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BEFORE THE
SURFACE TRANSPORTATION BOARD

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TRANSPORTATION AUTHORITY

**REPLY TO FEE WAIVER REQUEST AND PETITION FOR A
DECLARATORY ORDER**

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REPLY TO PETITION FOR DECLARATORY ORDER

INTRODUCTION

Pitman Family Farms submits this reply to Petitioner, Tenth Avenue Neighbors’ (“TAN”) petition to the Surface Transportation Board (“Board”) for a declaratory order requesting that the Board declare that a rail spur used by Pitman Family Farms is not a rail carrier within the meaning of 49 U.S.C. § 10102(5). Pitman Family Farms maintains that the rail spur is subject to the Interstate Commerce Act and falls beneath the jurisdiction of the Board. Pitman Family Farms further contends that TAN’s request is wholly unnecessary because no actual controversy or uncertainty exists that requires the Board to act.

BACKGROUND

1. Pitman Family Farms, a family-owned local business, is based in Sanger, California with facilities in nearby Hanford and Fresno. Pitman Family Farms grows poultry products, including antibiotic-free, organic, free-range chicken, ducks and turkeys. These poultry products are distributed nationwide and feed the country¹. More than half of Pitman Family Farms employees belong to one or more minority groups. (Bel’s Poultry, LLC is a related entity.)

¹ Mary’s Chicken, a Pitman Family Farms product, is served exclusively at Stanford Dining Halls. (catering.stanford.edu, accessed January 10, 2023.)

2. Pitman Family Farms operates an antibiotic-free/organic feed mill in the southern part of rural Kings County, approximately 10 miles outside the small town of Hanford, California (“the feed mill”). The feed mill is located in an industrial park zoned for heavy industry named the Kings Industrial Park and is served by Burlington Northern and Santa Fe Railroad (“BNSF”). There is a double track through the park that assists with service. In the industrial park, approximately 10 businesses are served by rail. BN&SF service includes 48 trains per day through Hanford². The feed mill processes and stores feed for poultry animals, including chickens, turkeys and ducks.

3. The Pitman Family Farms’ facility sits directly on a railway line which enables it to ship and process substantial quantities of commodities that include distiller's grain, soybean meal and various types of grains for itself and other agricultural producers.

4. The feed mill also stores feed products for various third parties that also operate livestock feed manufacturing and transloading facilities throughout the western states, and export grains and commodities to Mexico, the Pacific Rim and the Far East. Pitman Family Farms stores various commodities for third parties and loads and ships them for the third parties own use, as well as fulfills orders on behalf of the third parties. None of the feed or feed commodities that are processed and

²https://www.cityofhanfordca.com/departments/community_development/economic_development_division/industrial_development.php (accessed January 11, 2023.)

stored at the feed mill are used to feed livestock on the property. The feed and/or commodities are stored before continuing transportation to distributors and ultimately to agricultural producers.

5. The railway line that services the feed mill is operated by BNSF Railway Company, one of North America's leading freight transportation companies. In 2021, BNSF hauled 1.2 million carloads of agricultural commodities. The BNSF line connects to the Pitman Spur adjacent to the feed mill, as it does to various other facilities in and near the feed mill.

6. Pitman Family Farms is obligated per the terms of its agreement with BNSF to offload deliveries of commodities within a tight timeframe. For example, a 100-car unit train of corn is required to be offloaded within 15 hours regardless of the time of delivery. This requires Pitman Family Farms to operate 24 hours per day.

7. In approximately 2019, Caleb Araujo, the only identified member of TAN, began harassing Pitman Family Farms' employees regarding the railcar activity at the feed mill. The harassment included trespassing and threatening behavior and angry telephone calls.

8. Based upon information and belief, Pitman Family Farms is concerned that Caleb Araujo, the only identified member of TAN, has improperly sought a fee waiver from the Board and has inappropriately weaponized the California Rural Legal Assistance League, among others, to pursue his personal hostility towards Pitman Family Farms.

9. Mr. Araujo is and was employed by the State of California at the Corcoran Correctional Facility. As a result, his annual pay is reported by Transparent California. According to that database, Mr. Araujo earned pay and benefits valued at \$282,953.05 in 2018, \$125,193.15 in 2020, and \$134,849.72 in 2021³. Thus, it appears that Mr. Araujo does not qualify as a low income individual and earns substantial income to pursue his complaints without any assistance from rural legal associations or fee waivers.

