UNITED STATES DISTRICT COURT JS - 6
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-8286 PA (JEMx)	Date	June 30, 2010
Title	Bhd. of Locomotive Eng'rs & Trainmen, et al. v. S. Cal. Reg'l Rail Auth.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS – MOTION FOR JUDGMENT ON THE PLEADINGS

Before the Court is defendant Southern California Regional Rail Authority's ("Defendant") Motion for Judgment on the Pleadings. (Docket No. 38.) Plaintiffs Brotherhood of Locomotive Engineers and Trainmen ("BLET") and Glenn Steele (collectively "Plaintiffs") have filed an Opposition. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for June 14, 2010, is vacated, and the matter taken off calendar.

I. Factual Background

According to the Complaint, Defendant is a California joint powers authority that owns the Metrolink rail system, a commuter passenger railroad that runs throughout southern California. Defendant contracts with a company called Connex Railroad, LLC ("Connex") for the provision of operating crews, including locomotive engineers. BLET is a labor union which represents locomotive engineers employed by Connex. BLET and Connex are the sole signatories to a collective bargaining agreement ("CBA"). Plaintiff Glenn William Steele is a member of BLET who works as a locomotive engineer on Defendant's Metrolink rail system.

In September 2008 a rail accident involving a Metrolink commuter train occurred in Chatsworth, California. It was suspected that the accident was caused by a Metrolink engineer who had been sending text messages on his cell phone in violation of operating rules. As a result, Defendant installed a locomotive digital video recorder system ("LDVR") in locomotive cabs in October 2009 to deter employees from violating rules while on duty. The LDVR provides both video and audio surveillance. Prior to installation of the LDVR the BLET sent Defendant a letter objecting to its implementation. Defendant did not respond, instead referring the letter to Connex. Defendant did not meet, confer, or bargain with BLET prior to implementing the LDVR. Defendant delivered a copy of the "SCRRA Locomotive Digital Video Recorder System Policy and Procedures" (the "Policy") to Connex, but never provided a copy to BLET. The Policy contains procedures governing the preservation and disclosure of LDVR recordings.

Based on these events Plaintiffs filed suit against Defendant, alleging that the Policy violates substantive and procedural due process rights, that the LDVR and Policy are preempted by Federal

Railroad Administration ("FRA") regulations, and that they are entitled to declaratory relief stating that BLET members are entitled to engage in work to rule.[1]

II. Legal Standard

Under Federal Rule of Civil Procedure 12(c), "After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." In ruling on a motion for judgment on the pleadings brought pursuant to Rule 12(c), "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990). The facts are viewed in the light most favorable to the non-moving party and all reasonable inferences are drawn in favor of that party. See Living Designs, Inc. v. E.I. DuPont de Nemours & Co., 431 F.3d 353, 360 (9th Cir. 2005). "However, conclusory allegations and unwarranted inferences are insufficient to defeat a motion for judgment on the pleadings." Butler v. Resurgence Fin., LLC, 521 F. Supp. 2d 1093, 1095 (C.D. Cal. 2007). Defendant has submitted a copy of the Policy with its Motion, which the Court may properly consider in ruling on a Rule 12(c) motion. See Voris v. Resurgent Capital Servs., L.P, 494 F. Supp. 2d 1156, 1162 (S.D. Cal. 2007)("Documents attached to, incorporated by reference in, or integral to the complaint . . . may be properly considered under Rule 12(c) without converting the motion into one for summary judgment."). Although generally all allegations of material fact are taken as true on a Rule 12(c) motion, the Court is not bound to accept allegations which are contradicted by uncontested documents which were incorporated by reference into the Complaint. See Dent v. Cox Commc'ns Las Vegas, Inc., 502 F.3d 1141, 1143 (9th Cir. 2007).

"Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Hal Roach Studios, 896 F.2d at 1550. Alternatively, the Court has discretion to grant leave to amend and may dismiss causes of action rather than grant judgment on a Rule 12(c) motion. See Lonberg v. City of Riverside, 300 F. Supp.2d 942, 945 (C.D. Cal. 2004); Carmen v. San Francisco Unified School Dist., 982 F. Supp. 1396, 1401 (N.D. Cal. 1997).

