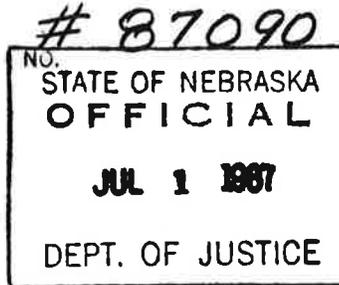


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: June 22, 1987

SUBJECT: Federal Preemption of Neb.Rev.Stat. §74-5,100.01
(Reissue 1986) Requiring the Use of Telemetry
Devices on Certain Trains Operating in Nebraska.

REQUESTED BY: Eric Rasmussen, Chairman
Nebraska Public Service Commission

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning the Nebraska Public Service Commission's authority to enforce Neb.Rev.Stat. §74-5,100.01 (Reissue 1986). Generally, §74-5,100.01 requires all trains in excess of 1,000 feet in length operating in the state without a manned caboose to be equipped with an operable telemetry system. Your specific question concerns whether certain actions recently taken by the Federal Railroad Administration [FRA] (in particular, the adoption of federal regulations pertaining to the use of end-of-train telemetry devices codified at 49 C.F.R. §232.19 (1986)), preempts enforcement of the Nebraska statutory requirements relating to telemetry systems contained in §74-5,100.01. For the reasons outlined below, it is our conclusion that the requirements of §74-5,100.01 have been preempted by federal law in this area, and, therefore, the Commission is precluded from attempting to enforce the requirements imposed under this statutory provision.

The Supremacy Clause of the United States Constitution renders void any state laws that "interfere with or are contrary to" federal law. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985) (quoting Gibbons v. Ogden, 9 Wheat. 1, 211 (1824)); U.S. Const., art. VI, cl.2. The crucial inquiry in preemption cases concerns whether Congress has manifested an intent to preclude the challenged state statute or regulation. Malone v. White Motor Corp., 435 U.S. 497 (1978). A congressional intent to preempt may be explicitly expressed by federal statute, or may be implicit in its structure and purpose. Jones v. Rath Packing Co., 430 U.S. 519 (1977); See also Pacific Gas and Electric Co. v. State Energy Resources Commission, 461

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U.S. 190 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). In determining whether the requirements pertaining to telemetry devices in §74-5,100.01 are preempted under federal law, we believe it is necessary to consider two federal statutory schemes regulating railroads, the Locomotive Boiler Inspection Act [LBIA], 45 U.S.C. §22 et seq. (1986), and the Federal Railroad Safety Act [FRSA], 45 U.S.C. §421 et seq. (1986).

The LBIA, as amended by Act of March 4, 1915, ch. 169, 38 Stat. 1192, granted the Interstate Commerce Commission the power to prescribe and regulate "all parts and appurtenances" of locomotives. 45 U.S.C. §23. That power was transferred to the Secretary of Transportation in 1966. See 45 U.S.C. §23; 49 U.S.C. §1655(e)(1)(E). Federal regulation of locomotive equipment under the LBIA has been held to completely preempt the field regarding the regulation of locomotive equipment, precluding any state or local regulation on the same subject. Napier v. Atlantic Coast Line Railroad Co., 272 U.S. 605 (1926). The prohibition against state legislation in this area "extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances." Id. at 611. The rule in Napier was recently reaffirmed in Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, 536 F. Supp. 653 (E.D.Pa. 1982), aff'd mem., 696 F.2d 981 (3d Cir. 1982), aff'd sum. sub nom., Pennsylvania Public Utility Commission v. Consolidated Rail Corp., 461 U.S. 912 (1983) (Pennsylvania regulation requiring speed recorders and indicators to be placed on locomotives held preempted by the LBIA).

The FRSA, unlike the LBIA, contains an express preemption provision:

The Congress declares that laws, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434 (1986).

