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BEFORE THE
PENNSYLVANIA PUBLIC UTILTITY COMMISSION

Petition of Norfolk Southern Railway Company for rescission or amendment of the Pennsylvania Public Utility Commission's Order entered on June 12, 1975 regarding the prevention of run outs in the 400 and 500 Classification Yards of Conway Yard in Beaver County, Pennsylvania	:	Docket No. C-00019560
United Transportation Union, Pennsylvania State Legislative Board,	:	
v.	:	P-2011-2267892
Norfolk Southern Railway Company	:	

NOTICE

A Motion for Summary Judgement has been filed before the Pennsylvania Public Utility Commission in the above Captioned Matter. If you wish to defend against the Motion set forth in the following pages, **you must take action within twenty (20) days after this Motion has been served upon you,** by entering a written appearance personally or by attorney and filing in writing with the Pennsylvania Public Utility Commission your responses or objections to the attached Motion for Summary Judgment. **Your reply must be filed no later than February 23, 2012.** You are warned that if you fail to do so the matter may proceed without you and a judgment may be entered against you by the Pennsylvania Public Utility Commission without further notice and you may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE.

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MOTION FOR SUMMARY JUDGMENT ON THE QUESTION OF FEDERAL PREEMPTION OF THE COMMISSION ORDER ENTERED ON JUNE 12, 1975 AT C-00019560

And now comes the Pennsylvania State Legislative Board of the United Transportation Union (hereinafter "UTU") by and through its counsel Willig, Williams & Davidson and Irwin W. Aronson, Esquire and respectfully moves the Honorable Pennsylvania Public Utility Commission (hereinafter "Commission") to grant Summary Judgment ***against*** Norfolk Southern Railway Company (hereinafter "NS") and in ***favor*** of the UTU by preserving the Commission's jurisdiction over the Commission Order entered on June 12, 1975 at C-00019560 (hereinafter "1975 Order") and the factual matrix and operational activity of NS at the Conway Railroad Yard in Beaver County, Pennsylvania giving rise to the 1975 Order by determining that the Commission is not preempted by

federal law from the sphere of regulation contemplated by the 1975 Order, and submits in support thereof as follows:

1. On or about November 13, 2009, NS filed a petition before the Commission seeking to rescind or amend the 1975 Order regarding the ***prevention*** of runouts in the Conway Railroad Yard. The 1975 Order was issued by consent of the then predecessors to NS and the UTU in response to a Complaint filed before the Commission on or about May 23, 1972.

2. Over the period of time subsequent to the filing of the November 13, 2009 petition by NS, that petition has been amended by NS, in the subject of unsuccessful mediation efforts by NS and the UTU and ultimately the subject of written testimony which has been submitted by both NS in support of its petition and the UTU in opposition to the NS petition to rescind or amend the 1975 Order. No oral hearing on the matter on the petition to rescind or amend has been conducted as of the date of the instant submission.

3. On or about October 19, 2011, UTU filed a petition for interim emergency relief with respect to runout incidents and related matters at the Conway Yard seeking emergency relief due to physical damage to rail cars and personal injuries to NS employees at the Conway Yard as a result of specific runout related incidents at the Conway Yard.

4. On October 27 and October 28, 2011 the Commission conducted oral hearing with respect to the UTU October 19, 2011 petition for emergency relief before Commission Administrative Law Judge David Salapa.

5. During the October 27 – October 28 hearing before ALJ Salapa, NS raised a narrow question of federal preemption solely with respect to the then pending application for emergency relief filed with the Commission by the UTU.

6. By Ordered entered December 1, 2011 the Commission denied the UTU's request for interim emergency relief and remanded the instant proceedings to the office of Administrative Law Judge.

7. On or about December 23, 2011 the Commission issued a Secretarial letter docketed to docket no. C-00019560.

8. That Secretarial Letter asserts, *sua sponte*, that NS raised the broader issue of federal preemption in the 1975 Order during the hearings held on October 27 and 28, 2011 on the application for emergency relief filed by the UTU.

9 The said December 23, 2011 Secretarial Letter further asserts, on behalf of the Commission, a preference for addressing the federal preemption issue raised by NS preliminarily.

10. On or about January 6, 2012 Administrative Law Judge Salapa issued an Order indicating concurrence with the assertion in the Secretarial Letter that an evidentiary record has been developed in the matter which may be sufficient for resolution of the federal preemption issue raised by NS and directing the parties to file Motions for Summary Judgment of those motions pursuant to 52 Pa. Code 5.102 addressing "[F]ederal preemption of the 1975 Order . . ." The said Order of ALJ Salapa requires the said Motions for Summary Judgment, "[A]ddressing federal preemption of the June 12, 1975 Pennsylvania Public Utility Commission Order at C-00019560 . . ." to be filed and served on or before February 3, 2012 and further that the parties shall file and

serve answers to the said Motions for Summary Judgment on or before February 23, 2012.

11. On or about October 25, 2011 NS filed a Complaint in the United States District Court for the Western District of Pennsylvania docketed to 2:11-cv-01350-CB (hereinafter "NS federal litigation") naming the Commission and its five individual Commissioners in their official capacities as Defendants seeking declaratory and injunctive relief with respect to the application for emergency relief filed by the UTU on October 19, 2011 as noted in paragraph 3 above, based upon notions of federal preemption. The NS federal litigation does not name the UTU as a party litigant.

12. In the said federal complaint NS asserts, inter alia, that the Commission is federally preempted from granting the UTU's application for emergency relief.

13. On or about January 12, 2012 the Commission and its five members in their official capacities filed a Motion to Dismiss the pending federal litigation more fully described in paragraph 11 of the instant Motion for Summary Judgment. Contemporaneous with the filing of the said motion to dismiss, the Commission and its five members in their official capacities filed their brief in support of their motion to dismiss the NS federal litigation.

14. On or about February 1, 2012 NS filed its brief ***in opposition*** to the Motion of the Commission, and its five members in their official capacities, to dismiss the NS federal litigation. (A true and correct copy of the NS Memorandum of Law in Opposition to the said Motion to Dismiss is attached hereto as "Exhibit A.")

15. In its brief in opposition to the Motion of the Commission, and its five members in their official capacities, to dismiss the NS federal litigation, NS correctly

asserts, that the issue of preemption was raised by NS for the first time at the hearing on the UTU's Application for Emergency Relief before ALJ Salapa. (Exhibit A at P. 4.)

16. In its brief in opposition to the Motion of the Commission, and its five members in their official capacities, to dismiss the NS federal litigation, NS correctly asserts, " The PUC's repeated assertion that Norfolk Southern raise the issue of federal preemption in its Petition [before the Commission seeking to rescind or amend the 1975 Order regarding the ***prevention*** of runouts in the Conway Railroad Yard] is simply false. Neither Norfolk Southern's November 13, 2009 Petition nor its September 1, 2010 amended petition made any reference to the issue of federal preemption... Norfolk Southern did not seek to amend its own Petition to assert federal preemption as a basis for relief before the PUC...

The pending PUC proceeding provides no occasion for this Court to decline jurisdiction of the dispute so clearly in the federal orbit..." (Exhibit A at P. 5.)

17. Norfolk Southern in its brief in opposition to the Motion of the Commission, and its five members in their official capacities, to dismiss the NS federal litigation offers detailed legal arguments and analysis regarding federal preemption concepts generally and analysis of the concept of federal abstention in particular. In concluding its analysis of federal preemption concepts, Norfolk Southern asserts, "The PUC has no relevant expertise in national railway safety standards and reconsideration of a 1975 Order is not so much an opportunity to correct an error made by the Commission thirty years ago, as it is [sic] new attempt at rule-making under entirely new technologies. Federal preemption of the 1975 order is a legal question, not one for which the PUC has useful expertise...(citations omitted.) (Exhibit A at pp. 13-14.)

18. While the UTU rejects substantially all of the conclusions asserted by Norfolk Southern in its brief in opposition to the Motion of the Commission, and its five members in their official capacities, to dismiss the NS federal litigation, it is clear that Norfolk Southern's assertion that the question of federal preemption is not appropriate for determination by the Commission is accurate. The question regarding federal preemption in this matter is one of whether the federal scheme expressly preempts the Commission from regulating railway safety in the circumstances of the underlying action presently pending before the Commission. It is respectfully submitted that the Commission has no useful expertise in such a legal analysis and that, consistent with Norfolk Southern's threshold analysis, the determination of federal preemption is best made by the federal judiciary that is deeply experienced and plainly competent to determine issues of preemption in general and the interrelationship between state and federal regulatory schemes in particular.

19. On or about January 25, 2012 of the Regional Administrator of the United States Department of Transportation, Federal Railroad Administration, transmitted a letter to the Ute TU regarding unsafe conditions at the Norfolk Southern Conway Yard with respect to role outs in the classification yard and the overspeed of equipment coming off the hump. The said letter is attached hereto as "Exhibit B."

20. The verbiage of the correspondence embodied in Exhibit B contains certain inaccuracies such as an assertion that the "UTU is asking a federal judge to block the state from ruling..." that are not germane either to the conclusions of the correspondence or to the instant motion for Summary Judgment.

