TR-230876

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State of Washington
Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

Re: Rulemaking Petition Submitted by SMART Transportation Division
Docket TR-230876
Our File No.: UNI45.115

Dear Sir or Madam:

This office represents Union Pacific Railroad Co. ("Union Pacific"), which transports a broad array of commodities and products important to Washington and the national economy. Union Pacific received notice dated Oct. 31, 2023 that the Commission received the referenced petition, which dates Oct. 9, 2023. The petition, pursuant to RCW 34.05.330, asks the Commission to make a rule "requir[ing] new railroad train crew employees to obtain a minimum amount of actual working experience before being placed in a supervisory or lead position involving the operation of trains." Pet. 1. We hereby ask the Commission to deny the petition pursuant to the same statute.

As a threshold matter, we observe that statutory authority constitutes the basis of rulemaking. *See, e.g., Washington Rest. Ass'n v. Washington State Liquor & Cannabis Bd.*, 10 Wash. App. 2d 319 (2019) ("It is well settled that an agency has "no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted.") As such, Washington state agencies undertake nearly all rulemaking in response to a directive from the Legislature.

WAC 82-05-020, which governs the Commission's consideration of the petition, reflects this foundational effect of statutory authority. It encourages petitioners to address, *inter alia*, whether the rule would (a) be authorized, (b) conflict with or duplicate other law (federal, state, or local), and/or (c) justifies the added costs to comply. The subject petition does none of these things, thus leaving it to an already overburdened UTC staff to evaluate these important issues.

Furthermore, we find no authority in Washington state statute for the proposed rulemaking. Indeed, to the contrary, we find multiple bodies of law that would preempt the petition's desired regulation. As noted, the proposed rule

seeks to regulate the minimum qualifications to serve as a train conductor or engineer. Federal safety rules comprehensively regulate this subject, however, thus preempting state law. And, as the petition acknowledges, this question has been the subject of collective bargaining in the rail industry. By seeking to end-run that process, the petition asks the Commission to interfere with federal labor law.

The Federal Railroad Safety Act (FRSA) prohibits states from regulating train-crew qualifications. FRSA creates a nationally uniform rail-safety regime. It empowers the Federal Railroad Administration (FRA) to issue rules regulating "every area of railroad safety," 49 U.S.C. § 20103(a), and mandates that all "[l]aws, regulations, and orders related to railroad safety … shall be nationally uniform to the extent practicable," *id*. § 20106(a)(1).

To enforce this mandate, the FRSA "preempts all state regulations aimed at the same safety concerns addressed by FRA regulations." *Burlington N. R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989). The statute thus allows states to "adopt or continue in force a law, regulation, or order related to railroad safety" only until FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id*. § 20106(a)(2). Once FRA has addressed the subject matter, "an additional or more stringent" state regulation can avoid preemption only if it satisfies a three-prong savings clause, requiring that it "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce." *Id*.

FRSA preemption applies here. To start, the proposed rule is related to railroad safety. The petition claims the rule is needed to ensure "the safe operation of trains." Pet. 1. The rule thus falls within the FRSA's preemptive scope. In turn, the key question is whether FRA's rules "cover[] the subject matter of the State requirement," 49 U.S.C. § 20106(a)(2)—in other words, whether "federal regulations substantially subsume the subject matter" of the proposed rule. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). "'The subject matter of the state requirement' is the safety concerns that the state law addresses." *BNSF Ry. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999). Identifying those concerns "necessarily involve[s] some level of generalization that requires backing away somewhat from the specific provisions at issue"; preemption does not require that federal and state law cover "identical" topics. *Id*.

Here, the alleged safety concern behind the proposed rule is whether railroad employees are qualified to serve "in supervisory or lead positions in train operations." Pet. 1. And federal laws and regulations directly and comprehensively cover this subject. "Congress's effort to increase rail safety" through the FRSA "included ensuring that only those locomotive engineers and train conductors who met federal training and safety standards could operate trains." *Bhd. of Locomotive Eng'rs & Trainmen v. FRA*, 972 F.3d 83, 88 (D.C.

Cir. 2020). "To that end, [the FRSA] obligates [FRA] … to establish a program requiring the certification of any operator of a locomotive and the certification of train conductors." *Id*. (cleaned up). "Congress placed the onus on each railroad carrier to develop and operate its own certification programs for the engineers and conductors it employs. Congress then mandated that each railroad's certification program comply with minimum program requirements established by the Secretary, and that each program be individually approved by the Secretary." *Id*. (cleaned up).

