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July 15, 2003

VIA FACSIMILE AND US MAIL

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

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

Re: BNSF and UP Comments on Proposed Rules for
Remote Control Locomotive (RCL) Operations
TR – 021465

Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) are disappointed that the Commission Staff has proposed rules purporting to regulate Remote Control Locomotive (RCL)¹ operations – a topic clearly preempted by federal law. While agreeing that FRA actions have preempted the field of RCL operations, the Commission Staff and Attorney General's Office suggest the Commission retains power to regulate within the preempted field. This is true, however, only where the rule is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States government; and does not unreasonably burden interstate commerce. Since the three-prong test of the FRSA is not satisfied, the proposed rules would be invalid; and if adopted by the Commission could potentially lead to costly and protracted legal challenges. In the hope that such a result can be avoided, BNSF and UP offer the following written comments on the rules proposed under docket TR-021465.

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.

BACKGROUND OF RCL RULEMAKING

Introduction

RCL technology has been extensively studied by the FRA, which has conducted a test program, held a technical conference, issued a safety advisory, and monitored the safety of operations. In denying the Brotherhood of Locomotive Engineers (BLE) request for rulemaking on the federal level, the FRA concluded: "Based on current safety data available to the FRA, there is nothing that would indicate that RCL operations are any less safe than conventional operations." May 1, 2003 Letter from FRA to AFL-CIO at p. 4 (Hereafter Rutter Letter)(Attachment 3); see also Rutter's March 11, 2003 Statement (Attachment 8)("Based on safety data gathered to date, there is nothing to indicate that remote control operations should be banned from use."). Because it fears loss of union jobs, however, the BLE now asks the Commission to adopt rules that would make use of the technology more expensive or burdensome for railroads.

Prior Commission Rulemaking

The topic of RCL operations was first addressed by the Commission as part of rulemaking under Docket TR981102. The Commission Staff requested that the railroads and the unions submit comments regarding any safety concerns involving RCL operations. See, WUTC Notice of Rulemaking, TR981102 (May 27, 1999), Attachment 1. During a workshop held on April 20, 1999, the new technology was explained by the Puget Sound and Pacific Railroad (PS&PR), the only railroad then using the technology in Washington. The only rule to come out of this fact-finding workshop required railroads to notify the WUTC if RCL operations were initiated within the state.

BLE Petitions for Rulemaking

During this early rulemaking, the BLE did not object to the use of RCL by the PS&PR.² The PS&PR, however, was not a BLE organized shop. Indeed, it was not until the UTU was awarded RCL work that the BLE campaign to limit RCL operations began. In early 2002, the BLE was enjoined from striking over the award of RCL jobs to the UTU. See Attachments 2, 5 and 6.

The BLE now seeks to accomplish through the Commission what it could not accomplish in the labor arena. Although couched in terms of safety, in reality the BLE is involved in a labor turf war. BLE statements support the view that rulemaking is driven by the baseless fear that the "[UTU] is assisting the carrier in the wholesale slaughter of the locomotive engineer's position in yard service on BNSF." Pierce Circulates Remote Control Response (Attachment 5). The conflict was summarized by UTU's National Legislative Director as follows:

² The BLE, who was offered the opportunity to submit comments at that time, did not do so. Dale Jeremiah represented the BLE at the workshop in April 1999, but raised no serious objection to the safety of RCL operations. New and improved technology has only improved RCL operations.

Recently the BLE and other unions have challenged the implementation of the remote control technology claiming that such operations are unsafe. They appear to be trying to use this process to either stop the use of remote control in the United States or to gain work for their own members. They have approached various levels of government expressing their supposed safety concerns, except in Montana where BLE has an agreement to operate remote control.

April 16, 2003 UTU Letter by James M. Brunkenhoefer, National Legislative Director, (Attachment 6).

