

EXHIBIT 3-LL

Docket No. DCA-08-MR009

**NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594**

**California Public Utilities Commission White Paper,
Including Explanation and Specific Examples of How
Federal Preemption Affects California PUC's Ability to
Ensure Railroad Safety**

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



April 6, 2009

VIA ELECTRONIC MAIL

National Transportation Safety Board
Hearing Officer Paul Stancil
paul.stancil@ntsb.gov
490 L'Enfant Plaza, SW
Washington, DC 20594

**RE: NTSB's Investigation into the Chatsworth, California, Train Collision,
DCA08MR009; California Public Utilities Commission's EXHIBIT 3 LL**

Dear Hearing Officer Stancil:

The California Public Utilities Commission submits the following comments in response to the National Transportation Safety Board's investigation into the disastrous head-on collision of a Metrolink commuter rail train and a Union Pacific Railroad freight train on September 12, 2008. NTSB Member Kathryn "Kitty" Higgins, chairing the investigation, asked for comments from the CPUC regarding the State of California's position with respect to federal preemption of rail safety. These Commission comments will be shared with the Federal Railroad Administration, Union Pacific Railroad, the Southern California Regional Rail Authority (Metrolink), and jointly with the United Transportation Union and the Brotherhood of Locomotive Engineers and Trainmen.

Sincerely,

A rectangular box with a red border, used to redact the signature of Patrick S. Berdge.

Patrick S. Berdge
Principal Counsel

cc: Paul Clanon, Executive Director, CPUC
Richard W. Clark, Director, CPSD
Paul W. King, Deputy Director
Jason Zeller, Asst. Gen. Counsel

**BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD**

**COLLISION OF SOUTHERN CALIFORNIA REGIONAL
RAIL AUTHORITY (METROLINK) PASSENGER TRAIN No. 111
AND UNION PACIFIC RAILROAD FREIGHT TRAIN No. LOF65-12
CHATSWORTH, CALIFORNIA, SEPTEMBER 12, 2008
DCA08MR009**

“EXHIBIT 3 LL”

**COMMENTS OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION
ON HOW *FEDERAL PREEMPTION* ADVERSELY AFFECTS
THE COMMISSION’S EFFORTS TO IMPROVE
COMMUTER RAIL SAFETY IN CALIFORNIA**

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April 6, 2009

I. INTRODUCTION

The California Public Utilities Commission (“CPUC” or “Commission”)¹ submits the following comments in response to the National Transportation Safety Board’s (“NTSB’s”) investigation into the disastrous head-on collision of a Metrolink commuter rail train and a Union Pacific Railroad freight train on September 12, 2008. NTSB Member Kathryn “Kitty” Higgins, chairing the investigation, asked for comments from the CPUC regarding the State of California’s position with respect to federal preemption of rail safety. These Commission comments will be shared with the Federal Railroad Administration (“FRA”), the Union Pacific Railroad (“UPRR”), the Southern California Regional Rail Authority (“Metrolink”), and jointly with the United Transportation Union (“UTU”) and Brotherhood of Locomotive Engineers and Trainmen (“BLET”).

II. SUMMARY

The federal preemption of the essential and historic powers of the States to police and protect their residents in the area of railroad safety has been overlooked by Congress far too long. There have been too many catastrophic railroad accidents. There are too few federal railroad inspectors to adequately oversee national railroad safety. The area of federal rail safety is far too great and complex for even a large competent bureaucracy such as the FRA to effectively manage and control. No doubt the railroads are correct in stating that the railroads are the first line of accident prevention and safety. Nevertheless, a more encompassing approach to rail safety is needed to enhance intrastate passenger commuter rail safety. The states along with the FRA must play a fundamental role in ensuring passenger commuter rail safety through, among other things, the passage of

¹ The California Public Utilities Commission exercises rail safety oversight over railroads in California under the California Public Utilities Code and under the State Participation Plan with the Federal Railroad Administration, 49 Code of Federal Regulations, Parts 212.1 et seq. As part of the safety oversight responsibilities, CPUC investigates railroad incidents that occur in California and maintains a record of the findings. CPUC frequently uses FRA railroad incident data as a reference and often notifies FRA when inconsistencies with CPUC findings are identified.

