



JACQUELINE M. VIGILANTE, ESQUIRE
NEW JERSEY SUPREME COURT CERTIFIED CIVIL TRIAL ATTORNEY
MANAGING PARTNER
EMAIL : JACCI@THEVIGILANTELAWFIRM.COM

309396

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VIA E-FILING & EMAIL: MILSS@STB.GOV

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

Re: *Petition for Declaratory Order*
Docket No.: FD 36770
Township of Pilesgrove in re SMS Rail Service, Inc.

Dear Ms. Brown:

Pilesgrove Township hereby provides its Opposition to SMS' Motion for Leave to File Sur Reply Regarding Recent Developments and Rebuttal Briefs of Pilesgrove Township and Mannington Township in the above-referenced proceeding. Should you have any questions, please feel free to contact our office.

Thank you.

Very truly yours,

THE VIGILANTE LAW FIRM, P.C.

By: Jacqueline M. Vigilante

JMV/dm
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOWNSHIP OF PILESGROVE, N.J. PETITION FOR DECLARATORY ORDER	Docket No. FD 36770 PETITIONER’S OPPOSITION TO SMS MOTION TO FILE SUR-REPLY
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**RESPONSE OF THE TOWNSHIP OF PILESGROVE,
COUNTY OF SALEM, NEW JERSEY, TO SMS RAIL SERVICE, INC.,
MOTION FOR LEAVE TO FILE SUR REPLY**

Introduction and Procedural History

On April 22, 2024, the Township of Pilesgrove, a New Jersey municipal corporation located in Salem County, New Jersey (“Pilesgrove”), filed a petition requesting a declaratory order from the Surface Transportation Board (“Board”) as to whether and to what extent the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) preempts Pilesgrove’s municipal zoning and site plan regulations, and certain requirements of New Jersey’s Uniform Construction Code (“UCC”), with regard to the land development and land use activities of SMS Rail Service, Inc. (“SMS”) within Pilesgrove Township in connection with SMS’s recently commenced entertainment-based intrastate railroad excursions.

On June 10, 2024, the Township of Mannington, a New Jersey municipal corporation also located in Salem County, New Jersey (“Mannington”), petitioned the Board for leave to intervene in Pilesgrove’s proceeding based upon SMS’ land use activities located within, within Mannington Township. Mannington’s petition to intervene was granted on September 13, 2024, as set forth in the Board’s decision served on that date.

The Board set a procedural schedule on October 24, 2024, allowing Piles Grove and Mannington to submit supplemental evidence and arguments by November 8, 2024. SMS's reply evidence and arguments, along with submissions from other interested parties, were due by December 9, 2024, with rebuttal statements from Piles Grove and Mannington, and SMS's responses to other submissions, due by January 7, 2025. On November 8, 2024, Mannington and Piles Grove submitted their supplemental evidence and arguments as per the Board's schedule. The Board modified the schedule on December 6, 2024, extending the deadline for SMS's reply and other submissions to December 16, 2024, and the deadline for rebuttal statements to January 14, 2025. SMS filed its reply evidence and argument on December 16, 2024, along with submissions from interested parties, including Sierra Northern Railway, Mendocino Railway, American Short Line and Regional Railroad Association, and California Short Line Railroad Association. On January 14, 2025, Mannington and Piles Grove filed their rebuttal statements as per the revised schedule.

SMS filed its reply evidence and argument on December 16, 2024, as did the following “Amici”

- Sierra Northern Railway (SNR) (*Amicus Curiae* Brief)
- Mendocino Railway (MRY) (*Amicus Curiae* Brief)
- American Short Line and Regional Railroad Association (ASLRRA) (Comments)
- California Short Line Railroad Association (CSLRA) (Comments)

On January 14, 2025, Mannington and Piles Grove filed their respective rebuttal statements as allowed by the Board’s December 6, 2024 decision.

Now before this body is SMS’ motion for leave to file a “Sur Reply of SMS Rail Service, Inc., Regarding Recent Developments and Rebuttal Statements of Piles Grove Township and

Mannington Township to SMS's Reply and Interested Persons' Comments and Amicus Curiae Briefs to the Townships' Petitions for Declaratory Order and Supplemental Evidence and Argument" (the "Sur Reply"). A copy of the Sur Reply was included with SMS's motion.

In its motion and brief SMS Rail Service, Inc. seeks permission from the STB to file a sur-reply due to alleged recent developments and to correct the record in the ongoing proceedings. The motion is in response to rebuttal briefs filed by Pilesgrove and Mannington Townships, which SMS falsely claims contain inaccurate allegations and misstatements of law. In sum, SMS argues that

- Pilesgrove Township has blocked electrical connections to its properties, causing operational disruptions and unnecessary expenses.
- Mannington Township is attempting to impose local land use regulations on SMS's operations at Building 90, which SMS claims are federally preempted, and
- the Townships' actions interfere with its rail operations and are contrary to federal preemption under 49 U.S.C. § 10501.

SMS also reiterates its previously asserted arguments that its operations on the Salem Branch are part of interstate commerce and thus subject to federal preemption, which should prevent local regulation by the Townships. SMSM also restates arguments that are already before the Board that the Townships' claims of SMS's operations being intrastate are incorrect and that their regulatory attempts undermine SMS's ability to maintain rail transportation.

