Comm'n v. Burlington N. & Santa Fe Ry. Co.*, 24 P.3d 368, 371 (Okla. Ct. App. 2000) (Congress did not intend when it enacted the ICCTA to pre-empt a state agency's police power over maintenance of a fence along its right of way.)

Fencing to prevent local trespassers is not "rail transportation," and does not involve the construction of a track or railroad "facility." Del Mar's laws governing the construction and parameters of fences does not prevent NCTD from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn v. U.S. Government*, 154 F.3d 1025 (9th Cir. 1998), cert. denied 527 U.S. 1022, 119 S. Ct. 2367, 144 L. Ed. 2d 771 (1999), and they are not preempted.

It has also been consistently held that the states have the traditional police power reserved by the Constitution to regulate the public safety of the rail-highway grade crossings, and can allocate

costs for safety projects in the crossing. See, e.g., *Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346, 98 L. Ed. 51, 74 S. Ct. 92 (1953); *Lehigh Valley R. Co. v. Board of Public Utility Commissioners*, 278 U.S. 24, 73 L. Ed. 161, 49 S. Ct. 69 (1928); *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394, 65 L. Ed. 322, 41 S. Ct. 169 (1921). Because the NCTD has not provided this Board with the specifics of its proposed fencing project, it cannot be determined whether they intend to construct a fence at or near the crossing. The data in Exhibit B to the NCTD Petition demonstrates that, over the last 10 years, railroad fatalities and incidents ("incidents") are clustered in one short segment of the track in Del Mar at or near the crossing, not on the tracks running along the steep bluffs. The incidents occurred from mile 244.1, the Coast grade crossing, to mile 244.8 with over 50 % of the incidents occurring at the crossing and the majority of the incidents occurring within approximately one third of a mile of the crossing between mile 244.1 and 244.3.

The Board cannot make an informed decision regarding preemption of this ill-defined fencing project. But one thing is certain: NCTD's own data does not establish a need for a 2 mile fence where no trespassing incidents have occurred. Instead, the data establishes that trespassers enter at the Coast crossing grade, and Del Mar will concentrate its efforts there, as an appropriate exercise of its police powers.

## **2. Amtrak Does Not Support Its or NCTD's Conclusory Allegation That CZMA Federal Consistency Review Cannot Be Harmonized With ICCTA.**

Amtrak makes the conclusory allegation that CZMA federal consistency review cannot be harmonized with ICCTA. However the STB has shown it believes such harmonization is not only possible, but necessary, by specifically providing for CZMA review and certification in its own regulations ( See 49 CFR 1105.9). The regulation provides that where federal consistency review applies, the STB "will withhold [or stay] a decision" in a proceeding until the CZMA compliance certification process has been completed. (49CFR 1105.9(b)

CZMA is triggered here because federal funding is involved in the bluffs stabilization project through SANDAG. SANDAG, not NCTD was the applicant for the August 2020 California Coastal Commission Consistency Certification CC-0001-20, and will be the applicant for future bluff stabilization projects. NCTD also seeks to use its own professed uncertainty and equivocation with respect to the use of federal funding for a possible future fencing project as a basis to obtain a premature declaratory order from the STB. The STB should decline the NCTD's invitation to issue an order based on NCTD's compound speculation that: (i) it may wish to conduct an undefined fencing project in the indefinite future, for which (ii) it might or might not seek to use federal funding. The Board has repeatedly cautioned that ICCTA preemption is a fact-dependent analysis requiring fact-specific determinations. A declaratory order based on NCTD's speculation, and not concrete facts, is not only unripe and unnecessary, it could be rendered moot or erroneous should NCTD go forward with a fencing project using federal funding. NCTD publicly stated in March, 2020 that in light of the pandemic, it intends to seek federal funding under CARES and from FEMA for its operations (<https://gonctd.com/wp-content/uploads/2020/03/NCTD-COVID-19-Fact-Sheet.pdf>) and NCTD here asserts that its operations include bluff stabilization and fence construction. Finally, NCTD has not declared that it has not already used federal funding obtained under the CARES Act or otherwise to

prepare and file its Petition seeking to avoid CZMA application to its current and future projects which itself is equivalent to using federal funding for its projects.

