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Carole J. Washburn
Washington Utilities and Transportation Commission
1300 E. Evergreen Park Drive S.W.
Post Office Box 47250
Olympia, Washington 98504-7250

Re: Remote Control Locomotive (RCL) Operations
WAC Chapter 480-62
TR – 021465

Dear Ms. Washburn:

Thank you for notifying The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) of the opportunity to file written comments in advance of the stakeholder workshop set for March 19, 2003. The railroad industry is very excited about remote control technology,[1] from both a safety and productivity standpoint. As relevant to the questions raised by the Washington Utilities and Transportation Comission (WUTC), we believe that control of train movements using Remote Control Locomotive (RCL) technology, and performed in compliance with the railroad's operating rules, will enhance the safety of train operations within the state. A common cause of switching accidents, for example, is a misunderstood signal or voice communication. Such misunderstandings are virtually eliminated with RCL. In addition, the person in control of the movement often has a better line of sight than a person in the locomotive cab. Unlike an engineer who is required to rely upon communications from the employee on the ground, an operator controlling a movement from the ground will actually see the speed, see the distance to a joint, and be in control of the equipment.

[1] Within the railroad industry, control of train movements with aid of on board computers is often referred to as portable locomotive control technology (PLCT). To avoid confusion, we will use RCL – the term used by the Commission in its notice.

To ensure RCL safety, the railroads have been working hand in hand with the Federal Railroad Administration (FRA). The FRA has allowed test programs, sponsored technical conferences, taken testimony and promulgated a Safety Advisory to supplement existing FRA rules. Since the issuing of the Safety Advisory in 2001, the FRA, labor organizations and railroads have continued to consult to ensure that remote controlled movements are as safe, if not safer, than traditional switching movements.

BACKGROUND ON REMOTE CONTROL LOCOMOTIVES

The BNSF currently has RCL operating in Seattle, Tacoma, Spokane and Everett. BNSF began RCL operations in Washington during 2002, and has operated since inception without mishap. We look forward to sharing the information regarding BNSF operations during the upcoming stakeholders meeting. While the UP does not conduct RCL operations within the state of Washington at the present time, it will likely begin such operations in the near future. Like the BNSF, the UP is also eager to explain the benefits of RCL technology.

RCL refers to control of a train movement using a radio transmitter. RCL technology employs an on-board computer to control the train movement 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 who is usually on the ground. In this fashion, the on-board computer replaces the traditional role of the on-board engineer in responding to signals from the ground.

The FRA has promulgated "Recommended Minimal Guidelines for the Operation of Remote Control Locomotives." Safety Advisory 2001-01, 66 Fed. Reg. 31, 10340 et seq. (February 14, 2001)(hereafter "Safety Advisory"). The Safety Advisory was the culmination of years of work by the FRA, railroads, manufacturers and labor organizations. Public hearings were held and testimony was taken regarding the merits of the technology. In 1995, the FRA began a test program for RCL. In 2000, the FRA held a technical conference to address a wide range of technical issues. Throughout this process, the FRA's stated priority was "to ensure that these operations pose no threat to railroad workers or the general public." Safety Advisory at 10341.

The Safety Advisory represents a comprehensive approach to RCL safety. It contains a blend of mandatory and recommended practices covering everything from the technical requirements of the equipment to operating practices. Within the Safety Advisory, the FRA noted:

FRA emphasizes that although compliance with this Safety Advisory is voluntary, nothing in this Safety Advisory is meant to relieve a railroad from compliance with all existing railroad safety regulations. Therefore, when procedures required by regulation are cited in this Safety Advisory, compliance is mandatory.

Consistent with FRA regulations, the BNSF and the UP sought and received FRA approval of their RCL qualification and training programs. For example, operators of RCL technology are certified as part of the BNSF training program in Overland Park, Kansas. Employees receive a minimum of 80 hours of classroom and on-the- job training.

The railroads have continued to consult with the FRA regarding RCL practice. For example, the Safety Advisory initially prohibited Remote Control operators from riding on the side of rolling stock. In a February 22, 2002 memo to its Regional Administrators, the Acting Director, Office of Safety Assurance and Compliance noted that that position had been modified:.

The FRA's position is that riding a car using the newer RCL technology provides at least an equivalent level of safety as conventional methods.

Further, it should be remembered that the operating rules that apply to movements made by an engineer in the locomotive apply to an employee using RCL technology. Therefore, remote control operations generally "provide at least an equivalent level of safety as conventional methods," and in many cases are safer.

