

EXHIBIT 3-NN

Docket No. DCA-08-MR009

**NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C. 20594**

**United Transportation Union and Brotherhood of
Locomotive Engineers and Trainmen Joint Comments
on How Federal Preemption Affects California PUC's
Ability to Ensure Railroad Safety**

EXHIBIT 3NN

BEFORE THE NATIONAL TRANSPORTATION SAFETY BOARD

COLLISION OF SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY
(METROLINK) PASSENGER TRAIN NO. 111 AND UNION PACIFIC
RAILROAD FREIGHT TRAIN NO. LOF 65-12 CHATSWORTH, CALIFORNIA

SEPTEMBER 12, 2008

DCA-08-MR-009

JOINT MEMORANDUM BY BROTHERHOOD OF LOCOMOTIVE
ENGINEERS AND TRAINMEN AND THE UNITED TRANSPORTATION
UNION REGARDING PREEMPTION UNDER THE FEDERAL RAILROAD
SAFETY LAWS AND THE AUTHORITY OF STATES TO REGULATE
RAILROAD SAFETY

BACKGROUND

At the hearings on the above referenced accident, Mrs. Kathryn Higgins, the Chairperson of the Board of Inquiry, requested the parties to submit a memorandum on the issue of preemption under the federal railroad safety laws. The undersigned Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union were the catalysts to the introduction and adoption of the Federal Railroad Safety Act of 1970 (hereinafter "FRSA").¹ The FRSA contained the preemption provision which is relevant here. We believe we can assist the Board in better understanding the intent of Congress in the said law's provisions.

At the outset, it should be recognized that the states are more painfully aware of rail tragedies that occur within their boundaries, and know what

¹ The FRSA was codified in 1994 into the general railroad safety laws at 49 U.S.C. §§20101-20117.

corrective measures should be taken at the state level. In many cases, the federal regulations do not protect the public or the employees. *See, e.g., Wyeth v. Levine*, No. 06-1249, slip op. at 22-23, S. Ct., March 4, 2009 (where Justice Stevens, writing for the majority, noted that the Food and Drug Administration has limited resources for overseeing its authority, and that state actions unknown hazards and provide incentives for manufacturers to disclose safety risks promptly). The statement by Justice Stevens is even more applicable to the oversight by the FRA. Mr. Grady Cothen, testifying on behalf of the FRA at the hearings before the Board of Inquiry, acknowledged that the FRA does not have an adequate number of inspectors. For example, there are not enough FRA and state inspectors to inspect each freight car even once per year. In congressional testimony, the Government Accountability Office ("GAO") pointed out that FRA is able to inspect only about 0.2 percent of railroads' operations each year.

Hearings on Reauthorization of the Federal Rail Safety Program Before the House Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure, 110th Cong., 1st Sess. 15 (2007). The issue of inadequate staffing at FRA has been a major concern of rail labor for many years. *See, Railroad Safety: Hearings on H.R. 14076 and H.R. 14077 Before the House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 93rd Cong., 2d Sess. 104-105 (1974); Rail Safety and Other Rail Matters: Hearings Before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. 189-90 (1982); Railroad Safety: Hearing Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce, 100th Cong., 1st Sess. 314-15 (1987).* During this time, neither has the staff of the FRA, nor the number of inspections, appreciably changed.

Furthermore, it is undisputed that the FRA regulations are "minimum" standards. Nevertheless, typically, the railroads challenge every state regulation that is adopted by states, and in many cases, the courts agree that states are preempted. Additionally, the FRA over the years has consistently sided with the railroads. We will identify a number of cases where the courts have ruled that states laws are preempted. The railroads and the FRA fail to recognize that particular safety concerns of the states created by local conditions are best handled by the states, not the FRA.

Under the FRSA, we believe that the states have authority to adopt any rule, regulation, or order until the FRA adopts a similar one that covers (i.e., "substantially subsumes") the subject matter. Even assuming arguendo that the FRA has issued a regulation substantially subsuming a subject matter, a state regulation may still be valid where it covers a local safety hazard.

Regarding local safety hazards, the railroads contend that if the physical characteristics are similar in other states, the safety hazard cannot be local. That position is invalid. Taken to its ultimate conclusion, the railroads argument would restrict a state from ever adopting a local safety hazard regulation, simply because a similar condition may exist in another state. That is nonsense, and contrary to what the FRSA was designed to accomplish. To be local, the only limitation is that the state regulation cannot be statewide.

Reliance on Supreme Court decisions prior to enactment of FRSA in 1970 is misplaced. Congress conferred on the states broad new regulatory powers in 1970. A state has at least the same power as the FRA to issue regulations "supplementing provisions of law". In fact, the states can adopt "a law" until FRA does so, and with regard to local hazards, may even adopt more stringent laws. 49 U.S.C. § 20106.^{2/} Therefore, if the FRA has the power to issue a rule, so

^{2/} In the 1994 recodification, the drafters changed "any" to "a". However, the codification law made it

does the state. An analogous situation was referred to in CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993), where the Supreme Court pointed out that FRA's preemptive authority under section 434[now 49 U.S.C. §20106] was not limited to regulations issued pursuant to the FRSA. Rather, the statute refers to "any regulation 'adopted'" by the Secretary. 507 U.S. at 663 fn. 4. Similarly, the state's powers are not limited to the FRSA. The current words of the FRSA provide that the states may adopt "a law, rule, regulation, order, or standard relating to railroad safety". 507 U.S. at 662.