FRA has implemented this congressional command. FRA's regulations at 49 C.F.R. Part 240 "prescribe[] minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all locomotive engineers" to "ensure that only qualified persons operate a locomotive or train." 49 C.F.R. § 240.1(a)–(b). Likewise, the regulations at Part 242 prescribe "standards for the eligibility, training, testing, certification and monitoring of all conductors," to "ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents and to improve railroad safety." *Id*. § 242.1(a)–(b).

As Congress directed, these rules require all railroads to adopt certification programs for both engineers and conductors. See id. §§ 240.101, 242.101. Each railroad must submit its programs to FRA and show that each program "conforms to the specific requirements of" FRA's regulations. *Id*. §§ 240.103, 242.103. One of those requirements is that each engineer candidate must "demonstrate[] … the skills to safely operate locomotives or locomotives and trains," *id*. § 240.211, and each conductor candidate must "demonstrate[] sufficient knowledge of the railroad's rules and practices for the safe movement of trains," *id*. § 242.121; see also id. § 243.1(b) (setting "minimum training and qualification requirements for each category and subcategory of safety-related railroad employee"). And FRA must audit these programs to ensure that they "provide locomotive engineers and conductors the knowledge, skill, and ability to safely operate a locomotive or train." Pub. L. No. 117–58, § 22410, 135 Stat. 429, 740 (2021). In short, these "regulations were enacted to improve railway safety, in part by ensuring that locomotives are only operated by qualified and safe engineers." *Carpenter v. Mineta*, 432 F.3d 1029, 1031 (9th Cir. 2005).

As these rules require, Union Pacific operates extensive engineer and conductor training and qualification programs, which FRA has approved. Union Pacific's training program for new-hire conductors is 14 weeks long, including six weeks of classroom facilitation developing rules knowledge, train handling procedures for switching and road operations, and hands-on equipment demonstrations; six weeks in the field conducting on-the-job training with road and local crews to reinforce skills learned during classroom training and apply rules application; and two weeks of familiarization in their assigned territories in accordance with FRA requirements. Likewise, Union Pacific's student locomotive engineer program is at least 17 weeks long, including seven weeks of classroom or locomotive

simulator facilitation and ten weeks of on-the-job training under the direct supervision of engineers holding FRA Class 1 certificates.

These extensive FRA regulations cover the same subject matter as the petition's proposed rule. Indeed, many courts have recognized as much. For example, *Doyle* considered a Wisconsin law that addressed "who is qualified to operate a train or locomotive safely" by "requir[ing] certain qualifications for" an engineer or trainman. *See* 186 F.3d at 793, 796. The court held that FRSA preemption applied because "[f]ederal regulations clearly cover the subject matter of these requirements," including "the numerous federal regulations in 49 C.F.R. part 240 that set the qualifications of an engineer" and the rules governing "the training of railroad employees." Id. at 796. It did not matter whether the state requirements were "contradictory," "duplicative," or cumulative with the federal rules, because FRA had covered the subject. *Id*.

Other cases are in accord. The Ninth Circuit has held that "federal training regulations do 'substantially subsume' the subject of employee training," so the FRSA preempted the California Public Utilities Commission's attempt to adopt training regulations "more specific and stringent than the federal government's." *Union Pacific R. Co. v. Calif. Pub. Utilities*, 346 F.3d 851, 868 (9th Cir. 2003). And many courts have held that the FRSA preempts state-law claims alleging that railroads' training or qualification programs were deficient. *See*, *e.g.*, *Prentice v. Nat'l R.R. Passenger Corp.*, No. 12-cv-5856, 2014 WL 3868221, at *8 (N.D. Cal. Aug. 6, 2014) (collecting "[n]umerous cases" holding that "state law claims of inadequate certification or training of locomotive engineers are preempted"); *Marsh v. Norfolk S., Inc.*, 243 F. Supp. 3d 557, 570 (M.D. Pa. 2017) (state-law claims aimed at railroad "training, education, instruction, supervision, and qualification are precluded" because FRA has "issued comprehensive regulations covering the[se] subjects"); *Union Pac. R.R. v. Taylor Truck Line, Inc.*, No. CV 15-0074, 2017 WL 839577, at *4 (W.D. La. Mar. 1, 2017) (same); *Lombardy v. Norfolk S. Ry.*, No. 1:12-CV-210, 2014 WL 2468612, at * (N.D. Ind. June 3, 2014) (same).

