



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

pap@sloverandloftus.com

301259

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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
November 5, 2020
Part of
Public Record

Re: FD 36433, *North County Transit District –
Petition for Declaratory Order*

Dear Ms. Brown:

The City of Del Mar (“Del Mar”) submits this letter in response to (1) the Motion for Leave to File a Rebuttal (“Motion”), and (2) the Rebuttal (“Surreply”), that the North County Transit District (“NCTD”) filed in the above-captioned proceeding on October 26, 2020, in response to the Reply in Opposition that Del Mar filed on October 5, 2020 (“Del Mar Reply”), responding to the Petition for Declaratory Order that BHR filed on August 28, 2020 (the “Petition”).

NCTD’s Surreply directly contravenes the Board’s rules prohibiting a reply to a reply, and thus the Board should not consider it. *See* 49 C.F.R. § 1104.13(c) (“A reply to a reply is not permitted.”); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. et al. in Aroostook Cnty., ME*, No. AB-124 (Sub-No. 2) (STB served May 6, 2003) (Decision ID 33324) (“*Waterloo*”), at 3 (“the pleading process ends with the reply, and replies to replies are not permitted”).

NCTD contends in its Motion that its Surreply is still justified because, while it believes its Petition was supported by “sufficient information,” NCTD now desires to provide “supplemental information” that it says “will only be helpful to the Board and will not prejudice the other parties.” However, the “new” information NCTD provides, including a general discussion of upcoming bluff stabilization and related projects, and a Risk Reduction & Feasibility Analysis (Final 6/30/2020) (“Trespasser Study”) were already known to it and should have been presented previously and addressed as part of its Petition. Although the Board does occasionally waive section 1104.13(c) for good cause shown (e.g., introduction of newly discovered evidence), NCTD has not shown here that good cause exists for waiving 49 CFR § 1104.13(c). Instead, NCTD’s Surreply consists largely of

rehashed arguments on “rebuttal,” and/or matters NCTD was obligated to present its case-in-chief, and did not.

The rules prohibiting a reply to a reply exist to prevent a party from withholding information or arguments until some opposition is presented, and in the case of petitions for declaratory order, do not allow the petitioner to have the last word, as NCTD seeks here, without justification. Accordingly, NCTD’s Surreply should be disregarded in its entirety.

In the event the Board chooses to allow NCTD’s filing, it is only fair and appropriate to permit a short response by Del Mar. First, nowhere in NCTD’s rebuttal does it dispute in any way Del Mar’s demonstration that Del Mar has not interfered with NCTD’s railroad operations with respect to the emergency repair and related work conducted by the San Diego Association of Government (“SANDAG”) along the coastal bluffs area in Del Mar (“Bluffs”). NCTD also does not contest in any way Del Mar’s showing that the decades long history of Bluff stabilization projects demonstrates that there is no unreasonable interference and there is no current controversy requiring Board resolution. Instead, NCTD offers information on Bluffs Stabilization Project 5, claiming that railroad operations interference has occurred because its partner and project sponsor, SANDAG, has improperly engaged in initial Federal Consistency Review under the Coastal Zone Management Act (“CZMA”) with the California Coastal Commission (“Coastal Commission”), erroneously arguing that the Coastal Commission, and apparently SANDAG, are “making rail operations impossible” through such review. However, once again, NCTD has not demonstrated that the CZMA and ICCTA cannot be harmonized, nor does it allege any *specific facts* about how the Consistency Review is interfering with, or might interfere with railroad operations. NCTD also omits, and does not dispute, that all the stakeholders, including Del Mar, the Coastal Commission, SANDAG, and NCTD have actively worked in good faith in cooperation towards Bluff stabilization for decades, and continue to do so.

Second, NCTD provides a copy of its Trespasser Study and expresses fear that Del Mar may oppose a new fencing project on or around NCTD’s right-of-way and/or participate in a future Coastal Commission CZMA Consistency Review. However, as Del Mar stated in its Reply, Del Mar has consistently been supportive of safety on the Bluffs, but not until *after* the filing of its Reply did NCTD share a copy of its previously completed Trespasser Study with Del Mar. Further, even the Trespasser Study reveals that specific fencing locations and improvements were only preliminarily “developed at a conceptual level using Google Earth” and will require further engineering feasibility evaluation and design. Trespasser Study at 45. Additionally, NCTD has acknowledged that the fencing project “may later include federal dollars” triggering Federal Consistency Review.

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In summary, the Board should not consider NCTD's unauthorized Surreply. Additionally, for the reasons stated herein and in Del Mar's Reply, NCTD's open-ended request for blanket preemption protection is a dangerous proposition that the Board should strongly resist.

Respectfully submitted,

/s/ Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for City of Del Mar

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of November, 2020, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/
Katherine F. Waring