safety rules which are complementary to those of the FRA for the intrastate operation of passenger commuter railroads that operate purely within their own jurisdictions.²

III. FEDERAL PREEMPTION OF STATE LAW IN RAILROAD SAFETY REGULATION

California has enacted railroad safety laws since the last half of the nineteenth century. Many of California's state rail safety laws and the Commission's General Orders predate the Federal Railroad Safety Act of 1970 ("FRSA"). State law requires the CPUC to investigate railroad incidents in California. In recent years the CPUC has significantly increased the frequency and detail of railroad incident investigations resulting in more accurate reports of incidents.

A. The Commission's Investigation Into the Dunsmuir Toxic Spill

The need for improved rail safety in California became obvious following the Commission's investigation into the causes of Southern Transportation Company's ("SP's") derailment and toxic spill into the upper Sacramento River at the Cantara Loop on July 14, 1991. The Commission's intensive investigation determined that the cause of the derailment of the SP train into the Sacramento River was caused by excessive lateral (L) over vertical (V) forces resulting in wheel climb and string lining of the train's car over the bridge at Cantara Loop. 57 CPUC 2d 386, 398-399, 1994 Cal. PUC LEXIS 1202, at pp. 41-45 (Nov. 22, 1994). This excessive L/V forces were the result of improper rail car placement, i.e., placing empty cars and short cars within the first eleven cars from the lead locomotives.

The Federal Railroad Administration ("FRA") had, and continues to have, no regulations governing rail car placement in a train other than one affecting hazardous materials cars. The SP's rules also permitted the make-up of the train which derailed. However, SP had been a leader in the American Association of Railroad's ("AAR's") Track Train Dynamics Program had initiated a rule in affect from October 28, 1973 through April 29, 1984, that previously had prohibited a train make-up like the one which

² State jurisdiction over intrastate commuter rail operations would not apply to Amtrak nationwide interstate passenger service.

derailed at the Cantara Loop on July 14, 1991. *Id.* at p. 401, 1997 Cal. PUC LEXIS at p. 51. SP had weakened this rule over time until the SP's own rules permitted this train's configuration which resulted in derailment. The Commission concluded "that SP knew or should have known of the dangers resulting from a train configuration similar to that of the train which derailed at Cantara curve [on July 14, 1991]. *Ibid.*, and 1997 Cal. PUC LEXIS at pp. 51-52.

B. The Commission's Local Safety Hazard Rulemaking

In 1997, the Commission promulgated rail safety rules in *Re Mitigation of Local Rail Safety Hazards Within California*, 75 CPUC 2d 1 (Decision 97-09-045), 1997 Cal. PUC LEXIS 888 (Sept. 3, 1997). The California Legislature directed the Commission to consider factors such as:

- (1) the severity of the grade and curve,
- (2) the value of special skills of train operators in negotiating such sites,
- (3) the value of special railroad equipment in negotiating the rail segment,
- (4) the types of commodities transported on the segment,
- (5) the hazard posed by the release of the commodity into the environment,
- (6) the proximity of railroad activity to human activity or sensitive environmental areas, and
- (7) the history of accidents at or near hazard sites.

California Public Utilities Code Section 7711(d) and (e).

The Rulemaking identified approximately 19 areas in California as "essentially local safety hazard" sites because of high instances of derailments due to difficult terrain, potential damage to urban centers or primary environmental resources, or other circumstances. Under the FRSA's preemption provision, 49 U.S.C. § 20106, once the Secretary has issued a regulation "covering" the subject matter of a state law, regulation, or order related to railroad safety, that state law, regulation, or order is preempted unless it is necessary to address "an essentially local safety hazard," is not incompatible with the federal regulation, and does not unreasonably burden interstate commerce. The statute is quoted in its entirety *infra* at page 11.