For the BNSF and the UP, safety is of paramount importance. Remote control operations are no exception. The railroads have engaged in a continuous review and evaluation of remote control operations in cooperation with the FRA, the principal agency changed with responsibility for railroad safety. The railroad unions and other interested parties were also actively involved in the development of guidelines. It is the belief of the railroads that rulemaking, and enforcement of rules are most effective and least burdensome when accomplished at the national level.

RAILROAD OPERATIONS IN WASHINGTON

The BNSF is a Delaware corporation with its principal place of business in Fort Worth, Texas. The BNSF is a Class I railroad doing business as a common carrier of freight by rail with operations in Washington and twenty-seven other states in the Western United States with interchanges of freight and equipment to connecting carriers in the eastern United States and Canada. In Washington, the BNSF has major routes north into Canada, east through Spokane to the Eastern half of the country, and south through the gateway to the major seaports of California. Passenger service is provided by Amtrak over the BNSF system from Chicago, and south through Portland to California.

The BNSF is a major link in the transportation of freight to and from Washington. Its major products include international intermodal container traffic to and from the Far East, as well as domestic products such as lumber, grain and consumer goods. The BNSF works in partnership with the major ports in Seattle and Tacoma to provide cost effective and reliable transportation service to domestic and international shippers.

The UP is a Delaware corporation with its principal place of business in Omaha, Nebraska. The UP is a Class I railroad doing business as a common carrier of freight by rail with operations in twenty-three states in the Western United States. UP serves the State of Washington with two north-south main lines. A connection with the Canadian rail system is made by a line from UP's main line in northeastern Oregon through Spokane to the border at Eastport, Idaho. In Western Washington, the UP connects Portland with the important ports of Seattle, Tacoma and Kalama.

Major commodities handled by the UP in the state include lumber, fruits, automobiles and trucks, manufactured products, grain, chemicals, and import-export consumer products. The UP moves export soda ash and grain to Kalama and handles consumer products on double-stack trains from Seattle and Tacoma.

BASIS FOR RULEMAKING

In November 2002, the Brotherhood of Locomotive Engineers petitioned the WUTC to adopt the FRA Safety Guidelines as their own rules. While that petition was denied, in January 2003, the Washington Utilities and Transportation Commission authorized the filing of a CR-101 Notice with the Code Reviser in Docket No. TR-021465. While acknowledging the Safety Advisory issued by the FRA, the WUTC seeks input on the extent to which it is preempted from regulating in this area. To aid in evaluating the propriety of action on the subject of RCL operations, we include a discussion of relevant legal authority on preemption. Citations to relevant federal statutes and regulations are also included.

FEDERAL PREEMPTION OF RCL OPERATIONS

Article VI of the United States Constitution (the Supremacy Clause) provides that the Constitution and acts of Congress preempt inconsistent state law. The critical question is whether Congress intended the federal legislation to supersede state law. In CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2D 387 (1993), the United States Supreme Court explained that state statutes are preempted if they conflict with federal law. Id., see also, Maryland v. Louisiana, 452 U.S. 725, 746 (1981). Congress may explicitly state its intent to preempt state regulations or it may be implied by the act's structure and purpose. Cipollone, 505 U.S. at 516. Absent express language in legislation, state laws are preempted if they conflict with federal law or if the federal legislation occupies the legislative field, leaving no room for states to act. Id.

Because of the paramount need for an effective system of commerce by rail, Congress has delegated the principal responsibility for railroad safety to the FRA.[2] The

[2] The Commerce Clause of the United States Constitution prohibits state regulation of many areas such as weight, length and configuration of trains traveling across state lines. If each state

need for a uniform system of safety which recognizes that the railroad industry freely interchanges trains, locomotives, cars and equipment is expressed in 49 USCA §20106:

§20106. National uniformity of regulation:

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.

49 U.S.C.A. §20106.

Clearly a rule promulgated by FRA has preemptive effect. See, e.g., United Transportation Union v. Foster, 205 F.3d 851, 863 (5th Cir. 2000)(FRA regulations covering locomotive equipment preempts state law); CST Transportation, Inc. v. City of Plymouth et al., 92 F.Supp.2d 643 (E.D. Mich. 2000) (FRA regulations preempt state train speed law). In addition, a decision by the FRA not to regulate a subject also means that FRA has covered the subject matter and preempted state action. In Norfolk &Western Ry. v. Public Utilities Comm'n of Ohio, 926 F.2d 567 (6th Cir. 1991), the Sixth Circuit found that the 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." Id. at 571. The FRA's explicit refusal to require cabooses has also been found to preempt 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, 671F.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

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attempted to regulate railroad trains and equipment, our system of interstate and international commerce for commodities traveling from the international ports of Seattle and Tacoma would soon fall apart. In the case of Class I carriers like BNSF and UP, many trains and their equipment which operate to and through the state of Washington come from connecting eastern carriers or are made up as far away as Chicago, Illinois; North Platte, Nebraska; Birmingham, Alabama; or Fort Worth, Texas.

