

BEFORE THE
SURFACE TRANSPORTATION BOARD

242119

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November 23, 2016
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Public Record

DOCKET NO. FD 36077

NORTH COAST RAILROAD AUTHORITY and
NORTHWESTERN PACIFIC RAILROAD COMPANY

v.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

BRIEF IN SUPPORT OF PETITION
FOR DECLARATORY ORDER

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I. INTRODUCTION

This controversy arose in September 2016 when the Railroad was denied track warrants by SMART, stranding incoming LPG railcars and requiring the Railroad to halt further inbound shipment of this cargo. The Railroad claims that SMART used its dispatch authority to unreasonably interfere with interstate commerce and prevent the Railroad from exercising its rights and duties as a common carrier. The Board denied the Railroad's request for injunctive relief, and converted this proceeding to a Petition for Declaratory Relief.

II. RESPONSE TO THE BOARD'S GENERAL REQUESTS

A. Maps depicting the Northwestern Pacific Railroad, "the Line" are attached hereto.

Exhibit 1 depicts the portions of the Line owned by SMART in fee subject to the Exclusive Freight Easement owned by NCRA.¹ SMART owns the Lombard Segment pursuant to a 2004 arrangement by which NCRA caused the fee ownership of the Healdsburg, Ignacio and Lombard segments to be transferred to SMART, without consideration, but subject to an Exclusive Freight Easement. (Decl. of Stogner, ¶2.)

Exhibit 2 depicts the area of NWPCo's active operations. NWPCo connects with the California Northern Railroad at Lombard, and serves customers as far north as Windsor.

Exhibit 3 depicts the area referred to in the Coordination Agreement as "Shared Track," which is track where operations will be conducted by both NWPCo and SMART. NWPCO has been actively operating since 2011. SMART is currently testing its transit operations and expects to commence passenger transit operations in early 2017. The Coordination Agreement vests control of the Shared Track in SMART.

¹ NCRA is the holder of an Exclusive Freight Easement on the Line, but it has transferred its primary common carrier obligation to NWPCo. (See Northwestern Pacific Railroad Company-Change in Operators Exemption-North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Company, Finance Docket 35073, (STB Served August 24, 2007)). NCRA and NWPCo are hereafter collectively referred to in this Brief as "the Railroad."

The Line north of Healdsburg to Willits is owned in fee by NCRA but subject to a passenger transit easement owned by SMART. NCRA owns the Line from Willits at NWP MP 140 to NWP MP 242 without encumbrance of a SMART transit easement.

Exhibit 4 depicts the Lombard Segment and the very short Ignacio Segment. Only NWPCo conducts operations on these segments. The Coordination Agreement vests control of the Lombard and Ignacio Segments in the Railroad.

Exhibit 5 and Exhibit 6 depict the Schellville Industrial Tracks. There are two industrial tracks each approximately one mile in length and parallel to the main line on the Lombard Segment. Pursuant to the Coordination Agreement all Industrial Track is under the exclusive control of the Railroad.

B. NWPCo is the only operator on the line at present.

NWPCo has conducted active operations since July 2011 and is now the only active operator on the Line at the present time although SMART's transit operations are scheduled to commence in the first quarter of 2017. In addition to its contract with Tesoro and Valero, the Railroad transports grain, wheat, and soybeans to dairies and processors, grain to Lagunitas Brewing Company in Petaluma, lumber products, wine, and natural resources such as gravel, rock and logs. The Railroad's volume has ranged from 10-120 carloads a week in the past few months. An average for its operation is 25 weekly carloads.

C. The Summaries of the conference calls are accurate except in one significant respect.

The Summary (STB Filed Nov 3, 2016) suggests an understanding that the shippers, Tesoro and Valero do not request that the loaded LPG cars be held at Schellville. This is incorrect. The contract between each of the respective shippers contemplates the holding of the railcars at Schellville pending instructions for resumption of the carriage to market. (See Motion for Protective Order, Exhibits A and B, Decl. of Park, ¶¶2-3.)

Bills of Lading from the shippers are issued instructing the delivery of the cars to Schellville and then routed by the same shipper to destinations determined by the same shipper. For example, see the representative Waybills demonstrating the movement of the subject railcars. (See Motion for Protective Order, Exhibits A-D, Decl. of Park, ¶¶ 2-3).

These representative waybills demonstrate that Valero Marketing Supply consigned a certain railcar to Schellville on September 2, 2016 (Motion for Protective Order, Ex. A) and then on November 9, 2016 ordered the same car to be dispatched to interchange for delivery to a facility in the San Francisco Bay Area.. (See Motion for Protective Order, Ex. B, Decl. of Park ¶2.)

For the Tesoro contract the representative waybills show a consignment of car RCOX 5402 on July 26, 2016 from Lombard to Schellville and the same car being ordered by the shipper to a location on the eastern coast of Mexico on August 17, 2016. (See Decl. of Park ¶ 5, Motion for Protective Order, Exhibits C and D.)

D. Factual Update

The twelve cars stranded on the mainline track at Lombard Station due to SMART's denial of track warrants for LPG have been transported to their ultimate destination due to the onset of winter weather and the need for the winter blend.²

Almost all of the railcars loaded with LPG have been shipped to their ultimate destinations and NWPCo will now be receiving, storing and staging empty railcars for shipment to refineries for loading prior to requirement for the summer season blend of LPG.

