



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference — International Brotherhood of Teamsters

NATIONAL LEGISLATIVE OFFICE

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JOHN P. TOLMAN

Vice President and

National Legislative Representative

September 28, 2007

Docket Clerk
DOT Central Docket Management Facility
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue, Southeast
Washington, DC 20590

Re: Docket No. FRA-2006-25268, Notice No. 1

Dear Docket Clerk:

Attached hereto please find the comments of the Brotherhood of Locomotive Engineers and Trainmen concerning the above-referenced matter.

Respectfully submitted,

Vice President and National Legislative Representative

Attachment

cc: Jo E. Strang, FRA Associate Administrator for Safety (w/att.)
Grady C. Cothen, Jr., Esquire, FRA Deputy Associate Administrator for Safety Standards
and Program Development (w/att.)
All Passenger General Chairmen (w/att.)
All Passenger State Legislative Board Chairmen (w/att.)
Thomas A. Pontolillo, Director of Regulatory Affairs (w/att.)

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION**

DOT DOCKET No. FRA-2006-25268

NOTICE No. 1

RIN 2130-AB80

NOTICE OF PROPOSED RULEMAKING

PASSENGER EQUIPMENT SAFETY STANDARDS;

FRONT-END STRENGTH OF CAB CARS

AND MULTIPLE-UNIT LOCOMOTIVES

(49 CFR PART 238)

COMMENTS OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN



**Before the
United States Department of Transportation
Federal Railroad Administration
DOT Docket No. FRA-2006-25268
Notice No. 1
Comments of Brotherhood of Locomotive Engineers and Trainmen**

I. Introduction

On August 1, 2007, the Federal Railroad Administration (“FRA”) published a Notice of Proposed Rulemaking (“NPRM”) with respect to passenger equipment safety standards set forth in Part 238 of Title 49 of the Code of Federal Regulations. Specifically, FRA is proposing standards governing the front-end strength of cab cars and multiple-unit locomotives used in passenger service. 72 FR 42016. In the NPRM, which was assigned the above-referenced docket number, FRA also solicited comments thereon from interested parties. Id.

These comments are submitted by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters (“BLET”), which is the duly designated and recognized collective bargaining representative for the craft or class of Locomotive Engineer employed on all Class I railroads, including Amtrak, as well as nearly all significant commuter railroads.¹ BLET also represents operating and other employees on numerous Class II and Class III railroads. Consequently, FRA’s proposed rule would have a significant impact upon our members. For the reasons set forth below, BLET respectfully requests that FRA revise the proposed rule as specified herein.

Our comments are divided into two general areas. The first is FRA’s unprecedented claims and statements on the subject of preemption. Simply stated, the preemption-related sections of the NPRM are misplaced because: (1) the NPRM incorrectly claims that the stated views concerning preemption reflect the consensus of FRA’s Railroad Safety Advisory Committee (“RSAC”); (2) they constitute an inappropriate venture by an Executive Branch agency into matters reserved for the Legislative and Judicial Branches; and (3) they are plainly contrary to the legislatively promulgated and judicially acknowledged rights of BLET members under the Federal Employers’ Liability Act.

The second area on which we will comment involves various provisions of the proposed rule. We believe it is appropriate and necessary for FRA to revisit two sections of the proposed rule; specifically, Section 238.211(b) and Section 238.213(c). In addition, there is one area not covered in the proposed rule that warrants FRA consideration.

¹ BLET is the recognized collective bargaining representative for locomotive engineers who operate trains for the following commuter railroads: Long Island Railroad; Massachusetts Bay Commuter Railroad; METRA (Chicago); Metrolink (Los Angeles); New Jersey Transit; Peninsula Commute Service (Bay Area); Port Authority Trans-Hudson; Southeastern Pennsylvania Transportation Authority; and Virginia Railway Express.

II. FRA’s Comments on Preemption Should Be Withdrawn or Significantly Revised, to Reflect Comments on this Issue in Previous Rulemakings, and Proposed Section 238.13 Also Should Be Revised.

In the preamble to the NPRM, FRA states that “it has preempted any State law, regulation, or order, including State common law, concerning the operation of a cab car or MU locomotive as the leading unit of a passenger train.” 72 FR 42028. FRA further states that “when FRA has regulated the construction of a railcar, FRA clearly permits its operation on the general system of railroad transportation unless FRA explicitly sets limits on its operation, and State or local governments may not prohibit certain of those operations or impose an independent duty of care with respect to those operations [because] FRA’s comprehensive regulation of this area has covered the subject matter of all aspects of the safe operation of cab cars and MU locomotives, leaving no room for State standards.” 72 FR 42030.²

