

March 28, 2023

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ENTERED
Office of Proceedings
March 28, 2023
Part of
Public Record

Chief, Section of Administration
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

Re: Opposition to Pitman Family Farms' Reply to Fee Waiver Request and Petition for Declaratory Order (Finance Docket No. 36654)

Dear Board members:

We write on behalf of Petitioners Tenth Avenue Neighbors to submit the attached Opposition to the Pitman Family Farms' Reply to Petitioners' Fee Waiver Request and Petition for Declaratory Order ("Pitman Farms' Reply").

Petitioner respectfully requests that the Board disregard Pitman Farms' Reply for failing to comply with the mandatory filing deadline under 49 C.F.R. § 1104.13. Petitioner also requests that the Board disregard Pitman Family Farms' objection to Petitioner's Fee Waiver Request because it lacks standing to oppose the Request.

Petitioner reiterates its request that the Board exercise its discretion to declare that a rail spur owned by Pitman Family Farms at its Hanford, CA agricultural facility does not fall under the jurisdiction of the Board, pursuant to 49 U.S.C. § 10102(5).

We appreciate your further attention to this important matter.

Sincerely,



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36654

TRANSPORTATION AUTHORITY

OPPOSITION TO PITMAN FAMILY FARMS'
REPLY TO FEE WAIVER REQUEST AND PETITION FOR DECLARATORY
ORDER

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Dated: March 28, 2023

INTRODUCTION

On December 20, 2022, Petitioner Tenth Avenue Neighbors submitted a Petition for Declaratory Order (“Petition”) to the Surface Transportation Board (“Board”) pursuant to its authority under 5 U.S.C. section 554(e) and 49 U.S.C. section 1321. The Petition requests that the Board declare that a private rail spur located on Pitman Family Farms’ (“Pitman Farms”) industrial agricultural facility at 10365 Iona Ave, Hanford, CA (“Hanford Property”), is not a “rail carrier” within the meaning of 49 U.S.C. section 10102(5) and, therefore, is not within the Board’s regulatory jurisdiction under the Interstate Commerce Commission Termination Act (“ICCTA”).

On January 17, 2023, Pitman Farms and related entity Bel’s Poultry LLC submitted a Reply to the Petition for Declaratory Order (“Reply”) opposing Tenth Avenue Neighbors’ Petition. The Board should disregard the Reply because it is procedurally and substantively flawed. The Reply was untimely, as Pitman Farms failed to comply with the mandatory statutory deadline set forth in 49 C.F.R. section 1104.13. Even if the Board were to consider the Reply, it should reject Pitman Farms’ arguments for failing to address the question before the Board. Rather than consider the Petition’s request for a declaratory order addressing the Board’s jurisdiction over private rail spurs, the Reply improperly focuses on the issue of federal preemption over state and local laws under the ICCTA, a topic that is not at issue in the instant matter. Pitman Farms also inappropriately opposes Tenth Avenue Neighbor’s Fee Waiver Request (“Request”). The Board

should disregard Pitman's objection to the Request because it lacks standing to oppose the Request.

For the foregoing reasons, Petitioner Tenth Avenue Neighbors requests that the Board reject and disregard Pitman Farms' Reply and grant the Petition based on the facts and law set forth therein.

ARGUMENT

I. The Board should not consider the Reply because it is untimely

As a threshold issue, the Board should disregard the Reply entirely because it is untimely. All submissions to the Board must be filed within the deadlines set by the Board's regulations. 49 C.F.R. § 1104.6. Pursuant to 49 C.F.R. section 1104.13, any reply must be filed within 20 days of the date the pleading is filed.

Here, Tenth Avenue Neighbors filed its Petition on December 20, 2022. *Tenth Avenue Neighbors Pet. for Declaratory Ord.*, No. FD 36654 (S.T.B.) (Dec. 20, 2022) (hereinafter "Petition"). Thus, any Reply to the Petition was due no later than January 9, 2023. Pitman Farms, and related entity Bel's Poultry LLC, filed the Reply on January 17, 2023, more than a week after the deadline set forth in 49 C.F.R. section 1104.13. *Pitman Family Farms Reply to Fee Waiver Request and Petition for a Declaratory Order*, No. FD 36654 (S.T.B.) (Jan. 17, 2023) (hereinafter "Reply"). Given that Pitman Farms failed to comply with the mandatory filing deadline under section 1104.13, the Board should not consider the Reply when making a final determination on the Petition's merits.

