

RULEMAKING COMMENT SUMMARY
DOCKET NO. TR-040151
Leading End (Point Protection) Rulemaking
Written Comments Received Since March 19, 2004

ISSUE	INTERESTED PERSON	COMMENTS	RESPONSE
General Comments			
	Cherie Rodgers, Spokane City Council Member, District 3, <i>March 19, 2004.</i>	As the past chair and a current member of the City of Spokane Public Safety Committee, Ms Rodgers asserts that it is her duty to assess potential dangers in the community. Ms. Rodgers has followed the Commission's remote control rulemaking and supports the Commissioners' efforts in protecting communities in the State from the dangers of railroad operations.	The Commission appreciates your comments and shares your concerns for safety of railroad operations in the State of Washington.
	Mark K. Ricci, Washington State Legislative Board, Brotherhood of Locomotive Engineers and Trainmen, <i>March 19, 2004.</i>	The WSLB-BLET agrees with the draft language outlined in the Notice of Opportunity to File Written Comments issued on February 20, 2004. The WSLB-BLET asserts that the four points set forth in the draft proposal are consistent with the railroads' own operating rules, and as the railroads purport to abide by their rules, there can be no new cost to comply with the rules. The WSLB-BLET asserts that the draft proposed rules would address the accidents, incidents and injuries documented in the remote control rulemaking process.	The Commission appreciates your comments.

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Federal Preemption			
	Carolyn Larson, Union Pacific Railroad Company (UP), and Douglas Werner, Burlington Northern & Santa Fe Railway Company (BNSF), <i>March 19, 2004</i>	<p>The February 20, 2004, Notice ignores the threshold jurisdictional issue of whether the Commission is preempted from regulating the subject matter. The Federal Railroad Safety Act (FRSA) expressly preempts state authority to adopt safety rules except where the Secretary of Transportation has not acted to cover the subject matter. The railroads assert that the draft point protection rules encroach upon areas preempted by federal law, including remote control locomotive (RCL) operations.</p> <p>The Federal Railroad Administration (FRA) closely monitors RCL operations and is currently conducted a "Remote Control Safety Audit" to determine if any regulations are necessary for RCL operations. The Commission should refrain from taking action on this filing until the FRA audit is complete.</p>	<p>The FRSA permits States to adopt railroad safety 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." 49 U.S.C. Sec. 20106.</p> <p>The FRA has no regulations governing point protection. Therefore, there is no basis for federal preemption on this issue.</p> <p>While the FRA is monitoring RCL operations, it has neither adopted rules regulating RCL operations nor affirmatively concluded that such regulation is unnecessary. Until the FRA does one or the other, there is no basis for preemption.</p>
	BNSF & UP, <i>March 19, 2004</i>	The draft rules conflict with Part 217 of Title 49 CFR. Under Part 217, railroads must file all operating rules and changes with FRA for review. FRA is aware of railroad operating rules. Mandatory standards adopted in place of railroad operating rules should be developed as a nationally uniform rule. The railroads assert that the State seeks to	The Ninth Circuit Court of Appeals upheld, against a preemption challenge that was based on Part 217, the California PUC's rules that (1) required railroads to comply with their own internal track-train dynamics (TTD) rules and provided civil penalties for violations of

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		<p>undermine the uniform national regulatory scheme, and left unchecked, could lead to inconsistent state rules and potentially, unsafe conditions.</p>	<p>those rules, and that (2) required railroads to obtain approval from the PUC before making any changes to their internal TTD rules.</p> <p>The proposed point protection rule, like the TTD rules at issue in <i>Union Pacific</i>, essentially requires the railroads to comply with existing GCOR and other internal railroad rules that already apply throughout the railroads' multi-state territories. Additionally, unlike TTD rules, a point protection rule would have no extraterritorial effect and therefore would not raise commerce clause concerns.</p> <p>Point protection rules generally address local movements in or near train yards, and do not affect the make up of trains traveling between states, as do TTD rules. In addition, remote-control operators are trained on a site-specific basis to address specific concerns in a remote-control area or zone.</p> <p>Moreover, as a practical matter, judging from the materials submitted by the railroads, it appears that only Puget Sound &</p>

