

**FILED**

04/28/2022

KIM TURNER, CLERK OF THE COURT  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF MENDOCINO

Jess, Dorothy  
DEPUTY CLERK

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MENDOCINO, TEN MILE BRANCH**

CITY OF FORT BRAGG, a California  
Municipal corporation

Plaintiff,

vs.

MENDOCINO RAILWAY and DOES  
1-10, inclusive,

Defendants.

Case No.: 21CV00850

**RULING ON DEMURRER  
TO THE COMPLAINT**

**I. Standard of Review on Demurrer:**

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. CCP §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.th 86, 90; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4<sup>th</sup> 968, 994. A demurrer is directed to the face of the pleading to which objection is made (*Sanchez v. Truck Ins. Exch.* (1994) 21 Cal.App.4<sup>th</sup> 1778, 1787; and to matters subject to judicial notice (CCP §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4<sup>th</sup> 157, 160.

The only issue a judge may resolve on a demurrer to a complaint is whether the complaint, standing alone, states a cause of action. *Gervase v. Superior Court* (1995) 31 Cal.App.4<sup>th</sup> 1218, 1224. On a demurrer, a judge should rule only on matters disclosed in the challenged pleading. *Ion Equip. Corp. v Nelson* (1980 110 Cal.App.3d 868, 881.

A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4<sup>th</sup> 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. *Cundiff v GTE Cal, Inc.* (2992) 101 Cal.App.4<sup>th</sup> 1395, 1404-1405. A demurrer is not the proper procedure for determining the truth of disputed facts, such as the correct interpretation of the parties' agreement or its enforceability (*Fremont Indem. Co. v Fremont Gen. Corp.* (207) 148 Cal.App.4<sup>th</sup> 97, 114-115. A judge may not make factual findings on a demurrer, including "implicit" findings. *Mink v Maccabee* (2004) 121 Cal.App.4<sup>th</sup> 835, 839.

For purposes of ruling on a demurrer, a judge must treat the demurrer as an admission of all material facts that are properly pleaded in the challenged pleading or that reasonably arise by implication, however improbably those facts may be. *Gervase v Superior Court* (1995) 31 Cal.App.4<sup>th</sup> 1218, 1224; *Yue v City of Auburn* (1992) 3 Cal.App.4<sup>th</sup> 751,756. A demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the challenged pleading. *Harris v Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149; *Hayter Trucking v Shell W. E&P* (1993) 18 Cal.App.4<sup>th</sup> 1, 12. For example, a demurrer does not admit the truth of argumentative allegations about the legal construction, operation, or effect of statutory provisions, or the truth of allegations that challenged actions are arbitrary and capricious or an abuse of discretion. *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645.

## II. The Complaint:

The plaintiff's (City of Fort Bragg) complaint alleges a single cause of action for declaratory relief. Although the complaint denominates the cause of action as being for "Declaratory and/or Injunctive Relief," the court is construing the pleading as stating a cause of action for Declaratory Relief which seeks injunctive relief as a remedy if appropriate. Injunctive relief is a remedy—not a cause of action.

The City seeks a judicial determination that Defendant (Mendocino Railway), despite being a railroad subject to regulation by the California Public Utilities Commission ("CPUC"), is nevertheless "subject to the City's ordinances, regulations, codes, local jurisdiction, local control and local police power and other City authority." Fort Bragg contends that a judicial determination of these issues and of the respective duties of the parties is now necessary and appropriate because the Defendant continues to resist compliance with City directives to repair and make safe the dangerous building on its property, and to comply with the City Land Use and Development Codes, and/or other valid exercise of City governing authority.

### III. The Demurrer:

Defendant, Mendocino Railway (hereinafter "MR"), raises two basic theories in support of its demurrer; namely, lack of subject matter jurisdiction, and preemption.

With regard to subject matter jurisdiction, MR contends that there is a decades long history of the CPUC recognizing and regulating its operations as a public utility. Moreover, MR argues that in the past, the City has vigorously defended MR's status as a "public utility" and thus should not be allowed to disavow those admissions now. More precisely, however, the gravamen of MR's contentions is that this court lacks subject matter jurisdiction based on Public Utilities Code Section 1759 which states:

No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court. Pub. Util Code § 1759

In short, MR contends that "the CPUC has exclusive jurisdiction over the regulation and control of utilities and that jurisdiction, once assumed, cannot be hampered or second-guessed by a superior court action addressing the same issue." (citing, *Anchor Lighting v. Southern California Edison* (2006) 142 Cal.App.4<sup>th</sup> 541, 548). Thus, the City is barred from obtaining a declaration from this court which might nullify Mendocino Railway's status as a CPUC-regulated public utility.