**3. The NCTD And Amtrak Arguments Regarding ICCTA Preemption Are Misguided And Incorrect, Because Rail Safety Is Primarily Governed By The FRSA, Administered By The FRA, And Not By ICCTA.**

Amtrak's arguments should be rejected for the additional reason that the primary authority for rail safety rests with the Federal Railroad Administration (FRA) under the Federal Railroad Safety Act (FRSA), not the STB.

North County Transit Development Board-Petition for Declaratory Order FD 34111 (2002) cited by Amtrak that found preemption is inapposite because that case dealt with the laying of tracks, not with safety, fencing or trespassing. Congress enacted the Federal Railroad Safety Act (FRSA) to "promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C 20101; *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009). The FRSA "confers authority upon the Secretary of Transportation to 'prescribe regulations and issue orders for every area of railroad safety.'" See 49 U.S.C. 20103 (a); *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 106 (2d Cir. 2009). The FRSA has an "express pre-emption provision that contemplates continued state regulation of railroad safety." (*Island Park* at p. 107; See 49 U.S.C. 20106. "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement" which the "ICCTA did not address." *Iowa, Chi. & R.R. Corp. v. Wash. County*, 384 F.3d 557, 561 (8th Cir. 2004). "Several circuits that have examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration ("FRA"), not the STB." *Id.*, citing *Boston & Me. Corp. v. Surface Transp. Bd.*, 361 U.S. App. D.C. 94, 364 F.3d 318, 321 (D.C. Cir. 2004); *Iowa, Chi. & E. R.R. Corp.*, 384 F.3d at 561; *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001).

Thus, FRSA provides the appropriate basis and forum for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law. This issue implicates rail safety concerns such that the FRSA and not ICCTA is the principal governing statute in determining whether local and state authority is pre-empted. The analysis must start with the FRSA, and not the ICCTA and not in this forum.

Respectfully submitted,

Laura Schaefer  
158 6<sup>th</sup> Street  
Del Mar, CA. 92014

Shirli Weiss  
551 Stratford Court  
Del Mar, CA. 92014

Proof of Service Financial Docket No. 36433

I certify that on October 21, 2020 all parties of record have been served with the Citizen Response to Amtrak Submission via email in this matter. CC: Parties of record:

Timothy J. Strafford  
[tstraftord@aar.org](mailto:tstraftord@aar.org)  
Association of American Railroads

William C. Pate  
[wpate@dpmclaw.com](mailto:wpate@dpmclaw.com)  
Peter A. Pfohl  
[pap@sloverandloftus.com](mailto:pap@sloverandloftus.com)  
City of Del Mar

Louise Warren  
[Louise.Warren@coastal.ca.gov](mailto:Louise.Warren@coastal.ca.gov)  
California Coastal Commission

Daniel Elliott  
[daneliottiii@outlook.com](mailto:daneliottiii@outlook.com)  
North County Transit District

Kristin Brinner  
[kristin@surfridersd.org](mailto:kristin@surfridersd.org)  
Surfrider Foundation, San Diego County

Jamee Jordan Patterson  
[jamee.patterson@doj.ca.gov](mailto:jamee.patterson@doj.ca.gov)  
California Coastal Commission

William (“Byl”) Herrmann  
[Byl.Herrmann@amtrak.com](mailto:Byl.Herrmann@amtrak.com)  
National Railroad Passenger Corporation (Amtrak)

Jeffrey G. Sturgis  
[jeffsturgis@me.com](mailto:jeffsturgis@me.com)  
The Sturgis Family

Signed:  
                   /s/  
Laura Schaefer