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August 11, 2004

VIA FACSIMILE AND U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 E. Evergreen Park Dr. S.W.
P.O Box 47250
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Additional BNSF and UP Comments on Railroad
Operating Rules Relating to Point Protection (Docket No. TR-040151)

Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") jointly submit these additional comments on Railroad Operating Rules Relating to Point Protection (Docket No. TR-040151) pursuant to the Notice of Opportunity to File Written Comments served July 23, 2004.

1. Prior comments are incorporated by reference.

These comments supplement comments filed on behalf of BNSF and UP (and by the Association of American Railroads) in Dockets TR-040151 and TR-021465. The Railroads also made oral presentations and comments. The last comments on rules proposed in this proceeding were dated June 11, 2004. All such comments and presentations are incorporated by reference into this submission.

2. The proposed rules are preempted by federal law.

Throughout these proceedings, BNSF and UP have argued that the WUTC should not attempt to promulgate and enforce rules affecting general railroad operations or remote

control operations. Federal law and the federal Constitution preempt the adoption and enforcement of the rules staff has proposed for reasons discussed at length in prior presentations and submissions. Attached at Tab 1 is a revised Comparison Chart showing changes in WUTC and UP rules since the last chart. Attached at Tab 2 is a copy of the last submission (dated June 11, 2004), with the Comparison Chart and the Rutter letter. The other attachments to that submission can be found in the record or website.

The Federal Railroad Administration has taken an active role in identifying and addressing safety concerns relating to implementation of remote control locomotive ("RCL") operations since it began investigating RCLs in 1994. FRA also conducted a two-year testing and information-gathering period to assess the impact of RCL technology on the United States rail industry. FRA's Notice of Safety Advisory 2001-01 sets forth a comprehensive set of guidelines to assist railroads in implementing and monitoring RCL technology with an emphasis on employee safety. FRA has worked closely with the railroads and rail labor organization to ensure that proper training is provided and to resolve RCL safety issues. In May 2004, FRA published its "Interim Report" on the safety of RCL operations following an intensive evaluation of RCL operations conducted in response to a directive from the Senate Committee on Commerce, Science and Transportation. Within the Interim Report, FRA identified seven safety issues that had been resolved through the collaborative and cooperative efforts of rail industry stakeholders, including the subject of point protection and remote control zones. Significantly, the Interim Report reaffirmed FRA's believe that regulatory action in this area is not necessary at this time. However, FRA has expressly reserved the right to regulate this field should regulation become necessary. FRA continues to oversee all safety and implementation issues and it is the coordinator of an ongoing study to identify potential safety risks and to analyze all reportable accidents involving RCL operations.

For both policy and legal reasons, the Railroads reiterate that the proposed rules are preempted by federal law and the Constitution.

3. Recent revisions to the rules do not cure prior concerns.

The rules, and scope of rules, proposed in the Notice of Opportunity to Submit Written Comments on Proposed Rule, served July 23, 2004, have been modified from the proposed rules pertaining to point protection previously attached to the CR-101 and CR-102 notices in this proceeding. The most recent revisions do not cure the problems noted in our previous comments dated June 11. We do not believe it is possible to draft around the key problems we have noted: (a) that attempting to draft rules exactly like the railroads' own rules is impossible because the railroads do not all have the same rules and continue to revise their rules when experience and technology warrants; and (b) that it creates confusion—and does not promote safety—to adopt rules that are similar to, yet different from, the railroads' own rules both in their wording and their interpretation. The comments made earlier apply equally to the rules as modified and

need not be repeated here, except by reference. The Railroads will have additional comments on the errors and burdens in the rules at the hearing of September 29, 2004.

On a policy basis, the proposed rules are unnecessary and would not promote the safety of railroad workers or the general public. Plainly stated, the proposed rules should not be adopted.

4. WUTC is without authority to promulgate the proposed rules.

In addition to the preemption and policy reasons referred to above and set forth in detail in the Railroads' prior submissions, WUTC lacks authority under the laws of this state to promulgate the proposed rules. In the CR-102, two statutes are cited as authority for the rules (RCW 80.01.040 and 81.04.160). Neither provides any authority to adopt the proposed rules.

The proposed rules are intended to be penal, both civilly and criminally. It is intended that the Commission will "enforce" them. (CR-102, "Reasons supporting proposal"). It is assumed that staff has in mind the imposition of civil or even criminal penalties, such as those provided in RCW 81.04.387 and 81.04.390.

WUTC is an agency of the State of Washington. It is fundamental that agencies cannot adopt and enforce rules unless the Legislature has specifically delegated the authority to do so. In the case of penal statutes and rules, the standard on review is one of strict construction. Authority will not be implied, but must be specifically demonstrated.

RCW 80.01.040, the first authority cited in the CR-102, is a global, general delegation of authority. It provides in subsection (1) that WUTC will "(e)xercise all the powers and perform all the duties prescribed therefor by this title and by Title 81 RCW, or by any other law." This delegation relies on *other* statutes for implementation and by itself confers no authority.

Subsection (2), similarly, states that WUTC will "(r)egulate in the public interest, *as provided by the public service laws,* the rates, services, facilities, and practices of all persons engaging in the transportation by whatever means of persons or property..." (Emphasis added) Here again, no independent, unfettered power is delegated. The WUTC must still find a statute specifically empowering it to regulate the subject matter included in the proposed rules --- railroad operating rules. None exists

RCW 81.04.160, the second statute cited in the CR-102, contains a careful and limited alliteration of specific subject matter that is subject to WUTC regulation. Matters such as placing bulletins about train arrivals and departures at stations, the times stations will be left open, and the like are listed, followed by a general phrase, "and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title." Nowhere does the statute mention regulation of railroad operating rules, point protection, remote control operations, or anything even close.

Moreover, Washington courts have long guarded the Constitutional policy of avoiding state laws or regulations placing a burden on interstate commerce. See, for example, *State v. Northern Express Co.,* 80 Wash. 309, 141 P. 757 (1914), app. dism. 241 U.S. 686 (1916). It is perhaps for these reasons – no authority and avoidance of burden on interstate commerce -- that the Commission and its predecessors never promulgated such rules before, and should not do so now.

5. There continue to be procedural irregularities in this Docket.

As the Railroads pointed out in previous submissions (See June 11) and oral hearings, there are serious procedural concerns in both Dockets TR-040151 and TR-021465. These problems are compounding as staff continues forward in this process. As stated, the most serious flaws are that the subject matter is preempted and the WUTC is without statutory authority. However, if one puts those arguments aside for a moment, there are still serious flaws in both the letter and spirit of the current process.

After changing the rules one week before the May oral hearing (no 20-day notice), the Commission this time again *changed the rules* (July 21, 2004). Then, without opportunity for further public comment, the Secretary *issued the CR-102* (July 23, 2004) and announced an adoption hearing for September 29, 2004. No one explained how this procedure fits the letter, or at least the spirit, of RCW 34.05.230 (keeping the public informed), RCW 34.05.310 (the pre-notice inquiry, since the rules now bear no resemblance to when the original CR-101 was issued here), or RCW 34.05.320 (20-days notice prior to this CR-102).

At a minimum, to preserve at least the appearance of fairness and the careful attention these rules need, the Commission should have announced that it agreed with the Railroads' position at the last oral hearing that the CR-102 should not have been issued on the previous rules. Staff could then have proposed these rules for a possible CR-102. Issuance of a CR-102 could then have been debated, as last time. Instead, the CR-102 was hastily issued immediately after *new* rules and we face an adoption hearing on September 29.

The Railroads object to these continuing procedural irregularities. Even if ultra-technical reasons are conjured up to defend this procedure, the appearance and reality of these proceedings is that they are being driven in a manner that disregards due process and material rights of the Railroads.

