RANDY RIDDLE, City Attorney
California State Bar No. 121788
TRISHA A. ALJOE, Special Counsel
California State Bar No.166189
RICHMOND CITY ATTORNEY'S OFFICE
450 Civic Center Plaza
Richmond, CA 94804
Telephone: (510) 620-6509
Facsimile: (510) 620-6518

G. SCOTT EMBLIDGE
California State Bar No. 121613
MICHAEL P. BROWN
California State Bar No. 183609
MOSCONE, EMBLIDGE, & QUADRA, LLP
220 Montgomery Street, Suite 2100
San Francisco, California 94104-4238
Telephone: (415) 362-3599
Facsimile: (415) 362-2006

Attorneys for Plaintiff The People of
The State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE IOF CALIFORNIA, Plaintiff, v. BURLINGTON NORTHERN SANTA FE RAILWAY, Defendant.	Case No. 301322-4 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO CRIMINAL COMPLAINT** Date: June 2, 2009 Time: 1:30 p.m. Dept.:

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INTRODUCTION

In demurring to the criminal complaint, defendant Burlington Northern & Santa Fe Railroad ("BNSF") makes a remarkable and untenable claim: States are completely helpless to address in any way the significant public safety and welfare problems caused when stopped trains block critical public intersections for extended periods of time. This claim cannot be squared with Supreme Court precedent establishing a presumption against federal preemption, or with the statutory schemes that recognize the States' continued authority to regulate in the area of railroad safety in particular, *and* with regard to matters of public safety and welfare more generally.

On February 6, 2009 the People of the State of California ("the People"), acting through the Richmond City Attorney's Office, filed a Misdemeanor Complaint against BNSF. The Complaint charged that BNSF had, on two occasions, blocked railroad crossings at public roads in excess of 10 minutes, as prohibited by General Order 135 of the California Public Utilities Commission ("General Order 135").

BNSF has demurred to the Complaint, contending that (1) it is factually innocent of the charged offenses, and (2) General Order 135 is preempted by two federal statutes, the Federal Railroad Safety Act ("FRSA") and the Interstate Commerce Commission Termination Act ("ICCTA"). Both arguments are baseless.

First, BNSF cannot "argue" its factual innocence by attempting to introduce evidence to support its Demurrer. Penal Code section 1004(4) permits a defendant to demur to a criminal complaint *only* by demonstrating that the facts alleged do not constitute the offense charged. It is clear that the People have stated a factual basis for the charged offense of violating General Order 135.

Second, BNSF is simply incorrect in its assertion of federal preemption. Indeed, BNSF *concedes* that federal regulations do not address the amount of time a train may block a public highway. Nevertheless, BNSF contends that federal law forbids states to place limits on such blocking, thus leaving railroads free to block public roads – impeding general traffic and the ability of police and fire authorities to respond to emergencies—for *as long* a they wish, and *for*

whatever reason they wish. The law *cannot* countenance that sort of free license for railroads, or the encroachment on traditional local police powers that it would necessarily entail. And, in fact, the law does not. FRSA preemption is very limited, and reaches only those subject matters that federal regulations have "substantially subsumed," a standard that certainly is not met here. And ICCTA preemption—while broader than FRSA preemption—simply does not apply where a State law is deemed to "relate to" railroad safety. Moreover, even where ICCTA applies, that statute recognizes an exception for local regulations related to public health and safety. The application of that exception requires a fact-intensive analysis, one that cannot take place in the context of a demurrer.

FACTUAL STATEMENT

Because the only basis for a demurrer under Penal Code section 1004(4) is that "*the facts stated* do not constitute a public offense," the People will limit their fact statement to the material facts pleaded in the Complaint, and a recitation of the PUC regulation that BNSF is alleged to have violated. In ruling on this Demurrer, the Court's inquiry into the facts of this matter should go no further.

For Count I, the People alleged that, on or about December 12, 2008, in the City of Richmond, County of Contra Costa, State of California, BNSF unlawfully blocked the railroad crossings at Harbor Way South and Marina Way South, in excess of 20 minutes after the BNSF train came to a stop, and in such a manner as to impede traffic in violation of PUC General Order 135. Misdemeanor Complaint ("Complaint"), at 1:21-25.

