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SERVICE DATE – LATE RELEASE NOVEMBER 3, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36077<sup>1</sup>

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD  
COMPANY—PETITION FOR DECLARATORY ORDER

Docket No. NOR 42148<sup>2</sup>

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD  
COMPANY v. SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

Decided: November 3, 2016

On October 4, 2016, North Coast Railroad Authority (NCRA) and Northwest Pacific Railroad Company (NWPCo) (together Petitioners) filed a petition requesting an emergency declaratory order and preliminary injunctive relief to prevent Sonoma-Marín Area Rail Transit District (SMART) from interfering with freight rail operations over portions of the Northwestern Pacific Railroad Line.<sup>3</sup> (Pet. 2, 4-5, 10-11.) Board staff held two conference calls with representatives of both parties on October 6 and October 11, 2016, to clarify the facts of the dispute over Petitioners' request for preliminary injunctive relief. On October 21, 2016, the Board issued an order denying the preliminary injunction. See N. Coast R.R. Auth. v. Sonoma-Marín Area Rail Transit Dist. (October 21 Decision), NOR 42148 (STB served Oct. 21, 2016) (with Commissioner Begeman partially concurring).

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<sup>1</sup> These proceedings are not consolidated. A single decision is being issued for administrative purposes.

<sup>2</sup> The initial pleading in this proceeding was styled as "Finance Docket No. NOR 42148" but appears to request a declaratory order. (Pet. 2; Addendum to Pet. 2.) Therefore, the Board is changing the docket number from NOR 42148 to FD 36077, without prejudice to Petitioners' requesting to restyle their petition to seek another remedy, if any, that may be appropriate. All filings and decisions in Docket No. NOR 42148 will be considered part of the record in Docket No. FD 36077.

<sup>3</sup> The parties also refer to the Northwestern Pacific Railroad Line as the Northwestern Pacific Line. For purposes of this decision, we will refer to it as the Line.

## BACKGROUND

The Line consists of three segments: the Willits Segment, the Healdsburg Segment, and the Lombard Segment. (Pet. 2-3.) NCRA, the public agency created to preserve freight operations on the Line, holds the exclusive right to conduct freight operations over the Line. (Pet. 3.)<sup>4</sup> NWPCo is the freight operator. (Pet. 2.)<sup>5</sup> SMART, the public agency created in 2003 and authorized to provide commuter passenger service over portions of the Line, holds the exclusive right to operate passenger service, including the right to dispatch over portions of the Line. (Pet. 2-3.) In 2004, SMART obtained Board authority to acquire the real estate and rail facilities and trackage to the Healdsburg and Lombard segments of the Line. Sonoma-Marín Area Rail Transit Dist., FD 34400, slip op. at 1-2.<sup>6</sup> NCRA owns the Willits Segment. (Pet. 2-3.) NWPCo operates on the Healdsburg and Lombard segments; SMART currently has plans to operate on the Healdsburg Segment. (Pet. 3.)

In 2011, NCRA and SMART entered into an Operating and Coordination Agreement (Agreement) for the Line. (Pet., Williams Decl. para. 1.) The Agreement gives SMART dispatching authority over the Lombard and Healdsburg segments and a portion of the Willits Segment. (Pet., Williams Decl., Ex. A at 4.) It defines dispatching as having the same meaning as in 49 C.F.R. § 241.5(1)(i). (Pet., Williams Decl., Ex. A at Ex. 1 at i.) The Agreement also contains a provision addressing hazardous materials, which states in part:

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 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 and in all events in accordance with Applicable Laws.

(Pet., Williams Decl., Ex. A at 11.) The Agreement defines “Industrial Track” as “all existing or later built track on the Healdsburg and Lombard Segments used solely for NCRA Freight Service” and provides that “NCRA, at its own expense, shall have the exclusive right to manage”

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<sup>4</sup> In 1996, NCRA acquired Board authority to lease and operate the Line. N. Coast R.R. Auth.—Lease & Operation Exemption—Cal. N. R.R., FD 33115 (STB served Sept. 27, 1996). See also Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—N.W. Pac. R.R. Auth., FD 34400, slip op. at 1 (STB served March 10, 2004) (indicating that SMART subsequently acquired portions of the Line subject to NCRA’s freight easement).

<sup>5</sup> See N.W. Pac. R.R.—Change in Operators Exemption—N. Coast R.R. Auth., FD 35073 (STB served Aug. 24, 2007).

