

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/01/11

DEPT. 13

HONORABLE LUIS A. LAVIN

JUDGE K. SANDOVAL

DEPUTY CLERK

HONORABLE
RULING ON SUBMITTED MATTER
NONE

JUDGE PRO TEM
Deputy Sheriff

NONE

ELECTRONIC RECORDING MONITOR

Reporter

8:30 am BC424287

Plaintiff
Counsel

NO APPEARANCES

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS
VS
S CALIF REGIONAL RAIL AUTHORITY
170.6 Judge Hess--Pltf

Defendant
Counsel

NATURE OF PROCEEDINGS:

RULING ON MATTER PLACED UNDER SUBMISSION;

Motion for Summary Judgment having been placed under submission on May 25, 2011, Court rules as follows:

For the reasons set forth in the Order Regarding Defendant's Motion for Summary Judgment signed and filed this date, Defendant's Motion for Summary Judgment is granted. A declaratory judgment in Defendant's favor shall be entered on all causes of action.

All matters on calendar, including the final status conference and trial dates set on June 13, 2011 are each advanced to this date and ordered vacated.

Defendant shall file and serve a proposed judgment within ten (10) days.

Order to show cause for filing of the proposed judgment is scheduled for June 20, 2011 at 8:30 a.m. in Department 13. No appearances necessary if the proposed judgment is on file by June 20, 2011.

A conformed copy of the Order Regarding Defendant's Motion for Summary Judgment is sent to counsel this date via U.S. Mail.

Clerk to give notice.

MINUTES ENTERED 06/01/11 COUNTY CLERK
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NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 6-1-11 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: June 1, 2011

John A. Clarke, Executive Officer/Clerk

By: _____
K. Sandoval

JEFF R. DINGWALL, ESQ.
750 W. FIR STREET
SUITE 504
SAN DIEGO, CA 92101

MINUTES ENTERED 06/01/11 COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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RULING ON SUBMITTED MATTER
NONE

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Deputy Sheriff NONE

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Reporter

8:30 am BC424287

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS
VS
S CALIF REGIONAL RAIL AUTHORITY
170.6 Judge Hess--Pltf

Plaintiff
Counsel

Defendant
Counsel

NO APPEARANCES

NATURE OF PROCEEDINGS:

STEVEN M. BERLINER, ESQ.
LIEBERT CASSIDY WHITMORE
6033 WEST CENTURY BOULEVARD
SUITE 500
LOS ANGELES, CA 90045

MINUTES ENTERED 06/01/11 COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED

Brotherhood of Locomotive Engineers and
Trainmen, and Glenn William Steele,

Plaintiffs,

vs.

Southern California Regional Rail Authority,

Defendant.

JUN - 1 2011

**LOS ANGELES
SUPERIOR COURT**

Case No. BC424287

) Order Regarding
) Defendant's Motion
) for Summary
) Judgment

On October 20, 2009, plaintiffs Brotherhood of Locomotive Engineers and Trainmen ("Union") and Glenn William Steele ("Steele"), (collectively, "Plaintiffs"), filed this lawsuit against defendant Southern California Regional Rail Authority ("Defendant"). In their operative pleading, Plaintiffs allege that Defendant's Locomotive Digital Video Recorder System Policy and Procedures (the "Policy"), on its face, violates their procedural and substantive due process rights, invades their right to privacy, and is invalid due to State preemption. (August 23, 2010 Third Amended Complaint("TAC")). Defendant's motion for summary judgment was argued and submitted on May 25, 2011. For the reasons set forth below, the motion is granted.

Analysis

To obtain summary judgment, a moving party's evidence must establish that there is no issue of material fact to be tried and that it is entitled to judgment as a matter of law. *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374. There is a triable issue of fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. In determining whether the papers show that there is no triable issue as to any material fact, the Court will consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the Court, and all inferences reasonably deducible from the evidence. Code of Civil Procedure § 437c(c). A defendant moving for summary judgment needs to address only the issues raised by the complaint; the plaintiff cannot bring up new unpleaded issues in his or her opposing papers. *Government Employees Insurance Company v. Superior Court* (2000) 79 Cal.App.4th 95, 98, n. 4.

