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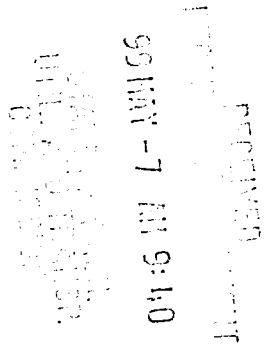

Mike Rowswell
Utilities and Transportation Commission
1300 E. Evergreen Park Drive S.W.
Post Office Box 47250
Olympia, Washington 98504-7250

Re: WUTC PROPOSED RULEMAKING
TR - 981101
TR - 981102

Dear Mr. Rowswell:

The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) hereby submit written comments with respect to the two referenced docket numbers. Under separate cover BNSF and UP will be submitting comments on the Sanitation and Clearance Rules discussed at the April 20, 1999, workshop. We felt, however, that it would be valuable for you to have our comments regarding the rulemaking process for both pending docket numbers. We have also included some specific observations in this letter for your consideration while you are considering proposed rules for the stakeholder meeting on May 27, 1999.

For the BNSF and UP safety is "job one." Railroad safety is a continuous process undertaken by America's railroads individually and in cooperation with federal and state agencies. The railroads and the principal agency changed with responsibility for railroad safety -- the Federal Railroad Administration ("FRA") -- work with the railroad unions, state agencies and other interested parties in a collaborative rulemaking and enforcement process. It is the belief of the railroads that safety innovations, rulemaking, and enforcement or rules are most effective and least burdensome when accomplished at the national level. When addressing proposed rules under both docket numbers, attention should be paid to whether it covers a subject better addressed on the national level, whether it unreasonably interferes with interstate and foreign commerce in violation of the United States Constitution and whether it is preempted by federal law.

I. INTRODUCTION

A. INTRODUCTION TO RAILROAD OPERATIONS IN WASHINGTON

BNSF is a Delaware corporation with its principal place of business in Fort Worth, Texas. 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.

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. 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.

UP is a Delaware corporation with its principal place of business in Omaha, Nebraska. 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, UP connects Portland with the important ports of Seattle, Tacoma and Kalama.

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

B. BASIS FOR RULEMAKING

In April 1997, Governor Gary Locke directed all state agencies to "embark upon an aggressive long term effort to improve the quality, effectiveness, and efficiency of state services." He issued Executive Order 97-02 to improve the effectiveness and fairness of state regulatory processes and directed each state agency to complete a review of its rules and regulations. To this end, the Washington Utilities and Transportation Commission ("Commission") has reviewed its rules on railroad sanitation and clearances and will soon look at its rules regarding railroad operations. To aid in evaluating these rule changes we have included a discussion of relevant legal authority on preemption. Citations to relevant federal and state statutes, and Codes of Federal Regulations provisions are also included. If the WUTC requires additional data to help evaluate any of the proposed changes, the BNSF and UP would welcome the opportunity to provide any information available to it.

II. LEGAL AUTHORITY

A. AUTHORITY OF THE COMMISSION

The Commission's authority over railroads operating in Washington has drastically changed since the Washington Administrative Code (WAC) chapters under consideration where first adopted. The ICC Termination Act, 49 U.S.C.A. § 10101, et seq., extensively revised the transportation laws in the United States. The Commission has lost all economic regulatory powers and has limited jurisdiction over railroad safety. The Commission derives its authority, except where preempted by federal law, from R.C.W. 80.01.040.

For the reasons set forth in these comments, 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. The Commission can also become involved in FRA's collaborative rulemaking processes by participating in the several committees, including the ongoing committee process involving locomotive cab environment, 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. BNSF and UP each also have ongoing committees which deal with safety issues as a part of FRA's Safety Assurance and Compliance Program (SAC-P). Regular monthly meetings with FRA, labor and railroad representatives are conducted at the division level and the Commission is welcome to and has participated on matters of particular importance to Washington. Lastly, each railroad has local safety committees which are open to participation by the Commission.

B. FEDERAL PREEMPTION GENERALLY

Because of the paramount need for an effective system of commerce by rail, Congress has delegated the principal responsibility for railroad safety to the Federal Railroad Administration. The 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.

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 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.

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 Untied 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). Courts interpreting a federal statute on a subject traditionally regulated by the states should be reluctant to find preemption unless it is the clear and manifest purpose of Congress. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).[1] 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.