<sup>6</sup> SMART retains the residual common carrier obligation over portions of the Line, including the Lombard Segment, which is at issue here. See Sonoma-Marín Area Rail Transit Dist., FD 34400, slip op. at 2; see also Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—in Marin Cty., Cal., FD 35732, slip op. at 2 n.2, 3 (STB served July 15, 2013).

such track. (Id. at 3.) Finally, the Agreement contains a provision subjecting disputes to arbitration. (Id. at 19.)

On July 28, 2016, NWPCo began transporting loaded liquid petroleum gas (LPG) tank cars to, and storing them at, the Schellville rail yard on the Lombard Segment. (Pet. 2, 5.) For about two months, SMART dispatchers issued track warrants<sup>7</sup> for these movements. By late September, 80 loaded LPG tank cars were stored at the Schellville yard. However, according to Petitioners, SMART recently began using its dispatching function as preclearance authority to prohibit the movement of certain freight on the Line. (Pet. 4, 6, 8.) On October 2, 2016, SMART denied a track warrant for 12 LPG tank cars destined for Schellville and six grain cars destined for Petaluma, thus prohibiting those cars from proceeding. (Id. at 6.) As clarified on the two conference calls, the six grain cars were allowed to proceed, but the 12 loaded LPG cars remained sitting on the track at an interchange with the California Northern Railroad. NWPCo also has a voluntary hold on an additional 30 loaded LPG tank cars bound for the Schellville yard. On October 21, 2016, the Board rejected Petitioners' request for preliminary injunctive relief. See October 21 Decision, slip op. at 5.

In addition to a preliminary injunction, Petitioners request an order that SMART has no regulatory authority to precondition freight shipments. (Pet. at 7.) They state that due to SMART's actions, they are uncertain when, and if, they will be able to discharge their common carrier obligations. (Id. at 9.) Petitioners also assert that the preclearance authority asserted and exercised by SMART through its dispatching function is preempted by federal law. (Id. at 8-9.)

SMART contends<sup>8</sup> that there is no reason for the Board to issue a declaratory order because it is not impermissibly interfering with Petitioners' movements. SMART acknowledges that it has refused to allow onto the Lombard Segment tank cars loaded with LPG that are not being moved directly to a customer or shipper destination but are instead intended for temporary storage, on the ground that NCRA does not have a contractual right to store such cars at the Schellville yard. (Reply 2.) SMART asserts that the provision of the Agreement dealing with hazardous materials prohibits Petitioners from storing the LPG tank cars on SMART's property, including the Schellville yard. (Id. at 3.) SMART also contends that Petitioners' storage activities at its yard violate federal safety regulations. (Id. at 5-6.)

SMART claims that this is a contractual dispute, that the Board typically does not get involved in contractual disputes, and there is no reason for it to do so in this instance. (Reply 2.) Specifically, the issue of whether the Petitioners "can store the LPG-loaded tank cars on SMART's property is a question of contractual interpretation," (id. at 4), and SMART "does not

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<sup>7</sup> A track warrant control system is a verbal authorization system using radio, phone, or other electronic transmission from a dispatcher. See CSX Transp., Inc.—Joint Use—Louisville & Ind. R.R., FD 35523, slip op. at 3 n.8 (STB served Apr. 10, 2015).

<sup>8</sup> On October 5, 2016, the Board issued an order requiring replies to the petition on an expedited schedule and scheduling a conference call with parties, counsel, and Board staff. On October 6, 2016, SMART filed a reply to the petition noting that it was not "waiving its right to file a more detailed response to the [October 4] Petition." (Reply 2 n.1.)

purport to require preclearance of the movement of grain cars over the SMART property,” (*id.* at 3). Relying on Town of Woodbridge v. Consolidated Rail Corp., FD 42053 (STB served Dec. 1, 2000), SMART argues that the Petitioners “agreed to the contractual restriction in [the hazardous materials section] of the Agreement and cannot invoke ICCTA preemption to avoid its voluntary contractual agreements.” (Reply 4.) SMART also asserts that Petitioners failed to show that enforcement of the contractual agreement not to store hazardous materials at Schellville<sup>9</sup> would unreasonably interfere with their common carrier obligations. (Reply 4-5.) On October 31, 2016, the City of American Canyon and American Canyon Fire Protection District filed a notice of intent to participate.

