

STB FINANCE DOCKET NO. 34111

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

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*Decided August 19, 2002*

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The Board finds that any requirement by the City of Encinitas, CA, under state law that petitioner obtain a permit or other prior approval in order to build a passing track is preempted by 49 U.S.C. 10501 (b).

**BY THE BOARD:**

By petition filed on October 11, 2001, North San Diego County Transit Development Board, d/b/a North County Transit District (NCTD), requested that we institute a declaratory order proceeding and determine that the City of Encinitas, CA (the City), is prohibited from requiring NCTD to obtain a permit or other prior approval in order to construct the Encinitas Passing Track on NCTD's San Diego Subdivision 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. Therein, to help determine the extent of the Board's jurisdiction over the project, the parties were asked 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 request.<sup>1</sup> On January 4, 2002, the City and the Commission also filed comments separately responding to the information request.<sup>2</sup>

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<sup>1</sup> Attached to NCTD's comments was a statement in support from Jeffery B. Wright, Division General Manager, The Burlington Northern and Santa Fe Railway Company (BNSF).

<sup>2</sup> 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.

## 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).<sup>3</sup> Although this transaction transferred ownership of the track and related physical assets 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, our predecessor agency, the Interstate Commerce Commission (ICC),<sup>4</sup> issued a decision concluding that, by 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<sup>5</sup> 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 that would connect to the Line between milepost 234.5 and milepost 243.3. The passing track would run from milepost 238.0 to milepost 239.7.

The California Coastal Act, a California state law, requires 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

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<sup>3</sup> The Santa Fe was a predecessor to BNSF. Other entities acquiring similar interests in property from the Santa Fe in the same transaction were the OCTA, the Riverside County Transportation Authority, the San Bernardino Associated Governments, and the San Diego Metropolitan Transit Development Board.

<sup>4</sup> 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.

<sup>5</sup> Specifically, NCTD acquired control over maintenance, dispatching, new track construction, and scheduling of service.

that preparation of an environmental report would be required prior to construction. NCTD appealed this determination on October 10, 1997, to the City Council of Encinitas, but abandoned the appeal on February 20, 1998, before it was heard. On July 19, 2001, stating that it feared the loss of state funds for the project,<sup>6</sup> NCTD's board voted to proceed with construction of the passing track without the permit.

In August 2001, prior to NCTD's filing of this request for declaratory order, the City filed an action with the San Diego County Superior Court seeking declaratory and injunctive relief preventing NCTD from building the passing track until it fulfilled the state permitting requirement.<sup>7</sup> On September 26, 2001, NCTD had the state court action removed to the United States District Court for the Southern District of California. On January 14, 2002, the District Court issued a decision finding that the City's permitting process is preempted by 49 U.S.C. 10501(b), as broadened by the ICCTA, and dismissing the 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)<sup>8</sup> (*City of Encinitas*).<sup>9</sup>

#### PRELIMINARY MATTERS

*Oral hearing and cross-examination.* Included in the City's January 4, 2002 reply is a request for oral hearing and cross-examination. The City has offered no justification for either request. The City has not shown that it is unable to make its case on a written record, or that it requires an oral hearing for any other reason. Nor has the City shown any need to cross-examine any witness offered by NCTD. The statements of these witnesses were offered in written form, and

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<sup>6</sup> 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.

<sup>7</sup> 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.*).

<sup>8</sup> Pending review in *City of Encinitas v. North San Diego County*, No. 02-55300 (9th Cir. filed February 20, 2002).

<sup>9</sup> In a letter dated January 16, 2002, NCTD commented on the court decision. On January 22, and February 5, 2002, respectively, respondents requested leave to file a response. In the interest of compiling a complete record, respondents' request will be granted and their response will be accepted and considered.

the City has not shown why written replies would not suffice to provide adequate opportunity to challenge and rebut those statements. Accordingly, the request for oral hearing and cross-examination will be denied.

*Expedited handling.* The City has also objected to NCTD's request that the case be accorded expedited handling. We have already solicited and received evidence and argument in two rounds of pleadings in this matter, and all parties, including the City, have had ample opportunity to state their views and to reply to the comments of the other parties. For these reasons, we find no merit in the City's objection.

*Discovery.* The City asked that we accord it the right to seek discovery. Our regulations at 49 CFR 1114.21(b) provide that "[a]ll discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." Thus the City had recourse to discovery without an order from us. Board action is required on discovery matters only when a party files a motion to compel discovery that another party has refused to provide. We have received no such motions during the course of this proceeding.

*Motion to strike.* On January 11, 2002, NCTD filed a motion to strike certain statements made in the City's comments as incorrect and misleading. Specifically, NCTD seeks to have stricken the City's assertion that the proposed passing track is included in the Coastal Double Track Implementation Policy (the Policy), and that NCTD committed to conducting an environmental impact report for the project. According to NCTD, neither point was included in the final version of the Policy. On January 31, 2002, the City filed a reply in which it disputed NCTD's characterization of its obligations under the Policy. The motion to strike will be denied. NCTD's objection goes more to the weight to be accorded the material than to its admissibility. In any event, the contents of the Policy are not a factor in our decisionmaking here.

#### DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. *See* 49 U.S.C. 721. As noted in the December 6, 2001 order instituting this proceeding, there is a controversy on the present record regarding the applicability of 49 U.S.C. 10501(b). Upon review of the record, as supplemented, we find 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).

NCTD asserts that federal law preempts state and local permitting requirements here because it is a carrier subject to our jurisdiction, because common carrier rail freight service will benefit from construction of the new passing track, and because imposing state and local laws in these circumstances could thwart the enhancement of operations on the Line. NCTD adds that the fact that it and Amtrak also use the Line for non-freight purposes does not divest us of our exclusive and plenary jurisdiction over the common carrier freight service provided over the Line.

BNSF's witness Wright discusses in his verified statement how the construction of the passing track will benefit common carrier rail freight service. According to Wright, 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.

Respondents counter that there is no preemption of state regulation in this case because the passing track would have little or no impact on, or benefit to, freight operations.<sup>10</sup> Rather, they argue, the passing track will primarily benefit NCTD's commuter operations, over which we lack jurisdiction.<sup>11</sup> Respondents also argue that the City's actions are a legitimate use of its police powers, that NCTD has voluntarily participated in the past in the state environmental permit process, and that petitioner's actions here are a clear violation of its legislative charter.<sup>12</sup>

In *City of Encinitas*, the District Court addressed the same preemption issues that have been raised here. The court rejected the City's claim that the Board

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<sup>10</sup> Respondents assert that the lack of benefit to BNSF is substantiated by the fact that it has not been asked to share the cost of the construction with NCTD. They also assert that BNSF's claims of benefit from the passing track are "conclusory, vague, and dubious."

<sup>11</sup> Respondents further argue against preemption by asserting that the sole *motive* for building the passing track is to improve commuter service, with only incidental benefit to freight service. We will not base our decision on NCTD's motives but, rather, on the effects of the project on interstate commerce by rail.

<sup>12</sup> Respondents argue that, because NCTD is not a private entity but a political creation of the State of California and must act according to its charter, intervention by us in this matter of state politics would violate California's constitutionally protected state sovereignty. But we are not attempting here to apply or interpret California state law; rather, in this decision, we are interpreting the reach of the federal preemption statute, 49 U.S.C. 10501(b).

lacks jurisdiction over NCTD because it is not an interstate railroad but, rather, a provider of local mass transportation. Rather, the court found that “NCTD is both a commuter rail operator and a ‘rail carrier’ owning and operating an interstate rail line\* \* \* \* Furthermore, under NCTD’s Shared Use Agreement with Amtrak and BNSF, NCTD is obligated to ‘efficiently maintain its rail line for both interstate and intra rail traffic.’” *City of Encinitas*, slip op. at 7. As such, the court concluded (*id.*), “NCTD comes within the Act’s definition of a rail carrier and is thus subject to STB jurisdiction.”

We agree with the court. Indeed, in *Orange County*, the ICC specifically found NCTD to be a rail carrier subject to our jurisdiction.<sup>13</sup> As indicated, NCTD owns and operates an interstate rail line and is obligated to maintain the line for both interstate and intrastate rail traffic. Although NCTD also conducts commuter rail service, that authority does not affect its rights and obligations under the ICCTA.

Furthermore, the record before us shows that the passing track will benefit freight operations in addition to mass transportation operations. As indicated above, 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).

Respondents maintain that the City’s actions are a legitimate use of its traditional police powers. However, as the Court found in *City of Encinitas*, slip op. at 6, “the ICCTA prohibits any (state or local) government action or regulation which forecloses or restricts the ‘railroad’s ability to conduct its operation or otherwise unreasonably burden interstate commerce.’”

Section 10501(b), as broadened by the ICCTA, provides:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

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<sup>13</sup> Respondents note that the Board granted NCTD an exemption from the provisions of 49 U.S.C. Subtitle IV in *Orange County Transportation Authority*, Finance Docket No. 32173 (STB served March 12, 1997) (*Orange County II*). The grant of that exemption, however, did not remove our jurisdiction, and we retain the power to reassert our regulatory authority over NCTD if appropriate. See 49 U.S.C. 10502(d).

(2) 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, is exclusive.