6. The Administrative Procedure Act is being avoided.

The WUTC is an agency of the State of Washington. It is, therefore, subject to the provisions of the Administrative Procedure Act (RCW Chapter 34.05). After a listing of several agencies that are not included in the Act (WUTC is not one of them), RCW 34.05.030(4) provides that "(a)ll other agencies, whether or not formerly specifically

excluded from the provisions of all or any part of the administrative procedure act, *shall be subject to the entire act.*" See also *Herritt Trucking Co. v. Wash. Public Service Comm.*, 58 Wn 2d 542 (1961).

The "entire act" includes RCW 34.05.328. The Commission's rule on rulemaking includes - 328 (though it mysteriously excludes other portions of the Act). WAC 480-07-210. Even so, the CR-102 states that "(T)he Commission is not an agency to which RCW 34.05.328 applies. The proposed rule is not a significant legislative rule of the sort referenced in RCW 34.05.328(5)."

The Railroads disagree with both of these statements. RCW 34.05.328 is directly relevant to this rulemaking. The section first states that an agency *shall* make two pages of detailed determinations *before* a "significant legislative rule" described in the section is adopted. Virtually none of these has been determined by the Commission.

A "significant legislative rule" is defined in the statute, RCW 34.05.328(5)(c)(iii), as "a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects the violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program."

The staff's explanation of the purpose and reasons supporting the proposed rules in the CR-102 makes it clear that all three of the above statutory criteria are involved here. Only one is necessary to trigger the protections of subsection (5).

Staff may argue that RCW 34.05.328 is not applicable because the agency is not listed in RCW 34.05.328(5)(a)(i). Even if that argument were adjudged to be true, that does not prevent application of the protections afforded in the statute. The statute says it applies to "any rule of any agency" if the agency voluntarily makes the rule subject to it or if the Joint Administrative Rules Review Committee makes it applicable within 45 days of the Notice. RCW 34.05.328(5)(a)(ii).

If the Commission does not voluntarily pull down this rulemaking or make these rules subject to the protection of -.328 prior to the 45 day limit in the statute, the Railroads reserve the right to petition the Joint Administrative Rules Review Committee for such a determination, which would force the Commission to do this rulemaking properly.

7. <u>The protections of RCW 34.05.328 should be afforded here</u>.

As observed above, the protections of -.328 could and should be applied to this rulemaking to bring the needed discipline and analysis to the process. The statute mirrors many of the concerns raised by the Railroads. Virtually every statutory criterion listed in RCW 34.05.328(1) applies here. For example, there needs to be a cost-benefit

analysis, especially for small businesses (some railroads in this state *are* small businesses, yet no analysis was done). See RCW 19-85 and RCW 34.05.328(1)(c). The statute directs an agency to consider the "least burdensome alternative." *Id., (d).* The statute directs an agency to take care that the proposed rule "does not require those to whom it applies to take an action that violates requirements of federal or state law." *Id.,*(e). The agency should determine whether the rule "differs from any federal regulation or statute applicable to the same activity or subject matter..." and, if so, specific additional determinations are required. The agency is to determine whether a state statute *explicitly* allows the agency to differ from federal standards, or substantial evidence justifies the differences. If there are differences, efforts are to be made to coordinate with other federal, state and local agencies. RCW 34.05.328(g) and –(h). These are just some of the concerns the Legislature had about rulemakings such as this that thrust the Commission into entirely new regulatory policy.

For these reasons, the Railroads again urge the Commission not to adopt the rules as proposed, but instead to recognize that they are preempted by federal law and not authorized by state law.

The Railroads reserve the right to raise these and all other legal and procedural objections arising under the Constitution, federal law, the Administrative Procedure Act, other provisions of law, and sound policy, as may be appropriate on judicial review of these proceedings. The Railroads plan to participate in the hearing of September 29, 2004.

Very truly yours,

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TAB - 1

COMPARISON OF POINT PROTECTION RULES

WUTC	GCOR	BNSF	UPRR
(1) The following definitions apply to this section: "Shove" means to back up or push cars with a locomotive rather than pulling them "Drop" and "kick" mean to release cars from a train or locomotive and allow them to coast or roll free.	**No parallel rule**	**No parallel rule**	**No parallel rule**
(2) When cars or engines are shoved, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. This requirement does not apply when it is reasonably certain, through the use of technology or other means, that neither people nor equipment are in the way and that switches are properly lined. Cars or engines must not be shoved to block other tracks until it is safe to do so.	**6.5 Handling Cars Ahead of Engine 4th edition** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service 5th edition same as UP, BNSF will adopt.	**6.5 Handling Cars Ahead of Engine** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved until the engineer knows who is protecting the point of the movement and how protection will be provided. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains. • Maximum timetable speed for snow service unless a higher speed is authorized by the employee in charge. Note: When plowing snow and all employees are on the equipment, one common authority may be used by both maintenance of way employees and the train crew. * * *	**6.5 Handling Cars Ahead of Engine (effective 4/1/04)** When cars or engines are shoved and conditions require, a crew member must provide protection for the movement. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service * * *

WUTC	GCOR	BNSF	UPRR
(3) When railroad cars are shoved, kicked or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Movements over the crossing may only be made on the crew member's signal. (4) The warning required in subsection (3) of this section is not required when crossing gates are in the fully lowered position, or it is clearly seen that no traffic is approaching or stopped at the crossing	**6.32.1 Cars Shoved, Kicked or Dropped** When cars are shoved, kicked, or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Make any movement over the crossing only on the crew member's signal. Such warning is not required when: • Crossing gates are in the fully lowered position. or • It is clearly seen that no traffic is approaching or stopped at the crossing.	**Same as GCOR.**	Same as GCOR except that a different rule applies when remote control moves are made over a gated crossing equipped with cameras: **35.1.6 Road Crossing Equipped with Cameras (effective 3/4/04)** When movements are made over a road crossing equipped with cameras, unless the RCO is on the engine or a crew member is at the crossing to provide warning, the RCO must: • Be in position to observe the crossing and roadway approaches in the monitor to assure that automatic crossing warning devices activate as designed when the RCL approaches and remain activated until the crossing is occupied by engine or cars; • Make sure movement over crossing does not exceed 4 MPH until crossing is occupied.
(5) Movements performed under remote control operation are to be considered "shoving" movements, regardless of the direction or position of the remote control locomotive, except when the primary remote control operator is riding the leading locomotive.	**No parallel rule in 4th edition. 5th edition 6.5.1 Remote Control Movements** Remote control movements are considered "shoving" movements, except when the remote control operator controlling the movement is riding the leading engine in the direction of movement. Before initiating movement, the remote control operator or a crew member must be in position to visually observe the	SSI 23(A)e Except when the primary Remote Control Operator is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.	**35.1.4 Shoving Movement (effective 6/7/02)** Except when the primary RCO is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.

