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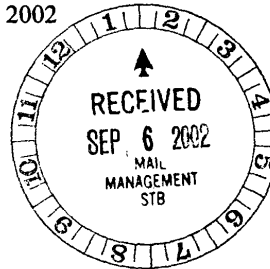
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September 6, 2002



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *North San Diego County Transit Development Board - -
Declaratory Order, Finance Docket No. 34111*

Dear Sir:

I am enclosing an original and ten (10) copies of the Verified Reply of North San Diego County Transit Development Board in Opposition to Petition of the City of Encinitas for Stay Pending Request for Judicial Review in the above-referenced proceeding. An additional copy is enclosed for date-stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Sincerely,

Charles A. Spitulnik

Enclosure

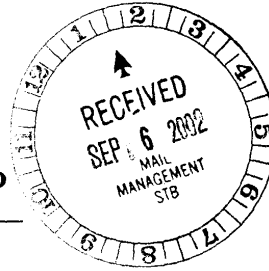
cc: Joseph H. Dettmar, Esquire
All parties on the Certificate of Service

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Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34111

**NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
- DECLARATORY ORDER -**

**VERIFIED REPLY OF
NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD IN OPPOSITION
TO PETITION OF THE CITY OF ENCINITAS FOR
STAY PENDING REQUEST FOR JUDICIAL REVIEW**

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BOARD

Dated: September 6, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
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TO PETITION OF THE CITY OF ENCINITAS FOR
STAY PENDING REQUEST FOR JUDICIAL REVIEW**

North San Diego County Transit Development Board ("NCTD"), by counsel files this Reply in Opposition to the Petition of the City of Encinitas (the "City") for Stay Pending Request for Judicial Review ("Stay Motion") filed in this proceeding on or about August 29, 2002 and in support thereof states as follows:

I. Facts

The facts in this proceeding have been developed in the record. Summarizing, NCTD is a political subdivision of the State of California, created pursuant to Cal. Pub. Util. Code §§ 125000, *et seq.* NCTD acquired the line that is in issue in this proceeding from The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") in 1999. The transaction transferred ownership of the track and related physical assets from Santa Fe to NCTD; however, Santa Fe retained the right to conduct freight operations on the line pursuant to a permanent easement granted by NCTD. *Id.* In *Orange County Transportation Authority-Acquisition Exemption-The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C.2d 78, 90 (1994), the Interstate Commerce Commission (ICC) held that as a result of the transaction NCTD had acquired sufficient power over Santa Fe's operations on the line to require a finding that NCTD controlled the rail freight operations and had thus become a common carrier by railroad subject to the

jurisdiction of the ICC. Now, NCTD seeks to enhance the capacity of the line it acquired by constructing a 1.7 mile passing track in the City. In this proceeding, the Board issued a Decision (served on August 21, 2002) ("Declaratory Order") concluding that "any requirement by the City under California state law that NCTD obtain a permit or other prior approval in order to build the passing track is preempted by section 10501(b)." *Declaratory Order* at 5. The City filed the Stay Motion in response.

II. Argument: The City Has Not Satisfied Any of the Requirements For Issuance of a Stay.

To obtain a stay, the City must show: (1) that it is likely to prevail on judicial review; (2) that, without a stay, it will suffer irreparable injury; (3) that a stay would not harm other interested parties; and (4) that the public interest supports granting a stay. STB Finance Docket No. 33388 *CSX Corporation, et al. --Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation*, Decision No. 200 (served October 4, 2001) citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

Moreover, the City must show satisfactory evidence on all four criteria. *In re Lykes Bros. Steamship Co., Inc.*, 221 B.R. 881, 884 (Bankr.M.D.Fla.1997). The failure to satisfy one prong of the standard for granting a stay pending appeal "dooms the motion." *Id.*, quoting from *Green Point v. Treston*, 188 B.R. 9, 12 (S.D.N.Y.1995). See also *In re Power Recovery Systems, Inc.*, 950 F.2d 798, at 804, n. 31 (1st Cir.1991) (failure to meet even one of the criteria necessary for the issuance of a stay justifies denial). The City has not satisfied the substantial burden it must bear to justify the issuance of a stay in this proceeding. Rather, the City has presented, without benefit of any citation to applicable law, brief, conclusory statements of specious arguments in an unsuccessful attempt to justify a stay. The stay should be denied.

