

MENDOCINO RAILWAY

100 West Laurel Street
Fort Bragg, CA 95437

309013

December 16, 2024

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
December 16, 2024
Part of
Public Record

Re: *Township of Pilesgrove, N.J. – Petition for Declaratory Order, FD 36770*

Dear Ms. Brown:

Enclosed is the *Amicus Curiae* Brief of Mendocino Railway (MRY) in response to the Surface Transportation Board instituting a proceeding in the above-referenced matter.

If there are any questions concerning this e-filing, please contact me by telephone at (530) 304-1044 or via email at tnilsson@sierraenergy.com.

Sincerely,

Torgny Nilsson
Vice President & General Counsel for
Mendocino Railway, a wholly owned
subsidiary of Sierra Railroad Company

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36770

**TOWNSHIP OF PILESGROVE, N.J. –
PETITION FOR DECLARATORY ORDER**

***AMICUS CURIAE* BRIEF OF MENDOCINO RAILWAY**

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INTRODUCTION

On September 13, 2024, the Surface Transportation Board (the “STB” or “Board”) served a decision instituting a declaratory proceeding at the request of Petitioner, the Township of Pilesgrove, N.J. (“Pilesgrove”), to “whether and to what extent 49 U.S.C. 10501(b) preempts certain local and state laws regarding land use and land development by SMS Rail Service, Inc. (“SMS”).”^{1, 2} The Board on October 24, 2024, adopted a procedural schedule,³ which the Board modified by its subsequent December 6, 2024 decision.⁴ As an interested party, Mendocino Railway (“MRY”) hereby submits its *Amicus Curiae* Brief in support of SMS.

¹ See Township of Pilesgrove, N.J. – Petition for Declaratory Order, FD 36770 (STB served September 13, 2024) (“September 13, 2024 Decision”) (the Board’s decision also granted the petition to intervene of the Township of Mannington, N.J. (“Mannington”), which asserted that it had “similarly attempted to enforce its municipal land regulations on SMS”).

² SMS was awarded a lease for the maintenance and operation of the Salem County Railroad. The Rail Line Service Agreement (hereinafter “Agreement”) sets forth the terms and agreement between the parties and provided, to wit, that SMS would “maintain, market, and operate the rail line and to provide exclusive rail service at the property.” See Township of Pilesgrove’s Petition for Declaratory Order, p. 2, filed May 1, 2024, in Township of Pilesgrove, N.J. – Petition for Declaratory Order, FD 36770 (“Petition for Declaratory Order”).

³ See Township of Pilesgrove, N.J., FD 36780 (STB served October 24, 2024) (wherein the Board set the date for Pilesgrove and Mannington to file supplemental evidence and argument to November 8, 2024).

⁴ The Board’s December 6th decision, for good cause, extended the due date for SMS’s reply evidence and argument, and submissions by other interested parties, to December 16, 2024, and likewise extended the date for Pilesgrove and Mannington to file rebuttal statements to January 14, 2025.

STATEMENT OF INTEREST

Pilesgrove, the Petitioner, seeks Board clarification “as to what the Township of Pilesgrove can and/or cannot regulate and require in terms of compliance with local ordinances and regulations including zoning and/or planning requirements and where federal preemption applies.”⁵ Mannington petitioned for leave to intervene on the ground that SMS’s rail line also extends through its Township such that Mannington has also attempted to enforce its municipal land regulations on SMS.⁶

Pilesgrove has requested that the Board declare SMS—a common carrier providing both freight and excursion rail services over the same jurisdictional trackage—not entitled to preemption protections for its excursion activities. Despite SMS’s status as a common carrier using largely the same facilities for both services, Pilesgrove and Mannington seek to assume some of the Board’s regulatory authority over the economics and operations of jurisdictional rail carriers.⁷ They argue this should occur whenever they perceive a lack of sufficient nexus to interstate commerce.

This request disregards the integrated nature of SMS’s operations, where the same infrastructure—tracks, stations, and facilities—supports both freight and excursion services. For many small short-line carriers, revenue from excursion services is crucial to sustaining freight operations, thereby supporting interstate commerce. Legal precedents, such as CSX Transp., Inc. v. Georgia Public Serv. Com’n, 944 F. Supp. 1573 (N.D. Ga. 1996), and Quincy College & Sem. Corp. v. Burlington Northern, Inc., 328 F. Supp. 808 (N.D. Ill. 1971) establish that such integration satisfies the nexus requirement. Recognizing this nexus is consistent with national

⁵ See Petition for Declaratory Order, at 10.