21. The correspondence embodied in Exhibit B focuses, at page 2, upon determinations by the Federal Railroad Administration regarding several uniquely local conditions present at the Conway Yard, at issue in the instant matter, that are not governed by federal regulation. These include an assertion that, "There is no federal regulation(s) governing the inspection of recorders, PD, CTC, and DCT circuits..." An additional assertion that, " A Track Profile Survey for the class yard [at Conway] showed some problems relative to elevation & bowl profile. A full surfacing units started working on the hump class your November 14th. Eleven tracks were surfaced before weather conditions halted the operation. The surfacing unit will continue in the spring. It is believed that once work is completed the effectiveness of the new retarder's will be greatly improved." And yet a third assertion in that correspondence states that a discussion was held between the FRA and an individual employed by Norfolk Southern regarding rollout issues at Conway in which the Norfolk Southern, "AVP of Rules... committed to get involved with local supervision for ways to improve protection of employees including additional training..." (Exhibit B at pp. 2-3.) The FRA letter appended hereto as Exhibit B concludes, at page 3, that rollouts or runouts have occurred at Conway based upon uniquely local conditions. " The rollouts appear to have been caused by a combination of factors including: (1) the yardmaster placing computer into trim/manual mode resulting in upper primary, secondary, and group retarders not applying or sufficiently applying to slow heavy loaded cars, ...(2) elevation/surface of class tracts into bowl of yard leading into retarder's, (3) failure to apply hand brakes on west end of class yard to assist State Rick Carter's holding the cars, (4) initial retarder rail settings not allowing empty cars to fully rests on head of rail,... and (5) electrical/ equipment failure."

22. The testimony of NS witness James Alexander, the company's Chief Engineer, Communications and Signal Department, Northern Region at the October 27-28, 2011 hearings is most instructive regarding the existence of unique local conditions at Conway that are the appropriate subject of Commission attention and regulation. In that testimony Mr. Alexander describes, on both direct and cross examination, issues regarding the bowl of the yard at Conway, the efficacy, based on unique manufacture specifications, at various speeds and weights of cars of the newly locally installed at Conway inert retarder system, the impact of the curvature of the trackage at Conway on system operations and the need for a local work and attention to assure the present and ongoing effective local operation of that system. (Transcript of Oct 27-28, 2011 hearing at pp. 403-429.)

23. The direct testimony of George A. Gavalla, an expert witness whose written testimony was submitted on behalf of the UTU on September 29, 2011, further elucidates on the uniquely local conditions at the Conway Yard and upon the efficacy of NS's operation of its Hump Process Control system as it relates to local safety conditions at Conway. Because the Gavalla direct testimony is based upon an expert report that itself was compiled subsequent to that expert's review of the direct testimony submitted by NS, it must be reviewed in the context of the instant Motion for Summary Judgment as a whole, with its focus on both efficacy in the ***prevention*** of runouts at Conway and with respect to the unique local conditions present at Conway giving rise to the ongoing need for Commission regulatory intervention well within the scope of the specifically federally authorized state regulatory sphere of permissibility.

24. Mr. Gavalla's conclusions, found at pages 24 through 29 of his direct testimony, submitted on September 20, 2011, are most instructive regarding the ongoing need for appropriate and permissible local regulatory intervention by the Commission in order to assure and protect local safety concerns.

25. The Federal Railroad Safety Act ("FRSA"), recodified at 49 U.S.C. §20101 *et. seq.*[1] governs the regulation of railroad safety, and the preemption of state law by FRSA is expressly set out at 49 U.S.C. § 20106.

Section 20106 of The Federal Railroad Safety Act explicitly provides for state regulation of Rail Safety.

26. Despite the FRSA's general language vesting regulatory authority of rail safety matters in the Secretary, §20106 of the FRSA explicitly authorizes state regulation of railroad safety. A state may regulate railroad safety until such time as the FRA has adopted a regulation covering the same specific subject matter, or even if the federal government has regulated the subject matter, the state regulation is necessary to eliminate a local safety hazard.

The statute provides

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable A State may adopt or continue in force [any] 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. A State may adopt or continue in force an additional or more stringent law, regulation, or order, related to railroad safety when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;

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[1] This provision was formerly cited as 45 U.S.C. 431 et seq.. It and other FRSA provisions were recodified without substantive change pursuant to Pub. L. 103-272, 1(a), July 5, 1994, 108 Stat. 1379.

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

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See*, Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir.), cert.denied, 414 U.S. *855* (1973); Burlington Northern R. Co. v. State of Montana, 880 F.2d 1104 (9th Cir. 1989).

27. After pointing out the policy of uniformity, Congress went further where there were no regulations covering a specific subject matter, and where local hazards necessitated more stringent requirements. The language of FRSA, its legislative history, and the court decisions interpreting it, make it clear that Congress did not intend to displace state rail safety regulations absent the specific exercise of federal regulatory authority. *See*, Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926); CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993).

28. The legislative history of the FRSA evidences congressional intent that states regulate Railroad Safety.

At the ALJ hearing of October 27-28, 2011 on the UTU's Application for Emergency Relief, NS suggested that the regulation at issue here, which is uniquely local to the Conway Yard, should be struck down by the Commission because Congress intended nationally uniform rail safety rules. In so doing NS ignores the specific language of the statute and the legislative history regarding state participation in the regulation of rail safety.

29. The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the then Secretary. *See,* Hearings on H.R. 16980 Before the House

Committee on Interstate and Foreign Commerce, 90th Cong.,2d Sess. 1-6, (May-June 1968). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas; however, no further action was taken in the 90th Congress.

30. On April 18, 1969, the Secretary created a Task Force on railroad safety comprised of representatives from the FRA, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force, submitted to the Secretary on June 30, 1969, provided with respect to the preemption issue that " [e]xisting State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report, the interested parties attempted to draft a proposed bill for congressional consideration in the 91st Congress. As related to preemption, the bill drafted by the FRA was not acceptable to labor or state commissions. Even in the section-by-section analysis of the Administration's bill, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted "... unless the Secretary prescribed federal safety, standards covering the subject matter of the particular state or local safety requirements...." The preemptive language of S. 3061 and H.R. 14417, as then introduced, provided:

> SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the state or local laws, regulations or standards.

The substance of section 5 above was incorporated into the compromise legislation reported by both Senate and House Committees, and passed by Congress in S. 1933.

31. In testifying on the proposed bills in the House of Representatives, then

Secretary of Transportation John Volpe discussed S. 1933 as passed by the Senate, pointing out the areas of permissible state jurisdiction over railroad safety. The relevant portion of Secretary Volpe's testimony states:

> To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be
> so whether such state requirements were in effect on or after the date of enactment of the Federal statute....

Hearings on H.R. 7068, H.R. 14417. and H.R. 14478 (and similar Bills). S. 1933, Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commeerce, 91st Cong. 2d Sess. 29 (March 1970) (hereinafter "House Hearings").

32. The congressional reports reiterated the authority of states to regulate railroad safety. The Senate Report explained:

> Section 105 expresses the congressional intent that Federal safety standards shall be nationally uniform to the extent practicable. On the other hand, the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section 105 preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969) (hereinafter "Senate Report").[2]

The report paraphrases the language of the statute regarding local safety hazards without any further discussion. *Id.* at 5, 9.

33. The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable: It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish State wide standards with respect to rail safety. The State may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce.
>
> The purpose of this latter provision is to enable States to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

H.R. Rep.. No. 91-1194, 91st Cong., 1st Sess., 19(1970), (hereinafter "House Report").

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[2] Section 105 of the Senate bill S. 1933,as reported, and section 205 of the House bill, as reported, are incorporated into 49 U.S.C. § 20106.

34. Harley Staggers, then Chairman of the House Committee on Interstate and Foreign Commerce, stated that "I would like to emphasize that the states will have an effective role under this legislation." (116 Cong. Rec. H27612 (daily ed. Aug. 6, 1970)). Another member emphasized the importance of the states role:

> Here again, the State is actively intertwined as a working partner with the Federal Government. It will be the State, the unit closest to the ground, which conducts the investigation, which submits the recommendations, which finds the problem
> before disaster strikes).
>
> Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas of safety not covered by Federal regulations; secondly, the State can deal directly with hazards of essentially local nature; and thirdly, the State can keep the Department of Transportation with their feet to the fire....

116 Cong Rec. H26613 (Daily ed. August 6, 1970) (Statement of Cong. Pickle).

35. As Congress has explicitly stated, the FRSA prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, are intended to preempt state railroad safety regulations. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation N.Y.S.Dept of Social Services v Dublino, 413 U S 405 (1973); State of Wisconsin v Wisconsin Central Transportation Corp., *et.al.,* 546 N.W.2d 206, 210 (1996) ("The use

of ...'covering' in the preemption clause suggests that Congressional purpose was to allow states to enact regulations relating to railroad safety up to the point that federal legislation enacted a provision which sp ecifically covered the same material." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); CSX Transportation Inc. v. Easterwood, *supra*.

35. The initial inquiry in determining whether Commission regulations are preempted by federal law is whether the federal government has prescribed a regulation covering the same subject matter of the State requirement.

