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CITY OF FORT BRAGG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation,

Plaintiff,

v.

MENDOCINO RAILWAY AND DOES 1–10, inclusive

Defendants.

Case No. 21CV00850

NOTICE OF LODGING OF ATTORNEY GENERAL OPINIONS CITED IN SUPPORT OF OPPOSITION TO DEMURRER

JUDGE: Hon. Clayton Brennan
DEPT.: Ten Mile

DATE: **February 24, 2021**
TIME: **2:00 p.m.**

TO THIS HONORABLE COURT AND ALL PARTIES OF RECORD HEREIN:

PLEASE TAKE NOTICE that Plaintiff's hereby lodge the following Federal Agency Opinions cited in Plaintiff's Opposition to Defendant's Demurrer filed on February 9, 2022, for the Court's convenience, copies of which accompany only the filed copy of this notice:

Federal Agency Opinions

E. B.C.D. 06-42.1 (Sept. 26, 2006) (*See also,* https://secure.rrb.gov/blaw/bcd/bcd06-42.asp; https://secure.rrb.gov/pdf/bcd/bcd06-42.pdf).

F. *Mendocino Coast Railway, Inc. Discontinuance of Train Service in Mendocino County, CA*, 1986 ICC LEXIS 188, Docket No. 30820 (Aug. 15, 1986).

G. *Mendocino Coast Railway Discont. of Train Service in Mendo. County, CA*, 1986 ICC LEXIS 72, Docket 30820 (Nov. 12, 1986)

H. *Napa Valley Wine Train Petition for Decl. Order*, 7 I.C.C.2d 954, 1991 ICC LEXIS 195, Finance Docket 31156 (July 18, 1991)

Dated: February 22, 2022

JONES MAYER

By: _____
Krista MacNevin Jee,
Attorneys for Plaintiff
CITY OF FORT BRAGG

EXHIBIT E

B.C.D. 06-42

SEP 2 8 2006

EMPLOYER STATUS DETERMINATION
Sierra Entertainment
Mendocino Railway

This is the determination of the Railroad Retirement Board concerning the status of Sierra Entertainment and Mendocino Railway, as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Sierra Entertainment and Mendocino Railway are owned and controlled by Sierra Railroad Company, an employer under the Acts (B.A. No. 2774) and are affiliated with Midland Railroad Enterprises Corporation, also an employer under the Acts (B.A. No. 9750). [1]

Information regarding these companies was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company. Sierra Entertainment was created and began operations on January 1, 2003. It operates dinner and brunch trains and excursion trains over the lines of its common carrier affiliates within California pursuant to an operating agreement. It also provides trains for use in movies, television, and commercials. Its excursion trains include (1) the Skunk Train which operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points); (2) the Sacramento RiverTrain which operates a round-trip excursion train from Woodland, California, to a turning point; and (3) the Oakdale Dinner Train which operates a round-trip dinner/excursion train from Oakdale, California, to a turning point 14 miles out. Sierra Entertainment owns its own equipment and employs its own staff, but does not own any rail lines.

Mendocino was created in 2004 to acquire the assets of the former California Western Railroad (a covered employer under the Acts; B.A. No. 2782), a 40-mile rail line in Mendocino County[2]. The acquisition was authorized by the Surface Transportation Board in a decision dated April 8, 2004 (Finance Docket No. 34465). Mendocino's line runs between Fort Bragg and Willits, California, and connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since Mendocino Railway's only access to the railroad system is over this line, that access is currently unusable.

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[1] Midland is a subsidiary of Sierra Railroad Company.

[2] CWRR, Inc., d/b/a California Western Railroad, was terminated as an employer effective September 30, 2003 (B.C.D. 04-40).

Mendocino's ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," to include

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) & (b)).

Section 10501 of Title 49 of the United States Code provides in pertinent part that the Surface Transportation Board has jurisdiction over rail carrier:

> * * * transportation in the United States between a place in –
>
> > (A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. § 10501(a)(2)(A).]

The rail service provided by Sierra Entertainment may be characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Since passengers are transported solely within one state, under section 10501(a) (2)(A), above, Sierra Entertainment would not be subject to Surface Transportation Board jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act. Therefore Sierra Entertainment is not a carrier by railroad.

The Railroad Retirement Act and the Railroad Unemployment Insurance Act also define the term "employer" to include:

> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) & (b)).

Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

> A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Sierra Entertainment is under common control with a railroad employer by reason of its being owned by Sierra Railroad, which also owns Midland Railroad Enterprises Corporation, a covered employer under the Acts. Therefore, if Sierra Entertainment provides a service in connection with the transportation of passengers or property by railroad it is an employer under the Acts. Section 202.7 of the regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

There is no evidence that Sierra Entertainment provides any service to Midland. Rather, the evidence shows that Sierra Entertainment operates solely to provide public passenger excursion tours within one state. Because Sierra Entertainment does not perform a service in connection with rail transportation, the Board finds that it is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Since Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts. If Mendocino commences operations, the Board will revisit this decision.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

EXHIBIT F

1986 ICC LEXIS 188

Interstate Commerce Commission

August 15, 1986

Finance Docket No. 30820

Interstate Commerce Commission Decisions

Reporter
1986 ICC LEXIS 188 *

MENDOCINO COAST RAILWAY, INC. DISCONTINUANCE OF TRAIN SERVICE IN MENDOCINO COUNTY, CA

Core Terms

discontinuance, section, passenger, transport, carrier, notice, intrastate, has, interstate

Panel: By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Vice Chairman Simmons concurred in the result. Commissioner Lamboley concurred in the result with a separate expression.

Opinion

Mendocino Coast Railway, Inc. (MCR) seeks authority to discontinue scheduled intrastate rail passenger service over a 40-mile line of the California and Western Railroad (CWR), between Fort Bragg and Willits, CA. On April 22, 1986, MCR filed a petition for exemption under *49 U.S.C. 10505* from the requirements of *49 U.S.C. 10909(a)* or, in the alternative, a petition for relief under the provision. [1]

MCR was authorized to lease and operate the CWR line in 1977. MCR is owned by Kyle Railways, Inc., but does **[*2]** business using CWR's name. It operates scheduled and unscheduled passenger service, as well as freight service. The majority of its passengers are tourists who ride from late spring to early fall. MCR contends that use of the scheduled service during the tourist off-season is very low and does not justify the operating costs. It seeks to discontinue all scheduled operations, and reestablish schedules consistent with demand and its costs.

On December 3, 1985, MCR filed a request to discontinue service with the California Public Utilities Commission (CAPUC). In its petition to this Commission, MCR contends that CAPUC has not rendered a decision within the 120-day period specified in 10909(a); it, accordingly, seeks discontinuance authority from this Commission.

We have received protests from CAPUC, numerous local community and business organizations, individuals served by the line, State legislators, U.S. Congressman Douglas H. Bosco, and U.S. Senator Alan Cranston. The protestants contend that MCR is vital to the economic well-being of the involved communities. By letter dated May 22, 1986, CAPUC sought a delay

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[1] Section 10909(a) provides that a carrier performing operations entirely within one State may petition this Commission for authority to change or discontinue operations, if its request has been denied by the State or the State has not acted upon the request within 120 days. As discussed infra, we find section 10908 rather than 10909 to be controlling and conclude that a proceeding, including a local hearing in California, should be instituted.

in the ICC proceedings until after CAPUC had ruled. On May 28, **[*3]** 1986, CAPUC denied MCR's request to discontinue operations. Therefore, protests's request to delay Commission processing is now moot.

MCR filed its petition under *49 U.S.C. 10909*. For that section to apply, two conditions must occur: first, a rail carrier subject to ICC jurisdiction must propose a discontinuance or change of any part of the transportation provided by it entirely in one State; and second, either State law "prohibits the discontinuance or change," or the "State authority having jurisdiction" must have denied the proposal or failed to act on it within 120 days. *49 U.S.C. 10909(a)(1)*-(3). If these conditions are met, then the carrier may petition this Commission for permission to discontinue or change the transportation. Thus, section 10909 is premised on the existence of original State Jurisdiction over the transportation.