There are a number of federal statutes that directly bear on the authority of the state to regulate railroad safety. The Safety Appliances Act ("SAA"), 49 U.S.C.A. §20301 et seq., and the Locomotive Boiler Inspection Act ("LBIA"), 49 U.S.C.A. §20701 et seq., grant the Secretary of Transportation exclusive authority to adopt uniform rules governing the safety of locomotive and freight car equipment and preempt any state regulation of these subjects. The Hours of Service Act ("HSA"), 49 U.S.C.A. §21101 et seq., was enacted to promote railroad safety by setting limits on the hours worked by train crews, signal operators, and other railroad employees. The Hazardous Material

[1] Where a federal statute, such as the Federal Rail Safety Act, 49 U.S.C.A. § 20106, contains an express preemption clause, broad statements regarding the reluctance of federal courts to imply preemption are not applicable.

Transportation Act ("HMTA"), 49 U.S.C.A. §5125 et seq., was adopted by Congress to establish national, uniform standards for railroads transporting hazardous substances.

The ICC Termination Act, 49 U.S.C.A. § 10101, et seq., extensively revised the transportation laws in the United States. The ICCTA was passed in an effort to reduce the regulation of railroads and other modes of surface transportation. It abolished the Interstate Commerce Commission ("ICC") and created the Surface Transportation Board ("STB") to perform many of the functions previously performed by the ICC. Under the ICCTA, exclusive jurisdiction over transportation, service and facilities is vested in the STB. Jurisdiction over railroad safety, on the other hand, is vested with the United States Department of Transportation. Although states are not preempted altogether from regulating safety, there are only a few very limited areas remaining in which states may impose their own safety rules.

III. COMMENTS ON PROPOSED RULES (Docket No. TR 981102)

In its Notice of Opportunity to File Written Comments and Notice of Workshop, the Washington Utilities and Transportation Commission ("Commission") indicated that it will consider the need to adopt new rules in a variety of areas. The Commission has also indicated that it is considering the amending of existing rules under WAC 480-62. While the railroads will be better able to comment on these rules after drafts are available, it would like to offer some preliminary comments in this letter.

A. Notification Requirements

The subject of notification of the commencement of work on planned construction projects and the associated road closures and traffic diversion is already addressed in the construction and maintenance agreements which each railroad enters into with the State or local road authority or it is handled as part of the permitting process. No need has been demonstrated for a regulation on this subject. In addition, each railroad's routine maintenance of grade crossing surfaces, such as crossing plank replacement, should be allowed to proceed as the need arises. A rigid requirement for advance notification will cause unnecessary delay and impede the Railroads' ability to perform required maintenance. This is not in the interest of public safety.

The Commission already receives notice of changes in FRA regulations for classes of track in 49 CFR 213.9. The Commission's federally certified track inspectors are aware of these federal regulations and their application to particular rail line segments. Although the FRA track classes establish the maximum allowable operating speed for a particular line of railroad based on the condition of the track, the Railroads' operating rules determine the maximum speed at which trains are allowed to operate on the involved rail line. The Railroads routinely provide advance notice to affected communities before implementing changes in operating rules to increase the maximum allowed speed of trains through residential or industrial areas. The railroads do not believe that a new rule on this subject is necessary.

The Commission has suggested that rules may be needed for reporting ownership changes of railroads operating in the state. The railroads do not object to providing information required by the Commission. Without more specifics, however, it is difficult to comment on this issue. If information is required, the railroads would like to see it included as part of annual reporting requirements.

The Commission is also contemplating rules requiring railroads to provide the Commission with copies of its time tables, bulletins and notices. The information contained in all time tables, bulletins and notices is voluminous and redundant. Much of the information is probably irrelevant and meaningless to the Commission. Production would be expensive, onerous and difficult for the railroads. The railroads believe that the Commission's need for information is better accomplished by specific requests for information and not by a rule. The railroads do not object to providing information, upon request, consistent with our 49 CFR §217.7(b) obligation.

The railroads have no objections to providing public contact information for their police forces. Such information is already available to the Commission or any member of the public. The emergency number for BNSF police services is 1-800-832-5452. The emergency contact number for UP police is 1-888-877-7267. A rule in this area may not be necessary.

B. Remotely Controlled Locomotives

BNSF and UP do not presently have any remotely controlled locomotive operations in the State of Washington. However, FRA has clearly expressed its intent to preempt the area and exercise jurisdiction over railroad operations in general. In its 1976 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 also specifically assumed responsibility for any proposal to operate remotely controlled equipment in the test plan which was issued in 1994 and Vol. 50 No. 222 of the Federal Register on page 59826.

C. Crossing Blocking

For the reasons stated herein, the delegation of authority to regulate the blocking of public grade crossings, pursuant to 49 U.S.C § 20106, is to the "state" and not to a municipality or other governmental entity. Any regulation has to be fashioned in a way that would allow the normal flow of commerce. CXS Transportation, Inc. v. City of Plymouth, 86 F.2d 626 (1996). If the Commission were to consider adoption of a state standard, that standard must recognize the practical operating needs of the railroad and the convenience of the highway traveling public. Any regulations must also recognize exceptions for circumstances where trains are stopped across a crossing due to mechanical or other failures and/or delays due to the necessity of performing federally prescribed airbrake tests and other appropriate exceptions. There may also be places where, due to the location of a public grade crossing immediately adjacent to railroad facilities trains are assembled, exceptions to blanket provisions would need to be made. The Commission may wish to set up a small working group to address these issues.

