

Agenda Date: January 28, 2004  
Item Number: C1

**Docket:** TR-021465

Company Name: Rulemaking – Railroad

Staff: Mike Rowswell, Rail Safety Manager  
Jonathan Thompson, Assistant Attorney General  
Ann Rendahl, Administrative Law Judge

**Recommendation:**

Direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-021465 proposing amendments to Chapter 480-62 WAC; or in the alternative,

Direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-021465 proposing amendments to Chapter 480-62 WAC, except those regarding point protection of remote-controlled locomotives at grade crossings and where trains can enter main line tracks; and to file a preproposal statement of inquiry (CR-101) with the Code Reviser relating to the topic of point protection, generally.

**Background:**

In the mid-1990's, railroads around the United States began using remote-control technology to operate trains without an engineer on board. Safety concerns were raised about the use of this new technology. The Federal Railroad Administration (FRA) responded by issuing a Notice of Safety Advisory 2001-01 on February 14, 2001. The FRA Advisory contains extensive guidelines addressing the design and operation of remote-control devices, training, operating practices, security, inspections and tests, and accident-incident reporting procedures.

The General Code of Operating Rules (GCOR) is a set of rules adopted by most railroads throughout the United States. It also addresses some of the safety concerns raised by remote-control operations. However, these rules were not created by any government agency and cannot be enforced with penalties.

Many of the guidelines in the FRA Advisory are actually unenforceable suggestions. The Brotherhood of Locomotive Engineers (BLE) took the position that the GCOR was insufficient to ensure safety of remote-control operations, and that safety guidelines should be made into enforceable rules to provide a greater incentive for them to be followed. On November 1, 2002, the Washington State Legislative Board of the BLE filed a petition requesting that the Commission adopt the FRA Advisory as a state rule.

On December 31, 2002, the Commission denied the BLE's petition. Among other reasons, the FRA Advisory included some enforceable requirements that clearly preempted state action on specific matters such as operator training. Also, the statutory process for a petition to adopt rules did not allow sufficient time for Staff and other stakeholders to completely analyze the complex issues involved.

Despite the denial of its petition, the BLE raised sufficient safety concerns to warrant further review. In addition, Commission Staff had noticed potential problems in remote-control operations because of an accident in Shelton involving a runaway remote-control train, and because a train in Seattle operating under remote control was unsafely shoved onto a main line track while an Amtrak passenger train was approaching. As a result of these concerns, the Commission issued a CR-101 Preproposal Statement of Inquiry on January 24, 2003.

**Process:**

The Commission held a stakeholder workshop on March 19, 2003. Interested parties on a list maintained by the Commission's Records Center were notified of the workshop. The agenda included federal preemption issues and specific proposals made by the BLE. The workshop was well attended by representatives of the Union Pacific Railroad (UPRR), Burlington Northern Santa Fe Railway Co. (BNSF), the BLE, and the United Transportation Union. A short line railroad representative also attended. The Commission also received many written comments prior to the workshop. These comments and Staff's responses are included in the Comment Summary reflecting comments received prior to March 3, 2003.

Based upon information provided in the written comments and during the workshop, Staff prepared a discussion draft of rules. Staff notified interested persons of the discussion draft on June 10, 2003, and requested further comment. The Commission held another workshop on August 12, 2003. Staff further revised the draft rules after considering the workshop discussions and comments received since the previous workshop. Staff prepared a second discussion draft of rules and notified interested persons of the draft on October 3, 2003, requesting further comments. A final stakeholder workshop was held on October 28, 2003. Staff modified the discussion draft based upon the written comments received and discussion during the workshop, and presents this proposal to the Commission for consideration. A summary of written comments received since March 3, 2003, and Staff's response is included in Comment Summary 2.

Most of the comments the Commission have received express support for rules governing remote-control operations, addressing both general and specific safety concerns. The railroads contest the need for rules in view of the FRA's Safety Advisory, and assert that the Commission is preempted from adopting regulations concerning remote-control operations.