II. The Board should disregard the Reply because it fails to address the main question before the Board

Even if the Board were to consider the untimely Reply, it should reject Pitman Farms' misguided arguments. In the Petition, Tenth Avenue Neighbors requested that the Board issue a declaratory order concluding that the Pitman Farms' rail spur on the Hanford Property¹ ("Pitman Spur") is a private rail line and therefore falls outside of the Board's regulatory jurisdiction under 49 U.S.C. section 10501(a). Pitman Farms does not respond to this threshold legal issue or meaningfully engage the authority cited in the Petition. Instead, it focuses on whether the ICCTA preempts the application of state and local law to the Pitman Spur under 49 U.S.C. section 10501(b). However, the Board's regulatory jurisdiction under 49 U.S.C. section 10501(a) and federal preemption under 49 U.S.C. section 10501(b) are two distinct legal questions.

The ICCTA general jurisdiction provision provides a two-part inquiry. First, under section 10501(a), the Board must determine whether it has jurisdiction to regulate a rail carrier as an interstate rail network. As discussed in the Petition, the Board has jurisdiction over rail carriers that provide common carrier railroad transportation for compensation but has no jurisdiction over private rail operations. Petition, at pp. 11-14. Second, if the Board has regulatory

¹ The Reply erroneously states that Pitman Farms is located approximately ten miles outside the small town of Hanford. Pitman Farms' Reply at ¶ 2. As demonstrated in the County of Kings Geographic Information System map, the Hanford Property is located within the City of Hanford. See "County of Kings Parcel & Services Map Viewer," Kings County Community Development Agency, available at <https://kingscomdev.maps.arcgis.com/apps/webappviewer/index.html?id=35c6e6dac50446b9945154c9fc7f46c8> (last accessed March 24, 2023).

jurisdiction over an interstate rail carrier, then section 10501(b) provides that “the remedies provided under [the ICCTA] 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). The courts have been clear that “[i]n order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the Surface Transportation Board (“STB”).” *BNSF Railway Company v. Clark County* (W.D. Wash. 2020) 438 F.Supp.3d 1199, 1201. That is, “[i]f the Board has jurisdiction under 49 U.S.C. § 10501(a), the question whether jurisdiction is exclusive—i.e., whether state regulation is preempted—is a *separate* question governed by 49 U.S.C. §10501(b).” *Id.* at 1202 (emphasis added).

Here, the Reply does not follow this two-step inquiry or distinguish between the Board’s regulatory jurisdiction under 49 U.S.C. section 10501(a) and the exclusive remedy preemption consequences that follow from that jurisdictional determination under 49 U.S.C. section 10501(b). Additionally, Pitman Farms does not dispute the facts put forth in the Petition as to the private nature of the Pitman Spur. Instead, the Reply jumps over the first step and threshold question of whether the Board has jurisdiction over its spur pursuant to section 10501(a). Pitman Farms inappropriately relies on *Boston and Maine Corporation and Springfield Terminal Railroad Company—Pet. for Declaratory Ord.* to answer the second question regarding federal preemption under the ICCTA. No. FD 35749, 2013 WL 3788140 (S.T.B.) (July 19, 2013). But *Boston and Maine Corporation* is inapplicable to the undisputed facts here. There, the

common carrier Pan Am sought a declaratory order that the ICCTA preempted a local government decision to regulate certain rail operations over two tracks leading to a warehouse. *Boston and Maine Corporation* did *not* raise the issue of whether the Board had jurisdiction over the rail line under 49 U.S.C. section 10501(a) because it was undisputed that common rail carrier Pan Am “provides common carrier rail transportation from its main line over these two tracks to the warehouse.” *Id.* at *1. Thus, the only question before the Board in that case was whether the town’s regulation of the common carrier’s operations on the track was preempted by section 10501(b). Here, in contrast, the undisputed facts show that Pitman Farms, which operates or contracts for exclusive private rail services on the Pitman Spur, is not a common carrier and that the Pitman Spur is a private rail line which falls outside of the Board’s regulatory jurisdiction. Petition, at pp. 5-8, 14-16. Accordingly, the Board cannot and should not reach the secondary issue of federal preemption.