D. Post Accident Drug and Alcohol Testing

In 1989, FRA adopted its regulations covering the control of alcohol and drug use by railroad workers when it adopted the regulations found in 49 CFR, Part 219. By doing so it occupied the field pursuant to § 20106. Subpart C to Part 219 deals specifically with "Post Accident Toxicology Testing". Section 219.201 lists the post accident events for which tests are required, and in § 219.201(b), it provides an express exception for grade crossing accidents:

> "... No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing...".

Pursuant to § 219.13 (a) entitled, "Preemptive effect", FRA clearly expressed its intent to preempt state law, while it recognized, in §213.13 (b), that state criminal laws regarding certain types of specified conduct would remain in effect. The railroads agree that the authorities with responsibility for enforcement of the state criminal statutes have authority to require railroad employees to undergo post accident drug and alcohol testing, if they have "probable cause" to suspect that such employee was at the time of the accident under the influence of drugs or alcohol. Testing without "probable cause" would violate the constitutionally protected right of the employees tested. *See attached,* UTU et al. v. Foster 14 BNA IER CAS 936. Since the Commission is not charged with responsibility for enforcing those criminal statutes,[2] no rulemaking in this area is necessary.

[2] See, e.g., RCW 9.91.020.

E. PROCEDURES FOR IMPLEMENTATION OF WHISTLE BANS

The critical importance of blowing the train whistle as a part of safety at public grade crossings was recognized in the "National Study of Train Whistle Bans" issued by the FRA in April 1995. The study found overall that crossings with whistle bans experienced an average 84% greater frequency of accidents than those without whistle bans. Clearly, the train whistle is an important component in alerting the highway traveling motorist to the approach of freight trains at public grade crossings.

In 1994, Congress enacted legislation in which it clearly delegated to the FRA responsibility for determining when the blowing of the train whistle is not required. 49 USC § 20153. When FRA issues rules later this year to implement its authority, it will clearly pre-empt the ability of municipalities to enact and enforce local whistle bans if the authority is not already pre-empted pursuant to 49 USC § 20106. Therefore, the most efficient use of the Commissions resources would be to review and approve grade crossing modifications which are proposed as a part of a FRA waiver request.

F. ADOPTING REGULATIONS AND RULES BY REFERENCE

The Commission should not adopt rules incorporating by reference FRA or DOT regulations.[3] The FRSA provides that a state may not enforce a rule "related to railroad safety" once the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement. 49 U.S.C.A. §20106. By definition, adopting FRA regulations will run afoul of the FRSA preemption provision. See also CSX Transportation v. Easterwood, 507 U.S. 658, 663 (1994)(regulations adopted by DOT under laws regulating highway safety must be given preemptive effect under FRSA).

Nor should the Commission adopt the any of the railroads' General Code of Operating Rules. There is no question that the FRA has adopted regulations to ensure compliance with their GCOR. See 49 CFR Part 217, "Railroad Operating Rules." FRSA preemption would preclude state action on the same subject matter. 49 U.S.C.A. §20106, see also Burlington Northern Railroad v. Montana, 880 F.2d 1104, 1106 n.1 (9th Cir. 1989). The FRA has emphasized that Part 217 is intended to "[i]mprove employee compliance with railroad operating rules" and reduce accidents resulting from inattention to the railroad operating rules. FRA Safety Directive 97-1, 62 Fed. Reg. 35,330 (1997). The FRA also uses its SACP to oversee the effective development and enforcement of railroad operating rules. For these reasons, the Commission should not adopt the GCOR by reference.

IV. MODIFICATION OF EXISTING RULES

The BNSF and UP look forward to reviewing the Commission's revisions of the rules found at WAC 480-62. In undertaking its review, the railroads hope that their

[3] As explained above, the most meaningful way for the Commission to promote railroad safety is through the federal-state participation program.

discussion of preemption contained in its submissions to the Commission will be helpful. Clearly some of the existing rules cover areas that are preempted. The railroads believe, for example, that rules related to locomotive speedometers, hazardous materials handling and bridge safety are preempted by provisions of the Locomotive Boiler Inspection Act, Safety Appliance Act, and Federal Railroad Safety Act.

V. CONCLUSIONS

BNSF and UP look forward to the stakeholders' workshop scheduled for May 27, 1999. We hope that the information provided here will be helpful in reviewing proposed rules for that workshop. If the Commission would like any additional information prior to the workshop, please feel free to contact us.

