

July 6, 2022

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Submitted via e-filing

Re: STB Finance Docket No. 36433, *North County Transit District – Petition for Declaratory Order*

Dear Ms. Brown:

I am attaching for e-filing in the above captioned proceeding the Comments of the Northern Indiana Commuter Transportation District in Support of Petition for Declaratory Order, in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Yours very truly,



Charles A. Spitulnik

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36433

**NORTH COUNTY TRANSIT DISTRICT –
PETITION FOR DECLARATORY ORDER**

**COMMENTS OF THE NORTHERN INDIANA COMMUTER TRANSPORTATION
DISTRICT IN SUPPORT OF PETITION FOR DECLARATORY ORDER**

Communications with respect to this pleading
should be addressed to:

Charles A. Spitulnik
Daniel C. Orlaskey
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
dorlaskey@kaplankirsch.com

L. Charles Lukmann, III
Harris Welsh & Lukmann
107 Broadway
Chesterton, IN
(219) 926-2114
clukmann@hwllaw.com

*Counsel for the Northern Indiana Commuter
Transportation District*

Dated: July 6, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36433

**NORTH COUNTY TRANSIT DISTRICT –
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**COMMENTS OF THE NORTHERN INDIANA COMMUTER TRANSPORTATION
DISTRICT IN SUPPORT OF PETITION FOR DECLARATORY ORDER**

The Northern Indiana Commuter Transportation District (“NICTD”) files these Comments in support of the North County Transit District’s (“NCTD”) Verified Petition for Declaratory Order (“Petition”) that is currently pending before the Surface Transportation Board (“STB” or “Board”). *See North County Transit District – Verified Petition for Declaratory Order*, STB FD 36433 (filed Aug. 28, 2020). NICTD also opposes the motion of the California Coastal Commission (“Commission”) for Order Holding this Matter in Abeyance (“Motion for Abeyance”), filed on April 26, 2022. *See North County Transit District – Verified Petition for Declaratory Order*, 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, STB FD 36433 (filed April 26, 2022).

I. BACKGROUND

As a fellow commuter railroad NICTD has a direct interest in the question presented in this proceeding. NICTD owns and operates a commuter railroad located along the southern coast of Lake Michigan known as the South Shore Line. NICTD provides commuter service between Millennium Station in Chicago, Illinois and South Bend International Airport in South Bend, Indiana. In addition to the commuter service on this line, the Chicago South Shore and

South Bend (“CSS”) railroad operates daily freight service. CSS operates 11 freight trains per day during the week and 5 to 6 freight trains on weekends along the South Shore line and interchanges traffic with major Class I railroads, including Canadian National, CSX, Norfolk Southern, Union Pacific, and Canadian Pacific.

Like NCTD, NICTD experiences frequent instances of trespassing on railroad right-of-way that cause significant safety risks to railroad passengers, employees, and the trespassers themselves. Additionally, NICTD must conduct maintenance activities within the railroad right-of-way almost continuously to make sure the service can operate safely, efficiently, and in compliance with applicable federal regulations. The outcome of this proceeding could have significant ramifications for NICTD’s ability to take necessary measures to deter trespassers and to maintain the South Shore Line.

NCTD is a California state agency that provides commuter rail transportation services in San Diego County, including the City of Del Mar. The “Coaster” service operates along the Pacific Ocean between Oceanside and San Diego. This line is also used by Amtrak, the Southern California Regional Rail Authority (“Metrolink”), the BNSF Railway Company (“BNSF”), and the Pacific Sun Railroad. This is similar to the South Shore Line, which is shared by the NICTD-provided commuter service and the CSS freight service. When NCTD acquired ownership of the line, it became a common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission (“ICC”), the predecessor agency to this Board. See, *Orange County Transp. Auth., et al.—Acquisition Exemption—The Atchison, Topeka and Santa Fe Ry. Co.*, ICC Finance Docket No. 32173, 10 I.C.C. 2d 78 (1994).