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).

Since Doyle, the FRA has held technical conferences on RCL and issued Safety Advisory 2001-1, establishing "recommended minimal guidelines for the operation of remote control locomotives." 66 Fed. Reg. 10340. The FRA explicitly stated that because "information currently available to FRA does not lead to the conclusion that RCL operations should be prohibited on safety grounds, FRA has elected to proceed cautiously." Id. at 10343.

Safety Advisory 2001-1 provides that when procedures required by regulation are cited by the Safety Advisory, compliance is mandatory. For example, the Safety Advisory provides, "Each person operating an RCL must be certified and qualified in accordance with 49 CFR Part 240 if conventional operation of a locomotive under the same circumstances would require certification under that regulation." 66 Fed. Reg. 10344. The FRA believes that the train operation by remote control is equivalent to conventional train operations and covered by the same regulations. Therefore, the FRA requires certification under Part 240.

Other federal rules and regulations apply to RCL operations. For example, the Locomotive Boiler Inspection Act ("LBIA"), 49 U.S.C.A. §20701 et seq., grants the Secretary of Transportation exclusive authority to adopt uniform rules governing the safety of locomotives and preempts any state regulation of these subjects. 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.

While the LBIA does not contain an explicit preemption provision, the Supreme Court has concluded that the Boiler Inspection Act was intended to occupy the field. That conclusion is supported by the broad scope of authority conferred upon the Interstate Commerce Commission. Because the standards set by the Commission

must prevail, conflicting state laws are preempted, "however commendable or however different their purpose." Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926). 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 PacificR.R. v. R.R. Comm'n of Texas, 833 F.2d 570 (5th Cir. 1987). Accord, 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). In United Transportation Union v. Foster, 205 F.3d at 861, for example, 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.

The Safety Advisory identifies mandatory requirements for RCL operations, and contains additional recommendations. 66 Fed. Reg. 10343("[W]hen procedures required by regulation are cited in this Safety Advisory, compliance is mandatory."). The Advisory addresses operating practices, the training of employees, and the inspection of remote control equipment. The Safety Advisory states that each person operating remote control technology has to be certified and qualified in accordance with the FRA's certification requirements "if conventional operation of a locomotive under the same circumstances would require certification under that regulation." *Id.* at 10344. Insofar as inspection and testing are concerned, the Safety Advisory specifically states that remote control systems are subject to the longstanding calendar day and periodic inspection requirements of 49 C.F.R. Part 229, Subpart B. FRA regulations require daily and periodic (92 day) inspections and tests of locomotives, pursuant to the LBIA's statutory directive. *Id.* The Safety Advisory stats that the:

RCL [remote control locomotive] system must be included as part of the calendar day inspection required by 49 CFR 229.21, since this equipment becomes an appurtenance to the locomotive.

The RCL system components that interface with the mechanical devices of the locomotive, e.g., air pressure monitoring devices, pressure switches, speed sensors, etc., should be inspected and calibrated as often as necessary, but not less than the locomotive's periodic (92-day) inspection.

*Id.* While the FRA has not promulgated regulations which apply only to remote control devices, there is no statutory mandate requiring the agency to address remote control devices in regulations which apply only to those devices. Certainly, the FRA has exercised its discretion to address remote control devices in regulations applicable to locomotive equipment generally. Regulation of the technology at the state or local level would be inconsistent with the FRA's clear intent to occupy the field.

## III. COMMENTS ON PROPOSED RULEMAKING

In its Notice of Opportunity to File Written Comments and Notice of Workshop, the WUTC indicated that it will consider the need to adopt new rules regarding RCL.

This is apparently based in part on an accident occurring in Shelton, Washington, on or about August 6, 2002. While the train in question was being remotely operated, this was **not** the cause of the incident. Rather, the incident was the result of placing the train on a grade without cutting in the train's air brakes. This accident could not have been prevented by an occupied cab. Indeed, the only change would have been the placing of an engineer at risk of injury in a train that could not be stopped.

