

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY—PETITION FOR DECLARATORY ORDER

Digest:¹ Petitions for reconsideration of a December 12, 2014 declaratory order in this proceeding and a motion for stay of that order were filed. The Board is unable to reach a majority decision regarding these filings. Accordingly, the petitions for reconsideration and motion for stay cannot be granted.

Decided: May 4, 2015

Petitions requesting reconsideration of California High-Speed Rail Authority—Petition for Declaratory Order (December Decision), FD 35861 (STB served Dec. 12, 2014) and a motion for stay of that decision were filed. In the December Decision, the Board (with Vice Chairman Begeman dissenting) issued a declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 regarding the application of federal preemption of the California Environmental Quality Act (CEQA) to the construction of a high-speed passenger line between Fresno and Bakersfield, Cal. (the Line). The Board is unable to reach a majority decision regarding the petitions for reconsideration and the motion for stay. Accordingly, the requests for reconsideration and a stay cannot be granted. A procedural history follows.

On October 9, 2014, the California High-Speed Rail Authority (Authority) filed a petition requesting that the Board issue a declaratory order regarding the availability of injunctive remedies under CEQA to prevent or delay construction of the Line. Following institution of a proceeding to consider the issues raised in the Authority's petition and an opportunity for interested parties to file replies, the Board issued the December Decision, providing its opinion that 49 U.S.C § 10501(b) preempts application of CEQA to the construction of the Line.

On December 29, 2014, the Community Coalition on High-Speed Rail (CC-HSR), Transportation Solutions Defense and Education Fund (TRANSDEF), California Rail Foundation (CRF), the Counties of Kings and Kern, the City of Shafter, Citizens for High Speed Rail Accountability (CHSRA), Kings County Farm Bureau, Dignity Health, and First Free Will

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Baptist Church of Bakersfield (collectively, Group Petitioners) filed a petition (the Group Petition)² asking that the Board reconsider the December Decision. On December 30, 2014, Jacqueline Ayer (Ayer) also filed a petition for reconsideration (the Ayer Petition). The Authority responded in opposition to the petitions for reconsideration on January 20, 2015. On February 19, 2015, CHSRA, CC-HSR, TRANSDEF, CRF, the Counties of Kern and Kings, the Kings County Farm Bureau, and Dignity Health (collectively, Stay Petitioners)³ filed a motion to stay the December Decision pending the Board's decision on reconsideration and judicial review by the federal court of appeals. The Authority replied in opposition to that motion on February 24, 2015.

Group Petitioners ask that the Board reconsider the December Decision and decline to issue a declaratory order. They argue that (1) Town of Atherton v. California High-Speed Rail Authority (Atherton), 175 Cal. Rptr. 3d 145 (Ct. App. 2014), controls the question of preemption of CEQA for the Line, (2) application of CEQA here does not interfere with the Board's jurisdiction and preemption defeats important state interests, (3) third-party enforcement is a key component of CEQA and should not be preempted, (4) application of the National Environmental Policy Act (NEPA) should not displace CEQA, (5) preemption here impinges on state sovereignty in violation of the Supremacy Clause, (6) § 10501(b) is not intended to preempt state police powers to protect the health and safety of its citizens, and (7) the Board's decision could cause a decline in state-sponsored railways.

The Ayer Petition asserts that the Board should reconsider the December Decision and deny the Authority's request for a declaratory order because the December Decision is internally inconsistent. The Ayer Petition also claims that (1) § 10501(b) does not preempt CEQA compliance imposed by Proposition 1A because the Board does not have jurisdiction over state funding statutes, (2) the Board's statements supporting its conclusion that the December Decision does not impinge on state sovereignty are contradictory, and (3) the Board should have relied on the preemption analysis in Atherton, but not on Friends of the Eel River v. North Coast Railroad Authority (Eel River), 178 Cal. Rptr. 3d 752 (Ct. App. 2014).⁴

In its reply to the petitions, the Authority argues that Ayer and Group Petitioners have not met the Board's standard for reconsideration. The Authority further asserts that (1) the December Decision is not internally inconsistent, (2) the Board properly relied on existing court and Board precedent in concluding that state and local environmental preclearance requirements are preempted, (3) the Board was not required to defer to the interpretation of the federal preemption provision in the Interstate Commerce Act by a state court in Atherton, and (4) the

² Coffee-Brimhall LLC was one of the filers of the Group Petition, but on April 9, 2015, it withdrew as a party from the proceeding.

