

BEFORE THE
SURFACE TRANSPORTATION BOARD

237000

Finance Docket No. 35861
California High-Speed Rail Authority
- Petition for Declaratory Order -

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**REPLY OF STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL OF CALIFORNIA
IN SUPPORT OF PETITION FOR DECLARATORY ORDER**

INTRODUCTION

The State Building and Construction Trades Council of California (“SBCTC”) respectfully submits these comments in support of the Petition for a Declaratory Order filed by the California High-Speed Rail Authority (“Authority”). As explained below, this Board should issue a declaratory order that, under the circumstances at issue here, the ICC Termination Act (“ICCTA”), 49 U.S.C. §701, *et seq.*, pre-empts state-law injunctive remedies under the California Environmental Quality Act (“CEQA”), Cal. Pub. Resources Code §21050, *et seq.*, that would prevent or delay the Authority from constructing the railway tracks and facilities at issue.

The planned segment of California’s high-speed passenger rail system (the “Project”) is of importance not only to California’s workers, economy, and transit system, but also to the national rail network, and therefore implicates the federal policy of promoting a safe and efficient rail transportation system. *See* 49 U.S.C. §10101(3) (stating federal policy “to promote a safe and efficient rail transportation system . . .”); *id.*

§10101(4) (stating federal policy “to ensure the development and continuation of a sound rail transportation system . . .”). This Board already has ruled that the Project is under the exclusive jurisdiction of this Board, conferred by federal statute, and has approved construction of the segment. Accordingly, federal law should preempt state-law remedies invoked by third-parties in suits against the Authority that would stop or delay the construction of the same railway tracks and facilities.

The order sought by the Authority is narrowly limited. The Authority is not asking for a ruling that it need not comply with CEQA. The Authority did comply with CEQA. The Authority “does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation.” Petition at 10. This matter also does not involve the question whether federal preemption would apply to CEQA suits that are not brought directly against rail carriers. The Board should issue the narrowly limited order sought by the Board, and need not reach any broader issues.

INTEREST OF THE SBCTC

The SBCTC is a federation of local unions, district labor councils, and local building trades councils that collectively represent about 400,000 California workers in the building and construction trades. The SBCTC’s affiliates co-sponsor, with their management partners, the state-approved apprenticeship programs that train the vast majority of the more than 50,000 apprentices in the building and construction trades. Many of the journey-level workers and apprentices who will be employed on the Project are members of SBCTC’s affiliates. The SBCTC’s affiliates and their co-sponsored

apprenticeship programs have been working to ensure that skilled and trained workers will be available to complete the Project in a streamlined and efficient manner with quality workmanship, and that local residents will have needed employment opportunities.

HISTORY AND IMPORTANCE OF THE PROJECT

In 1996, the California Legislature created the Authority to develop a high-speed, intercity train system to connect the major metropolitan areas of California, and provide service between Northern California and Southern California. See Pub. Util. Code §§185000, 185010(h), 185020. Over the next 12 years, the Authority spent about \$60 million for pre-construction activities, such as environmental studies and planning, related to the development of a high-speed rail system. In 2008, the Legislature adopted, and Governor Schwarzenegger signed, a bill to place before voters a \$9.95 billion bond measure to pay for part of the costs of constructing a high-speed rail system. This bond measure was put before California voters as Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, on the November 2008 general election ballot. The decision of the voters was that, after many years of study and debate, construction of a high-speed rail system should move forward. In addition to this state funding, to date California has obtained billions of dollars of federal funding to aid with construction of the Project, much of it time-sensitive funding from the federal stimulus

that must be expended by a date certain.¹ The presence of this federal support indicates a federal interest, not just in the interstate rail system, but also in the expenditure of federal stimulus funds.