10. Petitioner's request is based on mere conclusions and not supported by any evidence of its claims. Pitman Family Farms respectfully requests that the Board decline to issue the requested declaratory order for the reasons below.

ARGUMENT

I. No Actual Controversy Exists Regarding the Board and TAN

TAN focuses on a narrow issue—whether the Pitman Spur is a private rail line. But TAN's intent is much broader. TAN's broader goal is to use the Board to issue an order only focusing on the Pitman Spur, not the overall transportation activities taking place on the BNSF line, the Pitman Spur and the feed mill. Pitman Family Farms is informed and believes that TAN seeks to use the Board's order to next ask the City of Hanford to restrict or halt the transportation-related activities

³ See <https://transparentcalifornia.com/>, accessed January 9, 2023.

taking place at the feed mill. Thus, TAN will use the requested order for the purposes of restricting interstate commerce.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321⁴ to issue a declaratory order to eliminate a controversy or remove uncertainty. However, issues involving federal preemption under 49 U.S.C. § 10501(b) may be decided either by the Board or the courts in the first instance, as both the Board and courts have concurrent jurisdiction to determine preemption. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005).

In the present matter, the Board should decline to exercise its discretionary authority to issue a declaratory order. The issues in this case stem from Petitioner's complaints regarding Pitman Family Farms' use of its property pursuant to local and state law. Petitioner claims that Pitman Family Farms has violated local and state ordinances such as the California Health and Safety Code, the City of Hanford General Plan and the City of Hanford Municipal Code.

Thus, the complaints primarily involve the application of local and state laws regarding the use of the feed mill property. These are issues which the California state court can resolve in conjunction with the preemption arguments under the

⁴ The Surface Transportation Board Reauthorization Act of 2015, P.L. No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

Interstate Commerce Act. Without the benefit of having a complete record on these property use issues, there is no actual controversy for the Board to decided. The Board does not have the benefit of the totality of the issues alleged by the Petitioner and, therefore, should not assert its discretion in this matter. Because no controversy exists, it logically follows that TAN lacks standing to bring this petition.

II. If the Board Intends to Exercise its Discretion to Consider the Merits of this Matter, Petitioner's Allegations are Preempted Under the Act

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), expressly provides that the jurisdiction of the Board over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). The statute defines “transportation” expansively to encompass any property, facility, structure or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus is intended to

prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.

In interpreting the reach of § 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny or restrict a railroad's ability to conduct rail operations.

Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997); CSX Transp., Inc.—Pet. for Declaratory Order (CSXT), FD 34662 (STB served Mar. 14, 2005), reconsideration denied (STB served May 3, 2005); Joint Pet. for Declaratory Order—Bos. & Me. Corp. (Town of Ayer), FD 33971 (STB served May 1, 2001), reconsideration denied (STB served Oct. 5, 2001). While federal law permits “the continued application of laws having a more remote or incidental effect on rail transportation,” it preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation.” N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007).

Applying these well-established preemption principles, Petitioner's complaints regarding Pitman Family Farms' property use are preempted by § 10501(b). The Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable request. See 49 U.S.C. § 11101⁵. Any local orders prohibiting or restricting rail traffic to the feed mill would conflict with the federal right of Pitman Family Farms to request common carrier service and the federal obligation of BNSF, a rail common carrier, to provide that service, as well as the Board's exclusive jurisdiction over that service. 49 U.S.C. § 10501(b)(1). As the federal courts and the Board have held repeatedly, where a local regulation conflicts with the rights and obligations contained in the Interstate Commerce Act, federal law will preempt the local regulation. City of Auburn, 154 F.3d at 1031; City of Austell, 1997 U.S. Dist. LEXIS 17236, at *19-22; CSXT, slip op. at 8-9; Town of Ayer, slip op. at 8-11.

III. The Activities Complained of by TAN are Preempted Transportation-Related Activities

Petitioner's alleged complaints about noise from railcars braking and coupling are activities that fall within the statutory definition of rail "transportation". In establishing the Board's jurisdiction, Congress defined the term "transportation" broadly to include: (1) "a locomotive, car, vehicle, vessel, warehouse, wharf, pier,

⁵ These federal rights and obligations include, for example, the right of a shipper to require a carrier, under certain circumstances, to construct and operate a switch connection to connect the shipper's private side track with the interstate network. See 49 U.S.C. § 11103.

dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” 49 U.S.C. § 10102(9)(A); and (2) services “related to” that movement, including “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers or property,” 49 U.S.C. § 10102(9)(B).⁶ Whether a particular activity constitutes transportation by rail carrier under § 10501(b) is a case-by-case, fact-specific determination. Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015).