The Present Rulemaking

The present rulemaking is typical of this new BLE strategy: Requesting adoption of rules which, if enacted and enforceable, could eliminate RCL operations in Washington. Compare BLE's Washington State Legislative Board petition to the WUTC (Nov. 1, 2002) with the BLE's Request to the FRA for rulemaking. Attachments 3 and 4. Indeed, all of the areas covered in the denied FRA request for rulemaking are being raised again by the BLE. It is significant to note that BLE safety concerns are not borne out by the railroads' safety performance. In its 2002 Safety Assurance and Compliance Program (SACP) Report, the FRA noted:

As judged by most indicators, long-term safety trends on the nation's railroads are very positive and, while no death or injury is acceptable, progress is being made to continue these positive trends. Although the numbers are preliminary, year 2002 proved to be one of the safest since FRA started collecting data.

- The total number of rail-related accidents and incidents dropped by 13.4 percent from year 2001 (13,926 vs. 16,087) – a historical low for this category
- The accidents/incidents rate (total accidents and incidents per million train-miles) declined 14.1 percent (19.43 vs 22.61)
- The lowest number of railroad-employee fatalities ever, 20, occurred.
- The employee-casualties rate (fatalities and injuries per billion work-hours) dropped by almost 14 percent.
- All rail-related fatalities in year 2002 numbered 948, a 2.4 percent reduction over year 2001.

See Attachment 7.

The extensive written comments and workshop presentations confirmed the safety of RCL operations. Indeed, RCL technology enhances the safety of many train operations. Misunderstood signal or voice communications are virtually eliminated with RCL. The person in control of a RCL movement often has a better line of sight than a person in the locomotive cab and can actually see the speed, see the distance to a joint, and be in control of the equipment.

The Commission Staff has now proposed an amendment to WAC 480-62-320 (Remote Controlled Operations) which would (1) modify reporting requirements and (2) impose conditions on the use of RCL technology in Washington. These attempts to control RCL operations are unacceptable to BNSF and UP. The supposed safety concerns have been raised and rejected by the FRA based on much more thorough and methodical review than performed by the Commission Staff. The FRA found, "Based on current safety data available to the FRA, there is nothing that would indicate that RCL operations are any less safe than conventional operations." Rutter Letter (Attachment 3). In addition, the legal reasoning for these rules is fatally flawed in light of FRA preemption of the field.

ANALYSIS OF THE PROPOSED RULES

Reporting Requirements.

Introduction

The first and last sections of the proposed rule deal with reporting requirements. The BNSF and UP believe that prohibiting RCL operations (even for just 30 days following notice) is beyond the Commission's power. The BNSF and UP have, however, always been willing to respond to the Commission's request for information and have complied with the existing requirement that they identify initiation of RCL operations. Once the existence of RCL operations is reported, the Commission can obtain whatever additional information desired by contacting the railroad. In addition, existing reporting rules allow the Commission to request timetables containing some of the desired information. WAC 480-62 Part 3 (Reporting Requirement Rules). There appears to be no compelling reason for additional notice requirements. The Commission should not require by rule details that can be obtained by a request under WAC 480-62-315 or by a simple phone call.

The Proposed Reporting Rules Are Too Broad and Burdensome

The proposed notice rules are generally broad and potentially burdensome. For example, in Subsection (c) the railroad is being encouraged to be more detailed about location of operations than previously required. Subsections (1) and (d) then require notice if there is any change in the location of RCL operations. Section (e) requires identification of public and private crossings crossed and identification of remote control zones (an undefined term). Section (6) requires a one time report from all railroads using RCL technology without regard to whether new information is being provided.

Read together, even a relatively minor change in RCL operations would require the railroads to generate a new report. For example, would moving RCL operations from the North side of a yard to the South side of a yard require a report? Would temporarily relocating RCL operations to accommodate track maintenance require a report? Would closure of a private crossing in the area of RCL operations require a report?

The Notice Rules Fail to Identify the Terms Used

The proposed additional notice requirements are also vague and fail to adequately inform the railroads of what is required. The Commission Staff has asked for identification of pedestrian crossings, private crossings, yard limits, and remote control zones without defining any of these terms. Pedestrian crossings are not defined, but may (as suggested by the Commission Staff) include areas known to be used by trespassers. Does the term “private crossing” refer to a railroad’s crossing within a yard? Does the term include only deeded or permitted crossings, or also crossings used by trespassers without the railroad’s permission or unperfected prescriptive crossings? If the Commission claims no jurisdiction over private crossings, on what basis does it seek notification? Unless defined, a remote control zone can be read as including any area where RCL operations are conducted. In addition, the rules refer to yard limits, which is a term of art in the railroad industry, but is not defined in the proposed rule.