Very truly Yours,

KROSHCEL GIBSON KINERK REEVE, L.L.P.

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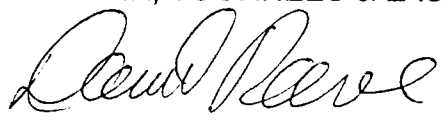

Carolyn Larson
Attorney for Union Pacific Railroad Company

DMR/klw

UNITED TRANSPORTATION UNION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS versus MICHAEL FOSTER, as Governor of the State of Louisiana and RICHARD IEYOUB, as Attorney General of the State of Louisiana

CIVIL ACTION No. 98-2443 SECTION: E/5

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1998 U.S. Dist. LEXIS 14576; 14 BNA IER CAS 936

September 9, 1998, Filed, Entered

DISPOSITION: [*1] Motions of plaintiffs United Transportation Union and Brotherhood of Locomotive Engineers, and of intervenor, Association of American Railroads, for a preliminary injunction GRANTED.

CORE TERMS: regulation, railroad, locomotive, state law, testing, recorder, train, crossing, engineer, preliminary injunction, federal law, pre-emption, alcohol, interstate commerce, toxicological, audible, hazard, Fourth Amendment, warning, prescribe, federal regulation, highway, subject matter, pre-empted, subsumed, pre-empt, covering, blood, equipping, whistle

COUNSEL: For UNITED TRANSPORTATION UNION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, plaintiffs: Blake G. Arata, Jr., Benjamin B. Saunders, Davis, Saunders, Arata & Rome, Metairie, LA.

For UNITED TRANSPORTATION UNION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, plaintiffs: Lawrence M. Mann, Alper & Mann, Washington, DC.

For ASSOCIATION OF AMERICAN RAILROADS, intervenor-plaintiff: Patrick A. Talley, Jr., Michael Raudon Phillips, Frilot, Partridge, Kohnke & Clements, LC, New Orleans, LA.

JUDGES: MARCEL LIVAUDAIS, JR., United States District Judge.

OPINIONBY: MARCEL LIVAUDAIS, JR.

OPINION: ORDER AND REASONS

Plaintiffs, United Transportation Union and Brotherhood of Locomotive Engineers ("the Unions") have filed a complaint for declaratory and injunctive relief to enjoin enforcement of three statutes recently passed by the Louisiana State Legislature, namely, Louisiana Senate Bill No. 26, which enacts La. R.S. 32:661.2, requiring toxicological testing of railroad crews involved in collisions at railroad crossings, Louisiana [*2] Senate Bill No. 30, which amends and reenacts La. R.S. 32:168, requiring the equipping of locomotives with audible signaling devices and requiring audible signaling by train operators when approaching railroad highway crossings, and Senate Bill No. 100, which enacts La. R.S. 32:176, requiring notification to state law enforcement officers if the train possesses an event recorder and also requiring the furnishing of the information contained on the recorder after railroad accidents at railroad highway crossings to state law enforcement officers. Plaintiffs contend that the statutes must be enjoined and seek a declaration that these three statutes violate the Commerce Clause of the United States Constitution because they impose an undue burden on interstate commerce and that they are preempted by federal law pursuant to the Supremacy Clause of the Constitution. In conjunction therewith, plaintiffs submitted a request for a temporary restraining order and an application for a preliminary injunction. The Court granted the temporary restraining order. The Association of American Railroads moved for leave to intervene as plaintiff, which was granted as no party objected to the intervention. [*3]

A hearing on the preliminary injunction was scheduled and conducted and oral argument was granted to plaintiffs, intervenor, and defendant, the State of Louisiana. The State, who appeared for Michael Foster, as Governor of the State of Louisiana, and for Richard Ieyoub, as Attorney General of the State of Louisiana, opposes the entry of a preliminary injunction.

The fundamental basis of this action arises from the uniformity of regulation provision of the Federal Railroad Safety Act ("FRSA"), *49 U.S.C. § 20106,* which provides:

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 [*4] Government; and

(3) does not unreasonably burden interstate commerce.

The plaintiffs contend that the challenged statutes are preempted by this FRSA, that Senate Bill 30, La. R.S. 32:168, is preempted by the Locomotive Boiler Inspection Act, as amended, *49 U.S.C. § 20701,* et seq, and that two of the state laws are unconstitutional as they burden interstate commerce in violation of the Commerce Clause of the United States Constitution. The plaintiffs also contend that La. R.S. 32:661.2 offends the Fourth Amendment of the United States Constitution, as extended to the states by the Fourteenth Amendment.

The Supreme Court in *Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986),* discussed the effect of the Supremacy Clause on state laws which relate to federal laws and regulations on the same subject, observing:

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance [*5] with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. . . .

The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.