For Count II, the People alleged that on or about January 31, 2009, in the City of Richmond, County of Contra Costa, State of California, BNSF unlawfully blocked the railroad crossing at MacDonald and Richmond Parkway in excess of 13 minutes after the BNSF train came to a stop and in such a manner as to impede traffic in violation of PUC General Order 135. *Id.*, at 1:26-2:3.

General Order 135, Paragraph 1, provides, in relevant part, that "except as provided in Paragraph 5, a public grade crossing which is blocked by a stopped train, other than a passenger train, must be opened within 10 minutes, unless no vehicle or pedestrian is waiting at the

crossing . . ." *See* Exh. B to BNSF Request for Judicial Notice. Paragraph 5 states that Paragraph 1 "shall not apply to any blocking resulting from compliance with State and Federal laws and regulations, terrain and physical conditions, conditions rendering the roadbed or track structure unsafe, mechanical failures, train accidents, or other occurrences over which the railroad has no control . . ." *Id.* General Order 135 has been in effect since 1974. *Id.*

ARGUMENT

I. THE COURT MUST DECLINE BNSF'S INVITATION TO EXAMINE FACTS OUTSIDE OF THE PEOPLE'S COMPLAINT.

Citing Penal Code section 1004(4), BNSF argues that the People's Complaint "fails to state facts that constitute a public defense." First, BNSF claims that the Complaint does not allege a violation of General Order 135, because it does not state that BNSF's trains were stopped for 10 minutes in violation of that Rule. General Order 135 states, in relevant part, that "except as provided in Paragraph 5, a public grade crossing which is blocked by a stopped train, other than a passenger train, must be opened within 10 minutes, unless no vehicle or pedestrian is waiting at the crossing . . ."

The Complaint clearly states a violation of General Order 135 by alleging that in Count I, that BNSF unlawfully blocked a railroad crossing in excess of 20 minutes after the BNSF train came to a stop, and in such a manner as to impede traffic in violation of PUC General Order 135, and in Count II that BNSF unlawfully blocked a railroad crossing in excess of 13 minutes after the BNSF train came to a stop and in such a manner as to impede traffic in violation of PUC General Order 135.

Nothing more is required. Penal Code section 952 states that a complaint is "sufficient if it contains in substance, a statement that the accused has committed some public offense" and that the complaint may be "may be in the words of the enactment describing the offense." Here, the complaint identifies the precise statute BNSF allegedly violated, and describes the violation

using the "words of the enactment" – General Order 135. Moreover, BNSF's demurrer itself makes clear that BNSF is fully aware of precisely the violation with which it is charged.[1]

BNSF then goes far beyond the complaint's allegations and tries to construct an evidentiary defense at the pleading stage. Essentially, BNSF uses inadmissible hearsay statements in police reports to argue that BNSF's conduct falls within an exception to the statute identified in the complaint. BNSF invites the Court to examine these "facts" and determine that BNSF will be able to prove (1) that the trains cited were not stopped for 10 minutes in the crossings, and (2) that based on these facts, BNSF did not violate Rule 135.

But the case law is clear under section 1004(4) that such a demurrer examines only the face of the complaint to determine whether there is any defect in the crime charged. *People v. Williams* 97 Cal.App.3d 382, 390 (1979). Here, the complaint clearly charges violations of Rule 135. That is where the Court's inquiry should end.

BNSF asks the court to examine a police report – and the hearsay statements contained within the police report – and conclude that the People will not be able to *prove* a violation in this case because BNSF has a fact-based defense to the allegations. BNSF cites no authority in support of its invitation that the Court go outside the pleadings to examine this "evidence," and the People are aware of none. In fact, the case law is directly to the contrary. *See Tobe v. City of Santa Ana* 9 Cal.4th 1069, 1090-1092 (1995) (demurrer tests only the sufficiency of the allegations and cannot examine circumstances outside the face of the complaint).

