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DATE: March 16, 1992

SUBJECT: LB 1172 - Federal Preemption of Requirement That Two-Way Communicating Devices or Occupied Cabooses be Used by Trains Operating Between Specified Locations in Nebraska.

REQUESTED BY: Senator Dennis Byars
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding whether certain provisions of LB 1172 seek to impose requirements on trains operating between certain locations in Nebraska which are in contravention of federal law.

Section 2 of LB 1172 contains a legislative declaration "that the operation of trains without satisfactory communicating devices or crew members on board creates a local safety hazard, especially in the areas specified in section 3 of this act." Section 2 further provides, in part: "In order to minimize such local safety hazard the Legislature hereby directs that trains operating between the areas specified in section 3 of this act shall (1) be equipped with either an occupied caboose or communicating devices that meet the requirements of section 4 of this act. . . ."

Subsection (1) of section 4 of the bill provides: "Whenever a train operates between any of the locations specified in section 3 of this act, the train shall be equipped with a communicating device on both the front of the train and the last car of the

train." The term "communicating device" is defined as "a radio transmitter and receiver system or other electronic equipment that transmits" certain specific information "to the engineer in the front of the train," including:

(a) Break pipe pressure at the rear car of the train displayed in increments of one pound per square inch;

(b) Rear car movement;

(c) Whether the rear marker light is operating;

(d) Available battery life powering the communicating device;

(e) Interruption of the communicating device radio transmissions; and

(f) Distance in feet the train has traveled from a given point for the purpose of establishing rear of train location.

Subsection (2) of section 4 further provides: "Communicating devices installed on a train in conformity with this section shall also be equipped so that emergency braking of the train can be initiated by activation of the communicating device placed on the last car of the train from the front of the train."

The primary issue raised by your request concerns whether the requirements sought to be imposed pursuant to the above-cited provisions of LB 1172 are preempted by federal law. For the reasons outlined below, it is our conclusion that the requirements proposed under LB 1172 are preempted by federal law.

In Attorney General Opinion No. 87090, July 1, 1987, we addressed at length the principle of federal preemption under the supremacy clause of the U.S. Constitution in considering whether a statute requiring certain trains operating in Nebraska without a manned caboose be equipped with an operable telemetry system was preempted by federal law. In this opinion, we concluded that the telemetry device requirement imposed by this statute was void as having been preempted by federal law, and, we advised the Public Service Commission that it should not seek to enforce this requirement. Id. at 5. Our analysis of the preemption issues raised in your present request as to the validity of LB 1172 requires us to revisit the principles addressed in our previous opinion.

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, 7112 (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 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 communicating devices in LB 1172 are preempted under federal law, it is necessary to consider two federal statutory schemes regulating railroads, the Locomotive Boiler Inspection Act [LBIA], 45 U.S.C. § 22 et seq. (1988), and the Federal Railroad Safety Act [FRSA], 45 U.S.C. § 421 et seq. (1988).

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 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 (1988).

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 areas 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 (1988); 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.

With respect to the application of the LBIA, it is evident that the total preemptive effect of the LBIA precludes any state efforts to impose requirements for additional locomotive equipment. Napier v. Atlantic Coast Railroad Co., supra; See also Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 833 F.2d 570, 576 n.7 (5th Cir. 1987) ("State attempts to prescribe any locomotive safety equipment must necessarily fail.") (Emphasis in original). It is evident that the "communicating device" provision of LB 1172 would require the installation and use of additional equipment on the locomotives of certain trains, in contravention of these principles. Specifically, section 4 of the bill requires that such devices include installation of "a radio transmitter and receiver system or other electronic equipment" that transmits certain information "to the engineer in the front of the train." The device is required to display specific information regarding brake pipe pressure at the rear car of the train, rear car movement, battery life, whether the rear marker light is operating, interruption of the communicating device radio transmission, and distance in feet travelled. LB 1172, § 4(1). The device must also be capable of sending a signal to the "end-of-train" device

placed on the last car of the train to initiate an "emergency braking" of the train. LB 1172, § 4(2).

As noted previously, a state requirement that railroads equip locomotives with speed recorders or indicators was declared to have been preempted under the LBIA. Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n, 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 Comm'n v. Consolidated Rail Corp., 461 U.S. 912 (1983). In addition, the radio communication requirements imposed under regulations adopted by the State of Texas were declared to have been preempted by the LBIA in Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 671 F.Supp. 461 (W. D. Texas 1987), aff'd on other grounds, 850 F.2d 264 (5th Cir. 1988), cert. denied 488 U.S. 1009 (1989). In light of this authority, it is our opinion that, as the "communicating device" required under LB 1172 would, necessarily, mandate installation of equipment on locomotives not required by federal law, the imposition of such a requirement by state statute is preempted under the LBIA.[1]

Even if the provisions of LB 1172 could withstand a preemption challenge under the LBIA, we believe that the requirements sought to be imposed under the bill would also be held to contravene the FRSA, and, as such, would be preempted on this basis. While section 1 of LB 1172 contains a declaration that the requirements sought to be imposed are intended to address a "local safety hazard," it is our opinion that the requirements sought to be enacted under the bill do not fall within the "local safety hazard" exception to the FRSA.