[citations omitted]; *Louisiana Public Service Commission, 106 S. Ct. at 1898-99.*

The Supreme Court in *CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)* explained the process by which a determination is made whether a state law is preempted by the FRSA, stating:

Where a state statute conflicts with, or frustrates, federal law, the former must give way. U.S. Const., Art. VI, cl. 2; *Maryland v. Louisiana, [*6] 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L. Ed. 2d 576 (1981).* In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947).* Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 103 S. Ct. 2890, 2898, 77 L. Ed. 2d 490 (1983).* If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.

According to [the pertinent provision of the FRSA], applicable federal regulations may pre-empt any state "law, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. [Citation [*7] omitted] Thus, the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as Georgia negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings. To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than they "touch upon" or "relate to" that subject matter, cf. *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992)*(statute's use of "relating to" confers broad pre-emptive effect), 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. See Webster's Third New International Dictionary 524 (1961) (in the phrase "policy clauses covering the situation," cover means "to comprise, include, or embrace in an effective scope of treatment or operation"). The term "covering" is in turn employed within a provision that displays considerable solicitude

for state law in that its express pre-emptions clause is both prefaced and succeeded by express savings clauses. [*8]

CSX Transp., 113 S. Ct. at 1737-38.

The FRSA itself plainly states that "laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable," allowing the states to pass their own laws on this subject only in these circumstances: (1) until the Secretary of Transportation prescribes a regulation or issues an order on that subject; (2) when the law, regulation or order "is necessary to eliminate or reduce an essentially local safety hazard"; (3) when the law, regulation or order "is not incompatible with a law, regulation or order" of the federal government; and (4) when the order does not unreasonably burden interstate commerce. Thus, the statute contains savings clauses for states to pass their own regulations and laws only until the federal government addresses the issue and after that, only if it addresses essentially a local hazard, doesn't conflict with federal law on the same subject, and doesn't burden interstate commerce. Creating a uniform national law on railroad regulations allows the railroads to cross state lines regularly and in the normal course of business without having to constantly alter or adapt to the laws [*9] of each individual state, and without being in peril of offending those laws.

With these general pre-emption principles in mind, each individual statute adopted shall be considered.

Senate Bill No. 26, La. R.S. 32:661.2

Toxicological Testing

Senate Bill 26, as enacted as La. R.S. 32:661.2, which was signed into law by the Governor of the State of Louisiana on May 6, 1998, concerns the toxicological testing of locomotive engineers. It provides as follows in relevant part:

A.(1) Any person who operates a locomotive engine upon the railroad tracks of this state shall be deemed to have given consent, subject to the provision of R.S. 32:662, to a chemical test or tests of his blood, breach, urine, or other bodily substances for the purpose of determining the alcoholic content of his blood and the presence of any abused or illegal controlled dangerous substances as set forth in R.S. 40:964 in his blood if he is involved in a collision at a railroad crossing at any roadway of this state alleged to have occurred when he was driving or in actual physical control of the locomotive engine while believed to be under the influence of alcoholic beverage or of any abused or illegal [*10] controlled dangerous substance as set forth in R.S. 40:964.

(2) The test or tests shall be administered at the direction of the law enforcement officer having reasonable grounds to believe the person to have been operating or in physical control of the locomotive engine while under the influence of either alcoholic beverages or any abused or illegal controlled dangerous substance as set forth in R.S. 40:964. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

The Unions allege that this statute is pre-empted by federal law, as the Federal Railroad Administration ("FRA") has completely and substantially subsumed the subject matter of alcohol and drug testing in the railroad industry, and that it offends the Fourth Amendment. In relation to the pre-emption issue, the FRA has issued regulations, contained in 49 C.F.R. Part 219, which concern the use and possession of alcohol and controlled substances by railroad employees. 49 C.F.R. § 219.201 details the circumstances under which mandatory post-accident toxicological testing is required, which includes a (1) major train accident, i.e., any train [*11] accident involving damage of more than $6,600 in 1998; (2) a reportable injury; (3) a fatality to any on-duty railroad employee; or (4) a passenger train accident causing a reportable injury to a passenger. However, the FRA promulgated regulations except the railroad employees from testing "in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing." 49 C.F.R. § 219.201(b).

The basis for the Fourth Amendment challenge is that the statute allows mandatory toxicological testing of railroad employees' blood, breath, urine, or other bodily substance, if the employee is involved in a collision while he was driving or in actual physical control of the locomotive engine and the law enforcement officer has "reasonable grounds to believe" that the engineer was operating the locomotive while under the influence of alcohol or illegal controlled substances. The Unions argue that the "reasonable grounds to believe" standard is less than the probable cause requirement contained in the Fourth Amendment, as applied to the states in the Fourteenth Amendment.