Implied preemption is another favorite argument by railroads to prevent state regulation. Implied preemption is not appropriate where, as here, there is an express preemption clause within the statute in question. The Supreme Court, in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992), stated that when Congress has expressly considered the preemption issue and included a preemption provision in the legislation, there can be no expansion of the preemptive effect through implication. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Id.* If Congressional intent is ambiguous, the presumption against preemption of state police powers will limit the preemptive scope to what is clearly mandated by the statute. *Id.* Since the FRSA contains an express preemption clause, implied preemption is not applicable to this case.

In light of Supreme Court decisions, there can be no doubt that the FRA cannot "substantially subsume" a subject matter merely by considering regulation of that subject matter and deciding, for whatever reason, to forego regulating. An affirmative regulation must substantially subsume a subject matter to preempt state regulation under § 20106.

clear that the codification was not intended to effect any substantive change. P.L. 103-272, Sec. 1 (a); H.R. Rep. No. 103-180, 103rd Cong., 1st Sess. 1 (1993).

As noted in the 1970 Congressional Hearings on the FRSA, "[a]pproximately 95 per cent of the accidents that occur on the Nation's railroads are caused by factors not subject to any control by the Federal agency responsible for promoting railroad safety". Hearings on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills), S. 1933, Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 160 (March 1970) (hereinafter "House Hearings"). With only 5% of rail safety problems covered by then existing law, obviously the then existing safety laws were not all inclusive, and Congress intended to give both the Federal Government and the States authority to fill the void.

The FRA has promulgated a number of regulations since enactment of the FRSA, and the FRA cites the FRSA in the Code of Federal Regulations ("C.F.R.") as its authority to do so. *See, e.g.*, 49 C.F.R. Part 215 (Railroad Freight Car Safety Standards); 49 C.F.R. Part 217 (Railroad Operating Rules); 49 C.F.R. Part 220 (Radio Standards and Procedures); 49 C.F.R. Part 221 (Rear End Marking Devices-Passenger, Commuter and Freight Cars), 49 C.F.R. Part 229 (Railroad Locomotive Safety Standards); 49 C.F.R. Part 230 (Locomotive Inspection); 49 C.F.R. Part 231 (Railroad Safety Appliance Standards). In every instance the FRA refers in the C.F.R. to the FRSA provisions, either by name or by the applicable sections of the U.S. Code. For example, where the FRA specifically addresses safety appliances, it cites both the Safety Appliance Act ("SAA"), 49 U.S.C. §§ 20102; 20301-20306, and the FRSA as authority to issue the rule. The FRSA alone is the source of all the necessary authority where the regulation covers a subject matter not already specifically covered prior to 1970. As evident from the various regulations which have been adopted since 1970 by the FRA, these regulations "supplement" laws in effect in 1970, and they directly relate to safety appliances and the components not specifically addressed by the SAA and the Locomotive

Boiler Inspection Act("LBIA"), 49 U.S.C. § 20701. While earlier court decisions referred to the LBIA and the SAA as all inclusive, we submit that dramatically changed upon enactment of the FRSA.

Congress was aware that in some instances problems would arise which cut across the then existing statutes and the FRSA. It noted:

In those situations, the Secretary will be expected, if necessary, to issue rules under two or more statutes. For example, certain self-propelled units are now in part, subject to the Locomotive Inspection Act. The remaining part will now be subject to the new law. The Committee is aware that some administrative problems may be presented. It is the desire of the Committee, however, at this time, that the Department makes its best effort to carry out the new statute in concert with the existing regulatory framework.

H. R. Rep. No. 91-1194, 91st Cong. 2d Sess. 16 (1970).

II. A STATE'S AUTHORITY TO REGULATE RAILROAD SAFETY IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT OF 1970.

The FRSA, recodified at 49 U.S.C. § 20101 *et seq.*,^{3/} governs the regulation of railroad safety, and authorizes the Secretary of Transportation to prescribe appropriate rules, regulations, orders, and standards for all areas of railroad safety. 49 U.S.C. §§ 20103, 20106.^{4/} The preemption of state law by the FRSA is expressly set out at 49 U.S.C. § 20106. Additionally, preemption issues involve the preemptive scope of the aforementioned LBIA and SAA.

^{3/} This provision was formerly cited as 45 U.S.C. §431 *et seq.* It and other FRSA provisions were recodified without substantive change pursuant to Pub. L. 103-272, § 1(a), July 5, 1994, 108 Stat. 1379.

^{4/} This duty has been delegated to the FRA pursuant to 49 C.F.R. § 1.49.

A. Section 20106 Of The Federal Railroad Safety Act Explicitly Provides For State Regulation Of Rail Safety.

Despite the FRSA's general language, vesting regulatory authority of rail safety matters in the Secretary, §20106 of the FRSA explicitly authorizes state regulation of railroad safety. A state may regulate railroad safety until such time as the FRA has adopted a regulation covering the same specific subject matter, or even if the federal government has regulated the subject matter, the state regulation is necessary to eliminate a local safety hazard.

As relevant here, the statute currently provides:

Sec. 20106. Preemption

(a) National Uniformity of Regulation

(1) 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.

(2) A State may adopt or continue in force any law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order, related to railroad safety when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

After pointing out the policy of uniformity, Congress went further where there were no regulations covering a specific subject matter, and where local hazards necessitated more stringent requirements. The language of FRSA, its legislative history, and the court decisions interpreting it, make it clear that

Congress did not intend to displace state rail safety regulations absent the specific exercise of federal regulatory authority. *See, CSX Transportation, Inc. v. Easterwood, supra.*

B. The Legislative History of the FRSA Evidences Congressional Intent That States Regulate Railroad Safety.

The railroads argue in most preemption cases that a State's regulation or statute should be struck down because Congress intended nationally uniform rail safety rules. The railroads ignore the specific language of the statute and the legislative history regarding state participation in the regulation of rail safety. Moreover, Congress, in the recently enacted Rail Safety Improvement Act of 2008 (PL 110-432), made it clear that that safety is the highest priority under the FRSA. In section 101 of the new law, it provides:

(c) SAFETY AS HIGHEST PRIORITY.—In carrying out its duties, the [Federal Railroad] Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

This issue has been addressed by the Supreme Court in interpreting a statute similar to the FRSA, the Federal Boat Safety Act ("FBSA"). The FBSA provides in its statement of purposes that the law is to encourage greater "uniformity of boating laws and regulations as among the several States and the Federal Government." Pub.L. 92-75, §2, 85 Stat. 213-214. The Court was clear that safety takes precedence over uniformity. Spreitsma v. Mercury Marine, 537 U.S. 51, 70 (2002). It stated:

Respondent ultimately relies upon one of the FBSA's main goals: fostering uniformity in manufacturing regulations. Uniformity is undoubtedly important to the industry, and the statute's preemption clause was meant

to "assur[e] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. 20. Yet this interest is not unyielding, as is demonstrated both by the Coast Guard's early grants of broad exemptions for state regulations and by the position it has taken in this litigation. Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.

The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary. *See, Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 1-6, (May-June 1968)*. Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas; however, no further action was taken in the 90th Congress.

On April 18, 1969, the Secretary created a Task Force on railroad safety comprised of representatives from the FRA, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force, submitted to the Secretary on June 30, 1969, provided with respect to the preemption issue that "[e]xisting State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report, the interested parties attempted to draft a proposed bill for Congressional consideration in the 91st Congress. As related to preemption, the bill drafted by the FRA was not acceptable to labor or state commissions. Even in the section-by-section analysis of the Administration's bill, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted "... unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements...." The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the state or local laws, regulations or standards.

The substance of section 5 above was incorporated into the compromise legislation reported by both Senate and House Committees, and passed by Congress in S. 1933.

In testifying on the proposed bills, then Secretary of Transportation John Volpe discussed S. 1933 as passed by the Senate, pointing out the areas of permissible state jurisdiction over railroad safety. The relevant portion of Secretary Volpe's testimony states:

To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute....

House Hearings at 29 (emphasis added).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 49 U.S.C. § 20106 was a countervailing concern to its desire for national uniformity. Moreover, this was clarified in the recent legislation. Furthermore, the general policy outlined in the first sentence of this section should yield to the more specific provisions contained in the remainder of that section.

The Congressional reports reiterated the authority of states to regulate railroad safety. The Senate Report explained:

the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section [105] preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969) (hereinafter "Senate Report") (emphasis added).

The House Report stated:

Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish State wide standards with respect to rail safety.

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess., 19 (1970), (hereinafter "House Report"). (emphasis added).^{5/}

Harley Staggers, then Chairman of the House Committee on Interstate and Foreign Commerce, stated that "I would like to emphasize that the states will have an effective role under this legislation." (116 Cong. Rec. H27612 (daily ed. Aug. 6, 1970)). Another member emphasized the importance of the state's role:

Here again, the State is actively intertwined as a working partner with the Federal Government. It will be the State, the unit closest to the ground, which conducts the investigation, which submits the recommendations, which finds the problem before disaster strikes.

Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas

^{5/} Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 49 U.S.C. § 20106.

of safety not covered by Federal regulations; secondly, the State can deal directly with hazards of essentially local nature; and thirdly, the State can keep the Department of Transportation with their feet to the fire...

116 Cong. Rec. H26613 (Daily ed. August 6, 1970) (Statement of Cong. Pickle) (emphasis added).

As Congress has explicitly stated, the FRSA prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, are intended to preempt state railroad safety regulations. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. N.Y.S. Dept. of Social Services v. Dublino, 413 U.S. 405 (1973); State of Wisconsin v. Wisconsin Central Transportation Corp., et al., 546 N.W.2d 206, 210 (1996) ("The use of ...'covering' in the preemption clause suggests that Congressional purpose was to allow states to enact regulations relating to railroad safety up to the point that federal legislation enacted a provision which specifically covered the same material." (emphasis added)); Florida Lime & Avocado Growers, 373 U.S. 132 (1963); CSX Transportation Inc. v. Easterwood, *supra*.

The initial inquiry in determining whether CPUC regulations are preempted by federal law is whether the federal government has prescribed a regulation covering the same subject matter of the State requirement.

C. Pursuant to Easterwood v. CSX, State Laws Are Not Preempted Unless The Federal Government Has Adopted Regulations Which Substantially Subsume The Subject Matter Of The State Laws.

With respect to preemption generally, the Supreme Court has observed that:

Pre-emption fundamentally is a question of congressional intent ... and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

English v. General Elec. Co., 496 U.S. 72, 79 (1990). When it adopted the FRSA, in response to growing concerns about threats to public safety, Congress did not intend to reduce public protection by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law." Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 184 (7th Cir. 1995). As another court observed:

Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but [the act creating the FRSA express preemption statute] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same thing as preempting the field; here, Congress has done only the former.

Civil City of South Bend, Ind. v. Conrail, 880 F.Supp. 595, 600 (N.D.Ind. 1995).

The Supreme Court observed, "...we have long presumed that Congress does not cavalierly pre-empt state law...." Medtronic, Inc. v. Lohr, 518 U.S.470, 485 (1996).

In wording the FRSA preemption provision, Congress clearly provided a continuing role for state regulation of railroad safety to avoid the creation of regulatory gaps. In addition, the Supreme Court in Cipollone v. Liggett Group, Inc., et al., 505 U.S. 504, 517, stated:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority." Malone v. White Motor Corp., 435 U.S. at

505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

On April 21, 1993, the Supreme Court decided CSX Transportation, Inc. v. Easterwood, *supra*, and interpreted, for the first time, the preemptive scope of § 20106, defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thus preempting the state regulation of the said subject matter. There are five principles set forth in Easterwood. The Supreme Court began its preemption analysis by stating that there is a presumption against preemption, citing the long held notion that, "[i]n the interest of avoiding unintended encroachment on the authority of the States, ... a court interpreting a federal statute ... will be reluctant to find pre-emption." *Id.* at 663-664 (emphasis added). *See also*, Wyeth v. Levine, *supra*, slip op. at 8-9. Similarly, the Court observed that preemption of state law under the FRSA is subject to a "relatively stringent standard and the presumption against pre-emption." *Id.* at 668 (emphasis added). The second principle of the Court is that the historic powers of states to regulate train safety must not be "superseded ... unless that [is] the clear and manifest purpose of Congress." *Id.* at 663-64; Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230((1947)). Evidence of preemptive purpose can be found in the text and structure of the statute at issue. *Id.* The "express preemption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665. Therefore, the statutory structure of the preemption clause reveals Congress' emphasis on the savings clause, and its intent not to apply the FRSA in an expansive manner. Thirdly, Easterwood noted the local safety hazard provision, and if there is an essentially local safety hazard and the other two savings clause provisions are met, the preemption will not apply even if the subject matter implicates a regulation with sufficient specificity for coverage. Fourthly, the FRA regulation must "cover" the

subject matter, and not be a general mandate and merely touch upon or relate to the subject. *Id.* at 664-70. Preemption will not lie unless the federal regulation "substantially subsumes" the subject matter. Therefore, the scope of preemption is not broad and all encompassing, but narrowly tailored and highly fact dependent. *See, e.g., Shanklin v. Norfolk Southern Ry. Co.* 173 F.3d 386 (6th Cir. 1999), *rev'd*, 529 U.S. 344 (2000); *Shanklin v. Norfolk Southern Ry. Co.*, 369 F.3d 978 (6th Cir. 2004). The fifth principle of Easterwood is that, even if a regulation is specific enough to cover a subject matter, there still should be an inquiry into "whether preconditions for the application of [the] regulations have been met." *Id.* *But see, Shanklin*, 529 U.S. at 357-58 (the determination of whether state law is preempted does not concern an examination of the compliance with or the adequacy of the federal regulation).

The Easterwood decision has been interpreted to mean that "a presumption against preemption is the appropriate point from which to begin [a preemption] analysis." *In Re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 90 (Ohio 1994); *Southern Pacific Transportation Co. v. OR. PUC*, 9 F.3d 807, 810 (9th Cir. 1993) ("In evaluating a federal law's preemptive effect, however, we proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act "unless that [is] the clear and manifest purpose of Congress"). *See also, Wyeth v. Levine, supra*, slip op. at 8-9.

The Court held that a subject matter is not preempted when the Secretary has issued regulations which merely "touch upon" or "relate to" that subject matter. The Court stated that the Congress' use of the word "covering" in § 20106 "indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Easterwood, 507 U.S. at 664 (emphasis added). The Court recognized the state interest and right to regulate railroad safety, noting that "[t]he term 'covering' is ... employed within a

provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665 (emphasis added).

The Supreme Court's analysis of the facts in the Easterwood case is instructive. The plaintiff in that wrongful death action alleged that the railroad company was negligent under state common law in two respects: for failing to maintain an adequate warning device at a highway crossing and for operating the train at excessive speeds. The railroad company defended on the ground that various FRSA regulations preempted both state law claims. The Court found that the plaintiff's excessive speed claim was preempted because the FRA had adopted regulations specifically setting the maximum allowable operating speeds for such trains and that this "should be understood as covering the subject matter of train speed." Easterwood, 507 U.S. at 675. However, because federal regulations requiring certain warning devices at some highway crossings^{6/} did not apply to this specific crossing, the Court found that the plaintiff's second claim was not preempted. *Id.*, 507 U.S. at 670-73. The Court thus required evidence of very specific "clear and manifest" federal regulation on the same subject matter covered by state law before the state law was preempted.

The Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. Miamisburg, *supra*, 626 N.E.2d at 93.

Similarly, the Ninth Circuit addressed the scope of § 20106 in the wake of Easterwood, in Southern Pacific v. OR. PUC, 9 F.3d 807 (9th Cir. 1993). That court noted:

^{6/} Namely, those in which the installation of warning devices was funded by the federal government.

To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* at 812. The court continued: "in light of the restrictive term 'cover' and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.

Id. at 813.

Before finding that a state law is preempted, other courts since Easterwood have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law. *See e.g., Miller v. Chicago And North Western Transp. Co.*, 925 F. Supp. 583, 589-90 (N.D.Ill. 1996) (state claim based on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject); Thiele v. Norfolk & Western Ry. Co. *supra*, 68 F.3d at 183-84 (no preemption of state law "adequacy of warning claims" prior to time that warning devices "explicitly prescribed" by federal regulations are actually installed); and Miamisburg, *supra*, 626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment). *Compare, Peters v. Union Pacific R. Co.*, 80 F.3d 257, 261 (8th Cir. 1996) (FRA promulgation of, "specific, detailed scheme" of regulations concerning revocation of locomotive engineers certification preempts state law conversion action to recover revoked certificate).

The Easterwood decision is in keeping with an earlier decision of the United States District Court for the Northern District of California in Southern Pacific Transportation Company v. Public Utilities Commission of the State of California, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th

Cir. 1987). The court held that in order for there to be federal "subject matter" preemption of state regulations, the federal regulation must address the same safety concern as addressed by the state regulation. The judge explained:

[T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was 'to promote safety in all areas of railroad operations.' H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulations until federal standards are adopted.

Id. at 1225 (emphasis added).

The court also held that the statutory requirement that a state statute not be burdensome to interstate commerce applies only with respect to regulations promulgated pursuant to the local hazard exception. *Id.* at 1227. Accordingly, when a state regulates a subject matter not covered by federal regulations, "whether they impose a burden on commerce is irrelevant." *Id.*

There is other precedent for the above analysis, limiting the preemptive scope of § 20106 to the particular subject matter addressed by federal regulations. In National Ass'n. of Regulatory Util. Comm'n. v. Coleman, 542 F.2d 11 (3d Cir. 1976), the Third Circuit held that only the precise subject matter of the FRA regulations (monthly accident reporting requirements) was beyond a state's regulatory authority. However, FRA regulation of monthly accident reporting requirements would not preclude states from requiring immediate notification of rail accidents, nor being furnished with copies of monthly FRA reports. *Id.* at 15.

While we acknowledge the right of States to address legitimate rail safety concerns within the scope of §20106, we also support national regulation in those areas where FRA has substantially subsumed a particular subject matter. For

example, braking systems on trains arriving from other States should not pose a safety hazard in another state, because braking systems on all train throughout the nation must be maintained at a level that ensures safety. We feel that the FRSA appropriately limits the scope of state regulation where a state law is inconsistent with a federal law or poses an undue burden on interstate commerce. The local safety hazard should be deleted so long as it did not create a risk to the employees and the public. For example, compliance with numerous different State standards would be so complex as to create a genuine risk that an improper standard would be inadvertently applied, which would reduce overall safety.

D. Regardless of Whether Federal Regulations Substantially Subsume the Subject Matter, a State May Regulate Pursuant to the Local Hazard Exception.

The foregoing shows that a state may regulate rail safety, notwithstanding the local hazard exception, with respect to any subject matter that is not substantially subsumed by federal regulations.

The inference advanced by the railroads is that the possibility of other states adopting rules covering this issue would subject railroads to potentially multiple regulations and enforcement policies. This was the argument the railroads presented during the Congressional consideration of the FRSA. *See, e.g.,* Testimony of Thomas Goodfellow, President of Association of American Railroads, at the House Hearings, 84, 89-90. That position was not adopted by Congress.

The railroads also usually argue that the states must establish that the local conditions are unique, and they are not capable of being encompassed within uniform national standards. The railroads have misinterpreted the statutory requirements of the FRSA and Easterwood.

As stated by then Secretary of Transportation Volpe at the congressional hearings:

Section 105^{7/} additionally provides that a state may adopt or continue in force an additional or more stringent law, rule or regulation relating to rail safety when necessary to eliminate or reduce local safety hazard when not incompatible with any Federal requirement and when not creating an undue burden on interstate commerce. The purpose of the provision is to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. It provides the states with authority to regulate individual local situations where necessary to eliminate or reduce particular local railroad safety hazards. 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. Such unique circumstances are not always amenable to broad Federal regulatory authority and are more readily identified and corrected at the local level.

House Hearings at 52.

Nowhere in the legislative history is it suggested that, merely because some states may share certain topographical characteristics, they cannot regulate their own local safety hazard. Even the railroad industry, at the hearings on the FRSA legislation, acknowledged that curves at certain locations could be classified as local safety hazards. *See*, House Hearings, at 85 (March 1970). The railroad industry, during the 1969-1970 congressional deliberations, proposed an amendment to require that local safety hazards be "unique." (House Hearings at 84). The proposed amendment stated in part:

A State may adopt or continue in force an additional or more stringent law, rule, regulation, or standard relating to railroad safety when necessary to eliminate or reduce unique hazards of local origin....

^{7/} Recodified at 49 U.S.C. § 20106.

Id. (emphasis added). This amendment by the railroads was not adopted by Congress nor was “unique” mentioned in either the House or Senate reports.

It also is noteworthy that, in the Senate, the railroads opposed any state regulation of a local safety hazard. Mr. Goodfellow of the Association of American Railroads testified that “If Congress is going to adopt a bill which gives the Federal government authority in all areas of safety of railroad operations, it should not permit the States to vary or supplement the Federal scheme in any manner.” Hearings on S.1933, S. 2915, and S. 3061 Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, 91st Cong., 1st Sess. 361 (May – Oct. 1969).

E. Undue Burden On Interstate Commerce.

In determining whether a state regulation creates an undue burden on interstate commerce, the Supreme Court applies a balancing test between the state interest in issuing the regulation and the amount of burden created by the regulation. Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943). In Terminal, the Court upheld an Illinois law requiring cabooses on trains moving through that state. The Court found that state interests, preventing injuries to railroad employees, outweighed the burden on interstate commerce (increased cost of interstate rail movement).

In Norfolk and Western Ry. Co. v. Pennsylvania Pub. Util. Comm’n, 413 A.2d 1037, 1045-1046 (1980), the court adopted essentially the same balancing test stating:

In determining whether a state regulation creates an undue burden on commerce, it must first be determined whether the state regulation serves a legitimate state interest.... Once a legitimate interest is established, it is

necessary to look to the degree of burden imposed by the regulation on interstate commerce.^{8/}

Clearly, the safe operation of trains in the California is a legitimate state interest. Many of the trains traveling through the state of California transport hazardous materials. "The transportation and storage of hazardous materials is inherently dangerous." Southern Pacific Transportation Co. v. Public Service Commission of Nevada, No. CV-N-86-444-BRT, slip. op., p.2 (D.Nev. Sept. 28, 1988). "[T]he subject matter of the regulations, transportation, and storage of hazardous materials, is certainly within the police power of the state for the protection of the public safety and welfare of its citizens." *Id.*, at 3.

[W]hen a state legitimately asserts the existence of a safety justification for a regulation ... the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce....

Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520, 524 (1959). The burden inquiry ends once the court finds a non-illusory safety interest to support the law. *See*, Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad, 393 U.S. 129, 140 (1968) (the Court will leave to the legislature the question of balancing financial losses to the railroads against "the loss of lives and limbs of workers and [the public]"); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 449 (1978) ("if safety justifications are not illusory, the court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.") (Blackmun, J. concurring); Kassel v. Consolidated Freightways Corporation, 450 U.S. 662 (1981).

^{8/} Applying the test, the court upheld a Pennsylvania regulation requiring locomotives to be equipped with sanitary toilets. The state interest in the health and safety of railroad employees was found to be substantial and justified the extra cost to the railroads.

III. IMPACT OF THE LOCOMOTIVE BOILER INSPECTION ACT AND THE SAFETY APPLIANCES ACT ON PREEMPTION UNDER THE FRSA.

There exists a serious problem with preemption issues as it relates to the application of preemption under the FRSA with preemption under the Locomotive Boiler Inspection Act, 49 U.S.C. §20701 *et seq.*, and the Safety Appliances Act, 49 U.S.C. §§ 20102; 20301-20306. Many courts have concluded, despite the FRSA provisions, that states are completely preempted from regulating anything related to locomotives and safety appliances. Some of those cases are cited in section IV of this memorandum. The rationale applied in such cases relates to an old Supreme Court case, Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926). That case held that the LBIA occupies the entire field of locomotive safety, and that parts and appurtenances cannot be regulated by the states. *Id.* at 613. This decision has been followed by most courts, even after the passage of the FRSA. The effect is that a railroad cannot be required to install equipment on a locomotive unless the equipment is required by federal regulations. Unfortunately, a locomotive or its parts and appurtenances might satisfy federal regulations and still be unsafe. The point is that there should not be two different preemption standards under the federal railroad safety laws. The FRSA provisions only should apply to all railroad equipment.

Congress in the FRSA recognized that then existing matters covered by the LBIA would continue to be regulated under that Act and any remaining areas would be subject to the FRSA:

The Committee is aware that in some instances problems will arise which cut across the existing statutes and the new law. In those situations, the Secretary will be expected, if necessary, to issue rules under two or more statutes. For example, certain self-propelled units are now in part, subject

to the Locomotive Inspection Act. The remaining part will now be subject to the new law.

House Report at 16; *See also, Norfolk and Western Ry Co. v. Pennsylvania Pub. Util. Comm'n*, 413 A.2d 1037, 1044 (1980) (the court affirmed a state regulation requiring the addition of sanitation devices to locomotives, concluding that "Under the mandate of the FRSA, in the absence of a federal rule covering the 'same subject matter,' we cannot, under section 205, infer preemption."

The legislative history of the FRSA provides further support for the foregoing.

Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others, ... Locomotive Inspection Act

These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. There are virtually no uniform State regulations Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale Federal legislation with provisions for active State participation to assure a much higher degree of railroad safety in the years ahead.

House Report at 7-8 (emphasis added).

The Senate Report is similar:

To date, scant attention has been paid to railroad safety at either the State or Federal levels. At present, there are several rail safety statutes, each one of which applies to some very specific safety hazard. The majority of these statutes are from 50 to 75 years old and were written when technology was quite different from what it is today

If there are standards in these areas they are self-imposed by the railroad industry except in those very few instances where States have taken the initiative. Self-imposed regulations are, of course, completely voluntary and may be violated by any railroad at will.

Senate Report at 4.

As Justice O'Connor explained in Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989):

The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.

The FRSA revealed a longstanding coexistence of state and federal law, and should be applied to the LBIA and SAA preemption. Furthermore, "An agency literally has no power to act, let alone preempt the [law] of a sovereign State, unless and until Congress confers power upon it." Louisiana Public Service Commission v. FERC, 476 U.S. 355, 374 (1986). We submit there is nothing in the LBIA nor the SAA that contains a specific preemption provision or confers such power on the FRA. Moreover, courts should not be able to draw inferences from congressional silence. *See*, Brown v. Gardner, 513 U.S. 115, 121 (1994); O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 616 (1997).

Additionally, states should not be relegated to "local safety hazards" in order to address a safety hazard. Rather, 49 U.S.C. § 20106(1) should be deleted and allow state regulation unless it is incompatible with a federal law or regulation, and is not an undue burden on interstate commerce. Such provision is supported by the National Association of Regulatory Utilities Commissions, the National Conference of State Transportation Specialists, and the FRA's Association of State Railroad Safety Program Managers. *See*, Hearings on Reauthorization of the Federal Rail Safety Program, *supra*, 110th Cong., 1st Sess. 148 (2007). The reason the change is needed is that the courts rarely hold that a particular safety issue is local. *See*, Union Pacific R.R., et al. v. California Public

Utilities Commission, 346 F. 3d 851 (9th Cir. 2003); Norfolk & Western Ry. Co. v. Public Utilities Commission of Ohio, 926 F.2d 567 (6th Cir. 1991); Herriman v. Conrail, Inc., 883 F. Supp. 303 (N.D. Ind. 1995); Biggers on Behalf of Key v. Southern Ry. Co., 820 F. Supp. 1409 (N.D. Ga. 1993); Walker v. St. Louis-Southwestern Ry. Co., 835 S.W. 2d. 469 (Mo. App. 1992). Moreover, it would allow the states to protect its citizens by helping to ensure safe railroad operations.

IV. HAVING POINTED OUT THE ABOVE PRINCIPLES OF LAW UNDER THE FRSA, COURTS STILL HOLD IN MANY INSTANCES THAT STATE LAWS AND REGULATIONS ARE PREEMPTED.