A. City has not demonstrated that it is likely to prevail on the merits if it seeks judicial review.

1. The record and applicable precedent clearly supports the Board's decision.

The City has made no showing in the Stay Motion, and will be able to make none on appeal, as to why this Board should depart from its longstanding precedent regarding preemption of state or local laws. The Board confirmed that federal law preempts state and local permitting requirements in this instance because NCTD is a carrier subject to the Board's jurisdiction. The record shows that interstate rail freight service will benefit from construction of the new passing track, and this Board correctly concluded that imposing state and local laws in these circumstances could thwart the enhancement of operations on the San Diego Main Line ("the Line").

The City argues in its Stay Motion that because "there has been no actual showing of any impact on interstate commerce, how then can the prevention of this Passing Track unreasonably burden interstate commerce?" *See Stay Motion* at p. 5. However, the Board clearly and unequivocally found that the Passing Track will impact interstate commerce. Specifically, the Board stated that "record before us shows that the passing track will benefit freight operations in addition to mass transportation operations." *See Declaratory Order* at p. 6. Furthermore, the Board found that

the passing track will be long enough to accommodate most, if not all, of BNSF's freight trains. Therefore, it will increase the capacity, efficiency, and flexibility of freight service on the Line, allow BNSF to schedule more frequent service, and provide flexibility for scheduling track maintenance. Because of this benefit to BNSF's common carrier interstate rail freight operations, there is no doubt that we have jurisdiction and that this case falls within section 10501(b).

Id. If there is a benefit from the construction, the inability to implement the project creates a burden on interstate commerce by preventing that improvement. This Board's conclusion was correct.

To succeed on appeal, the City would have to convince a reviewing Court that this Board's action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" *Railroad Ventures, Inc. v. S.T.B.*, 299 F.3d 523 (6th Cir. 2002), quoting 5 U.S.C. § 706(c)(2)(A). The City cannot succeed. There is no evidence in the record to dispute the testimony that the improvements to this line will benefit interstate commerce. There is nothing to contradict the logic of the Board's conclusion that if construction will benefit interstate commerce, then preventing that construction will burden the flow of such commerce.¹ The Board's decision that the Passing Track will impact interstate commerce was reasonable and supported by the record. The City has not shown that it is likely to prevail on the merits with respect to this issue.

2. The City's argument that the Board decision is an unconstitutional infringement on the sovereignty of the state of California is misguided.

The City argues that "by allowing the NCTD to go forward notwithstanding its legislative charter, the Board has essentially allowed a state agency to "run amuck" without the potential for any state oversight." *See Stay Motion* at p. 5. However, review of the legislative charter demonstrates that NCTD's action and the Board's decision are entirely consistent with the decision made by the California legislature when it created NCTD.

NCTD is a public agency charged by the California legislature with the responsibility for providing public transit services in its areas of jurisdiction. *See Declaratory Order* at p. 2. The powers and duties of NCTD are set forth in the North San Diego County Transit Development Board Act, *Cal. Pub. Util. Code* §§ 125000 *et seq.* (the "Act"). Specifically, the Act states:

The board shall:

- (a) Acquire, construct, maintain, and operate (or let a contract to operate) public transit systems and related facilities...;

¹ The City's assertions that its inability to conduct discovery inhibited its ability to develop the record are addressed below.

-
- (f) Do any and all things necessary to carry out the purpose of this division, including, but not limited to, adopting all ordinances and making all rules and regulations proper or necessary to regulate the use, operation, and maintenance of its property and facilities, including the public transit systems and related transportation facilities and services operating within its area of jurisdiction and those areas beyond the board's jurisdiction served by the board pursuant to contract or memorandum of agreement with another transit agency, and to carry into effect the powers granted to the board.