With regard to preemption, Mendocino Railway contends there is no dispute that it is a federally recognized railroad. As such, it is regulated by the federal Surface Transportation Board under the Interstate Commerce Commission Termination Act ("ICCTA") which gives plenary and exclusive power to the STB to regulate federally recognized railroads. Mendocino Railway contends that the STB's exclusive jurisdiction over a federally recognized railroad means that state and local regulatory and permitting requirements are broadly preempted. Mendocino Railway argues that the injunctive relief sought would necessarily confer to the City plenary regulatory authority over railroad operations and facilities and thus is in direct conflict with STB's exclusive grant of jurisdiction pursuant to 49 U.S.C. § 10501(b).

As explained more fully below, the court rules that for the purpose of determining the merits of this demurrer, Mendocino Railway's contentions, embrace an overly broad interpretation of both the subject matter jurisdiction limitation of Public Utilities Code Section 1759 and how the operation of federal preemption that might arise pursuant to 49 U.S.C. § 10501(b) on the facts of this case.

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**A. Requests for Judicial Notice:**

Mendocino Railway requests that the court take judicial notice of five documents, Exhibits A-E, attached to the declaration of Paul Beard II.

Although courts may notice various acts, law, and orders, judicial notice does not require acceptance of the truth of factual matters that might be deduced from the thing judicially noticed. e.g., from official acts and public records. *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4<sup>th</sup> 1057, 1062 Often what is being noticed is the existence of the act, not that what is asserted in the act is true. *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.

There is a mistaken notion that taking judicial notice of court records means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. The concept of judicial notice requires that the matter which is the proper subject of judicial notice be a fact that is not reasonably subject to dispute. Facts in the judicial record that are subject to dispute, such as allegations in affidavits, declarations, and probation reports, are not the proper subjects of judicial notice even though they are in a court record. In other words, while we take judicial notice of the existence of the document in court files, we do not take judicial notice of the truth of the facts asserted in such documents. *People v. Tolbert* (1986) 176 Cal.App.3d 685, 690.

Furthermore, the hearsay rule applies to statements in judicially noticed declarations from other actions and precludes consideration of those statements for their truth absent a hearsay exception. *Magnolia Square Homeowners Ass'n v. Safeco Ins.* (1990) 221 Cal.App.3d 1049, 1056. A court cannot take judicial notice of the truth of hearsay statements simply because they are part of the record.

**1. Exhibit A: Page from CPUC website listing railroads it regulates:**

While the court might take judicial notice that the website exists, the court will not take judicial notice of the webpage for the purpose of establishing, as a fact beyond dispute, that Mendocino Railway is a common carrier, engaged in railroad operations in interstate commerce, and regulated in that capacity by the CPUC. Such a factual or legal conclusion is directly contradicted by the CPUC decision in the Matter of the Application of California Western Railroad, Inc. for Authority to Modify Scheduled Commuter Passenger Service and Seek Relief from Regulated Excursion Passenger Scheduling and Fares 1998 Ca. PUC LEXIS 384. Accordingly, the factual content of the website is not a proper subject for judicial notice, and the document is not otherwise relevant to the issues to be decided. Accordingly, request for the court to take judicial notice of Exhibit A is denied.

**2. Exhibit B: CPUC Decision 98-01-050:**

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a)

3. Exhibit C: January 17, 2019 Letter from Fort Bragg City Attorney to California Coastal Commission:

The contents of the proffered letter are hearsay statements of opinion with respect to a matter of law. The content of the letter is not a proper subject for judicial notice. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4<sup>th</sup> 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, request for the court to take judicial notice of Exhibit C is denied

4. Exhibit D: August 1, 2019 Letter with Coastal Consistency Certification:

While the existence of the letter and certification may be judicially noticed, judicial notice is not proper as to their contents. Mendocino Railway requests the court take judicial notice of the documents because they are "relevant to, inter alia, the City's position on the history of Mendocino Railway's freight and passenger service as well as on whether the railroad is ready, willing, and able to resume full service upon the tunnel's reopening. For purposes of a demurrer, the court must assume the facts in the complaint as true. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4<sup>th</sup> 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, Mendocino Railway's stated purpose for the court to take judicial notice is irrelevant for determining the merits of its demurrer and thus the document is irrelevant to the motion at bar. Accordingly, request for the court to take judicial notice of Exhibit D is denied.