⁶ See September 13, 2024 Decision, slip. op. at 1.

⁷ The Board is an independent federal agency charged with the economic regulation of various modes of surface transportation, primarily freight rail.

transportation policies and essential for preserving the economic benefits these operations provide.⁸

Mendocino Railway (MRY), a freight common carrier under the Board's jurisdiction,⁹ submits its perspective as a Class III short-line railroad that, like SMS, conducts freight, excursion, local commuter passenger, and rail bike operations, all integral to its role as a common carrier. MRY's vested interest in this matter stems from the historical disregard local municipalities have shown for national interests when regulating rail carriers, a concern that led to the establishment of federal preemption.¹⁰

Allowing municipalities to regulate excursion services on jurisdictional trackage would create overlapping regulations, enabling indirect control over what they cannot directly regulate.¹¹ This interference threatens the efficient functioning of our national railroad system.

⁸ MRY has yet to see SMS's reply and thus cannot argue one way or another as to whether all of SMS's excursion operations should be entitled to preemption. But both Pilesgrove and Mannington appear from their submissions to be asking the Board to find that none of SMS's excursion rail activities are subject to the Board's jurisdiction, regardless of whether those railroad activities are integrally related to SMS's provision of its common carrier services. Such a decision by the Board would have devastating consequences for smaller common carriers regulated by the Board. These carriers rely on shared infrastructure—tracks, stations, offices, maintenance shops, and employees—to provide both freight and passenger services. Allowing local municipalities to impose regulations on these facilities, merely because they also support excursion services, would result in a complex web of conflicting regulations. This would unreasonably burden, interfere with, and discriminate against rail transportation nationwide, undermining the efficiency and viability of these essential services.

⁹ See Mendocino Ry. – Acquisition Exemption – Assets of the Cal. W.R.R., FD 34465, slip op. at 1 (STB served April 9, 2004).

¹⁰ For a recent example, consider *AAR v. CARB*, 2:23-cv-01154-JAM-JDP (United States District Court, Eastern District of California) (targeting railroads and imposing requirements solely on locomotive operators irrespective of the fact that ICCTA preempts all state and local laws and regulations which unreasonably burden railroad activity).

¹¹ Per 49 U.S.C. § 10501(b), the Board has exclusive jurisdiction over: “**(1)** transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 *et seq.*] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and **(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.**”

The Board's jurisdiction “is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 *et seq.*], the remedies provided under this part [49 U.S.C. §§ 10101 *et seq.*] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b) applies to all tracks and facilities owned by a jurisdictional carrier, whether used in part or whole to provide freight services, and even if the same tracks and facilities are also used to provide excursion or other ancillary services typically provided by a freight carrier.

The municipalities’ proposed “workaround” would result in a patchwork of local and federal regulations, artificially separating freight and excursion operations despite their shared infrastructure. This would subject MRY and similar short-line railroads to conflicting ordinances, undermining their ability to provide essential rail services.

For railroads like MRY, every freight carload is crucial, yet their economic viability also relies on revenue from diverse services, including railcar storage and passenger excursions. Subjecting any of these operations to local regulation—often arbitrary and misaligned with national network efficiency—would jeopardize the ability of small common carriers to meet their communities’ freight needs.

ARGUMENT

I. The Board has Exclusive Jurisdiction Over Rail Transportation Provided by a Board-Licensed Common Carrier.

Congress defined “transportation” in the Interstate Commerce Commission Termination Act (“ICCTA”) more broadly than the term’s ordinary meaning. Pursuant to the ICCTA, transportation includes a yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail and services related to that movement, including receipt, delivery transfer in transit handling, and interchange of passengers and property. 49 U.S.C. § 10102(9)(A)-(B).¹² In defining transportation, Congress excluded

In interpreting the reach of preemption under § 10501(b), both the Board and the courts have found that § 10501(b) categorically prevents states and localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). Other state actions may be preempted as applied, that is, only if they would have the effect of unreasonably burdening, interfering with, or discriminating against rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-54 (3rd Cir. 2007); Boston & Maine Corp. & Town of Ayer, MA, 5 S.T.B. 500, 510-12 (2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); and Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, 4 S.T.B. 380, 387 (1999).