36. Pursuant to Easterwood v. CSX, state laws are not preempted unless the federal government has adopted regulations that substantially subsume the subject matter of the state statutes and regulations promulgated thereunder.

37. While the Justices of the Supreme Court may differ as to the application of the principles regarding preemption, they are in agreement with the principles that apply. With respect to preemption generally, the Supreme Court has observed that:

> Pre-emption fundamentally is .a question of congressional intent. . . and when Congress has made its intent known through explicit statutory language, the courts task is an easy one.

English v. General Elec. Co., 496 U.S. 72, 79 (1990). As another court observed:

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but [the act creating the FRSA express preemption statute] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same thing as preempting the field; here, Congress has done only the former.

Civil City of South Bend, Ind. v. Conrail, 880 F.Supp. 595, 600 (N.D. Ind. 1995).

The Supreme Court observed,

> ... because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-

law causes of action. In all preemption cases, and particularly those in which Congress has 'legislated... in a field which the states have traditionally occupied '[citation omitted], we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [citations omitted].

Medtronic. Inc. v. Lohr, 518 U.S. 470, 485 (1996).

38. The Court said, moreover, that 'the purpose of Congress is the ultimate touch-stone' in every pre-emption case. [citation omitted]. As a result, any understanding of congressional purpose.' [citation omitted]. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. [citation omitted].

39. Also relevant, however, is the 'structure and purpose of the statute as a whole...' "*Id.* at 485-86. In addition, the Supreme Court in Cipollone v. Liggett Group. Inc., et al., 505 U.S. 504 517(1992) stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority" Malone v. White Motor Corp, 435 U.S. at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

40. In wording the FRSA preemption provision, Congress clearly provided a continuing role for state regulation of railroad safety to avoid the creation of regulatory gaps. States have always exercised their police powers to protect the health and safety of their citizens. Because these are primarily and historically matters of local concern, the states have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons. Medtronic, *supra,* 518 U. S.

at 475. When it adopted the FRSA, in response to growing concerns about threats to public safety, Congress did not intend to reduce public protection by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law." Thiele v. Norfolk Western Ry. Co., 68 F.3d 179,184 (7th Cir. 1995). Under NS's restrictive view of the FRSA, the public would not be fully protected.

41. In 1993, the Supreme Court decided CSX Transportation, Inc. v. Easterwood, *supra*, and interpreted, for the first time, the preemptive scope of § 20106, defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thus preempting the state regulation of the said subject matter. The Court began its preemption analysis citing the long held notion that, "[i]n the interest of avoiding unintended encroachment on the authority of the States, a court interpreting a federal statute ... will be reluctant to find preemption." *Id.* at 663-664. Similarly, the court observed that preemption of state law under the FRSA is subject to a "relatively stringent standard and the presumption against pre-emption." *Id.* at 668.

42. The Easterwood decision has been interpreted to mean that "a presumption against preemption is the appropriate point from which to begin [a preemption] analysis." In Re Miamisburg Train Derailment Litigation, 626 N.E.2d 85, 90 (Ohio 1994); Southern Pacific Transportation Co. v. OR. PUC, 9 F.3d 807, 810 (9th Cir. 1993) ("In evaluating a federal law's preemptive effect, however, we proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act "unless that [is] the clear and manifest purpose of Congress").

43. The Court held that a subject matter is not preempted when the Secretary has issued regulations that merely "touch upon" or "relate to" that subject matter. The Court stated that the Congress' use of the word "covering" in § 20106 "indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Easterwood, 507 U.S. at 664. *See also*, Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344, 352 (2000). The Court recognized the state interest and right to regulate railroad safety, noting that "t]he term 'covering' is ... employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

44. Our Supreme Court's analysis of the facts of the Easterwood case is instructive. The plaintiff in that wrongful death action alleged that the railroad company was negligent under state common law in two respects: for failing to maintain an adequate warning device at a highway crossing and for operating the train at excessive speeds. The railroad company defended on the ground that various FRSA regulations preempted both state law claims. The Court found that the plaintiff's excessive speed claim was preempted because the FRA had adopted regulations specifically setting the maximum allowable operating speeds for such trains and that this "should be understood as covering the subject matter of train speed." Easterwood, 507 U.S. at 675. However, because federal regulations requiring certain warning devices at some highway crossings[3] did not apply to this specific crossing, the Court found that the plaintiff's second claim was not preempted. *Id.*, 507 U.S. at 670-73. The Court thus required evi-

[3] Namely, those in which the installation of warning devices was funded by the federal government.

dence of very specific "clear and manifest" federal regulation on the same subject matter covered by state law before the state law was preempted.

45. The Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. Miamisburg, 626 N.E.2d at 93.

46. Other courts have addressed the scope of § 20106 in the wake of Easterwood. In Southern Pacific v. OR. PUC, 9 F.3d 807 (9th Cir. 1993), the court noted:

> To prevail on the claim that the regulations have preemptive 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 preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law."

Id. at 812.

The court continued:

> in light of the restrictive term 'cover' and the express savings clauses, in the FRSA, FRSA preemption is even more disfavored than preemption generally.

Id. at 813.

47. Before finding that a state law is preempted, other courts subsequent to Easterwood have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law. *See e.g.,* Miller v. Chicago and North Western Transp. Co., 925 F.Supp. 583, 589-90(N.D. Ill. 1996) (state claim based on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject); Thiele, 68 F.3d at 183-84 (no preemption of state law "adequacy of warning claims" prior to time that warning de-

vices "explicitly prescribed" by federal regulations are actually installed); and Miamisburg, 626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment).

48. The Easterwood decision is in keeping with an earlier decision of the United States District Court for the Northern District of California in Southern Pacific Transportation Company v. Public Utilities Commission of the State of California, 647 F. Supp. 1220 (N.D. Cal. 1986), affd *per curiam*, 820 F.2d 1111(9th Cir. 1987). The court held that in order for there to be federal "subject matter" preemption of state regulations, the federal regulation must address the same safety concern as addressed by the state regulation. Judge William Schwarzer explained:

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was 'to promote safety in all areas of railroad operations.' H.R. Rep. No.9 1-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 cited as House Report]; see also 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulations until federal standards are adopted.

Id. at 1225.

49. Judge Schwarzer also held that the statutory requirement that a state statute not be burdensome to interstate commerce applies only with respect to regulations promulgated pursuant to the local hazard exception. *Id.* at 1227. Accordingly, when a state regulates a subject matter not covered by federal regulations, "whether they impose a burden on commerce is irrelevant." *Id.*

50. There is other precedent for Judge Schwarzer's analysis, limiting the

preemptive scope of § 20106 to the particular subject matter addressed by federal regulations. In National Ass'n. of Regulatory Util. Comm'n. v.

ICColeman, 542 F.2d 11 (3d Cir. 1976), the Third Circuit held that only the precise subject matter of the FRA regulations (monthly accident reporting requirements) was beyond a state's regulatory authority. However, FRA regulation of monthly accident reporting requirements would not preclude states from requiring immediate notification of rail accidents, nor being furnished with copies of monthly FRA reports. *Id.* at 15.

51. Norfolk Southern's assertions that the requirement for national uniformity preempts the Commission's 1975 Order has no merit.

52. A familiar argument of NS in preemption litigation around the United States is that the requirement for national uniformity in the FRSA preempts state action. That position has no merit for the following reasons.

53. While it is true that Congress expressed national uniformity in rail safety to *the extent practicable*, the explicit authorization of state regulation in 49 U.S.C. § 20106 was a countervailing concern to its desire for national uniformity. Furthermore, the general policy outlined in the first sentence of this section should yield to the more specific provisions contained in the remainder of that section.

54. The Supreme Court has addressed "uniformity" in legislation similar to the FRSA. Sprietsrna v. Mercury Marine, 537 U.S. 51,70(2002) held that the goal of uniformity does not justify displacement of the Act's [here the FRSA] more prominent objective emphasized by its title to promote safety.

55. Sprietsma involved the Supreme Court's interpretation of the Federal Boat Safety Act of 1971, which was enacted one year after the FRSA. The boat safety statute

has a similar provision to that found in the FRSA to foster uniformity. The FBSA contains similar language as the FRSA as it relates to uniformity. In connection with state preemption in the regulation of railroad safety, the FRSA states: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Similarly, the FBSA provides in its statement of purposes that the law is to encourage greater "uniformity of boating laws and regulations as among the several States and the Federal Government." Pub. L. 92-75, §2, 85 Stat.213- 214. When balancing uniformity against safety, the Court said:

> Respondent ultimately relies upon one of the FBSA's main goals: fostering uniformity in manufacturing regulations. Uniformity is undoubtedly important to the industry, and the statute's preemption clause was meant to "assur[e] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. 20. Yet this interest is not unyielding, as is demonstrated both by the coast Guard's early grants of broad exemptions for state regulations and by the position it has taken in this litigation. Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.

537 U.S. at 470.

56. As in the boat safety law, the FRSA's primary purpose is safety. *See,* CSX Transportation, Inc. v. Easterwood, *supra,* 507 U.S. at 661-2.

