

May 5, 2014

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*Via Electronic Mail*

**Re: Docket TR-140424 BNSF Railway Request for Waiver of the Overhead Clearance Rules in WAC 480-60-040**

Dear Mr. King:

On behalf of the Sierra Club, I write to offer a few additional comments after the April 24, 2014, Utilities and Transportation Commission (UTC) open meeting on the BNSF surfactant re-spray station matter. As we understand the decision, the UTC voted to approve the overhead clearance waiver for the re-spray station, but held the full written decision until the May 8, 2014, open meeting hoping to further clarify the UTC's general role in rail issues in Washington.

While we respectfully disagree with the UTC's oral decision to approve the height variance, we appreciate the opportunity for the UTC to listen to our concerns regarding surfactants and the coal re-spray station, and greatly appreciate the Commission's time spent on this matter.

During the April 24 hearing, the Commissioners expressed concern that the preemption powers of the Interstate Commerce Termination Act (ICCTA) and the Federal Rail Safety Act (FRSA), administered by the Surface Transportation Board (STB) and the Federal Rail Administration (FRA) respectively, precluded the UTC from taking more action on surfactants.

The Sierra Club requests that the UTC limit its written decision to the issue of waiver of overhead clearance for the surfactant re-spray station, and not discuss general preemption issues. This area of law is extremely broad and complicated. As the letter below supports, the UTC does have a lot of authority over rail in certain spheres, especially on health and safety issues. We would urge the UTC to not offer an essentially advisory opinion without briefing on the preemption issue since it is not important to resolving the overhead clearance waiver here at issue. The UTC has already appropriately decided that it does have the power to administer overhead clearance rules.

## A. Existing Washington Rail Regulations

In Washington, there exist several rail regulations pertaining to a host of issues, including railroad crossings, and public interest issues like railroad safety (i.e., worker conditions and track clearance). The UTC's general rules indicate that the agency is intended to "[r]egulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property within this state for compensation."<sup>1</sup> The UTC's regulations cover railroad clearances, operations and sanitation issues.<sup>2</sup>

In Washington, limits are placed on the construction of at-grade railroad crossings.<sup>3</sup> When possible, railroad-highway crossings are to be constructed so that they cross either above or below the grade of a road. If the crossing must be constructed at grade, the railroad must first obtain permission for the crossing from the UTC.<sup>4</sup> In the petition, the railroad must set "forth the reasons why the crossing cannot be made either above or below grade."<sup>5</sup> After evaluating the petition, the UTC "shall enter a written order in the cause, either granting or denying the right to construct a grade crossing at the point in question."<sup>6</sup>

Additional restrictions apply if the railroad crossing will bisect a state highway. "The commission may not change the location of a state highway without the approval of the secretary of transportation, or the location of any crossing thereon adopted or approved by the department of transportation."<sup>7</sup> In addition, the UTC may not "grant a railroad authority to cross a state highway at grade without the consent of the [Washington] secretary of transportation."<sup>8</sup>

If a grade crossing is constructed or is about to be constructed in a manner that violates the requirements laid out in the Washington Revised Code, the construction of the crossing "may be enjoined, or may be abated, as provided by law for the abatement of nuisances."<sup>9</sup> "Suits to enjoin or abate may be brought by the attorney general, or by the prosecuting attorney of the county in which the unauthorized crossing is located."<sup>10</sup>

Washington regulations also require that railroads "not block a grade crossing for more than ten consecutive minutes, if reasonably possible."<sup>11</sup> Trains must move at the "request of law enforcement or other emergency services personnel, or when the engineer becomes aware that the crossing is being approached by a law enforcement or other emergency services vehicle with its emergency lights flashing or that such a vehicle is stopped with its emergency lights flashing at the crossing blocked by the train."<sup>12</sup>

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<sup>1</sup> WASH. REV. CODE § 80.01.040.

<sup>2</sup> WASH. ADMIN. CODE. § 480-60-66 (pertaining to topics ranging from grade crossings to community reporting requirements.)

<sup>3</sup> WASH. REV. CODE § 81.53.010.

<sup>4</sup> WASH. REV. CODE § 81.53.030.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> WASH. REV. CODE § 81.53.240.

<sup>8</sup> *Id.*

<sup>9</sup> WASH. REV. CODE § 81.53.190.

<sup>10</sup> *Id.*

<sup>11</sup> WASH. ADMIN. CODE. § 480-62-220

<sup>12</sup> *Id.*

Railroads are also subject to community notice and reporting requirements even outside of immediate safety hazards or emergencies.<sup>13</sup> Railroads must notify the governing authority of any community at least ten days prior to taking actions that may have a significant impact on the community, including, but not limited to, grade crossing disruptions for track inspection, rail reconstruction, maintenance, or blocking a crossing.<sup>14</sup> Questions about the regulation are directed to the UTC and FRA.<sup>15</sup> Additionally, if the UTC requests, railroads must disclose information about the average number of daytime/nighttime trains operating on Washington’s railways, and train switching movements over specific grade crossings.<sup>16</sup> Railroads must also provide the UTC access to track profiles and copies of the railroad’s timetable.<sup>17</sup>

There are a number of existing Washington state rail regulations that have not been challenged or preempted by any existing federal law.

## **B. Case law regarding preemption**

While a volume of case law exists on preemption issues and the ICCTA and FRSA, this letter is intended to highlight a few actions that courts have found permissible for states and localities to legislate on in the safety context.