NCTD had planned two projects for 2020. The first was to stabilize the coastal bluffs abutting the rail line to protect the track bed from erosion. The second project was to construct a

fence along the right-of-way to deter trespassers on the line. However, both the City of Del Mar (“Del Mar”), through which a portion of the line runs, and the Commission, a state agency supervising California’s Coastal Management Program, objected. Del Mar demanded extensive mitigation measures to reduce any aesthetic impacts to Del Mar and asked the Commission to intervene. On April 28, 2020, NCTD filed a Petition for Declaratory Order in this proceeding, asking the Board to clarify that it had the authority to regulate the line and that the line’s status as a line of railroad subject to the jurisdiction of this Board preempts any attempt by Del Mar or the Commission to impose mitigation measures. The parties filed various motions with the Board over the next two years and attempts at alternate resolution failed.

On April 13, 2022, NCTD informed the Board that the Commission issued a Cease-and-Desist Order to NCTD on March 7, 2022, and asked the Board to expedite its decision on NCTD’s Petition for Declaratory Order. The Commission filed an action in California state court on April 19, 2022, against NCTD, seeking declaratory and injunctive relief as well as fines and damages. It then filed a motion to hold this matter in abeyance pending the resolution of the state court action on April 26, 2022. NCTD filed its objection to the Motion for Abeyance on April 29, 2022.

NCTD asked the Board to declare that the requirements of the California Environmental Quality Act (“CEQA”) and the California Coastal Act are preempted by the ICC Termination Act (“ICCTA”), 49 U.S.C. § 10501(b) (“§ 10501 (b)”). *See Petition at 3.* NCTD plans to conduct important bluff stabilization maintenance and to erect fencing to deter trespassing, both within the railroad right-of-way. The Commission filed suit in state court, while this proceeding was already in process. The Commission also filed the Motion for Abeyance with the STB in which they claim that the STB must pause its proceeding so that the state court can decide

whether the fencing and bluff stabilization projects are preempted by the ICCTA, a function firmly within the authority of the STB to perform pursuant to the ICCTA. *See* 49 U.S.C. § 10501(b).

NICTD supports both NCTD's Petition and its April 29, 2022 opposition to the Commission's Motion for Abeyance and requests that the Board find that (a) the STB is the proper forum for adjudicating this matter; (b) the Board's authority preempts state and local law as well as the Commission's authority under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; and (c) that the mitigation measures imposed by Del Mar and the Commission are preempted since they would unduly burden rail operations.

II. ARGUMENT

A. The Board Should Deny the Motion for Abeyance

The Board should deny the Commission's Motion for Abeyance because the STB has the authority to issue a decision while state court actions are in process. The Board should issue a decision on NCTD's Petition regardless of any pending state court actions, which are clearly meant to delay NCTD's planned projects. These projects, and others like them, are vital to the safety of the rail line and the public and should be allowed to proceed without further delay. The state court action is also clearly meant to usurp the authority of the STB to make decisions on matters within its unique purview and primary jurisdiction. A ruling in favor of the Commission would overturn years of precedent stating that the exclusive authority granted to the STB in § 10501(b) preempts the application of state and local laws that would place an undue burden on railroads and potentially prevent them from fulfilling their common carrier obligation. *See Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 894 (7th Cir. 2017); *see also Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (The STB is "uniquely qualified to

determine whether state law should be preempted by the [ICCTA].”) (quoting *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2nd Cir. 2005)).

The Board has the authority to issue a decision in this proceeding without having to wait for the state court to act. First, the Board has exclusive and plenary jurisdiction over the “...transportation by rail carriers...” and “the remedies...with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. 49 U.S.C. § 10501(b). The statute defines “transportation” to include “property, facility, instrumentality or equipment of any kind related to the movement of passengers or property or both.” 49 U.S.C. § 10102(9). Clearly, this Board has exclusive and plenary jurisdiction over what happens on this track, including any efforts by state or local governments to mandate what happens with the track.