The Railroad has contracts with two different shippers, Valero Marketing Supply Company and Tesoro Refining & Marketing Company LLC., Decl. of Park ¶¶2-3). Both contracts provide for an integrated activity requiring the switching of railcars from the point of the Railroad's interchange to Schellville, storage of the railcars, and then switching back to

² The contract with Tesoro and Valero has those shippers transporting winter blend cars in the early summer for just-in-time delivery to markets. After delivery to markets the shippers return the cars to the Railroad which provides the service of temporary storage until the cars are shipped to the refineries for loading of the Summer Blend with those railcars being transferred back to Schellville and staged in the spring for delivery of the summer blend as summer weather unfolds.

interchange with the Union Pacific Railroad via the California Northern Railroad. The transport and storage contracts call for the switching and carriage of the railcars on the line and the service of storage pending issuance of waybills to the ultimate destination.

SMART refers to the Railroad's service of storing the railcars switched by NWPCo as being "indefinite." Because much of the transport function is triggered by seasonal changes in weather, the term is correct only in the sense that the shippers do not know exactly when the weather patterns will change and that they will call for market delivery of the railcars.. For example, all of the LPG cars transported by the Railroad in September and October 2016 have now been transported back to their ultimate destination. Likewise, the LPG cars containing summer blend which will be received in the spring of 2017 will be transported back to the ultimate destination when the weather warms in 2017, a period of storage of just a few months.

III. THE COMMON CARRIER OBLIGATION

As a common carrier, NWPCo performs an integrated transport and storage service for shippers, together consisting of "transportation by a rail carrier." 49 U.S.C. § 11101 provides "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request." As described above, here two shippers requested a combined service of transport and storage of cargo that is legal and routinely transported by rail throughout the United States. The ICCTA grants to the Board general jurisdiction over "transportation by rail carrier." The term "transportation" is defined broadly in 49 U.S.C. § 10102 to include "services "related to the movement of property. See DesertXpress Enterprises, LLC Petition for Declaratory Order, FD 34914 (STB Served May 7, 2010), p. 12; 2010 WL 1822102 (I.C.C.) *9. Specifically, the term "transportation" includes:

"[S]ervices related to that movement, including receipt, delivery, storage . . . of passengers and property."

49 U.S. C. 10102 (9) (B) (Emphasis Added.)

All parties to the instant proceeding agree NCRA has the right to transport hazardous materials throughout the Line. (Operating and Coordination Agreement, Section 7.05). Since "transportation by rail carrier" is defined as including "storage," a contractual agreement to

extract storage from transportation so as to impair the Railroad's common carrier obligations is preempted and falls within the Board's jurisdiction.

SMART's interpretation of Section 7.05 would prohibit the Railroad from providing the service of temporarily storing loaded LPG railcars in interstate commerce at the Schellville Industrial Tracks. Assuming for the sake of argument SMART is correct; the Board should preempt this provision as an impermissible restraint on interstate commerce.

Although a contractual arrangement is presumptively not regulatory and therefore not expressly preempted it is well recognized that contractual provisions unreasonably burdening interstate commerce are impliedly preempted under the doctrine of conflict preemption. PHS Phosphate Co. v. Norfolk S. Corp. 559 F. 3d 212, 220-221, (4th Cir., 2009). The contractual interpretation urged by SMART providing for the complete prohibition of transportation of LPG cars, whether by carriage from interchange and Schellville, or the service of storing the railcars for staging to markets, is on its face an unreasonable burden on interstate commerce as it prevents the Railroad from exercising its common carrier obligations.

The instant matter involves an integration of transportation and storage that together form the service NWPCo is requested by shippers to perform. For this reason, the Operating and Coordination Agreement prohibits storage of hazardous materials "*other than as may be used by the Party in its operations in the normal course of business or, in the case of NCRA, as may be transported by NCRA in its capacity as a common carrier by rail...*" (italics added) If the Railroad were unable to integrate transport with temporary storage, it could not meet the demand of shippers for the particular service they need.

A. SMART's status as a residual common carrier.

It is noteworthy that the former management of SMART attempted to divest itself of the residual common carrier obligation. The Board specifically rejected SMART's aspiration to be relieved of any common carrier responsibility for freight. Sonoma-Marín Area Rail Transit District - Acquisition and Operation Exemption , FD 34842, (STB Served Feb. 1, 2008), 2008 WL 275695. Although the Railroad holds the exclusive freight easement on the Healdsburg,

Ignacio and Lombard segments of the Line, SMART as the underlying fee holder of the title to the Line has the residual common carrier right and obligation.

SMART's status as a governmental agency does not change the preemption analysis. The only basis asserted by SMART to interfere with the railroad's activities is its contract with NCRA. The holding in Woodbridge, and DesertXpress both involved the significance or non-significance of a contract with a governmental agency in the specific context of preemption analysis. As is explained below, the Railroad objects to SMART's management, as government officials, usurping the ordinary railroad dispatch function to shut down part of NWPCo's operation as a means of enforcing their rendition of contract provisions.

IV. FEDERAL PREEMPTION

49 U.S.C. § 10501 (b) gives the Board broad jurisdiction over transportation by rail carriers. Subsection (c) specifically gives the Board jurisdiction over the operation of industrial track.

A. SMART's denial of track warrants directly regulates interstate commerce.

The Board has recently held:

“It is now well settled that the provisions of U.S.C. § 10501(b) preempt permitting or other laws or legal processes that try to regulate rail transportation directly or that could be used to deny a railroad's ability to conduct rail operations.”

Pinelawn Cemetary-Petition for Declaratory Order, FD 35468 (STB Served April 21, 2015), 2015 WL 1813674 *8.

Here, SMART unilaterally imposed its interpretation of Section 7.05 of the Operating and Coordination Agreement by denying track warrants for LPG railcars. SMART could have utilized the dispute resolution procedures under Operating and Coordination Agreement, but instead utilized its dispatching function to deny the Railroad authority to conduct rail transportation activities.

