

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB FINANCE DOCKET NO. 35977

**NORTHWESTERN PACIFIC RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER**

**REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads submits this Reply in support of the petition for declaratory order filed by Northwestern Pacific Railroad Company (“NWPCo”) on November 19, 2015 (“Petition”). The AAR is a trade association whose freight railroad members include all U.S. Class I railroads as well as approximately 160 U.S. short line and regional railroads and Amtrak.

NWPCo’s Petition raises issues of importance to the railroad industry. In the state court lawsuit that gave rise to NWPCo’s Petition, the plaintiffs have asked the court to order NWPCo to suspend rail operations that the Board has previously authorized. The plain language of ICCTA and years of unqualified case law provide that state law cannot be used to restrict or enjoin ongoing rail operations that are subject to the STB’s exclusive jurisdiction, and the STB should reiterate that bedrock legal principle here. NWPCo’s Petition also seeks guidance from the Board on the specific application of the California Environmental Quality Act (“CEQA”) to NWPCo’s freight rail operations, and the Board should declare that third-party CEQA enforcement actions challenging NWPCo’s ability to provide rail service are preempted by ICCTA.

I. The Board Has Jurisdiction To Issue The Requested Declaratory Order.

The dispute underlying NWPCo's Petition involves a challenge in state court under state law to NWPCo's freight operations over a 142-mile rail line that is part of the Russian River Division of the Northwest Pacific Rail Line. Petition at 1-2. NWPCo has been providing rail service over this line since 2011 pursuant to Board authorization obtained in 2007. Two environmental groups – the Friends of the Eel River (“FOER”) and Californians for Alternatives to Toxics (“CATs”) – brought claims in California state court under CEQA alleging that the public entity owners of the rail line failed to conduct an adequate environmental review under state law before reopening the rail line to freight rail operations. FOER and CATs have asked the state court to enjoin all of NWPCo's freight operations pending full compliance with the requirements of CEQA. Petition at 2; *see also* STB00004 attached to the Petition. In its declaratory order petition, NWPCo seeks a declaration from the Board that the CEQA litigation cannot be used to suspend or interfere with STB-approved freight rail operations on the line.

As a threshold matter, CATs challenges the Board's jurisdiction to issue the requested declaratory order. CATs argues that NWPCo's petition should be dismissed because the underlying dispute over CEQA compliance involves the rehabilitation of a rail line, and “[t]he Board does not have – and has never asserted – any section 10901(a) authority or statutory jurisdiction over rehabilitation and repair work.” CATs Reply at 2.

CATs' jurisdictional argument, which is based on the scope of the Board's licensing authority under 49 U.S.C. § 10901(a), misses the point. Many rail-related activities come within the scope of the Board's exclusive jurisdiction over rail transportation under 49 U.S.C. § 10501(b) but are not subject to direct Board regulation under some other provision of ICCTA. Congress gave the Board exclusive jurisdiction over rail “transportation,” 49 U.S.C. § 10501(b), and expansively defined “transportation” to include “property, facility, instrumentality, or

equipment of any kind . . . related to the movement of passengers or property . . . [and] services related to that movement” 49 U.S.C. § 10102(8), (9). Even where Congress did not provide the Board with specific regulatory authority over a particular aspect of the broadly defined “rail transportation,” the Board has repeatedly stated that Congress did not intend to allow states to step into the void and impose their own regulatory requirements in that area. *See, e.g., N. San Diego County Transit Dev. Bd.—Petition for Declaratory Order*, STB Docket No. FD 34111, at 8 (STB served Aug. 21, 2002) (“Even in situations that do not require a Board license – for example, a carrier building or expanding facilities that assist the railroad in providing its existing operations . . . the courts have held that express statutory preemption of section 10501(b) applies.”) (citing cases).

Indeed, one of the cases cited by CATs directly contradicts CATs’ jurisdictional argument. In *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction*, STB Docket No. FD 33611 (STB served Aug. 21, 1998), cited by CATs at page 2 of its Reply, the Board concluded that it did not have licensing authority over the rail repair project at issue but went on to state that ICCTA nevertheless preempted state and local regulation of the rail repairs “including environmental requirements, which by their very nature interfere with interstate commerce because they impede the carrier’s right to conduct its operations.” *Id.* at 7-8.