57. Aside from the Supreme Court's decision in Spreitsma, Congress has addressed this issue, and reaffirmed its original intent that safety takes precedence over uniformity. In the recently enacted Rail Safety Improvement Act of 2008 (P.L. 110-432), section 101 states:

> Safety as Highest Priority--In carrying out its duties the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

As further emphasized in the House Report, H.R. Rep. No. 110-336, 110th Cong., 1st Sess. 36(2007):

> This section [Sec.101] also directs the Administration to consider the assignment of maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

Obviously, to accept NS's views in the present case would not accomplish this goal.

58. A federal court in Georgia has correctly applied the state of the law. In Earwood v. Norfolk Southern Ry. Co, 845 F.Supp.880 (N.D. Ga. 1993), the plaintiff brought a FELA action claiming, among other things, that his injuries were caused by unsafe working conditions and that the railroad knew or should have known of the unsafe conditions, and, therefore, failed to provide a safe place to work. The court concluded that the FRSA preempted state common law negligence claims based on excessive speed, but reasoned that Easterwood did not address the effect of the FRSA on federal FELA claims. 845 F.Supp. at 883. . The court noted that absent an intolerable or irreconcilable conflict between two statutes, a court need not decide whether one controls over the other or whether one statute impliedly repeals the other. *Id.*; *See also,* Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 566(1987).

59. The Earwood court agreed with the plaintiff in that case, that the FELA does not conflict with the FRSA regulations, because the FELA is the employee's exclusive tort remedy and intended to be broadly interpreted. 845 F.Supp. at 883. In contrast

to the FELA, the FRSA regulations are *minimum* safety requirements, and neither the FRSA, nor its regulations, purport to define the standard of care with which railroads must act with regard to its employees. *Id.*

60. It is important to recognize that, when presented with the interaction of two federal statutes, preemption in the constitutional sense does not apply. Nevertheless, cases addressing whether the FRSA preempts state law railroad injury claims are instructive in determining whether a state regulation is precluded by the FRSA. The critical question is whether Congress intended the claim to be superseded. As demonstrated above, Congress did not intend for FRSA to preclude a state law or regulation.

61. Regardless of whether Federal Regulations substantially subsume the Commission's 1975 Order, the Commission may regulate pursuant to the local hazard exception.

62. The foregoing paragraphs analyzing federal preemption concepts demonstrate that the Commission may regulate rail safety, irrespective of the local hazard exception, with respect to any subject matter that is not substantially subsumed by federal regulations.

63. The NS's typical argument in response to that are (1) the FRA has addressed the subject matter; (2) the local hazard exception under the FRSA is not applicable because the 1975 Order at issue as it does not cover unique local conditions, and the rules are capable of uniform national standards; and (3) the regulations violate the Commerce Clause.

64. Any contention by Norfolk Southern that the local safety hazard exception is not applicable has no merit.

65. it is anticipated that NS will argue that the local hazard exception in the FRSA must establish that the local conditions are unique, and they are not capable of being encompassed within uniform national standards. Even assuming, *arguendo*, that the Commission concludes FRA has substantially subsumed the subject matter of preventing run outs in the classification yard of Conway Yards, which we submit would be in error, NS analytically has misinterpreted the statutory requirements of "local safety hazard" in the FRSA and under the Easterwood analysis.

66. First, the railroad industry, during the 1969-1970 congressional deliberations noted previously, proposed an amendment to require that local safety hazards be unique. (House Hearings at 84). The proposed amendment stated in part:

> A State may adopt or continue in force an additional or more stringent law, rule , regulation, or standard relating to railroad safety when necessary to eliminate or reduce unique hazards of local origin....

Id.

This amendment by the railroads was not adopted by Congress nor was the word *unique* mentioned in either the House or Senate reports.

67. It is noteworthy that in the Senate the railroad industry opposed any state regulation of a local safety hazard. Mr. Goodfellow of the American Association of Railroads testified that "If Congress is going to adopt a bill which gives the Federal government authority in all areas of safety of railroad operations, it should not permit the States to vary or supplement the Federal scheme in any manner." Hearings on S.1933. S 2915, and S. 3061 Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, 9 1 st Cong., 1st Sess. 361 (May - Oct. 1969).

68. Congress did not specify all of the elements that would be determinative of

a "local safety hazard." We submit the core issue here is safety, and certainly the impact of an accident concerns safety.

69. A practical aspect of the above issue occurred on July 18, 2001 in Baltimore, Maryland. There, a 62 car freight train containing hazardous materials derailed in a 1.5 mile tunnel 60 feet below the ground, resulting in the release of hydrochloric acid and tripropylene, and causing a fire which lasted several days. Temperatures became so hot that the metal on the cars glowed. The derailment paralyzed parts of the city of Baltimore and caused businesses to close, stoppage of traffic, damaged cable lines controlling computer lines along the east coast, ruptured a major water main, streets buckled, and forced the postponement of several major league baseball games. The train was in violation of the TTD train make up requirements established by the Association of American Railroads, as were also the facts of the Cantara, California, derailment.

70. In Baltimore the first 18 of 20 cars located nearest the locomotives were empty, and 36 of the remaining 40 cars in the train were loaded. A knowledgeable person in railroad safety recognizes that it is unsafe to locate the empty cars in the front section of the train because of the likelihood that the loaded cars would impact with the empty cars in a downward grade. Unfortunately, the self-enforcement of the railroads, which is advocated by NS in this case, is totally ineffective in protecting the employees and the public.

71. That accident has cost the City of Baltimore and its residents approximately 64 million dollars. To adopt the anticipated NS restrictive position regarding a state's power to address local safety hazards would mean Pennsylvania, also, would have no authority to address a similar local catastrophe at Conway where testimony of record in

these proceedings has amply discussed the extraordinary variety of Hazardous materials routinely handled there on a daily basis.

72. Although the hazards in Conway Yard may be characterized as similar to other areas of the country, this in no way precludes the hazards from being classified as local.

73. NS and those advocating federal preemption would have the Commission conclude that it's 1975 Order falls outside the "local hazard" exemption because potentially similar hazards are located elsewhere. The notion that a hazard must occur over less than a certain percentage of track, or in an isolated portion of a state, to be classified as local, has no support in the legislative history. Carried to its logical conclusion, such reasoning would limit a local hazard to one per state, in the middle of nowhere, at the immediate and relentless threat to and expense of the safety to the public and railroad employees.

74. Because curves and terrain may be similar in other states, NS is expected to argue, that this removes such sites from being local. Such argument completely undermines the scope of state authority under the FRSA. Nowhere in the legislative history is it suggested that because some states may share certain characteristics, that states cannot regulate their own locally present or potentially present safety hazard.

75. Even the railroad industry, at the hearings on the FRSA legislation, acknowledged that curves at certain locations could be classified as local safety hazards. See House Hearings, at 85.

76. The 1975 Order at issue is not "statewide in nature" as it is specifically defined geographically and with respect to the factors making the locations hazardous.

The fact that different sites have been identified throughout the country does not make them "statewide in nature."

77. The 1975 Commission Order does not impose an undue burden on interstate commerce.

78. Congress, in the FRSA, expressly prohibited state regulation unduly burdening interstate commerce only when issuing local safety hazards regulations. 49 U.S.C. § 20106(3).

79. The issue is whether there is an undue burden on interstate commerce imposed on NS by the 1975 Order of the Commission. The answer to that is clearly no.

80. In determining whether a state regulation creates an undue burden on interstate commerce, the Supreme Court applies a balancing test between the state interest in issuing the regulation and the amount of burden created by the regulation. Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1(1943).

81. In Terminal, the Court upheld an Illinois law requiring cabooses on trains moving through that state. The Court found that state interests, preventing injuries to railroad employees, outweighed the burden on interstate commerce (increased cost of interstate rail movement).

82. In Norfolk and Western Ry. Company v. Pennsylvania Pub. Util. Comm'n, 413 A.2d 1037, 1046-1046 (1980), the court adopted essentially the same balancing test stating:

> In determining whether a state regulation creates an undue burden on commerce, it must first be determined whether the state regulation serves a legitimate state interest.... Once a legitimate interest is established, it is necessary to look to the degree of burden imposed by the regulation on in-

terstate commerce.[4]

83. Clearly, the safe operation of trains in the Pennsylvania is a legitimate state interest.

> [W]hen a state legitimately asserts the existence of a safety justification for a regulation ... the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce....

Bibb v. Navaho Freight Lines Inc., 359 U.S. 520, 524 (1959).

84. The burden inquiry ends once the court finds a non-illusory safety interest to support the law. *See,* Brotherhood of Locomotive Firemen and Enginemen v. Chicago. Rock Island & Pacific Railroad, 393 U.S. 129, 140 (1968) (the Court will leave to the legislature the question of balancing financial losses to the railroads against "the loss of lives and limbs of workers and the public]"); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 449 (1978) ("if safety justifications are not illusory, the court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.") (Blackmun, J. concurring); Kassel v. Consolidated Freightways Corporation, 450 U.S. 662 (1981).

85. The 1975 Order places an insignificant burden on NS operations at the Conway Yard when compared with the compelling need to promote safe train operations.

