IN THE COURT OF APPEAL OF THE STATE OF CALIFONRIA FIRST APPELLATE DISTRICT, DIVISION ONE

A168497 & A168959

MENDOCINO RAILWAY
Plaintiff-Appellant,

v.

JOHN MEYER
Defendant-Respondent.

On Appeal from the Superior Court of California,
County of Mendocino
(Case No. SCUKCVED202074939, Hon. Jeanine Nadel)

RESPONDENT'S ANSWER TO AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION'S AMICUS CURIAE BRIEF

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INTRODUCTION

The American Short Line And Regional Railroad Association ("ASLRRA") has filed an amicus curiae brief that addresses the jurisdiction of the Surface Transportation Board ("STB") and the interpretation of federal railroad related laws and regulations. The issues raised in its amicus curiae brief were not raised at trial and they are not supported by the record.

Generally, the appellate court considers only issues properly raised by the appealing parties, not propositions urged for the first time by an amicus curiae. The issues raised by ASLRRA are not relevant to this appeal and they are far outside the scope of the evidence provided at trial. As a result, ASLRRA's arguments should not be considered by the court.

ARGUMENT

I. Both ASLRRA And MR Argue That MR Must Be Considered A Common Carrier Under California Law Because MR Is An STB Regulated Common Carrier; This Is A New Argument That Cannot Be Raised First On Appeal.

ASLRRA claims that Mendocino Railway ("MR") is an STB federally regulated "common carrier," and therefore California law must also recognize MR as a "common carrier." This argument was not raised by MR at trial, and no evidence was offered at trial that established MR's STB status. (CT 2037.)

For the first time on appeal, MR argued that it is a public utility

under Article XII § 3 of the California Constitution for the purpose of California eminent domain law because it is "an STB-regulated common carrier," which thereby makes it a public utility. (MR Opening Brief, p. 10,15.) MR did not raise this argument in the trial court and it cannot raise it for the first time on appeal. (*Greewich S.F., LLC v. Wong* (2010) 190 Cal. App. 4th 739, 767, citing *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal. App. 4th 1480, 1488, fn. 3.)

MR's Complaint in this Eminent Domain action ("Complaint") made only one reference to the California Constitution and made no references to federal law provisions. The Complaint states the following:

> "Plaintiff MENDOCINO RAILWAY is now, and at all relevant times hereinafter stated was, a California railroad corporation organized and existing under the laws of the State of California and is authorized by law to exercise the power of eminent domain to acquire private property for public use pursuant to *California Constitution, Article I, § 19*; California Public Utilities Code §§ 229, 230, 611 and 7526(g); and California Code of Civil Procedure §§ Section 1230.010, et seq." (CT 14, emphasis added.)

At trial MR's CEO, Robert Pinoli ("Pinoli"), was asked about a 2022 letter written by an attorney for California Public Utilities Commission ("CPUC") which stated that MR "is not a public utility within the meaning of the California Constitution." (RT 677-678, referencing CT 1835-1838.) In response to this inquiry, Pinoli did not argue that MR's purported federal

STB-regulated status automatically granted it public utility status under Article XII § 3 of the California Constitution. Rather, Pinoli responded by claiming that the letter from the CPUC was simply the opinion of an CPUC staff attorney, and not that of the CPUC itself. (RT 677-678, referencing CT 1835-1838.)

The trial court decision provides "[t]hat there was no designation of MR's status by the STB offered by MR. MR acquired CWR in 2004 when it purchased its assets through bankruptcy and operated it as a non-carrier." (CT 2037.)

Judge Nadel stated the following at the hearing of MR's motion to reopen the case and vacate the Judgment:

> "Throughout the trial, plaintiff was steadfast in its position that this Court maintain jurisdiction over the eminent domain proceeding. To claim now that a ruling would potentially interfere with any input from the Surface Transportation Board as to whether the Court's decision could constitute an improper regulation of MR's services and whether such regulations preempted, is not only disingenuous, but untimely and unsupported by any legitimate authority." (RT 1056:12-20.)

The court denied MR's motion to reopen the case because the issue raised by MR "was addressed at trial when Mr. Pinoli testified that Mendocino Railway assumed carrier responsibilities from its affiliates in 2022." (RT 1056:21-25.) The court went on to state that "this case was filed in 2020 with Mendocino Railway as the only plaintiff in the action.

This case was filed with full knowledge that Mendocino Railway was not acting or providing common carrier services." (RT 1057:20-23.)

Since MR failed to raise the argument at trial that it is an STB-regulated common carrier it is by extension also a California common carrier, this Court does not need to consider this new argument on appeal. Generally, the appellate court considers only issues properly raised by the appealing parties, and it does not consider propositions urged for the first time on appeal by a party or an amicus curiae. (*Greewich S.F., LLC v. Wong* (2010) 190 Cal. App. 4th 739, 767; *Knetsch v. U.S.* (1960) 364 US 361, 370, 81 S Ct 132; *California Bldg. Indus. Ass'n v. State Water Resource Control Bd.* (2018) 4 Cal. 5th 1032, 1048 fn 12.)