Under *49 U.S.C. 11501(b)*, however, only certified States are permitted to regulate "transportation provided by a rail carrier. [2] If a State does not receive Federal certification, "[a]ny intrastate transportation provided by a rail carrier . . . shall be deemed to be transportation subject to the jurisdiction of the Commission." *49 U.S.C. 11501(b)(4)(B)*. **[*4]** Accordingly, a State that fails to obtain Federal certification must cease independent regulation altogether. *Texas v. United States, 730 F.2d 339, 353 (5th Cir. 1984)*, cert. denied, *105 S. Ct. 267 (1984)*. Since California is not certified, CAPUC has no jurisdiction over the discontinuance and changes proposed by MCR. [3] Absent State jurisdiction over the matter at issue, section 10909 does not apply.

We find, however, that similar relief is available to MCR under *49 U.S.C. 10908*. In contrast to the section **[*5]** 10909 requirements of original State jurisdiction, section 10908 is a preemptive provision which divests a State of jurisdiction over matters covered, rather than requiring exhaustion of original State remedies. Section 10908 permits a rail carrier to discontinue or change part of its service "notwithstanding [State] law, regulation, order, or proceeding," subject to our discretionary authority to conduct a proceeding under section 10908(b).

On the surface, section 10908 appears to apply only to discontinuance or partial changes in rail transportation "between a place in a State and a place in another State." However, as noted earlier, section 11501(b)(4)(B) provides that intrastate rail transportation in an uncertified State is "deemed" interstate, and subject to ICC jurisdiction. If such "transportation" jurisdiction (including passenger service) is considered preempted and thus legally "interstate" for purposes of the Interstate Commerce Act, section 10908 properly includes both actual interstate passenger discontinuance matters as well as intrastate matters in uncertified States. In conjunction with our findings regarding section 10909, and coupled with the fact that, consequently, **[*6]** section 10908 is the only provision of the Act that sets standards for actual interstate and "deemed" interstate passenger discontinuances and/or partial changes, [4] we conclude that section 10908 and the regulations at 49 C.F.R. 1153.1-4 govern MCR's proposed change in passenger operations.

Our implementing rules require the carrier to: (1) file a notice with us at least 45 days before the discontinuance is intended to be effective; (2) mail a copy of the notice to the chief executive officer and railroad regulatory body of each State in which the train is operated; and (3) post a copy of the notice is every facility served. MCR must comply with these rules.

We will exercise our authority under section 10908 to conduct a proceeding. That section states that we may do so if we begin between the date the carrier files the notice and its proposed effective date. Clearly, the intent of the statute is to require our decision prior to the actual discontinuance. Given the unusual circumstances present here, we believe the objective of the statute **[*7]** has been met despite our acting before MCR files its notice because MCR's intent is already well known.

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[2] The certification provisions draw no distinction between freight and passenger operations. "Transportation by rail carriers" as used in sections 10501 and 11501 includes "movements of passengers, or property, or both." *49 U.S.C. 10102(25)(A)*.

[3] Although MCR's passenger operations do not connect with any other passenger service, its freight operations connect with the Northwestern Pacific Railroad and the Eureka-Southern Railroad at Willits, CA. Therefore, MCR is connected to and part of the national rail system, as a result of its freight operations, and cannot be characterized as a purely intrastate scenic railway that is outside of ICC regulation altogether.

[4] We note that, had MCR proposed a complete abandonment of service, then this matter would have been considered under *49 U.S.C. 10903*.

We also have authority to postpone the proposed discontinuance for 4 months, and will do so here. Again, despite the unusual circumstances of our acting before the notice is filed, the 4 month postponement will begin on the date of MCR's proposed discontinuance (which as noted above can be on no fewer than 45 days' notice).

In a final decision, we may direct restoration or continuance of service, but only for a maximum of one year. *49 U.S.C. 10908(c)*. After that date, the 10908 process may begin again.

Numerous local community and business organizations and individuals have opposed this proposal. Even though CAPUC does not have jurisdiction, as an interested party, it has argued for denial. The California Coastal Commission and this Commission's Section of Energy and Environment both request time to prepare assessment reports. Based upon the protests and the need for further evidence, we will assign this proceeding to the Office of Hearings for an expedited hearing in California to commence within a reasonable time after MCR complies with the notice and posting requirements. **[*8]** Upon completion of the record, it will be certified to us for decision.

It is ordered:

1. A proceeding is instituted under *49 U.S.C. 10908*.

2. This proceeding is assigned to the Office of Hearings for a hearing in California, as described above.

3. Upon completion of the record, the Commission will decide the case.

4. This decision is effective on September 2, 1986.

Concur By: LAMBOLEY

Concur:

COMMISSIONER LAMBOLEY, concurring in the result:

This case is properly before the Commission to set for hearing under either section 10909, as in the Mendocino Coast Railway petition, or section 10908 as discussed in the decision, therefore I concur in instituting a proceeding and in assigning the case to the Office of Hearings to conduct an oral hearing in California. However, I am troubled by the subsidiary conclusion in our decision that under *49 U.S.C. 11501*, California does not have jurisdiction to regulate the purely intrastate rail passenger service involved here. I am not sure that compromise of Section 214 of the Staggers Act was intended to preempt original state jurisdiction in this situation.

End of Document

EXHIBIT G

1986 ICC LEXIS 72

Interstate Commerce Commission

November 12, 1986

Finance Docket No. 30820

Interstate Commerce Commission Decisions

Reporter
1986 ICC LEXIS 72 *

MENDOCINO COAST RAILWAY, INC. DISCONTINUANCE OF TRAIN SERVICE IN MENDOCINO COUNTY, CA

Core Terms

intrastate, section, transport, passenger service, passenger, discontinuance, has, was, stagger, certificate, preemptive, preemption, carrier, print, prior decision, interstate

Panel: By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley dissented with a separate expression. Vice Chairman Simmons would have granted the petition.

Opinion

On September 16, 1986, the California Public Utilities Commission (CAPUC) filed a petition to reopen our decision served August 27, 1986. In that decision, we instituted a proceeding under *49 U.S.C. 10908* to examine the proposed discontinunce of regularly-scheduled, intrastate rail passenger service by the Mendocino Cast Railway, Inc. (MCR), over a 40-mile line between Fort Bragg and Willits, CA. By letter, the United Transportation Union (UTU) also seeks reconsideration of the prior decision. UTU did not serve the letter on MCR. However, since UTU raises the same issues raised by CAPUC, we will treat its letter as a petition to reopen, and consider it here.

Although MCR filed its discontinuance petition under *49 U.S.C. 10909*, [1] we found in the prior decision that this section does not apply. We explained that, since California is not certified to regulate intrastate rail transportation under *49 U.S.C. 11501*, it has no jurisdiction over MCR's proposed passenger **[*2]** service discontinuance. Therefore, absent State jurisdiction over the matter at issue, we concluded that section 10909 is not operative.

Instead, we found that:

In conjunction with our findings regarding section 10909, and coupled with the fact that, consequently, section 10908 is the only provision of the Act that sets standards for actual interstate and "deemed" interstate passenger discontinuance and/or

[1] Section 10909(a) provides that a carrier performing operations entirely within one State may petition this Commission for authority to change or discontinue operations, if its request has been denied by the State or the State has not acted upon the request within 120 days.

partial changes (footnote omitted), we conclude that section 10908 and the regulations at 49 C.F.R. 1153.1-4 govern MCR's proposed changes in passenger operations. [2] (slip op. at p. 2)

[*3]

On petition, CAPUC argues that the Staggers Rail Act of 1980 did not affect California's original jurisdiction over intrastate passenger service because the section 11501 federal preemptive provisions were limited to rate matters only. In support, CAPUC points to Finance Docket No. 30123, Southern Pac. Transp. Co. - Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties (not printed), served December 3, 1984 (Ventura), a similar passenger service discontinuance in California. In that decision, the Commission, acting under section 10909, relied on a 1981 abandonment decision [3] and concluded that section 11501 preemption is limited solely to rate matters; it does not extend to the discontinuance of intrastate passenger service. Accordingly, CAPUC argues that Ventura and MP-AB are dispositive of both the original jurisdiction issue was well as the issue regarding the applicability of section 10909.