WHEREFORE, and in consideration of the factual record as developed in the instant matter, and of the authority and analysis discussed herein, Summary Judgment

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[4] Applying the test, the court upheld a Pennsylvania regulation requiring locomotives to be equipped with sanitary toilets. The state interest in the health and safety of railroad employees was found to be substantial and justified the extra cost to the railroads.

must be granted in favor of the UTU and against the imposition of federal preemption in the review of the pending Petition of Norfolk Southern Railway Company to rescind or amend the 1975 order of the Pennsylvania Public Utility Commission.

Respectfully submitted,

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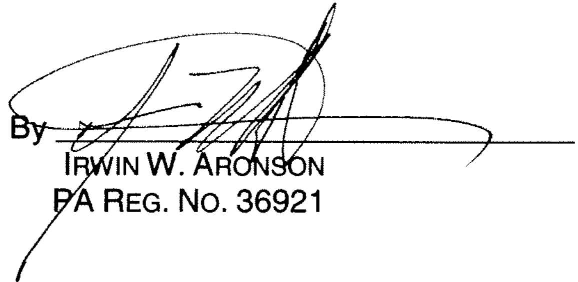

By ____________________
IRWIN W. ARONSON
PA REG. NO. 36921

Dated: February 3, 2012

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NORFOLK SOUTHERN RAILWAY COMPANY,	:	
Plaintiff,	:	
v.	:	**Civil Docket No. 11-1350**
PENNSYLVANIA PUBLIC UTILITY COMMISSION, et al.,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN
<u>OPPOSITION TO DEFENDANTS' MOTION TO DISMISS</u>

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") respectfully submits this Memorandum of Law in opposition to the Motion to Dismiss filed by Defendants Pennsylvania Public Utility Commission, Robert F. Powelson, James H. Cawley, Wayne E. Gardner, John F. Coleman and Pamela Witmer (collectively referred to herein as the "PUC").

FACTUAL ALLEGATIONS AND PREEMPTION FRAMEWORK

This action arises out of competing federal and state regulations that address a single issue of railway operations – runouts from the classification tracks at Conway Yard in Beaver County, Pennsylvania. Conway Yard, a major rail classification yard on the Norfolk Southern system, assembles groups of rail cars, known as "drafts," on classification tracks to form outbound trains. Complaint ¶ 26. Conway Yard is a type of classification yard known as a "hump yard" in which incoming rail cars are pushed up one side of a grade, released and allowed to roll down the other side into a "bowl" where they are routed to one of the multiple classification tracks and thereby grouped by destination to make up outbound trains. Complaint

¶ 27. As the rail cars descend by gravity into the bowl for classification, assisted by computer-operated switches, the speed of the rail cars must be controlled or they could travel beyond the designated clearance point for that track, or push another rail car beyond the designated clearance point for that track, and "run out." Complaint ¶ 30. If cars were to run out, they would violate regulations of the Federal Railroad Administration (the "FRA"), including 49 C.F.R. § 218.101(b), which states that rolling equipment must not be left where it will foul a connecting track, and 49 C.F.R. § 232.103(n), which governs the securement of unattended equipment.

On or about June 3, 1975, the PUC entered an order (the "1975 Order") requiring that a complement of train service employees be assigned around-the-clock at Conway Yard to prevent runouts of rail cars beyond designated clearance points of the classification tracks. Complaint ¶ 49. Historically, the train service employees, called "skatemen," applied steel wedges, known as "skates," to the top of the rails. Complaint ¶¶ 45, 52. In theory, if a rail car's wheels reach the skates, the skates will slide along the rails creating friction that slows the rail car before it reaches the designated clearance point at the end of the track. Complaint ¶ 45.

Over time, new technologies were employed at Conway Yard that allowed better control over the speed of rail cars descending the hump and better stopping of cars at the far west end of each classification track. In 2000, a state of the art, PC-based system known as the Hump Process Control System ("HPC") was installed to monitor the speed and location of the rail cars and to control a series of retarders on the descending side of the hump to slow the descending rail cars. Complaint ¶ 32-35. A state-of-the-art system of "hydraulic skates" that squeeze the wheels of rail cars until they stop was installed on all of the classification tracks at Conway Yard in 2010 and 2011. Complaint ¶¶ 37-42; *see* Nov. 2, 2011 Order at 13 (PUC Mem., App'x B). In light of the new technologies installed at Conway Yard, the use of manual skates was

discontinued and the skatemen required by the 1975 Order no longer serve any useful function. Complaint ¶ 52.

On or about March 24, 2010, the FRA issued a technical bulletin ("the Bulletin") interpreting 49 C.F.R. § 232.103(n), which covers generally the securement of unattended rail cars, and applying 49 C.F.R. § 232.103(n) specifically in the context of hump yards, where skates and retarders may be used as "alternate forms of securement." *See* FRA Technical Bulletin, *Enforcing the Guidance Regarding Securement of Equipment with Title 49 Code of Federal Regulations Section 232.103(n)* (Complaint, Exh. C).[1] The Bulletin followed the issuance of other FRA rules that also cover the subject matter of the need to secure unattended equipment and prevent it from fouling connecting tracks. For example, 49 C.F.R. § 218.101(b) prohibits leaving rolling equipment where it will foul a connecting track, and the fouling of a "ladder" track (the track into which the classification tracks connect) in a classification yard is the precise situation caused by a runout. The FRA also promulgated rules to protect employees working in the classification tracks of a hump yard operation from injury from unattended rail cars descending the hump. *See* 49 C.F.R. § 218.39.

The Bulletin confirmed the FRA's coverage of the securement of unattended rail cars at Conway Yard. On at least two occasions in 2011, FRA inspectors at Conway Yard reported or recommended violations. On August 31, 2011 the FRA reported that the hydraulic skates failed to stop the cars on two separate classification tracks and on September 1, 2011 the FRA reported that the hydraulic skates failed to sufficiently hold and prevent equipment from fouling the

[1] 49 C.F.R. § 232.103(n), as interpreted by the Bulletin, directly addresses the subject matter of the 1975 Order, dealing with "[u]nattended equipment in hump classification yards, classification yards with bowl tracks, or flat switching classification yards" and specifically addressing "skates and retarders." *Id.* at 3.

ladder. *See* Complaint, Exhs. D & E. In October 2011, the FRA continued to investigate the operation of hydraulic skates at the west end of Conway Yard. *See* Complaint, Exh. F.

On November 13, 2009, Norfolk Southern filed a Petition for Rescission with the PUC, requesting that the 1975 Order be rescinded based on the installation of the new technologies at Conway Yard. Complaint ¶ 53. Norfolk Southern's Petition, docketed as Case No. C-00019560, did not raise the issue of federal preemption. On September 1, 2010, Norfolk Southern filed an Amended Petition, adding the installation of the hydraulic skates as an additional ground for relief, but again making no mention of federal preemption. Complaint ¶ 54.

On October 18, 2011, the Pennsylvania State Legislative Board of the United Transportation Union (the "UTU") filed an Application for Emergency Relief (the "Application") with the PUC. The UTU's Application, which was docketed at Case No. P-2011-2267892, requested a variety of operational changes at Conway Yard, including allowing the use of hand skates, allowing employees to mount moving equipment, restoring previously-abolished car retarder operator assignments, removing the hydraulic boxes necessary for the hydraulic skates to function, repairing walkways, and taking certain tracks out of service. The UTU's Application further sought injunctive relief and monetary sanctions. A hearing was held before an Administrative Law Judge of the PUC to adjudicate the Application. Complaint ¶ 58. In the hearing, the issue of preemption was raised for the first time. *See* PUC Order, 11/2/11 (PUC Mem., App'x B).

By order dated November 2, 2011, the Administrative Law Judge ("ALJ") denied the UTU's Application. *See* PUC Mem., App'x B. The PUC affirmed the ALJ's November 2, 2011 Order and referred the matter back to the ALJ for further proceedings. PUC Mem., App'x C.

The PUC then issued a Secretarial letter on December 23, 2011 directing the ALJ to conduct expedited proceedings on Norfolk Southern's suggestion of preemption as it related to Norfolk Southern's Petition. *See* PUC Mem., App'x D.

The PUC's repeated assertion that Norfolk Southern raised the issue of federal preemption in its Petition is simply false. Neither Norfolk Southern's November 13, 2009 Petition nor its September 1, 2010 Amended Petition made any reference to the issue of federal preemption. The issue was raised only when, following issuance of the Bulletin on March 24, 2010, the FRA began actively regulating runouts at Conway Yard in the second half of 2011. The FRA's first notice of proposed penalties related to runouts at Conway Yard was received by the Norfolk Southern Law Department on October 14, 2011. *See* Complaint, Exh. D. Norfolk Southern filed the instant Complaint raising its federal preemption arguments on October 25, 2011. Only at the hearings on the UTU's Application, being litigated under a separate docket number, did Norfolk Southern raise the issue of federal preemption as a potential defense to the UTU's Application. Norfolk Southern did not seek to amend its own Petition to assert federal preemption as a basis for relief before the PUC but rather the PUC, on its own initiative, issued the Secretarial letter requesting the ALJ to conduct expedited proceedings on the question of federal preemption.

The pending PUC proceeding provides no occasion for this Court to decline jurisdiction of a dispute so clearly in the federal orbit and where Congress has articulated its express intention that state regulation be preempted.