5. Exhibit E: CPUC Decision No. 98-05-054:

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a).

6. Mendocino Railways's Supplemental Request for Judicial Notice filed April 13, 2022:

Mendocino Railway filed a Supplemental Request for Judicial Notice on April 13, 2022. This matter, however, was deemed submitted for decision on February 24, 2022 after the court had reviewed all of the parties' pleading and papers and heard oral argument. The supplemental request for judicial notice, coming 48 days after the matter was deemed submitted is untimely. The supplemental request for judicial notice is denied.

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#### IV. Discussion:

##### A. Public Utilities Code Section 1759:

By way of the instant demurrer, MR contends that the City is asking this court to “nullify Mendocino Railway’s status as a CPUC-regulated public utility and thus empower the City to seize unfettered control over a state regulated, public-utility.” MR characterizes the City’s action as an “extraordinary” and “unlawful” attempt to “second guess” and “interfere with the agency’s continuing jurisdiction....” In support of its allegations, MR argues that the Public Utilities Code “vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous specific powers for [that] purpose.” (citing, *San Diego Gas*, 13 Cal.4<sup>th</sup> at 915). MR notes that “to protect the CPUC’s broad mandate and limit judicial interference with the CPUC’s work, the Legislature enacted section 1759(a) of the Public Utilities Code which deprives the superior court of jurisdiction to entertain an action that could undermine the CPUC’s authority.” (citing *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4<sup>th</sup> 541, 548.

While it is true that section 1749(a) grants the CPUC exclusive governing authority over public utilities, application of the jurisdictional limitations of 1749(a) is more nuanced and fact-driven than Mendocino Railway admits. For example, it is well established that a suit is not barred in superior court when it actually furthers the policies of the CPUC. (see, *North Gas Co. v. Pacific Gas & Electric Company* 2016 U.S. Dist. LEXIS 131684 (N.D. Cal. 2016). In fact, there are several legal issues that need to be evaluated in determining the applicability of Section 1749. These issues include a “careful assessment of the scope of the CPUC’s regulatory authority and [an]evaluation of whether the suit would thwart or advance... CPUC regulation.” (See, *PegaStaff v. Pacific Gas & Electric Company* (2015) 239 Cal.App.4<sup>th</sup> 1303, 1318.)

As noted in *Vila v. Tahoe Southside Water Utility*, (1965) 233 Cal.App.2d 469, 477, California courts have frequently proclaimed concurrent jurisdiction in the superior court over controversies between utilities and others not inimical to the purposes of the Public Utility Act. For example, as the Vila court explained,

“In *Truck Owners, etc. Inc. v. Superior Court*, *supra*, 194 Cal. 146, the court, after stating that the Legislature under the Constitution had full power to divest the superior court of all jurisdiction, and had exercised that power in denying jurisdiction to “enjoin, restrain or interfere with the commission in the performance of its official duties,” and had also vested in the Supreme Court sole power “to compel the commission to act,” held that the superior court, nevertheless, had power to hear and determine a cause involving a complaint against a transportation company seeking to enjoin its transportation of freight as a public carrier with a certificate of public convenience. The court noted that the suit did not involve an interference with any act of the commission since the latter had not acted; that if it ever did act any conflicting injunction would be superseded. A contention that

recognition of concurrent jurisdiction in the court and the commission would cause confusion was rejected.”

A three prong test to determine whether an action is barred by section 1759 was set forth by the California Supreme Court in *San Diego Gas & Electric Co. v. Superior Court* 13 Cal.4<sup>th</sup> 893 (*Covalt*). The test is as follows:

- (1) Whether the commission had the authority to adopt a regulatory policy;
- (2) Whether the commission had exercised that authority; and
- (3) Whether the superior court action would hinder or interfere with the commission’s exercise of regulatory authority.

Superior court jurisdiction is precluded only if all three prongs of the *Covalt* test are met.