On January 15, 2004, the Commission issued a Notice of Consideration of Proposed Rulemaking (CR-102) advising persons interested in this rulemaking that a set of draft proposed rules would be presented at the Commission's January 28, 2004, open meeting, and advising interested persons that a copy of the set of draft proposed rules and Staff responses to written comments filed in the rulemaking proceeding were available on the Commission's website. Since that time, Staff recommended that subsection 6 of the draft proposed rules, which concerns periodic safety workshops initiated by the Commission or upon request, be removed from the set of draft proposed rules. The Commission does not ordinarily adopt rules that make mandatory actions that the Commission already has authority to conduct in a discretionary manner.

A small business economic impact statement, or SBEIS, was not prepared for this rulemaking proposal. RCW 19.85.030 requires agencies to prepare an SBEIS "If the proposed rule will impose more than minor costs on businesses in an industry." The suggested draft rules do not require a change in existing railroad operations. There is no substantive change in notice requirements, which pose minimal cost, and the substantive rules require railroads to follow existing railroad rules and procedures. The economic impact to railroads resulting from the suggested draft rules is not significant.

**Preemption:**

The State preemption provision of the Federal Railroad Safety Act (FRSA), 47 USC § 20106, provides that once the FRA has acted to regulate a particular aspect of railroad safety, the States may no longer adopt or enforce regulations on that topic. Courts have developed a corollary to this, called "negative preemption," which holds that once an agency such as the FRA has considered the need for regulation on a given topic, and affirmatively decided that regulation is not necessary, states may no longer adopt or enforce regulations on that topic.

In its Safety Advisory 2001-1 (establishing recommended minimal guidelines for the operation of remote control locomotives) the FRA considered the need for regulation of remote control locomotive operations and concluded that (1) currently available information does not lead to the conclusion that remote control locomotive (RCL) operations should be prohibited on safety grounds, and (2) some aspects of RCL use are already subject to FRA regulation. Those aspects of RCL use that are already covered by existing federal requirements are (1) certification of operators if it would be required of conventional operators under the same circumstances and (2) periodic inspection requirements for RCL equipment.

Based on standard "covering the subject matter" preemption analysis, the FRA's Advisory preempts state regulation of the *certification and qualification* of RCL operators and regulation of RCL *equipment*. However, it does not follow that all aspects of the *use* of RCL technology are immune from safety regulation by states.

FRA's Safety Advisory has not "substantially subsumed" state safety regulation of *all* aspects of railroad operations using remote control technology. Staff also disagrees with the railroads' analysis that the FRA Advisory represents an affirmative decision by the FRA that no regulation of the safety of remote control operations is necessary. Staff has restricted the draft proposed rules to topics on which the FRA has not covered the subject matter.

### **Discussion:**

The use of remote-control technology is a relatively recent phenomenon, at least on its current scale. Common sense indicates that eliminating personnel from the cab of a locomotive raises safety issues. Reducing crew sizes or requiring a train operator to walk to provide the type of visual protection envisioned by the GCOR creates incentives for railroad personnel to take short cuts in operating trains that could prove to be dangerous. Government inquiry is appropriate in such circumstances. When that inquiry reveals situations where dangers remain, especially to the general public, government has a responsibility to exercise oversight, including imposing enforceable rules.

Staff has narrowed the scope of the discussion draft rules over time based upon written comments and discussions during stakeholder workshops. Originally, draft rules considered signage at crossings and on remote-controlled locomotives. Federal Highway Administration rules do not yet allow signage regarding remote-control operations on roadways. Adequate signage or lights on trains could help warn railroad employees and the public to be aware of a train that may move even though no one is in the locomotive cab. A team with representatives from the Commission, FRA, BNSF management, and unions are looking at this issue. This cooperative effort appears to provide a better process for handling the issue at this time. If necessary, the lessons learned by the team could be incorporated into rules at a later time.

Trespass concerns were also initially included in draft rules. It became clear after reviewing written comments and discussion during workshops that circumstances varied so much at the different locations where remote-control operations currently occur that a single, workable rule could not be developed without more experience with the issue. Railroad management suggested that a consultative process might more effectively address individual trespass issues and other safety concerns. Staff incorporated this idea into subsection 6 of the draft proposed rules provided to interested persons on January 15, 2004, but recommends removing the subsection from the draft proposed rules as discussed above.

Staff has limited its draft rule recommendations to several areas where existing rules can be improved, and where potential risks present the need for enforceable rules that are not currently addressed by the FRA Safety Advisory.