## DISCUSSION AND CONCLUSIONS

As the Board has stated, this case appears to raise a number of novel issues that require further briefing by the parties. N. Coast R.R. Auth. v. Sonoma-Marín Area Rail Transit Dist., NOR 42148, slip op. at 2 (STB served Oct. 7, 2016); October 21 Decision, slip op. at 2, 5. In this case, there are controversies regarding the railroads’ common carrier obligation and whether SMART’s actions are preempted by federal law. See 49 U.S.C. § 10501(b). Petitioners are directed to brief the following issues and provide the following information, and SMART is directed to reply, as part of their further submissions to the Board in this proceeding:

1. General requests:
  - a. A detailed map of the entire Northwestern Pacific Railroad Line and operations including, but not limited to, information about interchange locations and responsibilities, which carrier has what rights and where, and alternative locations for storage. Also include a description of the volume and type of traffic that moves over the Line.
  - b. As necessary, include comments on or corrections to the Board’s written summaries of the October 6 and October 11 conference calls. The summaries are available on the Board’s website as miscellaneous filings in the docket.
  - c. As necessary, the parties should include any factual updates that have occurred since the date of their last filings.
2. Regarding the common carrier obligation:
  - a. Assuming for the sake of argument that the contract reflects that NCRA agreed not to store hazardous materials at the Schellville yard, would such an agreement be consistent with NCRA’s common carrier obligation under 49 U.S.C. § 11101? Why or why not?
  - b. Does the storage of loaded LPG cars at the Schellville yard for an indeterminate period of time constitute “transportation by rail carrier” within the meaning of 49 U.S.C. § 10501? In answering this question, parties should discuss:

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<sup>9</sup> The parties apparently disagree whether the Schellville yard tracks are “Industrial Tracks” as defined by the Agreement. (Reply 4, n.5.)

- i. Whether the storage at Schellville is a service that NWPCo provides at the request of and/or for another railroad or a shipper, and how that service is marketed.
    - ii. The typical route, from origin to ultimate destination, for loaded LPG tank cars stored at the Schellville yard. Include a description of NWPCo's role in that movement.
    - iii. How long loaded LPG cars are typically scheduled to be stored at the Schellville yard. If there is no typical time period, provide a range of time the cars will be stored and a final date by which they would depart the yard for final destination.
    - iv. Evidence, such as bills of lading, demonstrating that NWPCo uses the Schellville yard to transport goods in interstate commerce as part of a rail movement.
  - c. What are the implications of SMART's residual common carrier obligation over portions of the Line, including the Lombard Segment?
3. Regarding federal preemption:
  - a. Does SMART's denial of track warrants for loaded LPG cars destined for the Schellville yard constitute "regulation" of rail transportation within the meaning of 49 U.S.C. § 10501(b)?
  - b. Assuming for the sake of argument that the contract reflects that NCRA agreed not to store loaded LPG cars at the Schellville yard, would such an agreement "unreasonably interfere" with interstate commerce? In answering this question, parties should:
    - i. Address Town of Woodbridge v. Consolidated Rail Corp., NOR 42053 (STB served Dec. 1, 2000), and PCS Phosphate Co. v. Norfolk Southern Railway, 559 F.3d 212 (4th Cir. 2009); and
    - ii. Discuss the feasibility of NCRA/NWPCo storing loaded LPG tank cars elsewhere, either on tracks they currently own or lease or on tracks they could lease from other parties, or moving loaded LPG tank cars directly from their origin to their ultimate destination, thus avoiding entirely temporary storage at Schellville or elsewhere.
  - c. What effect, if any, does SMART's status as a governmental agency have on the preemption analysis?

As discussed above, the Petitioners and SMART have filed their initial pleadings.<sup>10</sup> However, the Board is establishing a procedural schedule for receiving additional evidence. In addition, either party may move for an appropriate protective order to protect against the public disclosure of any commercially sensitive, confidential information.

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<sup>10</sup> As noted above, SMART stated that it filed its October 6 reply in accordance with the Board's order and was not "waiving its right to file a more detailed response to the [October 4] Petition." (Reply 2 n.1.)

It is ordered:

1. The procedural schedule is as follows:

November 23, 2016

NCRA's and NWPCo's opening is due.

December 5, 2016

SMART's and any other party's replies are due.

2. All filings and decisions in Docket No. NOR 42148 will be considered part of the record in Docket No. FD 36077.

3. Notice of this decision will be published in the Federal Register.

4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.