FRSA is intended “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”<sup>18</sup> While this mandate is broad, the preemption powers are not absolute. Indeed, “FRSA... preemption is even more disfavored than preemption generally.”<sup>19</sup> There are two major exceptions to FRSA preemption. First, states can adopt or continue to enforce a law or regulation about rail safety or security until there is a new federal regulation covering that particular issue. Second, states may adopt or continue enforcement of more stringent laws regarding rail safety or security when it is necessary to eliminate or reduce an essentially local safety or security concern.<sup>20</sup>

As an example of the first exception, even on issues for which a general FRSA regulation might exist—like train whistles—more specific state regulations may survive a preemption challenge. In *Southern Pacific Transportation Company v. Public Utility Commission of the State of Oregon*, the Ninth Circuit found that the FRSA did not preempt an Oregon Public Utility Commission regulation, which permitted local authorities to ban the sounding of train whistles under certain circumstances.<sup>21</sup> “A Commission noise regulation banning the use of blow whistles at crossing grades was found not to fall within the ‘preempted zone’ because the federal

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<sup>13</sup> WASH. ADMIN. CODE. §480-62-305; § 480-62-315.

<sup>14</sup> WASH. ADMIN. CODE. §480-62-305.

<sup>15</sup> *Id.*

<sup>16</sup> WASH. ADMIN. CODE §480-62-315.

<sup>17</sup> *Id.*

<sup>18</sup> 49 U.S.C. § 20101.

<sup>19</sup> *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1064 (Cal. Ct. App. 2000).

<sup>20</sup> *See* 44 A.L.R. Fed. 2d 261 (2010).

<sup>21</sup> 9 F.3d 807, 812 (9th Cir. 1993).

regulation which required audible warning devices on every lead locomotive and other federal provisions did not substantially subsume regulation of the *use* of the whistles.”<sup>22</sup>

States and localities also retain power over local safety hazards. In *Union Pacific Railroad v. California Public Utilities Commission*, the Ninth Circuit defined local safety hazards as those concerns not “adequately encompassed within national uniform standards.”<sup>23</sup> More specifically, a “local safety hazard”... “refers to a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing.”<sup>24</sup> Although the court found that the factual circumstances in that case did not qualify as a local safety hazard under that definition, it left open the possibility that a state or local entity can issue regulations for “essentially local safety hazards.”<sup>25</sup> For example, in *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, the court upheld a Washington state regulation forbidding the operation of engines without modern spark plug arrestors.<sup>26</sup> The regulation was permissible because spark plug arrestors prevent fires, and “[t]he danger of fires along railroad rights-of-way may clearly be characterized as ‘an essentially local safety hazard.’”<sup>27</sup>

While jurisdiction over health and safety issues primarily involves the FRA and FRSA, there is also some STB and ICCTA case law. Generally, as long as state and local regulations do not “unduly restrict the railroad from conducting its operations” they should be permitted under the ICCTA.<sup>28</sup> For example, zoning laws and ordinances that have only a “remote or incidental effect on rail transportation” would not likely be preempted.<sup>29</sup> Noise regulations regarding train sounds are not preempted under the ICCTA.<sup>30</sup> State regulation of grade crossings is also not preempted under ICCTA.<sup>31</sup> States and localities may also require railroads to share plans with the community, implement precautionary measures, meet with citizens or government officials, provide environmental monitoring, and adhere to general laws like building, electrical, fire and plumbing codes.<sup>32</sup>

The Sierra Club urges the UTC to not use the decision on the limited matter of the surfactant re-spray station and the waiver of the overhead clearance rules to foreclose itself from any future action related to the transportation of fossil fuels like coal, oil, and petroleum coke in

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<sup>22</sup> *City of Seattle v. Burlington N. Ry. Co.*, 41 P.3d 1169, 1174 (Wash. 2002) (describing *S. Pac. Transp. Co.*, 9 F.3d at 812).

<sup>23</sup> 346 F.3d 851, 860 (9th Cir. 2003) (citation omitted); see also *Murrell v. Union Pac. R.R. Co.*, 544 F. Supp. 2d 1138 (D. Or. 2008) (finding that state law claims for failure to maintain adequate warning devices were not “essentially local”).

<sup>24</sup> *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 249 P.3d 607, 618 (Wash. 2011) (citing *Myers v. Mo. Pac. R.R. Co.*, 52 P.3d 1014, 1027-28 (Okla. 2002)).

<sup>25</sup> *Union Pac. R.R. Co.*, 346 F.3d at 860-861.

<sup>26</sup> WASH. REV. CODE § 9.40.040 (requiring the operation of any spark-emitting boiler or engine in close proximity to grass or bushes be operated with a modern spark-arrestor.)

<sup>27</sup> 484 P.2d 1146 (Wash. 1971) (quoting Federal Rail Safety Act, now at 49 U.S.C. § 20106(a)(2)(A)).

<sup>28</sup> *Humboldt Baykeeper v. Union Pac. R.R. Co.*, 2010 WL 2179900, at \*3 (N.D. Cal. 2010).

<sup>29</sup> *Id.* at \*2.

<sup>30</sup> See *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1059-60 (Cal. Ct. App. 2000).

<sup>31</sup> See *Wolf v. Cent. Oregon & Pac. R.R.*, 216 P.3d 316, 321 (Or. Ct. App. 2009).

<sup>32</sup> See *Boston and Maine Corp.*, S.T.B. Fin. Docket 33971, 2001 WL 458685 (2001).

Washington. Preemption issues are extremely complicated and need not be resolved for the purposes of this decision.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jessica Yarnall Loarie', with a stylized flourish at the end.

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