CATs’ jurisdictional argument that the Board has no authority to consider whether California law can be used to restrict or prohibit NWPCo’s rail operations must fail here, where the Board previously granted NWPCo authority to operate on the rail line at issue, and where the Board denied a petition by FOER seeking to revoke that authority. *See Northwestern Pac. R.R. Co.—Change In Operators Exemption—North Coast R.R. Auth., Sonoma-Marin Area Rail*

Transit District & N.W. Pac. Ry. Co., LLC, STB Docket No. FD 35073, at 1-2 (STB served Aug. 30, 2007) (notice of exemption); *Northwestern Pac. R.R. Co.—Change In Operators Exemption—North Coast R.R. Auth., Sonoma-Marin Area Rail Transit District & N.W. Pac. Ry. Co., LLC*, STB Docket No. FD 35073, at 3 (STB served Feb. 1, 2008) (denying FOER’s petition to revoke). The Board clearly has jurisdiction to determine whether state law can now be used to suspend the very same freight rail operations that the Board has previously authorized.

II. State Law Cannot Be Used To Suspend Or Restrict Rail Operations.

The central issue raised by NWPCo’s Petition – and the issue that raises the most serious concern for the rail industry – is whether state law can be used to restrict or enjoin ongoing rail operations. As NWPCo explains in its Petition, the CEQA litigants have asked the California courts to suspend NWPCo’s freight rail operations pending a “full CEQA” environmental analysis of rail operations. The Board is well aware that environmental analyses of rail-related projects can be very time-consuming. As a result, such an order, if granted, could result in a lengthy or permanent discontinuation of freight rail service that the Board has authorized.

FOER argues that the Board does not need to worry about such an impact on rail operations because the “pending CEQA action has not affected, and might never affect, those operations.” FOER Reply at 1. The point is irrelevant (and disingenuous). FOER may well lose its pending CEQA action, or if successful, the California courts might adopt remedies that have no impact on NWPCo’s operations. But the possibility of alternative outcomes is irrelevant. The CEQA litigants have expressly asked that freight rail operations be suspended or discontinued and that request is currently pending before the California courts. The Board should issue a declaratory order to avoid the costs, complications and possible disruptions in service that would result from waiting until an impermissible or unlawful action has been taken.

It is important for the Board to reaffirm unequivocally that the CEQA litigants' request for a suspension of rail operations is not permissible under ICCTA. The case law on this issue is long-standing and unambiguous. More than a century of precedent holds that states may not issue orders preventing railroads from providing authorized rail transportation or restricting rail service, which is a quintessential act of regulation preserved exclusively to federal law. Long before the enactment of ICCTA, the U.S. Supreme Court invalidated state action that required the stopping of trains. *See Herndon v. Chicago, R.I. & Po. Ry.*, 218 U.S. 135, 157 (1910) (“[A] state regulation which requires the stopping of such interstate trains, . . . is an unlawful regulation and burden upon interstate commerce.”). Congress formalized and reinforced this long-standing principle in ICCTA, placing exclusive authority over rail transportation with the STB and expressly preempting all state (and federal) law remedies that seek to regulate rail transportation. 49 U.S.C. § 10501(b). The Board’s authority over rail operations on the interstate rail network is exclusive whether or not the transportation at issue occurs only within a state. 49 U.S.C. § 10501(a)(2)(A). As Congress clearly understood, the use of state law to prohibit or impair the movement of goods in interstate commerce would wreak havoc on the rail industry and the national economy.

More recently, the Board has held that ICCTA “plainly” preempts state and local authorities from attempting to stop rail operations. “Such an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board’s exclusive jurisdiction over that service. The Town’s actions are therefore plainly preempted by § 10501(b).” *Boston & Maine Corp. & Springfield Terminal R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35749, at 4 (STB served July 19, 2013); *see also Friberg v. Kansas City S. Ry. Company*, 267 F.3d 439, 443

(5th Cir. 2001) (“[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB . . .”).