New Notice Requirements Are Not Necessary

The BNSF and UP believe that the benefits of additional notice requirements do not outweigh burdens imposed. The existing notice rule informs the Commission that RCL operations have been initiated. Remote Control Zones can be identified by requesting railroad timetables under existing rules. Crossings can be identified by requesting track profiles under existing rules.

RULES AFFECTING RCL OPERATIONS

The Effect of the Proposed Rules Is to Control or Prohibit RCL Operations

The major change in WAC 480-62-320 relates to the power to control RCL operations. As written, the rule would allow the Commission to set conditions for a railroad “implement[ing] remote control zones” or “begin[ing] remote controlled operations at any location.” The proposed rule would allow the Commission to prohibit or fine RCL operations unless specified conditions are met. Because the field of RCL operations has been preempted, the Commission is precluded from regulating these operations by imposing penalties, placing conditions on initiation, or regulating the manner in which the operations are performed. The proposed rule, however, seeks to do all these things.

It Is Clear That the Field of RCL Operations Has Been Preempted

The preemption issue has been addressed in the railroads’ prior written comments and workshop presentation. BNSF and UP understand that the preemptive effect of the FRA

oversight of RCL operations is not being challenged by the Commission Staff. Indeed, preemption under the facts is clear. In Burlington Northern and Santa Fe Railway, et al, v. Doyle, 186 F.3d 790, 801 (7th Cir. 1999), the court described when so called “negative preemption” occurs:

When the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is preempted. See Norfolk & W Ry. V. Public Util. Comm’n, 926 F.2d 567, 570 (6th Cir. 1991)(FRA decision not to impose requirement of walkways on railroad bridges preempted state requirement of such walkways); Burlington N. R.R., 880 F.2d at 1106-07 (FRA’s considering adopting rule requiring caboose but declining to do so reinforced conclusion that telemetry regulation preempted state requirement for caboose); Missouri & P. R.R. v. Texas R.R. Comm’n 850 F.2d 264, 267-68 (5th Cir. 1998)(same).

The extent of the FRA programs, investigations, oversight and data collection in this area has been previously presented. Since BNSF and UP’s prior submission, however, the FRA has denied in writing the BLE request for rulemaking. See Rutter Letter (Attachment 3). As noted by Mr. Rutter, the decision of the FRA was made after a careful safety analysis and is supported by subsequent safety information gathered by the FRA.

In its April 3, 2003 Supplemental Statement the BLE took an extremely narrow view of when negative preemption occurs, arguing that the state regulation is not preempted until the FRA gives notice that it will not undertake rulemaking. Even this narrow (and erroneous) standard has been met. The Rutter Letter leaves no doubt that the FRA declined to issue emergency orders or to engage in rulemaking.³ Mr. Rutter also noted, however, that the FRA had declined to establish new rules years before.

By issuing the guidelines, FRA effectively declined to establish the rules sought by BLE in its November 2000 petition for rulemaking. Although FRA did not officially deny BLE’s petition, issuance of the guidelines implicitly conveyed FRA’s conclusion that rules were not necessary at this time, and that FRA’s guidelines constituted the agency’s present conclusions concerning RCL operations

Commission Rulemaking Authority Is Limited by the FRSA

³ By letter dated November 16, 2000, the Brotherhood of Locomotive Engineers wrote the FRA requesting a rulemaking on RCL operations. The matter was assigned docket number FRA-2000-8422. On May 1, 2003, the FRA responded to the TTD of the AFL-CIO, with which the BLE is affiliated, denying the request for either a rulemaking or emergency orders. If the BLE is correct that “The FRA has the opportunity to close this debate with minimal agency action”, then the issue was decided in May. BNSF and UP, however, agree with Mr. Rutter’s view that FRA action (which preempted the field) occurred much earlier.