As planned, the high-speed rail system will be the largest infrastructure project in California history, and among the largest nationwide. In its first phase alone, the system is projected to create more than 6,000 direct construction worker jobs and many thousands of construction-related jobs. These jobs would be created in California's economically depressed Central Valley where they are desperately needed by construction workers and their families. Construction apprenticeship programs and hiring halls in the area have been preparing to meet the demand for skilled workers. Any delay in the progress of an infrastructure project of this magnitude will have irreparable consequences for California's ability to access federal matching funds, as well as ripple effects on contractors, subcontractors, material suppliers, workers, and many other third parties, not to mention state and federal transportation policy.

The Authority is currently in the process of procuring construction contracts for the 114-mile segment between Fresno and Bakersfield, California. Prior to beginning work on this segment, the Authority completed an environmental review pursuant to CEQA and certified a final environmental impact report/environmental impact

¹ See, e.g., January 28, 2010 California High-Speed Rail Authority Press Release, available at: http://www.hsr.ca.gov/docs/about/funding_finance/federal_stimulus/News%20Release%20Authority%20Statement%20on%20Announcement%20of%20Stimulus.pdf.

statement.² Third parties have now sued the Authority in seven different lawsuits in California state courts that each seek to use CEQA to obtain injunctive relief preventing construction of this segment. See Petition at 4 n.2 (citing cases).

ARGUMENT

A. The Board has Asserted Jurisdiction Over the Project and the Board's Jurisdiction is Exclusive

On June 13, 2013, this Board issued a decision finding that it has jurisdiction over the Project under 49 U.S.C. §10501(a)(2)(A), which confers jurisdiction on the Board over “transportation by rail carrier that is . . . between a place in . . . a State and a place in the same or another State as part of the interstate rail network.” In particular, the Board determined that “[g]iven the extensive interconnectivity that the HST System, including the Project, would have with Amtrak’s lines, we find that the HST System will be constructed as part of the interstate rail network. Therefore, the Board has jurisdiction here.” *Cal. High-Speed Rail Auth. – Construction Exemption – In Merced, Madera and Fresno Counties., Cal.*, STB Docket No. FD 35724, at p. 15 (June 13, 2013).

In ICCTA, Congress expressly provided that the Board’s jurisdiction over the construction of railway tracks and facilities that are part of the interstate rail network is exclusive and any competing remedies under federal or state law are preempted:

The jurisdiction of the Board over . . . the construction . . . of . . . tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, . . . is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

² Final environmental impact report/environmental impact statement, available at: http://www.hsr.ca.gov/Programs/Environmental_Planning/final_fresno_bakersfield.html.

transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. §10501(b). The STB's exclusive jurisdiction and its preemptive effect have been recognized by federal courts, *see Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005) (noting express preemption of state remedies and STB's exclusive jurisdiction over rail transportation and construction of related facilities); *City of Auburn v. United States Government*, 154 F.3d 1025, 1030 (9th Cir. 1998) (noting "the Act's grant of exclusive jurisdiction over almost all matters of rail regulation to the STB") (quoting *CSX Transp., Inc. v. Ga. Public Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)), California state courts, *see Friends of Eel River v. North Coast R.R. Auth.*, 230 Cal.App.4th 85, at 8-11 (2014), and this Board, *see DesertXpress Enter., LLC – Petition for Declaratory Order*, STB Finance Order No. 34914, 2007 WL 1833521, at *3 (Jun. 25, 2007); *North San Diego Cnty. Transit Dev. Bd. – Petition for Declaratory Order*, STB Finance Order No. 34111, 2002 WL 1924265 (Aug. 21, 2002).

B. Use of State Court CEQA Remedies to Enjoin the Authority's Construction of the Segment Would Interfere with the Board's Exclusive Jurisdiction

It does not appear to be disputed that, if the Authority were a private rail carrier, a third-party could not invoke CEQA remedies in the state courts to stop the rail carrier's construction of tracks and facilities within the exclusive jurisdiction of this Board. The

issue here appears to be whether the Authority's status as a public entity requires a different conclusion.