FRA also states that “a State or local entity which owns or controls a railroad may direct that railroad to exceed FRA’s requirements, provided that it does so in a capacity that is wholly distinct, and does not derive, from the statutory provision governing the preemptive effect of FRA’s regulation of this area.” *Id.* This is so, FRA claims, because it “has applied [its] knowledge in deciding to permit those railroads to operate cab cars and MU locomotives as the leading units of Tier I passenger trains, and FRA is not aware of any circumstances on any of those passenger railroads which would qualify under the statute as essentially local safety or security hazards affecting those operations.” 72 FR 42031. Accordingly, FRA posits, any failure by a commuter railroad to adhere to a more stringent standard than FRA’s proposed rule effectively immunizes that railroad from liability because any State action — including jury verdicts based upon a State’s common law — are preempted. *Id.*

FRA’s preamble comments on the preemptive effect of the proposed rule are highly inappropriate. FRA misstates current law and ignores the fact that the law may be further amended by this Congress. Furthermore, FRA’s comments represent the most recent incursion by an Executive Branch agency into matters reserved for the Legislative and Judicial Branches. Additionally, it is contrary to FRA’s duty as safety regulator to take actions that serve to immunize the railroad industry for its actions or inactions.

Moreover, and contrary to FRA’s assertion, the RSAC never addressed, much less reached consensus on, the preemptive effect of the proposed rule. Lastly, FRA’s position conflicts with the rights and protections enjoyed by railroad workers — including BLET members — pursuant to the Federal Employers’ Liability Act. For these reasons, FRA’s comments on preemption should be either withdrawn completely, or significantly revised to reflect comments on this issue in previous rulemakings, and proposed Section 238.13 should be revised as well.

² FRA did acknowledge that “States are free of course to craft standards to address the extremely rare ‘essentially local safety or security hazard,’ so long as the standards otherwise meet the three part test of 49 U.S.C. 20106.” *Id.*

A. Contrary to FRA's Assertion, the RSAC Never Addressed, Much Less Reached Consensus On, the Preemptive Effect of the Proposed Rule.

We find incredible FRA's claim that the RSAC's consensus encompassed what FRA describes as the preemptive effect of the proposed rule. Consider the following passages from the NPRM's preamble:

Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA.

72 FR 42019.

With the exception discussed below [concerning cab cars and MU locomotives without flat-ends or with CEM designs, or both], the Working Group reached consensus on the principal regulatory provisions contained in this NPRM at its meeting in September 2005. After the September 2005 meeting, the Working Group presented its recommendations to the full RSAC for concurrence at its meeting in October 2005. All of the members of the full RSAC in attendance at its October 2005 meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA in this matter. After reviewing the full RSAC's recommendations, FRA agreed that the recommendations provided a good basis for a proposed rule, but that test standards and performance criteria more suitable to cab cars and MU locomotives without a flat forward end or with energy absorbing structures used as part of a crash energy management design (CEM), or both, should be specified. As discussed below, the NPRM provides an option for the dynamic testing of cab cars and MU locomotives as a means of demonstrating compliance with the rule. However, FRA makes clear that this proposal was not the result of an RSAC recommendation. Otherwise, FRA has adopted the RSAC's recommendations with generally minor changes for purposes of clarity and formatting in the Federal Register.

72 FR 42019–42020.

[F]ederalism concerns have been considered in the development of this NPRM both internally and through consultation within the RSAC forum, as described in Section II of this preamble, above. The full RSAC, which reached consensus on the proposal (with the exception discussed above concerning cab cars and MU locomotives without flat-ends or with CEM designs, or both) and then recommended it to FRA, has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements (again, with the exception noted above). The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative on the Committee.

72 FR 42036.

FRA’s claim that RSAC agreed by consensus to the preemption position espoused in the NPRM is erroneous. The Power Point Presentation concerning the work of the Passenger Equipment Crashworthiness Task Force included in the RSAC Meeting Documents from the October 11, 2005 meeting — which formed the basis for RSAC’s vote — indicates that consensus was reached only on (1) “fundamental technical requirements,” (2) “recommended ‘home’ for standards,” and (3) values for energy absorption. *See* FRA-2000-7257-80 at p. 10. Furthermore, nowhere in the crashworthiness documents contained in the meeting record is there any reference to any discussions concerning preemptions. *Id.* at pp. 10–20. Similarly, neither the word “preempt” nor the word “preemption” appears anywhere in the minutes of the October 11, 2005 meeting. *See* FRA-2000-7257-83 at pp. 63–85.

The claim that the RSAC endorsed, by consensus, the position that adoption of crashworthiness standards occupied the field with respect to cab-car forward operation not only is untrue, it also imposes an impossible burden on RSAC and the entire concept of advisory groups developing consensus recommendations for regulatory action. For the reasons set forth herein, we strongly disagree with FRA’s view as to preemption for a variety of legal and public policy reasons. If the deliberations of RSAC participants were consistently clouded by concerns whether their actions could have ramifications far beyond the four corners of the regulatory subject being considered, we believe the process would inevitably become paralyzed and ineffective.

B. FRA’s Comments on Preemption Misstate Current Law.

The statutory extent to which FRA regulations preempt state law is set forth in Section 20106 of title 49 of the United States Code. Prior to 2002, that provision stated as follows:

§ 20106. National uniformity of regulation.

