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BEFORE THE
SURFACE TRANSPORTATION BOARD

SAN PEDRO PENINSULA HOMEOWNER'S UNITED INC
JOHN TOMMY ROSAS, TRIBAL ADMINISTRATOR, TONGVA ANCESTRAL TERRITORIAL TRIBAL NATION

DOCKET NO. FD 36065

REPLY TO PETITION FOR DECLARATORY ORDER

On September 12th, San Pedro Peninsula Homeowner's United Inc. and John Tommy Rosas, Tribal Administrator, Tongva Ancestral Territorial Tribal Nation ("Petitioners") filed a Petition for Declaratory Order ("Petition") in this proceeding at the Surface Transportation Board (the "Board"). The relief requested by Petitioners in the Petition is unclear.

The Petitioners appear to seek a Board determination that updated environmental documentation is required in connection with a temporary rail spur permit between the Port of Los Angeles (acting through the Board of Harbor Commissioners) and Rancho LPG Holding LLC ("Rancho"). More specifically, the Petitioners indicate (but do not specify) that certain environmental requirements are applicable to a "long-term lease agreement", and appear to suggest that the long-term use of a temporary permit may be an improper circumvention of such environmental requirements.

Pacific Harbor Line, Inc. ("PHL") is a class III rail carrier that provides common carrier rail service to Rancho over tracks owned by the City of Los Angeles (acting through the Board

of Harbor Commissioners) in the Port of Los Angeles.[1] PHL hereby submits its reply to the Petition ("Reply"). A. Board Environmental Review is not Dependent on the Length of a Permit.

On page 2 of the Petition, Petitioners assert the "temporary status" of the rail permit "allows the Port/City to circumvent the 'long-term lease requirements' of an environmental impact report and inclusion in their own Port Risk Management Plan." However, the Board's environmental regulation of track is not dependent upon whether a rail permit is temporary or long-term in duration.

In this case, the Petitioners seem to be arguing that environmental oversight by the Board is triggered by the failure of a party to exercise an optional right to terminate a permit. The Petitioners have not cited any statutory or regulatory provision in support of this principle. Accordingly, Petitioners do not appear to state a claim for which the Board can provide relief.

B. Spur Track Is Exempt from Board Licensing Authority, But ICCTA Preemption Applies.

Although the Petition does not clearly define the track at issue, it identifies the track as "rail spur line". Similarly, the permit attached to the Petition describes the track as "industrial railroad spur track". Under 49 U.S.C. 10906, "[t]he Board does not have authority...over construction, acquisition, operation, abandonment, or discontinuance of *spur*, *industrial*, team, switching, or side tracks". (Emphasis added.) However, even though the Board does not have licensing authority over spur or industry tracks, it retains exclusive jurisdiction over these tracks.

In *Joseph R. Fox - Petition for Declaratory Order,* Finance Docket No. 35161, served May 18, 2009, *aff'd sub nom, Joseph R. Fox v. STB*, 379 Fed App'x 767 (10th Cir. 2010), the

[1] *See Pacific Harbor Line, Inc. -- Operation Exemption -- Port of Los Angeles*, STB Finance Docket No. 33411, served Dec. 2, 1997.

Board explained the interplay between its licensing authority and its jurisdiction. In that decision, the Board stated:

> Industrial yard track, while excepted under 49 U.S.C. 10906 from the need to obtain Board authority for construction, abandonment, or operation, is nevertheless subject to the Board's jurisdiction and is not subject to state or local regulation. Indeed, although prior to the passage of ICCTA, state regulatory agencies had some authority over excepted track, [footnote omitted] ICCTA added a new provision that specifically established the exclusivity of the Board's jurisdiction over "transportation by rail carriers." This jurisdiction includes exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. 10501(b)(1)(2). When sections 10501(b) and 10906 are read together, it is clear that Congress intended to occupy the field and preempt state jurisdiction over excepted track such as yard track, even though Congress allowed rail carriers to construct, operate, and remove such facilities without Board approval. [Citation and footnote omitted.]

Thus, the Board's exclusive jurisdiction under 49 U.S.C. 10501(b) results in preemption of state and local laws with respect to the regulation of spur or industry tracks, even though the Board does not have licensing authority over these tracks.

C. Section 10501(b) Preemption Applies to Environmental Regulation.

The Board's environmental oversight is often related to an activity over which the Board has licensing authority (*e.g.*, certain construction, leases, abandonments, etc.). However, even in situations where the Board does not have licensing authority over tracks, pursuant to section 10906, the Board's exclusive jurisdiction over the tracks still preempts the application of state and local environmental regulation. The Board recently addressed this very issue:

> State and local regulation, including environmental regulation, has been found to be preempted in those cases where the Board has licensing authority over rail carrier activities, as well as cases where, as here, it does not [Footnote omitted.] [The railroad's] construction and use of the Parcel for rail carrier operations does

> not require our licensing authority because the construction of ancillary tracks and facilities is excepted from licensing by 49 U.S.C. § 10906. [Footnote omitted.] Nonetheless, the express statutory preemption of § 10501(b) applies here to prevent [the town] from imposing environmental and land use regulations and permitting requirements that could be used to deny or unreasonably delay the rail carrier's ability to use its property for railroad operations. [Citations omitted.]

See Grafton & Upton Railroad Company - Petition for Declaratory Order, Docket No. FD 35779, served Jan. 27, 2014. Accordingly, it is clear that the section 10501(b) preemption applies to state or local regulation of spur or industry track, even if there is no Board environmental regulation of the track. Thus, to the extent the Petitioners are seeking enforcement of state or local environmental laws, those laws would be preempted, as applied to spur or industry track.

D. Conclusion.

Petitioners state no basis under which the Board would have the authority to provide environmental oversight with respect to the track. PHL, by this Reply, requests the Board deny the Petition.

Respectfully submitted,

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Date: October 31, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, the foregoing Reply was served by first-class mail, postage prepaid on the following parties:

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