Finally, BNSF seems to argue that the Complaint must not only allege a violation of General Order 135, but also that none of the exceptions to that General Order apply. Again, the law is directly to the contrary: the exceptions are affirmative defenses to be proven by the defendant, not elements of the offense that must be negated in the complaint. *See In re Andre R* 158 Cal.App.3d. 336, 341 (1984) ("It is well established that where a statute first defines an

[1] Of course, if the Court believes the allegations in the Complaint are insufficient, the Court should sustain BNSF's demurrer *with leave to amend*.

offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant.")

II. GENERAL ORDER 135 IS NOT PREEMPTED UNDER THE FRSA OR ICCTA.

BNSF contends that General Order 135 is preempted under the FRSA and the ICCTA. It is incorrect on both counts.

The California Court of Appeal recently reaffirmed the long-established principle that, notwithstanding federal regulation of railroad transportation, States retain substantial authority to regulate in areas of traditional local concern, even where such state regulations touch upon matters that affect or relate to the rail industry. *Southern California Regional Rail Authority v. Superior Court*, 163 Cal.App.4th 712, 730-31 (2008). Indeed, "[i]n the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law *will be reluctant to find preemption*. Thus, there is a *presumption against preemption* . . . [and] preemption will not lie unless it is the *clear and manifest* purpose of Congress." *Id.* (*quoting CSX Transp. v. Easterwood*, 507 U.S. 658, 663-64 (1992) (emphasis added).

The Ninth Circuit has reached the same conclusion. It explained that "[i]n evaluating a federal law's preemptive effect . . . we proceed from the presumption that the historic police powers of the state are *not to be superseded* by a federal act unless it is the clear and manifest purpose of Congress." *Southern Pacific Transp. Co. v. Public Utility Commission*, 9 F.3d 807, 812-13 (9th Cir. 1993) (analyzing preemption under the FRSA) (emphasis added).

BNSF turns this presumption-against-preemption on its head, contending that the very federal statutes that enshrine the principles of limited preemption, have in fact globally occupied the field of railroad regulation, leaving the States helpless to protect their citizens, even as to critical local matters that federal law simply does not address.

A. General Order 135 Is Not Preempted By The Federal Railroad Safety Act.

By its express terms, the FRSA *permits* a State to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. §

20106(a); *Easterwood*, 507 U.S. at 661-62. In using the term "covering," Congress chose a "restrictive term" that would *limit* the scope of federal preemption over traditional areas of State concern. *Easterwood*, 507 U.S. at 664 (Congress chose "covering," rather than "relate to" or "touch upon," to ensure that federal preemption was circumscribed).[2] Indeed, in drafting the FRSA preemption provisions, Congress "display[ed] *considerable solicitude* for state law." *Id.* (emphasis added).

Applying *Easterwood*, both the Ninth Circuit and the appellate courts of this State have recognized the very *narrow* scope of federal preemption under the "covering" test for FRSA preemption. *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851, 864 (9th Cir. 2003) ("The standard for 'covering' under the FRSA is not . . . easy'"); *Southern Pacific Transp. Co. v. Public Utility Commission*, 9 F.3d 807, 812-13 (9th Cir. 1993) ("covering" standard for FRSA preemption "is not an easy standard to meet," and "FRSA preemption is even more disfavored than preemption generally"); *Jones v. Union Pacific Railroad Co.*, 79 Cal.App.4th 1053, 1064-65 (2000) (FRSA preemption "is even more disfavored than preemption generally").

