CALIFORNIA COURT OF APPEAL

THIRD APPELLATE DISTRICT

TOWN OF ATHERTON *et al.*,

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,

Defendant/Respondent

On Appeal from the Judgment and Post-Judgment Order of the Sacramento County Superior Court
Honorable Michael P. Kenny, Judge
Cases No. 34-2008-80000022CUWMGDS
and 34-2010-80000679CUWMGDS

APPELLANTS' ANSWER TO BRIEF OF AMICUS CURIAE UNION PACIFIC RAILROAD COMPANY

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INTRODUCTION

Amicus Curiae Union Pacific Railroad Company ("UP") argues that CEQA is categorically preempted by the Interstate Commerce Commission Termination Act ("ICCTA")[1]. (Brief of Amicus Curiae Union Pacific Railroad Company in Support of Neither Party ("UP Amicus Brief") at pp.4-5.) It is easy to see what is behind UP's amicus brief. From its perspective, what is crucial is eliminating anything that might interfere with its interest in serving its customers at the lowest possible cost (and highest possible profit). Consequently, the less it has to pay attention to the environment, the better. However, UP doesn't appear to understand the important difference between its position as a private corporation and the position of an agency that is part and parcel of the State of California.

STB jurisdiction precludes a California public agency's attempting to regulate a private rail project, because preemption prohibits the public agency's rejection or conditioning of the project. Consequently, because the agency lacks the discretion to disapprove or condition the project, the project would not be a discretionary project subject to CEQA.

The same, however, is not true for a California public agency's consideration of its own project. As already argued in Appellants' Joint Supplemental Brief on Federal Preemption ("Appel. Suppl. Brief"), the market participant exception to federal preemption applies, and the ICCTA preempts neither the agency's discretionary approval of its own project, not its environmental review of that project under CEQA.

ARGUMENT

I. CEQA DOES NOT APPLY WHERE STB JURISDICTION PREEMPTS STATE REGULATORY AUTHORITY.

Before considering the situation involved in this case, it is worth briefly reviewing the situation in the more typical case of a private rail operator such as UP seeking approval of its rail project. As UP correctly notes, such a project would be subject to STB jurisdiction if the proposed

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[1] ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803, 49 U.S.C. §10101 *et seq.*

project would be part of the interstate rail network regulated by the STB. (49 U.S.C. §10501(a)(2)(A).) Consequently, under 49 USC §10501(b)(2), STB jurisdiction over such a project is exclusive, and:

> Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. (*Id*.)

As demonstrated in *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025 and *Green Mountain Railroad Corp. v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, STB jurisdiction preempts any state or local law that attempts to assert regulatory authority over such a private project. In other words, no state or local government discretionary approval or conditioning for such a project is required or allowed.

However, CEQA applies only to discretionary projects. (Public Resources Code §21080(a); *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 176.) Because STB jurisdiction preempts any state or local regulatory authority over a private project, a state agency has no power to grant a discretionary approval to the project. Hence, CEQA would not apply to such a project and the issue of CEQA preemption would not arise.

II. NEITHER RESPONDENT'S ABILITY TO GRANT DISCRETIONARY APPROVAL TO THE PROJECT, NOR ITS CEQA REVIEW, IS PREEMPTED BY THE ICCTA.

A. RESPONDENT CALIFORNIA HIGH-SPEED RAIL AUTHORITY IS A RAIL SYSTEM OPERATOR ON BEHALF OF THE STATE OF CALIFORNIA.

The circumstances of this case are distinctly different from those described above. Respondent was created by the California legislature as an agency within the executive branch of California state government with the specific purpose of planning and implementing a high-speed train system for the State of California. (Public Utilities Code §1850020, 185030.)