An amicus curiae must accept the issues made and propositions urged by the appealing parties; any additional questions presented in a brief filed by an amicus curiae will not be considered. (*Lance Camper Mfg. v. Republic Indem. Co. Of America* (2001) Cal. App. 4th 1151, 11621 fn. 6.) Amicus curiae may not "launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*Pratt v. Coast Trucking, Inc.* (1964) 228 Cal. App. 2d 139, 143.)

In this case, ASLRRA cannot raise these new federal issues and the court should not consider such new issues.

II. Pinoli's Trial Testimony Contradicts ASLRRA's Argument That MR Is A Common Carrier.

The evidence and law do not support ASLRRA's and MR's arguments that MR is a "common carrier" or "public utility," but rather, the evidence established that it is an excursion service. (CT 2039.)

Public Utilities Code § 211 defines "common carrier" as a corporation that provides "transportation for compensation" including "every railroad corporation." The court stated in its decision that MR's "[r]ound trip excursions do not qualify as 'transportation' under Section 211 of the Public Utilities Code," and MR agreed. (CT 2039.)

Pinoli testified that Mendocino Railway has not performed common carrier services from the time that it purchased the CWR in 2004 through January 1st, 2022. (RT 866:6-11.) Additionally, MR's attorney confirmed in a letter written to the Railroad Retirement Board dated April 27, 2022[1], that "MR believes that it has become a 'carrier' under the Act effective January 1, 2022." (CT 1921-1926.)

The court stated in its decision that MR had the burden of proof to establish its legal status as a public utility, and "[t]here is no dispute that the

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[1] MR's letter to the Retirement Board was written just four months before the trial in this action, and approximately 16 months after the complaint was filed. (CT 1921.)

only evidence of railroad income during the relevant time was and is earned from the excursion services only. MR concedes that the excursion service does not fall under the category of 'transportation' and does not qualify MR as a public utility." (CT 2040.)

MR did not meet its burden of proof, and the evidence unequivocally established that MR did not operate as a "railroad," nor is it a "common carrier" or "public utility" because its trains do not transport persons or property. (CT 1917-1926; RT 866:6-11, 926:26-927:2, 1004:17-25.)

ASLRRA's unilateral assertion that MR is an STB-regulated common carrier is not supported by the record and should not be considered. (RT 866:6-11, CT 1917.)

III. California Eminent Domain Law Is Not Preempted By The STB Or Federal Regulations.

ASLRRA claims that court's determination that MR is not a common carrier may be preempted by federal law. ASLRRA states the following in its brief:

> "It is concerned that attempts to apply a different state-created definition for what constitutes an interstate common carrier would likely have the effect of unreasonably burdening interstate transportation and discriminating against interstate commerce. Further such an action would likely be preempted as applied under 49 U.S.C. § 10501(b)." (ASLRRA Brief, p. 21.)

MR did not raise this argument that California eminent domain

statutes are preempted by the STB or federal law in the trial court, and it cannot be raised first on appeal. The appellate court considers only issues properly raised by the appealing parties, and it does not consider propositions urged for the first time on appeal by a party or an amicus curiae. (*Greewich S.F., LLC v. Wong* (2010) 190 Cal. App. 4th 739, 767; *Knetsch v. U.S.* (1960) 364 US 361, 370, 81 S Ct 132; *California Bldg. Indus. Ass'n v. State Water Resource Control Bd.* (2018) 4 Cal. 5th 1032, 1048 fn 12.)

ASLRRA is professing that a California state court does not have the legal right to evaluate whether an entity may be considered a common carrier for California eminent domain purposes because that determination is preempted by the STB. Since there is a general presumption against preemption, ASLRRA bears the burden of persuasion. (*Elam v. Kansas City S. Ry. Co.*, 635 F 3. 796, 802 (5th Cir. 2011).) ASLRRA did not meet its burden because its preemption argument is not adequately supported by the record or case law. ASLRRA also does cite any cases that held that California eminent domain statutes were preempted by the STB or federal law.

California's eminent domain statues are not "regulating," "managing," or "governing" "railroad transportation," rather they are

incidental and remote to rail transportation.

Under California law a "'railroad corporation' may condemn any property necessary for the construction and maintenance of its *railroad.*" (Public Utilities Code § 611, italics added.) "A 'railroad corporation' includes every corporation or person owning, controlling, operating, or managing any *railroad* for compensation within this State." (Public Utilities Code § 230, italics added.) A "'railroad' includes every commercial, interurban, and other railway, . . . owned, controlled, operated, or managed *for public use in the transportation of persons or property.*" (Public Utilities Code § 229, italics added.) In California a "'common carrier' means every person and corporation providing *transportation for compensation* to or for the public" and it includes every railroad corporation. (Public Utilities Code § 211, italics added.)