Laws, regulations, and orders related to railroad safety 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 until the Secretary of Transportation 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—

- (1) is necessary to eliminate or reduce an essentially local safety hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

49 USC § 20106 (Pub. L. 103–272, Sec. 1(e), July 5, 1994, 108 Stat. 866).

As FRA correctly notes, Section 20106 was amended by the Homeland Security Act of 2002.³ *See* 72 FR 42028. The effect of the amendment was to change Section 20106 to read as follows:

³ Specifically, the Homeland Security Act of 2002 provided as follows:

“Sec. 1710. Railroad Safety to Include Railroad Security.

* * *

(c) National Uniformity of Regulation.—Section 20106 of such title is amended—

§ 20106. National uniformity of regulation.

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 (*with respect to railroad safety matters*), *or the Secretary of Homeland Security (with respect to railroad 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 *or security* when the law, regulation, or order—

- (1) is necessary to eliminate or reduce an essentially local safety *or security* hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

(emphasis added).

On its face, the 2002 amendment did nothing more than extend current safety preemption to matters of rail security. The scope of the safety preemption, itself, clearly was not expanded. Given that the proposed rule is a safety rule — and not a security rule — the mere fact that Congress extended preemption from safety to security matters provides no basis whatsoever for FRA to address the subject, much less to the degree that it did.

Moreover, at the time FRA published the NPRM, a bill entitled the Implementing Recommendations of the 9/11 Commission Act of 2007 (“the Act”) was on President Bush’s desk, awaiting his signature. When the Act was signed on August 3, 2007, Section 20106 was amended, again, as follows:

SEC. 1528. RAILROAD PREEMPTION CLARIFICATION.

Section 20106 of title 49, United States Code, is amended to read as follows:

“§ 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 a 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 railroad

(1) by inserting “and laws, regulations, and orders related to railroad security” after “safety” in the first sentence;

(2) by inserting “or security” after “safety” each place it appears after the first sentence; and

(3) by striking “Transportation” in the second sentence and inserting “Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters),”.

Pub. L. No. 107–296, November 25, 2002, 116 Stat. 2319.

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 or security when the law, regulation, or order—

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

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

“(C) does not unreasonably burden interstate commerce.

“(b) **CLARIFICATION REGARDING STATE LAW CAUSES OF ACTION.**—

“(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

“(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

“(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

“(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

“(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

“(c) **JURISDICTION.**—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.”.

Pub. L. 110–53, August 3, 2007, 121 Stat. 266, 453.

That Congress intended to not automatically preempt all State causes of action in every area where FRA has issued — or has considered but declined to issue — safety regulations is unequivocally stated in the Conference Report on the legislation, which points to the bill’s “provision that would clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent.” H. Rep. 110–259 at p. 351. Specifically, the Report states that

Subpart (b) of the Conference substitute provides further clarification of the intention of 49 U.S.C. § 20106, as it was enacted in the Federal Railroad Safety Act of 1970, to explain what State law causes of action for personal injury, death or property damage are not preempted. It clarifies that 49 U.S.C. § 20106 does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation or the Secretary of Homeland Security, its own plan or standard that it created pursuant to a regulation or order issued by either of the Secretaries, or a State law, regulation or order that is not incompatible with 49 U.S.C. § 20106(a)(2).

The modified language also contains a retroactivity provision, which clarifies that 49 U.S.C. § 20106 applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota de-

railment. Finally, this provision indicates that nothing in 49 U.S.C. § 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

Id. The Report further notes that the “modified language restructures 49 U.S.C. § 20106 and changes its title from ‘National Uniformity of Regulation’ to ‘Preemption’ to indicate that the entire section addresses the preemption of State laws related to railroad safety and security.” Id.

In our view, it could not be clearer that Congress intended to preserve State common law causes of action in circumstances defined in the Act. Admittedly, it is virtually certain that new subsection (b) will be subject to litigation to define its parameters. That being said, however, FRA’s preamble comments concerning preemption unquestionably conflict with current law and should be retracted.

C. FRA’s Comments on Preemption Improperly Address Matters Reserved for the Legislative and Judicial Branches.

Not only do FRA’s preamble preemption comments conflict with current law, they represent a significant incursion by an Executive Branch regulatory agency into areas that fall within the purview of the Legislative and Judicial Branches. In our view, this raises serious separation of powers questions. Even more troubling, FRA’s comments are just the latest in a series of similar actions by other Executive Branch agencies.

According to the *Preemption Monitor*, which is published by the Law & Criminal Justice Committee of the National Conference of State Legislatures (“NCSL”), a number of attempts at “preemption by preamble” have been made during the past two years, including these:

- In 2005, the National Highway Traffic Safety Administration (“NHTSA”) published a proposed rule purporting to strengthen federal automotive roof crush standards. *See* 70 FR 49223. The rule also included an express preemption of state product liability and wrongful death laws.
- In a final rule published on January 18, 2006, the Food and Drug Administration (“FDA”) revised its prescription drug labeling requirements and, *inter alia*, preempted by preamble all State product liability law relating to labeling.
- In a final rule published on March 15, 2006, the Consumer Product Safety Commission established new standards for mattress flammability and, in so doing, stated that conflicting state laws and common law practice was preempted by the new federal standard.
- On March 30, 2006, the Department of Transportation (“DOT”) published a final rule concerning corporate average fuel economy (CAFE) standards. In the preamble, DOT claimed that the Clean Air Act preempts California’s and other states’ mandates to cut carbon dioxide pollution.

