

305018

July 19, 2022

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

ENTERED
Office of Proceedings
July 19, 2022
Part of
Public Record

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 resubmission in the above captioned proceeding the Brief of Specified Members of the Commuter Rail Coalition in Support of the North County Transit District's Petition for Declaratory Order, in the above-referenced proceeding. We filed this brief originally on July 7, 2022 (see attached email acknowledging receipt of our filing). However, this filing does not appear on the STB's website. STB staff has instructed us to refile the attached brief.

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

Yours very truly,



Charles A. Spitulnik

Enclosure

cc: All Parties of Record

Sherry H. Edmonds

From: Charles A. Spitulnik
Sent: Tuesday, July 19, 2022 5:21 PM
To: Sherry H. Edmonds
Subject: FW: Acknowledgement of other filing

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He/Him/His



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From: eservice@stb.gov <eservice@stb.gov>
Sent: Thursday, July 7, 2022 3:53 PM
To: Charles A. Spitulnik <cspitulnik@kaplankirsch.com>
Subject: Acknowledgement of other filing

Thank you for your submission in docket number(s) FD_36433. Submissions that will appear on the Surface Transportation Board's website will be posted after they are processed during regular business hours. If you have any questions, please contact us at (202) 245-0350.

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July 7, 2022

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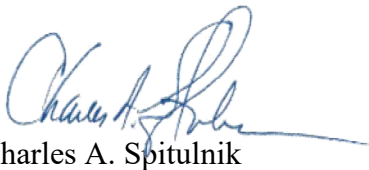
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If you have any questions, please do not hesitate to contact me.

Yours very truly,



Charles A. Spitulnik

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket 36433

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

**THE BRIEF OF SPECIFIED MEMBERS OF THE COMMUTER RAIL COALITION IN
SUPPORT OF THE NORTH COUNTY DISTRICT'S PETITION**

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Dated: July 7, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket 36433

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

**THE BRIEF OF SPECIFIED MEMBERS OF THE COMMUTER RAIL COALITION IN
SUPPORT OF THE NORTH COUNTY DISTRICT’S PETITION**

The Members of the Commuter Rail Coalition (“CRC Members”) listed in Exhibit A,¹, hereby respectfully file this brief in support of the North County Transit District’s Petition for a Declaratory Order filed with this Surface Transportation Board (“STB” or “Board”) on August 20, 2020. In addition, the CRC Members respectfully request that the Board reject the California Coastal Commission’s April 26, 2022, Motion To Hold This Matter In Abeyance and expeditiously issue a Declaratory Order in this matter.

The CRC is an association of commuter rail agencies, operators and interested parties who advocate for commuter railroads in the United States. It was formed by commuter rail industry leaders to engage and educate both the transportation industry and the public as well as advocate for the resources required to maintain the commuter rail industry. Approximately eighteen transportation agencies and over twenty consulting firms comprise the CRC and its founding Members include transportation leaders across the country. The CRC creates a voice for the industry with federal agencies and before Congress to ensure that the federal government delivers

¹ New Mexico Department of Transportation is a member of the CRC but is not joining in this brief.

the required funding and legislation to protect and promote commuter railroads. The North County Transit District (“NCTD”) is a CRC member.

NCTD is a public agency providing public transit services in certain areas of San Diego County, California. NCTD’s Coaster commuter rail line runs along the coast of the Pacific Ocean between the cities of Oceanside and San Diego and is mostly double-tracked. NCTD shares these tracks with Amtrak, Metrolink, BSNF Railway (“BNSF”), and the Pacific Sun Railroad. In 1992, NCTD purchased 6.1 miles of the San Diego Main Line (the “Line”) from the Atchison, Topeka and Santa Fe Railway Company the predecessor in interest to BNSF, becoming a common carrier subject to the jurisdiction of the Interstate Commerce Commission (“ICC”), the Board’s predecessor entity. *See Orange County Transportation Authority et. al- Acquisition Exemption- The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C.2d 78, 90 (1994). Part of the transaction described in that proceeding requires NCTD to maintain the line and ensure its safety.

NCTD planned two projects for 2020- one to stabilize the coastal bluffs abutting the rail line to protect the track bed from erosion and another 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 California Coastal Commission (“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 with the Surface Transportation Board (“STB” or “Board”), 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 action 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 on April 29, 2022.