³ Stay Petitioners include most of the Group Petitioners. Coffee-Brimhall LLC was one of the Stay Petitioners until it withdrew from the proceeding on April 9, 2015.

⁴ Eel River and Atherton are California state appellate court cases that came to opposite conclusions regarding the scope of federal preemption of CEQA.

Board was well within its discretion in deciding to issue a declaratory order to provide guidance to interested parties and the California Supreme Court that will hear an appeal of Eel River and presumably resolve the conflict between that decision and Atherton.

In the motion for a stay, Stay Petitioners claim that the Authority intends to cite the December Decision as grounds for dismissal of the state court litigation concerning the Authority's compliance with CEQA. Stay Petitioners argue that a stay of the December Decision meets the Board's standards for granting a stay. The Authority replies that the motion was untimely and does not meet the standards for a stay.

We have considered the record before us but are unable to reach a majority decision. Accordingly, the Group Petition, the Ayer Petition, and the motion for stay cannot be granted.

It is ordered:

1. The Group Petition, the Ayer Petition, and the motion for stay of the December Decision cannot be granted, as the Board was unable to reach a majority decision.

2. This proceeding is terminated.

3. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman. Acting Chairman Miller and Vice Chairman Begeman commented with separate expressions.

ACTING CHAIRMAN MILLER, commenting:

After reviewing the record, I conclude that the petitioners have raised no basis for reconsidering the December Decision. I also believe it would be appropriate to deny the motion for stay of that declaratory order.

Petitions for Reconsideration. A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the Board's decision, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). Where, as here, a petition alleges material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but merely restated arguments previously made and cited evidence previously submitted). Because I find no material error in the Board's prior analysis and no new evidence or changed circumstances are alleged, I believe the petitions for reconsideration should be denied.

Review of the December Decision shows that the decision itself addresses the arguments for reconsideration and refutes the claims of error. In the December Decision, slip op. at 8, the Board explained the longstanding precedent that state and local permitting or preclearance requirements are categorically preempted as to the construction and operation of rail lines and facilities within the Board's jurisdiction. The December Decision further explained the difference between preclearance or permitting requirements and localities' reserved police powers to protect the health and safety of their citizens, which are not preempted unless state and local regulation unreasonably burdens interstate commerce. Id. at 9. Based on this precedent, the Board concluded that the application of CEQA to the Line falls squarely within these categorically preempted state preclearance or permitting requirements. Id. at 10.

Contrary to the claims made by petitioners, preemption of CEQA as applied to the Line is also entirely consistent with Board precedent. As the Board explained, the correct analysis of 49 U.S.C. § 10501(b) and congressional intent of that provision is that application of CEQA through third-party enforcement suits would conflict with the Board's jurisdiction and could potentially block or significantly delay the construction of a rail line authorized by the Board. December Decision, slip op. at 10-11. As a result, § 10501(b) preempts application of CEQA for the Line, id., and it is only the environmental review conducted at the federal level pursuant to NEPA that need be applied to the Line. This is entirely consistent with Board precedent. Id. at 10, 12. Therefore, the claims that the December Decision is contrary to Board precedent are without basis.

Both petitions allege that the Board incorrectly relied on the Eel River decision and that it should have relied on Atherton. The Board, however, relied on neither decision as binding or precedential authority. Instead, the Board analyzed the applicable federal law and explained why the Board agreed with the interpretation of federal law stated in Eel River and how, in its view, the analysis in Atherton was incorrect. December Decision, slip op. at 12-14.

The arguments regarding interference with state funding law and state sovereignty are similarly incorrect and mischaracterize the Board's decision. The interpretation of Proposition 1A is a matter of state law that the Board explicitly left to the California state courts. Id. at 13, 15. Contrary to the claims, therefore, the Board's decision does not preempt the application of CEQA as a possible condition of receiving Proposition 1A funding. Rather, the December Decision, slip op. at 14-15, explains that § 10501(b) preempts third-party lawsuits to enforce CEQA against a state entity that could interfere with the construction authority the Board has granted for the Line. The question of whether CEQA compliance could still be required if Proposition 1A funds are used is not addressed in the December Decision. Id. at 15. Moreover, because the preemption issue raised in this declaratory order proceeding relates to third-party enforcement suits against a state entity and not enforcement actions being brought by the state itself, the Board's conclusion that § 10501(b) preempts CEQA for the Line does not impinge on state sovereignty, as the December Decision properly found. See id. at 14.