CAPUC contends, similarly, that there is nothing either in the Staggers Act or in its legislative history to **[*4]** indicate that passenger service was affected by the new preemptive provisions because the Act never refers to "passenger" service; instead it is replete with the word "freight." Thus, CAPUC concludes that, even though California was not certified, it continues to have original jurisdiction over intrastate passenger service, and that section 10909 is controlling.

We reject CAPUC's arguments. First, the law clearly provides that a State may regulate intrastate transportation only if it follows Federal standards and procedures (section 11501(b)(1)). [4] Certification is the only means by which States can so regulate intrastate transportation; California did not ask to be certified. Accordingly, regulation of California rail transportation matters was preempted by this Commission. [5]

[*5]

In determining the extent of this preemption, we note that section 11501 uses the broad term "intrastate transportation" and draws no distinction between freight and passenger operations conducted by an ICC-regulated "rail carrier." "Transportation by rail carriers," as used in sections 10501 (defining ICC jurisdiction), as well as 11501, includes "movement of passengers, or property, or both." *49 U.S.C. 10102(25)(A)*. There is no freight/passenger dichotomy in the Staggers Act language nor in the legislative history that would allow us to find that, in the absence of certification, States may continue to regulate passenger service. Recent judicial decisions support this conclusion. See *Railroad Commission of Texas v. U.S. 765 F.2d 221 (D.C. Cir. 1985)*; *Illinois Commerce Comm'n. v. ICC, 749 F.2d 875 (D.C. Cir. 1984)*, cert. denied *106 S. Ct. 70 (1985)*; *Aluminum Co. of America v. ICC, 790 F. 2d 938 (D.C. Cir. 1986)*; and *Utah Power & Light Co. v. I.C.C., 747 F. 2d 721 (D.C. Cir. 1984)*. on reh'g, *764 F.2d 865 (D.C. Cir. 1985)*. If all passenger transportation were categorically excluded from the preemptive reach of the Staggers Act as argued by CAPUC, there would have been no need **[*6]** for an inquiry as to an intrastate rail passenger carrier's connection with the national rail system in *Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441 (6th Cir. 1982)*.

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[2] Section 10908 permits a rail carrier to discontinue or change part of its service "notwithstanding [State] law, regulation, order, or proceeding," subject to our discretionary authority to conduct a proceeding under section 10908(b). In contrast to the section 10909 requirements of original State jurisdiction, section 10908 is a preemptive provision which divests a State of jurisdiction over matters covered, rather than requiring exhaustion of original State remedies.

[3] Docket No. AB-3 (Sub-No. 25), Missouri Pac. R.R. Co. - Abandonment - Between Dearing and Dexter, KS (not printed), served May 28, 1981 (MP-AB).

[4] See H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 83 (1980): "State authority over intrastate [rail] transportation is limited to administering the provisions of the Interstate Commerce Act."

[5] If a state does not receive Federal certification, "[a]ny intrastate transportation provided by a rail carrier . . . shall be deemed to be transportation subject to the jurisdiction of the Commission under [section 10501 et seq.]" *49 U.S.C. 11501(b)(4)(B)*.

Section 10909's applicability to passenger service is dependent upon the existence of original State jurisdiction. Where, as here, California's intrastate rail jurisdiction has been removed, including authority over non-rate matters, section 10909 cannot, accordingly, apply.

CAPUC does point, however, to our contrary precedent in Ventura that the preemptive provisions of section 11501 concern only rate matters. Our interpretation of the section 11501 preemption provisions must conform with the court interpretations cited above. Therefore, after further review, we conclude that Ventura and MP-AB are not controlling. MP-AB was an early post-Staggers Act decision, before our analysis in this area had developed. Ventura is overruled. We here hold that, in a situation where a State has failed to seek certification or has been denied certification, all intrastate economic rail regulation is preempted. [6]

[*7]

Additionally, there is no merit to CAPUC's reliance on a memorandum filed in a federal district court action involving an early challenge to the Staggers Act in which ICC counsel took the position that the preemptive provisions of 11501 relate only to intrastate rate regulation. First, that memorandum was prepared before the major court cases interpreting this provision. Second, statements of counsel are not decisions of the Commission.

Finally, CAPUC argues that our prior decision preempting State regulation of intrastate matters is an unfounded reinterpretation of section 11501 that is contrary to the recent decisions in *Louisiana Public Service Comm. v. F.C.C., 106 S. Ct. 1890 (1986)*, and the United States Court of Appeals for the District of Columbia Circuit in People of the State of California and the Public Utilities Commission of the State of California v. F.C.C., No. 85-1112, decided Aug. 22, 1986. Those cases both involved an examination of the authority of the Federal Communication Commission (FCC) over intrastate matters purportedly within the legal purview of the states.

Neither case is on point here, however. Both involve a very different regulatory reime, where **[*8]** there is no Federal preemptive provision of the type in the Staggers Act. To the contrary, the Communications Act includes a specific limitation on the FCC's authority over intrastate matters. Our prior decision is in accord with the approach the D.C. Circuit has taken in several major cases involving the applicability of section 11501, which are directly relevant to the issues in this proceeding. It has applied the Staggers Act preemption provisions and has ruled that original State jurisdiction is totally dependent on being certified. See *Railroad Com'n. of Texas v. U.S., supra*; *Illinois Commerce Comm'n. v. I.C.C., supra*; and *Aluminum Co. of America v. I.C.C., supra.*

Accordingly, CAPUC has not raised any arguments which would require us to alter our conclusion in the prior decision that a State must be certified to retain jurisdiction over any aspect of intrastate rail transportation, including rail passenger service. [7] While we recognize that intense local interest and participation in this matter before CAPUC may argue in favor of local resolution on grounds of comity, California simply relinquished its jurisdiction by not being certified. Absent such State jurisdiction, **[*9]** discontinuance or change of passenger service is "deemed" an interstate transaction and, as a matter of law, comes under this Commission's jurisdiction under *49 U.S.C. 10908*. According, CAPUC's petition will be denied.

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[6] There were two recent potential section 10909 cases that are somewhat analogous but inapposite. Finance Docket No. 30740, Alaska R.R. Corp. - Exemption from 49 U.S.C. Subtitle IV (not printed), served January 22, 1986, amended decision (not printed), served January 31, 1986; and a decision related to Ventura, No. 39595, California Dept of Transp. v. Southern Pac. Transp. Co. (not printed), served April 1, 1985, vacated, April 3, 1986. In Alaska Corp., the Commission was asked to exempt a schedule change in water rail passenger service in Alaska, an uncertified State. The Commission granted an exemption from all of Subtitle IV except from *49 U.S.C. 10909*, but noted that it had "not yet definitively determined the extent of . . . preemption [of passenger service] under section 11501(b)(4)(B)" (slip op. at p.3). In the decision related to Ventura, the Commission stated that "we need not decide whether we have jurisdiction over this service" (slip op. at p.3), because the 1986 decision vacated the 1985 decision due to a settlement between the parties. Neither case, accordingly, made a finding on the extent of the section 11501 preemption on section 10909 matters.

[7] CAPUC also argues that by proceeding under section 10908 the hearing it conducted is meaningless. However, when the ICC conducts its hearing, there is no impediment to use of the record compiled before the CAPUC to the extent it is relevant. This is the approach we adopted in the interlocutory order at issue in Alcoa, supra.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. CAPUC's petition to reopen is denied.