We believe our analysis of the FRSA is valid. However, numerous courts have ruled that state laws and regulations are preempted. We will identify some cases for your review:

City of Covington v. C & O Rwy. Co. 1989 WL 30478 (E.D. Ky. 1989) (speed of trains);

Conrail v. PA PUC, 536 F. Supp. 653, *aff'd* 96 F.2d 981 (3d Cir. 1982), *aff'd* 461 U.S. 912 (1983) (speed recorders);

CSX Transp. Co. v. City of Plymouth, 283 F.3d 812 (6th Cir. 2002) (blocking crossings);

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) (operating train at excessive speed);

CSXT, Inc. v. Pitz, 883 F.2d 468 (6th Cir. 1989), *cert. den.*, 110 S.Ct. 1480 (2000) (toilets on locomotives);

Federal Ins. Co. v. BNSF Ry. Co., 270 F. Supp. 2d 1183 (C.D. Cal. 2003) (negligent track inspection);

In Re Derailment Cases, 416 F. 3d 787 (8th Cir. 2005) (negligent inspection of cars);

Ingram v. CSX Transp., Inc., 146 F.3d 858 (11th Cir.1998) (inadequate sight distance at crossings);

Kalan Enterprises, LLC. V. BNSF Ry. Co., 2006 WL 348340, *2 (D. Minn. Feb. 14, 2006) (movement of defective cars in violation of Association of American Railroad standards, improper train make up, etc.);

King v. Illinois Central R.R., 337 F.3d 550 (5th Cir. 2003) (reflectors on boxcars);

Law v. General Motors, 114 F.3d 908 (9th Cir.1997) (locomotive parts);

Marshall v. BN RR, 720 F.3d 807 (9th Cir.1983) (oscillating lights);

Mayor & City Council of Baltimore, et. al. v. CSX Transportation, Inc., 404 F. Supp. 2d 869 (D. MD. 2005) (negligent inspection of rail cars);

Missouri Pacific RR v. Railroad Commission of Texas, 833 F. 2d 570 (5th Cir. 1987) (first aid kits; fire extinguishers; safe walkways for employees);

Norfolk & Western RR. v. Pa. PUC, 413 A.2d 1037 (1980) (flush toilets);

Oglesby v. Del. & Hudson Rwy., 180 F.3d 458 (2d Cir. 1999) (cab seats);

Scheidung v. General Motors Corp., 65 Cal. App. 4th 1310 (1998) (asbestos in locomotives);

Springston v. CONRAIL, 1997 U.S. App. LEXIS 32276 (6th Cir. 1997) (reflective devices on locomotives);

Union Pacific R.R., et al. v. California Public Utilities Commission, 346 F. 3d 851 (9th Cir. 2003) (steep grades and sharp curves; adequate training).

Union Pacific RR v. Cal. PUC, 109 F.Supp.2d 1186, 1218-19 (N.D. Cal. 2000) (locomotive maintenance);

Washington v. Chicago, Milwaukee, et al. RR, 484 P.2d 1146 (1971) (spark arresters);

Waymire v. Norfolk & Western Ry. Co., 218 F.3d 773 (7th Cir. 2000), *cert. den.* 531 U.S. 1112 (2001) (failure to signalize a crossing).

In far too many cases, the federal judiciary has imposed its own judgment as to whether a local safety hazard exists, irrespective of the judgment of the State and/or local officials elected or appointed to make such determinations. Indeed, in one case, a federal judge went so far as to use preemption to deny residents of Minot, North Dakota, a cause of action to recover damages against the Canadian Pacific Railway for its negligence in causing a derailment and toxic hazardous materials release. Perhaps even worse, some courts have ruled that a lack of federal regulation concerning a specific subject also preempts State and local action on that subject.

The BLET and the UTU have worked actively to stem abuse of legitimate preemption law. Indeed, we were among the strongest supporters of the successful 2007 effort to amend Section 20106 to clarify that federal preemption cannot be used as a means to deny justice to victims of railroad negligence. Moreover, we have strongly pushed back when FRA has improperly attempted to expand the preemptive effect of its regulations.⁹

As noted at the NTSB hearing on the Chatsworth accident, there are areas that potentially contributed to the accident which are not covered by a federal regulation (*i.e.*, unauthorized personnel in the locomotive), and the FRA and the railroads contend that the states are prohibited from regulating the subject matter. However, in addressing the shortcomings of the current preemption

⁹*See, e.g.*, Docket No. FRA-2006-25268-08 at pp. 1-15 (BLET opposition to FRA's statement of preemptive effect of proposed equipment safety standards); and Docket No. FRA-2006-25169-0078 at pp. 2-6 (BLET/UTU joint opposition to FRA's statement of preemptive effect of proposed tank car safety standards).

scheme, we recognize that there are instances where uniformity is appropriate. For example, federal legislation mandating the installation of Positive Train Control technology requires that it be interoperable (*i.e.*, the system and equipment must be uniformly operable) among all railroads with joint operations.

CONCLUSION

There needs to be further congressional action to clarify that states have full authority to regulate railroad safety if it is not inconsistent with a federal law or regulation, and not an undue burden on interstate commerce. In addition, preemption under the Locomotive Boiler Inspection Act and the Safety Appliances Act should be clarified so that only the preemption provisions under the FRSA are applicable.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2009 a copy of this memorandum was served by electronic mail upon to each member of the National Transportation Safety Board, and to each of the following party spokesmen to this proceeding.

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