In the Court of Appeal for the State of California

Third Appellate District

TOWN OF ATHERTON, ET AL., Plaintiffs and Appellants, vs. CALIFORNIA HIGH SPEED RAIL AUTHORITY, Defendant and Respondent.	No. C070877 (Sacramento County Sup. Ct. No. 34-2008-80000022CUWMGDS & 34-2010-800000679CUWMGDS)

BRIEF OF AMICUS CURIAE UNION PACIFIC RAILROAD COMPANY IN SUPPORT OF NEITHER PARTY

INTRODUCTION

Amicus curiae, Union Pacific Railroad Company ("Union Pacific"), submits that there is need for the additional argument presented in this brief on the following points:

1. The California Environmental Quality Act ("CEQA") is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). Appellants are wrong in suggesting that CEQA is merely "an informational statute" that cannot "stand in the way of granting a project approval." Appellants Joint Supplemental Brief ("Appellants Supp. Br."), pp. 5, 6. The California Supreme Court has made clear that CEQA imposes a "substantive mandate that public agencies refrain from approving projects

for which there are feasible alternatives or mitigation measures." *Mountain Lion Foundation v. Fish & Game Commission*, 16 Cal. 4th 105, 134 (1997).

2. ICCTA preemption does not require an assertion of jurisdiction by the Surface Transportation Board ("STB").

This brief is limited to those two issues. In this brief, Union Pacific is not addressing the other issues in the case, is not taking a position on the issues not addressed herein and reserves its rights to protect its interests in all proceedings of any nature.

INTEREST OF AMICUS CURIAE

Union Pacific has a strong interest in the issue of preemption under ICCTA, and the uniformity in the regulation of railroad tracks, rail yards and other rail transportation facilities and rail operations protected by that preemption. Union Pacific also has a strong interest in California's high-speed rail project, which has the potential to impact Union Pacific's freight rail network.

A. Union Pacific's Freight Rail Network.

Union Pacific operates a freight rail franchise, in rights of way owned by Union Pacific and others, in California and twenty-two other states. The Union Pacific system is part of a national freight rail network that forms a vital link in the nation's interstate and international commerce. Union Pacific's freight tracks, rail yards and other rail transportation facilities are located throughout the State of California, including in the

Central Valley, in the Los Angeles Basin, and on the San Francisco Peninsula. Union Pacific serves all of the state's major ports, including the Port of Los Angeles, Port of Long Beach, and Port of Oakland.

Union Pacific rights of way run in close proximity to, and in some locations are encroached upon by, portions of the proposed right of way for the approximately 800-mile high-speed rail project ("HSR Project"). At various stages in the development and environmental review of the HSR Project, Union Pacific has participated and commented in various proceedings in order to protect Union Pacific's freight rail network and avoid potential impacts to its operations. During review of the project, Union Pacific has raised significant operational, safety, environmental, and other concerns arising from the proposed construction and/or operation of the HSR Project on or adjacent to railroad tracks, rail yards and other rail transportation facilities on which Union Pacific operates.

B. California High Speed Rail Authority's Change To "Blended Service."

Ever since the HSR Project was proposed in California in the 1990s—and continuing until last year—the announced plan for the project was to construct and operate high-speed rail on new tracks dedicated to high-speed rail service. That plan changed fundamentally in April 2012, when the California High Speed Rail Authority ("CHSRA") adopted a "Revised Business Plan."

Under the Revised Business Plan, CHSRA has proposed for the first time to operate part of its network through "blended" [1] operations with existing commuter services. In some places, these commuter lines operate on freight tracks that Union Pacific owns or on which it has rights to operate freight service. In some locations, most notably the San Francisco Peninsula, CHSRA contemplates operating high-speed trains on the very same tracks as freight and conventional passenger trains. Thus, for Union Pacific, blended service has the potential to disrupt or impede severely Union Pacific's existing and future freight-rail operations—including access to existing and future customers.[2]

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[1] CHSRA proposes having passengers transfer to existing commuter service to complete their travel into urban areas such as Los Angeles, Sacramento, and San Francisco. CHSRA refers to these proposals as "blended service" or "blended operations" (collectively, "blended service"). The Revised Business Plan refers to *blended systems* and *blended operations*, "which are the integration of high-speed trains with existing intercity and regional/commuter rail systems via coordinated infrastructure (the system) and scheduling, ticketing, and other means (operations)." *See* http://californiastaterailplan.dot.ca.gov/docs/1a6251d7-36ab-4fec-ba8c-00e266dadec7.pdf, p. 2-1, last visited October 7, 2013.