The UP and the BNSF Railway Company immediately sought injunctive relief in the U.S. District Court for the Northern District of California. The District Court found the Cantara Loop to be a local safety hazard. *Union Pac. R.R. Co. v. Cal. PUC*, 109 F.Supp.2d 1186, 1204 (N.D. Calif. 2000). The court concluded:

that the phrase "essentially local safety hazard" is intended to strike a balance -- it encompasses more than a truly unique condition or geological anomaly but plainly less than authority to superimpose state-wide regulations. Rather, the phrase is directed at geographically discrete, localized areas that have peculiar or distinctive features or characteristics (or combinations thereof), that are neither typical nor common or otherwise "state-wide" in nature, and which create a safety hazard. Such an approach appears most consistent with both the language and spirit of the FRSA, as well as its legislative history.

Id. at 1205.

Consequently, the court found an essentially local safety hazard at the Cantara Loop and held that California could require more stringent track requirements there.

Site 9, known as the Cantara Loop, is a 10.5 mile stretch of track in the mountains in Northern California starting at a point north of Dunsmuir and ending at a point below Mt. Shasta. This line goes through the Sacramento River Canyon and crosses the river at several locations. This site experienced 32 out of 90 derailments on the line between 1976 and 1991, although there have been no accidents since 1992... The particularly sharp 14 percent curve is the sharpest main line track curve in the state of California. [Citation omitted.] The curve and grade [citation omitted] have been directly linked to one-third of the derailments at the site. [Citation omitted.] Track-train dynamics forces also contributed to many other derailments. [Citation omitted.] The most hazardous grade-curve combination occurs on a bridge which crosses over the Sacramento River, a major supplier of the state's water. This resource-critical river is already damaged from the devastating environmental effects of the 1991 Dunsmuir accident which poisoned the river and destroyed its ecosystem for many miles. [Citation omitted.] The severity of the environmental risk from future accidents can only be described as enormous. Of course, any such risk

also necessarily entails serious risks to the physical and economic health of the surrounding communities as well.

Id. at 1206.

Unfortunately, the U.S. Court of Appeals for Ninth Circuit disagreed with the trial court. While the trial court rejected the railroads' argument that a state could not find an essentially local safety hazard to exist if the hazard was "capable of being encompassed within uniform national uniform standards" (*id.* at 1204), the Ninth Circuit approved and adopted the requirement for the finding of a local safety hazard. *Union Pac. R.R. Co. v. Cal. PUC*, 346 F.3d 851, 860 (9th Cir. 2003). In so doing the Ninth Circuit effectively "eviscerated" the local safety hazard exception in Section 20106. See: *Union Pac. R.R. Co. v. Cal. PUC*, *supra*, 109 F.Supp.2d at 1204.

Moreover, the Ninth Circuit rejected the argument that protection of one of California's two primary sources of fresh water could support the finding of an essentially local safety hazard. *Union Pac. R.R. Co. v. Cal. PUC*, *supra*, 346 F.3d 851, 861-862. "The Railroads and the United States dispute CPUC's argument and contend that environmental consequences can be considered only if related to the probability of accidents." But, the Commission had demonstrated that "[t]rains derailed in this site at a rate eight times higher than on the rest of this line... Each statistical method confirms that the chance of the accident concentration at this site occurring randomly [footnote omitted] is extremely small at less than 1 in a trillion." *Re Mitigation of Local Rail Safety Hazards Within California*, 75 CPUC 2d 1, 65, 1997 Cal. PUC LEXIS at p. 196. The probability of an accident occurring at the Cantara curve was eight times greater than anywhere else on the UP's Black Butte Line from Dunsmuir, California, to Klamath Falls, Oregon. Nevertheless, the Ninth Circuit "decline[d] to determine whether environmental consequences can ever be considered in determining whether a condition is an 'essentially local safety hazard' because in this case they clearly cannot be." *Union Pac. R.R. Co. v. Cal. PUC*, *supra*, 346 F.3d 851, 862.