The California Court of Appeal recently held that, because the Authority is a public entity, a particular exception to federal preemption doctrines prevents ICCTA from preempting CEQA as applied to a different segment of the Project. *See Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal.App.4th 314 (2014). The *Atherton* decision relied on the market participant exception to federal preemption doctrine, applicable only to public entities, reasoning that the Authority took proprietary, not regulatory, action in complying with CEQA. *Id.* at 336-41. The court in *Atherton* stated that the Authority's status as a public entity was dispositive. *Id.* at 333 ("We are not faced with a private railroad company seeking to construct a rail line without having to comply with state regulations. Rather it is the State that is constructing the rail line"); *see also DesertXpress*, STB Finance Order 34914, 2007 WL 1833521, at *3 (finding that ICCTA preempts CEQA as applied to a private rail project).

The fundamental problem with the *Atherton* decision (described in a subsequent decision of the California Court of Appeal, *Friends of Eel River*, 230 Cal.App.4th 85), is that it misapprehends the purpose and effect of the market participant exception. The market participant doctrine distinguishes between state regulatory and proprietary action because federal "pre-emption doctrines apply only to state *regulation*." *Building and Const. Trades Council of Metropolitan Dist. v. Assoc. Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227 (1993) (emphasis in original). As such, the doctrine places public entities on *the same* footing as private parties when they take proprietary

action distinct from their regulatory roles. As the Supreme Court has explained, “state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.” *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980); *see also Friends of Eel River*, 230 Cal.App.4th at *14-*17 (discussing origin of market participant doctrine).

Here, the conclusion that private parties may sue the Authority under CEQA to block construction of tracks and facilities approved by the Board, in a situation in which such a remedy would be preempted as applied to a private rail carrier, would use the market participant doctrine to place a public entity on *worse* footing than a private party. That would be inconsistent with the purpose of the market participant doctrine.

The *Atherton* decision went astray by focusing on the wrong state action. In that case, the California Court of Appeal asked whether the construction of the Project, and the state’s decision to voluntarily follow CEQA requirements, was proprietary action. 228 Cal.App.4th at 336-40.³ The right questions are whether exercise of jurisdiction by the California state courts at the request of third-parties attempting to use CEQA to block the Authority’s construction of the tracks and facilities is proprietary or regulatory action,

³ In doing so, the *Atherton* court looked to whether the California legislature contemplated compliance with CEQA, and to the Authority’s past practice – both of which are irrelevant to the question of whether Congress intended ICCTA to preempt application of CEQA remedies against a rail carrier that is constructing tracks and facilities to carry out a project the Board has approved. *See City of Auburn*, 154 F.3d at 1031 (“[T]he pivotal question is not the nature of the state regulation, but the language and Congressional intent of the specific federal statute.”).

and whether that action would frustrate the exclusive jurisdiction of the Board over a rail carrier's construction of tracks and facilities. It was this error that led another California Court of Appeal to reject *Atherton* just two months after it was issued. See *Friends of Eel River*, 230 Cal.App.4th at *16 ("The aspect of CEQA that allows a citizen's group to challenge the adequacy of an EIR when CEQA compliance is required is clearly regulatory in nature, as a lawsuit against a governmental entity cannot be viewed as a part of its proprietary action, even if the lawsuit challenges that proprietary action.").

In this case, the Authority does not assert that ICCTA prevents it from following CEQA's requirements. Indeed, as the Authority explains, it has already complied with CEQA by going through the required environmental review and certifying a final environmental impact report/environmental impact statement. See Petition at 4. It also does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation. Rather, the Authority asserts, correctly, that ICCTA prevents third-parties from using CEQA to obtain from the state courts an injunction blocking the Authority's construction of tracks and facilities that this Board has authorized.

CONCLUSION

The Authority's request to this Board is a narrow one. The Authority has already conducted a thorough environmental review in compliance with CEQA. This Board has already asserted its jurisdiction over the construction work at issue and approved construction of the tracks and facilities. Third-parties should not be permitted to use a

state regulatory statute to prevent or delay construction. Accordingly, SBCTC supports the Authority's Petition for a declaratory order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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