Under federal law a "rail carrier" is defined as a "a person providing common carrier railroad *transportation for compensation.*" (49 U.S.C. § 10102(5).)

California's application of its eminent domain laws are unlikely to prevent or unreasonably interfere with railroad transportation. Both the federal and California definitions require transportation, which is understandable and expected. However, MR does not actually transport

persons or property, and as a result, it is considered an excursion service.

Pinoli testified that MR does not believe that it became a common carrier until January 1, 2022, when MR took over freight operations from Sierra Northern Railway. (RT 1004:17-25.) Pinoli testified that MR has "commuter fares," but these fares cannot be used by the public, as they can only be purchased by people that own property on the line and their guests. (RT 541:17-542:6, CT 1237-1238, 1233-1256.)

Pinoli also testified that in 2020 approximately 90 percent of MR's revenue was from excursion services and the remaining 10% of revenue was obtained from leases and easements, and he refused to discuss MR's revenue streams for other years. MR did not receive any revenue from common carrier services. (RT 926:26-927:2, 928:18-929:1.)

The trial court evaluated the eminent domain requirements and it found that the acquisition of defendant John Meyer's property "would enhance the operations of MR's excursion service that admittedly does not fall within the definition of transportation." (CT 2040.)

California's eminent domain stautes are not preempted by the STB or federal law, and MR cannot exercise the power of eminent domain to carry on its private business activities. (CT 2041.)

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IV. The Evidence Established That MR Cannot Access The Interstate Rail System And ASLRRA's Argument On The Issue Is Not Based Upon The Evidence In The Record.

ASLRRA claims that MR is a part of the Interstate Rail System, however its argument is not based upon the evidence in the record or operational reality.

MR operates a 40-mile long railroad line between Fort Bragg and Willits, California, however a tunnel collapse in 2015 prevents MR from running trains the full length of the line. (RT 64:19-22, 65:3-6, 66:6-13, 95:19-101:4, 344:11-17.) MR's line connects to the NCRA railroad line in Willits, which is currently inactive. (RT 881:13-882:6.) In 1998 the Federal Railroad Administration placed a moratorium on the use of the NCRA line due to safety issues. (RT 336:19-26.) As a result of the ongoing moratorium, the last time that MR interchanged a freight train onto the NCRA line was 26 years ago. (RT 336:2-7, 336:19-26.)

On February 6, 2020, Robert Pinoli wrote a letter to Mitch Stogner, Executive Director of the NCRA, in order to formally request that the NCRA restore rail service on its rail line south from Willits. (CT 1717.) Pinoli stated:

> "Mendocino Railway's line connects with the NCRA's line at Willits. Through that connection, Mendocino Railway connects to the national rail network. Since 1998, the NCRA's line has been embargoed as a result of unsafe operating conditions and

> noncompliance with federal rail safety laws and regulations. . . . Shippers located on our line cannot access the national rail network until the NCRA restores service on its line." (CT 1717.)

For 26 years MR's line has not been a functioning part of the Interstate Rail System. (RT 336:2-7, 336:19-26.) Notwithstanding, the question of whether or not MR's line is actually part of the Interstate Rail System is not material to court's evaluation of the issues in this case.

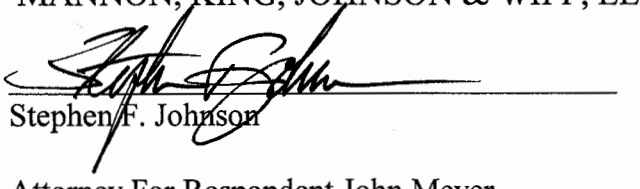
CONCLUSION

ASLRRA's arguments are outside the scope of the issues and evidence presented at trial, and they should not be considered on appeal. Notwithstanding, even if ASLRRA's arguments are considered, they do not alter the outcome of this case.

MR did not meet its burden of proof, its arguments are not supported by the evidence in the record, and defendant John Meyer's objections to the taking of his property are justified. There is substantial evidence in the record supporting the trial court's decision, and the judgment should be affirmed.

Dated: February 7, 2025

MANNON, KING, JOHNSON & WIPF, LLP



Stephen F. Johnson

Attorney For Respondent John Meyer

CERTIFICATE OF COMPLIANCE

I, Stephen F. Johnson, hereby certify that the foregoing Respondent's Answer To American Short Line And Regional Railroad Association's Amicus Curiae Brief is proportionally spaced, has typeface of 13 points or more, and contains 2,406 words.

Dated: February 7, 2025

Stephen F. Johnson