I. THE COURT SHOULD NOT DECLINE JURISDICTION OVER PLAINTIFF'S CLAIMS

The starting point in any determination whether a district court should abstain from exercising its jurisdiction is recognition that abstention is the exception, not the rule, and should

rarely be invoked. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992). Nowhere mentioned in the PUC's motion is the "virtually unflagging obligation" of the federal courts to exercise their jurisdiction. *Matusow v. Trans-Cnty. Title Agency*, 545 F.3d 241, 247 (3d Cir. 2008). The Court of Appeals for the Third Circuit recently characterized the limited role of abstention as follows:

> . . .[A]bstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and may be used "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest," and not "merely because a state court could entertain it."

National City Mortgage Co v. Stephen, 647 F.3d 78, 82 (3d Cir. 2011). It is against this backdrop that the PUC's suggestion of *Younger* and *Colorado River* abstention should be measured.

A. *Younger* Abstention Should Not Be Invoked.

In suggesting that this Court should abstain from exercising its jurisdiction on the basis of the principles articulated in *Younger v. Harris*, 401 U.S. 37, 46 (1971), the PUC offers no description of the nature of the federal preemption addressed in Norfolk Southern's Complaint. That omission is no doubt deliberate. The federal preemption raised in Norfolk Southern's pleading is the "express preemption" of the PUC's rules regarding run-outs.[2] Cases raising claims of "express preemption" are not suitable for *Younger* abstention. *See Woodfeathers Inc. v. Washington Cty.*, 180 F.3d 1017, 1022 (9th Cir. 1999). The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law. *Marathon Petroleum Co. LLC v. Stumbo*, 528 F. Supp.2d 639, 652 (E.D. Ky. 2007). Where a claim of preemption is facially conclusive, *Younger* abstention is not appropriate. *See New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989); *High*

[2] Express preemption arises when there is an explicit statutory command that state law be displaced. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303 (3d Cir. 2004).

Tech, 382 F.3d at 311; *Local Union No. 12004, United Steel Workers v. Commonwealth*, 377 F.3d 64, 78 (1st Cir. 2004).

It is not disputed that the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, contains an express preemption clause:

> [L]aws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

See M. Haley, FED. R.R. ADMIN. SAFETY PROGRAM 8 (ALI 2003)(FRSA contains express preemption provision). Courts have consistently recognized that the express preemption in the FRSA is pervasive.

> [The FRSA] on its face provides for broad preemption, permitting state regulation of railroad safety in only two circumstances: (1) if the FRA has not acted to '[cover'] the subject matter of the state law, or (2) where the FRA has so acted, if the state law is necessary to eliminate an essentially local safety concern and satisfies the other specified conditions.

Peters v. Union Pacific RR Co., 80 F.3d 257 (8th Cir. 1996).[3] Once the federal government acts, "the FRSA normally preempts state regulation of that subject matter." *Nat'l Ass'n of Reg. Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976). A federal regulation "covers" the subject matter of a state law where they 'comprise, include, or embrace [that concern] in an effective scope of treatment or operation.'" *BNSF Ry. Co. v. Swanson*, 533 F.3d 618, 621 (8th Cir. 2008) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993)). Although he made no final determination, the ALJ agreed that "[t]he Commission's authority to regulate safety of

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[3] "Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

railroad facilities . . . is limited in significant areas of railroad safety by the FRSA." *See* PUC Order (PUC Mem., App'x B).

Here the FRSA regulations 49 C.F.R. §§ 232.103(n), 218.101(b) and the Bulletin address the same subject matter as the 1975 PUC Order, i.e., the need to secure unattended equipment and prevent it from fouling connecting tracks, and therefore preempt that Order. No interpretation of the 1975 Order is required where the question is whether the FRSA has covered the issue. *See Norfolk & Western Ry. Co. v. Public Util. Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991).

Although an exception to the express preemption provision of the FRSA exists in the savings clause of the FRSA for "essentially local safety hazard[s]," 49 U.S.C. § 20106, the PUC does not assert its applicability other than to note that it is relevant to the issue of whether the UTU is an indispensible party. PUC Mem. at 15. "Local," in the context of the savings clause, involves more than looking at a map; it means that that the safety concerns of the state are "not capable of being adequately encompassed within uniform national standards." *Duluth, Winnipeg & Pac. Ry. Co. v. City of Orr*, 529 F.3d 794, 798 (8th Cir. 2008); *see Union Pacific R.R. Co. v. California Pub. Util. Comm'n*, 346 F.3d 851, 860 (9th Cir. 2003) (majority rule). Inasmuch as the PUC has the burden to establish the applicability of the savings clause, the failure to raise it is fatal to the PUC's Motion. *Duluth*, 529 F.3d at 798-99 (the burden is on the party asserting rights under the savings clause to establish that a local condition is not capable of being addressed by national standards). There is nothing unique about the measures used at the Conway Yard to break up and regroup rail cars that could not be addressed by a national standard, and the PUC does not contend otherwise. Moreover, rather than assert any state interest in safety, the Commission has acknowledged that the particular safety measures

employed at the Conway Yard are within the management discretion of Norfolk Southern. *See* PUC Order at 21 (PUC Mem., App'x B) ("Norfolk's actions do not justify the Commission interfering in Norfolk's management of the Conway Yard and substituting its judgment for Norfolk's by ordering Norfolk to reinstate the use of portable skates and remove the control boxes for the hydraulic skates").

Younger abstention is also not applicable in the circumstances of this case because the proceeding in the PUC is "remedial" and not "coercive." A "coercive" proceeding is one in which the state initiated a proceeding to enforce a state law, whereas a "remedial" proceeding is one in which a federal plaintiff is also a plaintiff in the state action and seeks to redress an error committed by the state. *ReMed Recovery Care Centers v. Township of Worcester*, No. 98-1799, 1998 WL 437272, at * 3 (E.D. Pa. July 30, 1998). This is plainly the situation presented to this Court, where Norfolk Southern is the plaintiff in both actions. In remedial actions such as this, *Younger* abstention is inappropriate. *See O'Neill v. City of Philadelphia*, 32 F.3d 785, 791 n. 13 (3d Cir. 1994); *Smolow v. Hafer*, 353 F. Supp.2d 561, 572 (E.D. Pa. 2005); *ReMed*, 1998 WL 437272 at *3. As one Court of Appeals explained:

> [P]roceedings must be coercive, and in most-cases, state-initiated, in order to warrant abstention.

Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 522 (1st Cir. 2009); *see American Consumer Pub. Ass'n*, 349 F.3d 1122, 1130 (9th Cir. 2003) (similar); *Christian Action Network v. Maine*, 679 F. Supp. 2d 140, 146 (D. Maine 2010) (similar).

This principle distinguishing coercive from remedial actions derives from distinctions made by the Supreme Court in articulating the limits of *Younger*. *Younger* has its origins in efforts to restrain state criminal proceedings. *See Sun Ref. & Mktg. Co. v. Brennan*, 921 F.2d 635, (6th Cir. 1990). Consistent with those origins, in *Ohio Civil Rights Commission v. Dayton*

Christian Schools, Inc., 477 U.S. 619 (1986), the Supreme Court applied *Younger* to pending state administrative proceedings, but "distinguished remedial state administrative proceedings ... from those that are coercive, concluding that *Younger* requires federal courts to abstain in favor of pending state administrative proceedings that are coercive in nature." *Moore v. City of Asheville*, 396 F.3d 385, 395 n. 4 (4th Cir. 2005). By these criteria, *Younger* provides no basis for abstention.

B. *Colorado River* Abstention Should Not Be Invoked.

The PUC's simplistic argument that this Court should abstain from exercising its jurisdiction by virtue of *Colorado River* abstention because there is a pending state proceeding with the same parties and issues misunderstands the limited place of that genre of abstention. As noted by the Court of Appeals for the Third Circuit, *Colorado River* Abstention "is even more rare than 'the three traditional categories [of abstention][4] because . . . the pendency of proceedings in state court does not normally bar litigation in federal court of the same issues.'" *National Mortgage*, 647 F.3d at 84 (quoting *Trent v. Dial Med, Inc.*, 33 F.2d 217, 223 (3d Cir. 1994)).

Colorado River abstention derives from a fact-based decision of the Supreme Court in *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) in which the Supreme Court found abstention appropriate in the context of a number of factors: (1) assumption by either court of jurisdiction over a res (**not an issue in this case**); (2) the relative inconvenience of the forums (**the rail yard is in the Western District**) ; (3) the avoidance of piecemeal litigation (see below); (4) the order in which jurisdiction was obtained by the concurrent forums (**here the state proceeding came first, but the preemption issue is newly**

[4] *i.e., Pullman, Burford* and *Younger* abstention. *See id.*

raised);[5] (5) whether and to what extent federal law provides the rules of decision on the merits (**entirely federal law in this case**); and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction (**here the state proceeding is before a state agency whose jurisdiction is being challenged**).[6] *Id.* at 818-19. "In assessing the propriety of abstention according to these factors, a federal court must keep in mind that 'the balance [should be] heavily weighted in favor of the exercise of jurisdiction.'" *Black Sea Invest., Ltd v. United Heritage Corp.*, 204 F.3d 647, 650 (5th Cir. 2000).

