

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DKT. NO. TR-021465:
REMOTE CONTROL (RCL) OPERATIONS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR),¹ on behalf of itself and its member railroads, submits the following written comments in response to the Washington Utilities and Transportation Commission's request for written comments on the operation of portable locomotive control technology (PLCT).² AAR's member railroads have used PLCT in both Canada and the U.S. and are pleased to be able to testify as to the safety advantages of PLCT and the need for regulation of PLCT to take place at the federal level.

PLCT Reduces Employee Injuries

PLCT has been used for years by CN and CP in Canada. As the enclosed charts show, PLCT has dramatically improved safety on CN and CP. CN and CP data show that yard accidents are dramatically lower where PLCT is used.³ CP data also show that employee injury rates are lower where PLCT is used.

It is no surprise that PLCT leads to fewer accidents and injuries. One of the major advantages with PLCT is the elimination of communications between ground personnel and locomotive engineers. Conventional railyard operations rely on ground personnel using hand signals or radio communications to instruct the locomotive engineer on the movement of the train under the engineer's control. While all reasonable safety precautions are taken, this system of communication always presents the possibility of misunderstandings and delayed reactions. With

¹A trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 91 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

²"Portable locomotive control technology" is a phrase commonly used in the railroad industry for the technology that the Commission refers to as "remote control."

³CN and CP keep different data. CN data are available for accidents caused by human factors. CP data are available for employee injury rates and accidents in general.

the possibility of railroad personnel between cars or in another dangerous position, there can be terrible consequences from misunderstandings and other communication problems.

PLCT eliminates the potential for communication problems between an employee on the ground and a locomotive engineer because the employee on the ground uses PLCT to move the locomotive instead of instructing a locomotive engineer. PLCT incorporates a computer on the locomotive to control locomotive movement. The on-board computer responds to signals passed by means of a radio transmitter operated by the employee on the ground. The computer determines how much throttle and brake to apply, automatically adjusting for train tonnage and the grade and condition of the track. In this fashion, the on-board computer replaces the traditional role of the engineer in controlling the locomotive.

Another PLCT advantage is that the PLCT operator on the ground often has a broader view of the surrounding environment than an employee on a locomotive. Thus, the PLCT operator generally is in a better position to spot potential problems.

PLCT Regulation Should Take Place At The Federal Level

FRA exercises extensive oversight of the use of PLCT by the railroad industry. PLCT systems are subject to the longstanding calendar day and periodic (every 92 days) inspection requirements of 49 C.F.R. Part 229, Subpart B. Each person operating remote control technology is certified and qualified in accordance with FRA's certification regulations (49 C.F.R. Part 240). Accidents and incidents must be reported as involving remote control operations, if appropriate.

FRA has taken other steps. In 1994, FRA specifically authorized the Wheeling and Lake Erie Railroad Company to use remote control technology. 59 Fed. Reg. 59826 (Nov. 18, 1994). In July 2000, FRA held a technical conference that covered a wide range of issues involved in remote control operations, including design standards, employee training, operating practices and procedures, tests and inspections, and accident/incident reporting. On February 14, 2001, FRA published a Safety Advisory concerning remote control technology. 66 Fed. Reg. 10340.

FRA's Safety Advisory both reminded the railroads of the above requirements and contained other recommendations governing the design of PLCT equipment and its operation. Since issuance of the Safety Advisory, FRA has exercised active oversight of railroad PLCT operations through approval of certification programs for PLCT operators, monitoring compliance with the Safety Advisory, and application of its inspection requirements.

It is appropriate that regulatory activity pertinent to the operation of PLCT has taken place at the federal level. The application of different state or local regulations governing locomotives and/or employees operating PLCT can adversely affect safety by causing confusion as employees and equipment move from one state to another. Furthermore, differing state or local regulations would increase railroad costs, particularly if they impose different equipment

requirements. Finally, if there were a need for additional regulation of PLCT, and AAR does not believe there is, FRA certainly has the authority to promulgate additional regulations.

State Regulation Of PLCT Is Preempted By The LBIA

State regulation of PLCT is preempted by the Locomotive Boiler Inspection Act (LBIA), codified at 49 U.S.C. §§ 20701 et seq., and by 49 U.S.C. § 20106. The LBIA provides that DOT shall

- (1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;
- (2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and
- (3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

49 U.S.C. § 20702(a). The LBIA also provides that a railroad can use a locomotive only when it has been inspected as required by DOT regulations and can "withstand every test prescribed" by DOT. 49 U.S.C. § 20701.

Long ago the Supreme Court concluded that the

the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the [Interstate Commerce] Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.

Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926). Consequently, other courts have concluded that "the Locomotive Boiler Inspection Act of 1911 . . . wholly occupies the field of regulation of locomotive equipment to the exclusion" of state regulation. *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987). *Accord, United Transportation Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (the Fifth Circuit held that the LBIA preempted a state requirement that a locomotive be equipped with an audible warning device that could be heard one-quarter mile away); *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

PLCT used by AAR's member railroads incorporates an on-board computer to control the movement of locomotives by determining how much throttle and brake to apply, automatically adjusting for train tonnage and the grade and condition of the track. The on-board computer responds to signals passed by means of a radio transmitter operated by an employee.

Thus, PLCT is subject to FRA regulations implementing the LBIA, specifically the inspection requirements of 49 C.F.R. Part 229. Clearly, state regulation of the equipment used for PLCT operations would be contrary to the Supreme Court's admonition that the LBIA "wholly occupies the field of regulation of locomotive equipment."

State Regulation of PLCT is Preempted by Section 20106

Section 20106 provides that

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. 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;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

The Federal Railroad Administration (FRA) has "covered the subject matter" of PLCT operations and thus preempted state regulation of PLCT. FRA regulations govern the inspection of PLCT equipment, the training and certification of employees using PLCT, and the reporting of accidents and incidents involving PLCT. FRA also has addressed PLCT through the recommendations contained in the Safety Advisory.⁴

⁴The recommendations constitute FRA action addressing the subject matter of PLCT and thus preempt state laws covering the same subject matter. Whether the recommendations are mandatory is irrelevant. Even decisions not to regulate a subject constitute action covering a subject matter and have preemptive effect. *See Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991) (FRA's affirmative decision not to require walkways on railroad bridges preempted a state's walkway requirement because FRA's consideration of walkways "covered the subject matter"); *Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (agreeing with the general principle of not needing regulation to constitute preemption, but

Conclusion

AAR believes it is in the public interest to facilitate the use of PLCT to enable the railroad industry to further improve its excellent safety record. However, as explained above, regulation by one or more states would hinder the efficient implementation of PLCT and be inconsistent with the comprehensive scheme of regulation imposed upon the railroad industry by FRA. Thus, AAR urges the Commission not to take any action to regulate PLCT operations.

Respectfully submitted,

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disagreeing on whether FRA actually preempted state regulation of walkways). *See also* cases where courts have found that FRA's explicit refusal to require cabooses preempts state caboose laws. *Burlington Northern R.R. v. State of Montana*, 880 F.2d 1104 (9th Cir. 1989); *Union Pacific R.R. v. Public Utility Comm'n of Oregon*, 723 F.Supp. 526 (D.Or. 1989); *Burlington Northern R.R. v. State of Minnesota*, 882 F.2d 1349 (8th Cir. 1989); *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 671 F.Supp. 466 (W.D. Tex. 1987). "For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it. The particular form of the decision is not dispositive." *Burlington Northern and Santa Fe Railway et al. v. Doyle et al.*, 186 F.3d 790, 795 (7th Cir. 1999).