

**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 REDUNDANT
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”) redundant motion for an order holding this matter in abeyance until final resolution of state court litigation now pending between the Commission and NCTD filed on December 1, 2022. 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. Moreover, the Commission already made the identical request by motion on April 26, 2022, thereby making this repeated request unnecessary and a waste of the Board’s resources.

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, providing by reference, pending examples of two separate projects for safety fencing and bluffs stabilization where the City and the Commission were trying to interfere with NCTD's safety and maintenance projects on its interstate rail line.¹ Numerous filings were received in response to the petition, including from the Commission, who has actively participated in this proceeding since its start.

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's Local Coastal Plan.² 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.

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 ("FDMB Action") in the Superior Court of the State of

¹ The state court litigation only involves the safety fencing project and has no relationship to the bluffs stabilization project also raised in NCTD's petition. Therefore, this Commission motion would strand any decision on this bluffs stabilization issue while litigation proceeded in State Court on the safety fencing matter which would be inherently unfair and irrational.

² 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.

California for the County of San Diego (“State Court”). 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 City’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 (“Federal Court”). On May 27, 2022, Friends of Del Mar Bluffs filed a Motion to Remand to State Court.

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 (“Commission Action”). 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 to Federal Court in that action as well. On this same day, the Commission filed a motion at the STB seeking to hold this proceeding in abeyance pending the State Court litigation as it has again done here. On May 27, 2022, the Commission filed a Motion to Remand the removed action 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.³ 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.⁴ 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.”⁵ 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.”⁶ As a result, the Federal Court granted NCTD’s motions to stay the cases until the STB’s ruling on preemption.⁷

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

³ 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.

⁴ Commission Action (June 2, 2022), <https://ecf.casd.uscourts.gov/doc1/037118195233>

⁵ *Id.* at 8.

⁶ *Id.*

⁷ 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.

Court remanded both cases to State Court in two separate orders, essentially finding no grounds for federal jurisdiction based on a federal defense.⁸ 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.⁹

On December 1, 2022, the Commission filed a motion to hold this declaratory order proceeding in abeyance, pending resolution of the State Court litigation, as it already did on April 26, 2022. For the same reasons, NCTD opposes this identical request and asks the Board to issue a decision on its petition for declaratory order in this case in an expedited fashion.

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 over 27 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 by agreement of the

⁸ Commission Action (Nov. 18, 2022) <https://ecf.casd.uscourts.gov/doc1/037118677493>; FDMB Action (Nov. 18, 2022) <https://ecf.casd.uscourts.gov/doc1/037118676753>

⁹ 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.)

parties. During this time since NCTD filed its petition, there has been 1 train incident involving a trespasser on the NCTD rail line in the City, including 1 fatality. From June 2016 through present, there have been 7 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 over 19 months after NCTD came to the Board.¹⁰

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 49 U.S.C. § 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, 27 months later, the Commission seeks to hold this proceeding in abeyance in another attempt to delay a final

¹⁰ 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, 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).

decision. This redundant request to delay this crucial case should be denied because the STB is the forum most qualified to make this decision on preemption.

As mentioned in the Commission's third update to the STB filed on August 19, 2022, the Commission again claims its approval of the San Diego Association of Government's (SANDAG) federal consistency certification for the Del Mar Bluffs Stabilization Project V (Project) is now final and binding. NCTD addressed this unfounded position in its reply filed on September 6, 2022 and will not repeat those arguments except to say the Commission's position has no merit.

The Commission concludes by arguing that allowing the state court to rule first would narrow the issues for the STB. However, the Commission has this argument completely backwards. A decision by the Board first finding these preclearance requirements to be preempted would render this State Court litigation moot and would avoid a waste of the parties' resources by litigating the same matter in two different forums.

As NCTD emphasized in its most recent status update, 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 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,...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 2019.¹¹ 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.

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.

¹¹ <http://www.cslra.org/wp-content/uploads/2021/02/AAR-California-Freight-Rail-Fact-Sheet-2019.pdf>

Respectfully submitted,

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Certificate of Service

I certify that I have, on this 7th day of December 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
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