

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

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

**NORTH COUNTY TRANSIT DISTRICT REPLY IN OPPOSITION
TO CALIFORNIA COASTAL COMMISSION, CITY OF DEL MAR, SURFRIDER
FOUNDATION, AND DEL MAR CITIZENS FILINGS**

North County Transit District (“NCTD”) respectfully submits its reply in opposition to the California Coastal Commission’s (“CCC”) Response to Letter from the Department of the Army, filed on July 21, 2022 (“CCC Response”), the Surfrider Foundation (“Surfrider”) Follow Up, filed July 25, 2022 (“Surfrider Filing”), the City of Del Mar (“City”) Reply, filed on July 25, 2022 (“City Reply”), and the Del Mar Citizens Reply, filed on July 27, 2022 (“Citizens Reply”). These numerous filings followed the letter filed by the Department of the Army (“Army”), filed on July 21, 2022 (“Army Letter”), which emphasized how important the line at issue in this case (“Line”) is to National Defense.

THE FILINGS

As noted, the Army Letter was filed on July 21, 2022, and provided in pertinent part as follows:

The Military Surface Deployment and Distribution Command (SDDC) wants the Board and all other participants in FD 36433 to be aware that the rail line between Los Angeles and San Diego, including the segment owned by the North County Transit District

(NCTD), is important to National Defense. This rail line is part of the Strategic Rail Corridor Network (STRACNET) and is the only rail line connecting the San Diego area to the rest of the country. It is used by BNSF to provide rail freight service to the San Diego area. It is important for national defense that this rail line be maintained to support safe and reliable railroad operations.

This letter speaks for itself and reemphasizes why the regulation of NCTD rail maintenance projects by the CCC and the City that interferes with interstate rail service must be preempted pursuant to 49 U.S.C § 10501(b).

On the same day, the CCC filed a response to this straightforward letter by the Army agreeing that the Line is important to National Defense. The CCC then notes that the San Diego Association of Governments (“SANDAG”) is the public agency that sought approval from the CCC for the Del Mar Bluff Stabilization Project 5 (“Project”) which CCC certified. CCC argues that its review process with SANDAG has not interfered with rail operations on the Line.

In reply, NCTD reemphasizes that it is the rail carrier on the Line, not SANDAG, with the statutory and contractual duty to maintain and operate this Line. Consequently, NCTD has the common carrier obligation to provide rail service pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”) for this extremely important piece of the U.S. rail network and has sole responsibility for the liabilities that arise from these rail operations in terms of the rail infrastructure. While the CCC notes it did finally certify the project, it fails to mention that NCTD’s original project was intended to have a useful life of 50 years but was reduced to a useful life of 30 years through negotiations between the CCC and SANDAG on the assumption that the tracks will be relocated off the bluffs sometime before the expiration of 30 years despite that the proposed relocation construction project is entirely unfunded at this time. The CCC also fails to mention the incredibly onerous and unrelated conditions it imposed on the Project that are entirely unrelated to the Project, like multi-million-dollar projects for beach access and

the eventual disassembly of the actual project itself, and that these onerous and far-reaching conditions followed the ten months NCTD waited for the certification in the first place. That is all to say that the CCC Federal Consistency Review process clearly cannot be harmonized with the ICCTA for maintenance projects on this crucial part of the U.S. rail network.

Four days later, the City filed a lengthy reply to various filings, including the Army Letter, comments in support of the Petition for Declaratory Order by the Commuter Rail Coalition (“CRC”) and the Northern Indiana Commuter Transportation District (“NICTD”), and the NCTD Reply in Opposition to the CCC’s and the City’s requests to the STB to decline to issue a declaratory order in this matter based on the recent certification of the Project filed on July 6, 2022 (“NCTD Reply”). In its filing, the City makes several completely unfounded arguments that are based on factual inaccuracies.

For example, the City mostly focuses on its contention that NCTD improperly raised a completely new argument in the NCTD Reply; specifically that NCTD did not raise the argument in its Petition that its request for declaratory relief was of great “significance to the industry.” However, there are some significant flaws in this contention. First of all, NCTD specifically addressed why its Petition raised such “significance to the industry” to warrant the institution of a declaratory order proceeding on October 26, 2020 in its rebuttal. (Docket Filing 301204 at p. 2, n. 1). Moreover, NCTD has emphasized the importance of this Line to interstate commerce, National Defense, and interstate passenger service throughout this proceeding, including in its initial Petition for Declaratory Order. (Petition for Declaratory Order at pp. 4-5; Docket Filing 303559 at p. 6; 304099 at p. 5; Docket Filing 304471 at p. 10). In other words, NCTD has been noting the national significance of this Line and why these preemption issues related to it are so crucial to interstate commerce throughout this proceeding.