On two occasions, once in September and again in October SMART used its dispatching function to deny any kind of rail transportation by the Railroad. (Decl. of Park ¶¶ 6 and 7) It also caused the carrier to cancel shipments ready for immediate transit, and strand twelve loaded LPG tanker cars on the main track. In doing so, SMART denied, and continues to deny, the Railroad's ability to conduct transportation services. SMART's maneuver is preempted by 49 U.S.C. 10501 (b) because it places SMART in the position of summarily prohibiting rail transportation that the Board with exclusive jurisdiction to do so, has authorized.

B. SMART distorts the contractual meaning of “dispatch” to justify regulation of interstate transportation of goods and services.

Pursuant to the Operating and Coordination Agreement, SMART is granted the authority to dispatch on all segments of the Line. Dispatching is defined in the Agreement as having the same meaning as 49 C.F.R. § 241.5, (Pet. Williams Decl., Ex. A, at 1.) This regulation defines “Dispatch” as being the control of train movements. This function is also referred to as a “track warrant control system,” CSX Transp. Inc.-Joint Use-Louisville & Ind. R.R., FD 35523, slip. Op. at 3 n.8 (STB Served Apr. 10, 2015, 2015 WL 3988114.

Nothing in 49 C.F.R. § 241.5 confers upon the dispatcher the authority to determine what property can be moved in interstate commerce or authorizes discrimination as to what property can be transported.

Prior to the filing of the Petition in this matter, SMART abrogated its dispatching function by taking train movement decisions out of the hands of the dispatcher and placing the issuance of track warrants in the discretion of SMART's management, who are public officials and operate at the pleasure of a Board consisting of elected public officials. (See California Public Resources Code §§ 105000-105004.) Between September 18-20, 2016, SMART exercised the dispatch function to completely deny the issuance of track warrants, even the issuance of track warrants for delivery of grain cars from interchange to Petaluma. (Decl. of Park, ¶6). Subsequently SMART issued a letter on September 22, 2016 indicating that SMART management would exercise its discretion on a “case by case basis.” (See Decl. of Stogner, Ex. B) Then on October 2, 2016 SMART by e-mail exercised this self- anointed “discretion” to deny the issuance of any track warrants for any type of railcar, (Decl. of Park, ¶ 7.) The October 2 e-

mail was the last written statement by SMART on the issue, but after the instant Petition was filed, SMART has issued track warrants for railcars of every type of cargo, except LPG cars. This resulted in twelve cars being stranded at interchange for a substantial time. SMART clearly and improperly interprets its dispatch authority to mean it is entitled to deny any movement of any type of product at any time.

Fundamentally, the Operating and Coordination Agreement cannot be construed to grant SMART unbridled discretion to determine when and if the railroad may exercise the common carrier right and obligation recognized by the Board.

Even if the contract could be construed for sake of argument to prohibit the storage or transport of LPG rail cars, such an interpretation would be preempted under the holding of California High-Speed Rail Authority-Petition For Declaratory Order, FD 35861 (STB Served Dec. 12, 2015), 2014 WL 7149612, at *6, (“. . . a railroad’s agreements with state or local entities may be preempted by § 10501(b) if the agreement unreasonably interferes with interstate commerce or railroad operations.”) As explained above and demonstrated by waybills in evidence the movement of LPG by the Railroad constitutes interstate rail transportation. In that transportation is defined as including storage, a complete prohibition of storage would necessarily interfere with the commerce performed by the Railroad and its shippers described in the instant proceeding. The key question is, “Was SMART’s interference with interstate commerce unreasonable?” The Railroad’s storage and transport of a legal commodity in accordance with the law should at least raise the presumption that the activity is reasonable. Section 7.05 of the Operating and Coordination Agreement requires transport of hazardous materials to be in compliance with all Applicable Laws, defined as “all federal, state, and local laws, rules, regulations, directives, orders and judgments applicable to the Subject Segments, regardless of scope.” (Agreement, Pet. Decl. of Williams, Ex A, “Certain Definitions “contained in Exhibit 1 of the Agreement.) Furthermore, “Hazardous Materials” are those identified pursuant to seven listed federal and state statutes. These include the Hazardous Materials Transportation Act, (49 U.S.C. § 1802), which governs many aspects of tanker car safety, construction, labeling, reporting, storage, movement, etc.). Given that the Agreement itself sets forth the exhaustive standards by which transport of hazardous materials are to be conducted,

compliance with these standards should be viewed as “reasonable.” Moreover, The Federal Railroad Administration has approved the safety and security plan for the Schellville Industrial Track for the assemblage and temporary staging and storage of liquefied petroleum railcars in interstate commerce. (See Decl. of Stogner, ¶5, Ex. A.) E-mail from the office of General Counsel, Federal Railroad Administration dated Nov. 2, 2016)

It is submitted that SMART, in the face of the clear legality of the cargo and method of storage it prohibits has offered no reasonable justification for its actions. Accordingly, this represents an unreasonable interference with interstate commerce and should be proscribed.

C. Applicability of Woodbridge and PCS Phosphate.

SMART cited Town of Woodbridge v. Consolidated Rail Corp., NOR 42053, (STB Served 12/1/2000), 2000 WL 1771044 in support of SMART’s proposition that NCRA contracted away all authority to store hazardous materials despite the statutory definition of “transportation” which includes the related service of “storage.” (49 U.S. C. 10102 (9) (B).

In Woodbridge the railroad contractually agreed to curtail the idling of locomotives and switching of rail cars on a specific siding during nighttime hours. The Board held that the railroad’s voluntary contractual obligation operated as a knowing waiver of preemption and an admission that the prohibition did not interfere with its common carrier obligations. In the instant proceeding, SMART’s interpretation of the contractual provisions would prohibit common carrier transportation services to an entire category of cargo, sweeping within the prohibition shippers who depend on and have a legal right to the service under 49 U.S.C. 11101.