Once a subject matter is preempted, all local regulations that have a “connection with” or “reference to” the subject matter are prohibited. In CSX v. Plymouth, 86 F.3d 626 (6th Cir. 1996) the court stated that, “A federal statute that expressly calls for preemption of matters ‘relating to’ the subject matter of that statute, preempts ‘actions having a connection with or reference to’ that subject matter.” Id. (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)). The Washington Supreme Court has held that even if a city has authority over grade crossings, attempts to regulate railroad operations over the crossing are preempted. Seattle v. BNSF, 145 Wn.2d 661; 41 P.3d 1169 (2002). The court concluded that the Seattle ordinance did more than simply “touch upon” or “relate to” the preempted field. Id. at 1174.

The FRA has occupied the field of RCL safety, including the areas under consideration by the Commission Staff. The BLE petition for rulemaking to the FRA covers all the subject matters now under consideration. It is irrelevant that the Commission is attempting to regulate an area within its statutory authority that it views as essential to public safety. The federal policy that rules “related to railroad safety shall be nationally uniform to the extent practicable” controls. 49 U.S.C.A. §20106.

The state of Washington is not without a role under the FRSA, but its authority is limited. A Commission may adopt a rule related to railroad safety when the rule is necessary to eliminate or reduce an essentially local safety hazard, is not incompatible with the FRA order, and does not unreasonably burden interstate commerce. 49 U.S.C.A. §20106. The first question present in this rulemaking is whether there is a local safety hazard supporting local action.

The Ninth Circuit has recently held:

The FRSA provides that the rules regulating railroad safety “shall be nationally uniform to the extent practicable,” and expressly preempts state authority to adopt safety rules, save for two exceptions. *Id.* § 20106. States are permitted to adopt railroad regulations if the Secretary of Transportation has not “prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement.” *Id.* Alternatively, if the DOT has “cover[ed]” the subject matter,

A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security 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.

Union Pacific v. California Public Utilities, No. 01-15531, Slip Op. at 8034-35 (9th Cir. 2003). Likewise, the Commission in this rulemaking may not regulate in the area of RCL operations except to eliminate or reduce an essentially local safety hazard.

In the California Public Utilities case, California argued that the unusual geometry of a curve, its proximity to an important waterway, a history of recent accidents, and the potential catastrophic environmental consequences of a derailment on the curve constituted an essentially local safety hazard. The 9th Circuit found these factors insufficient to establish an essentially local safety hazard:

Our sister circuits, which have plumbed the statutory history of the FRSA, have come to a similar conclusion and have created a workable definition of an “essentially local safety hazard,” defining it as one which is not “adequately encompassed within national uniform standards.” See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976) (“The exception was designed instead to enable the states to respond to local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards.”); *Norfolk & W. Ry. v. Pub. Utils. Comm’n*, 926 F.2d 567, 571 (6th Cir. 1991) (“[T]he second exception . . . permits state regulation only when local situations are ‘not capable of being adequately encompassed within uniform national standards.’ ”); see also, e.g., *Burlington N. R.R. v. Montana*, 805 F. Supp. 1522, 1528 (D. Mont. 1992) (adopting definition from *Nat’l Ass’n of Regulatory Util. Comm’rs*, 542 F.2d at 14-15); *Union Pac. R.R. v. Pub. Util. Comm’n*, 723 F. Supp. 526, 530 (D. Or. 1989) (“PUCO’s permanent regulations do not address essentially local safety hazards because the permanent regulations are statewide in character and capable of being addressed adequately in uniform national standards.”). Such definition provides an accurate inquiry, and we adopt it.

Id. Slip Op. at 8038. The 9th Circuit concluded that the track geometry (while unusual) was capable of uniform federal regulation, and did not constitute an essentially local safety hazard. Likewise, the subjects covered by the rules proposed by the Commission staff fall far short of meeting the 9th Circuit standard. Indeed, to suggest that a statewide rule is needed, in and of itself, suggests that the concern is not an essentially local safety hazard. Indeed, the FRA has already addressed each of the issues raised by the proposed rules and declined to impose restrictions like those in the proposed rules.