The CRC Members support both NCTD's Petition and its April 29, 2022, opposition to the Commission's recent motion 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, 16 U.S.C. § 1451 et seq.; and (c) that the mitigation measures imposed by Del Mar and the Commission are preempted since they unduly burden rail operations. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty and should do so in this case.

A. This Matter Should Be Adjudicated by the STB.

The Board has previously ruled that issues involving the federal preemption pursuant to 49 U.S.C. § 10501 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). The Board may even provide guidance to a referring court where the law is clear. *See 14500 Ltd., LLC- Petition for Declaratory Order*, STB Docket No. FD 35788, slip op. at 2 (Service Date June 5, 2014). Indeed, the United States Supreme Court found that administrative agencies can decide

issues on which they have specific expertise while an alternate court retains jurisdiction for remaining claims. *See Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

In the present case, NCTD filed this matter at the STB because of the STB's expertise in this matter and its statutory authority under 49 U.S.C. § 10501. CRC Members submit that the STB should retain primary jurisdiction over this matter rather than allow the case to proceed in California state court. The Board has specialized knowledge over the very issues the Commission has attempted to bring to the state court, namely preemption of the application of state laws and permitting requirements to an entity providing rail transportation that is subject to the jurisdiction of the Board.² As such, this Board is the forum in which to resolve this case and has previously done so in similar matters, *see Cal. High-Speed Rail Auth-Pet. For Declaratory Order*, STB Docket No. FD 35861 (Service Date Dec. 12, 2014). Moreover, the Commission waited almost two years to seek an alternative forum and this tactic is nothing more than a last attempt to further delay these proceedings. The Commission's latest filing is nothing more than a "Hail Mary" pass to prevent NCTD from improving the rail line and prevent further accidents for the railroads its line serves.

Moreover, it is well settled that when there are substantially similar actions filed in two separate courts, the forum of the later-filed action should defer to the jurisdiction of the forum 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). This matter was first filed with the Board. As such, the STB should be the forum to hear this matter to its conclusion. Doing otherwise not only subverts settled law, it also creates a dangerous precedent for future applicants to forum shop

² Although the commuter rail service provided by NCTD itself is not subject to the STB's jurisdiction, the line of railroad that NCTD owns is subject to that jurisdiction and is within the meaning of "transportation" in the statute. *See* 49 U.S.C. § 10102(9)(A).

as well as abrogates STB's authority to resolve matters involving rail safety and transportation. This Board should, therefore, deny the Commission's Motion to hold this matter in Abeyance and issue its Declaratory Order in favor of NCTD.

B. STB Authority Preempts California's State and Local Laws.

It is well settled that carriers providing transportation that is subject to the jurisdiction of this Board are governed by the STB's rules and regulations and that state and local authorities cannot interfere with a common carrier's ability to run, maintain and ensure the safety of a rail line. The ICC Termination Act of 1995, 49 U.S.C. Subtitle IV ("ICCTA") provides the Board with "exclusive" jurisdiction over "transportation by rail carrier" (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is carried out as a part of the interstate rail network. 49 U.S.C. § 10501(a). The STB's jurisdiction extends to "the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or sidetracks or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(2). The ICCTA defines "transportation" broadly to encompass real property, equipment and activities, 49 U.S.C. § 10102(9), and "rail carrier" to be a person providing common carrier railroad transportation for compensation, 49 U.S.C. § 10102(5).

The ICCTA also expressly preempts state and local regulation of the interstate rail network, stating that: "[e]xcept as otherwise provided in this part, the remedies under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). Accordingly, the ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the

continued application of laws having a more remote or incidental effect on rail transportation.” *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

One of the most important implications of federal preemption under the ICCTA is that state and local laws that have the effect of interfering with existing or future common carrier operations are preempted. Courts have acknowledged that federal preemption under the ICCTA and the STB’s jurisdiction is extremely broad. 49 U.S.C. § 10501(b) preempts two categories of state regulation categorically with respect to transportation by rail carriers: (1) permitting or preclearance requirements that by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized, and (2) attempts to intrude into matters that are regulated by the STB. For example, in *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005), the State of Vermont’s environmental land use statute was preempted by ICCTA and the Green Mountain Railroad was permitted to construct a transloading facility on its property.