As currently constituted, Respondent is included within the California Transportation Agency. (Appellants' Joint Supplemental Motion for Judicial Notice in Support of Answer to Amicus Brief of Union

Pacific Railroad Company and Exhibit A thereto.) In creating Respondent, the legislature also provided that, once a financial plan providing the necessary funding had been enacted, Respondent was empowered to enter into contracts for the design, construction, and operation of high-speed trains. (Public Utilities Code §185036.) Thus, the legislature designated Respondent to design, build, and operate (directly or through a contractor) a high-speed rail system on behalf of the State of California.

Once it had been so-designated, and specifically once the voters of California, by approving Proposition 1A in 2008, authorized initial financing for this high-speed rail system (*See*, Streets & Highways Code §2704 *et seq*), Respondent became a potential high-speed railway system operator, in the same sense that UP is a freight railway system operator.

B. AS OPERATOR OF A RAIL SYSTEM CONNECTED TO THE INTERSTATE RAIL NETWORK, RESPONDENT IS SUBJECT TO STB JURISDICTION.

As all the parties, and UP, acknowledge, the STB has, through Congressional action, been given plenary jurisdiction over all interstate rail transportation. As interpreted by the STB, this jurisdiction includes rail systems existing entirely within a single state, so long as they are connected to the interstate rail network. (STB Decision Docket No. FD 35724, California High-Speed Rail Authority – Construction Exemption, June 13, 2013 [hereinafter, "STB HSR Decision"], at p. 11.) In this regard, Appellants agree with UP that the timing of the STB's actual assertion of jurisdiction is immaterial to the question of CEQA preemption. Once Respondent, through its determinations, decided that its high-speed rail system would be part of the interstate rail network, it was subject to STB jurisdiction[2].

[2] The determination of whether a rail project is subject to STB jurisdiction is fact-specific. (STB HSR Decision at pp.11-12.) Hence, if Respondent had chosen not to connect its high-speed rail system to the interstate rail network, the STB would not have had jurisdiction.

C. UNDER THE MARKET PARTICIPANT EXCEPTION, RESPONDENT'S APPROVAL PROCESS, INCLUDING CEQA REVIEW, IS NOT PREEMPTED BY THE ICCTA.

What UP apparently fails to comprehend, and fails[3] entirely to address in its brief, is the fundamental difference between Respondent's role as a state agency in approving its own project, using CEQA as a tool to guide that approval, and the more typical role of a state regulatory agency in approving a private project – for example a proposal for freight service submitted by UP. Indeed, UP fails entirely to come to grips with the market participant exception that applies to Respondent's action here, as a part of California state government acting under the control and direction of the California legislature.

As Appellants have pointed out in their supplemental brief (Appellants Suppl. Brief at pp. 8-11), Respondent's action in approving its own project is fundamentally different from the approval of a private project by a typical state regulator. It is, rather, similar to the action of UP, or more specifically, for example, the Roseville service unit of UP's Western Division, in deciding on a project to submit to the STB for approval. The STB has no more control over Respondent's internal deliberations about whether or what kind of project it would propose than it would over UP's internal process in designing its own project and approving it for submittal to the STB for its consideration.

1. THE STATE OF CALIFORNIA ITSELF ACTS AS THE MARKET PARTICIPANT IN MANDATING THAT ITS HIGH-SPEED RAIL COMPONENT COMPLY WITH CEQA.

As noted earlier, Respondent is a component of the California Transportation Agency, which is itself a part of the Executive Branch of California State Government. Thus it is the State of California itself that is the market participant here in the passenger rail transportation sector, acting

[3] Respondent, in its supplemental letter brief, likewise failed to address the difference between itself and a typical private rail carrier and more specifically the applicability of the market participant exception to preemption.

through Respondent as its implementing agency[4]. This is evident from the fact that the State of California funds Respondent through legislative appropriations (*see, e.g.*, SB 1029 Stats. 2012, ch. 152) , appoints, through members of its legislative and executive branches, the members of its board of directors (Public Utilities Code §185020(b)), and writes all of the legislation (not just CEQA) that governs its actions[5]. (*See, e.g.*, Public Utilities Code §185000 *et seq.* [California High-Speed Rail Act], Government Code §11120 *et seq.* [Bagley-Keene Open Meeting Act].) As was pointed out by *Amicus Curiae* Preserve Our Heritage (Supplemental Brief of Amicus Curiae Preserve Our Heritage at pp. 4-9), this is not regulation but the self-governance of a state, in which federal law does not interfere by preemption without explicit legislative indications of that intent. (*See infra.*)

2. APPLICATION OF THE MARKET PARTICIPANT EXCEPTION DOES NOT DEPEND ON WHETHER THE STATE CHOOSES TO BURDEN OR BENEFIT ITSELF.