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 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 (1988). In order for a state rule or

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[1] The option provided under LB 1172, allowing trains not equipped with a "communicating device" to operate in the locations specified in section 3 of the bill if such are equipped with an "occupied caboose," cannot save the bill from invalidity, as the Eighth Circuit has expressly held that such an "occupied caboose" requirement is preempted under the FRSA. Burlington Northern Railroad Co. v. State of Minnesota, 882 F.2d 1349 (8th Cir. 1989). Accord, Burlington Northern Railroad Co. v. State of Montana, 880 F.2d 1104 (9th Cir. 1989); Missouri Pacific Railroad v. Railroad Comm'n of Texas, supra.

regulation reaching a federally-addressed rail safety issue to survive preemption under the FRSA, it must satisfy each of the elements of this narrow exception. National Association of Regulatory Commissioners v. Coleman, 542 F.2d 11 (3d Cir. 1976).

There can be no question that the federal government has enacted rules or regulations covering the "subject matter" sought to be addressed by LB 1172. In 1986, the Federal Railroad Administration [FRA] considered and rejected both a possible caboose requirement and a possible two-way "telemetry" device requirement similar to that proposed under LB 1172. See 51 Fed. Reg. 17,300-301 (1986). The FRA did promulgate regulations in 1986 which set forth specifications for certain telemetry devices which it would permit to be used on trains subject to its jurisdiction. 49 C.F.R. § 232.19. In doing so, however, the FRA expressly rejected any requirement that either occupied cabooses or communicating devices such as required under LB 1172 were either necessary or appropriate. Such a ruling is tantamount to a determination that no such regulation is appropriate. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 179 (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)). See also Burlington Northern Railroad Co. v. State of Minnesota, supra; Burlington Northern Railroad Co. v. State of Montana, supra; Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, supra. **Accordingly, it is clear that the "subject matter" addressed in LB 1172 has been covered by regulations adopted by the FRA.**

As to the potential applicability of the "local safety hazard" exception under the FRSA to LB 1172, we do not believe that the requirements sought to be imposed under the bill can satisfy each of the three elements necessary for application of the exception.

First, while section 1 of LB 1172 declares the occupied caboose or communicating device requirements are necessary to address "local safety hazard" concerns in areas specified in section 3 of the bill, it does not identify what specific "local safety hazard" issues are sought to be remedied by imposing such requirements in these areas. When the State of Oregon imposed telemetry equipment requirements on cabooseless trains operating through assertedly "local safety hazard" areas, which were defined to include areas where track grades, urban development, or certain rail-highway grade-crossings existed, the federal district court held that the "local safety hazard" exception was inapplicable:

> The hazards defined by PUCO are not peculiar to the State of Oregon; they involve the types of terrain and crossings that commonly occur throughout the national railroad system. . . .Indeed, the hazards as defined occur throughout the rail routes in the State of Oregon and are for practical purposes statewide. For this reason, PUCO's . . . regulations are not allowed under the local safety hazard exception.

Union Pacific Railroad Co. v. Public Utility Comm'n of Oregon, 723 F.Supp. 526, 530 (D. Or. 1989).

While we are not aware of the basis upon which the specified areas in section 3 of LB 1172 were selected as identifying particular "local safety hazard" areas, we question whether these particular locations pose hazards unique to the overall railway system in the State of Nebraska, and, more importantly, whether such areas present hazards peculiar to the State of Nebraska which do not exist throughout the national railroad system.

As to the second element of the "local safety hazard" exception, we also must question whether the provisions of LB 1172 can be deemed compatible with existing federal regulations. In particular, we are concerned with the requirement of section 4(2) of the bill, which mandates that a "communicating device" be capable of initiating "emergency braking" by activation "of the device placed on the last car of the train from the front of the train." The regulations adopted by the FRA provide that any end-of-train device must be "[d]esigned so that an internal failure will not cause an undesired emergency brake application." 49 C.F.R. § 232.19(b)(3). A state statute requiring that trains be equipped with devices which are specifically designed to permit such emergency braking capability simply cannot be reconciled with a federal regulatory requirement that end-of-train devices be designed to be incapable of accidental brake application.

Finally, and most importantly, the "local safety hazard" exception is not applicable if the state law places an undue burden on interstate commerce. As the Fifth Circuit stated: "[I]t is difficult to imagine a state regulation of the train itself, as opposed to the right-of-way, which could escape being a burden upon commerce under Article I, Section 8, Clause 3, of the United States Constitution." Missouri Pacific Railroad v. Railroad Comm'n of Texas, supra, 850 F.2d at 268. The adoption and enforcement of the requirements imposed under LB 1172 could result in trains being stopped or delayed for noncompliance. At the minimum, compliance with such requirements would require railroads operating trains within the areas specified in section 3 of the bill to either operate with occupied cabooses or a "communicating device" throughout the state (and, likely, outside the state), or would

require railroads with trains passing through such areas to couple and uncouple cabooses. Under an even more unlikely scenario, the bill would require that special equipment ("communicating devices") be added to such trains while operating in these areas, but not in other portions of the state or outside the State of Nebraska. Under either circumstance, it is difficult to imagine how the imposition of such requirements would not constitute an impermissible burden on interstate commerce.

In conclusion, it is our opinion that, for the reasons stated above, the requirements sought to be imposed on the operation of trains in the State of Nebraska under LB 1172 are preempted by federal law.

Very truly yours,

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cc: Patrick O'Donnell
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7-330-7.12

APPROVED BY:

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