

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

NORTH COUNTY TRANSIT DISTRICT
VERIFIED PETITION FOR DECLARATORY ORDER

**NORTH COUNTY TRANSIT DISTRICT REPLY IN OPPOSITION TO MOTION OF
THE CALIFORNIA COASTAL COMMISSION
FOR ORDER HOLDING THIS MATTER IN ABEYANCE
PENDING RESOLUTION OF STATE COURT LITIGATION BETWEEN
THE COMMISSION AND NORTH COUNTY TRANSIT DISTRICT**

North County Transit District (“NCTD”) respectfully submits to the Surface Transportation Board (“Board” or “STB”) its reply in opposition to the California Coastal Commission’s (“Commission”) motion for an order holding this matter in abeyance until final resolution of state court litigation now pending between the Commission and NCTD, which was removed to federal district court. NCTD urges the Board to deny this request which is simply another attempt to delay the above-referenced proceeding that has been before the Board since NCTD filed its Petition for Declaratory Order on August 28, 2020.

BACKGROUND

As background, on August 28, 2020, NCTD filed a petition for declaratory order relating to certain actions of the City of Del Mar, Cal. (“City”) and the Commission regarding NCTD’s rail line maintenance and other upgrading activities in its rail right-of-way, specifically two

separate projects for safety fencing and bluffs stabilization.¹ Numerous filings were received in response to the petition, including from the Commission, who has actively participated in this proceeding since its start. On November 6, 2020, NCTD filed a motion to hold this proceeding in abeyance, stating that it recently had constructive discussions with the City and the Commission and that the three parties agreed that they should engage in further discussions to attempt to resolve the matters at issue. The Board granted NCTD's unopposed request and held this proceeding in abeyance until March 30, 2021 and directed NCTD to file a status update by that date. On March 29, 2021, NCTD filed a status report, stating that it, the City, and the Commission had engaged in further constructive discussions and that the parties had agreed that settlement discussions should continue. As such, NCTD, with the concurrence of the City and the Commission, requested that the Board continue to hold this matter in abeyance until December 31, 2021. The Board stated that it favors the private resolution of disputes whenever possible and granted the request, continuing to hold this matter in abeyance until December 31, 2021. The Board directed NCTD to file a status update by December 31, 2021.

For more than a year, the City, Commission, and NCTD attempted to resolve the issues regarding these projects raised in NCTD's petition, including talks about the terms of a license agreement that included a modified safety fencing plan in the City. Unfortunately, the parties failed to reach an agreement by the December 31, 2021 deadline.

As a result, on December 30, 2021, NCTD filed its status update pursuant to the order served on April 7, 2021 and asked the STB to lift the order holding this proceeding in abeyance and to place this proceeding in active status because the negotiations had not been successful.

¹ The state court litigation only involves the safety fencing project and has no relationship to the bluffs stabilization project raised in NCTD's petition.

NCTD also explained that because the railroad projects at issue will begin soon, it requested that the Board expedite this proceeding to ensure the parties understand their obligations under the applicable laws.

On January 14 and 18, 2022, the City and the Commission each respectively filed responses to the status update, including motions for the STB to order the matter into its mediation program. NCTD opposed the request for STB mediation because it believed the parties were at an impasse in their negotiations. The Board has not ruled on this request by the City and Commission.

On January 20, 2022, the NCTD held a Board Meeting during which its Board approved a job order for the right-of-way safety fencing installation in the City. The Board approved the installation of a modified fencing plan contingent on the City executing a license agreement that would include the acceptance of liability for use of NCTD's right-of-way for an upper bluff trail and maintenance by February 28, 2022. In the event the City failed to enter into a license agreement by that date, the Board authorized the NCTD Executive Director Matthew Tucker to proceed with a different fencing plan in the right-of-way.²

Following the NCTD Board decision, NCTD reached out to the City expressing a willingness to consider further modifications to the terms of the license agreement in hopes of reaching agreement prior to the February 28, 2022 deadline. Following meetings between executive staff and legal counsel from NCTD and the City, which also included representatives

² Minutes of the Special and Regular Meetings of the NCTD's Board of Directors, Jan. 20, 2022, at 7, <https://lfportal.nctd.org/weblink/0/edoc/194186/Board%20Minutes%20-%2001202022%20-%20Special%20%20Regular%20Meeting.pdf>

of the Commission, a revised license agreement was agreed to by NCTD and the City subject to the City Council's approval.