In keeping with the statute's command of narrow and limited preemption, the Supreme Court has established that federal regulations will be found to "cover" the subject matter of state law *only* where they "substantially subsume" the same subject matter that the state law seeks to regulate. *Id.* In applying this test the court must first determine the subject matter that the state law aims to regulate. Next, the court must determine the subject matter of the federal regulations that are said to have preemptive effect. The court must be careful to define the subject matter of the state and federal regulations narrowly, for to define them in general categorical terms would be to expand the reach of FRSA preemption beyond that intended by Congress. *See Jones*, 79 Cal.App.4th at 1064 ("When applying FRSA preemption, the Court has eschewed broad categories such as 'railroad safety' and has looked at the narrow categories" specifically

[2] The *Easterwood* Court explained that Congress' "solicitude for state law" was further evidenced by the fact that it employed the word "covering" in an express preemption clause that "is both prefaced and succeeded by express savings clauses." *Id.*

addressed by the federal regulations); *Southern Pacific Transp. Co.*, 9 F.3d at 813 (making same observation and holding that federal regulation of sound-producing *capacity* of train whistles does not "substantially subsume" State's restriction on *use* of whistles). Finally, having determined the subject matter of the federal rules, and the requirements of the state law, the court must decide whether the former "substantially subsumes" the latter, thus indicating that Congress *intended* that the state requirement be preempted. *Southern Pacific Transp. Co.*, 9 F.3d at 813.

The subject of the provisions of General Order 135 here at issue is apparent from the plain text of the regulation—how long a stopped train may block a public road grade crossing. BNSF Request for Judicial Notice, Exh. B, ¶¶ 1, 4, 5; *see Ohio v. Wheeling & Lake Erie Railway Co.*, 743 N.E.2d 513, 514 (Ohio App. 2000) (applying FRSA preemption analysis to similar blocking statute, and finding that "[i]n essence, [the state law] governs the length of time a stopped train can block a roadway"). BNSF concedes that federal regulations *do not address* this particular and important subject. Demurrer at 10:7-12.

The Federal Railroad Administration ("FRA") has also noted that federal regulations "do[] not regulate the length of time a train may block a grade crossing." *See* People's Request For Judicial Notice, Exh. A. It recognized that the matter of trains blocking public roads is of critical local importance, in terms of general traffic control and, more importantly, the ability of fire and police to effectively respond to emergencies. *Id.* It acknowledged the "role of States" in the regulation of trains blocking public roads, and noted that the National Committee On Uniform Traffic Laws And Ordinances issued a "model rule" to guide States in drafting such regulations. *Id.*, at Exhs. A & B. The FRA is the agency charged with administering the FRSA; as such, its interpretation of the statute's preemptive effect is "entitled to deference." *Union Pacific Railroad Co.*, 346 F.3d at 866. It is notable, then, that the FRA addressed this particular matter and did *not* suggest that the State blocking regulations are or should be *per se* preempted.

Because federal safety regulations do not address, let alone subsume, the subject matter of General Order 135, the State law is not preempted. *Wheeling & Lake Erie Railway Co.*, 743 N.E.2d at 513 (no preemption of blocking statute because federal regulations did not address same subject matter); *CSX Transp., Inc. v. City of Mitchell*, 105 F.Supp.2d 949 (S.D. Ind. 1999)

(refusing to preempt prospective enforcement of Indiana blocking statute, with the proviso (reflected in General Order 135) that railroads not be cited where their blocking was due to compliance with federal regulations).

BNSF appears to make essentially three arguments as to why, even in the absence of any federal regulation of "blocking," California's regulation of that subject matter is forbidden. First, it contends that *other* FRSA regulations substantially subsume the matter of stopped trains blocking public roads, because the subject of blocking is "mathematically related to" the matters addressed by the regulations. Second, BNSF contends, unconvincingly, that federal regulations relating to train speed and air brake testing subsume the *entire* subject matter of "the movement of trains at grade crossings." Finally, BNSF contends that federal regulations subsume the subject of blocking *because* federal regulators have *declined* to issue regulations on that subject. As demonstrated below, none of these arguments has merit.[3]

1. BNSF's Proposed "Mathematically Related To" Standard Is Contrary To *Easterwood* And Its Progeny.

BNSF relies primarily on *CSX Transp. Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002), for the proposition that Congress has manifested a clear intent to subsume the subject of blocking, by issuing regulations on three different matters: (1) maximum train speed; (2) maximum train length; and (3) mandatory testing or air brake systems. In *City of Plymouth*, the court concluded that federal speed and length regulations "subsumed" the matter of blocking, because the amount of time it takes a train to clear a grade crossing is "mathematically a function of" how long the train is and how fast it is traveling. *Id.* It concluded that federal air brake

