

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35977

NORTHWESTERN PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> The Board declines to issue a declaratory order in this case and instead refers the parties to a recent declaratory order fully addressing the same preemption issues.

Decided: April 22, 2016

By petition filed on November 19, 2015, Northwestern Pacific Railroad Company (NWPCO) asks the Board to declare that the California Environmental Quality Act (CEQA) is preempted by the Board's exclusive jurisdiction over railroad transportation under 49 U.S.C. § 10501(b). This decision denies NWPCO's petition for a declaratory order. As discussed below, because the Board has recently provided its views on the preemption issues presented by NWPCO, an additional declaratory order addressing the same issues is not necessary. See Cal. High-Speed Rail Auth.—Pet. for Declaratory Order (CHSRA Declaratory Order), FD 35861 (STB served Dec. 12, 2014), pet. for review pending sub nom. Kings Cty. v. STB, No. 15-71780 (9th Cir. filed June 11, 2015).

BACKGROUND

NWPCO's petition for declaratory order concerns its freight operations on the 142-mile Russian River Division of the Northwestern Pacific Railroad Line between Willits and Lombard, Cal. (the Line). The Line is jointly owned by two public entities established by the California legislature: the Sonoma Marin Area Rail Transit Authority (SMART), which has authority over passenger commuter and excursion service, and the North Coast Railroad Authority (NCRA), which has authority to operate freight and passenger excursion service. Pursuant to an Operating and Coordination Agreement between NCRA and SMART, NWPCO is responsible for freight and passenger excursion operations on the Line.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> The Board authorized NWPCO to conduct freight operations on the Line in 2007. See Nw. Pac. R.R.—Change in Operators Exemption—N. Coast R.R. Auth., FD 35073 (STB served Sept. 7, 2007) (denying Mendocino Railway's petition for a stay of the effective date of NWPCO's operating authority on the Line); Nw. Pac. R.R.—Change in Operators Exemption—

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NWPCO states that the State of California provided funding to NCRA in part for stabilization of the railway (primarily roadbed, signal, and track repair) and required compliance with CEQA as a condition of funding that project (though NWPCO states that under statutory and categorical exemptions in CEQA, NCRA was not required to prepare an environmental report). (NWPCO Pet. 12-13) NWPCO asserts that, later on, NCRA used unallocated funds from part of the stabilization project to mistakenly prepare an Environmental Impact Report (EIR) under CEQA for railroad operations on the Line, even though such a report was not legally required. (NWPCO Pet. 15) Friends of the Eel River (FOER) and Californians for Alternatives to Toxics (CATs) (collectively, CEQA litigants) each sued NWPCO in California Superior Court challenging the adequacy of the CEQA EIR and seeking to restrain NWPCO from allowing freight traffic to move between Willits and Lombard pending adequate CEQA compliance by NCRA.

Both the California Superior Court and the California Court of Appeal have found that 49 U.S.C. § 10501(b) preempts the application of CEQA to the Line. See Friends of the Eel River v. N. Coast R.R. Auth., 178 Cal. Rptr. 3d 752 (Cal. Ct. App. 2014). A consolidated appeal of that decision is now pending in the California Supreme Court, where it has been fully briefed. Friends of the Eel River v. N. Coast R.R. Auth., Case No. S222472 (Cal. Sup. Ct.). NWPCO has filed a petition with the Board asking that it also find that 49 U.S.C. § 10501(b) preempts CEQA remedies because, if the consolidated appeal is successful, injunctive relief would suspend Board-authorized operations of a rail carrier with Board authority to operate.

The Association of American Railroads and California High-Speed Rail Authority filed comments in support of NWPCO's petition. The CEQA litigants filed replies in opposition to the petition.

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty. The Board, however, has recently issued a declaratory order providing its view that § 10501(b) preempts the application of CEQA to rail lines within the Board's jurisdiction.<sup>3</sup> See CHSRA Declaratory

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N. Coast R.R. Auth., FD 35073 (STB served Jan. 31, 2008) (denying a request to revoke NWPCO's authorization to operate the Line).