WUTC	GCOR	BNSF	UPRR
	direction the equipment moves. Relief of Providing Protection The remote control operator is relieved from the requirement to stop within half the range of vision for movements with engine on leading end when: 1.The remote control zone has been activated. 2.Switches/derails are known to be properly lined. 3.Track(s) within the zone are known to be clear of other trains, engines, railroad cars and men or equipment fouling track. This process must be repeated each time the remote control zone is activated.		
(6) When a remote-control zone has been activated in accordance with a railroad's own rules, the railroad may relieve the remote-control operator of the requirements of this rule. However, the railroad must provide point protection in accordance with subsections (2) and (3) of this section at road crossings at grade or where a car or engine that is being moved could block mainline tracks except: (a) When it is reasonably certain, through the use of technology or other means, that neither people nor equipment are in the way and switches are properly lined. (b) When crossing gates are in the fully lowered position, or it is clearly seen that no traffic is	**No parallel rule in 4th edition.** **5th edition 6.7** **Remote Control Zone** A. Entering Remote Control Zone • Before entering a remote control zone, all employees that are not part of the remote control crew must determine whether the zone is activated. Employees may receive this information from the remote control operator, other authorized employee or special instructions. • When the remote control zone is activated, track(s) within the zone must not be fouled with equipment, occupied or switches operated until the remote control zone has been deactivated or permission is granted by the remote control operator to enter the remote control zone.	**SSI 23(F)b.** When a Remote Control Zone is activated, the Remote Control Operators are relieved of point protection for pullout movements (locomotive on leading end) only. Rule 6.28 requirement to stop within half the range of vision is waived. After Remote Control Zone is activated, Remote Control Operator must ascertain that switches/derails are properly lined and track(s) within zone are clear of trains, engines, railroad cars and men or equipment fouling track before initial pullout movement. This process must be repeated each time the Remote Control Zone is activated.	**35.6.2 Activated Remote Control Zone** **(8/4/04)** When a remote control zone is activated, the RCO must ascertain that switches/derails are properly lined and track(s) within the zone are clear of trains, engines, cars and men or equipment fouling track. The RCO is then relieved of point protection and the requirement to stop in one half the range of vision for pull out movements with locomotive on the leading end only. Point protection is required under the following conditions: * Remote Control Zone is not equipped with pull back and stop protection (PSP) or track is not protected by a derail lined in the derailing position. * PSP equipment is inoperative. RCO must test equipment as contained in the

WUTC	GCOR	BNSF	UPRR
approaching or stopped at the crossing.	B. Transfer of an Active Remote Control Zone • An active remote control zone may be transferred to other remote control operators. • A job briefing must be conducted each time the zone is transferred between remote control operators and, if applicable, other authorized employee. C. Deactivating Remote Control Zone When the remote control operator ends the tour of duty, the remote control zone must be deactivated except the remote control zone may remain active if: • Transferred. • Special instructions specify the hours the remote control zone is active.		instructions for the operation of the equipment. or * RCO manually overrides the PSP equipment.
(7) The requirements of this section apply to a railroad unless and until it has filed with the Federal Railroad Administration, pursuant to 49 C.F.R. Sec. 217, operating rules that materially modify the requirements of Sections 6.5 and 6.32.1 of the General Code of Operating Rules (Fourth Ed., Effective April 2, 2000).	**49 C.F.R. Sec. 217**	**49 C.F.R. Sec. 217**	**49 C.F.R. Sec. 217**

TAB - 2

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Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") jointly submit these additional comments on Railroad Operating Rules Relating to Point Protection (Docket No. TR-040151) pursuant to the Notice of Opportunity to File Written Comments served May 21, 2004.

These comments supplement extensive comments filed on behalf of BNSF and UP (and by the Association of American Railroads) in Dockets TR-040151 and TR-021465. The Railroads also made oral presentations and comments recently (on April 28, 2004 and May 12, 2004). All such comments and presentations are incorporated by reference into this submission.

Throughout these proceedings, BNSF and UP have strenuously argued that the WUTC should not attempt to promulgate and enforce rules affecting general railroad operations or remote control operations. This is true not only for legal reasons, but sound policy reasons as well. Federal law and the federal Constitution preempt the adoption and enforcement of the rules staff proposed on or about May 5, 2004. This is true even under the 9th Circuit case upon which staff seems to rely, as will be discussed.[1]

[1] Union Pacific RR. Co. v. California Public Utilities Commission, (9th C., 2003), will be discussed briefly in this submission, as its holdings impact the last version of the proposed rules.

Even if adoption of these rules weren't preempted, this submission will discuss why they are unnecessary and would be counterproductive to the safety of railroad workers and the general public.

The Goal of Adopting the Railroads' Own Rules is Flawed.

The process of drafting and promulgating railroad operating rules, and backing them with suitable training and enforcement, is long and complex. The General Code of Operating Rules ("GCOR") is amended from time to time, but the process involves long and careful consideration. Seasoned experts examine every conceivable situation before rules are recommended. Even then, railroads are free to adopt or modify them as needed.

The rules have changed substantially over time. What was standard twenty years ago is dramatically different from what is in the rules today. The ability to modify rules to conform to best practices is crucial. The GCOR rules currently used will be replaced in April 2005. Participating railroads have known what they will be for months now. UP has already adopted at least one of these new rules, whereas BNSF has not as yet, as was demonstrated in the Comparison Chart on May 12, 2004 (Attached hereto for convenience).

There is a misconception inherent in the draft rules that the GCOR and similar rules are the only source of operating rules, when many other sources also make up the body of operating rules (i.e., timetables, General Orders and the like, each subject to change). Adopting part of one set of rules without considering the entire context can result in different requirements from what Railroads mandate in their rules.

For all these reasons, it is bad policy to adopt regulations that take a snapshot of GCOR rules at one moment in time and take away the Railroads' ability to improve operating practices as experience and technology warrant.

There are Procedural Irregularities That Signal Great Haste.

The thorough industry process and similar FRA processes should be contrasted with the procedures that have been employed in Dockets TR-040151 and TR-021465. The latest example is the proposal by WUTC staff of eight new, completely different rules that appeared on the Commission's web site on or about May 5, 2004, just a week before the open meeting. There had been no opportunity for comments. This occurred after very different rules had been posted for months and commented on in our submissions of March 10 and March 19, 2004. Nonetheless, on April 28, 2004, staff recommended and the Commission adopted the rules in TR-021465 and, on May 12, WUTC staff repeated its recommendation that the Commission enter a CR-102 on the new rules in TR-040151.

It has been our understanding that CR-102s are normally not issued until an agency has written the proposed rules and tested them by requesting public comment. That did not happen with these rules until the Notice of May 21, nine days after the CR-102 hearing. A record like this is not the proper basis for an important rulemaking.

More generally, TR-21465 and TR-040151 have bounced around until no one can be sure exactly what is intended to be regulated. TR-21465 started as a scheme to regulate aspects of RCL operations, but it finally devolved into definitions and notice requirements on the subject of remote control operations. As everyone knows, definitions cannot be given meaning until they are seen in the context of rules. However, a second docket (this TR-040151) now has morphed into proposed rules, some specifically on remote control and some not.

The following kinds of issues are created by this irregular procedure. Are the new rules modified by the definitions in the other Docket? If so, why are they not repeated in the new rules? If not, what definitions will be used in the new rules? The record will not be of much assistance due to the great haste evident in the procedures employed.

Railroad operating rules require careful drafting, internal consistency, precise interpretation and extensive training. None of that has been present in rules proposed from time to time in this Docket. This is a recipe for denigrating safety.

The Railroads strongly register their concern about the haste of these proceedings and urge the Commissioners to end the process before real damage is done to safety.

The Preemption Argument.

This record is replete with extensive analysis supporting the Railroads' preemption arguments. This Commission simply does not have the authority to regulate the subject matter encompassed in the draft rules. We submit that every point made by the Railroads in earlier submissions about preemption is just as valid after the latest rule versions. This was the thrust of our presentation to the full Commission on May 12 and this submission will discuss those policy issues more fully.

The Criteria for These Rules Cannot Be Met.

The Railroads do not believe that it is possible for WUTC staff to draft point protection rules that meet the five criteria spelled out in the Notice.[2] Some of the reasons

[2] In the Notice of May 21, 2004, WUTC staff requested assistance in drafting a proposed rule that "1. Is understood by the railroads; 2. Does not interfere with existing operations; 3. Allows for the use of new technologies when they are shown to provide the same level of safety as previous techniques; 4. Takes into account concerns expressed by any commenter in this proceeding; and 5. Promotes safety by providing a rule to be enforced by the Commission through the imposition of penalties that requires railroads to detect and respond to persons or property in front of a movement unless it is clear that other means of protection substitute for that decision."

supporting this position will be repeated in these comments as we reply to the questions in the Notice that WUTC staff propounded.