The six factors in *Colorado River* are not equally weighted. *Youell v. Exxon Corp.*, 48 F.3d 105, 109 (2d Cir. 1995). The primary reason for abstention in *Colorado River* was the existence of the McCarran Amendment which expressed a preference for unified state adjudication. *See United States v. Morros*, 268 F.3d 695, 819 (9th Cir. 2001).[7] No such congressional policy is present here. This factor is expressed in the Court's listing as "avoidance of piecemeal litigation:"

> It is evident that the avoidance of piecemeal litigation factor is met, as it was in . .. *Colorado River* itself, only when there is evidence of a strong federal policy that all claims should be tried in the state courts."

Ryan v. Johnson, 115 F.3d 193, 197-98 (3d Cir. 1997). Again, no such policy applies here.

Colorado River abstention also does not apply in the circumstances of this case because the issues before this Court involve the application of federal law in the context of preemption,

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[5] Priority is measured by the progress of the litigation, not date of filing. *American Family Life Assur. Co. v. Anderson*, No. 00-60027, 2000 WL 1056303, at *3 (5th Cir. July 27, 2000).

[6] This factor can only be a neutral factor or one that weighs against, not for, abstention. *Black Sea Invest., Ltd v. United Heritage Corp.*, 204 F.3d 647, 651.(5th Cir. 2000).

[7] "Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Colorado River*, 424 U.S. at 819.

whereas *Colorado River* was a state law case that the Government sought to have federally adjudicated. That difference is meaningful where preemption is raised.

> It would be surprising indeed if Congress had passed a law expressing a preference for state adjudication of federal preemption issues. Because Congress has not done so, we hold that *Colorado River* abstention has no applicability here.

Morros, 268 F.3d at 707; *see Youell*, 48 F.3d at 114 (presence of novel federal law issues requires a federal forum, not abstention). Peculiar weight must be given to the presence of a federal question in the case. *Sverdrup Corp. v. Edwardsville Cmty. Unit Sch. Dist. 7*, 125 F.3d 546, 549 (7th Cir. 1997) (federal preemption claim). This is not the exceptional case where *Colorado River* abstention applies. There is no federal policy favoring state adjudication of the claims and federal issues predominate.

II. THERE IS NO REQUIREMENT THAT PLAINTIFF EXHAUST ADMINISTRATIVE REMEDIES BEFORE THE PUC

Because the PUC proceeding is remedial and not coercive, jurisprudence in this Circuit does not require that the federal plaintiff exhaust its administrative remedies before resort to the federal courts may be had. *See Wyatt v. Keating*, 130 Fed. Appx. 511, 514 (3d Cir. 2005) (administrative proceedings involving revocation of insurance license).

> Whereas exhaustion of administrative remedies was required for coercive proceedings, exhaustion was not required for remedial actions.

Durga v. Bryan, No. 3:10-cv-1989, 2011 WL 4594281, at *6 (D.N.J. Sept. 30, 2011) (construing *O'Neill v. City of Philadelphia* in the context of a denial of a fire arms license).

It bears mention that this Court took up the issue of exhaustion of administrative remedies in a 2010 action between Norfolk Southern and the PUC in which, as here, the issue of preemption of PUC safety rules was pending both before the PUC and in this Court. *See Norfolk*

Southern Rwy. Co. v. Pennsylvania Public Utility Comm'n, No. 09-835, 2010 WL 12535511 (Mar. 24, 2010). Although the proceedings in the PUC in the earlier case did not arise in the same manner as here (the PUC initiated the state proceeding, while here, Norfolk Southern initiated the state proceeding but the PUC *sua sponte* instructed the ALJ to consider the issue of federal preemption), this Court enunciated a number of principles that remain useful in the context of this action.

- the decision whether to require exhaustion is a matter of sound judicial discretion;
- in exercising its discretion, a federal court considers whether exhaustion would promote administrative efficiency by avoiding premature interference with agency processes, promote executive autonomy by allowing the agency to correct its own errors, provide the court with the agency's expertise and serve judicial economy;
- the PUC lacked demonstrated expertise in matters of federal preemption;[8] and
- consideration of an order issued 37 years previously did not afford the PUC an opportunity to correct error and only indicated that circumstances had changed.

Id. at *1-*2.

As applied to this case, the reasoning of the federal court in the prior case is persuasive. The PUC has no relevant expertise in national railway safety standards and reconsideration of a 1975 Order is not so much an opportunity to correct an error made by the Commission thirty years ago, as it is new attempt at rule-making under entirely new technologies. Federal preemption of the 1975 Order is a legal question, not one for which the PUC has useful

[8] Although the Court later made mention of the possible utility of the PUC's expertise on "local safety hazard[s]," no such determination need be made in the context of this case.

expertise. *Accord BNSF Ry. Co. v. Box*, 470 F. Supp. 2d 855, 862-63 (C.D. Ill. 2007) (rejecting utility commission's ripeness argument on the grounds that the federal preemption issue "is primarily an issue of law and no further factual development is necessary"). Neither is there merit to the notion that deferring the federal forum would foster judicial economy. Because the federal scheme expressly preempts the states from regulating railway safety in the circumstances of this action (where the FRA has regulated and local safety concerns are not present), the state process is also preempted and has no value going forward. *See NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2000). To postpone Norfolk Southern's right to judicial review would frustrate the intent of Congress that railroads be free of such burdens. *See id.* at 343. [9]

III. THE UNITED TRANSPORTATION UNION IS NOT A NECESSARY PARTY

Nothing in Rule 19(a), Fed. R. Civ. P., requires that the Union be denominated a "necessary party" to this preemption action. Rule 19(a) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the Court cannot accord complete relief among existing parties; or
>
> (B) the person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the interest.

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[9] Exhaustion of administrative remedies is not well suited for disposition on motion to dismiss and should be made at a later stage of the litigation. *Norfolk Southern*, 2010 WL 12535511 at *2.

Pointing to Rule 19(a)(B), Defendants contend that disposing of this action without the Union would impair the Union's ability to protect the interests of its members in maintaining safe working conditions. (Def. Mem. 14-15). But the Union has not sought to intervene in this action and, therefore, does not qualify as a person claiming an interest in the subject of this action. *See United States v. San Juan Bay Marina*, 239 F.3d 400, 406-07 (1st Cir. 2001) (decision to forego intervention negates claim of interest in subject of action); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1271 (W.D. Wash. 2005) (similar). *See Innotex Precision Ltd. v. Horei Image Prods., Inc.*, 2009 WL 5174736, *5 (N.D. Ga. Dec .17, 2009) ("[i]f a person knows of the action but chooses not to participate, the court should be reluctant to find that person ... a required party under Rule 19 based on the possible harm to its interests"; "[t]he [c]ourt [should] not second-guess the [absent party's] assessment of its own interests") (collecting legal authority, citation to quoted sources omitted).

Even were the Union not disqualified by its lack of interest, it would still not qualify as a necessary party because it cannot assert a legally protected interest in this action. *See Pittsburgh Logistics Systems, Inc. v. C.R. England, Inc.*, No. 09-1036, 2009 WL 3756690, at *5 (W.D. Pa. Nov. 9, 2009) (a party is only necessary if it has a legally protected interest, and not merely a financial interest, in the action); *States v. Nye County, Nev.*, 951 F. Supp. 1502, 1513 (D. Nev. 1996) (the interest relating to the subject of the action referred to in Rule 19(a)(B) is a legally protected interest); *Demeter, Inc. v. Werries*, 676 F. Supp. 882, 888 (C.D. Ill. 1988) ("'an interest relating to the subject of the action' does not include economic interests-it must be a legally protected interest'"); *Florian v. Sequa Corp.*, No. 85-3536, 2002 WL 31844985, at *6 (N.D. Ill. Jan. 7, 1988) (similar). Nothing in the statutory scheme of 49 U.S.C. § 20106 bestows any legally enforceable entitlement on the Union to any particular safety standard. That entitlement is

given to the States.[10] Thus, nothing in Rule 19(a)(B) requires or suggests that the Union is a necessary party herein.

In any event, as movants, Defendants bear the burdens under Federal Rule 19(a). *Norfolk Southern*, 2010 WL 12535511 at *3; *see generally Prime Capital Group, Inc. v. Klein*, 2008 WL 2945966, *3 (D.N.J. July 29, 2008) (movant bears burdens of showing that absent party is "necessary," joinder is infeasible, and party is indispensable) (citations omitted). Those duties have not been discharged.

IV. Venue Is Proper in this Court

The PUC contends that venue in this District is improper and the Amended Complaint therefore should be dismissed. Venue is proper in any judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred, **or a substantial part of the property that is the subject of the action is situated**." 28 U.S.C. § 1391(b) (emphasis added). The 1975 Order is not a regulation of statewide applicability. Rather, it was narrowly crafted to apply exclusively at Conway Yard, located completely within this District, and the effects of the 1975 Order therefore are felt principally within this District. *See* Developments in Federal Jurisdiction & Practice: Personal Jurisdiction, Supplemental (Pendent & Ancillary) Jurisdiction, Venue & Removal, 653 PLI Lit. 7, 89 (Apr.2001) ("[i]f tangible, or at least identifiable, property is the subject matter of the action-which would ... exclude from this criterion [a] naked money action-proper venue lies in any district in which a substantial part' of the property lies," "even if the conduct that made the claim with respect to that property actionable took place elsewhere"). "[P]laintiff's choice of venue should not be lightly disturbed." *See Norfolk Southern*, 2010 WL 12535511 at *4; *Frank Calandra, Jr. Irrevocable Trust v. Signature Bank Corp.*, 2009 WL

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[10] "A State may adopt or continue in force a law . . . ." 49 U.S.C. § 20106.