NWPCo obtained authority to operate as a common carrier from the Board in 2007. That grant of authority was not appealed. Since NWPCo has been authorized to operate as a rail carrier on the line, only the Board can authorize NWPCo to cease or suspend providing rail service. The Board should remind all that state law claims that seek to interfere with the Board’s exclusive authority in this area are preempted.

III. Third-Party CEQA Actions Directed At Rail Transportation Projects Are Preempted By ICCTA.

In addition to the general question of state authority to regulate or interfere with ongoing rail operations, discussed above, NWPCo’s Petition raises the question whether CEQA, in particular, is preempted by ICCTA when CEQA third-party enforcement actions are directed at rail transportation projects. While the Board has previously issued a declaratory order on this subject, it is appropriate for the Board to address the preemption question again in the context of NWPCo’s circumstances, which are quite different from the circumstances in prior cases involving ICCTA’s preemption of CEQA.

The Board has succinctly laid out the basic ICCTA preemption principles as applied to CEQA in *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Docket No. FD 35861 (STB served Dec. 12, 2014) (“*CHSRA*”), and other recent decisions. Based on those principles, the Board concluded in *CHSRA* that “CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity’s right to construct a line that the Board has specifically authorized, thus impinging on the Board’s exclusive jurisdiction over rail transportation.” *Id.* at 10 (citing *DesertXpress Enters., LLC—Pet. for*

Declaratory Order, STB Docket No. FD 34914, at 5 (STB served June 27, 2007)). There is a long line of Board and court decisions finding that environmental preclearance requirements under state law cannot be applied to rail transportation projects because they interfere with conduct that is exclusively under the Board’s jurisdiction. The Board should reiterate that principle here.

The CEQA litigants in this case expressly seek to use CEQA as a form of preclearance requirement, asking the California courts to suspend all rail operations until a “full” CEQA review has been completed. The third-party CEQA claims therefore fall squarely into the area of state law that is preempted by ICCTA.

The circumstances here are very different than in *CHSRA*, and the case for ICCTA preemption is even more compelling here than in that case. Here, when the Board authorized NWPCo to operate over the line at issue, the Board specifically found, over the objections of FOER and others, that the expected level of service did not trigger environmental review under federal law. *Northwestern Pac. R.R. Co.—Change In Operators Exemption—N. Coast R.R. Auth., Sonoma-Marin Area Rail Transit District & N.W. Pac. Ry. Co., LLC*, STB Docket No. FD 35073, at 3 (STB served Feb. 1, 2008) (denying FOER’s petition to revoke); *see also Northwestern Pac. R.R. Co.—Change In Operators Exemption—North Coast R.R. Auth., Sonoma-Marin Area Rail Transit District & N.W. Pac. Ry. Co., LLC*, STB Docket No. FD 35073, at 2 (STB served Sept 7, 2007) (denying petition to stay and stating that “under the regulation, no environmental review is required” for NWPCo’s operation exemption). FOER did not challenge or appeal that conclusion. Instead, the CEQA litigants, including FOER, are pursuing a state court proceeding under CEQA that seeks to effectively override the Board’s prior decision, arguing that NWPCo should *not* be able to provide rail service until the

environmental effects of NWPCo's operations are subjected to a "full" CEQA review. Unlike *CHSRA*, where the Board acknowledged the need for environmental analysis of the project, in the case of NWPCo's operating authority the Board has already concluded that no environmental review was necessary under the Board's governing rules. Thus, this case presents a conflict with the Board's jurisdiction even more squarely than *CHSRA* where a majority of the Board found the application of CEQA to be preempted.