Proposed Rule Relating to Access to Remote Control Zones (Section (2))

The rule proposed in Section 2 seeks to regulate access to remote control zones. The term remote control zone is not defined, and as used could encompass all RCL operations. Even if remote control zone is defined in a manner consistent with the FRA’s use of that term (see, e.g. Attachment 9), the proposed rule suggests that the public has access to such a zone. Remote Control Zones are on railroad’s right of way, which is not open to the public. Where such zones intersect public grade crossings, active warning devices are present

The proposed section requires “barriers to prevent pedestrian access to the zone.” The railroad is being burdened with the possible fencing of its facilities or forgoing RCL operations. While the section is silent as to who would determine the adequacy of the barrier, presumably it

would be the Commission. Under this rule, a railroad would not be permitted to implement remote control zones unless Commission Staff is satisfied. If the rule is intended to apply to trespassers, experience has shown that it is virtually impossible to establish an adequate barrier. This would again mean that the Commission could prohibit RCL operations.

Since any rule prohibiting the use of RCL technology is preempted, Section (2) exceeds the Commission's rulemaking authority. The rule states that the no railroad "may implement" a remote control zone except upon the conditions determined by the Commission. This rule fails to satisfy the essentially local safety hazard required by the FRSA. Under recent 9th Circuit authority, it is clear that Section (2) fails to meet the requirement that it be "designed . . . to enable the states to respond to local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards." Nor can it be said that the problem of trespassers in the vicinity of any railroad operations is essentially local.

Posting of Federally Approved Warning Signs as Required by Section (3) Is Clearly Not Addressing An Essentially Local Safety Hazard.

Section 3 requires a railroad to post warning signs "before a railroad company begins remote controlled operations at any location . . ." These signs are already being posted by virtue of the railroads voluntary compliance with FRA guidelines. The fact that the BNSF and UP are voluntarily complying (and therefore are not burdened by this rule), however, is not the issue. The issue is whether the requirement of the FRA approved signs for RCL operations is a matter capable of being adequately encompassed within national uniform standards. To ask the question is also an answer to the question. Even if not preempted, making any aspect of the federal guidelines mandatory is ill conceived in a fluid and dynamic process such as this one. Indeed, the FRA adopted guidelines instead of rules to allow the flexibility that the Commission's proposed rules take away.

Protecting the Point of RCL Operations Is Not an Essentially Local Hazard.

Proposed Sections 4 and 5 both seek to control the degree and nature of a railroad's protection of RCL movements. As discussed in earlier submissions and at the workshop, RCL movements are made in a manner approved by the FRA guidelines and consistent with each railroad's operating practices. For example, the General Code of Operating Rules already requires protection when making a shoving move across a grade crossing. The safety of all aspects of RCL operations has been continually monitored as part of the FRA oversight and safety analysis. The FRA has concluded that the point is adequately protected by compliance with the railroad's operating rules or by establishing Remote Control Zones where the leading end of a movement need not be protected.

In addition, as with the other proposed rules, the protection of the point in RCL movements is capable of being adequately encompassed in a national standard. This is clearly illustrated by the February 22, 2002, FRA Memorandum from Acting Director Edward Pritchard to Regional Administrators at pp 3-4. Attachment 9. There is no basis in fact or logic to conclude that this is an essentially local issue.

It is clear that none of the areas addressed in Sections 2 through 5 are local in character or incapable of uniform rule. While the Commission Staff may be motivated by the desire to protect the public, it must remember that the public interest has been factored into the decision making process at the federal level. As noted in its earlier submission, piecemeal regulation is contrary to public policy and detracts from public safety.

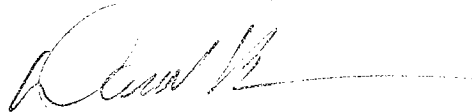
While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that **piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disputed 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....

FRA Policy Statement (1978)(emphasis added). As noted in the Rutter Letter (Attachment 3), the FRA has determined that the public interest is not advanced by additional rules on RCL operations at this time.

If the Commission Staff would like any additional information prior to the workshop, please feel free to contact us.

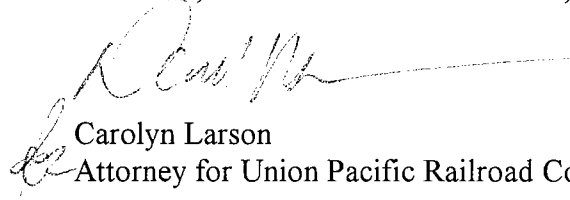
Very truly yours,

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