



VIA E-FILING

October 6, 2016

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

Re: STB Docket No. NOR 42148 North Coast Railroad Authority and Northwestern Pacific Railroad Company v. Sonoma-Marín Area Rail Transit District

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the Sonoma-Marín Area Rail Transit District ("SMART") reply to the North Coast Railroad Authority and Northwestern Pacific Railroad Company in accordance with the Board's October 5, 2016 order.

If you have any questions, please let me know.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Ed Fishman', written over a horizontal line.

Ed Fishman  
Attorney for Sonoma-Marín Area Rail Transit District

Enclosures

ATTORNEYS AT LAW

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**ENTERED**  
**Office of Proceedings**  
**October 6, 2016**  
**Part of**  
**Public Record**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. NOR 42148**

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

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**SMART'S REPLY IN ACCORDANCE WITH BOARD ORDER OF OCTOBER 5, 2016**

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*Counsel for Sonoma-Marín Area Rail Transit District*

October 6, 2016

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. NOR 42148**

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**NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC  
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**SMART'S REPLY IN ACCORDANCE WITH BOARD ORDER OF OCTOBER 5, 2016**

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The Sonoma-Marín Area Rapid Transit District (“SMART”), through undersigned counsel, hereby files this reply in accordance with the Board’s order in this proceeding served on October 5, 2016.<sup>1</sup>

SMART believes that the issuance of a declaratory order by the Board in this matter is unwarranted because (i) there is no purported limitation on the movement by the Railroad<sup>2</sup> of grain cars or any cars other than tank cars loaded with Liquefied Petroleum Gas (“LPG”), (ii) the LPG-loaded tank cars are *not* being moved to a customer or shipper destination, and (iii) the Railroad intends to move the LPG-loaded tank cars to storage on the subject line for an indefinite period of time. Whether the Railroad has the right to store LPG-loaded tank cars on the subject line is in dispute between SMART and the Railroad. That dispute depends on the interpretation of an Operating and Coordination Agreement (the “Agreement”)<sup>3</sup> between the parties and is subject to arbitration. Moreover, it is our understanding that the Railroad’s intended storage operation here would violate PHMSA regulations as interpreted by the FRA.

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<sup>1</sup> SMART is filing this reply in accordance with the Board’s order without waiving the right to file a more detailed response to the Petition for Declaratory Order filed on October 4, 2016.

<sup>2</sup> We use the term “Railroad” here for convenience to refer to the North Coast Railroad Authority (“NCRA”) and the Northwestern Pacific Railroad Company (“NWP”). The NCRA is the counterparty to the Operating and Coordination Agreement with SMART, and NWP is subject to the Operating and Coordination Agreement by virtue of being NCRA’s contract freight operator.

<sup>3</sup> A copy of the Agreement is included in the Petition for Declaratory Order.

SMART believes that Section 7.05 of the Agreement prohibits the Railroad from storing hazardous materials on SMART's property. The Railroad disagrees and, instead of resolving the issue with SMART or arbitrating the issue under the Agreement, it has been attempting to move 12 tank cars loaded with LPG from its interchange with the California Northern Railroad at Brazos Junction to two yard tracks in Schellville on the Lombard Segment of the property owned by SMART. These LPG-loaded tank cars were designated by the Railroad for delivery to "Schellville," are not designated for delivery to any customer of the Railroad, and (based on information and belief) will be stored in the Schellville yard on an indefinite basis until the Railroad moves the cars by reverse route back to interchange with the California Northern.

In order to protect its contractual rights under Section 7.05 of the Agreement, SMART's dispatching office (which is responsible for dispatching the Lombard Segment pursuant to Section 5.01 of the Agreement) has refused to issue a track warrant to the Railroad for the delivery of these LPG-loaded tank cars to Schellville for indefinite storage. SMART has never purported to stop the Railroad's movement of grain cars or any cars other than the LPG-loaded tank cars bound for storage. SMART has made it clear to the Railroad that it does not purport to require preclearance of the movement of the grain cars over the SMART property.<sup>4</sup>

Instead of taking simple steps to move the six grain cars from Brazos Junction to its awaiting customers in Petaluma, the Railroad is using those grain cars as a pretense to support its Petition for Declaratory Order by leaving them attached to the end of the consist that includes the 12 LPG-loaded tank cars and asking for a track warrant from SMART for the entire consist. The Railroad knows full well that it can meet its common carrier delivery requirements with respect to the grain cars without any preclearance or interference from SMART.