¹² 49 U.S.C. § 10102 (5) defines a “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. All board-licensed carriers are part of the general system of rail transportation (interstate rail network) either directly or indirectly.

certain activities (street, suburban, or interurban electric railways not operated as part of the general system of rail transportation system), but did not exclude excursion services provided by freight railroads from the definition of “transportation” by a “rail carrier” over the interstate rail system. Congress could easily have done so had it wanted to. But it did not do so.

The preemptive scope of 49 U.S.C. § 10501(b) has been characterized by the courts as broad and sweeping.¹³ Similarly, in 2013, in a passenger rail case, the Board explained “[u]nder 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carrier between a place in a state and a place in the same state, as long as that intrastate transportation is carried out ‘**as part of the interstate rail network.**’” See California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, CAL., FD 35724 (STB served June 13, 2013) (“CHSRA-I”) (citing DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914 (DesertXpress), slip op. at 9 (STB served May 7, 2010)). Likewise, in CHSRA-I, the Board found the California High-Speed Rail Authority (the “Authority”) to be a carrier because the HST Passenger System/Project would be constructed as part of the interstate rail network; therefore, the Board has jurisdiction under § 10501(a)(2)(A). Id. at 14. Notwithstanding the Authority’s assertions that the HST System involves purely intrastate operations, the Board found the HST System would have extensive interconnectivity with Amtrak, which has long provided interstate passenger rail service and is therefore part of the interstate rail network. Id.¹⁴

¹³ See San Pedro Peninsula Homeowner’s United Inc., John Tommy Rosas Tribal Administrator, Tongva Ancestral Territorial Tribal Nation – Petition for Declaratory Order, FD 36065, slip op. at 3-4 (STB served March 6, 2017) (“San Pedro”) (“The primary purpose of § 10501(b)’s broad preemption provision is to prevent a patchwork of state and local regulation from interfering with interstate commerce.”); see also H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (noting the need for “uniformity” of federal standards for railroads and the risk of “balkanization” from state and local regulation); CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)) (in referring to the broad and sweeping effect of § 10501 (b), the district court stated, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”)

¹⁴ The CHSRA-I decision highlights certain facets of the Board’s jurisdiction. Under 49 U.S.C. § 10901 mainline track requires STB authority to construct, acquire, operate, discontinue (cease operations), and abandon under 49

Intuitively, the Board’s decision in CHSRA-I not only makes sense but reflects that Congress placed no limitations on what constitutes “transportation” by a “rail carrier” over the interstate rail system. Congress could have placed limitations, but it did not. MRY believes that Congress recognized that, for certain rail carriers’ whose freight and excursion services were integrally related (using the same tracks, same equipment, same personnel, and same facilities), Congress intended—to the maximum extent possible—that the Board’s jurisdiction would apply and preempt local municipalities from regulating activities that were—consistently with the supremacy clause—delegated to the Board.¹⁵

II. Rail Excursion Operations Conducted By Board-Authorized Common Carriers Over Jurisdictional Track Must Be Afforded Preemption When Excursion and Freight Operations Are Integrally Related.

As stated in FN 15, MRY understands that the Board—the guardian of railroad entry/exit—decides who becomes a “rail carrier,”¹⁶ who provides “rail transportation,”¹⁷ and when 49 U.S.C. § 10501(b) preempts state, local, and municipal attempts to regulate rail transportation. In exercising its jurisdiction, the Board has made clear that newly created railroads, railroads acquired pursuant to an Offer of Financial Assistance, and entities seeking to become carriers for the **sole purpose** of providing intrastate excursion operations would

U.S.C. § 10903 (permanently remove from the interstate rail network). See Allied Indus. Dev. Corp. – Petition for Declaratory Order, FD 35477, slip op. 2, n. 5 (S.T.B. served Sept. 17, 2015) (explaining that under the Interstate Commerce Act, the STB “has exclusive jurisdiction over rail lines over which railroads provide point-to-point ‘common carrier’ line-haul service to shippers (i.e., mainlines).”); citing Suffolk & S. R.R. LLC – Lease & Operation Exemption – Sills Road Realty, FD 35036, slip op. 1 (S.T.B. served Nov. 16, 2007) (explaining that “[t]he federal government has licensed rail carrier entry and exit since 1920. Thus, the Board and its predecessor agency, the Interstate Commerce Commission (“ICC”), have long had exclusive jurisdiction and plenary authority over the construction, operation, and abandonment of mainlines. 49 U.S.C. §§ 10901, 10903.”).