Furthermore, it is well settled that, even where a state or local law is not categorically preempted by 49 U.S.C. § 10501(b), it may still be preempted if it has the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-specific determination. *See Adrian*, 550 F.3d 533, 539 (6th Cir. 2008) (the ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation”). *See also Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th Cir. 2010) (en banc). For example, routine non-conflicting uses, such as non-exclusive easements for at-grade crossings, are not preempted, if they would not impede rail operations or pose undue safety risks. *See E. Ala. Ry.—Pet. for Decl. Order*, FD 35583 (STB served Mar. 9, 2012); *Maumee & Western R.R. and RMW Ventures, LLC—Pet. for Decl. Order*, FD 34354 (STB served Mar. 3, 2004).

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)*. 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.*

STB preemption prevents state and local laws from unreasonably interfering with railroad operations as well as the creation of patchwork regulations. *See Norfolk S. Ry. Co.- Pet. For Declaratory Order, FD 35701*, slip op at 4,6 n. 14 (STB served Nov. 4, 2013). If this Board allowed the Commission to proceed, both freight and interstate passenger rail operations would be interrupted, impermissibly interfering with interstate commerce. The interstate rail network would not function properly if the Commission imposed its own standards and other local or state agencies impose different standards for activities that are an integral part of, and directly affect, rail transportation. Preventing the tracks from natural erosion is an integral part of railroad transportation since railroads cannot operate if the tracks are washed away or in any way structurally compromised. Similarly, constructing fences to address safety concerns is essential to

railroad operations and ensures that the strict standards set by the Federal Railroad Administration are maintained. Del Mar's mitigation measures essentially seek to govern or manage railroad operations by interfering with NCTD's ability to maintain its track. Allowing the Commission's and Del Mar's attempts to regulate what happens on this federally-governed right-of-way would be contrary to existing law and would set a dangerous precedent for rail operations in the United States. *See also Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (finding that the city's attempt to regulate construction of a railroad embankment was preempted).

Del Mar's local authority is clearly preempted by ICCTA. The mitigation measures sought by Del Mar to protect aesthetics and sight lines will both directly and indirectly affect NCTD's ability to protect the right-of-way from both erosion and trespassers, issues that are left to federal, and not state or local law, to decide. NCTD cannot operate its rail line without implementing the bluff stabilization project to ensure that the viability of rail service is preserved on the line. Indeed, if the bluffs continue to erode at their current frequency, the track bed could be compromised, and rail service would be suspended. Similarly, NCTD's fencing project not only ensures the continued safety of the public, but lessens the burden and interruptions caused by trespasser fatalities. The Board should, therefore, declare that Del Mar's and the Commission's demands are preempted by ICCTA and are unenforceable as a matter of law.

Not just the plain language of the ICCTA but the Supremacy Clause of the United States Constitution confirms that states may not interfere with the federal government's exercise of its constitutional powers or prevent it from assuming functions that are exclusively entrusted to the federal government. *See U.S. Const. Art. VI, cl. 2*. California state law and local laws must, therefore, yield to federal rules and regulations when a federal entity is vested with the authority

to regulate a specific industry. The Federal Railroad Administration (“FRA”) establishes and enforces the safety standards for freight and commuter railroads which with NCTD must comply. *See generally*, 49 C.F.R. Part 200; 49 C.F.R. § 209.201(a) (providing FRA enforcement authority); 49 C.F.R. Part 213 (track safety standards). FRA’s safety regulations for maintenance, repair and inspection of NCTD’s tracks take precedence over California’s environmental laws and requires NCTD to comply with FRA’s regulations over state law. NCTD is unable to properly maintain and secure the line and susceptible to FRA violations if this Board finds in favor of the Commission.

The Commission argues that the California Supreme Court’s decision in *Friends of Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017), requires a California state court to decide that NCTD must comply with California environmental laws. In that matter, the Court ruled that the ICCTA, does not preempt state laws where there is no express conflict with federal law. *Id.* at 691. It held that the environmental regulation of railroads was a void in ICCTA and that could be filled by state regulations. *Id.* However, unlike the *Friends of the Eel River* case, the regulations at hand would hamper freight, interstate passenger and commuter operations as well as prevent compliance with applicable FRA track safety standards and the safe operation of trains. Failure to timely repair the bluffs as NCTD requires would halt rail traffic across state lines. As such, California’s laws directly conflict with ICCTA as they impede railroad operations and interstate commerce. *Friends of the Eel River* does not apply in the present case.

