

communitycoalition on high speed rail

August 11, 2011

Mr. Ray LaHood, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590

Mr. Joseph C. Szabo, Administrator
Federal Railroad Administration
1200 New Jersey Avenue SE
Washington, D.C. 20590

Dear Secretary LaHood and Administrator Szabo:

This letter is written on behalf of the Board of Directors of the Community Coalition on High Speed Rail (CC-HSR), which is a grassroots, non-profit corporation based on the San Francisco Peninsula. CC-HSR is working through public advocacy, litigation, and political action to make sure the proposed California High Speed Rail project doesn't adversely affect the economy, environment, or quality of life of California's existing communities.

We wish to express our serious concern about the legality of plans under active consideration for the transfer of federal high-speed rail funds from the Central Valley project to the San Francisco Peninsula. We do believe that such discussions have been taking place. There are several moving parts to these plans, the full significance of which may be missed by the casual observer:

- Last April, three Peninsula legislators (Congress Member Eshoo, State Senator Simitian, and State Assembly Member Gordon) established a set of "minimum standards" for any use of the Caltrain right of way for high-speed train service. Adherence to these minimum standards could lead to what has been called a "blended system" on the Caltrain corridor. This so-called "blended system" would place Caltrain commuter trains on the same tracks as high-speed trains operated by, or under the authority of, the California High Speed Rail Authority (the "Authority"). All service would be within the existing right-of-way, primarily on the existing two tracks. No proposal for financing was specified.
- The Executive Director of the California High-Speed Rail Authority ("Authority") responded to the joint statement made by Congress Member Eshoo, Senator Simitian, and Assembly Member Gordon by proposing what he called a "phased implementation" system. The significant difference between "a blended system" and "a phased implementation system" is that the "phased implementation" system would only be the initial or first phase of a four-track, fully grade-separated project aimed specifically at providing facilities for high-speed rail service--with that full system being constructed only when and if funding became available, perhaps decades later.
- The May 2011 Report of the California Legislative Analyst's Office (LAO) recommended a transfer of federal HSR funds from the Central Valley Project to the "ends" of the proposed HSR line from San Francisco to Los Angeles/Anaheim.

- The July 2011 Report of the Authority's independent Peer Review Group made essentially the same recommendation as the LAO.
- Approximately \$715 million of FY2010 HSR funds that FRA awarded to the Authority some months ago for its Central Valley project are as yet "unobligated," for reasons that have not been made public.
- Caltrain recently resurrected its Final Environmental Impact Report for electrification of its commuter tracks on the Peninsula,¹ an EIR that has been dormant since 2006. The estimated cost for this electrification project was \$758 million (without rolling stock). Caltrain management may seek to have its Board certify the FEIR as early as this September, even though no funding for the project has been identified. Indeed, a Caltrain representative stated that this initial EIR certification for Caltrain electrification will *not include* high-speed rail "in the picture." Presumably, that will come later.

It seems apparent that there may be a plan, so far held back from public scrutiny, to transfer federal HSR funds from the Central Valley project to pay for the electrification of Caltrain's commuter rail operations as part of a "blended system" or as part of a "phased implementation system." Alternatively, there may be an attempt to use other unobligated HSIPR funds to pay for Caltrain electrification. In either case, as well-intentioned as such a plan might be, trying to do either one of these things does not appear to meet the essential tests of transparency and public accountability, or to comply with federal laws and regulations. Transparency, at a minimum, requires public disclosure of the essential elements of the entire proposal, including financing, so that it may be fully evaluated by stakeholders and the public before, not after, it has become a virtual *fait accompli*. Public accountability in this context means full compliance with both the letter and the spirit of federal and state laws and regulations governing funding of this project. Our concern here is compliance with the *federal* statutes and regulations applicable to funding of High Speed and Intercity Passenger Rail ("HSIPR") projects.

Electrification of Caltrain is Not Eligible for Federal HSIPR Funding

Three separate and independent reasons compel the conclusion that the electrification of Caltrain is *not* eligible for funding under the relevant statutes authorizing HSIPR funding and under applicable FRA Interim Guidance²:

1. The FRA lacks statutory authority to fund the electrification of Caltrain's commuter rail operations since each of the applicable statutory provisions authorizing HSIPR funding contains this categorical prohibition:

"No grants shall be provided under this chapter for *commuter rail passenger transportation*, as defined in section 24102 (4)³ of this title [49 of the United States Code]." 49 U.S.C. 24405(f) (applicable to section 24406 funding) (emphasis added).