2. This decision is effective on November 28, 1986.

Dissent By: LAMBOLEY

Dissent:

COMMISSIONER LAMBOLEY, dissenting:

I would reopen and grant the relief requested.

At issue in this case is continuation of passenger service conducted wholly within the State of California. There is no dispute that as a matter of fact, the transportation is purely intrastate in character.

In my view, provisions of the 1980 Staggers Act do not contemplate nor operate to effect displacement of the State's traditional **[*10]** jurisdiction over such service. See *49 U.S.C. Section 10501(b)(1)*, (c) and (d). Accordingly, for purposes of our jurisdiction, I would conclude that Section 10909 [1] is applicable. Finance Docket No. 30123, Southern Pac. Transp. Co. - Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, (not printed) served December 3, 1984.

I find that the majority's reliance on Section 11501 [2] is misplaced as a basis for broad pre-emption beyond the rate and related classification, rule or practice matters to which that section applies. The Congressional concern over a perceived disparity between inter-and intra-state rail rates, resulting from the exercise of State jurisdiction, was addressed in Section 214 of the Staggers Act. The Section 214 amendments to Section 11501 focus on intrastate rates and related matters. [3]

The legislative history of the Act evidences that efforts to fully pre-empt state action on such matters by proposing exclusive federal jurisdiction were expressly rejected. [4] As adopted, Section 214 **[*11]** represents a compromise on pre-emption, and limits the scope of Section 11501 and required certification, to intrastate rail rate regulation matters.

Consistent with the scope and direction of Section 214, on November 10, 1980, the Commission published notice opening Ex Parte No. 388, State Intrastate Rail Rate Authority - *P.L. 96-448*, which as the title suggests, specifically concerns the exercise state jurisdiction over intrastate rail rates. [5] As a part of that proceeding the State of California, among others, expressly relinquished its authority over intrastate rail rate regulation and tendered the same to the Commission which it accepted. [6] Beyond that it is apparent California's jurisdictional authority was not otherwise relinquished nor displaced by virtue of Section 11501. [7]

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[1] *49 U.S.C. Section 10909*.

[2] *49 U.S.C. Section 11501*.

[3] See *Indianapolis Power and Light v. ICC 687 F2d 1098, 1110 (7th Cir. 1982)*.

[4] See H.R. No. 96-1430, 96th Cong. 2nd Sess. 105-106 (1980).

[5] ***45 Fed. Reg. 74571***.

[6] Ex Parte No. 388, State Intrastate Rail Rate Authority - *P.L. No. 96-448* *365 ICC 700 (1982)*.

[7] Precedent cited by the majority in essence supports the view that the scope of Section 11501 is limited to intrastate cite regulation. See e.g., *Aluminum Co. of America v. United States, 790 F2d 938 (D.C. Cir. 1986)* (denying shipper standing to review ICC assumption of original

[*12]

Finally, there are no facts of record which demonstrate that the intrastate passenger transportation in this case "would affect intereste activity sufficiently to overcome the bar contained in *49 U.S.C. Sec. 10501(b)*." See Magner - *O'Hara Scenic Ry. v. I.C.C., 692 F2d 441 (6th Cir. 1982)*. [8]

Interstate Commerce Commission Decisions

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jurisdiction over all intrastate rail rates complaint cases following denial of Texas certification); *Utah Power & Light Co. v. I.C.C., 747 F2d 721 (D.C. Cir. 1984)* (remanding review of complaint case involving tariff rate on intrastate coal transportation).

[8] Mere existence of interstate freight connections unrelated to intrastate passenger service does not alter the character of the transportation and is not a legally sufficient nexus upon which to claim jurisdiction in this case any more than was the use of interstate rail lines in Magner-O'Hara.

EXHIBIT H

7 I.C.C.2d 954; 1991 ICC LEXIS 195

Interstate Commerce Commission

July 18, 1991

FINANCE DOCKET NO. 31156

Interstate Commerce Commission Decisions

Reporter
1991 ICC LEXIS 195 *; 7 I.C.C.2d 954

NAPA VALLEY WINE TRAIN, INC. PETITION FOR DECLARATORY ORDER

Core Terms

wine, train, passenger, intrastate, was, freight, commerce, interstate, has, passenger service, ticket, valley, interstate commerce, transport, discontinuance, carrier, excursion, interstate carrier, reopen, traveler, winery, interstate freight, passenger train, bus, prior decision, abandonment, railroad, tourist, traffic, nexus

Syllabus

[*1]

Prior declaratory rulings reversed. Wine Train's passenger operations found not subject to the Commission's jurisdiction.

Panel: By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald. Commissioner Simmons concurred in the result. Commissioner McDonald concurred in the result with a commenting separate expression.

Opinion By: SIMMONS, PHILLIPS, MCDONALD

Opinion

We reopened this proceeding [1] to reconsider two prior declaratory rulings [2] that the passenger service of Napa Valley Wine Train, Inc. (Wine Train) is an interstate operation, subject to the exclusive jurisdiction of this Commission rather than the jurisdiction of Public Utilities Commission of California (CAPUC). For the reasons discussed below, we are reversing our prior conclusions.

BACKGROUND

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[1] Finance Docket No. 31156, Napa Valley Wine Train, Inc. - Pet. For Declaratory Order (not printed), served November 3, 1989, and April 4, 1990.

[2] Napa Valley Wine Train, Inc. - Pet. For Declaratory Order, 5 I.C.C.2d 1122 (1989) and Napa Valley Wine Train, Inc. - *Pet. For Declaratory Order, 4 I.C.C.2d 720 (1988)*.

1. Introduction.

In December 1985, Wine Train acquired the involved 21-mile rail line **[*2]** located in Napa Valley, CA, from Southern Pacific Transportation Company (SP) under the financial assistance procedures of *49 U.S.C. § 10905*. [3] At that time, SP used the line for freight operations only, but Wine Train planned to use it primarily to conduct a passenger excursion service.

CAPUC contends that Wine Train's passenger trains are intrastate operations and subject to its jurisdiction. [4] It believes that a more extensive environmental assessment of the impact of the operations is needed, and that restrictions may need to be imposed. [5] Wine Train, disagreeing, sought the declaratory jurisdictional ruling at issue here. While litigation on this jurisdictional issue was pending in court, Wine Train reached an agreement with CAPUC under which it could conduct restricted operations [6] and would prepare an environmental report.

[*3]

Subsequent to the agreement with CAPUC and after extensive rehabilitation of the line, Wine Train began operations in September 1989. Round-trip passenger operations have been conducted over an 18-mile segment of the line from Napa to St. Helena, CA. About 42,000 passengers rode the Wine Train from September 1989 to May 1990. Freight traffic over the line has been very light. [7]

There is strong local opposition to Wine Train's passenger service. A number of wineries and individuals in the area are concerned that the Wine Train will bring more tourists and, thus, more congestion and more development, to what they consider an already overcrowded, overdeveloped area. They believe that Wine Train's operations are solely a local matter and should be subject to State regulation.

Wine Train contends that it cannot operate profitably with any restrictions on its service. According to Wine Train, it will not be financially viable if it is subjected to economic regulation by CAPUC **[*4]** and the restrictions in service that would surely follow.

2. The prior decisions.

The prior decisions in this proceeding noted that the line was acquired under the § 10905 financial assistance procedures for continued rail service, and concluded that Wine Train, as the successor-in-interest to SP's license to operate the line, was authorized to conduct freight or passenger operations, or both. We found there that Wine Train's start up of passenger operations would not, therefore, require additional authority, because SP itself could have conducted passenger operations without additional authority.

The prior rulings were also based in large part on the preemptive effect of *49 U.S.C. § 11501*, which provides that only State authorities whose standards and procedures have been certified by this Commission may exercise jurisdiction over certain intrastate matters. In this regard, they relied on Mendocino Coast Ry., Inc. - Discont. - *Mendocino Co., CA, 4 I.C.C.2d 71 (1987)* (Mendocino), [8] where the Commission had held that, because § 11501 refers broadly to "intrastate transportation," a

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[3] Abandonment of the line had been approved in Docket No. AB-12 (Sub-No. 79), Southern Pacific Transportation Company - Abandonment - In Napa County, CA (not printed), served October 15, 1985.