III. Analysis

A. Procedural Due Process

"The Fourteenth Amendment protects against governmental deprivations of 'life, liberty, or property' without due process of law." Guzman v. Shewry, 552 F.3d 941, 953 (9th Cir. 2009). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59, 119 S. Ct. 977,

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1/ Plaintiffs' Complaint also alleges a cause of action under 42 U.S.C. § 1983, which the Court dismissed in an order dated April 19, 2010. Plaintiffs voluntarily dismissed their claim under 18 U.S.C. § 2511 on April 26, 2010.

990, 143 L. Ed. 2d 130 (1999)(citations omitted). Plaintiffs argue that they have a protectable property interest in their continued employment with a government entity. See, e.g., Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998)("[O]ne's actual job as a tenured civil servant is property . . . ."). Assuming that Plaintiffs have properly alleged a protectable property interest, they must also demonstrate that the Policy actually deprives BLET members of this interest. See Guzman, 552 F.3d at 954 ("Although all three interests are protected under the Fourteenth Amendment, [plaintiff] must demonstrate that he was actually deprived of at least one of these interests before he can establish that he is entitled to relief.").

Plaintiffs have not alleged that the Policy was applied in an unconstitutional manner; rather, they allege that "the Policy issued by [Defendant], on its face, deprives BLET and its members of their constitutionally protected right to procedural and substantive due process." (Compl. ¶ 63.) "[T]he test prescribed by the United States Supreme Court requires a party asserting a facial challenge to show that 'no set of circumstances exists under which the [policy] would be valid.'." Lanier v. City of Woodburn, 518 F.3d 1147, 1150 (9th Cir. 2008)(quoting United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987)). "In determining whether a law is facially invalid, we must be careful not to go beyond the [policy's] facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008); see also id. at 454, 128 S. Ct. at 1193 (rejecting a facial challenge to a regulation because the plaintiff's argument did not depend on any facial requirement of the regulation, but rather on "sheer speculation").

Plaintiffs complain that the Policy is facially invalid because it inherently deprives BLET members of their property without notice or an opportunity for hearing. Specifically, Plaintiffs claim the Policy allows disciplinary action for any "Incident," which is defined so broadly as to "amount to essentially anything." (Opp'n p. 10.) Plaintiffs also note that the LDVR recordings could potentially be used against BLET members in assessing civil penalties, in a criminal prosecution, or to disqualify BLET members from working on any railroads.

Contrary to Plaintiffs' assertions, nowhere on the face of the Policy does it state that Defendant may terminate or otherwise discipline BLET members. The Policy uses the term "Incident" only in reference to procedures governing the preservation of an LDVR recording. The Policy does state that recordings may be used for purposes of assisting with employee discipline or for testing compliance with Defendant's operating rules. However, the fact that the LDVR recordings may be used in the course of disciplinary or termination proceedings does not change any notice or hearing requirements set forth by statute or through the BLET's CBA with Connex. See, e.g., 49 U.S.C. § 20111(c) (stating that notice and an opportunity for a hearing must be provided prior to the issuance of any order prohibiting an individual from performing safety-sensitive functions in the railroad industry); 49 C.F.R. § 240.307(b) (requiring notice and an opportunity for a hearing prior to revoking a locomotive engineer's certification). Speculation that the LDVR recordings could possibly be used to terminate a BLET member without notice and a hearing is insufficient to establish that the LDVR policy is facially invalid.