Preemption Monitor, Vol. II, No. 4 (Dec. 5, 2006) at pp. 12–13.

Legislation passed by Congress typically includes — either in the bill text, or in accompanying reporting and during debate, or both — expressions concerning the intent of the legislation. When a dispute arises of the meaning or scope of legislation the judiciary addresses the dispute and rules thereon. In cases of significance Congress may “overrule” the judiciary by amending the law to correct an erroneous ruling, in the process reasserting, refining or clarifying the original intent of the law. That is precisely what occurred this summer with regard to rail safety and security preemption. FRA’s preamble comments inappropriately delve into matters reserved for the Legislative and Judicial Branches.

Furthermore, preemption by preamble usurps state legislative and judicial authority, and undermines state policy and judicial decisions. For that reason, Executive Branch agencies are required by Executive Order No. 13132 to consider whether action the agency is considering raises federalism implications. In cases where states or localities will be impacted, the Executive Order requires the agency to consult with those to be impacted.

FRA’s preamble statement on the federalism implications of the proposed rule claims that

federalism concerns have been considered in the development of this NPRM both internally and through consultation within the RSAC forum, as described in Section II of this preamble, above. The full RSAC, which reached consensus on the proposal (with the exception discussed above concerning cab cars and MU locomotives without flat-ends or with CEM designs, or both) and then recommended it to FRA, has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements (again, with the exception noted above). The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative on the Committee.

72 FR 42036.

FRA’s representation that RSAC concurred with its position concerning preemption is untrue, as we have shown. *See* p. 3, *supra*. The members of RSAC that FRA points to as “representing State and local interests” are American Association of State Highway & Transportation Officials, and Association of State Rail Safety Managers. Both of these associations are comprised of State — not local — executive branch agency representatives.

There is no evidence, nor does FRA claim, that it consulted with any representative of a State or local legislative branch, such as NCSL. There also is no evidence, nor does FRA claim, that it consulted with any representative of a State or local judicial branch, or even a single State’s Attorney General. Contrary to FRA’s assertion, its preamble comments create a significant federalism question, and the consultation required by Executive Order No. 13132 has not been performed. The preamble comments should be withdrawn because they exceed FRA’s authority and jurisdiction.

D. FRA’s Comments on Preemption Serve to Immunize the Railroad Industry For Its Actions or Inactions, Contrary to FRA’s Duty as Safety Regulator.

Particularly objectionable to us is the fact that FRA has issued this preamble in a naked attempt to affect the outcome of a judicial appeal in which a railroad appellant that the FRA has the legal duty to regulate is the defendant in the underlying matter. FRA specifically states that the “NPRM on cab car and MU locomotive crashworthiness further refines FRA’s comprehensive regulation of passenger equipment safety and serves to show that the operation of cab cars and MU locomotives is a matter regulated by FRA, and not one which FRA has left subject to State statutory, regulatory, or common law standards covering that subject matter.” 72 FR 42028. However, Congress has not at any time has negated any state common law remedy pertaining to tort actions, and certainly knows how to write language doing so.

Even worse, FRA makes the astounding claim that the possibility in 1999 that the final rule would be amended at some unspecified later date preempts all state law — including common law — by the complete absence of a standard to this point, which preemption it now “activates” on a retroactive basis by publishing the NPRM:

FRA specifically stated in the [1999] final rule that additional effort needed to be made to enhance corner post safety standards for cab cars and MU locomotives — leading to the NPRM that FRA is issuing today. 64 FR at 25607. However, FRA made clear that the very fact that it identified the possibility of specifying additional regulations did not nullify the preemptive effect of the final rule, both in terms of the issues addressed by the specific requirements imposed, and those as to which FRA considered specific requirements but ultimately chose to allow a more flexible approach.

72 FR 42030.

Having transformed the 2002 addition of security language to the rail safety preemption statute into a 1999 preemption of state common law pertaining to standards that were not imposed, FRA then puts its thumb on the scale of justice:

Where FRA has prohibited one thing and chosen not to prohibit another, *such as prohibiting cab car-forward operations for Tier II and not for Tier I*, FRA intended to allow a railroad to do that which FRA did not prohibit. FRA’s regulatory choice was intended to be preemptive of State standards with regard to both Tier I and Tier II passenger equipment.