[4] CAPUC does not challenge this Commission's authority to regulate Wine Train's freight operations.

[5] The California Supreme Court has since determined that the State's environmental statute does not apply to Wine Train's commencement of passenger service.

[6] Wine Train cannot stop along the route for passengers to board or leave the train; its operations are restricted to only 3 round-trips per day, with a limit of 15 per week.

[7] Wine Train does not provide exact figures about freight traffic. From the evidence it submits, however, it appears that less than 1 carload a month has moved over the line since operations began.

State must obtain I.C.C. certification to retain any authority to regulate intrastate rail operations **[*5]** by interstate carriers. Since California had never sought certification, we concluded that the State could not impose any economic regulation over Wine Train. Its authority over Wine Train was limited to enforcement of local safety, zoning, land use, and other so-called "non-economic" regulation. [9]

3. Reopening.

The prior decisions in this case were pending judicial review in Public Utils. Comm'n of Cal. v. ICC, Nos. 88-1650 and 89-1154 **[*6]** (D.C. Cir.), when the same circuit issued its opinion in *Illinois Commerce Comm'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989)* (Illinois Commerce). As pertinent here, the court, citing Mendocino as an example, rejected the Commission's broad interpretation of the preemption provisions and ruled that the State certification requirement in § 11501(b)(2) did not preempt state jurisdiction over the abandonment of spur lines located entirely within one state. In its ruling, the court took a narrow view of the preemptive provisions of § 11501(b)(2) and stated:

We agree with the petitioners that the Commission's reliance upon § 11501(b)(2) is misplaced. While that section speaks in terms of state exercises over "intrastate transportation," those words must be read in context, which here is emphatically and exclusively ratemaking and related activities.

Thus, Illinois Commerce appeared to cast doubt on part of the analysis that formed the basis for the holding in the prior declaratory rulings in this case. As a result, we reopened this case to reconsider it in light of Illinois Commerce. [10]

[*7]

The parties were given an opportunity to introduce new evidence and argument on the issue of whether Wine Train's passenger operations are inter- or intrastate in nature, as well as the extent of our jurisdiction over intrastate passenger operations in California. The parties were also asked to address whether SP would have required our approval to commence passenger operations over the involved line, and whether Wine Train is its successor-in-interest in this regard.

Petitions to intervene were filed by SP and a group called Concerned Citizens of Napa Valley (Concerned Citizens). Wine Train opposes Concerned Citizens' intervention. Wine Train had an opportunity to respond to Concerned Citizens' pleading, however, and opponents had an opportunity to respond to SP; therefore, no one will be prejudiced by their intervention. Since the purpose of reopening was to gather further evidence and argument, and to assure a complete hearing on the issues, we will grant both intervention requests.

Pleadings were filed by Wine Train, SP, CAPUC, Friends of Napa Valley, [11] Concerned Citizens, and jointly by St. Helena, Town of Yountville, County of Napa, and the Napa Valley Vintners Association. **[*8]**

ISSUES ON REOPENING

1. The effect of *Illinois Commerce, supra*, on this proceeding.

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[8] Earlier decisions to the same effect in Finance Docket No. 30820, Mendocino Coast Ry., Inc. - Discont. - Mendocino Co., CA (not printed), were served August 27 and November 28, 1986.

[9] The prior rulings also stated that, since CAPUC had no power to regulate Wine Train's operations, the California Environmental Quality Act (CEQA) was inapplicable. Moreover, the Commission found that no environmental analysis of the § 10905 transfer was required under the National Environmental Policy Act (NEPA), because no licensing type inquiry was being made. Under § 10905, the new operator is merely a successor-in-interest to the license held by the previous carrier. The application of CEQA and NEPA to this proposal is not at issue on reopening.

[10] The court granted our request for remand of the case to us for reopening and further consideration on February 8, 1990.

[11] It calls itself a citizens group (allegedly composed of 1,800 residents and 39 Napa wineries) formed to address the threat it perceives that Wine Train poses to the Valley.

Under § 11501, only State authorities whose standards and procedures have been certified by this Commission may exercise jurisdiction over certain intrastate matters. [12] The prior rulings in this proceeding relied on a broad interpretation of that section, and held that, since California had never sought certification, it could not impose any economic regulation over Wine Train even if its passenger operations were deemed to be solely intrastate. [13]

[*9]

As mentioned above, the court in Illinois Commerce cast doubt on the Commission's determination that § 11501 applies to any rail transportation matter and stated that § 11501 must be read in the context of ratemaking and related activities. [14] Illinois Commerce involved the abandonment of spur track that was statutorily exempt from the Commission's abandonment regulation under *49 U.S.C. § 10907(b)*. This Commission had ruled that the spur was not subject to State abandonment regulation either. The Commission explained that it simply makes no sense for the State agency that regulates intrastate transportation to impose regulatory requirements on track used solely in interstate commerce. As an alternative ground, the Commission relied on the changed regulatory environment of the Staggers Act. The court rejected both of these arguments.

[*10]

Wine Train and SP contend that Illinois Commerce does not require us to change our prior decisions in this case. They argue that it is a narrow ruling and only stands for the proposition that the Commission cannot rely on § 11501 to foreclose a certified State from regulating a spur abandonment. Wine Train also argues that there are other cases where courts, including the Supreme Court, have indicated that § 11501 applies to areas other than rates. Wine Train and SP further argue that no amendment to the statute was needed if § 11501 is limited to State rate regulation -- the Commission already had authority to set aside offending intrastate rates. Therefore, if § 11501 has any purpose, it must apply to other areas of regulation.

Opponents to Wine Train's proposal argue that Illinois Commerce limits the § 11501 preemption to rates and rate-related matters and, thus, removes the bases for Commission jurisdiction over other aspects of passenger service. They contend that the statutory provision as well as the legislative history show that Congress was concerned only with State rate regulation. [15] Finally, they note, prior to the Staggers Act, this Commission could nullify intrastate **[*11]** rates only after a showing that the rates placed an undue burden on or unreasonably discriminated against interstate commerce. In the Staggers Act, § 11501 was

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[12] Section 11501(b) was added to the Interstate Commerce Act by the Staggers Rail Act (Staggers Act), *Public Law 96-448*, 94 Stat. 824 (1980). It provides in pertinent part:

(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction. (Emphasis added).

[13] In Mendocino in which it had also adopted a broad interpretation of § 11501, the Commission stated:

[A] State must be certified to retain jurisdiction over any aspect of intrastate rail transportation, including rail passenger service. November 28, 1986 decision, at 3.) Mendocino became moot as to the parties, but the Commission declined to vacate the statutory interpretation of § 11501 [see Mendocino, supra, at 75].

[14] Illinois Commerce does not mention whether § 11501 applies to intrastate passenger fares and does not define the scope of ICC jurisdiction which would fall under the rubric of "ratemaking and related activities." There has been no ruling by the Commission on these issues since Illinois Commerce was decided, and since these issues are not directly challenged here, we need not address them.

[15] They rely on a similar analysis as that of the court in *Illinois Commerce, 879 F.2d at 925-926*, and also cite *Wheeling-Pittsburgh Steel Corp. v. ICC, 723 F.2d 346, 352-53 (3d Cir. 1983)*; and Railroad Deregulation Act of 1979, Hearings Before the Surface Transp. Subcomm. of the Senate Comm. on Commerce, Science and Transp., 96th Cong., 1st Sess. 217 (1979).

amended to eliminate inconsistencies between inter- and intrastate rates irrespective of whether the intrastate rates burdened interstate commerce. Thus, § 11501 has a valid purpose even if it is read to apply only to rate-related matters.