¹⁵ See U.S. Const. art. VI, cl. 2. Of course, as explained herein, MRY understands that while ICCTA’s preemption language is unquestionably broad, it does not encompass everything touching on railroads.

¹⁶ See FN 15.

¹⁷ See § I.

generally not be jurisdictional carriers for Board purposes or entitled to preemption.¹⁸ But see the Board’s decision in Magner–O’Hara Scenic Ry.—Operation—in the State of Michigan (not printed), served May 12, 1981, *aff’d sub nom. Magner–O’Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir.1982), noting in dicta that the Board would have jurisdiction over a railroad lying wholly within one state if it participated in the movement of passengers or freight from one state to another under common arrangements with connecting carriers, i.e., by means of through-ticketing or the movement of interstate freight.

Denver & Rio Grande, Wine Train, and Fun Train are not representative of MRY or other traditional Class III freight common carriers¹⁹ (“Class III Freight Carriers”) that publish tariffs,²⁰ hold themselves out to all freight customers interested in service upon reasonable demand, market and promote and grow freight business,²¹ and are subject to full FRA regulation.

¹⁸ See Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order, FD 35496, slip op. at 9-10 (STB served Aug. 18, 2014) (“Denver & Rio Grande”) (finding that for 14 years the railroad, which was acquired pursuant to an OFA, was only used to provide seasonal entirely intrastate movement of passengers and recreational rafts (freight movement on the Creede Branch was limited to the transportation of river rafts and other gear for excursion passengers; moreover, river rafts and other gear moved with the passengers as a package; and there was no separate compensation for movement of freight) was outside the Board’s jurisdiction), recons. denied Denver & Rio Grande Ry. Hist. Found., FD 35496 (STB served Mar. 24, 2015); see also Napa Valley Wine Train, Inc.—Pet. for Declaratory Order, 7 I.C.C. 2d 954, 965-68 (1991) (“Wine Train”) (finding an excursion entity that utilized a line acquired pursuant to an OFA to handle less than one carload of freight a month for certain wineries, with no regularly scheduled freight service, or marketing for freight, and limited ability to connect to Amtrak (nearest connection 30 miles away and bus service would be required for passengers to move between Wine Train and Amtrak) was not providing transportation subject to the Board’s jurisdiction; see also Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., FD 33472 (STB served March 5, 1998) (“Fun Train”) (finding the Board did not have jurisdiction over an excursion passenger train in Florida that operated pursuant to trackage rights granted by CSX Transportation, Inc., which was marketed primarily to tourists and did not connect to Amtrak directly); but cf. Yakima Interurban Lines Association – Abandonment Exemption – In Yakima County, WA, AB 600 (Sub-No. 1x) (STB served October 27, 20006) (finding YILA a carrier subject to the Board’s jurisdiction even though the Railroad Retirement Board found YILA to be an excursion railroad as YILA became a carrier to the Board’s jurisdiction when it acquired the rail line in 1999 by invoking the Board’s authority).

¹⁹ Disney World’s train, which is an insular railroad circling an amusement park, is likewise inapposite to Class III Freight Carriers for analogous reasons.

²⁰ MRY publishes a tariff (Freight Tariff CWR 9500) for its switching and interchange services. See <https://www.skunktrain.com/wp-content/uploads/2022/02/MENDOCINO-2021-FREIGHT-TARIFF-FINAL.pdf>. MRY also publishes a tariff (Local Passenger Tariff No. 3-R) for its passenger commuter services. See <https://www.skunktrain.com/wp-content/uploads/2022/02/Commute-Fares-2022.1-FINAL.pdf>.

²¹ While MRY understands that SMS first acquired the rail line at issue in 2022, MRY understands that SMS has over the past two years doubled the line’s freight traffic despite there currently being only one shipper on the line.