There is No Valid Reason for WUTC Intervention in Operating Rules.

Fundamentally, the Railroads submit that there is no valid public policy reason for the WUTC to attempt to promulgate such rules. A fundamental justification for the WUTC staff's recommendation that the Commission adopt point protection rules was as follows: "There is currently no enforcement by FRA or the railroads of point protection rules." (Rulemaking Comment Summary, Docket No. TR-040151, edited May 3, 2004). That statement is untrue. Railroads train their employees on point protection, test them for compliance and discipline them for non-compliance. The Federal Railroad Administration requires that railroads provide training on and enforce these rules. The FRA is intimately and closely involved with virtually all aspects of railroad operations and enforcement. As the next discussion will show, the FRA is not taking the "hands-off" approach that some have alleged. The Commissioners should decide that there is no need for them to try to promulgate railroad operating rules because doing so would in fact be harmful, not helpful, to the cause of safety.

The FRA Interim Report Sheds New Light on These Dockets.

To our knowledge, there is no convincing evidence in the Commission's files that would support WUTC point protection rules. It is unclear upon what evidence staff may be relying, but to our knowledge it has not been shared with either stakeholders or Commissioners. This defective procedure forms no valid basis for a rulemaking by the Commissioners. To the contrary, there is overwhelming evidence that such WUTC rules are unnecessary and that such rules --- even if they were not preempted by federal regulation --- would actually be counterproductive to the objective of increasing safety.

On May 13, 2004, just one day after the last open meeting on this subject, the Federal Railroad Administration issued its interim report to Congress on its audit of railroad remote control operations. A copy of that report is attached.

The Railroads request that a copy of the Interim Report be furnished by staff to each Commissioner. The document speaks for itself, but we wish to point out several places in the document where FRA is directly and cogently speaking to the issues now before the WUTC. BNSF and UP invite the Commissioners' attention to the entire document and to the following in particular.

1. The letters to Senators McCain and Hollings. Of particular interest is the FRA finding that RCL train accident rates have been *13.5% lower* than rates for conventional switching operations. Employee injury rates have been "an impressive" *57.1% lower*

than rates for conventional switching operations.[3] By contrast, WUTC staff has apparently relied on statistics sounding exactly the opposite. The FRA report discusses accidents and causes in great detail and with great clarity and authority. The Report should convince WUTC Commissioners that railroad safety issues are being actively, aggressively and accurately pursued by FRA and there is no need for state resources to pursue the same subject matter.

2. Discussion of Safety Advisory 2001-01. FRA's discussion of its Safety Advisory 2001-01 should also allay fears that the people of the state of Washington are somehow in need of WUTC regulation of railroad operating rules. FRA's approach to rulemaking is carefully explained in part I of the Report (beginning at p. 2). FRA points out (at page 2) that whenever the "Advisory" references a railroad safety regulation *compliance with the regulation is mandatory.* FRA's close and detailed involvement in virtually all aspects of railroad safety (not only RCL), including training, is evident in this section. The close coordination of rules and *training* is stressed (at 3). What training is the WUTC prepared to provide its staff and railroad employees if new, Washington-specific rules are promulgated? The rules are silent.

3. Riding Freight Cars. Various issues are discussed in the Interim Report (beginning at 9). BNSF and UP draw attention to Issue 2 (at 10) in which the FRA is questioning allowing RCOs to ride the side of cars when operating an RCL. WUTC draft rules (specifically numbers 2 and 6) make no such distinction. They could be construed to *require* this practice in certain situations, although it is prohibited by existing rules for safety reasons (i.e., at road crossings, with certain equipment, or other special situations). This is typical of the consequences that could occur if rules are unclear or incomplete and no training is supplied to either railroad or agency personnel.

4. Point Protection Issues are Specifically Discussed. Issue 5 discusses point protection specifically and cites lack of adequate protection during movements as an issue. Rather than hastily writing rules, however, FRA is taking a deliberate approach spelled out in the "Status" discussion. In that discussion, FRA observes that point protection must be provided according to existing operating rules. Importantly, FRA is also saying here (by implication) that such protection is *not* required in given RCL situations. The point here is that nothing drafted in these Dockets reaches --- or could reach --- the degree of sophistication required in the text or enforcement of such rules.

5. Federal Regulations are Involved in Grade Crossing Operations. The staff has, in essence, argued that WUTC is free to promulgate rules in areas where the FRA has not acted. They appear to be loosely relying on the 9th Circuit case previously cited. Reading Issue 7 (at p. 14) should shed more light on this subject. FRA observes that "...train crews are required by federal regulation to provide proper protection at all

[3] These findings should be compared to the allegation repeated by staff that there was a 58% *increase* in certain injuries, though exactly what was being measured and how is unclear. What relevance it has is also unclear because the last proposed rules mish-mash general and RCL rules together under the "point protection" umbrella. The Report shows that FRA takes a much more precise and detailed approach.

crossings." Its discussion of the subject of crossings is thorough and illustrates, again, the complexity of the operating rulemaking process when properly done.

6. The Conclusion of the Report is Required Reading. The Conclusion beginning at page 10 summarizes the FRA's active, constant vigilance and interest in the entire area of rules proposed here by WUTC staff.

Setting aside the preemption argument, the Commissioners will, we believe, read this Report and conclude that state intervention in the field of railroad operating rules is unwarranted and unwise, even if these proposed rules were permissible under federal law.

Commission's Eight Questions.

The Commission's request for comments asked for input on eight specific topics:

Question 1. The requested terms are not found in the GCOR glossary. These and many other terms have uniquely different meanings depending upon the context of the rule(s) where they are used. Some are modified by other words, such as "Dutch drop" or "gravity drop." Also, their meanings vary by railroad and, sometimes, even by areas where they are used. They are understood because, like every aspect of the rules, they are reinforced by extensive and continuous training within the context of the situation and the body of rules in use.

Question 2. The table furnished to the Commission at the May 12, 2004 open meeting contains the versions of GCOR 6.5 adopted by BNSF and UP.

Question 3. The Commission asked for examples of practical differences between the railroads' own operating rules (current GCOR 6.5 or UP's version of Rule 6.5, which will be the official GCOR version when those rules are republished next spring) and the draft rule presented at the open meeting on May 12, 2004.

The WUTC's draft rule mimics the first sentence of the current version of GCOR 6.5, except that it adds the following preamble: "Except when it is reasonably certain that neither people nor equipment could be in the way . . ." Thus, the WUTC's rule would not require point protection if the crew member were reasonably certain that no people or equipment were in the way.

The avoidance of collisions is not the only reason that railroads want the point of the movement to be protected. They also want to make sure that the switch is lined properly for a movement, that cars aren't shoved where they could foul another track, that cars aren't shoved off the end of a track, etc. This discrepancy between the two rules could create confusion. By emphasizing only part of the railroads' own rules, the WUTC appears to be minimizing the importance of the part of the rule relevant to incidents much more common than collisions, such as running through switches. It can only

create confusion for railroad employees to tell them to abide by two somewhat similar rules, but to ignore one of them if they are reasonably certain no people or equipment are in the way.