Additionally, the cases cited by Wine Train do not conflict with the decision in Illinois Commerce. Although there are statements in other court cases that can be read as supporting full preemption, the language in those decisions could be considered dicta, because those cases all involved ratemaking and related activities or certification. [16]

[*12]

Since the court in Illinois Commerce seems to have adopted a narrower view of the scope of § 11501 than we adopted, we will no longer rely on our broad analysis, as we had done in our prior Napa Valley Wine Train rulings, as the basis for asserting ICC jurisdiction. Accordingly, we must now determine if our prior decisions can be affirmed on other grounds.

In short, we are persuaded that the court rejected the reasoning of Mendocino, supra. Accordingly, Illinois Commerce overruled a critical part of the analysis in the prior decisions in this case. We must now determine if those decisions could be affirmed on other grounds.

2. Are Wine Train's passenger operations interstate or intrastate?

Section 10501 defines, generally, our jurisdiction over transportation. Subsection (b)(1) states that the Commission does not have jurisdiction over "the transportation of passengers or property * * * entirely in a State * * *." However, we may have jurisdiction over intrastate operations by interstate carriers when those operations are sufficiently linked to, and part of, the interstate system to be deemed "interstate commerce" within the meaning of the commerce and supremacy clauses. [17] **[*13]** Once sufficient nexus has been established to bring the intrastate operation within the reach of Congress' power to regulate, the question then becomes whether Congress, by our Act, intended to regulate the operation in question. See *Illinois Commerce, supra, at 922*.

The Commission and the courts have handed down a long line of decisions defining "interstate commerce" subject to the Interstate Commerce Act and distinguishing purely local lines from lines that are connected to and part of the national rail system. A description of the kind of activity that makes an otherwise intrastate operation subject to Commission jurisdiction is contained in Magner-O'Hara Scenic Ry. -- Operation -- in the State of Michigan (not printed), served May 12, 1981, (Magner - O'Hara I), aff'd sub nom. *Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441 (6th Cir. 1982)* (Magner-O'Hara II). In that case, we found that the 262-mile passenger service from Detroit to Traverse City, MI, over the lines of 3 interstate freight carriers, was purely intrastate in nature. [18] In dicta, we noted, however, that we would have jurisdiction over a railroad lying wholly within one State if it were to participate in the movement of passengers from one State to another under common arrangements with connecting carriers, i.e., by means of through ticketing [19] or the movement of interstate freight. [20] In a subsequent appeal

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[16] See, e.g., *Illinois Commerce Comm'n v. ICC, 749 F.2d 875, 884-885 (D.C. Cir. 1984)*, cert. denied, ***474 U.S. 820 (1985)***; and *Utah Power & Light Co. v. ICC, 764 F.2d 865, 869 (D.C. Cir. 1985)*.

[17] See *I.C.C. v. Texas, 479 U.S. 450, 456 n.10 (1987)*; *Illinois Commerce, supra, 749 F.2d at 878, n. 4*; see also January 27, 1989, decision in this proceeding, at 3, and *Wichard v. Filburn, 317 U.S. 111 (1942)*, where the Supreme Court explained that "[T]he effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation."

[18] See *Manger-O'Hara II, supra, at 443, 445*, emphasizing that the railroad had made clear that it did not plan to establish interstate operations by connecting with other carriers.

[19] Citing *ICC v. Capital Transit Co., 325 U.S. 357 (1945), 338 U.S. 289 (1949)*, which in turn, cites another lead case in the area, *United States v. Yellow Cab, 332 U.S. 218 (1947)* (Yellow Cab).

[20] Citing Historic Railroads, Inc. - *Acquisition and Operation, 347 I.C.C. 369 (1974)*; and Durango & S.N.G. Co. - *Acquisition and Operation, 363 I.C.C. 292 (1979)*. The relevance of interstate freight is discussed in a separate section below.

of that decision, the Court of Appeals upheld our view that the single-state project in question was purely intrastate in nature, because no connectors to any other interstate carriers existed or were planned. See Magner-O'Hara II, 692, F.2d at 445.

[*15]

Indeed, this approach was followed recently in Cape Cod & Hyannis R.R. -- Exemp. Subtitle IV (not printed), served March 25, 1988, where an intrastate tourist railroad sought operating authority so that it could establish through ticketing with Amtrak. We held that, under the proposed expanded service involving the through ticket arrangements with Amtrak, the Commission would have jurisdiction over that aspect of the Railroad's operations.

Here, both sides argue that Magner-O'Hara supports their position. Wine Train contends that its plan to offer through service with Amtrak and Greyhound Bus lines [21] make its operations an interstate passenger service subject to the Commission's jurisdiction. It concedes that the restriction in the agreement with CAPUC (that passengers cannot disembark or board along Wine Train's route) currently prevents through ticketing with Amtrak. A traveler from a point outside of California may not, under the current restriction, use Amtrak to connect with the Wine Train for a destination on that line or vice versa, since a traveler cannot depart or board from an intermediate point. Wine Train contends, however, that as soon as this restriction is **[*16]** lifted, the carrier will authorize Amtrak to sell through tickets. Wine Train submits a statement from an Amtrak agent that it will offer through ticketing with Wine Train, as well as a draft tariff for one-way fares for stops along the line, so that travelers can board and disembark at intermediate points on Wine Train's route.

Opponents argue that Wine Train's proposal is so cumbersome, time consuming, and costly that no interstate traveler would use it, and that it is thus not valid through ticketing under Magner-O'Hara. They characterize the proposal as an attempt by Wine Train to masquerade as an interstate operation to avoid legitimate State and local regulation. [22] Opponents note that the closest Amtrak connection is over 30 miles from Wine Train's station at Napa. To combine Wine Train and Amtrak services, travelers would have to use an intermediate State-funded bus that transports Amtrak passengers between Santa Rosa and Martinez. They also note that Napa is a "flag stop" among other intermediate stops on the bus route and that a separate **[*17]** ticket is needed to ride the bus. Thus, to use Wine Train, an interstate traveler would have to coordinate Amtrak, bus, and Wine Train schedules and purchase a separate bus ticket. In addition, Wine Train takes 1-1/2 hours to travel its 18-mile one-way route. Opponents conclude that, as a practical matter, no traveler bound for or departing from a point on Wine Train's route would go through all these inconveniences.

Opponents argue further that Wine Train's service is designed to be a tourist excursion and dining experience solely in Napa Valley. [23] They support this argument by noting that Wine Train is marketed as a tourist excursion and not as an interstate passenger service. [24] For example, pamphlets about the train describe elegance, luxury, gourmet meals, and fine wine. No

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[21] On reopening, Wine Train does not provide any information about through ticketing with any motor common carrier of passengers.

[22] Opponents argue that Wine Train should be subject to the same regulation applicable to other businesses in the Napa Valley. For example, there are restrictions on the number of tours and visitors at wineries, and there are even restrictions limiting how the wineries do businesses (i.e., where they can locate their warehouses).

[23] Indeed, Concerned Citizens argues that Wine Train's tourist excursion service is not "transportation" within the meaning of § 10102(26). The group contends that transportation means the movement of passengers from one location to another. Wine Train's round-trip excursion does not move passengers between different points, but picks them up and drops them off at the same point. Friends of Napa Valley also points out that Wine Train has no chair cars or baggage handling facilities. Moreover, male passengers must wear a jacket on the dinner train, which is "hardly in keeping with the claim to be a common carrier." Opponents urge that Wine Train is a tourist attraction like Disneyland or Sea World and not a provider of transportation under the statute.

While there is some merit to these arguments, we believe that, on balance, Wine Train's passenger service is transportation within the meaning of the statute. Section 10102(26) refers to the "movement of passengers" without distinction as to where their journey begins and ends. Moreover, opponents have focused on current operations, not the more expanded service Wine Train hopes to provide. Wine Train states that it will offer one-way service for through passengers and has acquired parlor cars for this purpose.