Plaintiffs' remaining arguments are similarly speculative. The Policy states that recordings are typically overwritten every 96 hours. However, recordings of "Incidents," which is defined to include rule violations by contractor employees and any activity that could be deemed criminally punishable by law, shall be preserved prior to being overwritten whenever feasible. The Policy allows BLET members to obtain recordings by making a public records request pursuant to the California Public Records Act. Plaintiffs claim this procedure is inadequate because "there is every possibility" that by the time a BLET member becomes aware of an "Incident" the recording will be overwritten and any exculpatory evidence related to possible adverse action against the member would be lost. (Opp'n p. 11.) Although in some circumstances the government's failure to preserve evidence constitutes a due process violation,[2] Plaintiffs have not shown that there is no set of circumstances under which the Policy would be valid. The Policy on its face requires that recordings related to rule violations or criminal activity must be preserved whenever feasible, and provides a procedure by which BLET members can obtain copies of the recordings. Plaintiffs cannot establish facial invalidity by speculating about the possibility that a particular recording related to a BLET member's disciplinary or criminal action might be destroyed before the member can access it. In light of Plaintiffs' failure to establish that the Policy on its face actually deprives BLET members of a property interest, the procedural due process claim is dismissed with prejudice.

B. Substantive Due Process

Substantive due process "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" Nunez, 147 F.3d at 871 (quoting Salerno, 481 U.S. at 746, 107 S. Ct. at 2101). Just as in a procedural due process claim, "[t]o establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." Id. As already discussed, Plaintiffs have not demonstrated that the Policy actually deprives BLET members of any property interest they may have in their employment. Moreover, since the right to pursue work is not a fundamental right, Defendant need only show that there was some legitimate reason for its actions in order to overcome Plaintiffs' substantive due process claim. See Sagana v. Tenorio, 384 F.3d 731, 743 (9th Cir. 2004). Here the Policy has several legitimate purposes, such as allowing Defendant to investigate any future accidents, improving public safety and the safety of its employees, and testing engineers' compliance with Defendant's operating rules. See Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 183 (1st Cir. 1997)("[V]ideo surveillance is a rational means to advance the employer's legitimate, work-related interest in monitoring employee performance."). Plaintiffs' substantive due process claim is thus also dismissed with prejudice.

C. Preemption

[2/] See, e.g., U.S. v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)(stating that it is a due process violation if the government, acting in bad faith, fails to preserve evidence whose exculpatory value was apparent prior to being destroyed and is the type of evidence which a defendant would be unable to obtain by other reasonably available means).

Plaintiffs claim that the LDVR and the Policy are preempted by regulations issued by the FRA under the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 20101, et seq. The FRSA contains the following express preemption clause:

> (1) Laws, regulation, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation or order –
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

Plaintiffs argue that the LDVR and the Policy are preempted because they do not address a local safety hazard. However, the Court need not reach this question because, as stated in the statute, a state regulation or order is not preempted until the federal government has issued an order or a regulation "covering" the same subject matter. The Ninth Circuit has noted:

> "[T]his is not an easy standard to meet: To prevail on the claim that the regulations have preemptive effect, [plaintiff] 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." . . . [I]n light of the restrictive term "cover" and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.

S. Pac. Transp. Co. v. Public Utility Comm'n of the State of Or., 9 F.3d 807, 812 (9th Cir. 1993)(quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664, 113 S. Ct. 1732, 1738, 123 L. Ed. 2d 387 (1993))(emphasis in original). In other words, when assessing whether a federal regulation "covers" the same subject matter as the state regulation a court should construe the regulations narrowly. See id. at 813 (holding that the federal statute did not preempt state regulations because the "subject matter" of the federal statute was the "sound-producing capacity of train whistles," whereas the state regulation dealt with the use of whistles in certain locations and at certain times).

Plaintiff first points to FRA Emergency Order No. 26. ("Emergency Order") as a basis for its

preemption claim. The Emergency Order prohibits engineers from using cell phones for personal use while on duty. See Emergency Order to Restrict On-Duty Railroad Operating Employees' Use of Cellular Telephones and Other Distracting Electronic and Electrical Devices, 73 Fed. Reg. 58,702 (Oct. 7, 2008). Although the LDVR might be used to monitor engineers' compliance with the Emergency Order, the Policy does not contain any provisions on the use of cell phones. Instead, the Policy covers procedures for preserving and disclosing LDVR recordings. Because the Emergency Order does not cover the same subject matter, the Policy is not preempted by the Emergency Order.