The draft rule requires a crew member to "take an easily seen position on the leading car or engine, or be ahead of the movement" *"[e]xcept when it is reasonably certain that neither people nor equipment could be in the way."* It is unclear what degree of certainty the crew member must have about the absence of any people. There are places and times when this rule should never apply. For example, railroads currently do not ever require an employee to ride the point or be ahead of the movement in the bowl of a hump yard. In a hump yard, employee access to the bowl tracks is strictly limited. Cars are allowed to roll by gravity down a lead track, with their speed controlled by retarders along the track. A tower operator controls which bowl track the car will roll into by remotely opening the appropriate switch. Under the WUTC's draft rule, if a trespasser wandered into the hump yard and were struck by a car rolling into a bowl track, the railroad might be accused of violating the point protection rule. It might be asserted that the railroad "couldn't have been reasonably certain that no one was there since someone *was* there." Such an interpretation would require substantial changes in the operation of hump yards and create new risks for railroad employees, forcing them to ride cars through the retarders or run ahead of the cars into the bowl tracks. With slips, trips and falls being the most common source of railroad employee injuries, such a requirement would undoubtedly increase injuries to railroad employees. The Railroads doubt this result is actually intended by the WUTC staff, but it is an example of the unintended consequences that flow from this entire rulemaking effort.

The Railroads also doubt it is the WUTC's intent to create new legal rights for trespassers in railroad yards, or to enact a rule that would make the railroad responsible for ensuring that no unauthorized person has entered the yard before performing normal hump yard activities. However, here again, someone could conceivably so interpret these draft rules.

The version of GCOR 6.5 that will be adopted on April 1, 2005 (which is the same as UP's current Rule 6.5) requires point protection "when conditions require," but does not limit the methods of providing point protection to riding the point or being ahead of the movement. Examples:

"Conditions require" that crew members make sure a route is properly lined to avoid running through switches. Historically, a crew member would walk in front of a movement or ride the point, get off the car, and line each switch by hand to make sure the switches were lined properly. Under the upcoming 2005 version of GCOR 6.5 (or UP's current Rule 6.5), a crew member could ensure that a switch were properly lined for the movement by relying on (a) electronic radio feedback from a radio-controlled switch; (b) a tower operator's notification that a tower-operated switch has be lined for the move; (c) notification from another crew that it had lined the switch; or (d) visual confirmation of the positioning of the green target stand at the switch.

We cannot tell whether the WUTC would interpret its draft rule to not require a crew member to ride the point or proceed in front of the movement if the crew member had electronic feedback from a radio-controlled switch, notification from a tower operator or another crew, or could see from the green target stand that the switch was lined correctly. We do not know how the WUTC would interpret when "conditions require." If the occurrence of an accident will be interpreted to mean that conditions did require a person at the point, railroads will not be free to utilize excellent, improved, but not 100% guaranteed error-free technology. Instead, they may be mandated to employ historical practices that might be less safe for railroad employees and less reliable than the new technology. If the traditional methods worked 98% of the time and the new methods work 99% of the time, the WUTC's draft rule could be wrongfully used to prevent railroads from utilizing the new technology. This, too, would be bad policy, as the FRA Interim Report is suggesting.

"Conditions require" that cars not enter a main line track without authority. This can be ensured not only by riding the point or preceding the movement, but also through other methods, including derails, track and time permits from the dispatcher, transponders ("pucks") that slow and stop a movement as it nears a main line switch, or perhaps, in the future, through some global positioning system device that tracks and controls the movement of cars and engines. We cannot tell whether the WUTC would interpret its draft rule to not require a crew member at the leading end of the movement if the crew had a track and time permit or if pucks, derails, or some other technology were in place to keep unauthorized cars from entering the main line.

It is not possible to provide an exhaustive list of circumstances in which the WUTC's draft rule and the railroads' own rules are in conflict because we do not know how the WUTC staff will interpret or apply the terms "when conditions require" or "take an easily seen position." However, the examples given are a sample of what is involved.

Question 4. The Commission asks how UP's version of Rule 6.5 allows for use of new technology if a crew member must provide protection. UP allows a crew member to confirm such things as the lining of a switch through methods other than being on the point or preceding the movement. Examples were given above.

Question 5. UP thinks the version of GCOR 6.5 that will be adopted nationwide next spring is preferable. BNSF will adopt that version when it is adopted nationally (if not sooner).

Question 6. The Commission asked what operations would be allowed under GCOR Rule 6.32.1 that would not be allowed under the WUTC's proposed rules. We do not know whether the WUTC will agree that crews can verify through a camera that crossing gates are in their fully lowered position or that no traffic is approaching or stopped at the crossing. In addition, GCOR 6.32.1 does not exist in isolation. It is modified by UP in remote control situations by UP Rule 35.1.6 to require more from

crews than in conventional switching operations. UP Rule 35.1.6 requires a crew member to verify, by looking thought a camera monitor, not only that the gates are down but that they activated as designed when the train was approaching the crossing.

Question 7. The Commission requested verification of the FRA's position on diagnostic team validation of the use of cameras at crossings. The FRA's recommendation, as set forth on pages 15-16 of the FRA Interim Report, is as follows:

- Before camera assisted RCL operations are permitted at highway-rail grade crossings, a Crossing Diagnostic Team should evaluate the crossing. The Diagnostic Team should have representatives from the railroad, FRA, the State Department of Transportation (or other state agency having jurisdiction over the highway) and local governmental authorities. The Diagnostic Team should evaluate the suitability of each crossing for remote camera operations. They should consider factors such as average daily traffic counts; number of highway lanes; highway speed limits; number of railroad tracks; volume of school bus, transit bus, emergency vehicle, large truck and hazardous material traffic over the crossing; minimum RCL operator sight distances of roadway approaches to the crossing; and other relevant factors that could effect the safety of the crossing. The Diagnostic Team should also consider the appropriate number of camera and appropriate camera angles needed to provide for the remote operation of RCL's over the crossing.

- Remote cameras should only be used at crossings equipped with warning lights, gates, and constant warning and motion sensor devices.

- The cameras should be arranged so as to give the RCO a clear view of the rail approaches to the crossing from each direction to accurately judge the locomotive's proximity to the crossing.

- The cameras should be arranged so as to give the RCO a clear view to determine the speed and drive behavior (e.g. speeding, driving erratically) regarding any approaching motor vehicles.

- Either the camera resolution should be sufficient to determine whether the flashing lights and gates are working as intended or the crossing should be equipped with a remote health monitoring system that is capable of notifying the RCO immediately if the flashing lights and gates are not working as intended.

- The railroad should notify local FRA offices when this type of protection has been installed and activated at a crossing to ensure that FRA grade crossing specialists and signal inspectors can monitor these operations.

We also suggested that if a highway-rail crossing were equipped with supplemental safety devices that prevent motorists from driving around lowered gates, then perhaps some of the above recommendations may not be necessary to permit the safe remote operation of RCLs. However, a Diagnostic Team should make such determinations. FRA recognizes that camera assisted remote operation of RCLs may not be a viable alternative at all highway-rail grade crossings.

We were not able to find an FRA recommendation that "the responsible state safety oversight agency" be on the Crossing Diagnostic Team.

Question 8. The Commission asked whether its proposed rule on point protection in remote control zones would impose more limitations on the use of remote control locomotives than the railroads had envisioned. Yes, it would.

The WUTC's draft rule would require a crew member to ride the point or proceed in front of the movement as it approached a main line track. As stated above, railroads have additional methods of protecting the point of the movement in these circumstances, including the use of derails, track and time permits, pucks and, potentially, GPS devices.

The Ninth Circuit Case Does Not Support the Proposed Rules.

WUTC staff has apparently relied on the Ninth Circuit case *Union Pacific RR. Co. v California Public Utilities Commission,* (CA 9, 2003) 346 F.3rd 851 (copy attached), to support the proposed rules. The Railroads submit that the case does not support promulgation of the proposed rules.

The CPUC promulgated regulations governing railroad track standards and certain internal railroad rules in response to derailments within the state. UP, BNSF and Southern Pacific Transportation Company sued to enjoin the regulations. The complicated decision of the District Court was appealed to the Ninth Circuit.