[3] Within its FRSA preemption argument, BNSF briefly contends that General Order 135 violates the Commerce Clause. Demurrer at 9:17-23. But "railroad activity of a local concern, which is not regulated by federal legislation, and does not seriously interfere with interstate commerce, may be regulated by the states under the police powers reserved by the federal Constitution." *Jones*, 79 Cal.App.4th at 1066; *see also Union Pacific Railroad Co.*, 346 F.3d at 870 ("CPUC regulations are afforded a presumption of constitutionality . . . and the Railroads must meet this rather stringent test" to show that the State's interests are not legitimate or that the "burden on interstate commerce *clearly exceeds* the local benefits.") (emphasis added). Needless to say, in its three-sentence discussion, BNSF fails to establish the factual basis for Commerce Clause preemption.

testing requirements "subsumed" the subject of blocking, because a railroad's compliance with a blocking law could interfere with its ability to be stopped long enough to perform the brake tests. *Id.*

But *City of Plymouth* does not control here. First, that case involved a preemption challenge to a much different state law—a Michigan law that restricted the time a *moving* train could occupy a public road grade crossing. Here, by contrast, General Order 135 regulates how long a *stopped* train may block a public road grade crossing. BNSF Request for Judicial Notice, Exh. B. Even assuming for the moment that the "mathematically a function of" test is a proper one under *Easterwood*, it is simply absurd to contend that the amount of time a train is *stopped* at a grade crossing is "mathematically a function of" how fast it is moving or how long it is.

Second, *unlike* the Michigan law, General Order 135 contains an *express exception* for "any blocking resulting from compliance with State or Federal laws and regulations." BNSF Request for Judicial Notice, Exh. B, at ¶ 5. As such, it simply *cannot* interfere with BNSF's compliance with federally-mandated air brake testing. *See City of Mitchell*, 105 F.Supp.2d at 952-53 ("we perceive situations that may occur in which [the blocking] statute would warrant enforcement in a manner consistent with federal law . . . [if] the trains were obstructing crossings in excess of ten minutes for reasons *not attributable to compliance with mandatory federal law*, any ensuing decision to effect enforcement of [the state law] *would likely be consistent with federal law*") (emphasis added).[4] Further, in the context of a demurrer BNSF cannot make a showing that its compliance with General Order 135 has or threatens to "frustrate" its compliance with any federal safety regulation. *City of Alexandria*, 2009 WL 1011653 at *7 (no preemption under "frustration" argument absent a showing that compliance with local law conflicts with compliance with federal law); *In re Vermont Railway*, 769 A.2d 648, 655 (Vt. 2000) (no preemption because railroad failed to "point to any conditions that conflict with specific federal regulations regarding rail safety").

[4] BNSF cites *City of Mitchell* for the proposition that State blocking statutes are preempted, but it fails to mention that the court only found the statute preempted *as previously enforced*, and expressly permitted future enforcement, with the stated provisos.

Finally, the *City of Plymouth* court's "mathematically a function of" test is simply far too broad to be consistent with the *Easterwood* Court's mandate of limited preemption. Indeed, in adopting the narrow "substantially subsumes" test, the *Easterwood* Court expressly *rejected* the notion that a federal rule substantially subsumes a subject matter merely because it "relates to" or "impacts" that subject matter. *Easterwood*, 507 U.S. at 664 (to establish FRSA preemption petitioner "must show more than" that the state regulations "touch upon" or "relate to" the subject matter of the federal regulations); *see also Union Pacific Railroad Co.*, 346 F.3d at 864-65 (same); *Norfolk Southern Railway Co. v. City of Alexandria*, 2009 WL 1011653 at *6 (E.D. Va. 2009) (no FRSA preemption because federal regulations "do not cover, but *instead merely relate to*, the subject matter" of the challenged local law) (emphasis added); *Southern Pacific Transportation Co. v. California Public Utilities Commission*, 647 F.Supp. 1220, 1225 (N.D. Cal. 1986) (rejecting railroad's argument that State regulations are preempted merely because they "affect" a subject covered by federal regulations; State requirement for minimum distance between tracks not preempted by federal regulations regarding track width or clearance surrounding track or track ballast).