Section 434 expressly declares a congressional intent to establish a nationally uniform system of regulation in the field of rail safety. National Association of Regulatory Utility Commissioners v. Coleman, 542 F.2d 11 (3d Cir. 1976). The FRSA allows state railroad safety regulation of areas not covered by the "subject matter" of rules adopted by the federal government. A state may regulate railroad safety in the same area as the federal government, however, only: (1) "when necessary to eliminate or reduce an essentially local safety hazard"; (2) "when not incompatible with any Federal law, rule, regulation, order or standard"; and (3) "when not creating an undue burden on interstate commerce." 45 U.S.C. §434 (1986); Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, supra; Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973). If a state rule or regulation reaching a federally-addressed rail safety issue is to survive preemption under the FRSA, the state must satisfy each of the elements of this narrow exception. National Association of Regulatory Utilities Commissioners v. Coleman, supra; Donelon v. New Orleans Terminal Co., supra. In particular, courts which have addressed preemption issues under the standards of Section 434 have consistently held the first prong of the test precludes the imposition of statewide rail safety standards which are incompatible with federal requirements. National Association of Regulatory Utilities Commissioners v. Coleman, supra (state accident reporting requirements in addition to federal accident reporting requirements preempted due to statewide impact); Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, supra (state regulation requiring speed recorders preempted due to statewide impact).

In a recent Texas federal district court decision, Missouri Pacific Railroad Co. v. Railroad Commission of Texas, No. A-86-CA-569 (W.D. Tex. May 8, 1987) [Missouri Pacific], the court held a rule adopted by the Railroad Commission of Texas which required, in part, that freight trains over 2,000 feet in length operating without a manned caboose be equipped with a telemetry system, was void as federally preempted under both the LBIA and the FRSA. With regard to the issue of preemption of the telemetry device requirement under the LBIA, the court stated:

Section (d)(4). . . requires an operating telemetry device on the rear of the train capable of communicating designated information to the locomotive engineer. . . [I]t is clear that the rule would require a unit on the locomotive able to receive signals from the rear-end device. . . . There can be no question that such a requirement is preempted by the LBIA.

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Id., slip op. at 16-17.

In addition to determining that the telemetry device requirement was preempted by the LBIA, the court in Missouri Pacific further held this requirement was preempted under the FRSA:

Section (d)(4) requires the use of end-of-train telemetry devices on caboosless trains. . . . [T]he FRA recently adopted a rule allowing the use of such devices as substitutes for visual inspection of brake systems. During the rule-making proceeding the FRA received comments suggesting the necessity of such devices on trains without cabooses. See Fed. Reg. 17,300-301 (1986). . . The FRA expressly rejected the commentator's proposal, and enacted a rule which does not require telemetry devices on caboosless trains. See 49 C.F.R. §232.19 (1986). The FRA's action constitutes an affirmative ruling that such regulation is inappropriate. Section (d)(4) is therefore preempted.

Id., slip op. at 24-25 (citations omitted). See Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978) ("[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, 'states are not permitted to use their police power to enact such a regulation.'") (quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947)).

Based on the analysis adopted by the court in Missouri Pacific, we are compelled to conclude that the provisions of §74-5,100.01 are void and unenforceable on federal preemption grounds. Section 74-5,100.01 requires that any train requiring a telemetry device must provide monitoring "from a continual visual display in the controlling locomotive of the train." Obviously, such a display would require the installation of monitoring equipment in the cab of the locomotive. The requirement of such monitoring equipment in the locomotive is preempted by the LBIA. Missouri Pacific, supra, slip. op. at 16-17.

Furthermore, it appears equally clear that the telemetry device requirement of §74-5,100.01 is preempted under the FRSA. As the court noted in Missouri Pacific, the Federal Railroad Administration has considered and expressly rejected adopting any rule which would require telemetry devices on caboosless trains. Such a determination is tantamount to a ruling that no such regulation is appropriate. Id., slip. op. at 24-25. It is

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therefore our conclusion that the telemetry system requirement contained in §74-5,100.01 is also preempted under the FRSA.

In summary, it is our opinion that the telemetry device requirement imposed under §74-5,100.01 is void as being preempted by federal law. Accordingly, we recommend that the Commission should not seek to enforce the provisions of §74-5,100.01, and that the Commission should not proceed to adopt rules and regulations with respect to this statutory provision, as authorized under Neb.Rev.Stat. §74-5,103 (Reissue 1986).

Very truly yours,

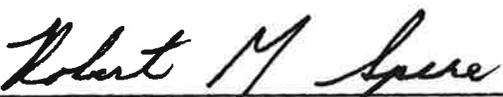
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