Defendant is a multi-county, joint powers public agency that maintains and operates the Metrolink commuter train system. Beginning in October 2009, Defendant installed three video cameras on all of its locomotive cabs. Only two cameras are inward-facing. While one of the inward-facing cameras records the control panel and gauges, the other one is located seven to eight feet from where the engineer is seated inside the cab and captures a 270 degree span of the interior of the cab including a view of the engineer. The forward-facing camera does not capture any activities or sounds in the locomotive cab; it records video images of the rail right of way, tracks, and train signals.

Pursuant to the Policy, the video and audio data captured by the cameras is recorded and saved for 96 hours. After 96 hours, the data is automatically overwritten unless Defendant or its Operating Services Contractor requests the retrieval and inspection of the recorded data due to an "incident" or as otherwise provided in the Policy. The recorded data may be viewed by 12 designated individuals by filling out a requested form. In addition, a copy is available to third-parties, including Plaintiffs, through a California Public Records Act request, or to law enforcement through a "Law Enforcement LDVR Recording Request Form." If an incident occurs, the recorded data is retained for at least 365 days. Under the Policy, Metrolink maintains a log of all recordings of incidents.

Steele is a member of the Union. At all times relevant to this lawsuit, the Union's collective bargaining agreement was with Connex Railroad, LLC or Amtrak, not Defendant. While some evidence was presented that Defendant could bar a member of the Union from its locomotive cabs, Defendant cannot terminate or demote any Union member.

Procedural and Substantive Due Process Claim

Plaintiffs' first cause of action asserts a facial challenge to the Policy on procedural and substantive due process grounds. As a facial challenge, Plaintiffs must show that the policy implemented will result in legally impermissible outcomes in the generality or the great majority of cases. *Larson v. City and County of San Francisco* (2011) 192 Cal. App. 4th 1263, 1280; *Zuckerman v. State Bd. Of Chiropractic Examiners* (2002) 29 Cal. 4th 32, 38-39.

Although under a state due process analysis an aggrieved party need not establish a protected property interest, the claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution. *Ryan v. California Interscholastic Federation-San Diego* (2001) 94 Cal. App. 4th 1048, 1070-1073. The "requirement of a statutorily conferred benefit limits the universe of potential due process claims: presumably not every citizen adversely affected by governmental action can assert due process rights; identification of a statutory benefit subject to deprivation is a

prerequisite." *Schultz v. Regents of University of California* (1984) 160 Cal. App. 3d 768, 786. What safeguards comport with due process or what due process requires under specific circumstances varies, as not every context to which the right to procedural due process applies requires the same procedure. The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner. Consequently, due process is a flexible concept, as the characteristic of elasticity is required in order to tailor the process to the particular need. *People v. Hansel* (1992) 1 Cal. 4th 1211, 1219.

Here, Plaintiffs have not identified a statutorily conferred benefit or interest of which they have been deprived invoking the procedural due process protections afforded by the California Constitution. Plaintiffs' argument that the Policy undermines their collective bargaining agreement with Connex or Amtrak is not supported by the undisputed facts. Indeed, in his deposition, Steele admits that procedures in the collective bargaining agreement to appeal disciplinary actions did not change after the cameras were installed. (Steele Deposition, pp. 88-89). There is also no evidence that the Policy has resulted in Defendant improperly terminating or barring Plaintiffs "in the generality or the great majority of cases" from operating locomotives. As for access to the recorded data, Plaintiffs admit they have never been denied the right to review any of the recordings provided for in the Policy (Defendant's UF 48), and may obtain copies of recordings through a Public Records Act request (Defendant's UF 19; Defendant's Exh. 1, § 7.0). Since the Policy has not deprived Plaintiffs of life, liberty or property, or of a statutorily conferred benefit, Defendants are entitled to a declaratory judgment that the Policy does not violate the Constitution's procedural due process protections.

To establish a substantive due process violation, a plaintiff must show some form of outrageous or egregious conduct constituting a true abuse of power. *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal. App. 4th 837, 856. In order to establish arbitrary and oppressive abuse of power, a plaintiff must prove conduct which shocks the conscience or is done, at a minimum, with deliberate indifference. *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 846-49. Generally, the constitutional guaranty of substantive due process protects against arbitrary legislative action; it requires legislation not to be unreasonable, arbitrary or capricious but to have a real and substantial relation to the object sought to be attained. *Coshov v. City of Escondido* (2005) 132 Cal. App. 4th 687, 711.