A thorough analysis would require more than is possible here. However, some basic principals can be gleaned from the case that are directly applicable here.

It should first be noted that the District Court and the Ninth Circuit found that the safety concern that most of CPUC's regulations were intended to address was already covered by a federal rule and was therefore preempted under the Federal Rail Safety Act, 49 USC Section 20106. Here, too, the subject matter of the proposed rule has already been addressed by FRA. CPUC attempted to justify some of its rules under the exception that is provided in 49 USC Section 20106 for an "essentially local safety hazard", but failed. The Ninth Circuit held that *none* of the mountain grade line segments that CPUC had identified manifested conditions that were essentially local in nature. Because the WUTC's rules are statewide, this exception obviously wouldn't apply.

Even if WUTC could establish that the subject is not covered by a federal rule, UP and BNSF have crews that originate in other states or provinces and enter Washington state. At least some of these crews would have to be trained in and observe special Washington rules while in this state, while observing other rules outside this state. For this reason, the Ninth Circuit observed in the CPUC case that state rules that have an

"extraterritorial effect" are "constitutionally infirm." 346 F.3rd 851, 871. This "patch work regulatory scheme" would be an "immense burden" on interstate commerce, 346 F.3rd 851, 871, as well as contrary to the national goal of uniformity.

These few observations should dispel any notion that the Ninth Circuit case somehow sanctions the rules proposed here. To the contrary, we submit that this case and others discussed previously spell doom for the proposed rules. Reading the Ninth Circuit case will also demonstrate to anyone the complexity and precision with which railroad operating rules must be written and, if necessary, litigated.

States Are Preempted From Regulating RCL Operations.

In *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, (CA 7, 1999) 186 F.3d 790, the Seventh Circuit analyzed another aspect of federal preemption – the doctrine that has come to be known as "negative preemption." Where the FRA has considered an operating issue and affirmatively decided *not* to regulate such operations, state regulation is preempted. Thus, when analyzing the preemption issue, it is not enough simply find that there is no federal regulation covering the issue. When the attached "Rutter Letter" dated May 1, 2003, is read with *Doyle,* the conclusion is inescapable that state regulation of RCL operations is preempted. Thus, the proposed rules are preempted.

For all the reasons discussed in these and previous comments, the Railroads urge the Commissioners to decide against issuing a CR-102 on these or any similar rules.

Very truly yours,

GIBSON KINERK, L.L.P.

Robert E. Walkley
Attorney for The Burlington Northern and
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Attorney for Union Pacific Railroad Company

COMPARISON OF POINT PROTECTION RULES

WUTC	GCOR	BNSF	UPRR
(1) The following definitions apply to this section: "Shove" means to back up or push cars with a locomotive rather than pulling them. "Drop" and "kick" mean to release cars from a train or locomotive and allow them to coast or roll free.	**No parallel rule**	**No parallel rule**	**No parallel rule**
(2) Except when it is reasonably certain that neither people nor equipment could be in the way, when cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved to block other tracks until it is safe to do so.	**6.5 Handling Cars Ahead of Engine 4th edition** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service 5th edition same as UP, BNSF will adopt.	**6.5 Handling Cars Ahead of Engine** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved until the engineer knows who is protecting the point of the movement and how protection will be provided. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains. • Maximum timetable speed for snow service unless a higher speed is authorized by the employee in charge. **Note: When plowing snow and all employees are on the equipment, one common authority may be used by both maintenance of way employees and the train crew.** * * *	**6.5 Handling Cars Ahead of Engine (effective 4/1/04)** When cars or engines are shoved and conditions require, a crew member must provide protection for the movement. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service * * *

WUTC	GCOR	BNSF	UPRR
(3) When railroad cars are shoved, kicked or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Movements over the crossing may only be made on the crew member's signal. (4) The warning required by subsection (2) is not required when crossing gates are in the fully lowered position, or it is clearly seen that no traffic is approaching or stopped at the crossing.	**6.32.1 Cars Shoved, Kicked or Dropped** When cars are shoved, kicked, or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Make any movement over the crossing only on the crew member's signal. Such warning is not required when: • Crossing gates are in the fully lowered position. or • It is clearly seen that no traffic is approaching or stopped at the crossing.	**Same as GCOR.**	Same as GCOR except that a different rule applies when remote control moves are made over a gated crossing equipped with cameras: **35.1.6 Road Crossing Equipped with Cameras (effective 3/4/04)** When movements are made over a road crossing equipped with cameras, unless the RCO is on the engine or a crew member is at the crossing to provide warning, the RCO must: • Be in position to observe the crossing and roadway approaches in the monitor to assure that automatic crossing warning devices activate as designed when the RCL approaches and remain activated until the crossing is occupied by engine or cars; • Make sure movement over crossing does not exceed 4 MPH until crossing is occupied.
(5) Movements performed under remote control operation are to be considered "shoving" movements, regardless of the direction or position of the remote control locomotive, except when the primary remote control operator is riding the leading locomotive.	**No parallel rule in 4th edition.** **5th edition 6.5.1** **Remote Control Movements** Remote control movements are considered "shoving" movements, except when the remote control operator controlling the movement is riding the leading engine in the direction of movement. Before initiating movement, the remote control operator or a crew member must be in position to visually observe the	**SSI 23(A)e** Except when the primary Remote Control Operator is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.	**35.1.4 Shoving Movement (effective 6/7/02)** Except when the primary RCO is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.

WUTC	GCOR	BNSF	UPRR
	direction the equipment moves. Relief of Providing Protection The remote control operator is relieved from the requirement to stop within half the range of vision for movements with engine on leading end when: 1.The remote control zone has been activated. 2.Switches/derails are known to be properly lined. 3.Track(s) within the zone are known to be clear of other trains, engines, railroad cars and men or equipment fouling track. This process must be repeated each time the remote control zone is activated.		
(6) When a remote-control zone has been activated in accordance with the railroad's own rules, the railroad may relieve the remote-control operator of the requirements in subsections (1) through (4). However, the railroad must always provide point protection, in accordance with subsections (1) through (3) of this section, at road crossings at grade or where a car or engine that is being moved could block mainline tracks.	**No parallel rule in 4th edition.** **5th edition 6.7** **Remote Control Zone** A. Entering Remote Control Zone • Before entering a remote control zone, all employees that are not part of the remote control crew must determine whether the zone is activated. Employees may receive this information from the remote control operator, other authorized employee or special instructions. • When the remote control zone is activated, track(s) within the zone must not be fouled with equipment, occupied or switches operated until the remote control zone has been deactivated or permission is granted by the remote control operator to enter the remote control zone.	**SSI 23(F)b.** When a Remote Control Zone is activated, the Remote Control Operators are relieved of point protection for pullout movements (locomotive on leading end) only. Rule 6.28 requirement to stop within half the range of vision is waived. After Remote Control Zone is activated, Remote Control Operator must ascertain that switches/derails are properly lined and track(s) within zone are clear of trains, engines, railroad cars and men or equipment fouling track before initial pullout movement. This process must be repeated each time the Remote Control Zone is activated.	**35.6.2 Activated Remote Control Zone** **(4/1/04)** When a remote control zone is activated, the RCO must ascertain that switches/derails are properly lined and track(s) within the zone are clear of trains, engines, cars and men or equipment fouling track. The RCO is then relieved of point protection and the requirement to stop in one half the range of vision for pull out movements with locomotive on the leading end only.