Traditional Class III Freight Carriers provide transportation over covered trackage, using covered service equipment, and operate subject to covered service rules of operation (e.g., hours of service limitations).²² Moreover, as explained further in § III *infra*, light-density Class III Freight Carriers are continuously trying to expand the railroad services they offer so they can remain financially viable and continue to meet the (perhaps minimal but still vital) freight rail service needs of their communities. These efforts often not only involve efforts to expand their freight service, but also to provide transloading, railcar storage, passenger rail services, excursion rail services, and more. All of the services provided by such Class III Freight Carriers, be it freight, excursion, passenger commuter, or other services such as car storage or rail bikes,²³ are integrally related and cannot, and should not, be artificially bifurcated and subjected to overlapping and far more arbitrary municipal regulation.

One of the reasons the Board, and its predecessor, the Interstate Commerce Commission (“ICC”), was created was to eliminate an inconsistent patchwork of state and local regulations that would have unreasonably burdened, interfered with, or discriminated against rail transportation.^{24, 25} Subjecting Class III Freight Carriers to the overlapping and inconsistent

MRY also understands that SMS has purchased 93 acres in order to develop transloading on the line, intending to restore manufacturing and freight rail service to the people and businesses on its line. MRY finds it telling that Salem County, the line’s owner, has not opposed SMS’s efforts or supported the municipalities’ Petition.

²² See Roanoke Southern, LLC—Acquisition and Operation Exemption—Norfolk Southern Railway Company, FD 35976 (STB served December 31, 2015) (granting an acquisition and operation exemption to Roanoke Southern, LLC (“RSRL”), wherein RSRL acquired a 2.42-mile segment of a rail line from Norfolk Southern Railway Company for excursion operations and RSRL assumed the status and obligations of a common carrier to provide freight service upon a reasonable demand).

²³ While the public can rent MRY’s rail bikes, they are only permitted to operate them on MRY’s jurisdictional trackage (maintained in accordance with federal requirements), subject track warrant control (“TWC”) authority, and while accompanied by MRY’s railbike personnel (who are trained and held the same standards as MRY’s passenger and covered service freight train conductors). MRY’s maintenance-of-way (“MOW”) personnel also use MRY’s rail bikes to conduct track inspections and to assist with repairs to its jurisdictional trackage. And inspectors from the CPUC and the FRA use MRY’s railbikes to conduct their regulatory inspections of MRY’s jurisdictional tracks and other common carrier facilities.

²⁴ The Board evaluates preemption in such circumstances as applied, versus being categorically preempted.

²⁵ See FN 11.

regulatory schemes that would be created if their freight and excursion operations were bifurcated—despite being conducted by STB jurisdictional rail carriers using the same jurisdictional trackage, using the same equipment, facilities, and employees—would not only allow municipalities to indirectly regulate what they cannot directly regulate, but would subject SNR and other similarly situated short-line railroads to local ordinances and regulations (including zoning and planning requirements) that would, and might even be designed to, undermine their financial ability to continue to operate altogether.²⁶

As to Class III Freight Carriers, 49 U.S.C. § 10501(b), either categorically or as applied, preempts many state, local, and municipal ordinances and laws. See Denver & Rio Grande, FD 35496, slip op. at 9; citing Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (“[S]tate or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.”). In this proceeding, Pilesgrove and Mannington want the Board to transfer to them some of the Board’s regulatory authority over the economics and operations of jurisdictional rail carriers operating over jurisdictional trackage, whenever either municipality decides that a given railroad activity by such rail carrier lacks a sufficient nexus to interstate commerce. Neither Pilesgrove nor Mannington proposes a method for doing so. Nor do they appear to appreciate the integrated nature of SMS’s operations (with SMS using the same jurisdictional trackage, equipment and personnel for its freight and its excursion services) or the fact that, for many small carriers,

²⁶ Since it acquired its 40-mile rail line, which extends from Willits, CA to Fort Bragg, CA, in April 2004, MRY has been a Class III common carrier subject to the Board’s jurisdiction and the fact that its track, equipment, and facilities are also, but not exclusively, used for excursion purposes does not negate MRY’s common carrier status or its obligation to continue to provide freight service upon reasonable demand.

revenue from excursion services underpins the viability of freight operations, ensuring continued support for interstate commerce and the needs of the communities these carriers serve.²⁷

MRY's excursion and commuter passenger railroad operations are similar to those of SMS in not being separate, stand-alone services, instead being services conducted on the same jurisdictional trackage using the same facilities, the same equipment, and many of the same personnel that MRY uses for its freight operations. Likewise, MRY's excursion and commuter passenger railroad operations help finance MRY's continued offering of, and efforts to expand, its freight rail and rail transloading services to its communities.