More generally, the BNSF and the UP do not believe it is proper or good practice to adopt the FRA Safety Advisory as mandatory rules for RCL operations in the State of Washington. As discussed above, we believe that rulemaking in this area has been preempted by the FRA. Even if the WUTC had retained some authority in this area, adoption of the Safety Advisory would not be advisable because of the rapidly improving nature of the technology. The FRA and the railroads continue to consult regarding these guidelines and refine them to better reflect actual RCL practice. Since the Advisory is a dynamic document, it would not be appropriate to make it a set rule in this single jurisdiction. The FRA certainly has had the opportunity to engage in formal rulemaking, but has chosen not to do so. No doubt this is due in part to the fact that existing mandatory rules are considered adequate. These rules reference in, and are consistent with, the guidelines of the FRA Safety Advisory.

The FRA has clearly expressed its view that piecemeal regulation in this area is contrary to public policy. In its 1978, policy statement regarding its exercise of authority, it stated as follows:

The overall FRA programs to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track roadbed, and associated devises and structures, (2) equipment and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disputed and contrary to the public interest. Should it be demonstrated that further specific regulatory action is required prior to the completion of FRA rulemaking, addressing a given class of hazards within one of the three major fields, FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems....

The FRA has specifically assumed responsibility for any proposal to operate remotely controlled equipment.

## IV. QUESTIONS POSED BY THE WUTC

**1. Is the Commission preempted to any degree by federal law from adopting rules establishing safety requirements relating to RCL operations? If you contend that federal law preempts the Commission to any degree, please**

**state the degree of preemption and refer to specific legal authority that supports your contention.**

As addressed above, the BNSF and the UP believe that the WUTC is preempted from entering this field that has so clearly been occupied by the FRA. The Safety Advisory aside, the LBIA, implemented by the FRA through locomotive inspection requirements contained in the CFR clearly preempts state regulation of locomotive equipment. Likewise, Section 20106, 49 U.S.C., authorizes the FRA to issue requirements regarding engineer certification and training, and preempt state laws covering the same subject matter.

**2. If you represent a railroad company engaged in RCL operations in Washington, please identify with specificity which, if any, of the Safety Advisory 2001-01 guidelines your railroad has implemented. Further, please explain with specificity why other guidelines have not been implemented.**

The BNSF and the UP have both complied with the provisions of the Safety Advisory. The only exceptions are when, in consultation with the FRA, it is determined that an alternative practice "provides at least an equivalent level of safety as conventional methods." The BNSF and the UP both comply with all the mandatory provisions set forth in the Advisory.

**3. What are the specific dangers, if any, that exist with RCL operations but do not exist when locomotive are occupied by an engineer?**

The BNSF and the UP earnestly believe that RCL operations are safer than conventional switching operations. The incident in Shelton, for example, would still have occurred if the cab were occupied – except that a worker would have been at risk of injury. In its January 31, 2003, letter filed with the WUTC, the United Transportation Union (UTU) expressed its approval for the technology and existing safety protocols. The railroads also believe that putting the control of the movement into the hands of the person on the ground enhances worker and public safety.

Conventional switching, on the other hand, has the inherent problem of miscommunications. In November 2000, the FRA issued Safety Advisory 2000-03 involving Switching Operations Fatality Analysis (SOFA). This advisory was prompted by the number of fatalities caused by conventional switching operations. As part of its conclusion, the advisory notes that poor communication and the involvement of multiple persons were both contributing factors. These risks are not only mitigated, but virtually eliminated with this new technology.

**4. What specific state safety rules may be necessary, and why? Are they included in, or in addition to, the provisions of Safety Advisory 2001-01?**

No additional rules are required.

**5. What alternatives to mandatory requirements for RCL operations are available to assure safety of railroad employees and the general public?**

The most meaningful way for this Commission to promote railroad safety is through enforcement as a part of the federal-state participation program as provided in the Federal Railway Safety Act, 49 U.S.C.A. §20105 & 49 CFR Part 212. Section 20105, which authorizes individual states to participate in the enforcement of federal safety regulations and orders applicable to railroad equipment, facilities, rolling stock and operations in the State of Washington. Through this program, certified members of the WUTC assist the FRA with investigation, surveillance, and monitoring activities. including operating practices, among others. Certified state inspectors can report violations and instigate enforcement action if FRA fails to act. 49 C.F.R. 212.115. The Commission can also become involved in FRA's collaborative rulemaking processes as a part of the Rail Safety and Advisory Committee (RSAC). FRA, labor, the railroads and interested states are welcome to participate in the standing RSAC committees which the FRA has convened.

## V. CONCLUSION

The BNSF and the UP look forward to the stakeholders' workshop scheduled for March 19, 2003. We hope that the information provided here will be helpful. If the Commission would like any additional information prior to the workshop, please feel free to contact us.

Very truly Yours,

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