In sum, contrary to Pitman Farms’ assertion, a declaratory order from the Board is necessary to eliminate uncertainty regarding jurisdiction over the Pitman Spur. *See* 49 U.S.C. § 1321 (providing the Board authority to issue declaratory orders to eliminate controversy or uncertainty). As previously discussed in the Petition, both local and federal authorities have disclaimed jurisdiction over the Pitman Spur. Petition, at pp. 9-10. In a letter addressed to a member of Tenth Avenue Neighbors, the Hanford City Attorney claimed that the Board has exclusive authority over all railroad matters, including the Pitman Spur. *Id.* Yet, the Federal Railroad Administration, a federal agency within the Department of

Transportation, concluded that the Pitman Spur does not fall within the definition of “railroad” under 40 C.F.R. Part 201 and therefore is not subject to federal regulations. *Id.* at 10. Thus, a declaratory order from the Board is needed to resolve conflicting positions regarding what agency has oversight over the Pitman Spur.

III. The Board should disregard Pitman Farms’ opposition to Petitioner’s Fee Waiver Request

a. Third Parties have no legal interest in fee waiver requests

Pitman Farms improperly challenges Tenth Avenue Neighbor’s Fee Waiver Request. Along with the Petition, Tenth Avenue Neighbors submitted a Fee Waiver Request pursuant to 49 C.F.R. section 1002.2, seeking a waiver of the filing fee of \$1,400. The Board may waive a filing fee pursuant to 49 C.F.R. section 1002.2(e)(2)(ii).

On December 23, 2020, the Board issued a final rule to clarify and update rules regarding requests to waive or reduce certain filing fees. As part of this rulemaking, the Board codified the principle from *Hartwell First United Methodist Church—Adverse Abandonment and Discontinuance—the Great Walton Railroad Company, Inc. in Hart County, GA*, No. AB 1242, 2017 WL 2416742 (S.T.B.) (May 30, 2017), that, “third parties lack any legal interest in, and therefore cannot challenge or appeal, the grant or denial of a fee waiver or reduction request.” *Filing Fee Waiver Requests*, No. EP 758 (S.T.B.) (Dec. 17, 2020). The Board codified this rule in 49 C.F.R. section 1002.2(e)(3) (“No third-party appeals of fee waiver or reduction decisions are permitted.”). In *Hartwell First United Methodist Church*, the Board determined that “the grant or denial of

a party's fee waiver request has no bearing on the merits of that party's underlying application and, therefore, has no effect on any third party that might oppose the initial party's application." No. AB 1242, 2017 WL 2416742 at *1. Accordingly, third parties like Pitman Farms and Bel's Poultry LLC do not have any legal interest in Tenth Avenue Neighbor's Fee Waiver Request and do not have standing to challenge the request. Thus, the Board should disregard Pitman Farms' Reply to Petitioner's Fee Waiver Request.

b. Board determination of a fee waiver request on behalf of an organization should not depend on individual member's income

Pitman Farms incorrectly argues that the Tenth Avenue Neighbor's Fee Waiver Request should be denied on the basis of one member's income. The Board may waive a filing fee if the applicant shows that the waiver is in "the best interest of the public, or that payment of the fee would impose an undue hardship on the fee waiver applicant." 49 C.F.R. § 1002.2(e)(2)(ii). In evaluating a fee waiver request on behalf of an organization or a nonprofit, the Board does not evaluate the individual members' personal finances, but rather the financial position of the organizational entity and its organizational purpose. *See Hartwell First United Methodist Church*, No. AB 1242, 2017 WL 2416742 at *1 (stating fee waiver request on behalf of a nonprofit organization was granted by the Board pursuant to section 1002.2(e); *see also Hartwell First United Methodist Church*, No. AB 1242 (May 25, 2016) (Hartwell First United Methodist Church Fee Waiver Request).

Here, Pitman Farms alleges that Petitioner's Fee Waiver Request should be denied based on the income of one member. However, an individual members' income is irrelevant because the Petition was filed on behalf of an unincorporated association.² Along with the Stanford Environmental Law Clinic, CRLA filed the Petition and Fee Waiver Request on behalf of Tenth Avenue Neighbors, and not on behalf of any member in their individual capacity. Thompson Decl. ¶ 3.