Moreover, the City claims “NCTD’s belated “national significance” contentions are largely based on two filings of its fellow trade association members, NICTD, styled as ‘Comments,’ and CRC, styled as a ‘Brief.’” However, NCTD did not mention either filing by CRC or NICTD in the NCTD Reply. That is because these filings were submitted to the Board on the same day or after the NCTD Reply. While NCTD is not sure what the City stands to gain from making these incorrect claims other than to continue its pattern of making unprofessional and unnecessary assertions in this case, NCTD felt compelled to point out these inaccuracies. More importantly though, in the midst of making these unfounded accusations, the City did not rebut NCTD’s position that its Petition raises matters of national significance. That is because there cannot be any argument to counter this point as the filings by the Army, Amtrak, the Association of American Railroads, and the commuter entities in this proceeding demonstrate.

The City also makes various other claims in its Reply including that NCTD admitted that “SANDAG, the California Coastal Commission (“Coastal Commission”), and NCTD have reached agreement on the Commission’s conditional concurrence of the Project.” Again, this is not true. NCTD stated that it had reached a verbal agreement with SANDAG about the Project. There was no mention of an agreement between NCTD and the CCC because there is none. In addition, NCTD in its Reply emphasized that there was no formal written agreement with SANDAG and would advise the Board if and when one was reached. However, no formal written agreement has been reached to date.

Generally, the City Reply demonstrates a pattern of misleading claims.¹ The remainder of the City’s unfounded arguments are simply retreads of prior arguments that NCTD successfully has rebutted in prior filings in this proceeding.

In addition, Surfrider filed its follow up on the same day as the City and focused its argument primarily on the portion of the Project that is not in the NCTD right-of-way arguing that it is not subject to preemption under the ICCTA. However, there are various fatal flaws to this argument. Whether the rail activity is inside or outside the right-of-way, “land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA.”. *Borough of Riverdale – Pet. for Declaratory Order*, FD 33466, slip op. at 7 (STB served Sep. 9, 1999) (citing *Norfolk Southern Ry. Company v. City of Austell, Ga.*, 1997 WL 11113647 (N.D. Ga. 1997); *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998)). See also *Thomas Tubbs, et al – Pet. for Declaratory Order*, FD 35792 (STB served Oct. 31, 2014) (Board found claims under state law seeking compensation from railroad for flooding neighboring area allegedly caused by improper design, construction, and maintenance of rail line are preempted.); *Grafton & Upton R.R. Co. – Pet. for Declaratory Order*, FD 35779 (STB served January 27, 2014) (preclearance regulations of town that would prohibit or unreasonably interfere with the proposed construction and operation of an additional

¹ The City also argues that the NCTD Reply should not be permitted as a reply to a reply in violation of Board rules. However, as NCTD noted in its filing, the NCTD Reply was in response to the motions by the City and CCC to deny NCTD’s Petition for Declaratory Order based on the CCC certification of the Project. While these filings were not titled motions (CCC first and second updates, filed on June 23 and 29, 2022, and the City reply, filed on July 1, 2022), they asked the Board for this relief. Therefore, the City’s request should be rejected.

rail yard and storage tracks in the town are preempted by federal law); *Norfolk Southern Ry Co.* – *Pet. for Declaratory Order*, FD 35701 (STB served Nov. 4, 2013) (the state law claims raised by nearby property owners against NSR for noise and vibration damages are federally preempted); *Norfolk Southern Ry Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010) (city's haul ordinance, as applied through railroad's haul permit, was preempted by ICCTA). Therefore, as long as the regulation frustrates rail operations like the CCC has done here, the action will be preempted by the ICCTA whether inside or outside the right-of-way. *See Boston and Maine Corp. and Springfield Terminal R.R. Co. – Pet. for Declaratory Order*, FD 35749 (STB served Jul. 19, 2013) (certain zoning decisions by town which would ban freight rail transportation on a private track are preempted).

Furthermore, even assuming preemption did not apply to this work outside the right-of-way, which it does, NCTD has agreed to accept certain conditions related to any effects from this seawall to be built on the beach outside its right-of-way in the form of nearly \$8.7 million dollars in sand replacement and for the value of the beach area that will no longer be accessible to the public as requested by the Commission². However, despite NCTD's willingness to cooperate with the CCC and SANDAG on this issue to advance a critical safety project, it certainly does not agree that these preclearance requirements can be harmonized with the ICCTA outside the right-of-way and obviously for its work inside the right-of-way.