To say that the subject of a state law is "mathematically a function of" subjects covered by federal law, is to say nothing more than that the state law "is related to" or "has an effect on" the federally-regulated subjects. Under *Easterwood*, *that* connection is simply too attenuated to satisfy the "substantially subsumes" requirement. Indeed, the "ultimate touchstone of preemptive effect" is Congress' manifest intent. *Tyrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 522 (6th Cir 2001). It defies common sense to propose that, when Congress issues regulations over one specific subject, it *manifestly intends* to forbid State regulation over any "mathematically related" subjects. Such a proposition is entirely inconsistent with the special, limited nature of FRSA preemption.[5]

[5] BNSF cites *Rotter v. Union Pacific Railroad Co.*, 4 F.Supp.2d 872, 874 (E.D. Mo. 1998) to support its argument that federal regulations subsume the subject of blocking. But *Rotter* did not even *consider* that question. The *Rotter* court never applied the "covering" or "substantially subsumed" tests, because it relied on the Sixth Circuit's earlier ruling, that *local* ordinances are not eligible for the FRSA preemption "exemption" in the first place. *See CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 628 (6th Cir. 1996) (FRSA preempts all local laws (continued on next page)

2. Even Accepting BNSF's Overbroad Definition Of The Subject Matter Of General Order 135, The "Substantially Subsumed" Test Is Not Satisfied.

BNSF suggests that the "subject matter" of General Order 135 is not in fact "blocking," but is instead the much more general category of "the movement of trains at highway grade crossings." *See Village of Mundelein v. Wisconsin Central Railroad*, 882 N.E.2d 544, 554 (Ill. 2008) (reaching that conclusion with respect to a local blocking ordinance). BNSF's argument is wrong for two reasons.

First, BNSF over-generalizes from the text and effect of General Order 135 to define its "subject matter." It is true that defining the subject matter of a State law "will necessarily involve *some level* of generalization that requires backing away *somewhat* from the specific provisions at issue. *Burlington Northern & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999) (emphasis added). However, "with too much generalizing" the court's "analysis would be meaningless because all FRA regulations cover those concerns." *Id.* And, as *Easterwood* and subsequent decisions have made clear, to remain true to the doctrine of narrow preemption, a court must define the "subject matter" of federal regulations narrowly, rather than in broad categorical terms. For example, in *People v. Union Pacific*, 141 Cal.App.4th 1228, 1260 (2006), the court noted that FRSA preemption will be found only where "a federal regulation covers a *particular matter*" addressed by State law (emphasis added). The court defined the particular subject matter of the challenged State law "the transportation of calcium oxide by rail," and, finding no federal regulations on that subject, ruled against preemption. *Id.*, at 1261; *see also Southern Pacific Transp. Co.*, 9 F.3d at 813 (court must look at "narrow categories," not "broad categories"). BNSF ignores this guidance when it asks this Court to define the subject matter of General Order 135 so broadly. *See Ohio v. Wheeling & Lake Erie Railway Co.*, 743 N.E.2d 513, 514 (Ohio App. 2000) (applying FRSA preemption analysis to similar blocking statute, and

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that merely "relate to" railroad safety; the narrower "covering the subject matter" preemption test applies only to *State* laws and is therefore irrelevant to the analysis of local laws). Thus, all that the *Rotter* court had to find (and all that it did find) was that the local blocking ordinance was "related to railroad safety." *Id*.

finding that "[i]n essence, [the state law] governs the length of time a stopped train can block a roadway").[6]