As noted by the Supreme Court in *Skinner v. Railway Labor [*12] Executives' Association, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)*, the FRA promulgated detailed and specific regulations addressing the problem of alcohol and drug use by railroad employees, which, among other things, prohibit employees from reporting to work while under the

influence of, or impaired by, alcohol, while having a blood alcohol concentration of .04 or more, or while under the influence of, or impaired by, any controlled substance. *109 S. Ct. at 1408,* citing 49 C.F.R. § 219.101(a)(2). Subpart C, which is mandatory, requires post-accident toxicological testing, under the circumstances previously stated, and Subpart D, which is permissive, requires covered employees to submit to breath or urine tests where there is a "reasonable suspicion" that the employee's acts or omissions may have contributed to an accident, in the event of specific rule violations, such as excessive speeding, or when a supervisor has "reasonable suspicion" that an employee is under the influence of alcohol, based upon specific, personal observations concerning appearance, behavior, speech or body odors of the employee. *109 S. Ct. at 1410.*

These regulations provide for administrative [*13] "searches" of the employees' blood and urine under specific circumstances stated in a detailed plan. The purpose for such testing, as described by the Skinner Court, is "'to prevent accidents and casualties that result from impairment of employees by alcohol or drugs'", not to assist in the prosecution of employees. *109 S. Ct. at 1415.* By contrast, the predominant purpose of Louisiana Senate Bill 26, La. R.S. 32:661.2, is to aid state law enforcement officers in the criminal prosecution of locomotive engineers. As such, the statute allows the law enforcement officers to "search" the bodily fluids of the locomotive engineers based upon a reasonable suspicion, which does not rise to the level of "probable cause" mandated by the Fourth Amendment. *50 Fed. Reg. 31565* (Aug. 2, 1985); See, *Tamez v. City of San Marcos, Texas, 118 F.3d 1085, 1093 (5th Cir. 1997); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1189 (5th Cir. 1991).*

The detailed federal regulations adopted by the FRA provide an administrative scheme by which the federal government seeks to prevent alcohol and illegal drug use by railroad engineers and thus enhance the safety of railroad operations, designed [*14] to aid not only railroad passengers and motorists and pedestrians at crossings, but railroad employees and those having an interest in cargo being carried by the railroad. The primary purpose of the administrative regulations is to deter "employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place". *Skinner, 109 S. Ct. at 1420.* While such testing may also aid in criminal prosecution, such is not the primary objective of the regulations.

By contrast, the predominant, if not the sole, purpose of the Louisiana statute at issue requiring toxicological testing of railroad engineers following an accident is to aid in criminal prosecution of these individuals. The fact that such testing is allowed on the basis of a "reasonable suspicion", which is "a test clearly short of traditional criminal probable cause," conflicts with Fourth Amendment guarantees. *50 Fed. Reg. 31508-01.* The Unions concede that if the statute allowed drug and alcohol testing on the basis of the law enforcement officer having probable cause to believe the engineer was operating the locomotive while under the influence, they would not have a Fourth Amendment challenge. [*15] Neither the plaintiffs, nor this Court, nor the State, can rewrite the statute so that it will comport with constitutional dictates, however. Only the legislature can legislate.

The State contends that the Act is not pre-empted by federal law and that its purpose is to give state law enforcement officials investigating a rail crossing accident the power to administer chemical tests to the operators of trains to determine the presence of alcohol and drugs in the operators and to add the operator of a locomotive train to the group of persons who have given implied consent to chemical tests. This argument, like the statute, while well-intentioned, ignores the plethora of federal regulations governing the administration of such tests to railroad employees. The federal regulatory scheme for administering such tests in accident situations is specific as to circumstances and how the testing is to be carried out. If the state had probable cause to believe that one of its criminal statutes had been violated, then state law enforcement officials could certainly enforce such statutes. See, e.g., *Schmerber v. California, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908 (1966)* [*16] (Supreme Court found that chemical testing without the actual consent of the individual suspected of driving while intoxicated is constitutional, where such is done with probable cause and in a reasonable manner). The Act in question affords state law enforcement officials the right to administer chemical tests using a "reasonable suspicion" test, which is less than the Fourth Amendment guarantees for a state mandated search to enforce criminal laws.

Given the complexity and specificity of the federal administrative regulations in the area of toxicological testing of railroad employees, the Court finds that federal regulations have substantially subsumed this particular area pursuant to the FRSA as evidenced by 49 C.F.R. Part 219. Senate Bill 26, La. R.S. 32:661.2, has been pre-empted by the FRSA and related federal regulations.

Further, for the reasons previously stated, the Court also finds that the statute at issue does not comport with the requirements of the Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment.