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			<p>Pacific's RCL rules differ in any respect (and not in any material way) from the exact wording of the proposed rule. Accepting for argument's sake that Puget Sound and Pacific would have to amend its rules to track a new commission point protection rule, this would actually enhance uniformity of railroad operations, not degrade it.</p> <p>To address the railroads' concern that the proposed rule could lead to an inconsistent state rule if point protection rules change or evolve on a national level, Staff has proposed a new subsection (7).</p>
Specific Comments on Draft Rules			
	BNSF & UP, <i>March 19, 2004</i>	The proposed rules address point protection. As the rules relate to RCL operations, the railroads assert that all RCL operations at grade crossings are performed in accordance with FRA guidelines and railroad operating practices. BNSF and UP address point protection in the General Code of Operating Rules (GCOR). The FRA monitors the safety of point protection and other aspects of RCL operations.	The proposed rule acknowledges, and indeed, is based upon this premise. The purpose of the proposed rule is to make these existing rules and practices enforceable with penalties as an additional incentive for compliance.

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	BNSF & UP, <i>March 19, 2004</i>	<p>The draft proposed rules incorrectly assume that all railroads in the State of Washington abide by the same rules for RCL operations. RCL rules for BNSF, UP, and the Puget Sound and Pacific Railroad are not included in the GCOR and are not the same. The railroads assert that they have developed these rules to address unique operating situations.</p> <p>Contrary to the proposal in this rulemaking, in the California Public Utilities Commission's (CPUC) rulemaking efforts contested in <i>Union Pacific Railroad Company et al v. California Public Utilities Commission et al</i>, 346 F. 3d 851 (9th Cir. 2003), the CPUC allowed railroads to continue to apply their own internal rules concerning track train dynamics (TTD), instead of requiring all railroads to adhere to one rule.</p>	<p>This proposed rule does one simple thing: it prohibits "blind" shoves. Although it does provide some elaboration around this basic principle, it is simply not a matter on which there is, or should be, any material variation among railroads.</p> <p>Subsections (2) through (4) of the proposed rule track, verbatim, point protection requirements in Sections 6.5 and 6.32.1 of the currently effective GCOR (Fourth Ed., Effective April 2, 2000). The GCOR has been adopted by BNSF, UP, and Puget Sound & Pacific Railroad, as well as by Camas Prairie RailNet, Inc., Cascade and Columbia River Railroad, Columbia Basin Railroad Co., Columbia and Cowlitz Railway, Lewis and Clark Railway Company, Palouse River and Coulee City Railroad, Pend Oreille Valley Railroad, and Tacoma Municipal Belt Line.</p>

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			<p>As for subsection (5), concerning RCL, the proposed rule tracks, verbatim, the requirement of section 23(A)(e) of BNSF's system special instructions for remote control operations and UP's rule 35.1.4 (from materials provided with the railroads' comments).</p> <p>Staff recognizes, however, that the railroads' RCL rules allow an exception to the general rule that all RCL movements should be afforded the same point protection as shoves. Specifically, UP, BNSF and PS&P all relieve the operator of point protection when an RC zone has been established. The proposed rule would allow for this exception, but not at grade crossings or where a train could be moved onto other tracks. Staff understands this to be consistent with the existing practice. Staff has proposed a new subsection (6) to clarify this point. How the zone is established is left to the railroad.</p>

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	BNSF & UP, <i>March 19, 2004</i>	If the Staff intended to adopt GCOR rules governing RCL operations, the rulemaking proceeding is premature. The railroads are working on a consistent set of RCL rules for the GCOR when it is republished in April 2005. These rules will likely be subject to modification to allow carriers to address particular conditions, technology and experience. Adopting one set of point protection rules that all railroads must adhere to will create confusion when the railroads work to amend the GCOR.	The focus of this rulemaking is not to adopt GCOR rules governing remote control operations, but to allow the Commission to enforce railroad point protection rules, generally. The subsection of the draft rule addressing remote control is intended to clarify how point protection rules work during remote-control operations. The Commission addressed this issue at its January 28, 2004 open meeting in Docket TR-021465. BNSF and UP both recognize in internal rules that a forward movement with remote control is essentially a shoving movement because no one is in the cab. BNSF has not provided any information that indicates that railroads would adopt point protection rules significantly different than the basic rules that have been in effect for many years.