<sup>3</sup> There is no question that the Line is subject to the Board's jurisdiction, as the Board specifically authorized NWPCO to conduct common carrier freight operations on the Line, finding that it is part of the interstate rail network. See supra note 2. Likewise, it is undisputed that § 10501(b) expressly preempts not just state regulation of rail construction projects that are

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Order. Indeed, the CHSRA Declaratory Order addresses the same arguments presented by NWPCO here and was issued specifically to advise the California Supreme Court of the Board's views on preemption of CEQA to assist that court in deciding the Friends of the Eel River appeal. See CHSRA Declaratory Order at 5, 7. Because the Board has already ruled on preemption in the context of this precise matter, an additional declaratory order addressing the same issues is not warranted, and we will deny NWPCO's petition. Instead, we refer the parties to the Board's recent decision in the CHSRA Declaratory Order, explaining that CEQA is categorically preempted by § 10501(b) in connection with rail lines regulated by the Board, including state-operated or owned rail lines.

For the reasons above, we deny NWPCO's petition for a declaratory order.

It is ordered:

1. NWPCO's petition for declaratory order is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

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part of the interstate rail network, but also any state law attempts to regulate rail operations over the interstate rail network, as they are under the Board's exclusive jurisdiction. CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005).

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COMMISSIONER BEGEMAN, dissenting:

The Board has a general policy of leaving already pending preemption issues before a court for resolution. I opposed the majority's departure from that deferential course when it decided "to advise the California Supreme Court of the Board's views on preemption ...."<sup>1</sup> In the December 2014 Decision, the majority broadly pronounced that the California Environmental Quality Act (CEQA) was categorically preempted from affecting California High-Speed Rail Authority (Authority) construction activities, while also claiming to not "opine" on whether that broad preemptive brush extended to any CEQA-related funding conditions. If the Board is not going to truly defer to the courts already wrestling with CEQA preemption issues, then we have an obligation here to answer what is a straightforward preemption question from the Northwest Pacific Railroad Company (NWPCO).<sup>2</sup> I cannot support the majority's mere citation to the gratuitous December 2014 Decision instead of providing NWPCO with a clear answer.

Although the majority cites its December 2014 Decision as the basis for declining NWPCO's request for relief, there are important distinctions between the two cases. NWPCO is a private carrier, not a state-created entity counting on CEQA-restricted bond money for construction.<sup>3</sup> While NWPCO seeks preemption relief from CEQA being used to halt its ongoing rail operations, the Authority sought relief from CEQA enforcement challenges being used to slow construction. And, unlike the Authority, NWPCO did not commit to CEQA compliance while seeking—and receiving—Board authorization.

Given the differences between the two cases, the majority is leaving NWPCO with more questions than answers. What, exactly, should NWPCO take away from the majority's reference to the December 2014 Decision? Is the majority refusing to weigh in on preemption cases involving CEQA-conditioned funding even when, as here, the carrier did not receive such funding? If that is the message, it could have far-reaching implications that deserve more consideration than the majority's mere reference to a prior case.

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<sup>1</sup> See supra. at 4; Cal. High-Speed Rail Auth.—Pet. for Declaratory Order (December 2014 Decision), FD 35861 (STB served Dec. 12, 2014) (Begeman dissenting).

<sup>2</sup> The Board and the courts have found that § 10501(b) preemption prevents state and local imposition of requirements that could deny a rail carrier's ability to conduct rail operations. See, e.g., Norfolk S. Ry.—Pet. for Expedited Declaratory Order, FD 35949 (STB served Feb. 25, 2016).

<sup>3</sup> Although CEQA-conditioned funds are involved in this case, they weren't provided directly to NWPCO.

The majority does NWPCO a disservice by lumping the carrier in with the Authority rather than using the Board's more relevant precedent preempting State interference with railroad operations.<sup>4</sup> The Board should not now take a pass on addressing the questions it created and allow the possibility that state regulations can be used to interfere with freight rail operations. Unfortunately, the majority appears more interested in not disturbing its December 2014 Decision than providing NWPCO with a meaningful answer to its preemption question.

I dissent.

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<sup>4</sup> E.g., Cities of Auburn & Kent, Wash.—Pet. for Declaratory Order, FD 33200 (STB served July 2, 1997); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662 (STB served Mar. 14, 2005).