Second, this matter was filed almost a year and a half before the state court proceeding. The Board’s precedent confirms that it may issue a decision in a preemption case. *See Cal. High-Speed Rail Auth. – Pet. for Declaratory Order*, STB FD 35861 (served Dec. 12, 2014). The cases cited by the Commission in support of delaying this proceeding are distinguishable in that they all deal with STB proceedings that were held in abeyance because there were issues of state law pending in state court. In this case, however, the issue is not regarding how state law applies, but whether state law is *preempted* by federal law. Based on its long history of decisions on this issue, there is no compelling reason for the STB to hold this matter in abeyance. *See Id.*

It is also important to note that, while NCTD is the owner of the line in question, the line is a vital link in the movement of freight and passengers in interstate commerce. Both Amtrak and BNSF operate over the line in question. Therefore, an order granting the Motion for Abeyance that would delay the very important bluff remediation and fencing projects will not

only cause a disruption to the operations of NCTD, but to two other, non-state agency railroads whose operations are subject to the jurisdiction of the federal regulators including the STB and the Federal Railroad Administration. This clearly would not be consistent with the mandate of § 10501(b). *See, e.g. Seattle v. Burlington Northern, R. Co.*, 105 Wash.App. 832, 836-7 (2001). *See also, City of Auburn v. U.S.*, 154 F. 3rd 1025 (9th Cir. 1998).

Additionally, the “First-filed” rule is meant to resolve conflicts of jurisdiction where substantially identical actions are proceeding in different courts. It is well settled that if there are substantially similar actions filed in two separate federal courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action. *See E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969, 971 (3d Cir. 1988), *aff’d on other grounds*, 493 U.S. 182 (1990).¹ While this case does not involve a federal court, it does involve a federal agency that has statutory authority to adjudicate this case. *See* 49 U.S.C. 10501(b). Additionally, while federal circuits have split on the question of whether the first-filed rule applies in cases where federal and state court actions involving the same or substantially similar issues and litigants exist concurrently, it is generally accepted that the court that first established jurisdiction is the one that should hear the case. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982) (“the court initially seized of a controversy should be the one to decide the case. . . . It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction.”) (citations omitted); *United Artists Theatre Circuit, Inc. v. F.C.C.*, 147 F. Supp. 2d 965, 979 n. 12 (D. Ariz. 2000) (stating that the first-filed rule “is no less applicable when the courts set in competition against

¹ Referred to as the “First-filed” rule of the “First-to-file” rule.

each other are a federal court and a state court."); but see *Flack v. U.S.*, 1996 WL 628317, at * 1 (D. Ariz. Aug. 14, 1996) ("The doctrine of federal comity is a discretionary doctrine which permits one federal district court to decline [**52] to exercise jurisdiction over a matter if a complaint has been filed in another federal district court.") (citing *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 749 (9th Cir. 1979) (overlooking first-filed rule on grounds of judicial economy between litigation in D.C. Circuit Court of Appeals and Federal District Court for the Central District of California, but stating "In its classic formulation, the [federal] comity doctrine permits a district court to decline jurisdiction over a matter if a complaint has already been filed in another district.")). The authority of the STB to hear this case is not being disputed. This proceeding was filed nearly a year and half before the state court action was filed and the STB's jurisdiction has never been questioned.

NCTD filed this matter before the STB because the STB has primary jurisdiction over this matter. The Board has specialized knowledge, over the very issues the Commission seeks to resolve in state court, namely enforcement of state laws against an entity providing rail transportation that is subject to the jurisdiction of the STB. The doctrine of primary jurisdiction does not *require* a court to defer to a federal agency that is uniquely qualified to rule on an issue to resolve the matter. However where, as here, the case also involves the "first-filed" rule the STB should assert its authority to issue a decision without holding this proceeding in abeyance.