On February 28, 2022, the City Council held a special meeting to consider the license agreement between NCTD and the City for public use of the NCTD right-of-way. The license agreement addressed the safety fencing project, public access to the upper bluff within the right-of-way, maintenance of the fence, liability, and other matters.³ The City Council rejected the license agreement at the special meeting.⁴

The Executive Director of the Commission issued a Cease and Desist Order to NCTD on March 7, 2022, demanding that NCTD cease and desist from any construction of the safety fencing project in its right-of-way before it obtained a Coastal Development Permit. The Commission noted therein that it was seeking to enforce the City of Del Mar's Local Coastal Plan.⁵ Shortly thereafter, on March 11, 2022, NCTD was served with a demand letter from the Friends of Del Mar Bluffs threatening to file a lawsuit to enjoin NCTD from implementing its stated plan to install safety fencing on the Del Mar Bluffs in its rail right-of-way unless NCTD agreed to suspend or terminate its plans to begin this work by March 18, 2022. NCTD did not agree to terminate its plans to build the safety fencing in its right-of-way.

³ Special Meeting Agenda, Feb. 28, 2022, <https://www.delmar.ca.us/AgendaCenter/ViewFile/Agenda/02282022-2932>

⁴ San Diego Union-Tribune, *Del Mar Rejects Modified Plan for Railroad Fence*, Mar. 1, 2022, <https://www.sandiegouniontribune.com/communities/north-county/del-mar/story/2022-03-01/del-mar-rejects-modified-plan-for-railroad-fence>

⁵ This enforcement of Del Mar's Local Coastal Plan demonstrates the "patchwork of local regulation" concern that NCTD has pointed out in prior filings. This means each city with a Local Coastal Plan on the coast could make similar demands on a railroad if the Commission is allowed to proceed with its Cease and Desist Order.

Friends of Del Mar Bluffs filed a petition for writ of mandate and complaint for quiet title, invalidation of contract, and declaratory and injunctive relief, including preliminary injunctive relief, on March 21, 2022 in the Superior Court of the State of California for the County of San Diego. Specifically, Friends of Del Mar Bluffs claim NCTD violated a state grant agreement by not complying with state environmental permitting laws. Friends of Del Mar Bluffs also “seek a judicial determination under California real property law of the public’s right to continue to access and use portions of the Del Mar Bluffs in NCTD’s right-of-way for sitting, walking, running, meditating, observing the Pacific Ocean and other public uses, as the public has for over 100 years.” In addition, Friends of Del Mar Bluffs seek declaratory relief establishing the invalidity of certain actions taken by NCTD on or around the January 20, 2022, at a general meeting of its Board of Directors when it approved a contract to construct a 6-foot wire mesh fence on the Del Mar’s upper bluff in the NCTD rail right-of-way without seeking a Coastal Development Permit under the California Coastal Act from the City of Del Mar. On April 12, 2022, NCTD filed a notice of removal of this civil action to the United States District Court for the Southern District of California, where it sits.

The Commission filed an action in state court on April 19, 2022, seeking declaratory and injunctive relief as well as civil fines and exemplary damages. The Commission’s first cause of action seeks a writ of mandate directing NCTD to set aside its approval of the safety fencing construction, cancel its contract with Exbon,, and refrain from taking other activities in furtherance of the safety fencing construction until NCTD complies with the California Environmental Quality Act (“CEQA”). The Commission also asks the court for a declaration of rights and responsibilities of the parties with respect to CEQA, including that NCTD’s safety fencing project is not exempt from CEQA. The Commission’s second and third causes of action also request a declaration of rights and responsibilities of the parties with respect to the Coastal

Act and the Executive Director of the Commission's cease and desist order regarding compliance with the Coastal Act's permitting requirements, respectively. On April 26, 2022, NCTD filed a notice of removal in that action as well. On this same day, the Commission filed this motion at the STB. On April 29, 2022, NCTD also filed a motion for a stay in the Commission case in the United States District Court for the Southern District of California pending resolution of this STB proceeding.