The Board held in California High-Speed Rail Authority – Petition for Declaratory Order FD 35861 , (STB Served Dec. 12, 2014), 2014 WL 7149612 (STB) *6, “[a]s the Board has explained, a railroad’s agreements with state or local entities may be preempted by § 10501(b) if the agreement unreasonably interferes with interstate commerce or railroad operations.”

Therefore, even if the Coordination Agreement can be interpreted as being an agreement by NCRA to refrain altogether from transportation of liquefied petroleum and services related to thereto the agreement differs considerably from the type of agreement in Woodbridge where the

railroad merely agreed to refrain from certain railcar switching activities during nighttime hours with the same activities being allowed during normal daylight business hours. The contract in Woodbridge did not prohibit transportation of an entire class of property in interstate commerce, nor could it without unreasonably burdening interstate commerce. Piecemeal and incremental prohibition by any means, whether by direct regulation or by voluntary contractual prohibition of certain materials by local jurisdictions would imperil the delivery of a class of useful product to markets and upon its face constitute an unreasonable burden on interstate commerce.

Furthermore, preemption has been interpreted more narrowly by the Board when the regulation is of a type within the definition of state-law nuisance such as hours and volume of operations adjacent to residential areas, Fayard v. Northeast Vehicle Services, LLC, 533 F. 3d 42, 47, (First Cir., 2008). The contractual restriction in Woodbridge was within the scope of the exercise of police powers of which the Board tends to be more accepting. Transportation safety of hazardous materials is not a matter of state-law jurisdiction and indeed is preempted by federal law, and specifically the Federal Hazardous Material Transportation Law, 49 U.S. C. §§ 5101-5128, and is not within the scope of traditional local police power regulation.

SMART is a special district possessing limited powers specifically enumerated in its enabling act which created it. It has been delegated no police powers by the California Legislature and ambition to exercise those powers would be ultra vires. (Calif. Pub. Res. C. §§ 10500 et seq..)

In PCS Phosphate Co. v. Norfolk S. Corp. 559 F. 3d 212, (4th Cir. 2009) (“PCS Phosphate.”) the railroad acquired an easement for a spur to a mining operation but agreed to relocate the rail if the mine owner determined that the placement of the spur affected mining operations. After the mine sought relocation the railroad argued that the contract made by it was presumptively regulatory and preempted. The Court found that preemption did not reach all voluntary agreements. PCS Phosphate at p. 220.

However, the court in PCS Phosphate held that even though a voluntary agreement is not presumptively regulatory and expressly preempted, a second stage analysis is necessary—to determine whether the contractual restraint is “impliedly preempted.” As to the determination as

to whether the contractual restraint is impliedly preempted, “the generally accepted test for ICCTA implied or conflict preemption: does the enforcement action unreasonably interfere with rail transportation.” PCS Phosphate at pp. 220-221

It is noteworthy that the voluntary contractual agreement in PCS Phosphate did not threaten to prevent transportation altogether, but adherence to the voluntary contractual provision merely shifted the cost of the relocation to the railroad, not prohibit it from rail transportation.

**V. THERE IS NO FEASIBLE ALTERNATIVE TO STAGING
AND ASSEMBLAGE OF RAILCARS AT
THE SCHELLVILLE SIDING.**

Storage and staging at Schellville is ideal because the tracks have already achieved FRA approval, the location is near the interchange, and the surrounding area is rural and virtually unpopulated. Other railroad property would include industrial track that would undoubtedly meet the same or perhaps intensified objections from SMART. These tracks are near residential neighborhoods and along the Shared Track. The Railroad has already invested some seven million dollars in reconstructing the Schellville site to accommodate the Schellville Industrial Track, and cannot afford to build new industrial track, only to encounter the same opposition from SMART. Under the Operating and Coordination Agreement, construction of new industrial track would require SMART’s approval. The Railroad is unaware of any private locations along the Line that are approved to store LPG tankers.

The objection of SMART to the Railroad’s activity is not site specific to Schellville. It is clear that SMART does not want liquefied petroleum shipped or stored anywhere on the Line. SMART is not objecting to the location of the staging and storage, but to the concept of it. SMART’s goal is not the relocation of LPG transport and storage to another site, but effectively prohibiting this form of commerce altogether.

VI. CONCLUSION

As carriers engaged in interstate commerce, NCRA/NWPCo have been subjected to unreasonable interference with their business through SMART’s improper use of dispatch function to impose its view of contract terms on these carriers. This has resulted in substantial

loss of business to the carriers, who are prevented from serving shippers upon reasonable request. Any contract term that permits this form of unreasonable interference with interstate commerce is preempted and should be proscribed by the Board.

The Board is requested to issue a Declaratory Order to the effect that the dispatching function cannot be utilized by SMART to deny track warrants to the Railroad to prohibit or obstruct rail transportation -- in the statutory sense of the term-- of LPG railcars, or any other commodity, and that any contractual interpretation or provision granting to SMART the authority to prohibit interstate commerce is preempted.