1 The Caltrain electrification FEIR was jointly sponsored by Caltrain's parent agency (the Peninsula Corridor Joint Powers Board) and the Federal Transit Administration--the DOT agency with statutory jurisdiction over commuter passenger rail.

2 There are two Interim Guidance publications that could be applicable, depending on the funding source: 75 Fed.Reg. No. 126, July 1, 2010, pp. 38344 et seq ("Interim Guidance for FY2010 Funding"), and 76 Fed.Reg. No. 51, March 15, 2011, pp. 14443 et seq. ("Interim Guidance for Returned Florida Funding"). Both include coverage of previous ARRA funding to the extent applicable.

This categorical funding prohibition is incorporated by reference in both the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 208 (ARRA Funding), and the Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3056 (FY2010 Funding).

2. Congress mandated the FRA to administer capital assistance grants for high speed rail corridors and intercity passenger rail service pursuant to its published Interim Guidance until final regulations are issued. 49 U.S. C. 24402(a)(2); Consolidated Appropriations Act, 2010, *supra*. That Interim Guidance requires that both 2010 grants and previously funded ARRA grants (now refined) “will result in high-speed or intercity passenger rail service with operational independence, as defined in Section 3.5.2 of this notice.”⁴ Interim Guidance, section 3.4.3 (emphasis added). This requirement cannot be met by electrification of Caltrain’s commuter passenger rail service.
3. Neither the Authority nor Caltrain (from which it plans to lease operating rights) has the legal rights to operate intercity passenger rail service on the Caltrain corridor. Those rights belong, exclusively and perpetually, to Union Pacific Railroad (as successor to Southern Pacific Railroad Co.) pursuant to its Trackage Agreement with the Peninsula Corridor Joint Powers Board (“JPB”) which operates Caltrain. The governing statute provides: “The Secretary shall require as a condition of making any grant under this chapter for a project that uses rights-of-way owned by a railroad that - (1) a written agreement exist between the applicant and the railroad regarding such use and ownership . . .” 49 U.S.C. 24405(c).⁵ That written agreement is lacking and it is doubtful whether it can be obtained.

Funding Electrification of Caltrain With HSPiR Funds Would Violate A Clear Congressional Prohibition

Congress’s categorical prohibition of using HSPiR funding for commuter rail passenger transportation is definite and unambiguous: “No grants shall be provided under this chapter for commuter rail passenger transportation,” as the term is defined by Congress. 49 U.S.C. 24405(f).” Nothing could be clearer:

1. Caltrain is a classic case of “commuter rail passenger transportation.” The long-established, fundamental distinction between “commuter rail passenger transportation” and “intercity rail passenger transportation” (and its subset “high speed rail”⁶) is defined by federal statute. “Intercity rail passenger transportation” is defined at 49 U.S.C. 24102(4) as “rail passenger transportation except commuter rail passenger transportation” (emphasis added). “Commuter rail passenger transportation” is defined at 49 U.S.C. 24102(3) as “short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple ride, and commuter tickets and morning and evening peak period operations.” Thus, by statutory definition, “intercity rail passenger transportation” and “commuter rail passenger transportation” are mutually exclusive categories. Caltrain squarely fits the definition of “commuter rail passenger transportation.” Caltrain’s 50-mile Peninsula system has provided commuter rail service to 24 stations in 17

3 In 2008, Public Law 110-432 redesignated the paragraphs so that former section 21402 (4) defining “commuter rail passenger transportation” is now designated as section 21402 (3).

4 See sec. 3.5.2 of Interim Guidance for FY2010 Funding, *supra*; sec. 3.5.2 of Interim Guidance for Returned Florida Funding, *supra*.

5 This condition is incorporated by reference in the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 208 (ARRA Funding), and the Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3056 (FY2010 Funding).

6 “The term ‘high-speed rail’ means intercity passenger rail service that is reasonably expected to reach speeds of at least 110 miles per hour.” 49 U.S.C. 26106(b)(4) (emphasis added).

Peninsula cities for several decades—an average distance between stations of slightly over 2 miles.⁷ Even a cursory glance at Caltrain's 86-train weekday schedule⁸ is sufficient to establish beyond question its status as “commuter rail passenger transportation.” Indeed, it is a paradigm example of commuter rail passenger service.⁹