As described in *Pegastaff, supra*, 239 Cal.App.4<sup>th</sup> at 1315,:

“The issue in *Covalt* was whether section 1759 barred a superior court action for nuisance and property damage allegedly caused by electric and magnetic fields from power lines owned and operated by a public utility. (citation) The court, considering the third prong of the test, concluded that a superior court verdict for plaintiffs would be inconsistent with the PUC’s conclusion “that the available evidence does not support a reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm, and that unless and until the evidence supports such a belief regulated utilities need take no action to reduce field levels from existing powerlines.”

Since *Covalt* was decided, courts have had repeated occasion to apply the test it established. In *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4<sup>th</sup> 256, residents brought actions against, among others, water providers regulated by the PUC for injuries caused by harmful chemicals in the water they supplied. Asserting tort and other causes of action, the plaintiffs sought damages and injunctive relief against those defendants. The water companies argued that section 1759 deprived the superior court of jurisdiction over the plaintiff’s claims. The Supreme Court found that the first two prongs of the *Covalt* test were met: The CPUC had regulatory authority over water quality and safety and had exercised that authority. Applying *Covalt*’s third prong, it held that adjudication of some—but not all—of the plaintiff’s claims against the regulated water companies would hinder or interfere with the CPUC’s exercise of regulatory authority. The plaintiff’s injunctive relief claims would interfere with the PUC’s exercise of its authority because the PUC had determined that the water companies were in compliance with state water quality standards and impliedly declined to take remedial action against those companies. “A court injunction, predicated on a contrary finding of utility noncompliance, would clearly

conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." Plaintiff's damages claims were also barred by section 1759 to the extent they sought to recover for harm caused by water that met state standards but allegedly was unhealthy nonetheless."

As the Pegastaff court concludes,

*"Hartwell demonstrates that application of the third prong of Covalt does not turn solely or primarily on whether there is overlap between conduct regulated by the PUC and the conduct targeted by the suit. The fact that the PUC has the power and has exercised the power to regulate the subject at issue in the case established the first and second prongs of Covalt, but will not alone establish the third. Instead, the third prong requires a careful assessment of the scope of the PUC's regulatory authority and evaluation of whether the suit would thwart or advance enforcement of the PUC regulation. Also relevant to the analysis is the nature of the relief sought—prospective relief, such as an injunction, may sometime interfere with the PUC's regulatory authority in ways that damages claims based on past harms would not. Ultimately, if the nature of the relief sought or the parties against whom the suit is brought fall outside the PUC's constitutional and statutory powers, the claim will not be barred by section 1759. (Emphasis added).*

In the case at bar, it is clear that the superior court jurisdiction of the parties' dispute will not impair, hinder or interfere with the CPUC's exercise of regulatory authority. The reason is simple. As plaintiff contends, MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity.

"The Legislature enacted the Public Utilities Act (§ 201 et seq.) which 'vests the commission with broad authority to "supervise and regulate every public utility in the State.'" (*San Diego Gas & Electric v. Superior Court* (1996) 13 Cal.4<sup>th</sup> 893 (*Covalt*) This broad authority authorizes the commission to "do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient" in the exercise of its jurisdiction over public utilities." The commission's authority has been liberally construed, and includes not only administrative but also legislative and judicial powers..." *Pegastaff, supra* at p. 620 .When the CPUC's determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 629.

As emphasized by the City of Fort Bragg in their opposition, the CPUC has already made judicial findings regarding MR's predecessor, California Western Railroad (CWRR), regarding its status as a public utility. Simply put, the CPUC found that the



railroad is not functioning as a public utility. Its services are limited to sightseeing excursions and do not constitute "transportation under Public Utilities Code section 1007.

The CPUC writes,

"The primary purpose of CWRR's excursion service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing.... [The Commission [has] also opined that public utilities are ordinarily understood as providing essential services... [But, CWRR's excursion service is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility. Based on the above, we conclude that CWRR's excursion service should not be regulated by the CPUC." (1998 Cal. PUC LEXIS 189 (1998)

Obviously, if the CPUC has already found that the railroad should not be subject to its regulation, it is difficult to imagine how the superior court, by hearing the current dispute, would impair or hinder any exercise of the CPUC's regulatory authority.