Dated: November 23, 2016

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EXHIBIT 1

Willits
MP 142.5

STB Docket FD_36077_0

Ukiah

Yuba City

Healdsburg
MP 69.22

Windsor

Santa Rosa

Davis

Schellville
NWP MP 40.6

Novato
MP 29.96

Ignacio
MP 25.57

Lombard
MP 63.4

San Francisco

Oakland

Palo Alto

San Jose

■ SMART Ownership subject to NCRA Freight Easement

○ City

◇ Station

0 1 5 10 20 mi
Approximate Distance

EXHIBIT 2

Willits
MP 142.5

STB Docket FD_36077_0

Ukiah

Yuba City

Healdsburg
MP 69.22

Windsor

Santa Rosa

Davis

Schellville
NWP MP 40.6

Novato
MP 29.96

Ignacio
MP 25.57

Lombard
MP 63.4

San Francisco

Oakland

Palo Alto

San Jose

Active NWPCo Freight Operations

City

Station

0 1 5 10 20 mi
Approximate Distance

EXHIBIT 3

Willits
MP 142.5

STB Docket FD_36077_0

Ukiah

Yuba City

Healdsburg
MP 69.22

Windsor

Davis

Santa Rosa

Schellville
NWP MP 40.6

Lombard
MP 63.4

Novato
MP 29.96

Ignacio
MP 25.57

San Francisco

Oakland

Palo Alto

San Jose

Shared Track for SMART Transit and NCRA Freight

City

Station

0 1 5 10 20 mi
Approximate Distance

EXHIBIT 4

Willits
MP 142.5

STB Docket FD_36077_0

Ukiah

Yuba City

Healdsburg
MP 69.22

Windsor

Santa Rosa

Davis

Schellville
NWP MP 40.6

Novato
MP 29.96

Ignacio
MP 25.57

Lombard
MP 63.4

San Francisco

Oakland

Palo Alto

San Jose

 Lombard Segment

 City

 Station

0 1 5 10 20 mi
Approximate Distance

EXHIBIT 5

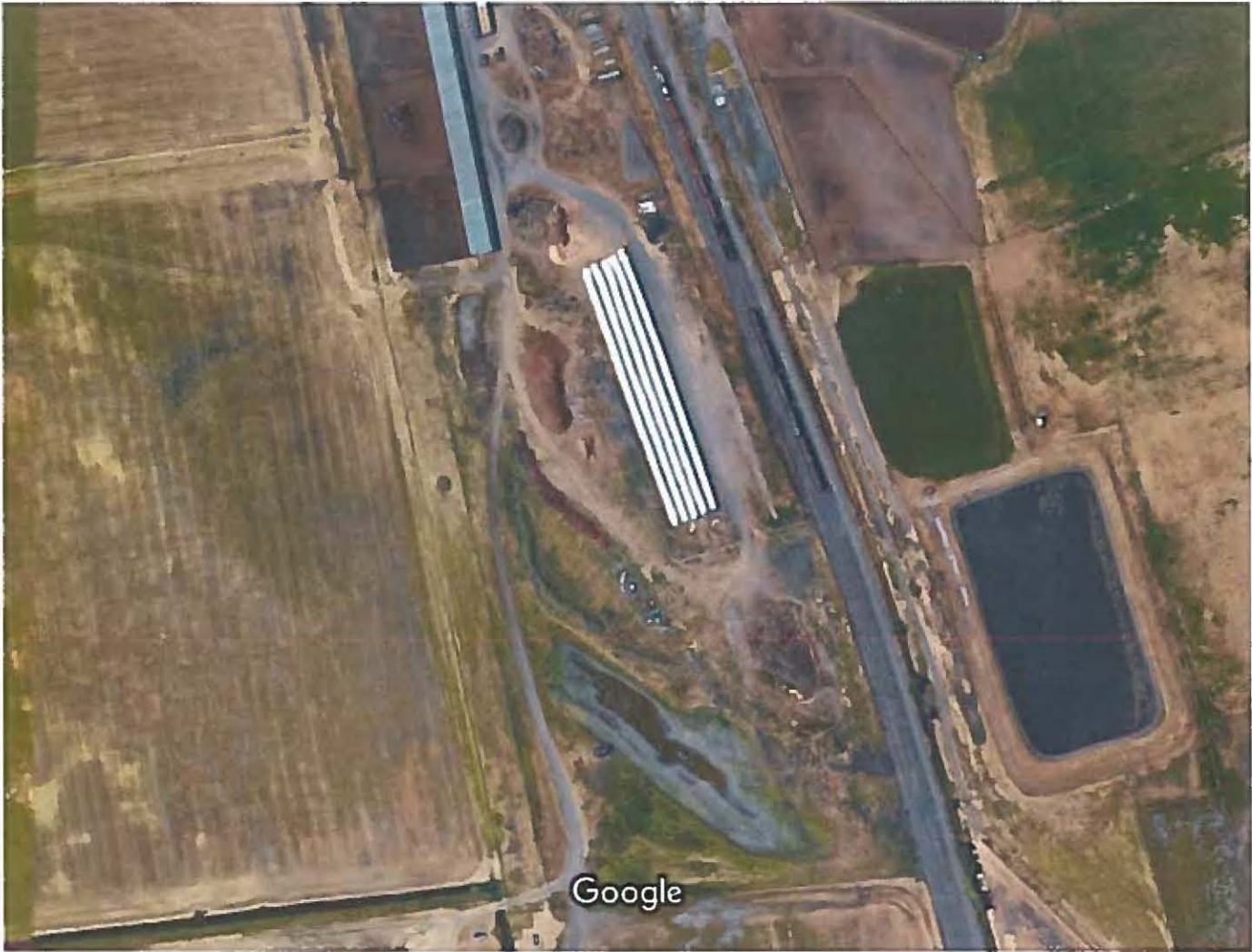
Google Maps



Imagery ©2016 Google, Map data ©2016 Google 1000 ft

EXHIBIT 6

Google Maps



Imagery ©2016 Google, Map data ©2016 Google 200 ft

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DOCKET NO. FD 36077

NORTH COAST RAILROAD AUTHORITY and
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v.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

**DECLARATION OF JACOB PARK IN SUPPORT
OF PETITION FOR DECLARATORY ORDER**

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I Jacob Park declare as follows:

1. I am the General Manger of NWPCo and I make this Declaration in my capacity as such and with personal knowledge, except where indicated otherwise, of the facts recited in this Declaration.

2. Northwestern Pacific Railroad Company, (“NWPCo”) entered into a Railcar Storage and Transportation Agreement with Valero Marketing and Supply Company in August 2016 which provided for NWPCo to transport Valero railcars delivered to it for a destination of an FRA approved facility at Schellville, to provide the service of storage at Schellville, and to then transport the railcars back to interchange with Union Pacific Railroad via California Northern.