Senate Bill No. 30, La. R.S. 32:168

Audible Signalling Devices

Senate Bill No. 30, which amends and [*17] reenacts La. R.S. 32:168, and becomes effective in March, 1999, provides in relevant part:

A. Every railroad company or person owning and operating a railroad in this state shall equip each locomotive engine with a bell and whistle or horn which, under normal conditions, can be heard at a distance of not less than one quarter mile.

B. Except as specifically exempted by law, any person controlling the motion of an engine on any railroad shall commence sounding the audible signal when such engine is approaching and not less than one quarter of a mile from the place where such railroad crosses any highway. Such sounding shall be prolonged either continuously or by blasts of the whistle or horn to be sounded in the manner provided by the Uniform Code of Railroad Operating Rules until the engine has crossed the roadway, unless the distance from that crossing and the start of the movement or the distance between the crossings is less than one quarter mile, in which event such warning signals shall be so sounded for the lesser distance. In cases of emergency said whistles or horn may be sounded in repeated short blasts.

The Unions seek a preliminary injunction prohibiting [*18] the enforcement of this statute on the grounds that it prescribes a regulation in an area which has been subsumed by federal laws and regulations, i.e., 49 C.F.R. Part 229, it burdens interstate commerce, and it is clearly precluded by the Locomotive Boiler Inspection Act, as amended, *49 U.S.C. §§ 20701*-20703. The State admits that Senate Bill 30 [Act 83, enacted as La. R.S. 32:168] covers the same subject matter as *49 U.S.C. § 20153* and 49 C.F.R § 229.129. The State suggests, however, that under the FRSA, savings clauses allow a state to legislate in an area of federal regulation if (1) it is necessary to eliminate or reduce an essentially local safety hazard; (2) it is not incompatible with a federal law, regulation, or order; and (3) it does not unreasonably burden interstate commerce. The defendants' position is that this Act meets these requirements.

Under regulations promulgated by the FRA, "each lead locomotive shall be provided with an audible warning device that produces a minimum sound level of 96db(A) [decibels] at 100 feet forward of the locomotive in its direction of travel. The device shall be arranged so that it can be conveniently operated from the engineer's [*19] normal position in the cab." 49 C.F.R. § 229.129. The Locomotive Boiler Inspection Act, *49 U.S.C. § 20702*, requires all locomotives to be in compliance with all regulations prescribed by the Secretary, including specifically to contain all parts and appurtenances, such as audible warning devices, required by the applicable Code of Federal Regulations. The Swift Rail Development Act of 1994, *49 U.S.C. § 20153*, mandates that the Secretary of Transportation prescribe "regulations requiring that a locomotive horn shall be sounded while each train is approaching and entering upon each public highway-rail grade crossing." It is evident that the area of audible warning devices and the sounding of such devices at rail-highway crossings are areas of specific federal regulation.

More than seventy years ago, the United States Supreme Court held in *Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926)*, that in the area of the equipping of locomotive engines, Congress intended the Locomotive Boiler Inspection Act to occupy the field, such that the federal regulations "must prevail [and] requirements by the states are precluded, however commendable or [*20] however different their purpose." *47 S. Ct. at 209-210.* The Locomotive Boiler Inspection Act continues to occupy the field of the regulation of locomotive equipment. *Missouri Pacific R. Co. v. Railroad Com'n of Texas, 833 F.2d 570, 576 and 576 n. 7 (5th Cir. 1987); Missouri Pacific R. Co. V. Railroad Com'n of Texas, 948 F.2d 179, 186 (5th Cir. 1991).* In fact, the Ninth Circuit in *Marshall v. Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983)*, found that the Federal Railroad Safety Act indicated the intent of Congress "to leave the Boiler Inspection Act intact, including its preemptive effect." Id.

While acknowledging the extensive federal regulations in the area of audible warning devices and their signalling, e.g., 49 C.F.R. § 20153, the State contends that these regulations do not offend the FRSA because they address an essentially local hazard and do not unreasonably burden interstate commerce. An essentially local hazard concerns a particular crossing in a locality, not a state-wide hazard, else the statute would have so many exceptions it would be rendered meaningless. Allowing each state to prescribe its own regulations concerning the equipping of [*21] locomotives would burden interstate commerce, as each train would have to stop at state boundaries and change, add, or delete its equipment, depending upon that state's regulation. These are the concerns which the Locomotive Boiler Act and the FRSA intended to address.

Upon reviewing the authorities concluding that federal regulation occupies the field of equipping of locomotives, there is no doubt that state laws on the same

subject are pre-empted. For the same reasons, state regulations concerning the sounding of audible warning devices at highway crossings are likewise pre-empted by federal regulations and statutes.