Additionally, the Del Mar Citizens filed their reply on July 27, 2022, asserting various

² The methodology for calculating the mitigation for the loss of sand NCTD agreed to is as follows: 17,824 cubic yards (CY) of sand multiplied by the cost to replace the sand, \$17/CY, for a total of \$303,015. The methodology for calculating the loss of public recreational beach impact is 49,336 square feet (SF) of loss of beach recreational area multiplied by the beach recreation value, \$170/SF, for a total of \$8,387,103. The loss of sand and public recreational beach area due to the seawall outside of NCTD's right-of-way were agreed actual Project impacts. The other permit conditions imposed by the Commission are entirely unrelated to NCTD's Project.

arguments that are easily dispatched. First, they argue that the ICCTA excludes Board jurisdiction of NCTD’s “public transportation” by rail pursuant to 49 U.S.C § 10501(c)(2)(a). However, this assertion is simply a misunderstanding of this statute. When NCTD acquired the Line, the Interstate Commerce Commission (“ICC”), the STB’s predecessor agency,³ issued a decision that authorized the acquisition of the Line, concluding, by the transaction, that NCTD had acquired sufficient power over the freight railroad’s operations on the Line to require a finding that NCTD controlled the rail freight operations⁴ and had thus become a common carrier by railroad subject to the jurisdiction of the ICC. *Orange Cty. Transp. Auth.*, 10 I.C.C.2d 79, 90 (1997). Therefore, the NCTD is a “rail carrier” and subject to the exclusive jurisdiction of the STB pursuant to the ICCTA. *See* 49 U.S.C. §§ 10102(5); 10501(b).⁵ This decision by the ICC puts this matter to rest.

The Del Mar Citizens also argue that the Federal Railroad Safety Act (“FRSA”), not the ICCTA, determines preemption of state laws regulating safety of railroads. This argument is simply a misreading of the applicable Board precedent on this issue. NCTD, in response, agrees that Congress has vested aspects of national rail oversight in different federal agencies: U.S. Department of Transportation – Federal Railroad Administration (with primary jurisdiction over rail safety matters) and the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network). The jurisdiction and regulatory responsibilities

³ Under the ICCTA, Pub. L. No. 104-88, 109 Stat. 803 (1995), the ICC was abolished, and all remaining rail regulatory functions were transferred to the STB, effective January 1, 1996.

⁴ Specifically, NCTD acquired control over maintenance, dispatching, new track construction, and scheduling of service on the Line.

⁵ The Del Mar Citizens strongly rely on *Peninsula Corridor Joint Powers Board – Pet. for Declaratory Order*, FD 35929 (STB served Jul. 2, 2015) for its argument that NCTD is not subject to the ICCTA. While there are some similarities in these situations, the determining factor in *Peninsula Corridor* was the electrification project at issue solely related to the commuter rail operations, not the freight rail service. Here, the Project clearly relates to the freight rail service as it stabilizes the track that BNSF operates on, thereby making *Peninsula Corridor* inapposite.

of these federal bodies necessarily overlap to some degree, and, where they do, the federal bodies coordinate and cooperate with each other as appropriate. *See Boston & Maine Corp. v. STB*, 364 F.3d 318 (D.C. Cir. 2004); *Tyrrell v. Norfolk Southern Ry Co.*, 248 F.3d 517 (6th Cir. 2001). “The fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA ... does not lessen the preemptive effect of section 10501(b) or vice-versa.” *CSX Transportation, Inc.* FD 34662, slip op. at 10 (STB served Mar. 14, 2005) (citing *Tyrrell*, 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety, and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted). Therefore, it is clear that these preemption provisions in the ICCTA and FRSA do not cancel each other out but work in tandem independently to protect rail operations across the U.S. In summary, FRSA preemption does not impact the analysis of ICCTA preemption here as it stands alone.⁶

The Del Mar Citizens additionally argue that NCTD failed to comply with the STB regulations governing compliance with the Coastal Zone Management Act (“CZMA”). While there are certainly requirements for Federal Consistency Review under CZMA for certain activities authorized by the STB to non-federal applicants, a petition for a declaratory order is not one of these activities. The following Federal agency licenses and permits are the only STB activities subject to the certification process for consistency in California, under Section 307(c)(3) of CZMA, if the activity being licensed or permitted affects any land or water use or