3. NWPCo entered into a contract with Tesoro Refining & Marketing Company, LLC on July 1, 2016 which provided for NWPCo to transport Tesoro railcars delivered to it for a destination at an FRA approved facility at Schellville, to provide the service of storage on 10,000 lineal feet of industrial track at Schellville and to transport the railcars back to Lombard Station for eventual connection to Union Pacific Railroad

4. A representative set of waybills for a shipper is attached to the Motion for Protective Order, Exhibits A and B. Specifically this representative set illustrates that Railcar CTCX 780077 was delivered by Union Pacific via California Northern with a Schellville destination on September 2, 2016 and then ordered by the shipper back out to interchange on November 3, 2016 with a destination of its facility in Benicia which is located on the San Francisco Bay.

5. A representative set of waybills for another shipper is attached to the Motion for Protective Order, Exhibits C and D. Specifically this representative set illustrates that Railcar RCOX 5042 was received at Lombard Station on July 26, 2016 and then ordered by the same shipper on August 17, 2016 out to interchange for the delivery to the Eastern coast of the Republic of Mexico.

6. On September 21, 2016 SMART suddenly denied to NWPCo any track warrants to the Railroad leaving approximately eleven grain cars stranded on the

mainline. It was my understanding that SMART General Manager told our General Counsel that the SMART Board of Directors had ordered the freight railroad “shut down.” On September 21, 2016 I was told by the SMART dispatcher that no more track warrants would be issued to NWPCo. On this occasion track warrants were denied for a total of three days. I was told by Bill Lewis, Transportation Manager for Lagunitas Brewery in Petaluma that the brewery would have to cease its brewery operations if the four grain cars included in the eleven cars were not delivered by September 24, 2016.

7. On October 2, 2016 I sought a track warrant from the SMART dispatcher for six grain cars and twelve LPG cars then assembled on the mainline. The Track Warrant for all cars was denied by SMART because it was referred to SMART’s Superintendent of Transportation, Jon Kerruish. On October 3, 2016 I again sought a Track Warrant which was not approved. After SMART was notified that the Railroad was making an emergency filing with the Surface Transportation Board for an injunctive order, SMART then issued a track warrant for the six grain cars leaving the twelve LPG cars stranded on the mainline.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed this 21st day of November 2016 at Willits, California.

/s/ Jacob Park
Jacob Park

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**DECLARATION OF MITCH STOGNER IN SUPPORT
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I, Mitch Stogner, declare as follows;

1. I have been the Executive Director of the North Coast Railroad Authority (“NCRA”) since August 2003 and I make this Declaration in such capacity of my own personal knowledge.

2. In 2004 NCRA owned the fee ownership of the Northwestern Pacific Railroad (“the Line”) by way of purchase to which NCRA contributed \$12 million from all points south of Willits in partnership with the Golden Gate Bridge Highway and Transportation District and the County of Marin. With the expectation that the Sonoma-Marín Area Transit District (SMART) would design, build and commence operations of a transit system, NCRA consented to the transfer of the fee ownership of the Line to SMART without any monetary payment to NCRA, but subject to an exclusive freight easement in favor of the NCRA which was recorded prior to the gratuitous transfer to SMART.

3. In 2007 the NCRA contracted for the construction of two rail sidings immediately south of the Schellville Station at a cost of approximately \$7 million of which NCRA received a contribution of approximately \$2.2 million from the Department of Fish and Game. The sidings were constructed for the purpose of assembling freight rail cars. SMART did not make any contribution of any kind to the construction of the rail sidings.

4. In 2011 NCRA contracted with SMART for the coordination of joint activities on the portion of the track over which NCRA holds an exclusive freight easement. A true copy of the agreement was attached as Exhibit A to the Declaration of John Williams filed with the Petition in this proceeding. The NCRA required in such contract that NCRA maintain control of freight sidings which are referenced in the agreement as “Industrial Track,” which is inclusive of the Schellville sidings which NCRA constructed at its cost in 2007.

5. On November 2, 2016 NCRA’s general counsel received an E-mail from Roberta Stewart of the Office of Chief Counsel of the Federal Railroad Administration, a

true copy of which is attached hereto as Exhibit A. In this E-Mail the FRA confirmed that the NWPCo operations at Schellville are in compliance with the hazardous materials transportation regulations that are promulgated by the Pipeline and Hazardous Materials Safety Administration.

6. On September 22, 2016 the undersigned received a letter from Farhad Mansourian, General Manager of SMART after SMART asserting its ownership interest, and based upon information provided to me by the general counsel of NWPCo, had indicated that freight railroad operations were “shut down,” with grain and LPG railcars stranded at interchange. A true copy of Mr. Mansourian’s letter upgrading freight railroad operations from “shut down,” to a case-by-case” basis is attached as Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed this 22nd day of November, 2016, at Santa Rosa, California.

/s/ Mitch Stogner
Mitch Stogner

EXHIBIT A

From: Stewart, Roberta (FRA) [<mailto:roberta.stewart@dot.gov>]

Sent: Wednesday, November 02, 2016 8:17 AM

To: cineary@pacific.net

Cc: FRA Legal

Subject: RE: RCC_Correspondence_000000640003, Due 11-8-16, FW: Referral from Surface Transportation Board

Dear Mr. Neary:

I apologize for the delay in responding to you on this matter, as I know you are working to resolve it for your client.

I am familiar with the North Coast Railroad Authority and the disagreement with SMART regarding the use of the trackage for storage of LPG. As you stated, FRA has inspected the operation and found all aspects to be in compliance with the hazardous materials transportation regulations that are promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA) and enforced by FRA.