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<sup>4</sup> See e-mail correspondence between SMART and the Railroad that is attached hereto as Exhibit A.

The issue of whether the Railroad can store the LPG-loaded tank cars on SMART's property is a question of contractual interpretation. Although SMART believes that the contract is clear on this point, the contract is governed by California law and disputes about the interpretation of this provision of the contract are subject to the arbitration clause in Section 14 of the Agreement.<sup>5</sup> The Board typically does not get involved in contractual disputes<sup>6</sup> and there is no reason for it to do so in this instance. The Railroad agreed to the contractual restriction in Section 7.05 of the Agreement and cannot invoke ICCTA preemption to avoid its voluntary contractual commitments. Town of Woodbridge v. Consolidated Rail Corporation, STB Finance Docket No. 42053 (STB served Dec. 1, 2000). The Railroad's own commitments, as reflected in the Agreement, are not subject to ICCTA preemption. The Board need not consider hypothetical preemption issues related to the storage of LPG-loaded tank cars on the property that it might need to consider if the Railroad and SMART had not entered into the Agreement. The Agreement reflects the Railroad's determination that not storing loaded hazardous material tank cars on the subject line would be acceptable to it. The Railroad has not shown that enforcement

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<sup>5</sup>The Railroad apparently believes that the tracks in question in the Schellville yard where it intends to store the LPG-loaded tank cars fall within the definition of "Industrial Tracks" under the Agreement and therefore may not be subject to the prohibition on storage set forth in Section 7.05. SMART disagrees with the Railroad's position because the tracks are in the Schellville yard next to the main line track on which Amtrak special trains and SMART DMU's have operated in the recent past. These tracks are not clearly designated as Industrial Tracks available only for freight service under the Agreement. Moreover, the railroad operating timetable applicable to the Lombard Segment does not designate these tracks as Industrial Tracks (but does designate three other tracks within the Lombard Segments as Industrial Tracks by agreement of the parties, including one industrial track on the Brazos Subdivision). The timetable also makes clear that the tracks where the Railroad intends to store the LPG-loaded tank cars in Schellville are considered yard tracks. Ultimately, the question of how these tracks are defined under the Agreement is a matter of contractual interpretation subject to arbitration in the event of a dispute between the parties.

<sup>6</sup> See, General Ry. Corp., D/B/A Iowa Northwestern R.R. —Exemption for Acquisition of Railroad Line—in Osceola & Dickinson Counties, Iowa, STB Finance Docket 34867, slip op. at 4 (STB served June 15, 2007), Lackawanna County R.R. Authority – Acquisition Exemption – F&L Realty, STB Finance Docket 33905, et al., slip op at 6 (STB served Oct. 22, 2001).

of this contractual obligation would unreasonably interfere with its common carrier operations. Id. slip. op. at 4-5.

In addition to the dispute between the parties about the contractual interpretation of Section 7.05 of the Agreement, the Railroad's proposed storage activity here would violate federal hazardous material safety regulations which prohibit "rolling storage" of hazardous materials on railroad property unless the storage takes place under a lease arrangement with a shipper that qualifies as a "private track" agreement under 49 CFR 171.8. The Railroad has failed to provide any evidence to the Board, or to SMART, of any such "private track" agreement, which might make its proposed storage activities on the Lombard Segment permissible under FRA and PMHSA regulations.<sup>7</sup> Even if the Railroad could show that it has a "private track" agreement with a shipper for storage, that agreement would violate Section 8.03 of the Agreement, which prohibits the Railroad from entering into any leases on the subject property (which is part of the Lombard Segment) without SMART's approval. To SMART's knowledge, the Railroad does not dispute SMART's approval rights under Section 8.03 of the Agreement, but in any event the interpretation of this contractual provision also is subject to arbitration.

Although the Railroad's proposed storage activity here would violate federal hazardous material safety regulations, it bases its request for expedited consideration and emergency injunctive relief on its purported need to comply with 49 C.F.R. 174.14, which requires a rail carrier to forward each shipment of hazardous materials that it receives in interchange "promptly" and within 48 hours or via the first available train if train service is provided only a weekly or biweekly basis. In other words, the Railroad cloaks its injunction request on federal

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<sup>7</sup> The FRA inspection report included with the Railroad's Petition for Declaratory Order indicates that "lease agreements were not available and will be provided at a later date."

hazardous materials safety regulations which it would violate if it obtained the relief it seeks here from the Board and moved the LPG-loaded tank cars to Schellville for indefinite storage.