Moreover, under § 10102(9)(B), “transportation” activities are not limited to transloading, but rather encompass “services related to [the rail] movement.” The loading and unloading of railcars performed at the feed mill satisfy the statutory definition because they relate directly to the transportation of goods by a common carrier. The statutory definition of “transportation” broadly includes “handling” and other “services related to [rail] movement.” 49 U.S.C. § 10102(9)(B). “Handling” involves “coordination and integration of operations such as un-packing, re-packing, packaging, and movement of materials or goods over short distances.” Under the statute, “transportation” is not limited to transloading activities.

⁶ Congress has long recognized a need to regulate rail operations at the federal level to avoid state and local regulation from interfering with interstate commerce. City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). Indeed, “transportation” has been defined broadly to encompass handling and services related to the physical movement of property by rail since the Hepburn Act of 1906, Pub. L. No. 59-337, § 1, 34 Stat. 584. The statutory wording changed slightly in 1978, but the change was not intended to be substantive.

Rather, “transportation” embraces both “the movement of passengers or property, or both, by rail” and “services related to that movement.” (*Id.*) Because all the activities complained of by TAN are part of “transportation” under the auspices of a rail carrier, BNSF, they are within the Board’s jurisdiction under 49 U.S.C. § 10501(a). And, therefore, the property-related claims are preempted.

IV. The Transportation-Related Activities at the Feed Mill are Preempted Despite the Classification of the Pitman Spur

The Petitioner argues that the Pitman Spur is a private rail track and, therefore, preemption does not apply. But, the Board has held in a previous decision in the Boston and Marine Corporation and Springfield Terminal Railroad Company—Pet. for Declaratory Order (Boston and Marine), FD 35749 (STB served July 19, 2013) that the private or public nature of a track is not dispositive. That proceeding involved two railroad tracks adjacent to a warehouse. Residents near those tracks filed a complaint with the local municipality regarding noise complaints from the trains coupling at night. The town ordered all rail traffic at the two tracks to immediately cease. The Board held in its decision that zoning decisions by local municipalities which would ban freight to a warehouse are preempted by federal law.

The Board focused on the nature of the transportation-related activities and whether transportation and interstate commerce would be affected to deprive the warehouse operator of the right to receive common carrier services. The Boston and Marine decision is closely on point to the facts in the present matter. Here, Pitman

Family Farms has the right to receive common carrier services from BNSF and the classification of the Pitman Spur should not affect the analysis of the Board. (Id.)

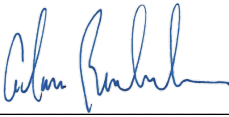
Petitioner cites to the Willis decision in support of its request that the Board declare the Pitman Spur a private rail line. The Willis decision focuses on a permitting dispute regarding a private rail track and is not relevant to the current matter. Willis does not address the broader issue of transportation-related activities that are actually interfacing with BNSF and Pitman Family Farms and third-party customers and is not governing here and should be disregarded. (B. Willis, C.P.A., Inc.—Pet. for Declaratory Order (Willis), FD 34013 (STB served October 3, 2001).)

CONCLUSION

For the reasons identified above, Pitman Family Farms respectfully requests the Board decline TAN's request for a declaratory order that Pitman Family Farms' transportation-related activities are not preempted under the Act. In the alternative, if the Board intends to exercise its jurisdictional discretion in this matter and does not intend to rule at this stage that preemption applies to Petitioner's claims, Pitman Family Farms requests the Board schedule a hearing to allow Pitman Family Farms to put on witnesses and introduce evidence into the record to establish that the transportation-related activities are preempted.

DATED: January 17, 2023

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CERTIFICATE OF SERVICE

I certify that I have this day served copies of document upon all parties of record in this proceeding, by causing the instant REPLY TO FEE WAIVER REQUEST AND PETITION FOR A DECLARATORY ORDER to be electronically filed with United States Surface Transportation Board and sent via electronic mail and United States Postal Service to the following parties and non-parties below:

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Dated: 1-17-2023



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(49 U.S.C. 721, 5 U.S.C. 553)