As the court in *City of Encinitas* observed, “[c]ourts have interpreted [section 10501(b)] broadly, since ‘[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.’” *City of Encinitas*, slip op. at 5, citing *CSX Transp., Inc. v. Georgia Public Service Com’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In addressing the scope of section 10501(b), the courts have found no basis for distinguishing between “economic” and “environmental” regulation, stating that:

if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

*City of Encinitas*, slip op. at 6, citing *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (*City of Auburn*). Thus, as the court in *City of Encinitas* explained (slip op. at 6):

If the Court were to allow the City of Encinitas to impose environmental or permit regulations upon NCTD operations, NCTD might be prevented from constructing the passing track. Such action would be tantamount to economic regulation by a local government over a rail carrier. The ICCTA demonstrates Congress’ intent to preempt such regulatory authority over railroad operations and to vest jurisdiction over these claims exclusively in the STB. Accordingly, the Court finds that [the City’s] claims are preempted by the ICCTA.

We have repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce. See *Auburn & Kent, WA—Pet. For Declar. Order—Stampede Pass Line*, 2 S.T.B. 330 (1997) (*Stampede Pass*), *aff’d*, *City of Auburn; Borough of Riverdale—Petition for Declaratory Order*, 4 S.T.B. 380 (1999) (*Riverdale I*) at 388; *Friends of the Aquifer, et al.—Petition for Declaratory Order*, 5 S.T.B. 880 (2001) (*Friends of the Aquifer*) at 884 n.8.

State and local environmental regulation has been found to be preempted in those cases where the Board has licensing authority over railroad activities, as

well as where it does not. The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and it conducts an environmental review of such activities under the National Environmental Policy Act (NEPA), and can adopt appropriate environmental mitigation conditions in response to concerns of the parties, including local authorities. *See Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500 (2001) (*Ayer*) at 503, n.14.<sup>14</sup> Even in situations that do not require a Board license — for example, a carrier building or expanding facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets,<sup>15</sup> or constructing ancillary tracks and facilities excepted from the Board licensing requirement by 49 U.S.C. 10906<sup>16</sup> — in which the Board therefore does not conduct its own environmental review, the courts have held that the express statutory preemption of section 10501(b) applies. *See Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp.2d 1186 (E.D. Wash. 2000) (*Flynn*); *Ayer* at 506-7; *Riverdale I* at 384-390; *Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (STB served February 27, 2001) (*Riverdale II*) at 3; *Friends of the Aquifer* at 883.<sup>17</sup>

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<sup>14</sup> Under section 10901(a), a license from the Board (and an appropriate environmental review) is required for a railroad's construction of "an extension to any of its railroad lines \* \* \* [or] \* \* \* an additional railroad line \* \* \*". The terms "extension" and "additional railroad line" are not defined in the statute. These terms have been interpreted, however, in *Texas & Pacific v. Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266 (1926), as those tracks that enable a railroad to penetrate or invade a new market. *See Union Pacific RR Co.—Petition—Rehabilitation of MO-KS-TX RR*, 3 S.T.B. 646 (1998) (*Rehabilitation of M-K-T*).

<sup>15</sup> *See Nicholson v. ICC*, 711 F.2d 364, 368-70 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984); *Riverdale I*. Railroads also do not require Board authority to upgrade an existing line. *See Rehabilitation of M-K-T*.

<sup>16</sup> Under section 10906, "The Board does not have authority \* \* \* over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

<sup>17</sup> We have not, however, held in these cases that all state and local regulation that affects railroads is preempted. Rather we have stated that state and local regulation is appropriate where it does not interfere with rail operations. Furthermore, we and the courts have indicated that state and local entities may utilize their police power to protect the public health and safety and may enforce, in a non-discriminatory manner, electrical and building codes or fire and plumbing regulations, so long as they do not require the obtaining of permits as a prerequisite to constructing or operating railroad facilities. *See Flynn*. In this case, however, none of these types of activities is implicated and the City has nevertheless imposed a local permitting requirement. It is well settled that such requirements are preempted.

Here, as in *Stampede Pass* and *Ayer*, the City seeks to require that NCTD apply for and obtain an environmental permit and other pre-approvals as a prerequisite to building a passing track. As the court found in *City of Encinitas*, these state permitting requirements are preempted because, otherwise, the City could deny NCTD the right to proceed with its construction project, thus frustrating NCTD's proposal to construct a passing track that would benefit not only it and Amtrak but interstate freight carrier BNSF as well.<sup>18</sup>

*We find:*

Under 49 U.S.C. 10501(b), the City of Encinitas, CA, is prohibited from requiring NCTD to obtain a permit or other pre-approvals prior to constructing the Encinitas Passing Track on NCTD's San Diego Subdivision main track.

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 request for oral hearing and cross-examination is denied.
2. NCTD's motion to strike is denied.
3. Respondent's request for leave to file comments related to the court decision in *City of Encinitas* is granted.
4. NCTD's request for declaratory relief is granted as set forth above.
5. This decision is effective 30 days from its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

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<sup>18</sup> Indeed, were we to allow the City to block this proposal by not preempting the permit process here, we would, in effect, be sanctioning the kind of "undue interference" with interstate freight service about which we were concerned in our 1997 *Orange County II* decision.