

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34111

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD—
PETITION FOR DECLARATORY ORDER

Decided: September 16, 2002

This decision denies a petition by the City of Encinitas, CA (the City), to stay, pending judicial review, the effectiveness of a Board declaratory order issued at the request of North San Diego County Transit Development Board, d/b/a North County Transit District (NCTD), setting forth the Board's view that the City is prohibited from requiring NCTD to obtain a permit or other pre-approval prior to constructing the Encinitas Passing Track on NCTD's San Diego Subdivision main line. The Board's decision is scheduled to become effective on September 20, 2002.

BACKGROUND

NCTD is a public agency charged by the California Legislature with the responsibility of providing public transit services in its areas of jurisdiction. In 1992, NCTD acquired the 6.1-mile long San Diego Main Line (the Line) from The Atchison, Topeka and Santa Fe Railway Company (Santa Fe).¹ Although ownership of the track and related physical assets were transferred from Santa Fe to NCTD, Santa Fe retained the right to conduct freight operations on the line pursuant to a permanent easement granted by NCTD. In 1994, the Board's predecessor agency, the Interstate Commerce Commission (ICC),² issued a decision concluding that, by the transaction, NCTD had acquired sufficient power over Santa Fe's operations on the Line that NCTD could exercise control over the rail

¹ The Santa Fe was a predecessor to The Burlington Northern and Santa Fe Railway Company (BNSF).

² Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), the ICC was abolished and all remaining rail regulatory functions were transferred to the Board, effective January 1, 1996.

freight operations³ and had thus become a common carrier by railroad subject to the jurisdiction of the ICC. See Orange County Transportation Authority–Acquisition Exemption–The Atchison, Topeka and Santa Fe Railway Company, 10 I.C.C.2d 78, 90 (1994) (Orange County).

NCTD now operates a commuter rail service over the Line. The National Railroad Passenger Corporation (Amtrak) also uses the Line to provide intercity passenger rail service. BNSF, in accordance with the rights and obligations in its contract with NCTD governing the sale of the Line, operates four to six freight trains daily over the Line, mostly at night.

To improve both freight and passenger service on the Line, NCTD now plans to construct a 1.7-mile long passing track within the City. The passing track would run from milepost 238.0 to milepost 239.7.

The California Coastal Act, a California state law, if applicable, would require that NCTD apply for and obtain a Coastal Development Permit from the City in order to construct the passing track. See Cal. Public Resources Code § 30600(a), (d) (Deering 2001). On or about June 26, 1996, NCTD applied for such a permit. After public hearings on NCTD's request, the City's planning commission determined that preparation of an environmental report would be required prior to construction. On October 10, 1997, NCTD appealed this determination to the City Council of Encinitas, but abandoned the appeal on February 20, 1998, before it was heard. On July 19, 2001, NCTD's board voted to proceed with construction of the passing track without the permit because it feared the loss of state funds for the project.⁴

In August 2001, the City filed an action in the San Diego County Superior Court to prevent NCTD from building the passing track until NCTD fulfilled the state permitting requirement.⁵ On September 26, 2001, NCTD had the state court action removed to the United States District Court for

³ Specifically, NCTD acquired control over maintenance, dispatching, new track construction, and scheduling of service.

⁴ At the time, NCTD apparently believed that state funds appropriated for the project would be available only through February 2002. However, according to an area newspaper article, in January 2002 NCTD was granted a 19-month extension on use of the funds. City reply to motion to strike, filed January 31, 2002, Exhibit Q.

⁵ In addition to the claimed permit violation, the City argued that NCTD had violated the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et seq.), the State CEQA Guidelines (Cal. Code of Regs., § 15000 et seq.), and San Diego County's Regional Transportation Plan (Public Resources Code § 125000 et seq.).

the Southern District of California. On October 11, 2001, NCTD filed a petition requesting that the Board institute a declaratory order proceeding and determine that the state and local laws are preempted by 49 U.S.C. 10501(b)(2), and that the City therefore may not require NCTD to obtain a permit or other prior approval in order to construct the passing track on NCTD's main line. On October 31, 2001, the City and the California Coastal Commission (Commission) (collectively, respondents) filed separate replies to NCTD's petition.

On December 6, 2001, the Board issued a decision instituting a declaratory order proceeding and asking the parties to provide further information on the effect of the passing track on interstate freight operations. On December 17, 2001, NCTD filed comments responding to the Board's request for information. Attached to NCTD's comments was a statement in support from Jeffery B. Wright, Division General Manager, BNSF. BNSF's witness discussed how the construction of the passing track will benefit common carrier rail freight service. The witness stated that, because the passing track will be long enough to accommodate most, if not all of BNSF's freight trains, 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. On January 4, 2002, the City and the Commission also filed comments separately responding to the information request.⁶

On January 14, 2002, the District Court issued a decision finding that the City's permitting process is indeed preempted by 49 U.S.C. 10501(b)(2), as broadened by the ICCTA, and dismissing the court action with prejudice for lack of subject matter jurisdiction. See City of Encinitas v. North San Diego County Transit Development Board, et al., Case No. 01-CV-1734-J (AJB) (City of Encinitas).⁷ On August 21, 2002, the Board served its decision (August Decision) agreeing with the District Court's determination that, under section 10501(b)(2), the City is foreclosed from requiring NCTD to obtain a permit or other pre-approval prior to constructing the passing track.