Senate Bill No. 100, La. R.S. 32:176

Recording Devices

Senate Bill No. 100, enacting La. R.S. 32:176, provides in relevant part:

Immediately following a railroad crossing accident, the engineer or a responsible member of the crew, if the engineer is unable to provide the information, shall inform the law enforcement officer investigating such accident if the train possesses an event recorder which records and preserves any information which is relevant to the accident or may be of assistance in the investigation of the accident. Upon request of the law [*22] enforcement officer, the railroad or its representative shall provide, in a timely manner, any such information contained on the event recorder whose release is not prohibited by federal law, rule or regulation.

Like the areas of toxicological testing of railroad engineers and audible warning devices, the equipping of trains with event recorders [i.e, "black boxes"], is the subject of extensive federal regulation. *49 U.S.C. § 20137* defines the term "event recorder" as a device that "(1) records train speed, hot box detection, throttle position, brake application, brake operations, and any other function the Secretary of Transportation considers necessary to record to assist in monitoring the safety of train operation, such as time and signal indication; and (2) is designed to resist tampering." Section 30137 requires that the Secretary of Transportation prescribe regulations requiring that a train be equipped with an event recorder within a specified time period. Such regulations were promulgated in 49 C.F.R. Part 229. 49 C.F.R. § 229.25 mandates that event recorders be tested and lists parameters for such testing. 49 C.F.R. § 135 dictates that event recorders be installed [*23] on any train operated faster than 30 miles per hour and dictates how the locomotive is to respond to defective equipment, how the event recorder may be removed from service, and requires that the railroad preserve the data contained on the recorder and provide it to the FRA or the National Transportation Safety Board in the event of an accident. The regulation also specifically provides:

Nothing in this section is intended to alter the legal authority of law enforcement officials investigating potential violation[s] of State criminal law[s] and nothing in this chapter is intended to alter in any way the priority of National Transportation Safety Board investigations . . ., nor the authority of the Secretary of Transportation to investigate railroad accidents . . . .

49 C.F.R. § 229.135.

These federal regulations require locomotives to be equipped with event recorders and to furnish the information to specified federal authorities, in certain delineated situations. Further, it allows states to obtain the information on the recorders in the enforcement of their criminal laws. As such, event recorders are an area of federal regulation in which the state has also [*24] sought to regulate. The states already possess the authority to enforce their criminal laws and to subpoena such information as is necessary to aid in their criminal investigations. This statute does not fall into the savings provisions of the FRSA because it does not address an essentially local hazard and it concerns the same area as extensive federal regulations. Considering the wealth of regulations in this area, federal law has subsumed the subject matter of event recorders and pre-empts Senate Bill No. 100, La. R.S. 32:176.

Standards for Issuing a Preliminary Injunction

The Fifth Circuit has established the following requirements which the plaintiff must establish in order to be entitled to preliminary injunctive relief: (1) a substantial likelihood of success on the merits; (2) a substantial threat that irreparable injury will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) granting the preliminary injunction will not disserve the public interest. *Mississippi Power & Light v. United Gas Pipe Line, 760 F.2d 618, 621 (5th Cir. 1985); Trans World Airlines, Inc. V. Mattox, 897 F.2d 773, 783 [*25] (5th Cir. 1990); Doe v. Duncanville Independent School District, 994 F.2d 160, 163 (5th Cir. 1993).* A district court's decision whether to grant or deny a preliminary injunction will be reviewed only upon a showing of abuse of discretion. *Doe, 994 F.2d at 163; M.P.&L., 760 F.2d at 621.*

The Unions must establish these four prerequisites in order to obtain preliminary injunctive relief. This Court has already entered a temporary restraining order in their favor pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. The Court finds that there is a substantial likelihood that the plaintiffs will prevail on the merits, for the reasons previously stated. Federal regulations have substantially subsumed the areas addressed by the three state statutes in question, and the toxicological testing requirement offends the Fourth Amendment to the Constitution. The Court also finds that there is a threat of irreparable injury, as railroad

employees could be subject to chemical testing in violation of their constitutional rights and the railroads will have to alter their "whistle posts", i.e., the posts that advise the engineers when to sound their whistles, to meet the state [*26] requirements, which differ somewhat from the federal requirements. The threatened injury outweighs the harm to the state, as the violation of the engineers' constitutional rights is a serious harm. Finally, the Court finds no disservice to the public interest, as there are extensive federal regulations in the areas addressed by the state statutes which will protect the public and are designed to increase railroad safety. Thus, the four requirements for the entry of a preliminary injunction are met.

Conclusion

For the above and foregoing reasons, the Court finds that the plaintiffs and intervenor have established their entitlement to the entry of a preliminary injunction. Accordingly,

IT IS ORDERED that the motions of plaintiffs United Transportation Union and Brotherhood of Locomotive Engineers, and of intervenor, Association of American Railroads, for a preliminary injunction be and are hereby GRANTED.

New Orleans, Louisiana, September 9, 1998.

MARCEL LIVAUDAIS, JR.

United States District Judge