For smaller Class III Freight Carriers, there is simply no way to bifurcate their railcar transportation services from the other railroad services they offer using the same trackage, the same facilities, the same equipment, and the same personnel, especially when the revenues from all of their various rail services underwrite their continued provision of freight rail service and the trackage and facilities used to provide that service. Allowing a local municipality to impose its own chosen regulations on a Class III Freight Carrier's railroad facilities, maintenance operations, operating requirements, locomotives and other railroad equipment, safety requirements, and employee regulations simply because the rail carrier is also using the same property, equipment, and employees to provide commuter passenger or excursion rail services would wreak havoc with the rail carrier's ability to fulfill its common carrier obligations. See, e.g., Green Mountain, 404 F.3d at 643 (concluding that the ICCTA preempted state

²⁷ Local municipalities and state agencies such as the California Coastal Commission have repeatedly attempted to regulate—or even to outright prohibit—MRY's railroad operations. The Commission, for instance, has argued that MRY should be barred from operating over, or even maintaining, certain of its jurisdictional trackage due to perceived environmental risks to nearby creeks and rivers. These local interventions impose significant time and financial burdens on small freight railroads. MRY thus advocates for a Board decision affirming that preemption applies to rail "transportation" by common carrier freight railroads, even when involving excursion or commuter passenger operations, particularly when the services use the same trackage, equipment, and personnel. Such a decision would best ensure the continued functioning of our national railroad system and the provision of freight rail service to communities served by the smallest Class III carriers.

environmental law that “unduly interfere[d] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations).

MRY has reviewed Pilesgrove’s Petition for Declaratory Order and believes that Pilesgrove’s intentional interference with SMS’s operations (blocking electrical supply to the properties in question and placing stop work orders)²⁸ should be either categorically preempted or preempted as applied, as such interferences has the effect of unreasonably burdening, interfering with, and discriminating against rail transportation in general. MRY understands that the municipalities’ conduct has not only interfered with SMS’s right—as a rail carrier under the Board’s jurisdiction—to construct and maintain essential rail facilities (such as SMS’s locomotive maintenance shop/storage facility, the “SMS Facility”), but have interfered with SMS’s use of its own railroad facilities through numerous claims of zoning violations and at least one attempt to enjoin SMS from accessing its own rail facilities. MRY presumes that the SMS Facility is used to support all of SMS’s freight and excursion operations.²⁹ In fact, based on MRY’s review of the record, the buildings erected on Block 73, Lot 1, appear to be an “integral part of rail transportation” for SMS. As a similarly-situated common carrier, MRY knows that constructing and maintaining locomotive maintenance/storage facilities is an indispensable part of providing rail service of any kind, including freight rail service.

Similarly to SMS, MRY also uses rail bikes as part of the rail excursion services it offers.³⁰ As such, MRY wholeheartedly agrees with SMS that Pilesgrove is preempted from

²⁸ See Supplemental Evidence and Argument of Petition, Pilesgrove Township, Exhibit J, p. 13, filed November 7, 2024, in Township of Pilesgrove, N.J. – Petition for Declaratory Order, FD 36770 (“Pilesgrove Supplemental Evidence”).

²⁹ See Pilesgrove Supplemental Evidence at p. 3.

³⁰ See Petition for Declaratory Order at p. 3. (“Additionally, and for a complete factual background, an application was filed by SMS Rail Service, Inc., [o]n or about December 2023, for a Use Variance for the operation of a rail bike tour facility along with accessory structures and a Use Variance for multiple principle uses on one lot located on property known as Block 73, Lots 1.”)