Since, as the trial court noted, any safety hazard may be encompassed in a uniform national standard, under that interpretation of Section 20106, the states are effectively precluded from promulgating a more stringent standard than those promulgated by the FRA. Without the ability of establishing an essentially local safety hazard, a more stringent state standard cannot be promulgated whether it conflicts with the FRA standard or unreasonably burdens interstate commerce, or not. The Ninth Circuit's opinion effectively closed the door to state improvement of railroad safety rules except in instances where the FRA has not acted.

Nonetheless, the Ninth Circuit did find that California's train make-up standard was not federally preempted because the FRA had never passed train make-up rules. In addition, California was free to adopt and enforce the railroads' own train make-up rules because the FRA had never adopted the railroads' General Code of Operating Practices or enforced these railroad rules. *Union Pac. R.R. Co. v. Cal. PUC, supra*, 346 F.3d 851, 865-871.

IV. STATE PARTICIPATION UNDER THE FEDERAL RAILROAD SAFETY ACT OF 1970

The FRSA provides that the states may hire their own rail safety inspectors when certified by the FRA. 49 C.F.R. Parts 212.201 et seq. These joint state/federal safety inspectors supplement the number of railroad safety inspectors in a participating state. The joint state/federal safety inspectors have the same authority as the federal inspectors to inspect and cite railroads for safety violations. In California, joint state/federal safety inspectors number 29 and the number of federal safety inspectors is 30. There can be no doubt that without California's railroad safety inspectors provided under the state participation program, there would be a grossly inadequate number of rail safety inspectors in California.

Thirty-one states have participation programs under the FRSA. Not every state has sufficient rail operations to warrant an agency of its own to provide additional inspectors. However, there are a handful of states that have a large number of passenger and freight

operations, which have the resources and rail competency to become more involved with rail safety if given the opportunity.

The State Participation Plan under FRSA allows California to supplement the number of FRA-certified railroad inspectors in the state. However, it does not permit California, or any other state, the ability to engage in research and development of new, more stringent, safety protections in the area of railroad safety. California has approximately 10,000 miles of mainline track, the largest container port operations in the nation (Los Angeles-Long Beach)³, has spent 11 billion dollars on constructing the Alameda Corridor in Los Angeles, passed a nine billion dollar appropriation for the first phase of a high speed rail project between California's northern and southern population centers, has the nation's most developed high technology center (Silicon Valley), and is the world's sixth largest economy—and yet is denied involvement in testing and developing new technologies and means for improving rail safety under the State Participation Plan under the FRSA.

V. METROLINK CONTENDS THAT FEDERAL PREEMPTION PROHIBITS THE COMMISSION FROM SAFETY OVERSIGHT OVER ITS OPERATIONS

After the Chatsworth collision in September of 2008, the Commission received “whistle blower” reports of continued red signal violations during Metrolink passenger operations. Soon after, the Commission's Director of its Consumer Protection and Safety Division, Richard W. Clark, directed Metrolink's Chief Executive Officer (“CEO”) to provide the CPUC with specifics concerning the alleged incidents and directed Metrolink's CEO to immediately report all future red light violations to Mr. Clark. While describing the reported violations in his letter of January 5, 2009 (attached to these comments), Metrolink's CEO opined that the FRA's jurisdiction “preempts any reporting requirements that the PUC may attempt to assert over Metrolink.” The CEO provided the information concerning the violations “[n]otwithstanding that preemption,” doing so in

³ The Long Beach-Los Angeles Ports have approximately 45 trains arriving and departing each day. California's Oakland Port has approximately 1,092 BNSF trains and 936 UP trains per year. California's Cajon Pass into Southern California carries approximately 59 trains per day.

the interest of coopera[tion]...” Metrolink claimed that these incidents did not require reporting under 49 C.F.R. Pt. 225.5 and were therefore, effectively, not reportable to anyone. Given Metrolink’s position with respect to the request for notice of red signal violations, there is little doubt that Metrolink will assert Section 20106 as prohibiting any safety oversight that is not strictly in conformance with FRA violations of its C.F.R. safety regulations and, then, only when enforced under FRA’s authority. In other words, Metrolink will comply only with FRA inspections regarding FRA violations.