Second, *even if* the subject matter of General Order 135 is "the movement of trains at grade crossings," FRSA preemption still does not apply. In order to find a State law preempted, the court must conclude not just that the federal government has regulated *in that field*, but rather that Congress has *subsumed* that field to such an extent, that its clear and manifest intent was to preclude all State regulation. The difference between the former and the latter is represented in *Easterwood* itself. The *Easterwood* Court held that federal regulations regarding the adequacy of warning devices installed at federally-funded crossing improvement sites, did not "cover" (or "subsume") the category of the adequacy of warning signs at grade crossings *generally*. As such, State law was free to regulate in the latter field so long as the grade crossings at issue were not part of federally-funded improvement projects. *Easterwood*, 507 U.S. at 1741-42. On the other hand, the Court concluded, Congress had issued so many detailed regulations setting maximum safe train speeds for various different track conditions, that it *did* "subsume" the particular subject matter of "train speed with respect to tack conditions." *Id.*, at 1743. State law could not impose liability on a railroad for allegedly operating at an unsafe speed, where the train was abiding by applicable federal speed regulations. *Id.*

It is not plausible that Congress has manifested a clear intent to preclude any State regulation over the broad category of "the movement of trains at grade crossings," simply by issuing regulations over the *particular* matters of maximum train speed and air brake testing, which merely have some *relation* to the subject of blocking.[7] The preemptive effect of federal

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[6] BNSF calls it "incredible" that the *Wheeling* court defined the subject matter of a blocking statute as "the length of time a stopped train can block a roadway." Demurrer at 8:19. But BNSF makes no argument as to *why* this definition was incorrect, let alone not credible. The court in *Village of Mundelein* did indeed disagree with the *Wheeling* court, and greatly expanded the scope of the "subject matter" of the blocking ordinance there at issue. However, the People believe that the *Wheeling* court's approach is more faithful to the limited nature of FRSA preemption.

[7] Indeed, BNSF cites to no federal regulations regarding air brake testing that apply specifically to grade crossings. Instead, these regulations apply *everywhere*, including grade crossings. Thus, to the extent that air brake testing requirements suggest that Congress has subsumed the subject of movement at grade crossings, they equally suggest that Congress has

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safety regulations simply is not that broad. *See Easterwood*, 507 U.S. at 665-75; *see also Union Pacific*, 141 Cal.App.4th at 1261 (no FRSA preemption because federal regulations did not address the *specific* subject of "the transportation of calcium oxide by rail," even though federal regulations addressed a number of other matters of rail transport safety *and* addressed the safe transportation of dangerous materials); *Southern Pacific Transp. Co.*, 9 F.3d at 815 (regulation of sound-producing capacity of train whistles did not "cover" the more general area of train whistles; thus state regulation of train whistle *use* was not preempted).

3. BNSF's Negative Preemption Argument Is Utterly Meritless

BNSF contends, remarkably, that FRSA preemption should be found here *because* federal regulations are silent on the subject of the blocking of grade crossings. Demurrer at 9:24-27. It is difficult to imagine a more frontal attack on the holding of *Easterwood*—that FRSA preemption is narrow and is limited to those *specific* areas that have been *expressly* subsumed by Congress—than to premise FRSA preemption on the mere *absence* of federal regulations regarding a subject matter. *Union Pacific Railroad Co.*, 346 F.3d at 866 (FRA's failure to issue speed regulations is not a basis for preempting state speed laws, even where FRA was aware of a particular danger and addressed it in a different manner).

To support its argument BNSF relies on dicta from *Marshall v. Burlington Northern Inc.*, 720 F.2d 1149, 1153-54 (9th Cir. 1983). In that case, the court concluded that State regulations requiring certain types of "strobe and oscillating lights" were preempted, because federal regulators had carefully studied the same matter for five years, and had *formally* determined that such requirements would "not be justified" (because the lights would be ineffective at reducing accidents). *Id.* Here, by contrast, BNSF points only to an FRA "Fact Sheet" regarding blocking statutes. In that publication, the FRA notes that issuing federal blocking regulations "could have" the effect of interfering with other federal regulations, but it *also* acknowledges the local traffic and emergency response problems posed when trains block grade crossings for extended

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subsumed the subject of "the movement of trains" *generally*. That proposition is not consistent with *Easterwood* and its progeny.