Id.⁴ (emphasis added)

This pronouncement came mere weeks after a judge in the Los Angeles Superior Court rejected an argument by Metrolink — the Los Angeles area commuter railroad — that negligence claims stemming from a 2005 collision and derailment involving a train being operated in cab car-forward mode were preempted by FRA regulations. Approximately five weeks after FRA’s publication of the preemption preamble, the appellate court agreed to hear Metrolink’s

⁴ Tier I means operating at speeds not exceeding 125 mph, and Tier II means operating at speeds exceeding 125 mph but not exceeding 150 mph. *See* 49 CFR § 238.5.

challenge to the ruling of the trial judge. *See* Los Angeles Daily News website article entitled “L.A.’s Metrolink to challenge negligence claims,” as reprinted on BLET website, appended hereto as Exhibit BLET-1.

We believe there is substantial evidence establishing that FRA published this preamble concerning this subject at this time specifically in an attempt to assist Metrolink in its appeal. First, when the 1999 Final Rule was published, FRA never even suggested — much less held — that the prohibition pertaining to cab car-forward operation of Tier II equipment preempted all State and local law concerning the subject of cab car-forward operation of Tier I equipment, including common law. The totality of FRA’s preemption comments in the 1999 preamble were as follows:

Proposed Sec. 238.13 informs the public as to FRA’s views regarding what will be the preemptive effect of the final rule. While the presence or absence of such a section does not in itself affect the preemptive effect of a final rule, it informs the public concerning the statutory provision which governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations in this final rule.

See 64 FR 25581.

Similar to the unprecedented spate of “preemption by preamble” actions on the part of other federal Executive Branch agencies detailed above, the apparent attempt by FRA to influence the outcome of a specific legal matter sounds a troubling echo. During the past few years, FDA has intervened in a number of private failure to warn lawsuits filed in state court, filing a series of *amicus* briefs on behalf of the pharmaceutical defendant FDA is charged with regulating, aggressively asserting the doctrine of implied preemption. *See* Testimony of Collyn A. Peddie, Esquire, before the United States Senate Committee on the Judiciary Hearing on “Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority,” September 12, 2007.

Not only does such activism on behalf of the regulated community conflict with FRA’s statutory duty — set forth in 49 USC Section 103 — to “carry out all railroad safety laws in the United States,” we believe immunizing railroads from liability in all cases except where a federal regulation or statute is violated will diminish safety and increase costs to the public in the long run. Part 238 merely “prescribes minimum Federal safety standards for railroad passenger equipment,” and “does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.” 49 CFR § 238.1(b).

It should be obvious that all railroads will attempt to latch on to FRA’s stated rationale every time a State or local authority moves to address a local safety concern or a party files suit in state court claiming damages because of alleged railroad negligence. In this way, FRA’s posi-

tion on preemption opens a Pandora's Box that will implicate every FRA regulation, and sooner, rather than later. As the industry becomes immunized from liability in all cases except where a federal regulation or statute is violated, FRA's regulatory "minimum Federal safety standards" will become a ceiling above which no railroad will venture to avoid voluntary exposure to liability flowing from a failure to adhere to its own higher standard. Thereafter, higher standards will not come about unless it is through a subsequent FRA rulemaking, a time-consuming and somewhat imprecise process.

Furthermore, the broad expansion of preemption claimed by FRA will result in significantly higher costs for the public. Many accidents result in damages beyond the ability of the victims to bear; major accidents inevitably produce increased public cost for medical and disability for those who cannot otherwise provide for themselves. Indeed, the primary benefit from tort liability is that the negligent party is legally responsible for such costs, thereby making it unnecessary for the state to step in and pick up many of the pieces.

Thus, even if it could be argued that the liability of a publicly-funded transportation agency should be protected to some extent, the taxpayers of California ultimately will bear the cost one way or the other. Additionally, if such protection is to be provided, the appropriate body to provide the protection is the California State Legislature, not the federal safety regulator. FRA's rationale also cannot be limited to publicly-funded commuter railroads; the doctrine set out in the preamble would apply to all railroads, or to none.

Consequently, the immunity FRA proposes to grant commuter railroads eventually will result in the public bearing the cost of damages caused by private, profit-making railroads who have acted negligently, but not in violation of a federal safety law or regulation. We believe such an outcome is unconscionable. It also would create unnecessary havoc with respect to settled law regarding the rights of railroad workers to recover for injuries caused by a railroad's negligence.

E. FRA's Comments on Preemption Conflict with Legislatively Promulgated and Judicially Recognized Rights under the Federal Employers' Liability Act.

The rights of railroad workers to recover damages for injuries sustained while on the job are enshrined in the Federal Employers' Liability Act ("FELA"). 45 USC §§ 51–60. FELA provides that

every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by

reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 USC § 51.

A railroad worker's contributory negligence does not bar a recovery, but contributory negligence reduces damages proportionally. 45 USC § 53. However, there can be no contributory negligence in any case where a violation by the common carrier of any statute enacted for the safety of employees contributed to the injury or death for which damages are claimed. Id. Moreover, a "regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code, or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute" in the application of Section 3 of FELA. 45 USC § 54a.