ARGUMENT

The Commission's court action stems from the argument that NCTD cannot build the safety fencing project in its railroad right-of-way in the City at this time because it has not complied with state environmental permitting laws under CEQA and the California Coastal Act. As discussed herein, NCTD came to the Board 20 months ago asking the Board whether these state law environmental permitting requirements were preempted by 49 U.S.C. § 10501(b). NCTD did not proceed with the safety fencing project in the interest of encouraging resolution of this matter over the thirteen months this proceeding was held in abeyance. During this time since NCTD filed its petition, there have been 1,828 train incidents involving trespassers on the NCTD rail line in the City, including 1 fatality. From June 2016 through June 2021, there have been 6 deaths and 3 serious injuries on the NCTD rail line in the City. NCTD cannot emphasize enough how dangerous this rail line is in the City and how important this safety fencing project is to safe rail operations and the public. Now, the Commission comes to the Board seeking to further delay the answer NCTD has been seeking because of the court action it filed just this month.⁶

⁶ Under the first-filed rule alone, the Board should reject this motion as NCTD filed 19 months before the Commission. "The first-filed rule is a comity rule for resolving conflicts of jurisdiction where parallel actions are filed in different federal district courts. It provides that where substantially identical actions are proceeding in different courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing,

As noted, NCTD came to the Board in 2020 seeking clarity on the preemption issues in dispute in these various proceedings and negotiated in good faith with the Commission and the City to arrive at a joint resolution. NCTD brought this action to the Board, because as the agency authorized by Congress to administer the ICCTA, the STB is “uniquely qualified to determine whether state law should be preempted by the [ICCTA].” *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (quoting *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005)); *see also New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331-32 (5th Cir. 2008). In addition, to ascertain whether a claim falls within § 10501(b)’s preemption provision, “courts rely” on “[t]he [Surface Transportation Board’s] interpretation of the provision.” *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009). Now, 20 months later, the Commission seeks to hold this proceeding in abeyance in another attempt to delay a final decision along with its two previous requests for mediation and for further briefing. This additional request to delay this case, along with the others, should be denied for the STB is the forum most qualified to make this decision on preemption.

The Commission cites to various cases by the Board holding a proceeding in abeyance until a state court can resolve state law issues in the interests of efficiency and a more complete adjudication of the dispute. However, this proceeding is entirely different from those cases because the state law issue that the Commission has raised in its court case is inextricably intertwined with the preemption issue that NCTD seeks to resolve in this matter. The Commission’s only state law argument is that NCTD is a state government entity and must comply with state law based on *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017). The Board is

staying, or transferring the later-filed suit.” *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F.Supp.2d 1081, 1089 (S.D.Cal. 2002) (citations omitted).

perfectly capable of addressing this issue and in fact, has done so in nearly identical circumstances where state cases were pending, and the Board ruled on the same type of preemption question.

First of all, with respect to the *Friends of the Eel River* issue raised by the Commission, the Board has already expressed its opinion on that matter and had no issue resolving the question in the context of the preemption argument in a declaratory order proceeding where parallel state cases were pending. In 2014, the California High-Speed Rail Authority (“Authority”) filed a petition requesting that the Board issue a declaratory order regarding the availability of injunctive remedies under the CEQA to prevent or delay construction of an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (“the Line”). See *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order (CHSRA Declaratory Order)*, FD 35861 (STB served Dec. 12, 2014). Seven state suits already had been brought against the Authority challenging its compliance with CEQA for this project. The Authority claimed that *Town of Atherton v. California High-Speed Rail Authority*, 175 Cal. Rptr. 3d 145 (Ct. App. 2014), in which the California Court of Appeal held that the “market participant” doctrine negated § 10501(b) preemption, should not affect the Board’s decision, arguing that the market participation doctrine was misapplied by the court in *Atherton*, as another California Court of Appeal had found in *Friends of the Eel River v. North Coast Railroad Authority*, 178 Cal. Rptr. 3d 752 (Ct. App. 2014).⁷ *CHSRA Declaratory Order*, slip op. at 2-3. This California Court of Appeal decision in *Friends of the Eel River* was appealed to the California Supreme Court, eventually resulting in the decision the Commission is relying on here.

⁷ The petition for review had been accepted by the California Supreme Court in *Friends of the Eel River* when the Authority filed its petition for declaratory order and was pending when the Board issued the *CHSRA Declaratory Order*.