[24] As evidence of the non-transportation orientation of Wine Train, opponents point to revenue projections for the third year of operations. Food and beverage sales are projected to amount to $ 15,104,303, whereas ticket sales are projected to be only $ 1,136,883.

mention is made of interstate travel or through ticketing with **[*18]** Amtrak. They also note in this regard that Wine Train is listed in the yellow pages under "restaurants" and not under "railroads."

[*19]

Finally, opponents argue that the purely intrastate nature of Wine Train's passenger service is reflected in the environmental report it prepared for CAPUC (dated January 1990). Wine Train describes two types of services it proposes, both round trip: one service would allow passengers to disembark at wineries, or to catch shuttle buses to other wineries and points of interest not on the route; the other service would be a dinner train with no passengers disembarking. The purpose of the line is described as to provide tourists with an alternative to using motor vehicles to drive through the Valley and visit local wineries. [25] The opponents conclude that Wine Train's passenger service has no interstate aspects and no effect on interstate commerce, and thus it should be subject to State and local, not Federal, regulation.

[*20]

The "through ticketing" criterion as a basis to determine whether this agency has jurisdiction under § 10501 is relevant but is not the only basis for that determination. [26] Even though bona fide through ticketing or other arrangements may be sufficient (i.e., irrespective of interstate freight traffic) to subject the intrastate operations of interstate carriers to the Commission's economic regulation, the facts presented here indicate that Wine Train's passenger service (including Wine Train's plans for expanded service) does not meet these criteria. First, there is no physical interchange of equipment for the through movement of passengers. [27] Second, even assuming Wine Train were to institute the expanded service it envisions, the record does not demonstrate that any significant number of ex-Amtrak customers would actually be moving in interstate commerce. [28] Third, there is no direct connection with Amtrak. Rather, through passengers have to use the intervening bus service. This requires a separate ticket and thus tends to diminish the claim of through ticketing between Wine Train and ex-Amtrak, since the intermediate bus fare is not encompassed within the so-called through **[*21]** ticket. Fourth, it is very impractical for Amtrak customers to connect with Wine Train. Finally, the actual operations and marketing of Wine Train are more a local tourist excursion than a conveyance for the through movement of passengers. [29]

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[25] The Environmental Report at section 2.1, Purpose of the Project, provides:

The railroad's general purpose is to provide a scheduled excursion passenger service within the Napa Valley that includes both rail and shuttle bus service. Such a service is primarily directed at the over 2.5 million visitors who now come to the Valley, primarily in private vehicles.

[26] Both sides cite the contractual arrangement criterion enunciated in *Yellow Cab, supra*, to support their positions. Wine Train argues that its "holding out" that it will through ticket is enough to meet the criterion, citing Atchison, T. & S. F. Ry. v. Kansas City Stock Yards Co., 33 I.C.C. 92 (1915). That case involves the issue of private vs. common carriage, and "holding out" is the relevant criterion. However, "holding out" has not been applied as the criterion in the area of passenger operations within one State.

Opponents rely on Yellow Cab for the proposition that having out-of-state travelers on board is not necessarily an indication that the service is in interstate commerce. Rather, there must be a contractual arrangement with an interstate carrier. They cite that part of the decision involving cabs that did not have an arrangement with an interstate carrier, and that the court found were not interstate movements.

[27] Compare *New Jersey v. New York, Susquehanna & Western R.R., 372 U.S. 1 (1963)*, and Penn Central Transp. Co. Discontinuance of Trains, 338 I.C.C. 380, 388-89 (1970).

[28] Wine Train's principal Amtrak connection at Martinez is with the three daily San Joaquin trains operating intrastate between Richmond and Bakersfield, CA. While there are also connections at Martinez with Amtrak's Coast Starlight between Seattle, WA, and Los Angeles, CA, it seems likely that some portion of ex-Amtrak customers would be moving between intrastate points (particularly on the northbound train from Los Angeles). Finally, there is a connection with Amtrak's California Zephyr between Oakland, CA, and Chicago, IL. However, it would seem that some portion of ex-Amtrak customers from this train also would be moving between intrastate points (particularly between Martinez and Truckee, CA, which are about five hours apart by train). Thus, whatever minuscule portion of Wine Train's patrons arrive from or are destined to Amtrak connections, it appears that only a very small percentage would be moving in uninterrupted interstate commerce.

[29] We note that Wine Train's Environmental Report, discussed above, does not mention transportation for interstate travelers at all. The entire focus of that report is on the local excursion nature of that service.

[*22]

3. Do Wine Train's interstate freight operations make its intrastate passenger operations subject to the Commission's jurisdiction? Do its freight operations provide the nexus to create such jurisdiction?

On reopening, Wine Train argues again that its interstate freight operations (it connects with SP), make it an interstate carrier. It contends that passenger and freight jurisdiction cannot be bifurcated and that as an interstate carrier, all of its operations are subject to the exclusive and plenary economic regulation of this Commission. [30] Wine Train acknowledges that the amount of freight traffic it has moved has not been large, but states that it has published interchange tariffs with SP and is soliciting more interstate traffic. [31]

[*23]

Opponents reply that, in situations like Wine Train's (where the primary service is intrastate passenger service with minimal interstate freight operations), the Commission has not claimed to have jurisdiction over intrastate passenger operations even though the carrier is an "interstate carrier." For example in Finance Docket No. 30879, Staten Island Rap. Trans. Op. Auth. -- Pet. for Dec. Order (not printed), served October 6, 1987 (Staten Is. II), the Commission confirmed a prior ruling [32] that it did not have jurisdiction over the intrastate passenger service performed by the Staten Island Transit Commission. There, the Commission had jurisdiction over the carrier, because it had acquired a rail line over which freight had moved, and it had not abandoned the common carrier obligation to provide freight service.

Likewise, in Finance Docket No. 31024, Durango & S.N.G.R. Co. -- Acquisition and Operation (not printed), served August 21, 1987 (Durango II) and November 28, 1988 (Durango III), the **[*24]** Commission held that the carrier's scenic rail passenger service was not subject to its jurisdiction even though (very minimal) freight operations were. Opponents argue that Wine Train, like Staten Island Transit and Durango, conducts both passenger service within one State and some minimal interstate freight operations. They conclude that, like them, only its freight operations should be subject to our regulation.

Wine Train argues that, because its interstate freight operations are regulated by the Commission, its passenger operations must also be similarly regulated. It cites Magner-O'Hara I, supra, at 1, which in turn cites Historic Railroads, Inc., -- *Acquisition and Operation, 347 I.C.C. 369 (1974)*, and Durango & S.N.G.R. Co. -- *Acquisition and Operation, 363 I.C.C. 292 (1979)* (Durango I). [33]

Opponents **[*25]** reply that Wine Train has handled too little freight traffic for these operations to provide a nexus with interstate commerce. They note that, since operations began, the line has averaged less than 1 carload of freight a month, and that Wine Train has no regularly scheduled freight service. [34] Opponents contend that Wine Train primarily provides an

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[30] It relies on cases establishing the supremacy of Federal regulation, e.g. *Chicago, Rock Island & P. R.R. v. Hardwick Farms Elevator Co., 226 U.S. 426 (1913)*.

[31] Wine Train argues that it has had difficulty obtaining freight traffic on the line because opponents are boycotting its freight service.

Opponents reply that most wine sold by Napa Valley wineries is sold F.O.B. the winery. Thus, the choice of the shipping carrier is made, and the shipping costs are borne, by the buyer of the wine, not by the winery. Any effort by a winery to discourage a buyer from using a specific mode of transportation, they contend, would be considered a restraint of trade.

[32] *Brotherhood of Loco. Engineers v. Staten Island, 360 I.C.C. 464 (1979)* (Staten Is. I), aff'd sub nom. *Staten Island Rapid Transit Op. Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983)*.

[33] Wine Train also argues that the Federal Railroad Administration's regulation of safety on the line is an indication of a nexus with interstate commerce. However, the Federal Railroad Safety Act of 1970 gives FRA broad authority to regulate all areas of railroad safety, and FRA's jurisdiction extends to all railroads -- even those not engaged in interstate commerce.