IV. There Is No Market Participant Exception To ICCTA For Third-Party CEQA Lawsuits.

NWPCo's Petition contains a lengthy discussion of the market participant doctrine, which was also the subject of extensive discussion in the California appellate court decision that is currently on appeal to the California Supreme Court. As the California appellate court explained, the market participant doctrine "gives government entities the freedom to engage in conduct that would be allowed to private market participants." *Friends of the Eel River v. North Coast R.R.R. Auth.*, 178 Cal. Rptr. 3d 752, 776 (Ct. App. 2014), *petition for review granted*, 339 P.3d 329 (Cal. 2014).¹ NWPCo argues in its Petition to the Board that third-party challenges to a state entity's actions in rail markets do not fall within this market participant doctrine, and the AAR agrees. If the Board determines that it is necessary to address the market participant doctrine in issuing a declaratory order in this proceeding, the Board's consideration of the issue should be guided by three principles.

¹ Under California law, the appellate court decision was superseded when the California Supreme Court granted review and does not have the force of law, but AAR cites the decision here only as a concise and accurate summary of the legal doctrine, as the Board acknowledged in the *CHSRA* decision. *CHSRA*, at 12-13.

First, the plain language of ICCTA precludes application of a market participant exception to third-party CEQA enforcement actions. As the United States Supreme Court has explained, “[w]hen a federal law contains an express preemption clause, we ‘focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.’” *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). ICCTA contains an express preemption clause, and it defines the scope of preemption to cover all state law “remedies” relating to rail transportation. 49 U.S.C. § 10501(b) (federal remedies “with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law.”). CEQA enforcement actions unquestionably are “remedies” established by the State of California for the purpose of ensuring that California environmental law and policies are applied to certain projects involving state entities. Congress has expressly preempted such “remedies” when the project at issue involves rail transportation, regardless of the state’s involvement in the rail activities that are being challenged.

Second, the market participant doctrine seeks to distinguish between actions of a state that are by nature regulatory (preempted) and actions by a state that are consistent with private market conduct by non-state market participants (not preempted). But as the Board recognized in *CHSRA*, lawsuits by California citizens challenging the conduct of a governmental entity on environmental policy grounds are inherently regulatory. *See CHSRA*, at 13 (third-party CEQA enforcement actions are “clearly regulatory in nature, as a lawsuit against a governmental entity cannot be viewed as part of its proprietary action, even if the lawsuit challenges that proprietary action”) (internal quotation marks omitted). Indeed, private market participants have no authority to create third-party remedies based on public interest considerations that are

enforceable in state court. Only a state sovereign, asserting regulatory authority, can create such third-party litigation rights. While the state may have a valid regulatory interest in giving state citizens a voice in the disposition of state property through CEQA third-party remedies, those remedies are regulatory by nature and are totally inconsistent with the actions of private market participants. When such remedies are sought in cases involving rail transportation projects, they are not saved from ICCTA preemption under the market participant doctrine.

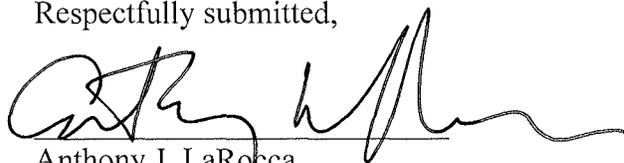
Third, as the Board recognized in *CHSRA*, the market participant doctrine is intended to be a shield – not a sword – that states can use defensively to avoid being subjected to regulation when they act as a market participant. *CHSRA*, at 12-13. For example, when a state decides to purchase equipment for internal use, the market participant doctrine would shield the state from regulatory challenges to the state’s purchase decisions that would not be applicable to private market participants making similar purchases. But the CEQA enforcement actions here seek to *impose* regulation, not shield state actors from regulation. It would turn the market participant doctrine on its head to use it to impose state regulation on railroad operations that are subject to the Board’s exclusive jurisdiction.

Conclusion

The Board should issue a declaratory order finding that state law, including CEQA, cannot be used to enjoin or restrict rail operations that have been authorized by the Board.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2015, I caused a copy of the foregoing to be served by electronic mail or first-class mail upon the following:

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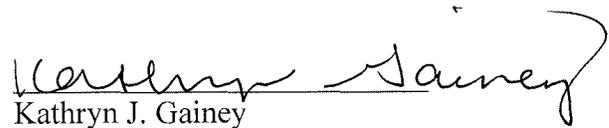
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