The City filed the instant petition on August 30, 2002, asking the Board to stay the effectiveness of its decision, pending judicial review. NCTD replied on September 6, 2002.

⁶ On December 18, 2001, the Orange County Transportation Authority (OCTA) filed a petition for leave to intervene, along with comments in support of NCTD's request. On December 21, 2001, the Board issued a decision granting OCTA's intervention request. On January 9, 2002, the City filed a reply to OCTA's comments, and, on January 10, 2002, the Commission also filed a reply.

⁷ That decision has been appealed to the court of appeals in City of Encinitas v. North San Diego County, No. 02-55300 (9th Cir. filed Feb. 20, 2002).

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay pending judicial review are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of these elements. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, no need for a stay has been shown in this case.

Likelihood of Success on the Merits.

The Board's determination in the August Decision is entirely consistent with court and agency precedent. See cases cited in the August Decision. Both the courts and the Board have found that the type of permitting requirements sought to be imposed by the State and the City here are preempted by section 10501(b)(2). Indeed, as pointed out in the August Decision, the District Court in City of Encinitas has specifically ruled that the City's permitting process is preempted because, otherwise, the City could deny NCTD the right to proceed with its construction project, which would be tantamount to economic regulation by a local government over a rail carrier.

The City makes three arguments supporting its contention that it will prevail on the merits of a judicial challenge. None of these arguments demonstrates a likelihood of success.

First, the City argues that the Board's decision is an unconstitutional infringement on the sovereignty of the State of California to control its own political subdivisions. The City asserts that, by permitting NCTD to subvert its legislative charter, the Board has essentially allowed a state agency to "run amuck" without the potential for any state oversight. However, as the Board's August Decision made clear, because NCTD owns and operates an interstate rail line and is obligated to maintain the line for both interstate and intrastate rail traffic, the Board has jurisdiction over NCTD, notwithstanding its status as a state agency. August Decision at 5-6. Moreover, as the Board noted (*id.* at 5 n.12), the Board is not attempting here to apply or interpret California state law; rather it is interpreting the reach of the federal preemption statute, 49 U.S.C. 10501(b).

Second, the City argues that NCTD and the Board have not shown how the City's proposed regulation of the passing track is an unreasonable burden on interstate commerce. It contends that BNSF has shown only hypothetical, not actual, benefits from the passing track to interstate freight operations. In addition, the City states that it has presented evidence to the effect that BNSF does not intend to increase its capacity or train frequency as a result of the passing track. Therefore, it

concludes, preventing the construction of the track would have no impact on interstate freight operations.

The City's argument lacks merit. As the Board explained (August Decision at 6), construction of the passing track will result in tangible benefits to BNSF's freight service in terms of capacity, efficiency, frequency, and flexibility. If the City were to impose permitting or other preapproval requirements on NCTD, this could frustrate or defeat the project and, thereby, deprive BNSF and its customers of the passing track's benefits, thus unreasonably interfering with interstate commerce.

Finally, the City argues that its inability to conduct discovery was detrimental to its case. Specifically, the City claims that the Board's expedited briefing schedule (established in the December 2001 decision instituting this proceeding) did not provide sufficient time (less than 30 days) to obtain further information on the effect of the passing track on interstate freight transportation and to incorporate that information in its brief.

However, the City has not specified what additional information it hoped to obtain upon conducting discovery. Nor has it shown how the failure to conduct discovery impacted the Board's decision. In any event, the Board properly found in the August decision that the City had ample opportunity to conduct discovery in this case. This petition for declaratory order was filed in October 2001. Therefore, from that date until January 4, 2002, the due date for its brief, the City had recourse to discovery without an order from the Board. See 49 CFR 114.21. The City failed to pursue discovery. Moreover, it filed no motions pertaining to discovery during the course of the proceeding, such as a request to compel, a request for expedited discovery, or a request for an extension of the procedural schedule to conduct discovery.⁸ In these circumstances, the City cannot credibly claim that there was a lack of opportunity for discovery that has caused it to be harmed in any way.

Other Stay Criteria.

The City has made no showing that a stay of the Board's August Decision is necessary or appropriate. The City's assertions of harm are unsupported. To the contrary, statements by both parties indicate that construction of the passing track in the near future is unlikely. In its petition for stay, the City concedes that, because NCTD lacks sufficient state funding, NCTD is not prepared to go forward with the construction of this project. NCTD's reply to the petition for stay supports this assessment. NCTD states that the California Department of Transportation has asked it to withdraw its requests for additional funding until litigation in this matter is complete.

⁸ In any event, NCTD asserts in its reply that it has already provided to the City "hundreds of pages of documents" relating to the proposal. Reply p. 6.

In sum, the City has shown neither a likelihood that it will prevail on the merits, nor irreparable harm in the absence of a stay. The City has therefore not demonstrated that the public interest would be served by a stay of the Board's decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's petition for stay is denied.
2. This decision is effective on the date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary