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NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594

Union Pacific Railroad Comments on How Federal Preemption Affects California PUC's Ability to Ensure Railroad Safety

BRIEF OF UNION PACIFIC RAILROAD COMPANY

ON PREEMPTION LAW IN THE RAILROAD INDUSTRY

Submitted to the National Transportation Safety Board

In re: Investigation of Chatsworth, California

Incident on September 12, 2008

April 3, 2009

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BRIEF OF UNION PACIFIC RAILROAD ON PREEMPTION LAW IN THE RAILROAD INDUSTRY

This brief is submitted on behalf of Union Pacific Railroad Company ("UP") in response to a request made by the National Transportation Safety Board ("NTSB") on March 4, 2009 for information on the state of preemption law in the railroad industry. This document responds to that request by describing the current state of preemption law and explaining why Congress correctly recognized that preemption is so essential for fostering the safety of railroad operations throughout the United States.

I. INTRODUCTION

Preemption is the judicial principle asserting the supremacy of federal over state legislation. *See* U.S. Const. art. VI, cl. 2. If a state law frustrates or conflicts with federal law, it is preempted and has no effect. *Maryland v. Louisiana,* 451 U.S. 725, 747 (1981). As applied to railroad operations, preemption ensures that federal regulations prescribe one uniform standard of conduct for railroads nationwide and that differing or conflicting requirements are not imposed at the state or local level. When Congress passed the Federal Railroad Safety Act ("FRSA") in 1970, it recognized the interstate character of railroad operations, and accordingly, expressly preempted state laws related to railroad safety. *See* 49 U.S.C. § 20106(a).

Railroads in the United States operate across state lines, transporting both passengers and freight cargo. The railroads operate in 49 states and the District of Columbia; Union Pacific ("UP") alone operates over more than 32,000 miles of track running through 23 states. The freight services that railroads provide are essential to the United States economy and relieve congestion and wear and tear on the public highways. Moreover, the freight railroads are a safer way to transport goods, and especially hazardous materials, than by trucking this cargo on the nation's public highways. As common carriers, the railroads cannot refuse to transport cargo

based on its dangerous characteristics, and therefore, provide a valuable public service by transporting hazardous materials ("hazmat") pursuant to federal safety regulation by the U.S. Department of Transportation ("DOT"). *See* 49 U.S.C. §§ 11101(a), 5101, *et. seq.*

Preemption is an essential aspect of railroad safety law. Uniform federal regulation of railroads is the most practical and effective way to achieve railroad safety because it ensures that one set of national regulations applies in every state where railroads operate. The railroads are subject to uniform, comprehensive safety programs administered by the DOT under the FRSA, 49 U.S.C. §§ 20101 *et seq.*, and other laws such as the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101 *et seq*. The FRSA was enacted for the express purpose of ensuring that all regulations relating to railroad safety "shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). The FRSA expressly preempts state or municipal laws or regulations related to railroad safety where the DOT has passed regulations covering the same subject. *Id.* § 20106(a)(2); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993). FRSA preemption also applies to DOT regulations promulgated pursuant to other Acts, such as the HMTA. *See Easterwood*, 507 U.S. at 663 n.4.

Although spelled out in greater detail below, several important points regarding preemption law as applied to railroads are as follows:

- In enacting the FRSA, Congress considered the "truly interstate" character of the railway system and expressly provided for federal preemption of state laws. *See* 49 U.S.C. § 20106(a); H.R. Rep. No. 91-1194 (1970). Congress also expressly limited the states' role in the FRSA in order to avoid disparate state regulations and standards. *See id.* Further, due to the complex mechanical and structural issues facing railroads, preemption is necessary in order to ensure that sole regulatory authority rests with an agency that has railroad industry expertise, such as the FRA.

- Since the passage of the FRSA in 1970, the railroads have dramatically improved their safety record: train collisions per million train miles have dropped 85 percent since 1980, and 25 percent since 2000. Further, train accidents per million train-miles

have dropped 73 percent since 1980 and 25 percent since 2000.[1] Trains now have less than 5 percent of the total hazmat incidents that trucks have, despite roughly equal hazmat ton-mileage.[2] Moreover, preemption of state law and uniform federal regulation *increases* railroad safety by enabling the FRA to require parity and interoperability of safety systems. *See, e.g.*, 49 U.S.C. § 20157(a)(1); 49 C.F.R. § 236.566.

- Congress provides for a state role in "investigative and surveillance activities," as well as enforcement of federal railroad regulations. *See* 49 U.S.C. §§ 20105, 20113(a); 49 C.F.R. § 212. States may also regulate rail safety until the Secretary of Transportation acts with respect to a particular subject matter. *See* 49 U.S.C. § 20106(a)(2).

- Courts have consistently interpreted FRSA's express preemption provision to preclude all state regulation where the Secretary of Transportation has issued regulations covering the same subject matter. *See* 49 U.S.C. § 20106(a). This precedent effectuates Congressional intent to have uniform safety regulations. *See Easterwood*, 507 U.S. at 674 (holding that FRA's train speed regulations "preclude[e] additional state regulation of the sort that respondent seeks to impose.").

- The Locomotive Inspection Act ("LIA"), Safety Appliance Act ("SAA"), and Signal Inspection Act ("SIA"), preempt state regulation in the fields of locomotive equipment, train safety appliances, and signals systems, respectively. Courts interpreting these Acts have recognized that preemption is essential because "individual freight cars are treated interchangeably . . . in an interstate system that knows no boundaries . . . . Standardization of safety devices is thus vital." *Carillo v. ACF Industries, Inc.*, 20 Cal. 4th 1158, 1163-64 (Cal. 1999). Additionally, the ICC Termination Act provides the Safety Transportation Board ("STB") with exclusive jurisdiction over rail transportation and economic matters.

- State regulation of railroad equipment has also been held to unduly burden interstate commerce in violation of the Commerce Clause. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774 (1945) (stating, "the confusion and difficulty with which interstate [rail] operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident.")

For these reasons, and the detailed discussion that follows, federal preemption is essential to the safe and effective operation of the railroad industry.

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[1] *See* FRA Office of Safety Analysis, Preliminary Data (2008), http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx; FRA, Railroad Safety Statistics Annual Report, 1997-2006, Tables 1-1, 1-2; FRA, Accident /IncidentBulletin, 1980-1996, Tables 19, 36.

[2] *See* U.S. Dept. of Transp., Pipeline & Hazardous Materials Safety Administration, Hazardous Materials Incidents By Year & Mode, http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/ Files/tenyr.pdf.

II. PREEMPTION IS NECESSARY IN THE RAILROAD INDUSTRY IN ORDER TO ENSURE UNIFORM SAFETY REGULATIONS THAT APPLY THROUGHOUT THE UNITED STATES

Due to the interstate and interdependent nature of the railroad industry, uniform federal regulations are essential to safe operation. Congress considered the interstate character of the railway system and expressly provided for federal preemption of state law in the FRSA. *See* 49 U.S.C. § 20106(a). And in fact, the railroads have become much safer since the enactment of the FRSA's uniform safety regulations in 1970.

A. Due To The Interstate Nature Of The Railroad Industry, Congress Expressly Limited The States' Role In The FRSA But Allows The States A Role in Investigation, Surveillance, and Enforcement

The legislative history of the FRSA reflects Congressional analysis of the local versus national aspects of railroad operations. Congress concluded that rail transportation is unquestionably interstate in nature:

> [The rail industry] has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system . . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), 91st Cong., 2nd Sess., *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11.

Congress further stated that safety would not be advanced "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *Id.* Accordingly, in the FRSA, Congress made enactment of safety regulations exclusively federal

and expressly preempted all state regulation of rail safety where the Secretary of Transportation has issued regulations covering the same subject matter.[3] *See id.*; 49 U.S.C. § 20106(a)(2).

Congress also structured the FRSA to place all regulatory authority in the DOT, but provided the states with an investigatory and enforcement role. The FRSA provides that the Federal Railroad Administration ("FRA"), pursuant to authority delegated by the Secretary of Transportation, "shall prescribe regulations and issue orders for *every area* of railroad safety." *See* 49 U.S.C. § 20103(a) (emphasis added); 49 C.F.R. § 1.49(c) (delegating authority to the FRA). Furthermore, 49 U.S.C. § 20111(a) grants federal authorities "exclusive authority" over regulatory enforcement. Congress recognized that due to the complex mechanical and operational issues facing railroads, rulemaking and enforcement powers must be vested in an agency with railroad expertise, such as the FRA. *See id.*

Congress allows the states a role in "investigative and surveillance activities," subject to certification and oversight by the Secretary of Transportation. *See* 49 U.S.C. § 20105. Congress also provides for a state role in seeking injunctive relief for violations of federal railroad safety regulations if the state notifies the Secretary of a violation, and the Secretary fails to commence a civil action within 15 days or determine that no violation occurred.[4] *See* 49 U.S.C. § 20113(a). Therefore, the states do have a role in investigation, surveillance, and enforcement. *See id.* In

[3] The conclusion that federal law should exclusively govern railroad safety and operations is consistent with earlier Congressional views on preemption. In 1953, President Eisenhower's Advisory Commission on Intergovernmental Regulations identified several factors justifying federal preemption of state law. Among these, the Commission identified, "[w]hen the activity cannot be handled within the geographic or jurisdictional limits of smaller units" and "[w]hen the activity requires a *nationwide uniformity of policy* that cannot be achieved by interstate action." U.S. Advisory Commission on Intergovernmental Regulations (1953) (emphasis added).

[4] Of course, a state may also regulate rail safety until the Secretary acts with respect to a particular subject matter. *See* 49 U.S.C. § 20106(a)(2). A state may also adopt an additional requirement when necessary to eliminate or reduce an "essentially local safety hazard," provided it is not incompatible with federal requirements and does not unduly burden interstate commerce. *Id.* These exceptions are addressed in Section III.B.

fact, in drafting the FRSA, Congress considered but *rejected* a greater state role in regulatory enforcement:

> As originally considered . . . this section allowed for certifying states to adopt all federal standards and . . . enforce them at the state level. . . . *such a vital part of our interstate commerce as railroads should not be subject to this multiplicity of enforcement by various certifying states* as well as the federal government . . . . At the same time, the valuable assistance of the states will be very much needed to carry out this act.

H.R. Rep. No. 91-1194 (1970) (emphasis added). Therefore, Congress drafted Sections 20105 and 20113 in their present form (formerly 43 U.S.C. §§ 205 and 207) in order to strike the appropriate balance between exclusive federal regulatory control and state involvement in investigation and enforcement.[5] This allocation of power is also consistent with the view that the FRA—and not the states— has the industry expertise necessary to establish and enforce effective railroad operating and safety regulations. *See id.*

B. Exclusive Federal Regulation Is Necessary To Provide Uniform Standards For Interstate And Interdependent Railroad Operations

Exclusive federal regulation of railroad safety is essential for practical operation of the railroads because trains move in interstate commerce, depend upon other trains and railroad companies for their safety, and require uniform standards in order to be interoperable with other railroads and achieve the highest level of safety.

Railroads operate across many state and jurisdictional boundaries. This requires train equipment (such as locomotives and cars) to function properly in every jurisdiction, and operating procedures (such as compliance with signals) to be uniform throughout the U.S. To achieve this, the FRA has issued detailed regulations governing train movements, compliance with traffic signals, safety equipment, and crew training. *See* 49 C.F.R. Parts 200-268. For

[5] Furthermore, states have a role in the FRA rulemaking process through the Regional State Advisory Committee ("RSAC").

example, in the specific area of collision-avoidance, the FRA has issued detailed regulations governing signal systems of all types—ranging from 20th century automatic train stop ("ATS"), automatic train control ("ATC"), and automatic cab signal ("ACS") systems to 21st century processor-based systems like PTC. *See* 49 C.F.R. § 236 Subparts E and H, respectively. It would be impossible to comply with distinct state regulations for such safety equipment, as train locomotives move across state lines and would be subject to different standards in every jurisdiction. Further, train crews also move across state lines and would have to be trained to perform differently in each jurisdiction, fostering confusion and undermining safety.

Additionally, the railroads are structurally interdependent. They share track with one another throughout the U.S.—freight rail with other freight rail, freight rail with commuter rail, and commuter rail with other commuter rail. Because of this structural interdependence, the FRA has issued regulations that aim to integrate train safety systems in order to increase safety. *See, e.g.,* 49 C.F.R. Parts 235-236 (regulations for signal and train control systems).

For example, the FRA requires parity with respect to the collision-avoidance systems for all trains (freight and commuter) that share track with one another. *See* 49 C.F.R. § 236.566. Locomotives must be equipped to interface with any available wayside collision-avoidance equipment that is installed on the track where it operates. *See id.* This demonstrates the value of uniform federal regulations, as the FRA can require parity and interoperability for railroad safety systems. *See id.* Moreover, this provision shows that a separate state requirement for commuter rail to install safety equipment would require the same equipment to be installed on freight rail. *See id.* Such state regulation would impact interstate commerce and controvert the FRA's express goal of nationally uniform regulations. *See* 49 U.S.C. § 20106(a)(1); *Southern Pacific,*

325 U.S. at 773-74 (holding that state regulation of train equipment unduly burdens interstate commerce).

As a further push for interoperability, in 2008, Congress passed the Rail Safety Improvement Act, which requires that positive train control ("PTC")—an advanced collision-avoidance system—be installed on all Class I freight and commuter railroads by the end of 2015. 49 U.S.C. § 20157(a). As part of this command, Congress requires that the PTC systems on every locomotive be interoperable with the PTC systems of all other trains, in order to enable communication among all trains on the rail system and ultimately make the railroads safer. *Id.* at § 20157(a)(2). Thus, any separate, state-by-state regulation of safety or collision-avoidance systems would directly conflict with the FRA's stated commitment to uniformity and would present a major obstacle to interoperability. *See* 49 U.S.C. § 20106(a)(1). Therefore, preemption is necessary in order to ensure uniform federal regulation and further advance railroad safety.

C. Since The FRSA Has Been In Effect, The Nation's Railroads Have Become Safer, Demonstrating The Success Of The Federal Regulatory Scheme

Since the enactment of the FRSA in 1970, the railroads have dramatically improved their safety record. Train collisions per million train miles have dropped 85 percent since 1980, and 25 percent since 2000. Further, train accidents per million train-miles have dropped 73 percent since 1980 and 25 percent since 2000.[6]

Moreover, rail transportation is safer than truck transportation—the main alternative to freight rail in the U.S. Freight railroads incur only about 6 percent of the injuries that trucks do per trillion ton-miles, and only about 12 percent of the fatalities.[7] And in the important area of

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[6] *See* FRA Office of Safety Analysis, Preliminary Data (2008), http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx; FRA, Railroad Safety Statistics Annual Report, 1997-2006, Tables 1-1, 1-2; FRA, Accident/IncidentBulletin, 1980-1996, Tables 19, 36.

[7] *See* American Association of Railroads ("AAR"), Analysis of FRA Casualty Database for 2006; U.S. Dept. of Transp., Large Truck Crash Facts, Table 16 at 19 (2006), http://ai.volpe.dot.gov/CarrierResearchResults/

transportation of hazardous materials, railroads now have less than 5 percent of the hazmat incidents that trucks do, and less than 18 percent of the hazmat accidents, despite roughly equal ton-mileage.[8]

Therefore, the railroads have dramatically improved their safety record since the passage of the FRSA in 1970. And as of October 2008, the FRA requires all Class I freight and commuter railroads to implement interoperable PTC collision-avoidance systems by 2015. *See* 49 U.S.C. § 20157(a). Therefore, the railroads will likely become even safer in the years ahead.

III. FEDERAL LAWS PREEMPT STATE LAWS AND REGULATIONS WHERE NECESSARY TO EFFECTUATE CONGRESSIONAL INTENT

Preemption provides that state and local laws are invalid or precluded by federal laws that address the same subject. Preemption has long been present in railroad laws, due to the compelling need for national uniformity in this interstate industry.

A. Federal Preemption Derives From The Supremacy Clause Of The U.S. Constitution

The Supremacy Clause of the United States Constitution authorizes federal law to preempt conflicting state laws. *See* U.S. Const. art VI, cl. 2. The Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Id.* Consistent with that command, courts have long recognized that state laws that frustrate or conflict with federal laws are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

There are three main types of preemption: express, field, and conflict preemption. First, state law is preempted when Congress expressly so provides in the statute itself. *See Gade v.*

PDFs/LargeTruckCrash Facts2006.pdf.

[8] *See* U.S. Dept. of Transp, Pipeline & Hazardous Materials Safety Administration, Hazardous Materials Incidents By Year & Mode, http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/ Files/tenyr.pdf.

Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). Congress has expressly preempted state law in the FRSA. *See* 49 U.S.C. § 20106(a); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Second, in the absence of express preemption, preemption will nonetheless be implied when it is clear that Congress intended federal regulation of a field to be exclusive. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). Finally, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict is present where it is impossible to comply with both federal and state requirements, *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Gade*, 505 U.S. at 98.

The need for national uniformity in the area of train safety and operation and is self-evident: trains and train crews cross state lines to transport cargo throughout the U.S., and share track with other trains all over the country. Accordingly, Congress has addressed the issue of railroad safety and operations in five federal statutes addressed here—the Federal Railroad Safety Act ("FRSA"), the Locomotive Inspection Act ("LIA"), the Safety Appliance Act ("SAA"), the Signal Inspection Act ("SIA"), and the ICC Termination Act ("ICCTA"). Each of these statutes and their specific preemption provisions are addressed in turn below.

B. The Federal Railroad Safety Act Preempts State Laws Related To Railroad Safety And Security

The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101 *et seq.*, was adopted in 1970 to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents. At the time of its passage, the FRSA was the "most comprehensive" rail safety legislation ever enacted. *See* H. R. Rep. No. 91-1194. The FRSA directs the Secretary of Transportation to prescribe any necessary rules, regulations, orders, and standards for all areas of

railroad safety. 49 U.S.C. § 20103(a). The Secretary has delegated this rulemaking authority to the FRA. 49 C.F.R. § 1.49. Pursuant to that authority, the FRA has promulgated hundreds of rules regulating the safety of railroad operations. *See* 49 C.F.R. Parts 200-268. Moreover, any federal law or regulation related to rail safety—not only FRA regulations— can have preemptive force under the FRSA's preemption provision. *See Easterwood*, 507 U.S. at 663 n.4; *CSX Transp., Inc. v. Pub. Utils. Comm'n of Ohio*, 901 F.2d 497, 503 (6th Cir. 1990) ("applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes.").

The FRSA provides that, "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the state requirement." 49 U.S.C. § 20106(a)(1)-(2). The FRSA allows state regulation of railroad safety only if:

> (1) the Secretary of Transportation has not yet regulated the subject matter of the state regulation; or
> (2) the regulation is: (a) necessary to eliminate an essentially local safety or security hazard, (b) is not incompatible with federal law, *and* (c) does not unreasonably burden interstate commerce.

See 49 U.S.C. § 20106(a)(2). State regulations related to rail safety are preempted if a federal regulation "cover[s] the subject matter" of the state regulation. *Easterwood*, 507 U.S. at 674. Preemption will be found if the state law has the same *purpose* as the federal regulation, or if the state regulation has an *effect* on the subject matter covered by an FRA or DOT regulation. Either overlapping purpose or intrusive effect is enough. *Id.* at 675; *Gade*, 505 U.S. at 107. Therefore, state authority to regulate rail safety is preempted if the Secretary of Transportation has covered

the subject matter of the state law, whether by regulations issued under the FRSA or by regulations issued pursuant to other authorities.[9]

1. The Supreme Court Has Interpreted The FRSA As Preempting Any State Law That Regulates The Same Subject Matter As Federal Law

The determination of whether state law is preempted by federal law under the FRSA does not concern an examination of the compliance with, or the adequacy of, the federal regulation. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 357-58 (2000). Rather, the "subject matter" of a state rule is defined by the conduct or subject that it regulates, even if the state rule serves a different purpose from the federal rule. *See Easterwood*, 507 U.S. at 675. This interpretation of the FRSA is consistent with Congressional intent to prevent regulation of the railroads by "50 different judicial and administrative systems." *See* H.R. Rep. No. 91-1194.

The U.S. Supreme Court has twice ruled that the FRSA preempts common-law tort duties. *See Easterwood*, 507 U.S. at 664; *Shanklin*, 529 U.S. at 358-59. In *Easterwood*, the Supreme Court held that a plaintiff could not pursue a claim for negligence based on a train traveling at excessive speed because the FRA had issued regulations covering the speed of trains. 507 U.S. at 674 (citing 49 C.F.R. § 213.9). The Court held that FRSA preemption displaces all "legal duties imposed on railroads by the common law" once "regulations issued by the Secretary *cover the subject matter* of the . . . allegations." *Id.* (emphasis added). The Court stated that FRA's speed provisions "must be read as . . . precluding additional state regulation of the sort that respondent seeks to impose." *Id.* at 674.

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[9] In 2002, Congress enacted the Homeland Security Act. Pub. L. No. 107-296, 116 Stat. 2135. Section 1710 of the Homeland Security Act amends the FRSA, providing that, throughout the FRSA, "the term 'safety' includes security," and further providing that the Secretary of Homeland Security ("DHS") shall have concurrent authority with DOT over matters of railroad security. DHS's authority over railroad security is delegated to the Transportation Security Administration ("TSA"). Through the Homeland Security Act's amendments to the FRSA, Congress again declared that "laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a). Furthermore, Congress retained the same preemption provision in 2002, expressly preempting state authority to regulate rail security subject to certain limited exceptions. *Id.*

The Supreme Court later reiterated that once FRA regulations cover a subject matter, the FRSA preempts state regulation. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 357-58 (2000). Regulatory coverage, not regulatory compliance, is the touchstone of FRSA preemption: "It is this displacement of state law concerning the [subject matter], and not . . . adherence to the[federal] standard . . ., that pre-empts state tort actions." *Id.* Therefore, Supreme Court precedent is consistent with express Congressional intent to make all laws, regulations, and orders related to rail safety and security "nationally uniform to the extent possible." *See* 49 U.S.C. § 20106(a)(1).

In August 2007, Congress amended the FRSA preemption provision to clarify the extent of preemption of state law causes of action. *See* Pub. L. No. 110-53, § 1528, 121 Stat. 266 (Aug. 3, 2007). This Amendment is "is merely a clarification of what is not preempted by the FRSA, and does not alter the substance of the federal preemption analysis" under the FRSA. *Mastrocola v. Southeastern Penn. Transp. Auth.*, 941 A.2d 81, 90 n.12 (Pa. Cmmw. Ct. 2008). The Amendment restated the original broad policy in favor of uniformity and made only limited adjustments to legislatively overrule two district court decisions. *See* H.R. Rep. 110-259, at 351 (2007) (stating that the Amendment's purpose is to "rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent.").[10] Newly added subsection (b) clarifies that there is no preemption when a party alleges that a railroad "failed to comply with a federal standard of care established by a regulation or order issued by the Secretary of Transportation," or "with its own plan, rule or standard that it created pursuant to a regulation or order issued by" the Secretary. 49 U.S.C. §§ 20106(b)(1)(A), (B). The final

[10] The district court decisions that Congress sought to legislatively overrule were *Mehl v. Can. Pac. Ry.*, 417 F. Supp. 2d 1104, 1006 (D. N.D. 2006) and *Lundeen v. Can. Pac. Ry.*, 507 F. Supp. 2d 1006 (D. Minn. 2007).

Conference Report makes clear that this amendment was "not intended to indicate any substantive change in the meaning of the [FRSA] provision." H.R. Rep. No. 110-259, at 351.

Two federal agencies – the DOT and the FRA – have interpreted these statutory exceptions narrowly and declared that FRSA preemption remains broad. *See Hazardous Materials,* 74 Fed. Reg. 1770, 1791 (DOT Jan. 13, 2009); *Railroad Operating Rules*, 73 Fed. Reg. 8442, 8456 (FRA Feb. 13, 2008). Since the 2007 Amendment, every single one of the courts asked to decide this issue has concluded that the FRSA continues to preempt injury claims based on an alleged breach of a state common law duty.[11] The U.S. DOT also recently rejected the argument that common law claims are no longer preempted by the FRSA. *See Hazardous Materials,* 74 Fed. Reg. 1770, 1791-92 (Jan. 13, 2009).

Indeed, Congress has amended the FRSA a total of three times since *Easterwood* was decided—in 1994, 2002, and 2007—and each time, Congress retained the original preemption provision for state laws, regulation, and orders. *See* P.L. 103-272 (Jul. 5, 1994); P.L. 107-296 (Nov. 25, 2002); P.L. 110-55 (Aug. 3, 2007).[12] This is particularly compelling because Congress' preservation of FRSA preemption as described in *Easterwood* is tantamount to a legislative endorsement of that result. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) ("repetition of the same language in a new statute indicates, as a general

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[11] *See, e.g.*, *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1216 (10th Cir. 2008) ("Congress did not overrule *Shanklin*"); *Smith v. Burlington N. & Santa Fe Ry. Co.*, 187 P.3d 639, 646 (Mont. 2008); *Southern Cal. Reg'l Rail Auth. v. Superior Court*, 163 Cal. App. 4th 712, 738 (Cal. Ct. App. 2008), *review denied* (Sept. 17, 2008); *Murrell v. Union Pac. R.R.*, 544 F. Supp. 2d 1138, 1147-48 (D. Or. 2008); *Van Buren v. Burlington N. & Santa Fe Ry. Co.*, 544 F. Supp. 2d 867, 876 (D. Neb. 2008), and cases cited therein. *See also Nickels v. Grand Trunk Western R.R., Inc.*, __ F.3d __, Nos. 07-1736 & 07-2437, 2009 WL 691040, at *5 (6th Cir. Mar. 18, 2009) (rejecting plaintiffs' argument that Congress in 2007 legislatively overruled the preemption analysis announced in *Easterwood*).

[12] When recodifying the FRSA in 1994, Congress expressly preserved "the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 103-180, at 5 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 818, 822. In 2002, Congress amended the FRSA's preemption provision again, but did not make any substantive change much less overrule the Court's decisions. *See* Historical and Statutory Notes to 49 U.S.C. § 20106.

matter, the intent to incorporate its . . . judicial interpretations as well.") (internal citations omitted).

2. Appellate Courts Also Find FRSA Preemption Where State Laws Address Subjects Covered By Federal Regulations Because To Hold Otherwise Would Disrupt The Uniform Federal Regulatory Scheme

Appellate and district court have followed the Supreme Court and further outlined the contours of FRSA preemption. The Eighth Circuit recently held that FRSA preemption is found even where federal regulations do not "specify the manner" of railroad performance. *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005). The court acknowledged the preemptive force of several FRA regulations, including rules prohibiting cars with defective couplers. *Id.* at 793 (citing 49 C.F.R. § 215). The court stated, "a regulatory framework need not impose bureaucratic micromanagement in order to substantially subsume a particular subject matter." *Id.* Thus, federal performance standards and flexible regulations still preempt state laws. *See id.*

Moreover, the Seventh Circuit emphasized that the FRSA's preemption provision "does not distinguish between contradictory state requirements and merely duplicative state requirements." *Burlington N. & Santa Fe Ry. Co. v. Doyle,* 186 F.3d 790, 796 (7th Cir. 1999). Even state laws or orders that do not conflict with federal requirements are preempted if the subject matter of these rules is "covered" by FRA regulations. *See id.*

Further, in *CSX Transp., Inc. v. Williams*, the District of Columbia attempted to regulate the transportation of hazardous materials near the United States Capitol. 406 F.3d 667, 672 (D.C. Cir. 2005). The D.C. Circuit held that FRSA preempted this regulation, recognizing the impact on the national transportation system that could result if D.C. was allowed to issue a separate regulation. *Id.* at 672. The court found that DOT regulations "covered" the subject matter of the D.C. Act, because a DOT rule requires hazardous materials routing plans and defers to "rail carriers . . . to develop and implement security plans for transporting hazardous

materials." *Id.* (citing 49 C.F.R. §§ 172.800-04). This delegation of regulatory authority did not deter the court from finding the subject matter to be "covered"— and instead, the court was persuaded by the DOT's deliberate decision to "require[] a flexible, individually-tailored security plan for each hazardous material transporter. . ." *Id.*

Thus, *Williams* and other cases leave no doubt that state laws are preempted even where the FRA partners with the railroads to implement industry goals. And in fact, that approach is precisely the regulatory architecture employed by the FRA in its regulations for development and implementation of PTC collision-avoidance systems, as it chose to establish a performance standard rather than require specific equipment. *See* 49 C.F.R. § 236.909-.929. The FRA's decision to grant regulatory flexibility must not be disrupted by additional or more stringent state regulations. *See Williams*, 406 F.3d at 672.

3. Where The FRA Consciously Declines To Issue A Regulation, This Preempts State Regulation Where The Federal Decision Indicates That No Such Regulation Is Appropriate

FRSA preeminence is so compelling that courts have held state laws preempted where the FRA has *declined* to issue certain standards for railroads, reflecting a federal decision that no such regulation is proper. *See Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999); *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 926 F.2d 567, 572 (6th Cir. 1991); *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1107 (9th Cir. 1989). The Supreme Court has stated, "'where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that *no such regulation is appropriate or approved* pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002).

Further, appellate courts have upheld preemption of state regulations where the FRA has purposefully declined to issue federal regulations on the same subject. In *Marshall v. Burlington N., Inc.*, the Ninth Circuit held that the FRA's considered decision to *not* require oscillating or strobe lights on locomotives preempted a state law that would have required this equipment. 720 F.2d 1149 (9th Cir. 1983). Similarly, the Eighth Circuit held that the FRA's determination to *not* require a caboose was "the kind of inaction that has preemptive effect." *Burlington N. R.R. Co. v. Minnesota*, 882 F.2d 1349, 1353-54 (8th Cir. 1989). The Fifth, Sixth, and Seventh Circuits agree with this analysis. *See King v. Illinois Cent. R.R.*, 337 F.3d 550, 557 (5th Cir. 2003); *Doyle*, 186 F.3d at 801; *Norfolk & W. Ry.*, 926 F.2d at 572.

Therefore, not only do *existing* FRA regulations preempt state and local laws, but considered decisions to *decline from issuing regulations* may have preemptive effect where such a decision indicates that no regulation is proper.

4. The FRSA Provides A Narrow Exception To Preemption For State Regulation Of Local Safety Hazards Where Such Regulation Is Not Incompatible With Federal Law Nor Unduly Burdensome

When the Secretary of Transportation promulgates rules or regulations that cover rail safety, a state may adopt or continue in force similar laws, rules or regulations only:

> when necessary to eliminate or reduce an essentially local safety hazard, *and*
> when not incompatible with any federal provision, *and*
> when not creating an undue burden on interstate commerce.

49 U.S.C. § 20106(a)(2)(A)-(C). A state must establish each of the elements of this narrow exception to FRSA preemption. *Union Pacific R.R. Co.* v. *Cal. Pub. Util. Comm'n*, 346 F.3d 851, 860 (9th Cir. 2003); *Nat'l Ass'n of Reg. Util. Comm'n v. Coleman*, 542 F.2d 11, 13 (3rd Cir. 1976). Several courts have considered this exception and read it to provide a narrow exception to the broad preemption of state regulation of rail safety matters under the FRSA. *See id*;

Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1110 (5th Cir. 1973); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Penn. 1982).

Congressional intent regarding the first prong of this exception— essentially local hazards— is clear from the 1970 House Report on the FRSA:

> The purpose of this latter provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards. . . . Since these local hazards *would not be Statewide in character,* there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

H.R. Rep. No. 1194. Any statewide regulation, and any local hazard that is actually present throughout a state, does not meet this exception. *See id.*; *Coleman*, 542 F.2d at 14-15 (holding state accident reporting requirements, largely duplicative of similar federal requirements, preempted due to statewide impact); *Consolidated Rail*, 536 F. Supp. at 658 (finding regulation that required speed recorders preempted because it had statewide impact). Moreover, the Supreme Court has determined that common law negligence claims cannot qualify for the local safety hazard exception. *Easterwood*, 507 U.S. at 675 (stating, "[t]he common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions.").

Likewise, in *Union Pacific R.R. Co.*, the Ninth Circuit held that the character of the grade and curve combination at issue did not meet the definition of an "essentially local safety hazard" because "there are many curves in the United States that share the same characteristics as the one at issue here; there is nothing 'fundamentally' local about the steep grade/sharp curve combination." 346 F.3d at 861. The court also declined to consider potential environmental consequences in determining whether a condition is an "essentially local safety hazard" because "this broad definition [of local safety hazards] would effectively prohibit the FRA from ever

being able to preempt state law, contrary to Congress's stated goal of uniformity in railroad safety to the extent practicable." *Id.*

In short, the FRSA evinces a total preemptive intent in rail safety matters, with a very limited exception for "essentially local safety hazard[s]" which are not incompatible with federal laws or unduly burdensome on interstate commerce. *See* 49 U.S.C. § 20106(a)(2). This exception must be limited in order to ensure that statewide regulations are not passed under the guise of local hazards, because state-by-state regulation contravenes Congress' goal of uniform safety standards. *See* 49 U.S.C. § 20106(a)(1).

C. The Locomotive Inspection Act, Safety Appliance Act And Signal Inspection Act All Independently Preempt State Regulation In Specific Fields Committed Exclusively To Federal Control

The LIA, the SAA, and the SIA each commit the regulation of locomotive equipment, safety appliances, and signal systems, respectively, to exclusive federal control. These fields are regulated exclusively by the FRA under each of these Acts, pursuant to authority delegated by the Secretary of Transportation. *See* 49 U.S.C. §§ 20701, *et seq.* (LIA); 49 U.S.C. §§ 20301, *et. seq.* (SAA); 49 U.S.C. §§ 20501, *et seq.* (SIA); 49 C.F.R. § 1.49(c) (delegation to FRA). When Congress passed the FRSA in 1970, it left these Acts in place; therefore, they remain applicable and preempt any state regulation in their respective fields. *See* H.R. Rep. No. 91-1194 (1970).

The LIA authorizes the FRA to issue standards for the maintenance and testing of locomotives, and prohibits all rail carriers, including commuter rail carriers, from using unsafe locomotives. 49 U.S.C. § 20701. The LIA has no express preemption provision, but has long been held to occupy the field extending to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 611 (1926). Further, courts have held that the LIA's "broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines." *Law v.*

General Motors Corp., 114 F.3d 908, 910 (9th Cir. 1997) (holding that claims of defective brakes and engines were preempted by the LIA).

Similar to the LIA, the SAA sets forth requirements for certain safety appliances that must be provided on every railcar used in interstate transportation. 49 U.S.C. §20301, *et seq.* The FRA has issued comprehensive regulations for the design and placement of safety appliances. *See* 49 C.F.R. § 231. By enacting the SAA in 1893, Congress occupied the entire field of safety appliances that may be required on rail cars. *Southern Ry. Co. v. R.R. Comm'n*, 236 U.S. 439, 446-47 (1915). The Supreme Court has held that a state may not impose its own safety appliance regulations on a railroad, "whether consistent, complimentary, additional, or otherwise." *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57, 60-61 (1934); *Southern Ry.*, 236 U.S. at 446-47. The Supreme Court has also observed that the subject of railcar safety appliances "is peculiarly one that calls for uniform law." *Penn. R.R. Co. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919). Courts have highlighted the need for federal preemption in this area due to the nature of railroad operations:

> In our modern rail system, individual freight cars are treated interchangeably as "free runners," traveling on continent-wide routes and multiple roads in an interstate system that knows no boundaries . . . Standardization of safety devices is thus vital . . .

Carillo v. ACF Industries, Inc., 20 Cal. 4th 1158, 1163-64 (Cal. 1999) (finding SAA preemption) (internal quotations omitted). The SAA therefore preempts any state regulation of safety appliances and any claims of negligent design of safety appliances that comply with FRA regulations. *Gilvary,* 292 U.S. at 60-61.

Finally, the SIA gives the FRA exclusive authority to regulate all aspects of the installation, maintenance, testing, removal, and modification of signal systems. 49 U.S.C. §§ 20501, *et seq.* The SIA has strong language indicating that the Secretary of Transportation

has exclusive authority to regulate signal systems: "A carrier may discontinue or materially alter a signal system required under this paragraph only with the approval of the Secretary." 49 U.S.C. § 20502(a)(1). Like the SAA and LIA, the SIA preempts all state regulation in its field. *See id.*

Therefore, the LIA, SAA, and SIA preempt state regulation in fields committed to exclusive federal regulatory control under these Acts. Courts have held that federal preemption is vital in order to ensure uniform safety standards for locomotives, railcar equipment, and signal systems, consistent with express Congressional intent. *See* 49 U.S.C. § 20106(a)(1).