Plaintiffs' remaining arguments concern Defendant's failure to comply with certain FRA regulations and statutes. Plaintiffs allege that Defendant did not comply with procedures set forth in 49 C.F.R. §§ 240.101 and 240.9 and 49 U.S.C. § 20156(g)(1) prior to installing the LDVR,[3] and conclude that such violations result in preemption. However, Defendant's violation of a federal statute does not mean that it lacks authority to regulate that activity under the Supremacy Clause. See Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J, 817 F.2d 222, 225 (2d Cir. 1987)("A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law."). Indeed, the FRSA explicitly gives Defendant the authority to implement programs which monitor employees, so long as it follows certain procedures. See 49 C.F.R. §§ 240.101(c)(8). In this particular case Defendant's violation may result in a lack of authority to implement the LDVR, but that lack of authority is due to violation of the FRSA, not preemption. Plaintiffs do not have authority to enforce violations of the FRSA, and so this Court cannot invalidate the LDVR or the Policy on this basis. See 49 U.S.C. § 20111(a) (stating that the Secretary of Transportation has the exclusive authority to impose civil penalties, request injunctions to address violations of FRA regulations, or request civil actions to enforce FRA regulations).

Plaintiffs' Complaint also alleges that preemption applies because installation of the LDVR changed visibility inside locomotive cabs in violation of the Locomotive Inspection Act ("LIA"). The LIA prohibits railroad carriers from using a locomotive unless "the locomotive or tender and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701. Again, even assuming that installation of the LDVR violates the LIA, such violation does not mean that the LDVR or the Policy is preempted.[4] To the extent Plaintiffs

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[3] 49 C.F.R. §§ 240.101 and 240.9 require that all railroads must file their programs for monitoring engineers' operation performance with the FRA, and that any changes to a monitoring program or deviations from the FRA's requirements for monitoring programs must be approved by the FRA. 49 U.S.C. § 20156(g)(1) requires that a railroad consult with affected employees prior to implementing any safety risk reduction program.

[4] 49 U.S.C. § 20111(a) also applies to the LIA, thus preventing Plaintiffs from enforcing any violations of the LIA. Cf. Forrester v. Am. Dieselelectric, Inc., 255 F.3d 1205, 1207 (9th Cir. 2001)("The Secretary [of Transportation], acting through the Federal Railroad Administration, is responsible for the administration and enforcement of railroad safety laws, including the [Locomotive

may claim that the LIA preempts the Policy, this argument also fails. The LIA preempts state regulations regarding the "design, the construction and the material of every part of the locomotive" but it does not preempt state regulations regarding the use of locomotive parts. Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 869 (9th Cir. 2003). The Policy does not mandate installation of the LDVR; it merely sets forth procedures for handling recordings captured by the LDVR. Because the Policy only regulates the use of the LDVR recordings, it is not preempted by the LIA. Since Plaintiffs have failed to demonstrate that installation of the LDVR or the Policy are preempted by the FRSA or the LIA, the preemption claim is also dismissed with prejudice.

D. Declaratory Relief

Finally, the Complaint brings a cause of action seeking a declaratory judgment that the BLET is permitted to engage in work to rule. However, since the Court has now dismissed all causes of action in the Complaint, the claim for declaratory relief has no basis and cannot stand. See Walker Process Equip., Inc. v. FMC Corp., 356 F.2d 449, 451 (7th Cir. 1966)("The Declaratory Judgment Act created no new rights, but rather created a new remedy with which to adjudicate existing rights."); People of Cal. v. Kinder Morgan Energy, 569 F. Supp. 2d 1073, 1091 (S.D. Cal. 2008)("The Declaratory Judgment Act does not create any new substantive rights in federal courts, but instead creates a procedure for adjudicating existing rights.").

Conclusion

Accordingly, because the allegations of the Complaint, accepted as true, fail to establish claims for violation of substantive due process, procedural due process, preemption, and declaratory relief, Defendant's Motion is granted and the claims are dismissed with prejudice. Since all claims in this action are now dismissed, the Court vacates the Scheduling Conference calendared for June 14, 2010.

IT IS SO ORDERED.

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Initials of Preparer _____

Inspection] Act.").