As also pointed out in Appellants' Supplemental Brief, the State of California, as a market participant, has the discretion to decide what goals it sets for its high-speed train system. Those goals can include environmental protection just as much as UP's goals can include profit generation.

If a state chooses to lower the tax rate on its own municipal bonds, compared to those of other states, even though the effect is to decrease the amount of tax revenue it receives, that is its prerogative. (*Department of Revenue v. Davis* (2008) 128 S.Ct. 1801.) If a state determines to require vehicles it (and its subordinate public agencies) purchases to meet more stringent exhaust emission standards than required by federal law, even

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[4] *See, e.g., Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 440 [South Dakota Cement Commission acts for the State of South Dakota in owning and managing a cement plant].

[5] Significantly, while the legislature has granted Respondent the ability to conduct studies, enter into contracts, and accept grants, fees, and allocations from the State, the legislature did not grant it regulatory power. (Public Utilities Code §185034.) This contrasts, for example, with the South Coast Air Quality Management District, which has been authorized to enact air quality regulations within its jurisdictional area. (Health & Safety Code §40001; *Assoc. of American Railroads v. South Coast Air Quality Mgmt. Dist.* (9th Cir., 2010) 622 F.3d 1094, 1096

though that might put it at a disadvantage compared to private companies not required to meet those standards, again, it has that right as a market participant. (*Engine Manufacturers Assn. v. South Coast Air Quality Management Dist*. (9th Cir. 2007) 498 F.3d 1031, 1046-1047.)

Similarly here, California's determination that its agencies comply with CEQA in making their decisions, including decisions involving state-run enterprises, falls out of the legislature's determination that California state agencies, along with other California public agencies, "Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions." (Public Resources Code §21001(d).) As the above cases make clear, a congressional statute will not interfere with or preempt the authority of a sovereign state to set its own internal goals, especially when the state is acting as a market participant, unless Congress makes that intent explicit.

3. PREEMPTION OF CALIFORNIA'S AUTHORITY TO APPLY CEQA TO ITS OWN HIGH-SPEED RAIL PROJECT, AS PER UP'S SUGGESTION, WOULD LEAD TO ABSURD RESULTS.

As explained above, the high-speed rail project is, in reality, California's project, not just Respondent's. Thus, if the ICCTA preempts California's ability to require CEQA compliance of its own project, it must also preempt any other authority California might have to "regulate" or control its high-speed rail project.

By UP's logic, California must accede to STB's total control of the high-speed rail project, and would retain no ability to independently determine the nature of the project it would build. Thus, for example, California's determination that its high-speed rail system be fully integrated with the state's existing intercity rail and bus network, and that it be fully coordinated and connected with commuter rail lines and urban rail transit developed by California local transit agencies whenever possible (Public Utilities Code §185030) would be negated.

As in *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, this would lead to absurd results, with the STB able to lead the State of California around by the nose, dictating the nature of its state-run high-

speed rail system. However, as in *Nixon,* the question is where the money would come from to build, run, and administer this federally-dictated system, as certainly the ICCTA could not, by its own force, require California to provide funds for this system, or exercise the state's bonding capacity. (*See, Nixon, supra* 541 U.S. at 136.)

Because statutes should not be construed so as to result in absurd results (*People v. Leiva* (2013) 56 Cal.4th 498, 506), the ICCTA cannot be construed so as to preempt California's ability to direct and control its own high-speed rail system, including requiring CEQA compliance.