A railroad's duty under the FELA is extraordinarily high. FELA requires that the "standard of care must be commensurate to the dangers of the business." Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943) (citations omitted). A railroad's duty under the FELA "is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery.'" Bailey v. Central Vermont Ry., 319 U.S. 350, 353, citing Patton v. Texas & P. R. Co., 179 U.S. 658, 664 (1901). Thus, a FELA action is "significantly different from the ordinary common-law negligence action." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 509–510 (1957).

The Supreme Court has noted that the "Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.' S. Rep. No. 460, 60th Cong., 1st Sess. 3." Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 329–330 (1958). Because

of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the "human overhead" of doing business from employees to their employers. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1943). See also Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations").

Consolidated Rail Corporation v. Gottshall, 512 U.S. 532, 542 (1994).

In a FELA Section 3 case, a violation of a safety law or regulation that contributed to the injury or death "creates liability without regard to negligence." Kernan v. American Dredging Co., 355 U.S. 426, 431 (1958), citing San Antonio & A. P. R. Co. v. Wagner, 241 U.S. 476. It is a liability that is "absolute." Id. at 442 (Harlan, J., dissenting).

Construing the FELA requires considering "the Act's humanitarian purposes," by applying "its accepted standard of liberal construction." Urie v. Thompson, 337 U.S. 163, 180–181

(1949). *See also* Lilly v. Grand Trunk Western R. Co., 317 U.S. 481 (1943). This is so because “the general congressional intent was to provide liberal recovery for injured workers, . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry’s duty toward its workers.” Kernan, *supra*, 355 U.S. at 432, citing Rogers, *supra*. *See also* Bailey, *supra*, 319 U.S. at 352, citing Tiller, *supra*. And it is the duty of the courts “to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction.” Rogers, *supra*, 352 U.S. at 509.

When enacting the FELA, Congress

did not crystallize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.

Kernan, *supra*, 355 U.S. at 437.

Under the FELA

the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee’s contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

Rogers, *supra*, 352 U.S. 506–507, 508 (footnotes omitted).

Thus, “for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury” is left for resolution. Tiller, *supra*, 318 U.S. at 67. Moreover, since “Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee’s injury” it is overwhelmingly the exception — and not the rule — that a jury determines whether a railroad has been negligent, in accordance with FELA-specific common law that has evolved over nearly a century. Rogers, *supra*, 352 U.S. at 510.

Indeed, the threshold for liability under the FELA is such that Section 3 is not implicated in the majority of cases. While FRA’s preamble statement on preemption purports to affect only State law, including state common law governing torts, and notwithstanding the fact that an agency interpretation of a specific federal preemption law cannot serve to overturn well-rooted FELA federal common law principles precedents, we nonetheless point out that FRA’s attempt to limit theories of liability to violations of positive regulation — and excluding from liability that which has not been regulated — creates unnecessary tension. FRA’s attempt to extend preemption to the point that the proposed regulation conflicts with long-established rights under the FELA is likely to produce litigation that will certainly be resolved in favor of FELA plaintiffs. Such litigation will burden the courts and parties without any benefit to the public.

F. Revisions Necessary in the Final Rule.

We believe that 49 USC Section 20106 already is so wordy as to make a detailed recitation in the final rule inappropriate. Moreover, rail safety reauthorization legislation is actively being considered in both the House and the Senate. It is our understanding that the NCSL seeks to further amend Section 20106 — specifically with respect to the “local safety hazard” clause — in a way that will result in fewer preemptions. Therefore, with the language of Section 20106 still on the table, we believe it would be unwise to include a detailed recitation of its terms in the final rule. Accordingly, we strongly urge FRA to revise proposed Section 238.13 to read as follows:

§ 238.13 Preemptive effect.

Issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter to the extent provided in Section 20106 of title 49 of the United States Code.

With respect to the Preamble’s Section-by-Section Analysis, we urge FRA to withdraw the current language and substitute in its place the following language, which reflects that used in the preamble to the 1999 Final Rule,⁵ adjusted to include applicable comments from House Report 110–259, pertaining to the Public Law 110–53 amendments to Section 20106:

Sec. 238.13 informs the public as to FRA’s views regarding what will be the preemptive effect of the final rule. While the presence or absence of such a section does not in itself affect the preemptive effect of a final rule, it informs the public concerning the statutory provision which governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce.

Section 20106 does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation or the Secretary of Homeland Security, its own plan or standard that it created pursuant to a regulation or order issued by either of the Secreta-

⁵ See 64 FR 25581 (May 12, 1999).

ries, or a State law, regulation or order that is not incompatible with Section 20106(a)(2). However, nothing in Section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action. With the above exceptions, Section 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations in this final rule.

The language we propose more than adequately covers the subject matter, and does so in a manner consistent with the intent expressed by the Congress in enacting amendments to Section 20106 earlier this summer. Lastly, we urge FRA to revise its *Federalism Implications* statement to conform to the above-proposed analysis and language for Section 238.13.