WUTC	GCOR	BNSF	UPRR
	B. Transfer of an Active Remote Control Zone • An active remote control zone may be transferred to other remote control operators. • A job briefing must be conducted each time the zone is transferred between remote control operators and, if applicable, other authorized employee. C. Deactivating Remote Control Zone When the remote control operator ends the tour of duty, the remote control zone must be deactivated except the remote control zone may remain active if: • Transferred. • Special instructions specify the hours the remote control zone is active.		
(7) The requirements of this section apply to a railroad unless and until it has filed with the Federal Railroad Administration, pursuant to 49 C.F.R. Sec. 217, operating rules that materially modify the requirements of Sections 6.5 and 6.32.1 of the General Code of Operating Rules (Fourth Ed., Effective April 2, 2000).	**49 C.F.R. Sec. 217**	**49 C.F.R. Sec. 217**	**49 C.F.R. Sec. 217**

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U.S. Department of Transportation
Federal Railroad Administration

Administrator

1120 Vermont Ave., NW.
Washington, DC 20590

MAY 1 2003

FRA-2000-8422-4

Mr. Edward Wytkind
Executive Director
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888 16 Street, NW, Suite 650
Washington, D.C. 20006

Dear Mr. Wytkind:

The Federal Railroad Administration (FRA) has reviewed your letter dated March 11, 2003, urging FRA to favorably act upon the petition for rulemaking submitted by the Brotherhood of Locomotive Engineers (BLE) on the use of remote control locomotives (RCL). In that same letter, you also stated that "[u]ntil such a rule can be implemented, we [TTD] request that the agency issue an emergency order stopping all remote control operations." Because your letter raised two separate issues, I will address them individually.

I. BLE's Rulemaking Petition

On July 19, 2000, FRA held a technical conference to examine the use of RCL operations in the railroad industry. This public meeting allowed all interested parties, including the BLE and other rail unions, to present their views and describe their experiences with remote control operations. The conference examined all safety aspects of RCL operations, including (1) design standards, (2) employee training, (3) operating practices and procedures, (4) test and inspection procedures, and (5) security and accident/incident reporting procedures. BLE participated at the conference and submitted written comments to the docket (Docket No. FRA-2000-7325). BLE stated in its comments that it

> has consistently argued for safety above all other considerations. We recognize that a given technology is not necessarily unsafe in some circumstances, but in other circumstances it can never be made safe enough. This is especially true given the constantly changing environment of U.S. railroad operations .... With this in mind BLE will proceed with an open mind, holding to the principal [sic] that rail safety is our primary goal.

BLE also requested that FRA "recognize that: a one size-fits-all approach will not work in RCL use [because] ... each railroad is different [and] we recognize that the adoption of 'best practices' has served this industry well."

On November 16, 2000, BLE filed a petition asking FRA to conduct a regulatory proceeding on RCL use. BLE referred to the technical conference FRA had held and argued that the record FRA had developed justified a rulemaking.

In February 2001, FRA issued Safety Advisory 2001-01 "which establishes recommended minimal guidelines for the operation of remote control locomotives." See 66 Fed. Reg. 10340 (Feb. 14, 2001). Based on the agency's review of information presented at the technical conference, FRA concluded that "[b]ecause this technology is not widely used in railroad operations, FRA has limited data on which to base an objective safety analysis and must therefore proceed prudently." Furthermore FRA stated that "[b]ecause information currently available to FRA does not lead to the conclusion that RCL operations should be prohibited on safety grounds, FRA has elected to proceed cautiously."

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 the time, and that FRA's guidelines constituted the agency's present conclusions concerning RCL operations.

FRA's guidelines are comprehensive, covering all aspects of RCL operations. Safety Advisory 2001-01 covers seven subjects: (1) safety design and operational requirements; (2) training of persons who operate the devices; (3) operating practices for safe use of the devices; (4) security of the devices when not in use; (5) inspection and testing of the devices; (6) notification of remote control use and protection of nearby workers; and, (7) accident-incident reporting procedures. While the guidelines are comprehensive, FRA made clear that "[i]n those situations [where a railroad may not be able to obtain complete consistency with these recommendations,] railroads are encouraged to develop alternative designs or practices which offer at least equivalent or greater levels of safety." Thus, FRA's guidelines allow railroads "to tailor their own RCL operations" as needed to allow for differences in the design of equipment, or differences in operating practices among railroads.

Although the voluntary nature of the RCL guidelines allows for some flexibility, FRA expressly warned railroads that some of the RCL design criteria and operating procedures were mandatory requirements.

> FRA emphasizes that although compliance with this Safety Advisory is voluntary, nothing in this Safety Advisory is meant to relieve a railroad from compliance with all existing railroad safety regulations. Therefore, when procedures required by regulation are cited in this Safety Advisory, compliance is mandatory.

Id. at 10343. For example, the safety advisory made clear that the RCL system must be included as part of the required calendar day inspection for locomotives and RCL system components interfacing with the mechanical devices of the locomotive are subject to the required 92-day

periodic inspection. Similarly, FRA clearly stated that each RCL operator must be certified and qualified in accordance with 49 C.F.R. Part 240 if conventional operation of a locomotive under the same circumstances would require certification under that regulation. Furthermore, FRA made clear that each railroad must include RCL operating rules and procedures in its written program of operational tests and inspections required under 49 C.F.R. Part 217.

As explained more fully below, FRA continues to monitor RCL use closely. If at any time FRA concludes that voluntary guidelines, combined with enforcement of the existing relevant rules, are not sufficiently protecting employees and the public, we will take additional action which may include rulemaking.

II. TTD's Emergency Order Request

FRA's Emergency Authority Generally

FRA's authority to issue an emergency order is based on 49 U.S.C. § 20104, which states:

> If, through testing, inspection, investigation, or research carried out under this chapter, the Secretary of Transportation decides that an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death or personal injury, the Secretary immediately may order restrictions and prohibitions, without regard to section 20103(e) of this title, that may be necessary to abate the situation. (Emphasis supplied.)

This authority has been delegated to the Federal Railroad Administrator. 49 C.F.R. §1.49(m).

Because this extraordinary remedy does not require prior notice to the affected party or an opportunity to be heard prior to issuance of the order, Congress declared that such an order can be invoked only in "an emergency situation involving a hazard of death or injury to persons." FRA thus has no legal authority to issue such an emergency order unless such an emergency situation exists.

The Basis for TTD's Emergency Order Request

TTD asserts that FRA should issue an emergency order stopping all remote control operations [presumably, nation-wide] until FRA can implement a rule addressing the issues raised in the BLE's rulemaking petition. TTD offers no evidence of a safety emergency and presumably relies on its arguments advanced in support of BLE's rulemaking petition to also support its emergency order request. TTD states that FRA's Safety Advisory 2001-01 does "not actually require carriers to adopt all the safety procedures listed" in the Safety Advisory and that the recommended guidelines "do not go far enough to ensure that this technology is implemented and utilized safely." TTD, as an example of its claim, states that training for a remote control

operator (RCO) is inadequate as compared to that of a train service engineer. TTD also suggests that a rule is warranted because "there have been over 40 accidents involving remote control operations . . . [including one this year in which] a CSX [Transportation (CSXT)] trainman was killed when he was struck by a moving boxcar that was being pushed by a locomotive being operated remotely."

The Basis for FRA's Decision

Based on current safety data available to FRA, there is nothing that would indicate that RCL operations are any less safe than conventional operations. Nonetheless, FRA has elected to proceed cautiously in its approach to these operations and therefore issued Safety Advisory 2001-01 in February 2001. In issuing the Safety Advisory, FRA sought to identify a set of "best practices" to guide the rail industry when implementing RCL technology. As this is an emerging technology, FRA believes this approach serves the railroad industry by providing flexibility to both manufacturers designing the equipment and to railroads in their different operations, while reinforcing the importance of complying with all existing railroad safety regulations. All of the major railroads have used these recommendations as the basis for their own RCL operating procedures.

Regarding the enforcement of Federal regulations as they apply to RCL operations, the Safety Advisory explains that compliance with existing relevant regulations is mandatory. 66 Fed. Reg. at 10343.