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	BNSF & UP, <i>March 19, 2004</i>	Railroads need flexibility to modify operations to address changing circumstances or unforeseen safety issues. The current draft provides no mechanism for modifying the rules if needed, and would deny railroads the flexibility they need to operate, unlike the CPUC rules which allow the railroads to make changes with 30 days notice and a demonstration of sufficient justification.	Staff has added a proposed subsection (7) to address this concern. The proposed subsection (6) should also address the concern to the extent that it clarifies that railroads retain the ability to relieve RC operators of point protection within zones established for that purpose.
	BNSF & UP, <i>March 19, 2004</i>	The railroads object that the draft rules were developed without the input of personnel who are qualified in the area of operating practices. The railroads state that the Commission does not currently have an FRA certified "Operating Practices" inspector, whereas the CPUC has eight such inspectors.	The draft rule is taken directly from language in the GCOR and from the railroads' internal rules, which have been reviewed by qualified personnel and the railroads. The purpose of the rulemaking process is to gain input from interested persons including those qualified in the area of operating practices. The Commission has hired a staff person with 16 years of railroad experience as a switchman, conductor, hosteller, yard engineer, and over the road engineer who can review any specific and substantive issues presented. This staff person will likely be FRA-certified within 9 months.

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	BNSF & UP, <i>March 19, 2004</i>	The railroads object that the draft rules allow for “considerable latitude for personal judgment and discretion,” and allow Commission Staff to substitute its interpretation for that of experienced railroad personnel. By contrast, the CPUC’s TTD rules establish objective technical criteria.	Staff disagrees. Portions of the draft proposed rules are taken directly from language in GCOR sections 6.5 and 6.32.1. While the rule does not specify where the crew member who is protecting the point should be positioned with absolute precision, to do so would be neither practical nor desirable. The crew member must be “on the leading car or engine, or be ahead of the movement” and at crossings must be “on the ground at the crossing to warn traffic until the crossing is occupied.” This does not allow for “considerable latitude for personal judgment and discretion.”
	BNSF & UP, <i>March 19, 2004.</i>	The railroads object that the administrative record in this rulemaking proceeding “lacks any scientific, technical, economic or other evidence to support the need for the proposed point protection rules.” The railroads assert that the Commission cannot rely on the record in Docket No. TR-021465, as the workshops were so politically and emotionally charged. The railroads object that none of the speakers’ comments were made under oath and were not subject to cross-examination.	Through this proceeding, the Commission will develop the record necessary to support adopting rules addressing point protection, generally. If it appears that the record does not support adoption, the Commission will consider that at the appropriate stage of the proceeding. The Commission will develop a record in this proceeding through comments from interested persons, as well as other

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			<p>information available to the Commission. The Commission will incorporate into the record in this proceeding any relevant information contained in the record in Docket No. TR-021465.</p> <p>There is no requirement under chapter 34.05 RCW that comments made in a rulemaking proceeding be made under oath or subject to cross-examination.</p>
	<p>BNSF & UP, <i>March 19, 2004</i></p>	<p>The railroads object that the Commission has not sought input from the FRA or approached the FRA to discuss the rulemaking. The railroads assert that it is unlikely that the FRA will support such a rulemaking.</p>	<p>Commission Staff is in the process of consulting with FRA concerning the draft rules in this proceeding. The Commission will take any concerns expressed by FRA into consideration.</p>

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	BNSF & UP, <i>March 19, 2004</i>	The railroads object that there is no showing that the rules will reduce risks to public health or safety, or address how the magnitude of the risk relates to other risks within the Commission's railroad safety jurisdiction.	The Commission has considered information from FRA's website indicating that accidents relating to the failure to properly protect the leading end of movements are one of the leading causes of accidents in Washington. Requiring railroads to adhere to a Commission rule consistent with the current operating rules will, if nothing else, encourage railroads to operate in a safe manner. There is currently no enforcement by FRA or the railroads of point protection rules.
Cost to the Railroads			
	BNSF& UP, <i>March 19, 2004</i>	The railroads assert that the cost to the railroads from the draft rules are "potentially enormous." The railroads assert that a conflict may arise if the railroads adopt different rules in the GCOR, and may substantially increase the risk of accident if railroads are not able to address local safety conditions or concerns.	The railroads have not quantified the actual cost to the railroads of complying with their own operating rules, but simply assert that the effects of the draft rule are "potentially enormous." By adding subsection (7) to the draft rule, the Commission mitigates much of the railroads' concerns about modifications to the GCOR. In addition, the draft rule is almost identical to the railroads' own operating rules, with the wording differing only slightly.