3199692, *1 (W.D. Pa. Sept. 30, 2009) (defendants bear burden on motion to dismiss for improper venue, and court "must draw all reasonable inferences and resolve all factual conflicts in the plaintiff's favor") (citations omitted). Indeed, the PUC frequently is called upon to defend lawsuits brought in the Western and Eastern Districts of Pennsylvania. *See West Penn Power Co. v. Pa. P.U.C.*, No. 98-01117 (W.D. Pa. filed June 26, 1998); *Wheeling & Lake Erie R.R. Co. v. Pa. P.U.C.*, No. 94-01776 (W.D. Pa. filed Oct. 20, 1994); *Southeastern Pennsylvania Transportation Authority v. Pa. P.U.C.*, No. 92-0112 (E.D. Pa. filed Jan. 8, 1992).

A Western District venue is also consonant with the considerations of economy and convenience in 28 U.S.C. § 1404(a). To the extent witness testimony may be necessary, it is noteworthy that witnesses, including Norfolk Southern employees, who are most familiar with Conway Yard reside principally within this District. Finally, although Norfolk Southern does not purport to establish venue based on the PUC's residence in this District, the PUC maintains an office in Pittsburgh, Pennsylvania and therefore will not be inconvenienced by litigating in this District.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff Norfolk Southern Railway Company respectfully submits that Defendants' Motion to Dismiss should be denied

Dated: February 1, 2012

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: /s/ Kathleen Jones Goldman

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Attorneys for Plaintiff,
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EXHIBIT B

U. S. Department of Transportation

Federal Railroad Administration

Region II

Baldwin Towers
1510 Chester Pike
Suite 660
Crum Lynne, PA 19022

Re: OP2011-NS-2-016954

January 25, 2012

Mr. Donald W. Dunlevy
State Legislative Director and Chairman
Pennsylvania State Legislative Board
United Transportation Union
Suite 7B
500 N. Third Street
Harrisburg, PA 17101

Dear Mr. Dunlevy:

Please refer to your e-mail dated September 21, 2011, regarding alleged unsafe conditions at Norfolk Southern Corporation (NS) Conway Yard near Pittsburgh, PA of rollouts in the classification yard and the over-speed of equipment coming off the hump.

The Federal Railroad Administration (FRA) has completed its investigation into this allegation and there is some background history prior to this complaint. FRA previously conducted a hump audit at this location and was already working on some of your concerns. Two violations were submitted during that audit for securement and rolling equipment that was left standing in the foul.

FRA's audit and this investigation revealed NS replaced aged inert retarders with new electro-hydraulic skate retarders and eliminated hump/retarder operator jobs in March 2011. The yardmaster assumed these duties. NS also notified the United Transportation Union (UTU) that it wanted to eliminate the skate-person jobs. The union has been fighting the elimination of the positions, as you may know. The UTU and NS have both presented briefs to the Pennsylvania Public Utility Commission (PAPUC) with UTU asking a federal judge to block the state from ruling.

The UTU provided FRA a portion of its exhibits that was submitted to PAPUC on alleged rollouts starting July 1, 2011. Details in a whole were somewhat sketchy and carrier records did not record any information unless there was damage to equipment. The more serious incidents had already been investigated. FRA talked with numerous employees, prior to and following this complaint. FRA attempted to focus on reports of either cars that were fouling adjacent tracks or cars that were out of the retarders (overwhelmed), which were not coupled and/or secured with hand brake application.

Here is the timeline of FRA's investigation:

9.27.11 – FRA met with the terminal superintendent and assistant terminal superintendent at Conway Yard. We discussed rollouts on August 31st, September 1st, and September 8th. Supervisors did not feel Conway had a rollout problem and were surprised to have the problems appear on the days FRA was on property. We discussed FRA MPE Technical Bulletin 10-01 that reviews alternate forms of securement in classification yards. NS Supervisors were told they must take action to comply with Federal regulations.

9.12.11 – FRA met with the assistant division superintendent. He did not feel there was a rollout problem but an employee problem.

10.4.11 – FRA interviewed the NS signal supervisor who oversees the computerized /automatic hump operation. If the hump is placed in the trim/manual mode, the clearance track circuits and distance to clear circuits are by-passed and the Yardmaster will not get a proper indication on his computer monitor screen. There is no federal regulation(s) governing inspection of retarders, PD, CTC, and DTC circuits. NS does circuit testing twice a month and retarder maintenance more frequently.

A Track Profile Survey for the class yard showed some problems relative to elevation & bowl profile. A full surfacing unit started working on the hump class yard November 14th. Eleven tracks were surfaced before weather conditions halted the operation. The surfacing unit will continue in the spring. It is believed that once the work is completed the effectiveness of the new retarders will be greatly improved.

10.17.11 – FRA talked with the NS AVP of Rules in Atlanta to discuss rollout issues at Conway Yard and FRA MPE Technical Bulletin 10-01. He committed to get involved with local supervision for ways to improve protection of employees including additional training.
In mid-October, NS moved its Trainmasters to the lower end of the class yard to better monitor rollout issues and rules compliance. Maintainers were also based at the location to inspect and adjust retarders.

11.16.11 – FRA talked with you. The complaint investigation was reviewed. FRA observations show an improvement with rollouts subsiding. FRA understands you have acknowledged the frequency of incidents appear to be down.

FRA documented a combination of rollout, securement, and fouling incidents at Conway Terminal. FRA has recommended two violations to FRA's Office of Chief Counsel, as previously mention.

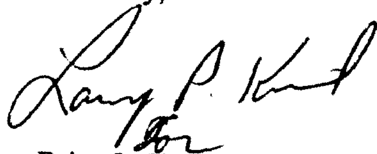
In conclusion, NS never fully acknowledged there is or was a problem and insisted human factor issues caused the rollouts. NS has been working to eliminate the problems (human factors) with a significant improvement noted in recent. A major surfacing project started in mid-November to improve the bowl contour in the classification yard. The project will continue in the spring; it is anticipate the rollout issue be eliminated significantly.

The rollouts appear to have been caused by a combination of factors including: (1) the yardmaster placing computer into trim/manual mode resulting in upper primary, secondary, and group retarders not applying or sufficiently applying to slow heavy loaded cars, (training & experience issue) (2) elevation/surface of class tracks into bowl of yard leading into retarders, (3) failure to apply hand brakes on west end of class yard to assist skate retarders holding the cars, (4) initial retarder rail settings not allowing empty cars to fully rest on head of rail, (heavy fast loads would kick empty cars out of retarder) and (5) electrical/equipment failure.

FRA will continue to monitor securement and fouling issues at the terminal with the possibility of a scheduled focused inspection if this and other issues persist.

Thank you again for your interest in railroad safety.

Sincerely,



Brian L. Hontz
Regional Administrator

RECEIVED
2/1/12
PA. STATE LEGISLATIVE BOARD
UNITED TRANSPORTATION UNION

BEFORE THE
PENNSYLVANIA PUBLIC UTILTITY COMMISSION

Petition of Norfolk Southern Railway Company for rescission or amendment of the Pennsylvania Public Utility Commission's Order entered on June 12, 1975 regarding the prevention of run outs in the 400 and 500 Classification Yards of Conway Yard in Beaver County, Pennsylvania	:	Docket No. C-00019560

CERTIFICATE OF SERVICE

I, IRWIN W. ARONSON, ESQUIRE, hereby certify that on this date I served a copy of the Motion for Summary Judgment on the Question of Federal Preemption of the Commission Order Entered on June 12, 1975 at C-00019560 in the above-captioned matter upon all parties of interest in this matter by sending the same via email transmission and via United States First Class mail, postage prepaid addressed as follows:

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Administrative Law Judge
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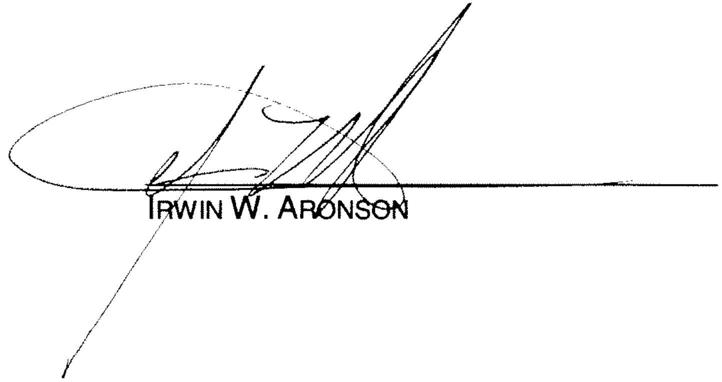

IRWIN W. ARONSON

Dated: February 3, 2012