In response, Pilesgrove objects to the motion to file a sur-reply on the following basis. First, this motion is not properly before the Board as such a sur-reply is prohibited under 49 CFR §1104.13. As stated in the Code:

§ 1104.13 Replies and motions.

(a) ***Time.*** A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.

(b) ***Number of copies.*** The original of a reply or motion should be accompanied by the same number of copies required to be filed with the pleading to which the reply or motion is addressed.

(c) ***Reply to a Reply.*** A reply to a reply is not permitted.

49 CFR §1104.13 (emphasis added).

SMS is requesting relief to which it is not entitled. Motions, replies and rebuttals are closed and no further argument is permitted or should be allowed. SMS should not be allowed to bypass the clear rules outlined in the Code, which are specifically designed to prevent parties from repeatedly restating their arguments. The Motions, Briefs, and Replies have been submitted in accordance with the Board's October 24, 2024, schedule, which does not permit sur-replies. Furthermore, by submitting the very sur-reply it seeks to file along with its motion, SMS has attempted to circumvent both the rules and the scheduling order. The relief requested by SMS should be denied for the foregoing reasons.

Without waiving these objections, should the Board grant SMS's motion to file a sur-reply, the following is submitted in response.

1. SMS argues that the Townships are requesting shared regulatory authority over the Salem Branch, SMS, and its rail operations, arguing that a new legal precedent would be set for municipalities to assume regulatory control over the nation's rail system. On the contrary, the Townships are not seeking to share responsibility with the Board to regulate rail operations and activities that are preempted. The Townships seek only to regulate operations which are not preempted under Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). To determine if the ICCTA overrides a state or local law, there are two key steps. First, the law must

regulate “transportation.” Second, this transportation must involve a “rail carrier.” The ICCTA defines “transportation” broadly to include both the movement of passengers and goods by rail, as well as the services related to that movement. Additionally, sections 10501(b)(1) and (2) grant the Board exclusive authority over such transportation and certain aspects of rail carriers’ operations, including tracks and related facilities. Considered in whether the Board’s exclusive jurisdiction applies to interstate and/or intrastate transportation, the Board’s exclusive jurisdiction over trackage under §10501(b)(2) is broad because it applies to tracks and track-related facilities “even if the tracks are located, or intended to be located, entirely in one state.” However, unlike trackage jurisdiction, the Board’s exclusive jurisdiction over “transportation” pursuant to §10501(b)(1) is limited by the prefacing language of §10501(a)(2) which provides that the Board’s jurisdiction over transportation does not extend to transportation “between a place in a state and a place in the same state” if such transportation is not “part of the interstate rail network.” SMS’s arguments ignore that facts SMS’ focus for the Salem Branch has been the seasonal intrastate passenger excursion rides and only recently, when challenged by Pilesgrove and Mannington, has SMS’ focus changed to marketing and seeking freight opportunities for the Salem Branch.

2. SMS argues that Pilesgrove blocked ACE from connecting electricity to SMS’ property. In New Jersey, electric utility companies, include ACE, require municipal approval before connecting new electrical service. This includes permits and inspections to ensure the installation complies with local building and electrical codes. The process involves:

- a. Electrical Permit – The property owner or electrician must obtain a permit from the local municipality before starting electrical work.
- b. Inspection – Once the work is completed, the municipality will conduct an inspection to verify compliance with codes.

- c. Utility Connection – After passing inspection, the municipality notifies the electric utility company, which then proceeds with the connection.

The approval is commonly referred to as a "cut card" which is issued by the municipal electrical inspector after passing the final inspection. This document serves as authorization for the utility company to connect or restore electrical service. Once the inspection is completed and approved, the municipality sends the cut card to the utility provider, allowing them to proceed with the connection. In this case, as is clear from the record, SMS has not obtained a permit for the electrical and therefor no cut card can be issued. ACE cannot establish the electrical connection due to SMS' failure to comply with the permitting process. It is inaccurate for SMS to allege that Pilesgrove blocked this service.

3. SMS argues that rail bikes are not a ripe issue to be addressed before this Board. On page 3 of Pilesgrove Township's Petition for Declaratory Order, Pilesgrove raised the issue of whether the ICCTA preempts municipal land use regulation of rail bike operations. On page 4, Pilesgrove noted that despite SMS applying to the Pilesgrove Township Planning Board for approval of a rail bike operation and receiving a use variance, SMS still claimed that "federal preemption prohibited the planning board from rendering a zoning decision." This raises questions about whether the rail bike operation falls under federal preemption. Consequently, Pilesgrove requested a declaratory order from the Board to resolve this and other SMS-related uncertainties.

In its reply evidence and argument brief on page 23, SMS's counsel addresses rail bike preemption, stating that SMS has been working with Pilesgrove's planning board to address concerns regarding a potential rail bike facility. SMS argues that the financial benefits of such a facility to its freight operations support federal preemption. SMS further argues that since a rail bike facility may utilize portions of Lot 1 in the future, the property remains part of the railroad

and thus federally preempted. Leaving the issue of rail bikes unaddressed creates an opportunity for SMS to later contest the site plan review requirement imposed as a condition of the planning board's approval.