[2] CHSRA has not yet developed alignment, construction, and operational plans for the project in general, and blended service. Because the Project's specific routes and service patterns have not been established, Union Pacific is unable to analyze or verify whether CHSRA can successfully avoid disruption of freight operations.

C. The Memorandum of Understanding Between Union Pacific And CHSRA.

When the Revised Business Plan was adopted, Union Pacific raised concerns to CHSRA about how blended service could cause serious disruption to Union Pacific's existing and future freight operations. Union Pacific subsequently engaged in negotiations with CHSRA and some of the commuter railroads whose operations would be affected by blended service under the Revised Business Plan, and on July 11, 2012, the parties executed a Memorandum of Understanding ("MOU") to ensure the HSR Project does not disrupt Union Pacific freight operations. The purpose and effect of the MOU is to secure Union Pacific's rights and ability to continue meeting its common carrier obligations, including access to new and existing customers. Further to protect Union Pacific's rights in the future, as CHSRA develops more specific routes and plans for high-speed rail on particular segments that could affect Union Pacific, the MOU specifically reserves Union Pacific's rights to participate in future proceedings, including potential claims or litigation concerning any aspect or portion of the Project.[3]

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[3] Since executing the MOU, Union Pacific and CHSRA have participated in negotiations for the formation of additional definitive agreements that will be necessary for construction of the Project to begin—including a construction and maintenance agreement, an engineering agreement, and (continued...)

ARGUMENT

In its July 8, 2013 order, this Court requested supplemental briefing by the parties addressing the effect of the Surface Transportation Board's assertion of jurisdiction over the HSR Project.

In their supplemental brief filed on September 23, 2013, Appellants argue that "[w]hile the ICCTA may preempt state environmental permit requirements, CEQA is an informational rather than a regulatory statute." Appellants Supp. Br., p. 4. Appellants are wrong. ICCTA does preempt CEQA.

I. ICCTA PREEMPTS CEQA.

ICCTA includes an express preemption provision that preempts state law remedies concerning the construction of rail tracks and facilities "even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). In *City of Auburn v. United States*, the U.S. Court of Appeals for the Ninth Circuit reviewed "the plain language of the ICCTA and the statutory framework surrounding it," concluding that "congressional intent is clear" and requires "a broad reading of Congress' preemption intent, not a narrow one." *City of Auburn v. United States*,

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(continued...)
an insurance and indemnity agreement—but no such agreements have yet been completed. CHSRA's alignment, construction, and operational plans for high-speed rail in general, and blended service in particular, likewise have yet to be developed.

154 F. 3d 1025, 1030-1031 (9th Cir. 1998) ("the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute").

As noted in *City of Auburn,* the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. 154 F.3d at 1029. In short, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Id.*; *quoting CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1561 (N.D.Ga. 1996).

In attempting to distinguish *City of Auburn*, Appellants suggest in their supplemental brief that *City of Auburn* somehow limits ICCTA preemption to "permit requirements," where permits were required for the project to proceed "and their denial would have defeated the project." Appellants Supp. Br., p. 4. Appellants' argument misperceives what was at issue in *City of Auburn*. Indeed, one of the STB orders on the underlying dispute in *City of Auburn* makes clear that the requirements found to be preempted in *City of Auburn* involved "a state or local environmental review process" that would impose additional environmental mitigation measures—much like the environmental review process of CEQA. *Cities of Auburn and Kent, WA--Petition for Declaratory Order*, STB Finance Docket No. 33200, 1997 WL 362017, at *6, *8 (I.C.C. July 2, 1997), cited

at *City of Auburn*, 154 F. 3d at 1028. Thus, Appellants are wrong in attempting to pigeon-hole *City of Auburn* as a "permit requirements" case.