B. Federal Statutory Preemption Prevents the Commissions and Del Mar from Regulating NCTD's Tracks, Notwithstanding NCTD's Status as a Public Agency

The Commission argues in its April 26, 2022, Motion for Abeyance that because NCTD is a state government agency, federal preemption of state law would not apply to it as it would a non-state government entity. See *North County Transit District – Verified Petition for Declaratory Order*, STB FD 36433, 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 (filed Apr. 26, 2022). The Commission argues that NCTD must comply with CEQA and the Coastal Act based on the California Supreme Court's ruling in *Friends of the Eel River v. North Coast R. Auth.*, 3 Cal.5th 677 (2017), and that the STB therefore must hold this proceeding in abeyance while the state court decides on the issue of federal preemption of state law. *See Id.*

However, the Commission is wrong. The *Friends of the Eel River* case is distinguishable. In *Friends of the Eel River*, the rail line in question was inoperable until it was purchased by North Coast Railroad Authority ("NCRA"), a state government agency, with state grant funds. In this case, NCTD owns the line that is used by interstate freight and Amtrak service and NCTD is itself subject to the jurisdiction of the STB as a result of the decision of the ICC when NCTD acquired the line. *See, Orange Co. Trans. Auth., supra.*

The court in *Friends of the Eel River* went so far as to acknowledge the possibility that requiring compliance with CEQA might "cross the line into preempted regulation if the review process imposes unreasonable burdens outside the particular market in which the state is the owner and developer of a railroad enterprise." *See Id.* at 731. In this case, requiring NCTD to comply with state laws would have the effect of placing unreasonable burdens "outside the particular market" because BNSF and Amtrak use the line as part of their interstate railroad operations.

Additionally, the California Supreme Court in *Friends of the Eel River* did not rule that the STB did not have the authority to issue decisions on issues of federal preemption of state law pursuant to § 10501(b). To the contrary, the Court cited another case that confirmed that "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."

Id. at 5, citing *Atherton v. California High Speed Rail Auth.*, 175 Cal. Rptr. 3d at 161 n.4.

In fact, another California state agency, the California Public Utilities Commission ("CPUC"), ruled in a case also involving NCTD that the STB had primary jurisdiction over the construction of a passing track on NCTD right-of-way. *See City of Encinitas vs. North San Diego City. Transit Dev. Board d/b/a North County Transit District*, 2002 Cal. PUC LEXIS 659, Decision 02-10-041; Case 01-11-006 (decided Oct. 24, 2002). The CPUC stated in its decision to deny the Commission relief that

...both the courts and STB have made clear that any exception to this rule applies only to laws that do not interfere with railroad operations. Further, both have made clear that state and local environmental and planning requirements do unduly interfere with railroad operations.

Id.

The U.S. District Court for the Southern District of California, in its decision on that same matter, agreed with CPUC. *City of Encinitas v. N. San Diego Cnty. Transit Dev. Bd.*, 2002 U.S. Dist. LEXIS 28531 (decided Jan. 14, 2002). The City of Encinitas had asserted that NCTD was violating CEQA and the California Public Utilities Code Section 125260 by having authorized the construction of a passing track within NCTD right-of-way without having conducted an environmental analysis required by the 2020 Regional Transportation Plan adopted by the San Diego Association of Governments. NCTD argued, *inter alia*, that the STB had exclusive jurisdiction over the construction of the passing track under § 10501(b). On the issue of preemption, the court stated that:

...[i]f the Court were to allow the City of Encinitas to impose environmental or permit regulations upon NCTD operations. . . such action would be tantamount to economic regulation by a local government over a rail carrier. The ICCTA demonstrates Congress' intent to preempt such regulatory authority over railroad operations, and to vest

jurisdiction over these claims exclusively in the STB. *City of Seattle*, 105 Wash.App. at 836-7. Accordingly, the Court finds that Plaintiff's claims are preempted by the ICCTA.

Id. at 11.

The United States Supreme Court has stated that the doctrine of primary jurisdiction applies to claims “properly cognizable in court that contain some issue within the special competence of an administrative agency.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). Clearly in this case the question whether § 10501(b) preempts the application of state and local laws, including the Commission’s and Del Mar’s attempts to regulate NCTDs tracks, is an issue that falls within the special competence of the STB.