In their opposition papers, Plaintiffs allege that Defendant does not have any proof that the Policy promotes or enhances safety and security for the general public, Defendant, or its contractor employees. However, since the Policy does not implicate a fundamental right, it does not violate substantive due process so long as it reasonably relates to a proper legislative goal. *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125. As an initial matter, the installation of three cameras in the locomotive cab, only one of which is trained on the locomotive engineer, is

not outrageous or egregious as a matter of law. In any event, the undisputed facts establish that the Policy was intended to further the safety of the general public, has a rational relationship to that goal, and does not infringe on Plaintiffs' fundamental right in continued public employment (assuming that the Union's members are public employees; see Defendant's UF 14). Whether the Policy, as implemented, will actually prevent future train accidents is of no moment. At a minimum, it is obvious that the recorded data will be useful in determining why an accident occurred in the same way that the recorded data on an airplane's "black box" assists federal regulators in determining the cause of an accident. As such, Plaintiffs' substantive due process argument is without merit.

Invasion of Privacy Claim

Plaintiffs' second cause of action asserts that the Policy violates their right of privacy by recording their "performance of personal activities" while at work. TAC, ¶ 44, 48. Plaintiffs also argue that the Policy provides for the dissemination of sensitive and confidential audio and video recordings to those outside the employment relationship without any involvement by Plaintiffs. TAC, ¶ 53-54.

In order to show a violation of the right of privacy, a plaintiff must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct constituting a serious invasion of privacy. *Hernandez v. Hillside, Inc.* (2009) 47 Cal. 4th 272, 287. Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be "highly offensive" to a reasonable person (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231), and "sufficiently serious" and unwarranted as to constitute an "egregious breach of the social norms" (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37). Under the undisputed facts, no reasonable trier of fact could find in Plaintiffs' favor and impose liability for invasion of privacy as a result of the audio and video surveillance system.

Our Supreme Court has previously characterized the "offensiveness" element as an indispensable part of the privacy analysis. It reflects the reality that "[n]o community could function if every intrusion into the realm of private action" gave rise to a viable claim. *Hill, supra*, 7 Cal.4th 1, 37. A court determining whether this requirement has been met as a matter of law examines all of the surrounding circumstances, including the "degree and setting" of the intrusion and "the intruder's 'motives and objectives.'" *Shulman, supra*, 18 Cal.3d 200, 236.

As for Plaintiffs' expectation of privacy, it is worth noting that other employees and third parties may be present in the cab with the locomotive engineer, and that Defendant's operations compliance officers may board the locomotives without prior notice to the engineers to observe their performance. With regard to the degree and setting of the privacy intrusion,

this set of factors "logically encompasses the place, time, and scope of defendants' [audio and] video surveillance efforts." *Hernandez, supra*, 47 Cal. 4th 272, 292. Here, they weigh heavily against a finding that the intrusion upon Plaintiffs' privacy interests was highly offensive or sufficiently serious to warrant liability. As discussed above, only one of the cameras is trained on the locomotive engineer. No camera is trained on any restroom that might be used by any member of the Union or the public. The other two cameras are aimed at the instrument panel or on the rail right of way. In addition, the audio and video recordings are not monitored in "real time" by any individual. They are simply saved to a digital hard drive for only 96 hours and then are automatically overdriven unless otherwise provided for by the Policy. The audio and video recording devices on the cabs are also locked. Apart from a request from law enforcement or by the public under a Public Records Act request, only 12 individuals from Metrolink may access the videos. As for the dissemination of audio and video recordings to law enforcement, or to the public under the Public Records Act, there is nothing to disseminate unless the recordings are saved as a result of an incident.

The Court notes that this case does not involve surveillance measures conducted for socially repugnant or illegal reasons. See, e.g., *Shulman, supra*, 18 Cal.4th 200, 237 (harassment, blackmail, or prurient curiosity). Nor, contrary to what Plaintiffs imply, does the record reveal the absence of any reasonable justification or beneficial motivation for installation of the cameras. Defendant installed the audio and video surveillance equipment in their locomotive cabs after a 2008 rail accident in Chatsworth where the locomotive engineer was thought to have been texting immediately before the accident. (TAC, ¶¶ 12-14). Whether the Policy and the audio and video recording system will deter any locomotive engineer from texting or using his/her cell phone while the train is moving remains to be seen. However, if an accident or "incident" occurs, the surveillance system will allow Defendant to help determine the cause of the accident or incident. As a result, the recordings may help exonerate, and not just implicate, locomotive engineers who are involved in an accident or incident.