⁶ Moreover, this preemption provision in the FRSA does not have any applicability to state environmental laws. The language specifically provides that “[a] state may adopt or continue in force any law, regulation, or order related to **railroad safety**. 49 U.S.C. § 20106(a)(2) (emphasis added). This language does not relate to every law in the state despite the Citizens of Del Mar’s attempt to shoehorn the California Coastal Act into this clause. In addition, the law also requires any such state law not to “unreasonably burden Interstate commerce,” which it clearly does as NCTD has demonstrated in this proceeding.

natural resource of the coastal zone a. Permits for railroad construction (49 USC § 10901). b. Exemption from service requirements for rail transportation and applications for rail line abandonments (49 USC §§ 10502, 10903). c. Removal of trackage and disposition of right-of-way (49 USC § 10101 et seq.).⁷ Obviously, this proceeding does not fall within this list of activities. Therefore, this CZMA argument also should be rejected.

These arguments by these various opposition parties appear to be an attempt to distract the Board from the genuine matter at issue here which is the preemption of these land use laws in a coastal zone with respect to rail maintenance/improvement projects in the NCTD right-of-way. As stated by the Ninth Circuit Court of Appeals, “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (citation omitted). For this reason, it is well settled that § 10501(b) categorically preempts state law requirements to obtain permits or other review before engaging in activity regulated by the STB,⁸ like the fencing project. *See, e.g., id.* at 1029-31 (providing that state and local permitting laws regarding railroad operations are preempted by plain language of the ICCTA); *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010) (holding that any form of state or local permitting or preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the STB has authorized is “unreasonable

⁷ https://www.coastal.ca.gov/fedcd/listlic_2015.pdf

⁸ Del Mar Citizens appear to argue disingenuously that the fencing project is subject to Federal Consistency Review as part of the Project. However, in the two consolidated cases in the U.S. District Court for the Southern District of California, Southern Division, involving the fencing project, the CCC (<https://ecf.casd.uscourts.gov/doc1/037118179300> at p. 10) and the Friends of Del Mar Bluffs (<https://ecf.casd.uscourts.gov/doc1/037118178787> at pp. 25-26) have conceded that the fencing project does not involve any federal action needed to trigger this review under CZMA. It is also worth noting that counsel for Friends of Del Mar Bluffs in this federal court case is a named Del Mar Citizen in this STB proceeding.

interference with interstate commerce” and must be preempted); *Norfolk S. Ry. Co.*, 608 F.3d 150 (stating that a local ordinance regarding truck traffic that may reasonably be said to have the effect of “managing” or “governing” rail transportation is preempted); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (providing that a Vermont environmental permit requirement was categorically preempted for railroad’s construction of a transloading facility on its property). For similar reasons, CZMA Federal Consistency Review cannot be harmonized with the ICCTA here because it is being used to interfere with rail operations and will result in an unworkable patchwork of rail regulation. *See, e.g., Ass’n of American Railroads – Petition for Dec. Order*, FD 36369, (STB served Dec. 30, 2020) (STB found this water discharge permitting program would be preempted explaining that if individual states were to apply the permitting program differently to discharges from the incidental operation of rail cars in transit, it would likely result in a patchwork of differing regulations that could not be harmonized with the ICCTA.); *U.S. Environ. Protection Agency – Petition for Dec. Order*, FD 35803 (STB served Dec. 30, 2014) (STB explained that the rules would be preempted because of the potential patchwork of regulations if each state issued its own locomotive idling rules that could result, contravening Congress’s purpose in enacting the ICCTA, because locomotives would be subject “to fluctuating rules as they cross[] state lines” (and as they cross air quality regions), and the rules would therefore likely “directly interfere” with the purpose of the ICCTA.)

One major reason that permitting or preclearance requirements like the ones at issue here are categorically preempted is because they will delay or prohibit crucial rail infrastructure projects which could grind interstate commerce to a halt. *See City of Auburn v. STB*, 154 F.3d at 1031 (state and local authorities could deny or unreasonably delay a railroad's right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the

Board's authorization of those facilities and operations). That is exactly what has happened here with respect to the projects NCTD has tried to complete in its right-of-way because the CCC and City have put up so many roadblocks to any type of rail improvement activity on the Del Mar Bluffs. While NCTD is certainly sensitive to the importance of the Del Mar Bluffs and has done everything within reason to protect and improve this area, it also must do everything within reason to protect this nation's need for a vibrant and successful rail system as Congress clearly intended.

CONCLUSION

Based on the foregoing discussion, NCTD respectfully asks the Board to rule on its Petition for Declaratory Order and find that the regulation by CCC of these two rail projects in the right-of-way is preempted.

Respectfully submitted,

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Dated: August 2, 2022

Certificate of Service

I certify that I have, this 2nd day of August 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