regulating SMS's rail bike tour facilities because—as with locomotives or hi-rail vehicles—small freight railroads do not use rail bikes exclusively to provide excursion services. In MRY's case, its rail bikes—which are electrically powered—operate on the same jurisdictional trackage as its freight trains, operate subject track warrant control (“TWC”) authority, and are always accompanied by MRY's railroad personnel (who are trained and held to the same standards as MRY's passenger and covered service freight train conductors). As MRY's rail bikes are electrically powered, they also supplement MRY's hi-rail maintenance vehicles and are used by MRY's maintenance-of-way (“MOW”) personnel as a more environmentally-friendly way to conduct track inspections and make repairs to MRY's covered trackage. CPUC and FRA inspectors also use MRY's rail bikes to conduct their inspections of MRY's trackage. MRY's rail bikes are thus a crucial part of MRY's efforts to ensure the safety, efficiency, and reliability of its trackage and overall railroad operations (including its freight operations), constituting an “integral part of [the] rail transportation” MRY provides.

The fact that SMS, like MRY, has dedicated excess rail capacity in its railroad operations to provide excursion operations³¹ does not have any negative impact on its common carrier obligations. In fact, their use of railroad assets to provide excursion and commuter passenger service makes it more likely that a carrier will be able to continue to meet its common carrier obligations, ensuring it has sufficient revenue to maintain its tracks and other rail facilities for freight service. The provision of excursion and commuter passenger service in addition to freight service should not subject the railroad's freight operations (or its track, equipment, or facilities) to overlapping state or local ordinances or regulations that would not otherwise be sustainable

³¹ See Petition for Declaratory Order at p. 5 (“SMS has remained steadfast in conveying to the Township that all of its activities are regulated under the Interstate Commerce Commission's (ICC) [Termination] Act even though SMS Rail Lines, Inc., has expanded its use from a freight rail line to offering fun/entertainment rides intrastate with no direct connection to interstate commerce.”).

against a freight common carrier. In short, a decision by the Board that Pilesgrove or Mannington can regulate the track, facilities, or equipment (such as that of SMS) that is used for both freight and excursion operations could lay the groundwork for local governments to use such regulations to undermine—or even end—the ability of many smaller Class III Freight Carriers to provide freight rail service to shippers.

III. Low-Density Short-Line Railroads Often Must Supplement Freight Revenues to Continue to Provide and Grow Freight Rail Service.

The Board has previously recognized that low-density short-line freight railroads are often dependent on revenue from other railroad operations (such as car storage, transloading, transporting commuter passengers, and transporting excursion passengers) to help finance their continued offering of freight services to their communities (e.g., when there isn't sufficient freight traffic, alone, to pay for all of the costs that are incurred in operating a freight railroad, such as maintenance and repair costs, equipment costs, insurance costs, employee costs, etc.). Consistently with this recognition, the Board has stated its commitment to Rail Transportation Policy ("RTP"), specifically by "promot[ing] a safe and efficient rail transportation system by allowing rail carriers to earn **adequate revenue**, as determined by the Board."³² See Midwest Rail d/b/a Toledo, Lake Erie and Western Railway—Lease and Operation Exemption—Toledo, Lake Erie and Western Railway and Museum, Inc., FD 35555 (STB Served October 14, 2021) ("Midwest Rail") (in granting a lease and operation exemption, the Board demonstrated its commitment to the ability of a freight carrier, who was entering the market, to earn adequate revenue as at the time of the decision, while the railroad had solicited potential freight customers and held itself out to be a provider of common carrier rail service over the line, only excursion rail services were being provided by the railroad); see also Trinidad Railway, Inc. –

³² See 49 U.S.C. § 10101(3) (Emphasis Supplied);

Abandonment Exemption – in Las Animas County, CO, AB-573X, et al., slip op. at 10 (STB served August 13, 2001) (“Trinidad Railway”) (stating [i]n determining whether there are sufficient traffic prospects to enable the [carrier] to operate the line ..., we consider all potential income resulting from the operation of the line, ... includ[ing] income from passenger operations.... This statement reflects an understanding by the Board that to ensure rail service remains financially, freight rail need not provide all the income that a railroad would need to cover the cost of owning, maintaining, and operating the line....”). The fact that the Board considers passenger operations as part of abandonment proceedings—to ascertain whether “sufficient traffic” exists for the carrier to support the continued operation of a line—suggests that the Board’s jurisdiction extends to non-freight rail operations provided by a “rail carrier” providing “transportation” subject to the Board’s jurisdiction.³³

RTP aims to promote safe and efficient rail transportation while allowing carriers to earn adequate revenue. Requiring small Class III Freight Carriers to try to abide by two conflicting sets of regulations as to their integrated operations that use the same tracks, equipment, and personnel would create operational inefficiencies and financial burdens that would likely drive these carriers—which are often the only freight rail link their communities have—out of business, negatively impacting interstate commerce. This result not only inherently goes against RTP as ensured by the Board, but also goes against the Board’s acknowledgements in Midwest Rail and Trinidad Railway that regulation promotes a system that allows rail carriers to earn adequate revenue, something that is especially important for small Class III Freight Carriers such as MRY and SMS.