Plaintiffs have not established, and cannot reasonably expect to establish, that Defendant's Policy, or well-publicized audio and video recording system, is highly offensive and constitutes an egregious violation of prevailing social norms. Put another way, the surveillance system in the locomotive cabs was narrowly tailored in place, time, and scope, and was prompted by the legitimate concerns of protecting the public and determining the cause of any accident.

Preemption Claim

Plaintiffs' third and final cause of action contends that Defendant is not authorized to regulate and participate in railroad safety because federal and state authorities, including the CPUC, have occupied the entire field. TAC, ¶ 59, 60, 63. Specifically, Plaintiffs allege that under Cal. Pub. Util. Code §

309.7 and/or FRA Emergency Order No. 26, Defendant's Policy is preempted. TAC, ¶ 64.

Preemption is a question of law which is proper for summary adjudication. See *Washington Mutual Bank v. Superior Court (Guilford)* (2002) 95 Cal. App. 4th 606, 612. A conflict exists between local legislation and state law and is void if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897. In order to find implied preemption, one of three conditions must be found: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. *O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1068.

The Policy (including Defendant's installation of audio and video equipment) is not preempted. First, the Policy is not a statute or regulation. It is an internal policy that addresses how Defendant will access, use and store audio and video recording data on its locomotive cabs. Second, even if the Policy, or the operation of the surveillance system, is deemed to be a regulation, Cal. Pub. Util. Code §309.7 (a) states that the CPUC's powers "shall not diminish the power of other agencies of state government to enforce laws relating to employee or environmental safety, pollution prevention, or public health and safety." Plaintiffs have cited no law that holds that Defendant, a five-county, joint-powers public agency created under section 130255 of the CPUC, may not enforce laws relating to public safety through an audio and video surveillance system. As for federal regulations, Plaintiffs concede that the Federal Railroad Administration has not fully occupied the subject area of surveillance cameras. (Opposition, p. 19).

Requests for Judicial Notice and Evidentiary Objections

The Court rules as follows regarding the requests for judicial notice and evidentiary objections:

Defendant's request for judicial notice.

- Exh. 1 - GRANTED.
- Exh. 2 - GRANTED.
- Exh. 3 - GRANTED.
- Exh. 4 - GRANTED.
- Exh. 5 - DENIED.
- Exh. 6 - GRANTED.

Plaintiffs' request for judicial notice.

Exh. 2 - GRANTED.
Exh. 4 - GRANTED.
Exh. 5 - GRANTED.
Exh. 6 - DENIED.
Exh. 7 - DENIED.
Exh. 8 - GRANTED.
Exh. 9 - GRANTED.
Exh. 10 - GRANTED.

Plaintiffs' evidentiary objections.

All of the objections are OVERRULED except for the objection to the Marzec Declaration, 10:12-14, which is SUSTAINED.

Defendant's evidentiary objections.

All of the objections are OVERRULED except for 4, 8, 12, 14, 16, 29, 30, and 31, which are SUSTAINED.

Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is granted. A declaratory judgment in Defendant's favor shall be entered on all causes of action.

All matters on calendar, including the final status conference and trial dates, are vacated. Defendant shall file and serve a proposed judgment within ten days. An order to show cause for filing the proposed judgment is scheduled for June 20, 2011, at 8:30 a.m. No appearance is necessary if the proposed judgment is on file by June 20, 2011. The clerk shall mail a copy of this order to the following counsel:

Jeff R. Dingwall, Esq.
750 W. Fir Street, STE 504
San Diego, California 92101

Steven M. Berliner, Esq.
Liebert Cassidy Whitmore
6033 West Century Boulevard, Suite 500
Los Angeles, California 90045

IT IS SO ORDERED

June 1, 2011



Luis A. Lavin
Judge of the Superior Court

RECEIVED
JUN 2 2011
LIBERT CASSIDY WHITMORE