Appellants are also wrong in suggesting that CEQA is merely "an informational statute" that cannot "stand in the way of granting a project approval." Appellants Supp. Br., pp. 5, 6. The California Supreme Court has made clear that there is a "CEQA obligation to mitigate or avoid significant environmental effects whenever feasible." *Mountain Lion Foundation v. Fish & Game Commission*, 16 Cal. 4th 105, 134 (1997). CEQA's Section 21081 has been described by the California Supreme Court as a "substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures." *Id.* "Under this provision, a decision-making agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific finding about alternatives and mitigation measures." *Id.*; *accord County of San Diego v. Grossmont-Cuyamaca Community College Dist.*, 141 Cal.App.4th 86, 99 (2006) ; *Sierra Club v. Gilroy City Council*, 222 Cal.App.3d 30, 41 (1990) ("Unlike the 'essentially procedural' National Environmental Policy Act, CEQA contains substantive provisions with which agencies must comply. The most important of these is the provision requiring public agencies to deny approval of a project with significant adverse effects when feasible

alternatives or feasible mitigation measures can substantially lessen such effects." (citation omitted)).

Appellants admit that CEQA is "action-forcing"; nonetheless, Appellants attempt to minimize the significance of CEQA's "substantive mandate" prohibiting approval of projects for which there are feasible alternatives or mitigation measures. *See Mountain Lion Foundation*, 16 Cal.4th at 134. According to Appellants, all that CEQA requires is that the agency have adequate information before approving the project. Appellants Supp. Br., pp. 6-7. Appellants argue that lead agencies may find alternatives or mitigation measures to be infeasible and approve a project despite its environmental impacts, as if this somehow negates the substantive nature of their obligation. Appellants' argument is contrary to the California Supreme Court's identification of CEQA Section 21081, including its language on feasibility, as a "substantive mandate."

Accordingly, the ICCTA preempts CEQA. *See DesertXpress Enterprises, LLC – Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, at *3 (S.T.B. June 25, 2007) ("state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted," citing *City of Auburn*). ICCTA preempts state regulation of the construction of rail lines—it is "categorically preempted regardless of the context of the action." *Adrian & Blissfield R.R. Co. v. Blissfield,* 550 F.3d 533, 540 (6th Cir. 2008). "[T]he

congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it." *City of Auburn*, 154 F. 3d at 1031.

II. ICCTA PREEMPTION DOES NOT REQUIRE AN ASSERTION OF JURISDICTION BY THE SURFACE TRANSPORTATION BOARD.

In its July 8, 2013 order, this Court also requested supplemental briefing by the parties addressing whether ICCTA preemption would be "in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature?" Union Pacific does not have a position on this issue in this appeal.

Union Pacific would, however, like to comment briefly on a statement in the supplemental brief filed by respondent CHSRA. In its supplemental brief, CHSRA states that "[t]he California High-Speed Train System is now subject to STB jurisdiction under the ICCTA, which preempts a CEQA remedy in this case." Respondent CHSRA's Supp. Br. (Aug. 9, 2013), p. 6. That statement could be construed as implying that an assertion of jurisdiction by STB is required for ICCTA preemption. In fact, there is no such requirement. ICCTA preemption does not require an assertion of jurisdiction by STB.

Section 10501(b) of ICCTA provides that the jurisdiction of STB over the construction of tracks is exclusive. Section 10501(b) further

provides that "[e]xcept 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." 49 U.S.C. § 10501(b). Thus, under Section 10501(b), it is not the assertion of jurisdiction by STB that preempts state law remedies. Rather, it is the provision of remedies in ICCTA itself that preempts state law remedies under Section 10501(b). *See Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 641 (2nd Cir. 2005).

CONCLUSION

For the reasons stated above, amicus curiae Union Pacific respectfully submits that the Court's decision should be consistent with the points set forth in this brief.

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Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP
MICHAEL R. BARR
KEVIN M. FONG
BLAINE I. GREEN

By Kevin M. Fong /dlm
Kevin M. Fong

Attorneys for Amicus Curiae
Union Pacific Railroad Company