Cal. Pub. Util. Code § 125105 (a),(f). Furthermore, NCTD's powers as to acquiring property are defined as:

The board may take by grant, purchase, devise, or lease, or condemn in proceedings under eminent domain, or otherwise, acquire, and hold and enjoy, real and personal property of every kind within or without its area of jurisdiction necessary to the full or convenient exercise of its powers.

Cal. Pub. Util. Code § 125240.

Pursuant to the authority granted in its legislative charter, NCTD purchased the Line and did what was "necessary to carry out the responsibility of providing public transit services in its areas of jurisdiction." As a result of this action, NCTD became a common carrier subject to the jurisdiction of the Board. Once NCTD acquired the Line and became a common carrier it was subject to all the benefits and burdens of federal jurisdiction. It is well settled that under the Constitution, specifically the Commerce Clause in Article I² and the Supremacy Clause in Article VI³ that federal jurisdiction involving interstate commerce controls and supersedes state law. Thus, NCTD, pursuant to and because of obligations and responsibilities it acquired while acting within the authority granted to it in its state legislative charter, is subject to federal jurisdiction with respect to the Line. In other words, NCTD is not going "forward notwithstanding its

² The Commerce Clause states: "The Congress shall have Power ... To regulate Commerce ... among the several States...." *U.S. Const.*, Art. I, § 8, cl. 3.

³ The Supremacy Clause requires courts to follow federal, not state, law on matters that have been assigned by the Constitution to the federal government. *U.S. Const.*, Art. VI, cl. 2; see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 280-281, 107 S.Ct. 683, 689-690, 93 L.Ed.2d 613 (1987) (reviewing pre-emption doctrine); *Perez v. Campbell*, 402 U.S. 637 (1971).

legislative charter.” Rather it is going forward pursuant to its legislative charter. Again, the City has not shown that it is likely to prevail on the merits of a petition for judicial review.

3. The City’s argument that its inability to conduct discovery was detrimental to its case fails.

The City blames this Board for its own decision not to pursue discovery. In the Stay Motion, it argues that the briefing schedule established by the Board “prevented the City from conducting any discovery.” *Stay Motion* at p. 6. The Board squarely addressed this issue by stating that pursuant to 49 CFR § 1114.21(b) the City had the ability to conduct discovery but failed to pursue any. *Declaratory Order* at p. 4. Furthermore, the Board noted that the City filed no motions pertaining to discovery during the course of the proceeding.⁴ *Id.* The City could have sought expedited discovery, but did not. The City could have sought an extension of the procedural schedule to conduct discovery, but did not.

Moreover, the City has submitted public record requests to NCTD under the California Public Records Act, Cal. Gov’t. Code §6250 *et seq.*, seeking all documents relating to this proposal. NCTD has responded, providing hundreds of pages of documents. The City could have gained no further information by conducting discovery in this proceeding. As a result, the City can not credibly claim that lack of discovery has caused it to be disadvantaged in any way.

Notwithstanding the fact that the City has no one to blame for its failure to conduct discovery but itself, the City has failed to demonstrate how this failure impacted the Board’s decision in this case. There is no basis for this Board to conclude that the City is likely to prevail on the merits of a petition for judicial review.

B. The City has failed to demonstrate that it will suffer irreparable harm

The City states that “because there has been a lack of any environmental analysis or

⁴ The City argues that the time frame was not sufficient to conduct discovery. However, as the Board noted, the City did not file any motion either seeking expedited discovery or an extension to conduct discovery.