[34] Opponents contend that Wine Train never intended that freight operations would amount to more than a tiny fraction of the traffic on the line. As evidence, they point to Wine Train's prospectus, where it projects freight revenues would be less than four-tenths of one percent (0.4%) of gross receipts by its third year of operation.

intrastate excursion passenger service, and regulation of that service is not required to protect the very minimal freight service it provides.

The nexus argument in the prior Napa rulings is summarized in the January 27, 1989, decision (at 1):

The fact that its freight operations are offered jointly with * * * SP gives the proposed passenger operations an adequate nexus to the interstate rail system to bring Congress' preemption of state regulation of this passenger service under *49 U.S.C. § [*26] 11501* within the scope of the Commerce and Supremacy Clauses. In essence, * * * Wine Train is an interstate carrier subject to our economic regulation because it is connected to and part of the national rail system, not a purely local line.

There are two separate and quite distinct questions involved here. The first is whether Wine Train's passenger operations have a sufficient nexus to interstate commerce to permit Congress to regulate them if it chose to do so. The second is whether Congress in fact has legislated Federal control of these operations. As to the first question, we conclude that Wine Train's freight operations do not provide a sufficient nexus to interstate commerce to permit Federal regulation of Wine Train's intrastate passenger operations. As to the second question, absent the underpinning of the expansive interpretation of § 11501, upon which we relied in our prior decision, there is no indication that Congress intended to authorize us to regulate Wine Train's passenger operations, or to deprive California of the right to do so.

Traditionally, the States have always had jurisdiction over purely intrastate passenger operations. Indeed, until 1958, the States **[*27]** had exclusive jurisdiction over the discontinuance of all passenger trains -- both interstate and intrastate (for interstate trains, each State had jurisdiction over the portion within its territory). In that year, § 13a was added. Section 13a(1) [now § 10908] gave the Commission exclusive jurisdiction over interstate passenger trains. However, § 13a(2) [now § 10909] gave the Commission jurisdiction over intrastate passenger trains only when the State constitution prohibited the discontinuance, or when the State authority had denied an application or failed to decide an application for discontinuance, within 120 days. Congress, in adding § 13a, was primarily concerned with the problem posed by unneeded and unprofitable passenger services which were being subsidized by freight operations. *Southern Ry. v. North Carolina, 376 U.S. 93, 101 (1964)*. That, of course, is not the case presented here.

Also, the analysis in the prior decisions is significantly weakened by the facts presented on reopening. Those decisions relied on projections by Wine Train about its freight operations and about the interstate connections with Amtrak and Greyhound. The information before the Commission **[*28]** was sketchy, because the record was developed before any actual operation had begun. The evidence on reopening, however, is based on actual experience. This evidence shows that Wine Train's passenger service is (and will be) essentially local and that its freight operations are and will continue to be very minimal. Thus, we cannot find that Wine Train's service is an interstate operation in any respect.

4. Are Wine Train's intrastate passenger operations subject to the Commission's jurisdiction because the line was acquired under section 10905?

Finally, Wine Train contends that, because it acquired the line under § 10905, the Commission should affirm its prior ruling that it is an interstate carrier. It argues that it is the successor-in-interest to SP's rights and obligations on the line. In Wine Train's view, until the Commission authorizes discontinuance it is obligated to perform interstate operations, both passenger and freight.

SP argues that there was no legal requirement that it apply to the ICC or any State Commission before starting passenger operations. It notes that it was authorized by the California Railroad Commission to discontinue regularly scheduled passenger **[*29]** service in 1929, and yet it continued excursion passenger trains for many years. It concludes that, just as it could continue passenger service on the line, Wine Train, as its successor-in-interest, should also be able to do so.

Opponents contend that the passenger excursion service SP provided over the Napa line after it was granted discontinuance authority was merely intermittent, unscheduled excursion service arranged for private groups. That type of private service is

very different from the public, regularly scheduled service Wine Train proposes. They contend that some type of oversight and authorization would be needed before any carrier could start the intrastate passenger service proposed here. [35]

We question whether SP could have instituted operations similar to Wine Train's without State regulation. [36] If SP had tried to perform purely local operations such as Wine Train's, it is not clear that it could **[*30]** have done so without State approval. Prior to the sale, SP could not engage in intrastate operations free from all regulatory oversight of the California authorities. To the contrary, as noted above, railroads may not discontinue an intrastate passenger train without first seeking permission from the State regulatory agency. [37] Moreover, until 1958 the States had exclusive jurisdiction over the discontinuance of all passenger trains.

SP appears to concede that it is subject to the requirement that it seek authority from the State first for the discontinuance of passenger service within California, and there are several cases involving discontinuance of its trains. See, e.g., Southern Pac. Co. Discontinuance of Passenger Trains, 312 I.C.C. 631 (1961). It follows that, **[*31]** absent an express Federal preemption by statute, just as the States could regulate the discontinuance of passenger trains, they may also regulate the commencement of intrastate passenger trains as well as other aspects of the service through the licensing authority inherent in a State's power to regulate commerce within its boundaries. [38] That California might not have regulated some unscheduled, infrequent intrastate excursions SP provided for various groups in the past does not mean the State could not have done so. Thus, SP's historical regulatory experience with excursions, even if they were comparable in quality to Wine Train's scheduled operations, provides an inadequate basis to conclude that the State may not regulate operations such as those provided by Wine Train.

We conclude on reopening that our prior **[*32]** declaratory rulings should be reversed. We find that Wine Train's passenger operations are not subject to the jurisdiction of this Commission.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

COMMISSIONER McDONALD, commenting:

In my view, Illinois Commerce did not merely "appear to cast doubt" on our earlier preemption analysis in Mendocino, [39] it specifically overruled it, stating that § 11501 is narrowly limited to intrastate ratemaking and related activities. Section 11501 evinces a congressional policy of reserving to the States control over purely local activities. Such is the instance before us.

It is ordered:

1. Petitions to intervene by Southern Pacific Transportation Company and Concerned Citizens of Napa Valley are granted.

2. We reserve our prior rulings and find that Wine Train's passenger operations are not subject to the jurisdiction of this Commission.

3. This proceeding is discontinued.

4. This decision is effective **[*33]** September 19, 1991.

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[35] Opponents also argue that Amtrak legislation and the agreement SP entered into with Amtrak for it to take over SP's passenger operations relieved SP of authority to start-up passenger operations. In light of our decision above, we need not reach this issue.

[36] We note that whether regulatory authority from either this Commission or a State agency is needed to commence interstate passenger service is a moot question, since we have found Wine Train's operations are intrastate.

[37] There is an exception in the statute allowing recourse to the Commission in the first instance where the State constitution prohibits the discontinuance of the train or service in issue.

[38] We note that CAPUC did not respond to SP's argument that it would not require approval from either the ICC or a State Commission to start up passenger operations. Since we have found the current passenger operations to be solely intrastate in nature, the question of what State authority is needed, if any, is an issue for CAPUC and the California Courts to decide.

[39] There, the Commission broadly interpreted § 11501 to apply not just to rates but rather to any intrastate rail operations by interstate carriers.

Interstate Commerce Commission Decisions

End of Document

Fort Bragg v. Mendocino Railway
Case No. 21CV00850

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835. On February 22, 2022, I served the foregoing document(s) described as **NOTICE OF LODGING OF ATTORNEY GENERAL OPINIONS CITED IN SUPPORT OF OPPOSITION TO DEMURRER,** on each interested party **listed below**/on the attached service list.

Paul J. Beard, II
Fisherbroyles LLP
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
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___ (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

I am readily familiar with Jones & Mayer's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at La Habra, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

XX (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s) listed above to the e-mail address(es) of the person(s) set forth above. The transmission was reported as complete and without error. See Rules of Court, Rule 2.251.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 22, 2022 at Fullerton, California.

WENDY A. GARDEA
wag@jones-mayer.com