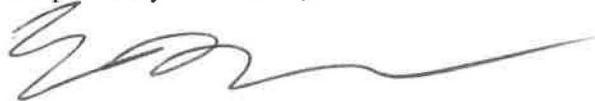
The FRA, which is responsible for enforcing 49 C.F.R. 174.14 and other related PMHSA regulations, has made it clear that railroads are prohibited from storing hazardous materials on their property indefinitely unless the storage occurs on “private track.” See 49 C.F.R. 173.10; 49 C.F.R. 174.14; and 49 C.F.R. 174.204. The applicable regulation (49 C.F.R. 171.8) defines “private track” as (i) track located outside of a carrier’s right-of-way, yard or terminal, or (ii) track leased by a railroad to a lessee, which the lease provides for exclusive use of that trackage by the lessee for purposes of moving only cars shipped to or by the lessee, and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage. The tracks at issue here in the Schellville yard do not qualify as “private track” because (i) the tracks are within the Schellville yard adjacent to the main line track, and (ii) the Railroad has control and responsibility over the tracks and specific cars that would be located on those tracks.<sup>8</sup> Thus, the Railroad is prohibiting under federal safety regulations from storing these LPG-loaded tank cars on the Schellville yard tracks indefinitely.

For the foregoing reasons, SMART believes that the Board should deny the request for declaratory order and looks forward to discussing the matter further with Board staff this afternoon.

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<sup>8</sup> 49 C.F.R. 174.14 (b) further provides that tank cars loaded with Division 2.1 flammable gas such as LPG may not be held at any point by a railroad subject to “forwarding orders.”

Respectfully submitted,



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Kevin M. Sheys  
Edward J. Fishman  
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(707) 794-3275

*Counsel for Sonoma-Marín Area Rapid  
Transit District*

Dated: October 6, 2016

# EXHIBIT A

## Marks, Justin

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**From:** Tom Lyons <tlyons@sonomamarintrain.org>  
**Sent:** Wednesday, October 05, 2016 12:33 PM  
**To:** Sheys, Kevin M.  
**Subject:** FW: Inbound LPG

### Tom Lyons

General Counsel  
Sonoma-Marine Area Rail Transit District  
5401 Old Redwood Hwy., 2<sup>nd</sup> Floor  
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707-794-3275 (direct)  
707-794-3037 (fax)  
[tlyons@sonomamarintrain.org](mailto:tlyons@sonomamarintrain.org)

The information in this e-mail is confidential. It may also be attorney-client privileged and/or protected from disclosure as attorney work product. If you have received this e-mail message in error or are not the intended recipient, you may not use, copy, nor disclose to anyone this message or any information contained in it. Please notify the sender by reply e-mail and delete the message.

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**From:** Jon Kerruish  
**Sent:** Wednesday, October 05, 2016 9:32 AM  
**To:** Tom Lyons  
**Subject:** FW: Inbound LPG

FYI

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**From:** Jon Kerruish  
**Sent:** Tuesday, October 04, 2016 1:43 PM  
**To:** 'nwpjake@gmail.com' <[nwpjake@gmail.com](mailto:nwpjake@gmail.com)>  
**Cc:** Duane Sayers <[dsayers@sonomamarintrain.org](mailto:dsayers@sonomamarintrain.org)>  
**Subject:** RE: Inbound LPG

Jake  
Just to clarify, SMART takes no exception to the transportation of NWPco non-hazardous material freight.

Jon

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**From:** Jon Kerruish  
**Sent:** Sunday, October 02, 2016 5:50 PM  
**To:** 'nwpjake@gmail.com' <[nwpjake@gmail.com](mailto:nwpjake@gmail.com)>  
**Cc:** Duane Sayers <[dsayers@sonomamarintrain.org](mailto:dsayers@sonomamarintrain.org)>  
**Subject:** RE: Inbound LPG

Jake-  
Please be advised SMART is not denying you transportation of these materials per the operating agreement. The same agreement also prohibits the storage of hazardous materials.

Please assure us these hazardous materials will not be stored at the Schellville location and will be transported to another location per our agreement.