periods of time. *See supra* note 3. The FRA's mere *observation* of the various competing interests at play with regard to the subject matter of blocking, cannot be taken as an expression-by-negative-implication of federal intent to foreclose State blocking regulations. *Union Pacific Railroad Co.*, 346 F.3d at 868 ("Because the FRA merely deferred making a rule, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap.").[8]

B. General Order 135 Is Not Preempted By The ICCTA.

General Order 135 is not preempted by the ICCTA. First, ICCTA preemption does not apply to State laws that that relate to rail safety and therefore fall within the purview of the preemption and savings clauses of the FRSA. In *Tyrell*, 248 F.3d at 522-23, the Sixth Circuit reasoned that the FRSA reflected Congressional intent to *balance* federal and State interests over matters related to rail safety. That balance is reflected in the FRSA's preemption-and-savings clause, which provide that States may regulate in the area of rail safety *until* federal regulations have "covered" a particular subject matter. *Id.* Thus, the FRSA reflects not only Congress' intent to establish the primacy of federal rail safety law, but also its intent to leave some rail safety matters open to State regulation. *Id.* To subject State laws related to rail safety to the broad preemption provisions of the ICCTA, the court reasoned, is to impermissibly impinge on the Federal Railway Administration's jurisdiction, and to "implicitly repeal[] the FRSA's first savings clause." *Id.*

The Eighth Circuit has followed *Tyrell*, as has at least one federal district court in California. *See Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557, 560 (8th Cir. 2004) (applying *Tyrell* to conclude that "the FRSA, not ICCTA, determines whether a state law relating to rail safety is preempted"); *Nippon Yusen Kaisha v. Burlington & Northern Santa Fe Railway Co.*, 367 F.Supp.2d 1292, 1302 n.10 (C.D. Cal. 2005) (same).

Second, even where the ICCTA does apply, it does not preempt States from exercising certain of their traditional police powers. "[I]n passing the ICCTA, Congress meant to occupy

[8] Further, *Marshall* was decided a decade before *Easterwood* elucidated the parameters of FRSA preemption and underscored the leeway remaining to the States under that statute.

the entire field of *economic* regulation of the interstate rail transportation system, *but retain for the states the police powers reserved by the Constitution*." *Jones*, 79 Cal.App.4th at 1059 (emphasis added). "Because the Act's subject matter is limited to deregulation of the railroad industry . . . courts and the Board have rightly held that it does not preempt *all* state regulation affecting transportation by rail carrier." *New York, Susquehana & W. Ry. v. Jackson*, 500 F.3d 238, 254 (3rd Cir. 2007).

Thus, the Surface Transportation Board ("STB") and several circuit courts have concluded that "while broad, the [ICCTA's] preemption clause does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads, so long as those regulations do not interfere with or unreasonably burden railroading." *Id.*, at 254 (quoting STB opinions); *see also Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005) ("not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety . . . generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption"). This "police powers" exception applies not only to general State laws, but also to laws that specifically address railroads, so long as the latter do not discriminate against or unduly burden rail carriers. *See Adrian & Blissfield Railroad Co. v. Village of Blissfield*, 550 F.3d 533, 541-42 (6th Cir. 2008).

In the end, however, the Court need not reach these issues at this stage in the proceedings. To decide the preemption question, a court must determine whether the state regulation (1) is "unreasonably burdensome" or (2) discriminates against railroads. "This is a fact-intensive inquiry." *Jackson*, 500 F.3d at 256. Accordingly, BNSF cannot establish the basis for ICCTA preemption by way of this Demurrer.

CONCLUSION

The People have pleaded facts that constitute a violation of General Order 135. BNSF's Demurrer should be overruled.

Dated: May 22, 2009

Respectfully Submitted,

RICHMOND CITY ATTORNEY'S OFFICE
Trisha A. Aljoe, Special Counsel
Randy Riddle, City Attorney

MOSCONE EMBLIDGE & QUADRA LLP
G. Scott Emblidge
Michael P. Brown

By: _____
G. Scott Emblidge

Attorneys for the People of the State of California