D. IN THE ICCTA, CONGRESS HAS NOT INDICATED ITS INTENT TO PREEMPT CALIFORNIA'S CONTROL OVER ITS OWN SUBSIDIARY AGENCIES.

The fact that the legislature has mandated that Respondent apply CEQA in deciding whether or what kind of project it submits to the STB is all the more reason for the STB not to be allowed to interfere with Respondent's deliberations. As pointed out in the Amicus brief submitted by Preserve Our Heritage ("POH"), The U.S. Supreme Court has held that federal preemption of a state's ability to control the actions of subsidiary public agencies should not be presumed but must be explicitly stated in the congressional legislation. (*See. e.g., Nixon v. Missouri Municipal League et al.* (2004) 541 U.S. 125, 138.)

In that case, the court queried whether the term "any entity" in the congressional act prohibiting a state or local government from regulating telecommunication services included subdivisions of the state itself, such that a state was barred from interfering with any of its subdivisions that attempt to offer such services. The court, drawing a number of hypothetical situations that resulted in *reductio ad absurdum* results, concluded it did not. As a result, the court decided that only when legislation specifically and explicitly prohibited a state or a locality from regulating its own subdivisions would such regulation be preempted. (*Id.* at 140-141.)

Here, while the ICCTA, in §10501, states that, " … the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law," it does not include the critical specific prohibition on a state or locality

attempting to direct its own enterprises. Thus, while the ICCTA's preemption language is sufficient to preempt a state or local government's attempt to regulate a private rail carrier, as was the case in *City of Auburn, supra* and *Green Mountain Railroad Corp., supra*, it did not specifically provide for preemption of a state's regulation of its own subdivisions, and that preemption can therefore not be presumed.

CONCLUSION

UP's preemption analysis makes sense in so far as it indicates that the ICCTA preempts state government regulation (including CEQA compliance) of a private rail project. Indeed, as this brief points out, CEQA preemption *per se* is unnecessary in that situation, because the ICCTA's preemption of state regulatory authority in itself makes CEQA inapplicable.

However, when the California state government establishes its own rail program, preemption is not applicable to its control of that program for two reasons: First, because preemption would interfere with California's sovereign control of its own internal affairs, and second, because California is acting as a market participant, not a regulator of external entities. For both these reasons, contrary to the argument of UP, preemption does not apply.

Dated: November 11, 2013

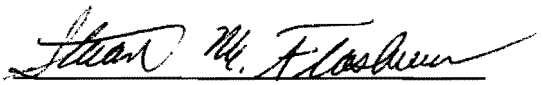
Respectfully submitted,

Stuart M. Flashman
Attorney for Appellants

CERTIFICATION

I, Stuart M. Flashman, as the attorney for the appellants herein, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 2,578 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: November 11, 2013



Stuart M. Flashman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On November 12, 2013, I served the within APPELLANTS' JOINT ANSWER TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE UNION PACIFIC RAILROAD COMPANY; APPELLANTS' JOINT MOTION FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE UNION PACIFIC RAILROAD COMPANY; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; and APPELLANTS' JOINT MOTION TO STRIKE PORTIONS OF RESPONDENTS' ANSWERS TO BRIEFS OF AMICI CURIAE, OR, IN THE ALTERNATIVE TO ALLOW FILING OF FURTHER SUPPLEMENTAL ARGUMENT ON NEWLY-RAISED POINTS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES on the parties listed on the attached service list by placing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as shown on the attached service list.:

In addition, on the above-same day, I served electronic copies of all the above-same documents, converted to "pdf" format, as e-mail attachments, to the parties on the service list at the e-mail addresses shown.

In addition, on the above-same day, I served a copy of APPELLANTS' JOINT ANSWER TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE UNION PACIFIC RAILROAD COMPANY, converted to "pdf" format, on the California Supreme Court through the Court of Appeal's website electronic filing address.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on November 12, 2013.

Stuart M. Flashman