III. Various Provisions in the Proposed Rule Require Reconsideration and Amendment.

At the outset, we wish to express our appreciation for the opportunity to participate in the RSAC process, generally, as well as on the Passenger Safety Working Group, and its subordinate Crashworthiness/Glazing Task Force, which developed the consensus regulation submitted to FRA for consideration in this rulemaking. We also wish to acknowledge the work of the American Public Transportation Association (“APTA”) — and, in particular, its Passenger Rail Equipment Safety Standards (“PRESS”) Working Group — with whom we have partnered for many years in the ongoing effort to improve cab car safety for BLET members and the traveling public.

We wholeheartedly support FRA’s goal of improving passenger and crew survivability for occupants of cab cars and multiple-unit locomotives as expressed in the preamble to the proposed rule. 72 FR 42029. Furthermore, we believe that the proposed rule takes several significant strides in that direction, for which we applaud FRA and RSAC. Nevertheless, we have concerns regarding a few issues that we believe merit a second look.

One concern is with Section 238.211(b)(2) of the proposed rule, which permits “[a]n equivalent end structure that can withstand the sum of the forces that each collision post in paragraph (b)(1) of this section is required to withstand.” *See* 72 FR 42037. Although styled as simply a correction of an error in the previous version of the regulation, this provision causes us concern. The purpose of collision posts was, perhaps, most clearly explained by FRA in the Final Rule governing crashworthiness of freight locomotives:

AAR S-580-2005 also requires collision posts to extend to a minimum of 24 inches above the finished floor and be located forward of the position of any seated crew member. The position of the collision posts and their required height were developed to provide the crew members a survivable area in the event of a frontal collision with an object above the underframe of the locomotive. The Working Group discussed the advantages of such a survivable volume in that it may help encourage crew members to remain in the cab rather than jumping, as they often do in the face of a collision. This would prevent unnecessary injuries, and even fatalities, resulting from jumping in these situations. FRA agrees with the Working Group’s recommendation and the final rule reflects this recommendation.

71 FR 39607.

Because the height and positioning of the collision posts is what creates the survivable area during an accident, FRA imposes strict standards if a railroad wants to deviate from the AAR S-580 standard for its wide-nose freight locomotives. New design standards and changes to existing design standards must be submitted to and approved by FRA pursuant to 49 CFR Section 229.207. 49 CFR § 229.205(a)(2). Alternative crashworthiness designs must be submitted to and approved by FRA pursuant to 49 CFR Section 229.209. 49 CFR § 229.205(a)(3). Deviations from the S-580 standard for other locomotives also must be approved by FRA. 49 CFR § 229.205(b)-(c).

We see two problems with the Section 238.211(b)(2) requirement that an “equivalent end structure that can withstand the sum of the forces” each collision post must withstand. One is that the level of protection provided by two collision posts is greater than the sum of the forces because of added energy dissipation provided by the outer sheeting of the locomotive superstructure. The other is that a differently-designed end structure that meets the equivalency requirement may or may not — depending upon its design and construction — provide at least the same amount of survivable area during an accident, but is not required to do so. Accordingly, we urge FRA to revise Section 238.211(b)(2) in a way that addresses both of these problems.

Our other concern involves proposed Section 238.213(c), which governs corner post requirements for cab cars and MU locomotives ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011, utilizing low-level passenger boarding on the non-operating side of the cab end. The requirements for corner post resistance on the non-operating side are significantly lower than those for the operating side. Compare § 238.213(b) and § 238.213(c), 72 FR 42038-42039.

As FRA knows, we have consistently voiced the position that current crashworthiness protection on this equipment is so low that the only practical recourse a locomotive engineer has when he/she realizes a collision is impending is to place the train’s brakes in emergency and flee the operating cab, running through the car toward the rear end. The standards set forth in proposed Section 238.213(b) mark a significant improvement for the engineer’s immediate work-site.

However, it is our opinion that the markedly lower non-operating side standard for equipment covered by Section 238.213(c) once again creates a Hobson’s Choice for a locomotive engineer in the seconds immediately preceding an accident, because of the much greater potential the non-operating side of the car will deform in such a way as to provide insufficient survivability. As we have stated in PRESS and Working Group meetings in the past, we believe the requirement should be that both sides of the equipment can withstand the same level of force.

It is noteworthy that — in the overwhelming majority — the non-operating side is the equipment is located on the left, in the direction of travel. Therefore, it usually will be on the “railroad” side of the train rather than the “non-railroad” side of the train. Impacts from the “railroad” side of the train that involve railroad equipment will produce dramatically higher forces on what is the weaker corner of the cab. Similarly, in a frontal raking collision between two trains made of up this equipment, the two weaker corners will meet, with potentially catastrophic consequences for passengers and crew alike.

We recall that the Volpe Center researched and tested step wells to determine the viability of designing a step well that was capable of supporting the end/buffer beam that would be required in order for the non-operating side to comply with Section 238.213(b). To their credit, Volpe was able to do so. Inasmuch as the equipment governed by this provision will not even be ordered for approximately another two years, we can see no legitimate safety reason for a significantly lower standard on the non-operating side, and respectfully urge FRA to reconsider this issue.

Finally, we are disappointed that the proposed rule does not include general cab standards. Indeed, while the proposed rule makes significant and meaningful strides in improving crashworthiness, no consideration has been given to any other ergonomic issue: there is no minimum cab size requirement, nor are subjects such as vibration, noise and seat construction addressed. Understanding that sufficient seating space is at a premium, we, nonetheless, strongly believe equipment evolving to the point where locomotive engineers are confined to essentially small cages — into which they barely fit — creates both safety and security risks that are foreseeable and avoidable. We, again, urge FRA to take up the issue of minimum cab standards to address these issues.

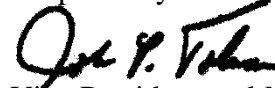
IV. Conclusion.

We strongly urge FRA to most seriously reconsider its preamble language concerning preemption, the preemption provision of the rule, and its comments concerning the federalism implications of this rulemaking. Moreover, for the reasons previously stated, we further urge FRA to revise the regulatory language, the preamble, and the federalism implications comments in line with what we have proposed herein.

Lastly, we urge FRA to reconsider three aspects of the proposed rule. First, with respect to proposed Section 238.211(b)(2), we believe FRA should adjust the provision so that (1) an equivalent level of survivable space is produced in the deformation of an alternative end structure, and (2) the use of an alternative end structure must be submitted to and approved by FRA. Further, the distinction in proposed Section 238.213 between the operating side and the non-operating side of cab cars and MU locomotives utilizing low-level passenger boarding on the non-operating side of the cab end should be eliminated, and both sides should be required to provide the higher level of protection.

Finally, we urge FRA to address the long-ignored subject of control cab and MU locomotive cab standards. We look forward to continuing to work with all stakeholders in further improving passenger equipment safety for our members, our co-workers, and the traveling public.

Respectfully submitted,



Vice President and National Legislative Representative

Exhibit BLET-1



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference of the International Brotherhood of Teamsters

L.A.'s Metrolink to challenge negligence claims

(The following report appeared on the Los Angeles Daily News website on September 7.)

LOS ANGELES — An appellate panel has agreed to hear Metrolink's challenge of a judge's decision to allow plaintiffs to pursue negligence claims stemming from a train wreck that killed 11 people, the agency announced today.

The Jan. 26, 2005, crash at the Glendale-Los Angeles city line also injured more than 180 others.

In June, Los Angeles Superior Court Judge Emilie H. Elias rejected an argument by Metrolink's attorneys that the transit agency was immune from negligence claims in the case. But she encouraged the 2nd District Court of Appeal to review her ruling before the first trial involving three consolidated lawsuits begins next July 14.

The Metrolink lawyers maintained the agency's immunity stems from relevant federal laws that override state statutes and because of regulations set forth by the Federal Railroad Administration.

The FRA left it up to local operators around the country whether they wished to use the "push-pull" method to drive trains where engines travel at less than 125 mph, Metrolink attorneys argued.

In her 16-page ruling, Elias stated "negligence law appears to be a reasonable check on operators' conduct or inaction."

In a friend-of-the-court brief filed by the Advertisement American Passenger Transportation Association on behalf of Metrolink, lawyers for APTA argue that Harris misread the law and rendered a decision that "threatens (train) operations across the country."

Metrolink continues to use the push-pull method, in which trains are pulled by a locomotive one way and then pushed when they go in the opposite direction, making it appear the trains are traveling toward their destinations in reverse. An engineer sits in the front of the leading passenger car during the push method and controls the train by remote control.

In the January 2005 Metrolink crash -- the deadliest rail crash since 1999 -- the cars were being pushed.

The plaintiffs allege the agency was negligent for having locomotives push passenger trains from the rear, where they cannot act as a buffer during a crash in the way a locomotive can.

Jerome L. Ringler, the lead lawyer for the plaintiffs, said he was not surprised by the appellate court's decision to review Harris' ruling. He said his clients have additional claims for negligence that go beyond the alleged liability stemming from the push-pull method.

Ringer said Metrolink has at least three alternatives to the push-pull method, including putting locomotives at both ends of the train. He maintains the trains can be made safer at a lower cost than Metrolink's plans to buy stronger passenger cars and continue to keep one up front while pushing.

Juan Manuel Alvarez, 28, is accused of driving a Jeep Grand Cherokee onto the railroad tracks that day and getting out of the vehicle before a Metrolink train slammed into it.

That train and another Metrolink train -- going in the

opposite direction - - derailed. Alvarez, who was arrested shortly after the crash and has been in jail without bail since then, faces 11 murder charges.

Prosecutors are seeking the death penalty against Alvarez, who is due back in court on Sept. 13 for a pretrial hearing.

The former construction worker's wife and cousin said after the crash that Alvarez was suicidal -- a claim challenged by Glendale police.

Friday, September 07, 2007
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<http://www.ble.org/pr/news/headline.asp?id=19582>

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