As a result, the petition's proposed rule could avoid FRSA preemption only by satisfying all three prongs of the statutory savings clause. See 49 U.S.C. § 20106(a)(2). But it cannot satisfy any of them, let alone all. First, the proposed rule would not address "an essentially local safety … hazard." *Id*. § 20106(a)(2)(A). This prong is aimed at problems "not capable of being adequately encompassed within uniform national standards," *Norfolk W. Ry. v. Pub. Utilities Comm'n*, 926 F.2d 567, 571 (6th Cir. 1991), and crew qualifications are not such an issue. For that matter, this prong never applies to laws or rules that would apply statewide—like the proposed regulation. *See id.*; *Duluth, Winnipeg, & Pacific Railway Co. v. City of Orr*, 529 F.3d 794, 798 (8th Cir. 2008). And while failing the first prong alone means the savings clause cannot apply, the proposed rule would not satisfy the other two either. The rule would be "incompatible with a law, regulation, or order of the United States Government," 49 U.S.C. § 20106(a)(2)(B), because it conflicts with federal

labor law (as explained below). And it would "unreasonably burden interstate commerce," id. § 20106(a)(2)(C), because if each state could adopt its own crew qualifications, the result would be "just the patchwork of railroad regulation that ICCTA sought to preempt," *Fayus Enters. v. BNSF Ry*., 602 F.3d 444, 445 (D.C. Cir. 2010).

In short, "state requirements for crew qualifications are ineffective" because "FRA has covered the subject matter of crew qualifications with its extensive regulations." *Doyle*, 186 F.3d at 804. The FRSA would thus preempt the petition's desired regulation.

Beyond FRSA, the proposed rule would be independently preempted by the Railway Labor Act (RLA). Almost a century ago, Congress declared a national policy of "avoid[ing] any interruption to commerce" by encouraging collective bargaining in the railroad industry. See 45 U.S.C. §§ 151a, 152. Congress made it the duty of all railroads and railroad employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes." *Id*. § 152.

To ensure a uniform scheme to resolve such disputes, federal labor law preempts "state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985). "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 65 (2008). While states can enact "genuine minimum labor standard[s]" that happen affect unionized workers, they cannot regulate "areas that Congress left to the free play of economic forces." *520 South Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1126, 1130 (7th Cir. 2008). This form of preemption is called "*Machinists* preemption," after *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).[1]

In distinguishing between permissible workplace standards and impermissible interference in the collective-bargaining process, courts focus on whether a state law is "generally applicable." *See Shannon*, 549 F.3d at 1130 (collecting cases). A law that targets "only one occupation … in one industry" is more likely to be "an interest group deal in public-interest clothing." *See id*. at 1130–1132. Such a narrowly targeted law also "equates more to a benefit for a bargaining unit than an individual protection" and "serves as a disincentive to collective bargaining" by "encourag[ing] … employers or unions to focus on lobbying at the state capital instead of negotiating at the bargaining table." Id. at 1132–33. And courts consider whether the law imposes "minimal substantive requirements" or "a low threshold" that can serve as "the backdrop for negotiations"

[1] Originally developed under other labor laws, *Machinists* preemption applies under the RLA too. *See Air Transp. Ass'n of Am. v. City & Cty. of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001); *cf. Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 263 n.9 (1994)

between employers and unions. *See id*. at 1134. "[A]s a standard becomes more stringent, the state, at a certain point, effectively substitutes itself as the bargaining representative." *Id*. at 1136.

This reasoning supports preemption here. For one thing, the petition's rule targets "only one occupation … in one industry," *id*. at 1130–1132, by focusing solely supervisory and leading train crew positions. For another, the petition explicitly attempts an end-run around the collective bargaining process. It asserts that the rule is necessary because railroads "are eliminating longstanding collective bargaining agreement requirements" related to crew qualifications. Pet. 1. But railroads cannot unilaterally change collectively bargained contract requirements—those requirements must be agreed on by railroads and unions (or, as happened last year, imposed by Congress and the President[2]). The petition thus asks the Commission to impose requirements that the unions could not secure through the most recent collective bargaining process. Adopting this proposal would thus create "a disincentive to collective bargaining." Id. at 1132–33. Finally, the petition's rule is not "a low threshold," but a "stringent" requirement that (as noted above) goes beyond what the FRA's comprehensive safety rules require. *See id*. As a result, the RLA would separately preempt the proposed rule.

As noted in our opening paragraphs, the petition fails to offer Commission staff substantive legal or evidentiary basis on which to proceed with the rulemaking. Like its constituents, government exists in a world of constrained resources. The Commission has ample other matters of public health and safety on its plate that warrant its attention.

Union Pacific asks the Commission to deny the subject petition and thanks it for this opportunity to comment.

Very truly yours,

Ty K. Wyman

TKW:mcd

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[2] See White House, *Remarks by President Biden at Signing of H.J. Res. 100 Providing a Resolution to Avert a Nationwide Rail Shutdown* (Dec. 2, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/0 2/remarks-by-president-biden-at-signing-of-h-j-res-100-providing-a-resolution-to-avert- a-nationwide-rail-shutdown/