2. In determining whether the passenger rail service that would be the primary beneficiary of the proposed electrification is a commuter passenger rail service or an intercity passenger rail service, the FRA considers (1) the statutory definition set forth above, and the interpretations of (2) the now-defunct Interstate Commerce Commission and (3) the Federal Transit Authority.¹⁰ All three confirm Caltrain's unquestioned status as a commuter rail passenger service.
3. In 1971, the ICC set forth six specific features of commuter rail to aid in classifying a service as commuter rather than intercity passenger rail passenger transportation. While commuter rail has changed some over the intervening forty years, the ICC factors have basically stood the test of time. Each of these six features describes Caltrain as well as any other commuter railroad in the U.S.¹¹
4. The Federal Transit Authority refined the definition of commuter rail by specifying that “predominantly commuter [rail passenger] service means that for any given trip segment (i.e. distance between any two stations), more than 50 percent of the average daily ridership travels on the train at least three times a week.”¹² We submit that the FTA has determined that Caltrain meets this criteria or it would not have jointly sponsored the EIR for the Caltrain electrification project at issue. This last factor also meets the FRA criteria that “the primary intended benefiting service has been or is currently the direct or intended beneficiary of funding provided by another Federal agency (e.g., FTA) for the purpose of improving commuter rail passenger service”¹³
5. Finally, the FRA must take into account whether the service in question, i.e. Caltrain, “is or will be operated by or on behalf of a local, regional, or State entity, whose primary rail transportation issue is the provision of commuter or transit service.”¹⁴ That, of course, is the Peninsula Corridor Joint Powers Board.

The Authority might, as it did in its 2009 application for HSIPR funding for the Peninsula, make the fanciful claim that Caltrain is an intercity passenger rail service rather than a commuter passenger rail service:

“Caltrain services running on the program's infrastructure would provide the State's first true 110 mph high-speed intercity rail service. At these speeds and with these improvements, trains from metro San Francisco to metro San Jose could save roughly 10 minutes compared to current trip times.” (Authority 2009 Application, p. 11)

7 San Francisco, Brisbane, South San Francisco, San Bruno, Millbrae, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Atherton, Menlo Park, Palo Alto, Mountain View, Sunnyvale, Santa Clara, and San Jose.

8 Copy of schedule attached. See also <http://www.caltrain.com/schedules/weekdaytimetable.html>

9 Cf. *Research Triangle Regional Public Transportation Authority v. United States* (4th Cir. 2003) (unpublished opinion)

10 Interim Guidance for FY2010 Funding, *supra*. Appendix I.

11 The ICC's six features are set forth in Appendix A hereto.

12 Interim Guidance for FY2010 Funding, *supra*. Appendix I

13 Interim Guidance for FY2010 Funding, *supra*. Appendix I

14 Interim Guidance for FY2010 Funding, *supra*. Appendix I

The Authority's argument falls of its own weight. Commuter rail service has been continuously provided from San Francisco to San Jose on this right-of-way for several decades, initially by Southern Pacific and then by its successor, Caltrain – including express commuter rail service from San Francisco to San Jose. The Authority's own documents state that "Caltrain provides commuter rail service to San Jose's Diridon Station."

Cutting the travel time to San Jose by 10 minutes (one minute per 5 miles) cannot transform Caltrain from a commuter rail service to an intercity rail service on this right-of-way. Nor do disingenuous references to so-called "metro San Francisco" and "metro San Jose" change anything. That's also been true for decades, and today's commuters do not become tomorrow's so-called "intercity passengers" by such sleight of hand. These contentions are pure sophistry, and should be rejected outright.

The Authority sounds like Humpty Dumpty in Lewis Carrol's *Through the Looking Glass*: "When I use a word, it means just what I choose it to mean – neither more nor less." That is the antithesis of what is meant by the rule of law.

This was not a successful argument in 2009, and it is still the same intellectually dishonest argument. Were the FRA to grant funding for Caltrain electrification on the ground that Caltrain is an intercity passenger rail service, that decision could not withstand proper judicial scrutiny.

Caltrain electrification would be for the primary benefit of Caltrain's commuter rail service, and funding it with HSIPR funds would violate federal law.

By statute, HSIPR capital projects must be "for the primary benefit of high-speed and intercity passenger rail service." 49 U.S.C sec 24401(2), 49 U.S.C. sec. 26106(b)(3); Interim Guidance for FY2010 Funding, *supra*, sec. 3.4; Interim Guidance for Returned Florida Funding, *supra*, sec 3.4.1 The Interim Guidance further provides:

"Pursuant to the provisions of Sections 301, 302 and 501 of PRIIA¹⁵, the following activities are ineligible to receive Federal funding under this application:

- Projects for which commuter rail passenger transportation is the primary intended beneficiary (see Appendix 1)"¹⁶

As we understand it, both the "phased implementation" and "blended system" proposals provide for electrification of Caltrain's commuter service which, upon implementation, will permit Caltrain's commuter service to be switched over from diesel locomotive to electrified trains—a longstanding service improvement goal of Caltrain. Secondly, there is the prospect that some years hence, should adequate funding and other prerequisites ever be satisfied, the same electrification might also be used by a limited but unknown number of so-called high-speed rail trains traveling at slower speeds along the Caltrain tracks. How could such a Peninsula rail corridor electrification project, in all honesty, be considered to be other than for the primary benefit of Caltrain's commuter service? The question answers itself. Accordingly, the use of federal HSIPR funds to pay for the electrification of Caltrain's commuter service is barred as a matter of law.