While it is the case that the Board has ruled that issues involving federal preemption pursuant to § 10501(b) can be decided either by the Board or the courts, *see CSX Transp., Inc.- Petition for Declaratory Order*, STB Docket No. FD 34662, slip op. at 8 (Service Date May 3, 2005) that does not mean that the Board has ceded its authority to the Courts. The Board has expansive authority over rail transportation, rail lines and related structures that are dedicated to use in interstate commerce. *See CSX Transportation, Inc.- Petition for Declaratory Order*, FD 35832, slip op. at 3 (Service Date July 15, 2015). NCTD provides the very services and facilities for use in interstate transportation that the STB like the ICC before it was created to oversee. The STB’s jurisdiction over these tracks sweeps aside the State’s attempts to regulate safety on those tracks.

Additionally, it is well-established that if an apparent conflict exists between ICCTA and another federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible. *See In re Bos. & Me. Corp. & Town of Ayer, Mass.*, No. 33971, 2001 STB LEXIS 435, 2001 WL 458685, at *6 n.28 (S.T.B. Apr. 30, 2001) (*citing Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 381, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996); *Blanchette v.*

Conn. Gen. Ins. Corps., 419 U.S. 102, 133-34, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974); *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 769 (9th Cir. 1999)). However, where two federal laws cannot be harmonized, and the application of a federal law would result in a “patchwork of differing regulations” the Board has held that the conflicting federal law is preempted by the ICCTA. *See Assoc. of American Railroads – Pet. for Declaratory Order*, FD 36369 (STB decided Dec. 29, 2020) (“*AAR*”). In that proceeding, the Board decided that it was not possible to harmonize the ICCTA with the requirements of the Clean Water Act’s (“CWA”) National Pollution Discharge Elimination System regulations. Therefore, those provisions of the CWA were preempted by the ICCTA. *See Id.* A very similar set of circumstances exist in the present case, where the Commission is attempting to assert provisions of the CZMA that cannot be harmonized with the ICCTA. The application of the CZMA provisions in this case would have the same effect as the application of the CWA provisions in *AAR* would have had and that the Board found to be preempted.

The application of the Commission’s and Del Mar’s requirements would unreasonably burden interstate transportation services. The mitigation measures imposed by Del Mar and the Commission would interfere with the railroad operations of BNSF, Amtrak and NCTD. NCTD operates rail transportation and maintains the line to ensure both BNSF and Amtrak can run their rail operations through Southern California safely and reliably. In order to properly maintain the line, NCTD must ensure that the right-of-way along the Del Mar shoreline remains sound and that the line is protected from other natural phenomena, such as erosion or rockslides. Moreover, NCTD must properly protect the right-of-way from trespasser interference and ensure that trains can pass through Del Mar safely and without delay. The Commission’s actions if successful,

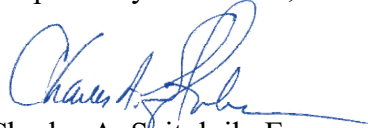
would unduly burden railroad operations and NICTD's ability to maintain the line and ensure that repairs are quickly and efficiently made.

NICTD respectfully requests that this Board expeditiously issue a Declaratory Order to both confirm the preemption of the provisions of the CZMA that the Commission is attempting to assert in a way that would undermine safety of rail operations and California's state and local regulations in this matter. NICTD urges the Board to allow NICTD to bring the line to a state of good repair to ensure a safe operating environment.

IV. CONCLUSION

In view of all the foregoing, NICTD asks the Board to: (1) deny the motion to hold this proceeding in abeyance; and (2) exercise its authority under § 10501(b) to grant NICTD's request for Declaratory Order that confirms that the attempts to require NICTD to comply with state and local laws are preempted by § 10501(b).

Respectfully Submitted,



Charles A. Spitulnik, Esq.
Daniel C. Orlaskey, Esq.
Kaplan, Kirsch, & Rockwell
1634 I (Eye) St. NW Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsh.com
dorlaskey@kaplankirsch.com

L. Charles Lukmann, III
Harris Welsh & Lukmann
107 Broadway
Chesterton, IN
(219) 926-2114
clukmann@hwllaw.com

Attorneys for NICTD

CERTIFICATE OF SERVICE

I certify that I have, this 6th day of July, 2022, served by email correspondence copies of the foregoing document on all parties of record in this proceeding.

A handwritten signature in blue ink is written over a horizontal line. The signature is cursive and appears to read "Charles H. [unclear]".