As discussed below in section VI. B., *infra*, regarding the Commission’s Rulemaking into collision-avoidance in California commuter rail operations, it is premature to discuss possible remedies to prevent collisions between passenger and freight trains operating in California. Nevertheless, it is very apparent that Metrolink will oppose any new rules such as California’s Resolution SX-88 prohibiting cell phone use, a rule that might require the “calling of signals” between operator and conductor, or any other rule that does not conform exactly to the FRA’s own regulations. Metrolink apparently would oppose any such state rule even if overall passenger safety were improved by the rule.

VI. FEDERAL PREEMPTION OF STATE LAW IN COMMUTER RAIL SAFETY REGULATION

The safety regulation of commuter rail lines differs significantly from freight railroads. The primary difference is that these rail carriers are not the Class 1 freight carriers such as UP or BNSF. Commuter rail carriers move passengers and they often do so simultaneously with freight trains on the same rail lines. This places passengers in danger of colliding with freight trains such as happened in the accident that occurred at Chatsworth, California, on September 12, 2008.

A. The FRA Is the Essential and Primary Regulator of the Safety of Commuter Rail Operations

The FRA has specific regulations for rail passenger safety. 49 C.F.R. Pt. 238 et seq. Additionally, the FRA requires conventional passenger rail systems, as opposed to urban rapid transit systems, to comply with its railroad operations requirements on the

nation's general railroad system. The FRA has wisely determined that the fundamental safety issue for passengers is the concern for collisions with freight trains. Passenger rail cars that do not meet the FRA's basic structural safety requirements, such as light rail transit vehicles, may not operate on tracks used by freight trains without specific approval of the FRA.⁴

The reason is sound and obvious. "[A] collision between an occupied light rail transit vehicle and conventional (heavier and more structural protected) freight or passenger equipment would have catastrophic consequences because the light rail vehicles are not designed to withstand such a collision." *Id.* at p. 42533. Metrolink's passenger rail cars are conventional equipment and although 25 died and 130 were injured in the collision at Chatsworth, California, a similar collision between the UP freight and a fully-packed light rail train would have been far worse.

B. The Chatsworth Collision Resulted in the Initiation of a Commission Rulemaking Concerning the Safety of Commuter Rail Operations in California

The Commission's *Order Instituting Rulemaking to Consider Implementation of Collision-Avoidance Systems on Commuter Rail Lines in California*, R.08-11-017, issued November 21, 2008. The purpose of the Rulemaking is to investigate appropriate collision-avoidance systems or rules that 1) will not affect operations of Class 1 freight operations even though both operations occur on the same rail lines, 2) will not delay installation of an FRA-approved Positive Train Control system on these lines, and 3) the systems or rules developed must be compatible, and not conflict, with existing FRA passenger safety rules. The exact nature and description of such rules have not yet been developed. Nevertheless, both Class 1 freight railroads and some California commuter rail operators have threatened opposition on grounds of federal railroad preemption under 49 U.S.C. § 20106. See Section 20106 immediately below. Consequently, a review of the

⁴ See: Statement of Agency Policy Concerning Jurisdiction Over the Safety of Railroad Passenger Operations and Waivers Related to Shared Use of the Tracks of the General Railroad System by Light Rail and Conventional Equipment, 65 F.R. 42529 (July 10, 2000).

federal preemption of state commuter rail safety regulations must be considered in improving commuter rail safety in California.

C. Background of Federal Preemption of Railroad Safety

Congress passed the Federal Railroad Safety Act ("FRSA") in 1970. The preemption provision, Section 20106, provides:

National uniformity of regulation.