¹⁵ The Passenger Rail Investment and Improvement Act of 2008 (Div. B of Pub. L. 110-432)

¹⁶ Interim Guidance for FY2010 Funding, *supra*, sec. 3.5.4; see Interim Guidance for Returned Florida Funding, *supra*, sec. 3.5.4.

Using HSIPR Funds to Pay for Electrification of Caltrain Would Violate the FRA's Requirement of "Operational Independence"

The FRA's Interim Guidance is quite clear:

*"All Service Development Programs that are proposed to be advanced using HSIPR program funding must have operational independence. A Service Development Program is considered to have operational independence if, upon being implemented, it will result in a minimal operating segment of new or substantially improved high-speed or intercity passenger rail service that demonstrates tangible and measurable benefits, even if no additional investments in the same service are made"*¹⁷ (italics added).

Since Caltrain electrification, *upon being implemented*, will not involve any high-speed or intercity passenger service on the Caltrain corridor, there can be no operational independence within the meaning of this provision. Invoking "phased implementation" does not change the result. The test is whether operational independence of new or improved high-speed or intercity passenger rail service is established "upon being implemented," not years later. Moreover, in addressing application packages that include phased implementation, the Interim Guidance specified that where there are "discrete phases, each [is to have] operational independence."¹⁸

HSIPR Funding Cannot Be Used to Electrify Caltrain Tracks for Possible Future Use of High-Speed Rail Trains Without the Written Agreement of Union Pacific Railroad

In order to qualify for an HSIPR grant, the Authority must show that at some point in the future the electrification of the Caltrain tracks would be used by the Authority's high-speed trains. The Authority cannot make this showing unless it has a valid written agreement with the "owner" of the right-of-way that the Authority will be legally entitled to use the right-of-way for its future high-speed or intercity passenger service. As shown below, such a valid legal agreement cannot be obtained from Caltrain's parent, the Peninsula Joint Powers Board, because it has never owned the right to provide intercity passenger service on the Peninsula rail corridor. That right has always been owned by the Union Pacific Railroad or its predecessor, the Southern Pacific Railroad. The Union Pacific has consistently refused to enter into any such written agreement with the Authority or the JPB. The governing federal statute provides:

"Grant conditions. - The Secretary shall require as a condition of making any grant under this chapter for a project that uses rights-of-way owned by a railroad that - (1) a written agreement exists between the applicant and the railroad regarding such use and ownership . . ." 49 U.S.C. 24405(c).¹⁹

17 Interim Guidance for FY2010 Funding, *supra*, sec. 3.5.2; see Interim Guidance for Returned Florida Funding, *supra*, sec. 3.5.2.

18 Interim Guidance for FY2010 Funding, *supra*, sec. 4.2. Nor does the final provision of section 3.5.2 of the Interim Guidance for Returned Florida Funding, to the extent it may be applicable, change the result. This provision states that operational independence can be shown where the project results in "tangible and measurable progress in implementing new or substantially improved high-speed or intercity passenger rail service." No such meaningful progress is established from what is little more than a hope and a prayer.

19 This condition is incorporated by reference in the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 208, and Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3056. Interestingly, there is an exemption from this condition for commuter rail passenger transportation. 49 U.S.C. 24405(e)(1), but this would require the FRA and the Authority to acknowledge, once and for all, that Caltrain is a commuter rail passenger transportation service. But even if this exemption applies, it does not change the fact that Union Pacific is the legal owner of the exclusive right to operate intercity passenger rail service on the Peninsula Rail corridor, and its written consent is still required before any changes can be made with respect to such service.