Thanks,  
Jon

**From:** [nwpjake@gmail.com](mailto:nwpjake@gmail.com) [<mailto:nwpjake@gmail.com>]  
**Sent:** Sunday, October 02, 2016 5:27 PM  
**To:** Jon Kerruish <[JKerruish@sonomamarintrain.org](mailto:JKerruish@sonomamarintrain.org)>  
**Cc:** Duane Sayers <[dsayers@sonomamarintrain.org](mailto:dsayers@sonomamarintrain.org)>  
**Subject:** Re: Inbound LPG

That is up to our customer.

Sent from my iPhone

On Oct 2, 2016, at 17:17, Jon Kerruish <[JKerruish@sonomamarintrain.org](mailto:JKerruish@sonomamarintrain.org)> wrote:

Jake please answer the highlighted question below.

Jon

-----Original Message-----

From: Jon Kerruish  
Sent: Sunday, October 02, 2016 5:07 PM  
To: '[nwpjake@gmail.com](mailto:nwpjake@gmail.com)' <[nwpjake@gmail.com](mailto:nwpjake@gmail.com)>  
Cc: Duane Sayers <[dsayers@sonomamarintrain.org](mailto:dsayers@sonomamarintrain.org)>  
Subject: RE: Inbound LPG

Jake, please send me all requested information from my email below.

Thanks,  
Jon

-----Original Message-----

From: [nwpjake@gmail.com](mailto:nwpjake@gmail.com) [<mailto:nwpjake@gmail.com>]  
Sent: Sunday, October 02, 2016 2:00 PM  
To: Jon Kerruish <[JKerruish@sonomamarintrain.org](mailto:JKerruish@sonomamarintrain.org)>  
Cc: Duane Sayers <[dsayers@sonomamarintrain.org](mailto:dsayers@sonomamarintrain.org)>  
Subject: Re: Inbound LPG

Your saying we can pick up the LPG cars and deliver to Schellville?

Sent from my iPhone

> On Oct 2, 2016, at 11:42, Jon Kerruish <[JKerruish@sonomamarintrain.org](mailto:JKerruish@sonomamarintrain.org)> wrote:

>

> Jake, please refer to the SMART's General Managers letter to the NCRA/NWPco dated September 22, 2016. Please provide SMART with the following information.

>

> 1. Copy of Manifest

> 2.Type of load/material being transported on SMART owned track 3.  
> Origin and Destination of transported rail cars 4.Total number of rail  
> cars 5. number of loads and empties 6.Total tonnage of train 7.Total  
> length of train  
>  
> Because the operating agreement between NCRA and SMART doesn't authorize storage of hazardous  
rail cars please, provide SMART with the timing of these 12 hazardous rail cars moving to the next  
destination from Schellville.  
>  
> SMART will issue a track warrant immediately to NCRA/NWPco after compiling with the information  
above.  
>  
> Best regards,  
> Jon Kerruish  
>  
>  
> -----Original Message-----  
> From: nwpjake@gmail.com [mailto:nwpjake@gmail.com]  
> Sent: Sunday, October 02, 2016 7:17 AM  
> To: Jon Kerruish <JKerruish@sonomamarintrain.org>  
> Subject: Inbound LPG  
>  
> There are 12 inbound loaded LPG cars at interchange to be picked up today Sunday October 2nd to be  
delivered to Schellville. I see that we are to get your approval to pick them up. We are asking for  
approval. These 12 were already in transit prior to the recent events. We have put all remaining  
inbound LPG cars on hold. If we do not pick them up we will be in violation of the 48 hour rule within 48  
hours of our outbound interchange. Please advise.  
>  
> Sent from my iPhone

**CERTIFICATE OF SERVICE**

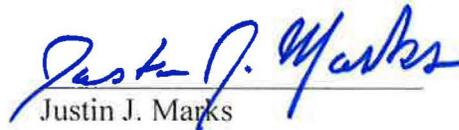
I certify that on October 6, 2016 a true copy of the foregoing Response was served via electronic mail upon the following counsel of record:

Douglas H. Bosco  
Law Office of Douglas Bosco  
3558 Round Barn Blvd., Suite 201  
Santa Rosa, CA 95403

*Counsel for Northwestern Pacific Railroad Company*

Christopher J. Neary  
Neary and O'Brien  
110 S Main Street, Suite C  
Willits, CA 95490

*Counsel for North Coast Railroad Authority*

  
Justin J. Marks