Despite these pending cases and the state law issues like in *Friends of the Eel River*, the Board issued a decision to inform interested parties and the California Supreme Court of its views on federal preemption of CEQA as it related to matters involving railroad transportation within the Board's jurisdiction under § 10501(b). *Id.* at 5 (citing *Atherton*, 175 Cal. Rptr. 3d at 161 n.4 (noting that, as the agency authorized by Congress to administer the Interstate Commerce Act, the Board is “uniquely qualified” to address whether § 10501(b) preempts state law and that a request to the Board for a declaratory order would be the remedy for the Authority's preemption claims)). Applying the well-established preemption principles, the Board concluded that CEQA was categorically preempted by § 10501(b) in connection with the Line. *CHSRA Declaratory Order*, slip op. at 10. The Board held, as it had in the past, that CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation. *Id.*

In coming to this conclusion, the Board reviewed the conflict between the *Atherton* and *Friends of the Eel River* appeal court decisions. It addressed the same state sovereignty, market participant doctrine, and voluntary agreement arguments asserted by the parties in *Friends of the Eel River* Supreme Court case against preemption and found CEQA was preempted. In other words, the Board ruled on the same state law issue raised by the Commission here while state court cases were pending. *See also Northwestern Pacific Railroad Company – Pet. for Declaratory Order*, FD 35977 (STB served Apr. 22, 2016).

Moreover, *Friends of the Eel River* is clearly distinguishable from the case at hand. First, the rail line at issue in *Friends of the Eel River* was inoperable and did not have any freight service on it when it was bought by North Coast Railroad Authority (“NCRA”), a California

government subdivision, with state grant funds to resume freight service thereon. A private entity was given a contract to operate the line by NCRA and did begin providing limited freight service on the rail line before the litigation began. NCTD, on the other hand, owns a rail line that is heavily used by Amtrak for interstate passenger service and BNSF for interstate freight service.⁸ Pursuant to two separate operating agreements with Amtrak and BNSF, NCTD is required to maintain the rail line to allow these two rail carriers to provide these crucial interstate services. Amtrak has a statutory right to operate on the NCTD rail line under the Rail Passenger Service Act. *See* 49 U.S.C. § 24308. BNSF has authority to operate on the line pursuant to the ICC Termination Act and retained a permanent freight easement to operate on the line when it was purchased by NCTD. *See Orange County Transportation Authority–Acquisition Exemption–The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C.2d 78 (1994). In sum, the Commission’s requirement for a permit before NCTD can install a safety fence in its right-of-way not only impacts NCTD but also BNSF and Amtrak. *See, e.g., Or. Coast Scenic R.R. v. Or. Dep’t of State Lands*, 841 F.3d 1069 (9th Cir. 2016). In other words, the Commission’s preclearance requirements under the guise of state sovereignty here will have an impact on two major interstate rail operations that are not California government subdivisions and are based on statutory and property rights beyond NCTD’s control, in essence allowing the Commission to stop their rail services on this line through NCTD if it has its way here. Moreover, if NCTD is prohibited from providing adequate maintenance of the line by the Commission’s preclearance interference here, BNSF and Amtrak have the contractual right to step in and

⁸ Amtrak operates the Pacific Surfliner intercity service on the tracks, operating 26 trips daily between Los Angeles and San Diego with an annual ridership of nearly 3 million people. **It is the second busiest intercity passenger rail corridor in the United States.** BNSF operates four (4) to six (6) daily freight trains on the San Diego coastal rail corridor. In 2017, BNSF moved more than 4.3 million tons of freight on this rail line.

provide this service. Accordingly, the Commission's interference is clearly tied to these other two interstate rail operations and cannot be viewed as an internal California government matter.

Consequently, the Board does not need to hold this proceeding in abeyance because the state issue raised by the Commission is preempted by the ICCTA and is exactly the type of issue the Board's expertise is best at resolving. In other words, the Commission's attempt to run around the federal preemption issues that involve BNSF's freight service and Amtrak's passenger service by bringing its action in state court 20 months after NCTD filed its Petition here should not be countenanced with further delay. In fact, this situation begs for an expedited decision on this straightforward preemption question to ensure the safety of the public and the smooth operation of these interstate carriers in the future.

CONCLUSION

Based on the foregoing discussion, NCTD respectfully asks the Board to reject this motion to hold this proceeding in abeyance pending resolution of the state court proceeding.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 620
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for North County Transit District

Dated: April 29, 2022

Certificate of Service

I certify that I have, this 29th day of April 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
Daniel R. Elliott
Attorney for North County Transit District