Two substantive areas require special attention because of the risks involved. The Commission has statutory authority and responsibility for safety at highway/railroad

grade crossings. The consequences for vehicle occupants of a collision with a train, even at low train speeds, can be disastrous. If a hazardous materials rail car is punctured on impact with a vehicle, or if there is a derailment after impact, an entire community can be at risk. The Commission also has a statutory responsibility for safety of passenger trains. A collision risk exists where remote-control trains can enter mainline tracks.

Existing, but currently unenforceable, GCOR rules require railroad personnel who are in contact with the engineer or conductor to be at or ahead of the leading end of a movement when a shove is made. (A shoving move involves a locomotive pushing rail cars while moving backwards, as opposed to pulling rail cars while moving forward.) The GCOR rules are intended to provide point protection for shoving and pushing moves for all circumstances, not just remote control operations. In remote-controlled operations, however, often no one is in the cab of the train. As a result pulling movements become identical to shoving movements. In addition, existing GCOR rules do not prohibit pulling movements without personnel at the head end of the train even though the dangers are the same as those for shoving movements.

Making the GCOR rules governing point protection enforceable state rules for remote control operations, or in the alternative, for all operations at grade crossings or where trains can enter main line track, would greatly increase the railroads' incentives to operate more safety, and may decrease railroad accidents and the public safety.

The draft rules that Staff recommends for consideration as proposed rules:

- Include definitions of “remote-control area,” “remote-control operations,” and “remote-control zone” to provide greater clarity.
- Amend existing requirements that railroads report their intentions to use remote control operations by clarifying the information railroads must report, and requiring railroads to report the creation as well as enlargement of remote-control areas and zones. These reporting requirements allow Staff to focus observation and enforcement efforts in the proper areas, and identify areas to conduct diagnostic evaluations for safety problems.
- Require railroads to report to the Commission their intention to use cameras for point protection at crossings. In a recent letter, the FRA suggested the use of diagnostic reviews by public safety, law enforcement, and public agency personnel before a railroad implements the use of cameras in remote-control operations. The suggested proposed rule allows such diagnostic evaluation by requiring the railroads to notify the Commission of their intent to use cameras during certain remote control operations.
- Require railroads to ensure that railroad employees who directly control a remote-controlled locomotive to maintain a view of grade crossings and along each roadway until the train occupies the crossing, if gates are not present or until the

gates are fully lowered. The draft rule does not apply to crossings for which use is restricted to railroad employees.

- Require railroads to provide protection at the point of movement at any location where a remote-controlled train can enter mainline tracks.

Most railroads treat safety seriously. The rules railroads impose upon themselves are often enough to prevent accidents, but not always. Sometimes these rules are insufficient, and sometimes rules are not followed because of fatigue, human error, reduced crew sizes, and the need to expedite work. It is important to note that of the 22 railroads that operate in this state, three use remote-control operations. Other railroads are expected to begin use of remote-control locomotives. Not every railroad can be expected to have the same high safety standards.

Given the potential risks and consequences involved, coupled with the Commission's statutory responsibilities, it is appropriate to create enforceable rules to provide additional reasons for railroads to follow existing railroad rules and procedures. Staff recommends that rules be proposed that require railroads operating remote-controlled trains provide visual protection at crossings, and adequate protection, including visual protection at locations where tracks connect to main-line tracks.

In the alternative, should the Commission wish to address the general safety issue of point protection at grade crossings and where trains can enter main line tracks, Staff recommends that the Commission direct the Secretary to file a Notice of Proposed Rulemaking with the Code Reviser, but excluding subsections 4 and 5 of the draft proposed rules, and that the Commission open a new rulemaking to address the topic of point protection generally.

### **Conclusion:**

Staff recommends that the Commission direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-021465 proposing amendments to Chapter 480-62, relating to regulation of railroad operations; or in the alternative,

Direct the Secretary to file a Notice of Proposed Rulemaking (CR-102) with the office of the Code Reviser in Docket TR-021465 proposing amendments to Chapter 480-62 WAC, except those regarding point protection of remote-controlled locomotives at grade crossings and where trains can enter main line tracks, and to file a preproposal statement of inquiry (CR-101) with the Code Reviser relating to the topic of point protection generally.