Two of the four interested parties who filed submissions with the Board also addressed the rail bike issue. MRY, on pages 5 and 10 of its brief, argues that its rail bike operations are integral to its role as a common carrier and thus should not be subject to municipal regulation. MRY provides a detailed explanation on pages 13 and 14, aligning with SMS's position that Piles Grove is preempted from regulating rail bike facilities. Similarly, SNR, on pages 9, 10, 15, and 21, contends that its excursion operations, including rail bikes, fall under common carrier status and should be federally preempted, echoing MRY's stance.

Piles Grove, in its rebuttal brief (pages 2 and 3), reiterates the need for a declaratory order, highlighting its concern that SMS is leaving open the possibility of claiming federal preemption over rail bikes. On page 21, Piles Grove explicitly requests the STB to clarify that activities such as rail bikes, warehousing, or other non-railroad operations must comply with all applicable state, county, and municipal regulations, including zoning and site plan review.

Mannington Township also weighed in on the issue in its rebuttal brief (pages 34-36), supporting Piles Grove's request and expressing its concerns that left unaddressed, the rail bike operations could proceed without local oversight. The Townships both seek the Board's determination on whether a rail bike concession, whether interstate or intrastate, constitutes "transportation" under §10501 of the Board's jurisdiction.

SMS claims it currently no plans for a rail bike facility but also argues that the issue has not been sufficiently briefed and is not ripe for decision—contradicting the well-developed record on the matter. Under 5 U.S.C.A. § 554(e), the Board is empowered to issue declaratory orders to

resolve disputes and eliminate uncertainty, SMS should not be allowed to avoid a ruling after full briefing. The Board should take this opportunity to clarify the preemption issue, preventing Pilesgrove and Mannington from facing further costly and prolonged litigation if SMS later reverses course and proceeds with rail bike operations. The urgency of this decision is heightened by the lack of clear precedent on whether the ICCTA preempts municipal regulation of rail bike operations.

4. SMS's motion and Sur-Reply do not assist the Board in any meaningful way in its mission. SMS fails to establish that its operations on the Salem Branch involve freight transportation between New Jersey and other states as part of the interstate rail network, which is necessary for Board jurisdiction under §10501(a)(2). While SMS speculates about future interstate deliveries, its filings primarily reference local freight traffic. SMS's reliance on the definition of "interstate commerce" in 49 C.F.R. § 390.5 does not prove that its transportation extends beyond New Jersey. Moreover the question before this Board is not about future freight that may pass through SMS's facilities or on the rails, but whether its operations currently extend to areas outside of the State of New Jersey "as part of the interstate rail network." The answer is they do not.

CONCLUSION

For the above reasons, the Board should deny the relief sought by SMS to file a sur-reply brief.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 26, 2025, I am filing Pilesgrove Township's Opposition to SMS Motion to file Sur-reply, including all attachments, using the Surface Transportation Board's online filing portal, and that, pursuant to agreement by the parties, I am causing the attorneys for

SMS and Pilesgrove, and the attorneys for the four interested persons who have filed submissions with the Board, to be served with copies of Pilesgrove Township's Opposition to SMS Motion to file Sur-reply, including all attachments, by email at their email addresses as set forth on the following Service List.

Jacqueline M. Vigilante, Esquire
The Vigilante Law Firm
99 North Main Street
Mullica Hill, NJ 08062
T. (856) 223-9990
F. (856)494-1400
E. jacci@thevigilantelawfirm.com
Attorney for Petitioner,
Township of Pilesgrove

SERVICE LIST
(Docket No. FD 36770)

Robert A. Klein, Esq. (Attorney for SMS Rail Service, Inc./Woodstown Central Railroad)
Berkowitz-Klein, LLP
433 West Market Street, Suite 100
West Chester, PA 19382
Email: rak@berklein.com
Phone: (215) 880-6913

William L. Horner, Esq. (Attorney for Intervenor, Mannington Township)
Horner & Horner, LLC
67 Market Street
P.O. Box 66
Salem, NJ 08079
wlh@hornerlaw.net

Sarah Yurasko, Esq., Senior Vice President – Law & General Counsel
American Short Line and Regional Railroad Association
50 F Street, NW, Suite 500
Washington, DC 20001-1537
Email: syurasko@aslrra.org
Phone: (202) 585-3448

Torgny Nilsson, Esq., Vice President & General Counsel
Sierra Northern Railway
1745 Enterprise Boulevard
West Sacramento, CA 95691
Email: tnilsson@sierraenergy.com
Phone: (530) 304-1044

Torgny Nilsson, Esq., Vice President & General Counsel
Mendocino Railway
100 West Laurel Street
Fort Bragg, CA 95437
Email: tnilsson@sierraenergy.com
Phone: (530) 304-1044

Donald G. Norton, Esq., Executive Director
California Short Line Railroad Association
1127 11th Street, Suite 242
Sacramento, CA 95814-3809
Email: executivedirector@csra.org
Phone: (310) 863-4573