*City of St. Helena v. Public Utilities Commission* (2004) 119 Cal.App.4<sup>th</sup> 793 lends further support to the conclusion that MR is not subject to regulation as a public utility in a manner that would deprive this court of subject matter jurisdiction. In that case, the City of St. Helena sought annulment of various decisions of the PUC conferring public utility status on the Napa Valley Wine Train. At issue in that case was whether the City was pre-empted, by reason of the Wine Train's public utility status, from exercising its local jurisdiction regarding the placement of a Wine Train station in downtown St. Helena. The case is strikingly similar to the case at bar in that, here, the MR has allegedly asserted any local regulatory authority of the City of Fort Bragg is also pre-empted.

The *City of St. Helena* court writes,

The Wine Train is not subject to regulation as a public utility because it does not qualify as a common carrier providing "transportation." Additionally, even if an up-valley station were permitted, it could be argued that any transportation provided would be incidental to the sightseeing service provided by the Wine Train. The PUC has previously held that sightseeing is not a public utility function. (*Western Travel, supra*, 7 Cal.P.U.C>2d 132 1981 WL 165289.) In *Western Travel*, the PUC found sightseeing is "essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Id.* at p. 135 1981 WL 165289.) Relying in part on *Western Travel*, the PUC previously found the Wine Train was not a public utility. (See, *NVWT IV, supra*, 2001 WL 873020, 2001 Cal. PUC LEXIS 407.) We leave for another day the question of whether a sightseeing service is subject to regulation

under section 216. Rather, we note the PUC's decisions in NVWT IV and Western Travel to illustrate the PUC's internal inconsistency.

This inconsistency is also evident in the California Western Railroad decision, in which the PUC concluded the Skunk Train, providing an excursion service between Fort Bragg and Willits, did not constitute "transportation" subject to regulation as a public utility. (78 Cal. P.U.C.2d at p. 295, 1998 WL 217965.) It is difficult to differentiate this service from that provided by the Skunk Train. The Skunk Train's excursion service involves transporting passengers from Fort Bragg to Willits, and then returning them to the point of origin for purpose of sightseeing. (Ibid.) The PUC does little to distinguish the Wine Train from the Skunk Train. Rather, it simply states the Wine Train would not provide a continuous loop service due to its proposed up-valley stops. As previously discussed, the proposed stops may give rise to public utility status in the future, but presently do not mandate such a determination. Finally, to the extent the PUC has made express findings of fact that that Wine train is a public utility, such findings are not supported by substantial evidence. Presently, the Wine Train provides a round-trip excursion that is indistinguishable from the Skunk Train.

It is quite clear from this decision that the correct finding of the CPUC regarding excursion service railroads, is that such railroads are not operating as public utilities and should not be regulated by the CPUC as such. Furthermore, as the City of St. Helena court noted, "The fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." The same holds true for MR. Accordingly, there is no basis for applying the jurisdictional bar of Section 1759 to the instant proceedings.

**B. The Application of Federal Preemption Requires a Case-by-Case Factual Assessment Which Cannot Properly be Determined on Demurrer:**

Mendocino Railway contends that the injunction sought in this case would grant the City unlimited power over a federally recognized railroad in that the injunction would require Mendocino Railway to submit to "all" local laws and regulations, as well as to the total "jurisdiction and authority of the City." MR claims that "with such vast power, the City could force Mendocino Railway to halt or delay rail-related activities pending compliance with local permitting and other preclearance requirements. Mendocino Railway asserts that the Surface Transportation Board, under the authority of the Interstate Commerce Commission Termination Act, has plenary regulatory power and exclusive jurisdiction over federally recognized railroads. Accordingly, any jurisdiction of this Superior Court is preempted.

This court finds that Mendocino Railway's preemption argument is overbroad. It fails to recognize that not all state and local regulations that affect railroads are preempted. It further fails to account for the fact that Mendocino Railway's is not involved in any interstate rail operations. As discussed above, from a regulatory standpoint, Mendocino

Railway is simply a luxury sightseeing excursion service with no connection to interstate commerce. As a result, its "railroad activities", for the purposes of federal preemption, are extremely limited.