If you would like a formal interpretation of some aspect of the PHMSA regulations by PHMSA's Office of Chief Counsel, or you would like to request a preemption determination, I would suggest contacting PHMSA's Office of Chief Counsel. I have listed contact information for that office below.

Contact PHMSA Chief Counsel

U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
East Building, 2nd Floor
Mail Stop: E26-105
1200 New Jersey Ave., SE
Washington, DC 20590

phmsachiefcounsel@dot.gov

202-366-4400

202-366-7041 (Fax)

I hope this is helpful.

Sincerely,

Roberta J. Stewart
Attorney
Federal Railroad Administration
Office of Chief Counsel
1200 New Jersey Ave. SE, Mail Stop 10
Washington, DC 20590
202-493-6027 (office)

EXHIBIT B



September 22, 2016

Judy Arnold, Chair
Marin County Board of Supervisors

Barbara Pahre, Vice Chair
Golden Gate Bridge,
Highway/Transportation District

Jim Eddie
Golden Gate Bridge,
Highway/Transportation District

Debora Fudge
Sonoma County Mayors and
Councilmembers Association

Eric Lucan
Transportation Authority of Marin

Jake Mackenzie
Sonoma Mayors and Councilmembers
Association

Stephanie Moulton-Peters
Marin Council of Mayors and
Councilmembers

Gary Phillips
Transportation Authority of Marin

David Rabbitt
Sonoma County Board of Supervisors

Carol Russell
Sonoma Mayors and Councilmembers
Association

Kathrin Sears
Marin County Board of Supervisors

Shirlee Zane
Sonoma County Board of Supervisors

Farhad Mansourian
General Manager

5401 Old Redwood Highway
Suite 200
Petaluma, CA 94954
Phone: 707-794-3330
Fax: 707-794-3037
www.sonomamarintrain.org

John H. Williams
President
Northwestern Pacific Railroad Co.
250 Cambridge Avenue
Suite 104
Palo Alto, CA 94306
Fax (605) 289-9856

Mitch Stogner
Executive Director
North Coast Railroad
Authority
419 Talmage Road, Suite M
Ukiah, CA 95482
Fax: (707) 463-3282

Re: Suspension of Freight Track Warrants on SMART Trackage in order to
protect public safety .

Dear Mr. Stogner and Mr. Williams:

Attached please find a letter dated September 15, from the President
of the Northwestern Pacific Railroad Company ("NWPCo") John Williams—
North Coast Railroad Authority's ("NCRA") freight operator. In that letter, the
freight operator admits that it transported and now is storing Liquefied
Petroleum Gas (LPG) in tank cars on SMART's track outside of Schellville,
California.

NWPCo failed to notify SMART Dispatch when seeking Track Warrants
of the nature, quantity and the fact it was transporting Hazardous Materials.
In order to protect Public Safety, had SMART had been properly notified of the
freight operator's intent to transport hazardous material, SMART Dispatch
would have worked in conjunction with NWPCo to ensure that the
appropriate track warrants were issued and would have been able to inform
and coordinate with first responders to ensure the proper safeguards were in
place for the safe transportation of the hazardous material.

NWPCo's transportation (and in this case storage) of hazardous
material cars through Schellville would require, at a minimum, notification to
SMART Dispatch of the nature, type and quantity of hazardous materials ,
proper training of operating staff, a safety and security plan and an
emergency response plan that included consultation with state and local first
responders.

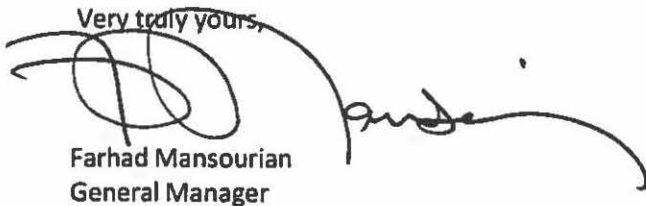
Moreover, the current storage of hazardous materials at that location
constitutes a disregard for the health and safety of the local community. It
should be noted that the track at Schellville is located next to California State
Highways 121 and 12 and approximately 2.75 miles from the Town of Sonoma
with a population of approximately 11,000 including a hospital and numerous
schools.

In order to protect the public safety and insure that the proper safeguards are in place SMART demands that you immediately provide the following:

- 1- For the rail cars currently being stored that SMART's track at Schellville immediately provide a copy of the manifest, type of load/ hazardous material being transported and/or stored, origin and destination of railcars, total number railcars, number of loaded and empty cars, and total quantity of hazardous material.
- 2- Furthermore, as a result of the freight operator's failure to document and provide SMART dispatchers with even the most basic information regarding the transportation of hazardous materials over SMART owned Track in violation of the hazardous material regulations, please be advised that SMART will not issue any further track warrants to NCRA's freight operator until, and unless the freight operator prepares a plan for immediate removal of the LPG tank cars from SMART owned trackage under procedures which clearly demonstrate full compliance with applicable regulations. A plan to safely move these cars in this compliant manner should be prepared for review by SMART Operations staff by close of business, Monday September 26, 2016.

For the continuation of commerce and notwithstanding the above, on a case by case basis SMART will review a track warrant requests by NWPCo intended to provide transportation services to detrimentally affected customers, so long as SMART is provided with a copy of the manifest, type of load/material being transported, origin and destination of railcars, total number railcars, number of loaded and empty cars, total tonnage of train and total length of train.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Farhad', with a long horizontal flourish extending to the right.

Farhad Mansourian
General Manager

CC: James Jordan- FRA
Gabriel Meyer - STB

NORTHWESTERN
PACIFIC
RAILROAD
COMPANY

September 15, 2016

Farhad Mansourian
General Manager
Sonoma Marin Area Rapid Transit
5401 Old Redwood Highway, Suite 200
Petaluma, CA 94954

Dear Farhad:

At a recent meeting, you asked that NWP address transport and temporary storage of hazardous materials. I believe you felt this would be objectionable to the Federal Railroad Administration and that applicable laws had not been followed.