compliance with the environmental review process the building of the Passing Track will cause irreparable harm." *Stay Motion* at p. 6-7. The City bears the burdens of establishing irreparable harm. See Finance Docket No. 33388, *CSX Corporation, et al. -- Control and Operating Leases/Agreements--Conrail Inc. et al.*, Decision No. 200 (served October 4, 2001); Finance Docket No. 31700 (Sub-No. 13) *Canadian Pacific Limited, et al.--Purchase and Trackage Rights-- Delaware & Hudson Railway Company (Arbitration Review)* (served November 6, 1998); Finance Docket No. 32479, *Caddo, Antoine & Little Missouri Railroad Company--Feeder Line Acquisition--Arkansas Midland Railroad Company Line between Qurdon and Birds Mill, AR*, (served June 23, 1995). The City offers only a series of conclusory and unsupported statements relating the facts that the Passing Track will be built close to residential developments, an elementary school and a coastal zone. It does not explain how the construction of an additional track in a right-of-way where a line of railroad already exists will cause irreparable harm. Surely given the amount of time that has passed, if any real harm were likely to occur, the City would have been able to uncover and describe it in its Motion. No such factual statements are present. Absent any actual factual demonstration of irreparable harm, the Board cannot conclude that the City has borne its burden. No Stay should be issued.

C. The City has failed to demonstrate that other interested parties will not be harmed.

The City ignores reality and the part its own actions have already played in delaying this project when it attempts to argue that no other party will be substantially harmed. Because of the uncertainty created by the litigation the City commenced, and because of the delays created by the City's attempts to impose regulatory burdens on this project, NCTD was required to seek extensions of the funding deadline. Those same factors caused the California Department of Transportation to ask NCTD to withdraw requests for additional funding until the litigation has

been resolved. NCTD's lack of full funding is directly caused by the City's actions. In addition, construction costs continue to escalate while the City's actions stall this project.

A stay of the effective date of the Board's decisions would further harm NCTD by preventing it from finalizing funding and other elements of the project, and by increasing the cost of the project. Just as the City's own decisions and actions (or inaction) caused it to conduct no discovery, so too are the City's own actions the cause of the lack of funding. NCTD should not be made to suffer further delays or cost increases due to those actions, and the stay should be denied.

D. The public interest does not support the granting of a stay.

Contrary to the City's exaggerated claims, the public has no interest in giving the City more time to subvert the basic principles of federalism that underlie the allocation of power between state and federal governments. As NCTD has explained above, NCTD has acted pursuant to specific authority granted by the California legislature. Allowing the City to succeed in stalling implementation of the construction would contravene not support the will of the people of the State, as expressed through the legislature's actions.

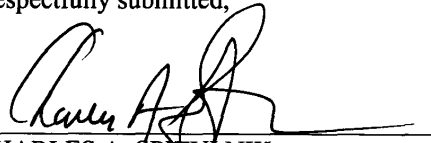
Moreover, the Board has specifically said that "this action will not significantly affect either the quality of the human environment or the conservation of energy resources."

Declaratory Order at p. 9. The City has introduced no evidence to the contrary.

III. Conclusion

For the reasons stated above and in view of the record developed in this proceeding the City's Motion for Stay Pending Request for Judicial Review should be denied.

Respectfully submitted,



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Counsel for NORTH SAN DIEGO
COUNTY TRANSIT DEVELOPMENT
BOARD

Dated: September 6, 2002

VERIFICATION

County of San Diego)
)
State of California)

I, Karen King, Interim Executive Director of the North San Diego County Transit Development Board, hereby verify that I have knowledge of the facts stated in the foregoing Reply of North San Diego County Transit Development Board in Opposition to the Petition of the City of Encinitas for Stay Pending Request for Judicial Review, and that the same are true as stated.

Karen H. King 9-6-02
Karen H. King

Subscribed and sworn to
before me this 6th day of
September , 2002.

C Cheryl D. Plontus
Notary Public CHERYL D. PLONTUS



My Commission Expires: DECEMBER 6, 2004

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of THE VERIFIED REPLY OF NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD IN OPPOSITION TO PETITION OF THE CITY OF ENCINITAS FOR STAY PENDING REQUEST FOR JUDICIAL REVIEW on the persons listed below by first class U. S. mail with postage prepaid and properly addressed.

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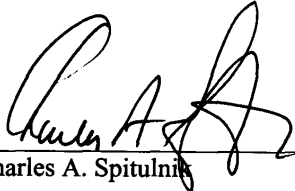
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Dated this 6th day of September 2002.



Charles A. Spitulnik