Not all state and local regulations that affect railroads are preempted. State and local regulation is permissible where it does not interfere with interstate rail operations. Local authorities, such as cities and/or counties, retain certain police powers to protect public health and safety. *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999). As the S.T.B. noted, "manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption." (Ibid, at 23)

In the *Borough* decision the Surface Transportation Board issued a declaratory order regarding the "nature and effect of the preemption in 49 U.S.C. 10501(b) as it related to the appropriate role of state and local regulation (including the application of local land use or zoning laws or regulations and other state and local regulation such as building codes, electrical codes, and environmental laws and regulations.)" The *Borough* decision is particularly instructive because it specifically addresses how preemption might apply in analyzing local zoning ordinances, local land use restrictions, environmental and other public safety issues, building codes and non-transportation facilities. The question at the very core of the preemption analysis is whether local control would interfere with a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. If local control does not interfere with interstate rail operations, then preemption does not apply.

*Borough* makes clear that,

"local land use restriction, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are place on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. Austell; City of Auburn. Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question." (Emphasis added)

Mendocino Railway has already been the subject of a CPUC judicial determination that it is not engaged in interstate transportation related activities but rather simply provides a sightseeing excursion loop service. Accordingly, it is difficult to see how any of its non-railroad services could possibly trigger preemption.

Put another way, Mendocino Railway's it is far more likely that Mendocino Railways facilities and activities will be analyzed as "non-transportation facilities.

As noted in *Borough*,

“It should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW [the railroad] has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad’s ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities”

Accordingly, the applicability of preemption is necessarily a “fact-bound” question, not suitable to resolution by demurrer.

V.    Order:

For the reasons set forth above Mendocino Railways Demurrer is overruled. Pursuant to Cal. Rules of Ct. 3.1320(g) defendants shall have ten (10) days from service of this order to file their answer.

SO ORDERED.

DATED: 4/28/2022



Clayton L. Brennan  
JUDGE OF THE SUPERIOR COURT

**Superior Court of California, County of Mendocino  
PROOF OF SERVICE**

Case: **21CV00850**    **CITY OF FORT BRAGG VS MENDOCINO RAILWAY**

Document Served:    **RULING ON DEMURRER TO THE COMPLAINT**

I declare that I am employed by the Superior Court of California, in and for the County of Mendocino; I am over the age of eighteen years and not a party to the within action. My business address is:

- Mendocino County Courthouse, 100 North State Street, Ukiah, CA 95482
- Ten Mile Branch, 700 South Franklin Street, Fort Bragg, CA 95437

I am familiar with the Superior Court of Mendocino County's practice whereby each document is placed in the Attorneys' boxes, located in Room 107 of the Mendocino County Courthouse or at the Ten Mile Branch, transmitted by fax or e-mail, and/or placed in an envelope that is sealed with appropriate postage is placed thereon and placed in the appropriate mail receptacle which is deposited in a U.S. mailbox at or before the close of the business day.

On the date of the declaration, I served copies of the attached document(s) on the below listed party(s) by placing or transmitting a true copy thereof to the party(s) in the manner indicated below.

Party Served	Ukiah US Mail	Ten Mile US Mail	Ukiah Attorney Box	Ten Mile Attorney Box	Inter Office Mail	Fax	E-mail
JONES & MAYER Atty. Russell A. Hildebrand 3777 North Harbor Boulevard Fullerton, CA. 92835 rah@jones-mayer.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
JONE & MAYER Atty. Krista MacNevin Jee 3777 North Harbor Boulevard Fullerton, CA. 92835 kmj@jones-mayer.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FISHERBROYLES LLP Atty. Paul J. Beard II 4470 W. Sunset Blvd., Suite 93165 Los Angeles, CA. 90027 paul.beard@fisherbroyles.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
COUNTY COUNSEL COUNTY OF MENDOCINO Atty. Chrstian M. Curtis 501 Low Gap Road, Room 1030 Ukiah, CA. 95482 curtisc@mendocinocounty.org cocosupport@mendocinocounty.org	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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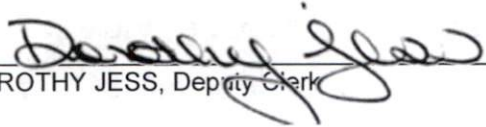
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed at:

- Ukiah, California
- Fort Bragg, California

4/28/2022 10:22:37 AM

Date: 4/28/2022

KIM TURNER, Clerk of the Court

  
By: DOROTHY JESS, Deputy Clerk