The Safety Advisory clearly states that "each person operating an RCL must be certified and qualified in accordance with 49 CFR Part 240 [FRA's locomotive engineer rule] if conventional operation of a locomotive under the same circumstances would require certification under that regulation." In November 2001, all six major railroads submitted to FRA their training programs for remote control operators (RCOs) as required by Part 240. Since that initial filing, several railroads have made changes to their remote control training programs at FRA's request. FRA is closely monitoring this training and making additional suggestions for improvement on individual railroads as they become necessary. These training programs currently require a minimum of two weeks classroom and hands-on training for railroad workers who were previously qualified on the railroad's operating and safety rules. Federal regulations require that locomotive engineers be trained and certified to perform the most demanding type of service they will be called upon to perform. Thus, an RCO that will only be called upon to perform switching duties using an RCL would not need to be trained to operate a locomotive on main track from the control stand of the cab. This training is no different than that afforded other locomotive engineers trained only for switching service in that both are limited to training in the type of service they will be called upon to perform.

In addition to the required training, the regulations require railroads to conduct skills performance testing of RCOs that is comparable to the testing required of any other locomotive engineer performing the same type of work. Federal regulations also hold RCOs responsible for

compliance with the same types of railroad operating rules and practices that other locomotive engineers are required to comply with in order to retain certification. See 49 C.F.R. § 240.117.

FRA will continue to exercise careful oversight of RCL operations. FRA inspectors are monitoring the evolving remote control operations and have had good success in working with railroads to resolve any safety concerns revealed by the inspections. Further, FRA has developed accident/injury reporting codes for RCL operations to ensure that any future safety hazards related to such operations can be easily identified, investigated, and analyzed for the purpose of discovering any potential safety risks associated with this evolving technology.

We have reviewed each of the 40 incidents to which you refer to the extent we have received any specific information on them. More than half of the 40 incidents you listed were not reported to FRA because they did not result in a serious injury to any employee nor did the railroad on-track equipment, signals, track, track structure, or roadbed incur damages meeting or exceeding the reporting threshold established by FRA regulation. See 49 C.F.R. § 225.5 (defining "acoident/incident"). To date, none of the FRA reportable accidents or incidents concerning RCL operations have been the result of the RCL technology (although a few have been the result of non-RCL equipment failures, e.g., Union Pacific Railroad's Hinkle, Oregon, incident on June 9, 2002, was caused by a retarder failure); instead, nearly all of the FRA reportable accidents or incidents concerning RCL operations have been the result of human error. Meanwhile, FRA is currently exploring "root cause" analysis of these types of events to determine whether the human errors may have been inherent to RCL operations.

The tragic incident you described in your letter occurred on February 16, 2003, in Dewitt Yard, in Syracuse, when a secondary RCO was fatally struck by a freight car that had been kicked during an RCL operated switching movement. Although FRA has not yet issued its final report regarding the investigation of this accident, at this point there is no indication the operation of the RCL caused the incident. The fatally injured employee was engaged in a classification operation at the time of the incident and a transcript of radio communications indicates that this person had acknowledged that he was ready to accept the movement over the same track upon which he was run over.

Subsequent to the accident, FRA conducted three safety audits of yard and switching activities (including RCL operations) on the Albany Division of CSXT. The audits entailed sending teams of FRA safety inspectors to all major CSXT yards in the Albany Division, including the Dewitt Yard. In addition, the Safety Analysis branch within FRA's Office of Safety contributed FRA data regarding train accidents and injuries for CSXT in New York State. During the first audit, which occurred on February 21 - 23, FRA found no systemic safety concerns with CSXT's remote control operations. During FRA's second audit, which occurred on March 3 - 6, the only RCL issue that caused lingering concern was that CSXT did not have a standard which would ensure the ongoing education of a certified RCO who has not worked an RCL job for an extended period of time; FRA's regional personnel have reminded CSXT of this regulatory requirement and FRA will continue to closely monitor compliance with it. 49 C.F.R.

§ 240.123(b) and App. B, § 3. During the third audit, which occurred on April 15 - 17, FRA found no systemic safety concerns with CSXT's remote control operations.

FRA has also addressed the security of RCL operations and believes that adequate safeguards are in place to ensure system integrity. Of paramount importance in RCL operations are the signals which direct the movement of the locomotive. The implications of an unauthorized movement can be severe. FRA sought to protect the integrity of the RCL system by recommending certain RCL design features in its Safety Advisory. Under the heading "Safety Design and Operational Requirements" FRA listed the following relevant recommendations:

- Although an RCT [remote control transmitter] can have the capability of control, at different times, different locomotives equipped with remote-control receivers [RCR], it should be designed to be capable of controlling only one RCR equipped locomotive at a time. (A locomotive may consist of one or more engines operated from a single control).

- An RCT having the capability to control more than one RCL should have a means to lock in one RCR "assignment address" to prevent simultaneous control over more than one locomotive.

- Each locomotive equipped with an RCR should respond only to the RCTs assigned to that receiver.

- The RCT should be designed to require at least two separate actions by the remote control operator before RCL movement can begin (in order to prevent accidental movement).

- When an RCT's signal to the RCL is interrupted for a set period, not to exceed five seconds, the remote-control system should cause:
  a. full service application of the locomotive and train brakes; and
  b. elimination of locomotive tractive effort.

The manufacturers of this equipment have designed sophisticated signal relay systems to protect the integrity of the system. The signals or bits of information sent to the RCL are encrypted with a unique address for that particular locomotive. If a control signal fails, is corrupted, or is interfered with in any way, the RCL system immediately acts to stop locomotive movement. Additionally, the RCLs are equipped with manual emergency "shutdown" push buttons on each side of the RCL. These buttons allow anyone close to the locomotive to immediately shut the locomotive down in the event of an emergency.

In addition to the above measures to ensure the safety and security of RCL operations, the railroad industry has undertaken a security risk assessment to identify potential security needs and enhancements. One of the key issues examined in the assessment was the security of

information, including the security of data radio transmissions like the kind used to operate RCLs. FRA is working with the Transportation Security Administration and the railroad industry to ensure the security and integrity of all critical data radio transmissions.

Based on the foregoing, I find that the conditions required by 49 U.S.C. § 20104(a) for issuance of an emergency order are not present. I find that conditions or practices nation-wide have not created an emergency situation involving a hazard of death or injury to persons and I am, therefore, unable to grant your request to issue an emergency order directing all railroads to cease all remote control operations. Should FRA's follow-up activities on any major railroad indicate that an emergency order is the appropriate remedy, we will not hesitate to act.

Conclusion

For the reasons explained above, FRA does not intend to take further action in connection with BLE's rulemaking petition at this time. Moreover, FRA has declined to issue the emergency order you have requested because no emergency has been shown to exist.

Finally, I have in fact met with BLE's president and discussed briefly the issue of RCL operations. Our meeting occurred in Florida in February of this year. I am always willing to discuss safety issues. However, on the narrow issue of whether a rule is necessary concerning RCL operations, BLE has decided to bring a legal action against FRA, and FRA has decided not to explore that issue further with BLE while BLE maintains its suit, which FRA believes to be lacking in merit.

Please note that FRA's policy of investigating every legitimate rail safety report (anonymous and otherwise) has not changed under this administration. Each year FRA expends substantial resources investigating numerous safety concerns raised by employees and rail labor organizations. Certainly, FRA's investigation of the fatality on CSXT, the related audits, and the follow-up work planned are recent and continuing examples of FRA's commitment to respond to our own, and the rail community's, safety concerns.

I hope this information is helpful and alleviates the concerns expressed by your organization. I appreciate your interest in transportation safety and look forward to working with you on other transportation issues of importance to you and your members.

Sincerely,

Allan Rutter
Administrator