D. The ICC Termination Act Preempts State Laws That Manage Or Govern Rail Transportation

The ICC Termination Act ("ICCTA") also preempts state laws with respect to rail transportation. The ICCTA, which became effective on January 1, 1996, created the Surface Transportation Board ("STB"). As codified at 49 U.S.C. § 10501, one section of the ICCTA addresses both the jurisdiction of the STB and the preemptive effect of its decisions and the remedies provided under the Act:

> (1) *transportation by rail carriers, and the remedies provided in this part* with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, *is exclusive*.
>
> Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added). The STB's substantive powers concern economic regulations or core operational decisions about railroads and other aspects of transportation. The

ICCTA's definition of "transportation" includes the physical apparatus of railroad operations (locomotives, cars, rails and terminals that are owned by rail carriers) and the services related to the movement of passengers or property by rail. *See* 49 U.S.C. § 10102(9).

The ICCTA preempts laws "with respect to regulation of rail transportation." *Id.* § 10501(b). Congress' use of this phrase meant that it intended to preempt all laws that "have the effect of 'manag[ing]' or 'govern[ing]' rail transportation . . ." *Florida East Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Because the STB's jurisdiction is exclusive, states may not legislate in the aforementioned areas, which embrace matters such as railroad construction and facility management.

The Ninth Circuit has interpreted the ICCTA as broadly preempting state laws that have the effect of impacting the operation of railroads— physically or economically. In *City of Auburn v. STB*, the Ninth Circuit held that if local authorities had the "ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." 154 F.3d 1025, 1029-31 (9th Cir. 1998). The court held that congressional intent to preempt this kind of state and local regulation of rail lines is "explicit in the plain language of the ICCTA and the statutory framework surrounding it." *Id.*

Likewise, the Court of Appeals for the Fifth Circuit recently held that the ICCTA expressly preempted a Texas law that prohibited railroads from willfully allowing a standing train to obstruct a crossing for more than five minutes. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 441-44 (5th Cir. 2001). The *Friberg* court stated that the ICCTA's preemption provision "could not be more precise, and it is beyond peradventure that regulation of . . . *train operations*, as well as the construction and operation of . . . side tracks, is under the exclusive

jurisdiction of the STB unless some other provision in the ICCTA provides otherwise." *Id.* at 443 (emphasis added); *see also Burlington N. Santa Fe Corp. v. Anderson,* 959 F.Supp. 1288, 1296 (D. Mont. 1997) (holding that a state law authorizing regulation of closure, consolidation, or centralization of railroad agencies was preempted by ICCTA because it has a direct and substantial effect on economic regulation of railroad transportation).

Therefore, the ICCTA preempts all state laws or orders that attempt to regulate railroad transportation— a field committed to exclusive STB jurisdiction under the ICCTA. 49 U.S.C. § 10501(b).

IV. THE COMMERCE CLAUSE LIMITS STATE REGULATION OF RAILROADS BECAUSE IT PROHIBITS STATES FROM UNDULY INTERFERING WITH INTERSTATE COMMERCE

While the Commerce Clause of the United States Constitution is not always defined as a type of "preemption," in practice, it operates to prohibit state laws and regulations that may unduly interfere with interstate commerce. The Commerce Clause gives Congress the power to regulate commerce among the several states. U.S. Const. art. I § 8, cl. 3. The Supreme Court has interpreted this clause to prohibit the states from unduly interfering with interstate commerce absent congressional consent. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1960).

In *Southern Pacific*, the Supreme Court held that an Arizona law governing the length of trains unduly burdened interstate commerce and was unenforceable. 325 U.S. at 773. The Court emphasized the need for national uniformity in the field of train equipment, stating, "the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident." *Id.* at 773-74.

Similarly, in *Union Pacific R.R. v. Cal. Pub. Util. Comm'n*, the Ninth Circuit held that a California Public Utility Commission rule requiring railroads to develop performance standards for train configuration impermissibly burdened interstate commerce. 346 F.3d 851, 872 (9th Cir. 2003). The court held that the rule was "clearly excessive in relation to the putative local benefits." *Id.* Although the Commission's rule did not, on its face, regulate conduct outside California, "the extra-territorial effect of its regulation [was] undisputed" because any train entering or leaving the state would have to be configured "to meet the most stringent standards on its trip." *Id.* at 871; *see also Missouri Pacific R.R. Co. v. R.R. Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) (stating, "[I]t is difficult to imagine a state regulation of the train itself . . . which could escape being a burden upon commerce . . . .").

Therefore, state-by-state regulation of train safety and operations may place an undue burden on interstate commerce by inhibiting interstate train movement. As the Ninth Circuit stated, "if [one state] can require the Railroads to develop and to implement [particular] standards, so can every other state, and there is no guarantee that the standards will be similar." *See Union Pacific*, 346 F.3d at 871. Moreover, the need for nationally uniform safety regulations makes this an area that "can only be regulated by the national government." *Id.* at 870. Congress and the FRA have consistently articulated the goal of national uniformity in the FRSA's preemption provision, 49 U.S.C. § 20106(a)(1), in the FRA's parity requirement for collision-avoidance equipment, 49 C.F.R. § 236.566, and in Congress' recent requirement for PTC interoperability, 49 U.S.C. § 20157(a)(2). Therefore, state-by-state regulation of train equipment or safety standards would likely violate the Commerce Clause.

V. CONCLUSION

Both Congress and the courts have consistently determined that federal preemption is necessary in order to effectively regulate the safety of the nation's railroad system. Union Pacific agrees, and respectfully recommends that federal regulations governing railroad safety and transportation continue to preempt state laws, consistent with Congressional intent.

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Respectfully submitted,

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