This mandatory requirement is further amplified in the Interim Guidance:

“As a condition of receiving a grant under this [HSIPR] program for a project that uses rights-of-way owned by a railroad the grant recipient shall have in place a written agreement between the grant recipient and the railroad regarding such use and ownership, including any compensation for such use”²⁰

Furthermore, the Interim Guidance requires that the written agreement with the railroad must provide the grant recipient with “continuing control” over the facilities:

“Grant recipients will be required to reach a written agreement, approved by the FRA, with each of the railroads or other entity on whose property the project will be located showing that the recipient will have continuing control over the use of the equipment and facilities necessary to implement the project”²¹

The right-of-way for the Peninsula rail corridor is owned by the Peninsula Corridor Joint Powers Board (JPB), but the legal right to operate an *intercity rail service* on this right-of-way belongs, exclusively and perpetually, to the Union Pacific Ry. Corp. (as the successor of Southern Pacific Ry. Corp.) under the terms of the 1991 Trackage Agreement between JPB and Southern Pacific. The Trackage Agreement confirms that in the sale of the Peninsula corridor right-of-way to the JPB, Southern Pacific never sold, but affirmatively reserved to itself, the perpetual right to provide intercity passenger service on the right-of-way. Manifestly, the JPB cannot grant intercity passenger rail usage rights to the Authority that it has never owned. Accordingly, the Union Pacific, as successor to Southern Pacific, has these rights under the Trackage Agreement :

1. Union Pacific was granted the perpetual and exclusive right to provide intercity passenger service over the right-of-way. p. 1, sections B, C; p. 6, section 2.1; p. 7, sections 2.4 and 2.5.
2. Union Pacific's usage rights concerning the right-of-way shall be exclusive and no other person or entity shall be entitled to or granted any rights to such use for such purposes (intercity passenger rail service). See p. 7, section 2.4.
3. Union Pacific has the perpetual and exclusive right to make changes or additions to the right-of-way for the provision of intercity passenger rail service. See p. 9, section 2.11. This provision means that no other entity may engage in such activities without the consent of Union Pacific.

The latter point was confirmed last June (in a suit seeking declaratory relief regarding the above-noted provisions of the Trackage Agreement) when a California Superior Court is reported to have ruled: “All parties agree [including the Authority and Caltrain] that no construction of a high speed rail project on the Peninsula corridor can commence unless and until the written consent of Union Pacific Railway Corporation has been obtained.”²²

²⁰ Interim Guidance for FY2010 Funding, *supra*, sec. 6.3.3.

²¹ Interim Guidance for Returned Florida Funding, *supra*, sec. 6.2.11. This section further provides that the required agreement must be “in place [as] a prerequisite for the obligation of funding for construction-related activities.” *Ibid*.

²² See <http://www.examiner.com/transportation-policy-in-san-francisco/california-high-speed-rail-lawsuit-cements-uprr-control-of-peninsula-rail-corridor>. The quoted statement was made in the course of dismissing the lawsuit as premature and not ripe for decision.

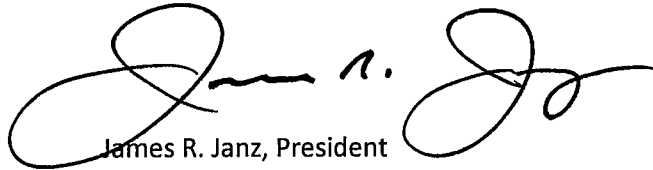
No such agreement exists, is imminent, or even likely. On the contrary, Union Pacific has consistently been adamantly opposed to the California high-speed rail project which it believes is harmful to its long-term business interests, and has said it would exercise its legal rights to protect its interests.

Conclusion

Given the litigious climate in the San Francisco Bay Area--combined with the anger and distrust of the Authority that has been manifest in several Peninsula communities over many months--it seems increasingly likely that if the FRA were to fund any request by the Authority to use HSIPR funds to electrify Caltrain in an apparent violation of federal law, it would result in a contentious lawsuit seeking judicial review of that decision.

Thank you for considering our very significant legal and policy concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "James R. Janz". The signature is fluid and cursive, with a large initial "J" and "R".

James R. Janz, President
CC-HSR Board of Directors

APPENDIX A

ICC Six Characteristics of Commuter Rail Passenger Transportation²³

- ▲ The passenger service is primarily being used by patrons traveling on a regular basis either within a metropolitan area or between a metropolitan area and its suburbs;
- ▲ The service is usually characterized by operation performed at morning and peak periods of travel;
- ▲ The service usually honors commutation or multiple-ride tickets at a fare reduced below the normal coach fare and carries the majority of its patrons on such a reduced fare basis;
- ▲ The service makes several stops at short intervals either within a zone or along the entire route;
- ▲ The equipment used may consist of little more than ordinary coaches; and
- ▲ The service should not extend more than 100 miles at the most, except in rare instances; although service over shorter distances may not be commuter or short haul within the meaning of this exclusion.

²³ *Penn Central Transportation Company Discontinuance or Change in Service of 22 Trains Between Boston, Mass. and Providence, R.I.*, February 10, 1971, I.C.C. 338, 318-333.