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

This preemption provision in Section 20106 of the FRSA was a legislative compromise. The National Association of Regulatory Utility Commissioners' ("NARUC's") position was that "[a] State agency should be permitted to adopt safety standards more stringent than the Federal standards, which do not create an undue burden on interstate commerce, where necessary to protect the public and railroad employees... Federal preemption should only apply where State standards are weaker than Federal ones."⁵ The railroads argued that they should not be subjected to 50 different

⁵ Before the Subcomm. On Surface Transp. of the Senate Comm. on Commerce, 91st Cong., 2nd Sess., Ser. No. 91-51, p. 67 (March 21, 1970).

judicial and administrative systems. 1970 U.S.C.C.A.N. 4109, 91st Cong. 2nd Sess. (1970). Transportation Secretary Volpe testified that in the compromise between the bills and between the two positions of the railroads and NARUC, "States would remain free to regulate in a given localized area where they felt there was some need for going beyond what the national standard called [for]."⁶

1) National Uniformity Has Little, If Any, Relevance to Commuter Rail Operations Within California

As mentioned above, the railroads' primary argument regarding federal preemption of railroad safety, and Section 20106's primary concern, is that railroad safety regulations be *uniform* throughout the fifty states. However, not one of California's commuter rail lines operates outside of the State of California. Any safety modification to a California commuter rail locomotive, passenger car, or station, would have no impact on operations outside California. Similarly, so long as a regulation did not affect an FRA Class 1 signal system, track, engineer or train crew certification or training requirement, there would be no affect on Class 1 freight railroads. As NARUC stated in its position with respect to federal preemption regarding Section 20106, only a California safety regulation affecting commuter rail operations which was less stringent than the FRA's, should be preempted. The affect on interstate commerce of a more stringent state safety regulation on commuter rail operations is minimal at best.

2) The Legal Basis for Federal Preemption of Railroads in Particular and Commuter Rail Operations in General

Federal preemption begins "with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear intention and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, (1947) 331 U.S. 218, 230. FRSA exhibits no such manifest purpose. To the contrary, federal preemption under FRSA "is even more disfavored than preemption generally." *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 9 F.3d 807, 813 (9th Cir. 1993).

⁶ Before the Subcomm. On Surface Transp. of the Senate Comm. on Commerce, 91st Cong., 2nd Sess., Ser. No. 91-51, p. 43 (March 17, 1970).

The U.S. Supreme Court in *CSX v. Easterwood*, 507 U.S. 658 (1993) held that 49 U.S.C. § 20106 “displayed considerable solicitude for state law.” *Easterwood, supra* at p. 665. There are two express saving clauses in Section 20106 that override federal preemption and permit the states to pass rail safety laws. *Ibid*.

To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they “touch upon” or “relate to” that subject matter...for “covering” is a more restrictive term which indicates that *pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law*. See Webster’s Third New International Dictionary 524 (1961) (in the phrase “policy clauses covering the situation,” cover means “to comprise, include, or embrace in an effective scope of treatment or operation”) [emphasis added].

Easterwood, supra, at p. 664.

The Ninth Circuit has held that “the Constitution permits [Congress] to regulate only those intrastate activities which have a *substantial* effect on interstate commerce, and such regulation of purely intrastate activity reaches the outer limits of Congress’ commerce power [original emphasis].” *U.S. v. McCoy*, 323 F.3d 1114, 1118, (9th Cir. 2003), citing *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002).⁷ Passing safety regulations on intrastate commuter rail carriers that are more stringent than those demanded by the FRA, but which have no affect on Class 1 freight railroads, will not have a substantial effect on interstate commerce. Increasingly, the doctrine of “field preemption” is inconsistent with modern federalism and its presumption that states retain concurrent powers. However, certain areas of interstate railroad safety are by necessity exclusively preempted, e.g., the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701, et seq., and the Safety Appliance Act, 49 U.S.C. § 20301 et seq.

⁷ See also: *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281 (1981), “...the commerce power ‘extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.’”

**D. State Jurisdiction over Commuter Rail Safety Should Apply
Concurrently with the Federal**

Commuter rail operations in California are intrastate only. The fundamental rationale for federal preemption under FRSA, national uniform safety standards, does not apply. So long as FRA's minimum safety standards are not weakened by the state, there is no reason to prohibit California from providing more stringent safety standards so long as they do not affect the inter- and intrastate commercial operations of freight railroads in California.