³³ See also American Orient Express Railway Company LL – Petition for Declaratory Order, FD 34502 (STB served December 27, 2005) (the STB held that AOERC was a rail carrier subject to the STB’s jurisdiction as it held itself out to the general public as engaged in the business of transporting persons or property from place to place in interstate movements for compensation.).

Pilesgrove’s intentional interference with SMS’s rail operations (trying to regulate certain rail operations of a Board-jurisdictional carrier) not only jeopardizes SMS’s ability to provide excursion services but unreasonably burdens, interferes with, discriminates against, and jeopardizes SMS’s transportation services in general, including its freight services. SMS has actively doubled its freight operations and is working to establish transloading to benefit local industry, expanding its operations to include rail excursion services so that it can ensure sufficient revenue to support its continued freight operations and the expansion thereof over Board-jurisdictional trackage.³⁴

In trying to apply local zoning ordinances and other regulations to SMS that the Board and its predecessor have found to be preempted as to railroad transportation broadly, the municipalities here seem to seek to undermine SMS’s continued financial viability and its ability to continue to provide, and to grow, its freight and other railroad transportation services.

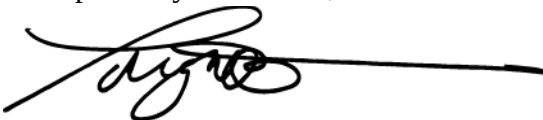
If the Board decides to bifurcate commuter passenger and excursion operations from freight operations, and to expose Class III Freight Carriers—and the jurisdictional tracks, facilities, and equipment they use to provide freight service to their communities—to local ordinances and regulations, including zoning and planning requirements, simply because the Class III Freight Carrier provide both freight and excursion service, it would destroy the ability of smaller freight railroads to fulfill their common carrier obligations, the end result of which would be a cessation of freight operations by a number of smaller freight railroads, greatly to the detriment of interstate commerce.

³⁴ See Petition for Declaratory Order on p. 5 states “SMS Rail Lines, Inc. has **expanded** its use from a freight rail line to offering fun/entertainment rides intrastate with no direct connection to interstate commerce.”) (*Emphasis Supplied*).

CONCLUSION

The Board must recognize the dire consequences of allowing municipalities to regulate the integrally related freight and passenger operations of Class III freight carriers like SMS and MRY. Granting the municipalities' Petition would severely jeopardize the financial viability of these smaller carriers, leading to a deferred maintenance, a decline in freight service, and potentially even the cessation of essential rail operations. The negative impacts would ripple through the communities these carriers serve, hindering economic growth and access to vital transportation services. By artificially bifurcating freight and passenger operations, the municipalities seek to impose a patchwork of local regulations that would unreasonably burden, interfere with, and discriminate against rail transportation as a whole. Such an outcome directly contradicts the Rail Transportation Policy's goals of promoting safe and efficient rail transportation and allowing rail carriers to earn adequate revenue. The Board must uphold these crucial policy objectives and protect the interests of smaller carriers like MRY and SMS, who rely on diverse revenue streams to maintain their infrastructure and fulfill their common carrier obligations. MRY respectfully urges the Board to recognize the integral relationship between freight and passenger operations for these carriers and prevent the devastating consequences that would result from the municipalities' desired outcome. The Board must preserve the ability of smaller carriers to continue providing essential rail services, both freight and passenger, by preventing undue interference from local regulations. The future of these carriers, and the communities they serve, depends on the Board's prudent decision in this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Torgny Nilsson', followed by a long horizontal line extending to the right.

Torgny Nilsson
Vice President & General Counsel for
Mendocino Railway, a wholly owned
subsidiary of Sierra Railroad Company