NWP does have contracts to transport and temporarily store Liquefied Petroleum Gas (LPG), which it does on industrial track outside of Schellville. Transport of this freight is common with freight railroads and very common by truck on public roads and highways. The FRA was notified of this activity from the outset and is fully aware of it. NWP is certified under the authority of 49 U.S.C. 5108 to transport it. On September 26, 2016, the FRA will conduct an inspection of the activity. The NWP engaged George Hardy, longtime former FRA official, to advise on compliance with all law and regulation, including training of employees (who have been trained and tested). NWP believes it is compliant with these laws and regulations.

Under the Operating Agreement, Section 7.05, "Neither Party shall use, generate, transport, handle or store Hazardous Materials on the Subject Segments other than as may be used by the Party in its operation in the normal course of business, *or in the case of NCRA, as may be transported by NCRA in its capacity as a common carrier by rail and in all events in accordance with Applicable Laws.*" (italics added). We therefore believe transport of LPG under contract with shippers and receivers is permitted under the Operating Agreement. Storage of this material is on industrial track exclusively controlled by NCRA, and not part of the "subject segments."

As with all matters of mutual concern, NWP stands ready to address any questions or concerns you may have in this regard.

Sincerely,



John H. Williams, President
Northwestern Pacific Railroad Company

cc: Doug Bosco
Jake Park

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36077

NORTH COAST RAILROAD AUTHORITY and
NORTHWESTERN PACIFIC RAILROAD COMPANY

v.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

CERTIFICATE OF SERVICE

I, Cyndi Mason, declare:

I am a citizen of the United State and resident of Mendocino County, California, I am over the age of eighteen and not a party to the within entitled action; my business address is 110 S Main Street, Suite C, Willits, California 95490.

On November 23, 2016, I served

BRIEF IN SUPPORT OF PETITION FOR DECLARATORY ORDER; DECLARATION OF MITCH STOGNER; DECLARATION OF JACOB PARK; MOTION FOR PROTECTIVE ORDER

on the parties in said action by placing a copy of the above-described documents in sealed envelopes, with postage thereon fully prepared for First-Class Mail, addressed to the parties as set forth below, for collection and mailing at Willits, California, following ordinary business practices. I am readily familiar with the practice of Neary & O'Brien for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service on the same day as it is placed for processing.

Tom Lyons
General Counsel
Sonoma-Marín Area Rail Transit District
5401 Old Redwood Hwy., 2nd Floor
Petaluma, CA 94954

Kevin M. Sheys
Edward J. Fishman
Justin J. marks
Nossaman LLP
1666 K Street, NW, suite 500
Washington, DC 20006

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 2016, at Willits, California.

/s/ Cyndi Mason
CYNDI MASON

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36077

NORTH COAST RAILROAD AUTHORITY and
NORTHWESTERN PACIFIC RAILROAD COMPANY

v.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

AMENDED CERTIFICATE OF SERVICE

I, Cyndi Mason, declare:

I am a citizen of the United State and resident of Mendocino County, California, I am over the age of eighteen and not a party to the within entitled action; my business address is 110 S Main Street, Suite C, Willits, California 95490.

On November 23, 2016, I served

BRIEF IN SUPPORT OF PETITION FOR DECLARATORY ORDER; DECLARATION OF MITCH STOGNER; DECLARATION OF JACOB PARK; MOTION FOR PROTECTIVE ORDER

on the parties in said action by placing a copy of the above-described documents in sealed envelopes, with postage thereon fully prepared for First-Class Mail, addressed to the parties as set forth below, for collection and mailing at Willits, California, following ordinary business practices. I am readily familiar with the practice of Neary & O'Brien for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service on the same day as it is placed for processing.

Tom Lyons
General Counsel
Sonoma-Marín Area Rail Transit District
5401 Old Redwood Hwy., 2nd Floor
Petaluma, CA 94954

Kevin M. Sheys
Edward J. Fishman
Justin J. marks
Nossaman LLP
1666 K Street, NW, suite 500
Washington, DC 20006

On November 25, 2016, I served

BRIEF IN SUPPORT OF PETITION FOR DECLARATORY ORDER; DECLARATION OF MITCH STOGNER; DECLARATION OF JACOB PARK; MOTION FOR PROTECTIVE ORDER

on the parties in said action by causing an electronic copy of the above-described documents to be transmitted by e-mail to the addresses known by or represented to me to be the receiving e-mails of the parties noted below.

William D. Ross
Law Offices of William D. Ross

James D. Squeri
Goodin, MacBride, Squeri & Day, LLP

Email: wross@lawross.com

Email: jsqueri@goodinmacbride.com

Megan Somogyi
Goodin, MacBride, Squeri & Day, LLP

Email: msomogyi@goodinmacbride.com

On November 28, 2016, I served

BRIEF IN SUPPORT OF PETITION FOR DECLARATORY ORDER; DECLARATION OF MITCH STOGNER; DECLARATION OF JACOB PARK; MOTION FOR PROTECTIVE ORDER

on the parties in said action by placing a copy of the above-described documents in sealed envelopes, with postage thereon fully prepared for First-Class Mail, addressed to the parties as set forth below, for collection and mailing at Willits, California, following ordinary business practices. I am readily familiar with the practice of Neary & O'Brien for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service on the same day as it is placed for processing.

William D. Ross
Law Offices of William D. Ross
400 Lambert Avenue
Palo Alto, CA 94306

James D. Squeri
Megan Somogyi
Goodin, MacBride, Squeri & Day, LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 28, 2016, at Willits, California.

/s/ Cyndi Mason
CYNDI MASON