As noted previously, national uniformity is not applicable to intrastate commuter rail operations. The U.S. Supreme Court has held that in areas of the law not inherently requiring national uniformity, state statutes must be upheld unless there is such actual conflict between the two schemes of regulation that both cannot stand in the same area, or there is evidence of a congressional design to preempt the field. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 (1963); see also: *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250, 1252-1253 (9th Cir. 1983). As noted in the discussion concerning the *Easterwood* case, *supra*, there is no evidence supporting a Congressional intent to preempt the entire field of railroad safety under Section 20106. Section 20106, having an express state saving clause preceding and succeeding it, shows "considerable solicitude for state law." *Easterwood, supra*, 507 U.S. at 665.

Further, commuter rail operators in California are created by the State of California.⁸ The state has the same interest in protecting the commercial interests of these intrastate operators as the federal government has in protecting those of the interstate Class 1 freight railroad operations. However, the accident in Chatsworth underscores the

⁸ E.g., the following commuter rail operations were established by the California Legislature under the California Public Utilities Code: the North County Transit District, California Public Utilities Code §§ 125700 et seq., the Peninsula Corridor Joint Powers Board, California Public Utilities Code §§ 160000 et seq., San Joaquin Regional Transit District, California Public Utilities Code §§ 50000 et seq., and the Southern California Regional Rail Authority, California Public Utilities Code §§ 99314 et seq.

need for increased safety supervision over commuter rail operations in the State of California. California residents traveling wholly within local areas within the state were killed and injured. Consequently, there is every reason to support concurrent safety jurisdiction of the state and federal government over commuter rail operations in California.

VII. CONCLUSION

Perhaps the best example of concurrent federal-state jurisdiction is the field of occupational safety and health regulation. Occupational safety and health is regulated federally and by those individual states which have initiated their own occupational safety and health agencies. State occupational safety and health regulations are not preempted by the U.S.D.O.T.'s Occupational Safety and Health Administration ("OSHA"). Federal OSHA standards are minimum standards and the individual state occupational safety and health agencies may promulgate stricter standards. The state standards must be "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated" by the federal government. 29 U.S.C. § 667(c) (2).

While railroading in America is clearly an essential part of interstate commerce, the usual grounds for federal preemption of railroads should not apply to intrastate commuter rail operations. Commuter rail agencies in California will not have to concern themselves with the oversight of 50 jurisdictions or varying equipment requirements when traveling from one area to another. The FRA provides minimum safety standards. The state may provide more stringent standards when it determines those minimum standards should be improved for the safety of its residents. Interstate commerce should not be burdened and the state standards must not affect operations of Class 1 railroads in the state. The tragic collision at Chatsworth, California, must result in a rethinking of

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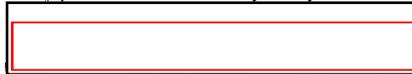
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federal preemption as it affects the safety of commuter rail lines operating purely within a state.

Respectfully submitted,

FRANK R. LINDH
JASON ZELLER
PATRICK S. BERDGE

By:

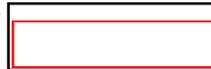


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April 6, 2009

**COLLISION OF SOUTHERN CALIFORNIA REGIONAL
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"EXHIBIT 3 LL"

ATTACHMENT 1

**January 5, 2009 Letter from Metrolink CEO
to Richard W. Clark, CPUC**



SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

Member Agencies:
 Los Angeles County
 Metropolitan Transportation
 Authority
 Orange County
 Transportation Authority
 Riverside County
 Transportation Commission
 San Bernardino
 Associated Governments
 Ventura County
 Transportation Commission
 Ex-Officio Members:
 Southern California
 Association of Governments
 San Diego Association
 of Governments
 State of California

January 5, 2009

Mr. Richard Clark
 Director, California Public Utilities Commission
 Consumer Protection & Safety Division
 505 Van Ness Avenue, Rm. 2205
 San Francisco, CA 94102-3298
 [Via Email:

Dear Mr. Clark:

This is in response to your email dated December 17 in which you requested data that addresses information you have received that suggests that Metrolink train operators have committed at least five red light violations and two stations run-by in recent months.

