

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 30, 2022
Part of
Public Record

Finance Docket No. 36433

NORTH COUNTY TRANSIT DISTRICT -
PETITION FOR DECLARATORY ORDER

NOVEMBER 30, 2022 STATUS UPDATE

North County Transit District (“NCTD”) respectfully submits this November 30, 2022 Status Update to advise the Surface Transportation Board (“STB”) of recent decisions by the United States District Court for the Southern District of California (“Federal Court”) to remand the two related cases to this proceeding to the Superior Court of the State of California, County of San Diego, Central Division (“State Court”).

BACKGROUND

On August 28, 2020, NCTD filed this Petition for Declaratory Order at the STB regarding its fencing project and a bluffs stabilization project both in its railroad right-of-way.

Over a year and a half later, Friends of Del Mar Bluffs (“FDMB”) 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 State Court regarding the same fencing project in the railroad right-of-way (“FDMB Action”).¹ Specifically, FDMB claim

¹ *Friends of Del Mar Bluffs et al. v. North County Transit District et al.*, Case No. 37-2022-00011260- CU-WM-CTL.

NCTD violated a state grant agreement by not complying with state environmental permitting laws. FDMB 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, FDMB seek declaratory relief establishing the invalidity of certain actions taken by NCTD on or around 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 City of Del Mar’s (“City”) upper bluff in the NCTD rail right-of-way without seeking a Coastal Development Permit under the California Coastal Act (“Coastal Act”) from the City. On April 12, 2022, NCTD filed a notice of removal of this civil action to the Federal Court.² On May 27, 2022, Friends of Del Mar Bluffs filed a Motion to Remand to State Court.

Shortly thereafter, the California Coastal Commission (“Commission”) filed an action in State Court against NCTD on April 19, 2022, seeking declaratory and injunctive relief as well as civil fines and exemplary damages (“Commission Action”).³ The Commission’s first cause of action seeks a writ of mandate directing NCTD to set aside its approval of the safety fencing construction in its railroad right-of-way, 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 State 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

² *Friends of Del Mar Bluffs et al. v. North County Transit District et al.*, Case No. 22-CV-503-LL-BGS.

³ *California Coastal Commission v. North County Transit District et al.*, Case No. 37-2022-00014604 CU-MC-CTL.

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 to the Federal Court as well.⁴ On May 27, 2022, the Commission filed a Motion to Remand to State Court.

On April 29, 2022, NCTD filed a motion for a stay in the Commission Action in the Federal Court pending resolution of this STB proceeding.⁵ On May 10, 2022, NCTD also filed a motion for a stay in the FDMB action. On June 2, 2022, the Court agreed with NCTD that a stay is appropriate to allow the STB to determine the preemption issues pertaining to both cases.⁶ The Federal Court stayed the cases *sua sponte* reasoning that "the orderly course of justice measured in terms of simplifying issues is served by allowing the STB to determine the preemption issues."⁷ In sum, the Federal Court "exercised its power in the vein of judicial economy to avoid two different federal entities (*i.e.*, the District Court and the STB) from determining the same issues as the pleadings in these cases indicate that the parties disagree over preemption and whether the ICCTA creates a basis for removal in this case."⁸ As a result, the Federal Court granted NCTD's motions to stay the cases until the STB's ruling on preemption.⁹

⁴ *California Coastal Commission v. North County Transit District et al.*, Case No. 22-CV-587-LL-BGS,

⁵ NCTD Executive Director Matthew Tucker agreed in a sworn declaration submitted in support of the motion not to begin construction of the safety fencing project in the railroad right-of-way until the STB rules on NCTD's petition for declaratory order.

⁶ Commission Action (June 2, 2022), <https://ecf.casd.uscourts.gov/doc1/037118195233>

⁷ *Id.* at 8.

⁸ *Id.*

⁹ On June 7, 2022, the Commission filed an Ex Parte Application to Vacate Stay and Resume Motion to Remand in response to this order which NCTD opposed.

Subsequently, both cases were transferred to a new judge, Honorable Robert S. Huie, on September 7, 2022. The Federal Court directed the parties to complete their briefing on the Motions to Remand in both cases on October 13, 2022. On November 18, 2022, the Federal Court remanded both cases to State Court in two separate orders, essentially finding no grounds for federal jurisdiction based on a federal defense.¹⁰ The cases now sit in State Court awaiting a ruling on this crucial issue of preemption by the ICCTA regarding rail projects in the right-of-way which could have a great impact on the rail industry and NCTD.¹¹

The STB has exclusive jurisdiction over these pending issues regarding preemption and is the most qualified forum to make this determination. *See 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 (2nd Cir. 2005)); *see also New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331-32 (5th Cir. 2008). One major reason that state and local environmental permitting or preclearance requirements like the ones at issue here are categorically preempted is because they will delay (and have, in fact, delayed) or prohibit crucial rail infrastructure projects which could grind interstate commerce to a halt. *See City of Auburn v. STB*, 154 F.3d 1025, 1031 (9th Cir. 1998) (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

¹⁰ Commission Action (Nov. 18, 2022) <https://ecf.casd.uscourts.gov/doc1/037118677493>; FDMB Action (Nov. 18, 2022) <https://ecf.casd.uscourts.gov/doc1/037118676753>

¹¹ *See, e.g., Carter v. National Railroad Passenger Corporation*, 63 F.Supp.3d 1118, 1147-51 (N.D. Ca. 2014) (Railroad had a duty under California law to install a fence or take other preventative measures at a worn path crossing its tracks where pedestrian was struck and killed by a train while walking from a parking lot to a nature area on other side of tracks; harm to pedestrian was foreseeable to railroad, as paths and trails on either side of tracks put railroad on notice that tracks were crossed on a regular basis, requiring railroad to fence limited areas where worn paths crossed tracks would not impose an intolerable burden, and fencing would likely prevent future harm by making it more difficult to trespass on tracks.)

Board's authorization of those facilities and operations); *Green Mountain*, 404 F.3d at 643 (“pre-construction permit requirement is preempted for two reasons: (i) it “unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations,” *Town of Ayer*, STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.”)

This is exactly what has happened here where an extremely simple, yet critical, railroad right-of-way fencing project needed to protect the public and rail employees from the inherent dangers of railroading and to ensure the flow of interstate commerce has been stuck in limbo due to the interference of state and local environmental requirements. There were 4971 freight rail miles, 3,405,000 carloads originated, 3,099,500 carloads terminated, and 27 freight railroads in California in 2019.¹² If California state and local environmental regulation is permitted to interfere with this substantial rail presence in this state, the impacts will be devastating to interstate commerce. Therefore, NCTD respectfully urges the STB to issue a decision in this proceeding in an expedited manner.

¹² <http://www.cslra.org/wp-content/uploads/2021/02/AAR-California-Freight-Rail-Fact-Sheet-2019.pdf>

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for North County Transit District

Dated: November 30, 2022

Certificate of Service

I certify that I have, this 30th day of November 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