C. **Del Mar and the Commission’s Requirements Unreasonably Interfere with Railroad Operations.**

The Commission argues that NCTD is a state agency and is, therefore, subject to state law. However, it fails to recognize two important factors: (1) that NCTD’s sole purpose is to provide public transit services; (2) NCTD is a common carrier subject to STB jurisdiction; and (3) that the

line is used by BNSF for interstate freight which is governed by the Supremacy Clause of the United States Constitution, Article VI. Given the Board's expansive authority over rail transportation, and the federal regulatory agencies' expansive regulations concerning maintenance and repair of rail lines and related structures, *see CSX Transportation, Inc.- Petition for Declaratory Order*, FD 35832, slip op. at 3 (Service Date July 15, 2015), NCTD's origin as a state agency is immaterial. NCTD, as the property owner, and the freight railroad with which it shares property, provides the very services the STB was created to oversee and the line's status as a line of railroad used in interstate commerce takes precedence over state regulations limiting railroad activities. To hold otherwise risks state and local government interference over the very issues under STB's control, *see Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068-69 (11th Cir. 2010), and thwarts the Supremacy Clause of the Constitution of the United States.

It is clear that, in this case, the mitigation measures imposed by Del Mar and the Commission unreasonably interfere with railroad operations. NCTD 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 it, 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 rock slides. *See also* 49 C.F.R. Part 213. Moreover, NCTD must properly protect the right-of-way from trespasser interference and ensure that trains can pass through Del Mar without delay. The Commission's actions unduly burden railroad operations, NCTD's ability to maintain the line and ensure that repairs are quickly and efficiently made. To find otherwise, allows local laws to control the railroad and infringe on the very structure the STB was created to protect.

CRC Members respectfully urge the Board to expeditiously issue a Declaratory Order to both confirm the preemption of the Coastal Zone Management Act requirements as well as of

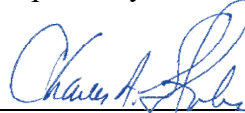
California's state and local regulations in this matter as well as allow NCTD to bring the line to a state of good repair. This matter has been open for almost two years with no resolution in sight. Mediation has failed and time is now of the essence. Finally, this Board must act to prevent other localities from usurping the Board's authority. Issuing an Order in favor of NCTD sends a clear message that the STB defends rail operators from ad hoc regulations and that it will continue to carry out the purpose for which it was created.

CONCLUSION

In view of all the foregoing, the CRC Members respectfully ask the Board to (1) reject the Commission's April 27, 2022, Motion To Hold This Proceeding In Abeyance and (2) issue a Declaratory Order preempting California's state and local laws and preventing NCTD from conducting the required maintenance activities on the line.

July 7, 2022

Respectfully Submitted,



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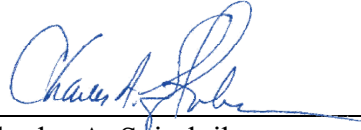
Exhibit A

Commuter Rail Coalition Members That Support this Petition

Peninsula Corridor Joint Powers Board (Caltrain)
The Capital Metropolitan Transportation Authority, officially stylized as CapMetro
Connecticut Department of Transportation
Massachusetts Bay Transportation Authority (MBTA)
The Commuter Rail Division of the Regional Transportation Authority d/b/a/ Metra
Southern California Regional Railroad (Metrolink)
New Jersey Transit
North County Transit District
Northern Indiana Commuter Transit District
Rio Metro RTD/New Mexico Rail Runner Express
Southeastern Pennsylvania Transportation Authority (SEPTA)
South Florida Regional Transportation Authority (SFRTA/Tri-Rail)
Trinity Metro
Utah Transit Authority
Tri-County Metropolitan Transportation District of Oregon
Virginia Railway Express

CERTIFICATE OF SERVICE

I certify that I have, this 7th day of July, 2022, served by email copies of the foregoing Brief of Specified Members of the Commuter Rail Coalition in Support of the North County Transit District's Petition for Declaratory Order on all parties of record in this proceeding.



Charles A. Spitulnik