To begin with, I want to emphasize that Metrolink's obligation to report incidents or accidents that occur during its operations is fully subject to the jurisdiction of the Federal Railroad Administration (FRA). Metrolink provides "railroad transportation" as that term is defined in 49 C.F.R. §225.5. Metrolink is also required by 49 C.F.R. Part 217 to submit its operating rules to the FRA, and to ensure that the employees who operate the trains receive testing and training in those operating rules. The FRA's jurisdiction over Metrolink, including the obligations described in the previous sentences, preempts any reporting requirements that the PUC may attempt to assert over Metrolink. Notwithstanding that preemption and in the interest of cooperating with PUC, I am providing you with the information you requested about the incidents that involved Metrolink operations.

The following table and the accompanying summary of follow up actions responds to your questions, at least to the extent that the incidents that occurred involved Metrolink trains:

Date:	Place:	Time:	Name:	Description:
11-13-08	CP HUMPHREY	10:25 AM	Metrolink 205	RED SIGNAL
11-20-08	CP LILAC	11:30 AM	Metrolink 306	RAN SIGNAL AT CP LILAC, STRUCK BNSF LOCAL01120
12-01-08	BNSF BUENA PARK	4:45 PM 1:05 PM	Metrolink 706 704	TRAIN RAN PAST STATION STOP; NON-RULE VIOLATION

With respect to the Red Signal Violation committed by Metrolink 205, Connex (Metrolink's operating contractor) pulled the crew out of service and performed drug and alcohol testing as required by the applicable FRA regulations. Conductor was interviewed and found to have acted within the scope of his duties and was not disciplined. Engineer signed a waiver admitting mistake and was disciplined with 30 days no pay and 15 days of remedial training. Additionally, Connex was assessed liquidated damages for delayed trains and rules violation.

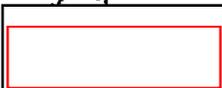
With respect to Metrolink 306, which ran the signal on November 20, Connex pulled crew out of service and performed drug and alcohol testing as required by the applicable FRA regulations. NTSB, FRA, PUC, Connex and Metrolink conducted a joint investigation. The investigation found that both the conductor and the engineer acting as "second set of eyes" acted within the scope of his duties and was not disciplined. Connex is waiting for the completion of the Investigation Hearing prior to assessing discipline for the Engineer.

With respect to the trains that allegedly ran past the station, Metrolink 704 & 706, Connex conducted the investigation and determined that Student Engineers were running Trains. The Engineer instructors were disqualified as Instructors. This action did not constitute a rules violation because the train remained within a signal block when it backed up to the station platform. As a result, no reporting was required.

The other two incidents about which you have heard apparently occurred on Amtrak trains. One of them was Amtrak 564 on November 25, 2008. The other was Amtrak 583 on October 26, 2008. The individual at Amtrak who can provide you with the information you request about those trains is Mr. Joseph Yanuzzi.

Please let me know if you have other questions. To the extent that I am able to answer any additional questions, I will get you that information as soon as possible.

Sincerely,



David M. Solow
Chief Executive Officer

cc. Gray Crary, Assistant Executive Officer, Operating Services
Gary Lettengarver, Acting Director, Operations
Tommy McDonald, Connex

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document entitled **COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ON HOW FEDERAL PREEMPTION ADVERSELY AFFECTS THE COMMISSION'S EFFORTS TO IMPROVE COMMUTER RAIL SAFETY IN CALIFORNIA, EXHIBIT 3 LL, in DCA08MR009**, upon the National Transportation Safety Board and the parties in this proceeding by electronically forwarding the document in Microsoft WORD and/or PDF to the Board and each party.

Dated at San Francisco, California, this 6th day of April, 2009.



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