In addition to the arguments explicitly discussed here, I considered all of the remaining arguments raised in the two petitions and conclude that neither petition establishes a material error, nor do the petitioners allege new evidence or substantially changed circumstances that

would materially affect the Board's December Decision. Accordingly, I find no basis for granting either of the petitions for reconsideration.

Motion for stay. As a threshold matter, the motion for a stay is untimely. Board rules require that such a filing be made within 10 days of service of the relevant action. 49 C.F.R. § 1115.3(f). The relevant action was issued on December 12, 2014, and, therefore, any request for a stay of that decision should have been filed by December 22, 2014. Stay Petitioners filed their motion on February 19, 2015, nearly two full months after the deadline and without explanation of why they could not have filed in a timely manner.

In addition, Stay Petitioners have failed to demonstrate that a stay is warranted. The Board requires a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. Eighteen Thirty Group, LLC—Acquis. Exemption—In Allegany County, Md., FD 35438 et al., slip op. at 2 (STB served Nov. 17, 2010). Stay Petitioners claim that denial of their motion would irreparably harm them because a stay is necessary to prevent dismissal of Stay Petitioners' California state court litigation concerning the Authority's compliance with CEQA.¹ The December Decision, however, was issued to "assist in the resolution of the conflict between Atherton and Eel River on federal preemption of CEQA." December Decision, slip op. at 5. The Board expressly stated that it was providing its interpretation of its governing statute "[b]ecause of the[] conflicting [state court] opinions regarding CEQA preemption and because the Board is 'uniquely qualified' to determine the preemption question." Id. at 7. The December Decision does not require dismissal of any litigation pending in the California courts. The fact that dismissal based on the December Decision may be sought and dismissal may be granted does not establish irreparable harm. A dismissal is merely one possible outcome. Moreover, even if the California court dismissed the cases based on the December Decision, Stay Petitioners would be able to appeal that dismissal and, thus, would have a remedy available to them. Therefore, Stay Petitioners have not shown that they would suffer irreparable harm absent a stay.

I believe that Stay Petitioners have also failed to show a likelihood that they will prevail on the merits of any challenge to the December Decision. As explained above, my views on preemption are consistent with precedent and there is no interference with state sovereignty or state funding.

Because I find that Stay Petitioners have not established either irreparable harm or a likelihood of success on the merits, the remaining stay criteria need not be addressed. See Eighteen Thirty Group, LLC—In Allegany County, Md., FD 35438 et al., slip op. at 3 (describing irreparable harm as "the threshold consideration" for a grant of injunctive relief); see

¹ The motion for stay states that several of Stay Petitioners have state court litigation pending against the Authority relating to the application of CEQA. The motion also states that there are multiple suits in one court and that Stay Petitioners anticipate that the Authority will file a motion to dismiss those suits in that court. Stay Mot. at 4.

also Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 2-3 (STB served Sept. 12, 2014) (denying petition for a stay due to petitioner’s failure to show irreparable harm without discussing remaining three criteria for a stay); Ballard Terminal R.R., LLC—Lease Exemption—Line of Eastside Cmty. Rail, LLC, FD 35730, slip op. at 2 (STB served May 1, 2013) (denying petition for a stay due to petitioner’s failure to show irreparable harm). Therefore, I believe that the motion for a stay should be denied.

VICE CHAIRMAN BEGEMAN, commenting:

It is no surprise that a majority decision was not reached to reverse course on the December Decision, which I opposed. I supported granting the petitions for reconsideration and motion for stay. Such actions would have enabled the Board to follow its own precedent while allowing the Authority to answer whether it will truly live up to commitments.¹

As I noted in my dissent accompanying the December Decision, it is well within the Board’s discretion to issue a declaratory order.² Even if the Authority had actually sought the “categorical preemption” the Board gratuitously granted, the Board should have opted to leave that decision to the courts.³ The Board was well aware that questions of preemption were already in the state courts and that no court sought the Board’s input on those questions. As such, the Board should not have interfered with those proceedings just to make a questionable finding that no one even sought.

¹ The Authority has come before the Board many times asserting its commitment to both CEQA and NEPA. This agency has adopted that commitment into its orders and many stakeholders have relied on the Authority’s representations over the years.

² See, e.g., 5 U.S.C. § 554(e); 49 U.S.C. § 721 (the Board has the discretion to grant or decline petitions for declaratory order).

³ It is well established that questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by either the Board or the courts. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).