Instead, what is actually relevant is that Tenth Avenue Neighbors is comprised primarily of low-income families who live in a rural, economically depressed area in the City of Hanford and unincorporated Kings County. Petitioner's Fee Waiver Request. The association is a volunteer organization without any financial resources and was forced to borrow funds to pay the initial fee while waiting for the determination on its Fee Waiver Request. Thompson Decl. ¶ 3. Given that payment of the filing fee would impose an undue hardship on the organization and divert resources away from its ability to carry out its public interest purpose, the Board should grant Tenth Avenue Neighbor's Fee Waiver Request without consideration of any individual member's income.

CONCLUSION

The question raised by the Petition is whether the Pitman Spur is a private rail line outside the Board's jurisdiction. The Reply does not address that core

² Under California law, an unincorporated association is a "group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not." Cal. Corp. Code § 18035(a). An unincorporated association is a legal entity separate from its membership. *White v. Cox* (1971) 17 Cal.App.3d 824, 828. Tenth Avenue Neighbors formed as an unincorporated association, as defined under Cal. Corp. Code § 18035(a), to address community issues caused by the Pitman Farms' rail spur operations. Petitioner's Fee Waiver Request.

issue and notably does not even attempt to refute the supporting facts set forth in the Petition. The tardy Reply is nothing more than a smokescreen of irrelevant legal arguments and erroneous factual assertions. Accordingly, the Board should disregard it. Based on the undisputed facts in the Petition and the clear law under 49 U.S.C. section 10501(a), Tenth Avenue Neighbors respectfully requests that the Board grant its Petition for Declaratory Order confirming that the Pitman Spur is a private track and therefore is not subject to the Board's jurisdiction.

Dated: March 28, 2023

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 
Jacqueline M. Maldonado, Certified Law
Student
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Attorneys for Tenth Avenue Neighbors

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

By: 
Mariah C. Thompson

Attorneys for Tenth Avenue Neighbors

CERTIFICATE OF SERVICE

I, Ana Villanueva, certify that on this day I caused the instant Opposition to Pitman Family Farms' Reply to Fee Waiver Request and Petition for a Declaratory Order to be sent via Certified Mail and electronically uploaded with the United States Surface Transpiration Board at <https://www.stb.gov/proceedings-actions/e-filing/>, and that I caused a copy to be served, via First-Class with the U.S. Postal Service in accordance with 46 C.F.R. § 1104.12(a), upon the following parties addressed below:

Hoppe Law Group

Adam Benkoski
680 W. Shaw Ave.
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Attorney for Pitman Farms and Bel's Poultry, LLC

Griswold, LaSalle, Cobb, Dowd, & Gin, LLP

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Attorneys for City of Hanford

I certify that I have this day served copies of this document upon all parties of record in this proceeding, with postage prepaid and respective envelopes deposited with the U.S. Postal Service, in Palo Alto, California.

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: Ana Villanueva
Ana Villanueva

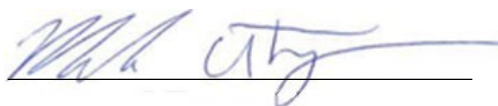
Dated: March 28, 2023

Declaration of Mariah C. Thompson

I, Mariah C. Thompson, do declare, and if called upon by the Surface Transportation Board could competently testify as follows:

1. I am an attorney in good standing licensed to practice law in the State of California and am an attorney of record in this action. I am employed by California Rural Legal Assistance, Inc. (CRLA) in Fresno, California.
2. CRLA is a non-profit law firm providing free legal services to qualifying low-income individuals and groups. Our firm follows a strict intake process that evaluates the financial status of each of our clients.
3. I represent Petitioner Tenth Avenue Neighbors in this and other matters. Tenth Avenue Neighbors is a registered unincorporated association comprised primarily of low-wage families. Tenth Avenue Neighbors lacks any financial resources and therefore qualifies for CRLA's services. Tenth Avenue Neighbors was unable to pay the filing fee in the instant matter and the cost of filing was therefore advanced by CRLA until the Board makes a determination on Tenth Avenue Neighbor's fee waiver.

I swear under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed this 24 day of March 2023 in Fresno, California.

A handwritten signature in blue ink, appearing to read "Maria C. Thompson", is written over a horizontal line.