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DATE: March 26, 1992

SUBJECT: LB 1172, As Amended - Federal Preemption of Requirement That 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 LB 1172, if amended as proposed under AM3540, would impose requirements on trains operating between certain locations in Nebraska which are in contravention of federal law.

In Attorney General Opinion No. 92044, March 17, 1992, we concluded that the requirements sought to be imposed on the operation of trains in Nebraska under LB 1172 were preempted by federal law. Specifically, we concluded that the requirement under LB 1172 that trains operating between certain locations specified in section 3 of the bill be equipped with "communicating devices" was preempted by both 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). Upon review of the proposed amendment to LB 1172, it is our opinion that, even if the changes contained in AM3540 were adopted, the requirements imposed under the bill would still be contrary to federal law.

In our prior opinion, we set forth the principles regarding the preemption under the supremacy clause of the United States Constitution of state laws which conflict with federal law, and noted that, in addressing the preemption issues raised by the proposed "communicating device" requirement provided for under LB 1172, it was necessary to consider two federal statutory schemes regulating railroads, the LBIA and the FRSA. The preemptive effect of these two congressional enactments was discussed at length in our earlier opinion, and, accordingly, such discussion will not be reiterated herein. In examining whether the changes to LB 1172 proposed under AM3540 remedy the defects identified in our previous opinion, it is again necessary to examine the preemption principles applicable under the LBIA and the FRSA.

With respect to the application of the LBIA, it is clear that the total preemptive effect of the LBIA precludes any state efforts to impose requirements for locomotive equipment. Napier v. Atlantic Coast Railroad Co., 272 U.S. 605 (1926); Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 833 F.2d 570, 576n.7 (5th Cir. 1987) ("State attempts to prescribe any locomotive safety equipment must necessarily fail.") (Emphasis in original). It is apparent that, even if the proposed amendment to LB 1172 were adopted, the "communicating devices" required under the bill would mandate the use and installation of equipment on locomotives of certain trains not required by federal law, in contravention of these principles.

The proposed amendment to section 4 of the bill would retain the requirement 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 still required to display specific information to the engineer at the front of the train 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. The amendment would eliminate the provision requiring that the device 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.

Upon review of these proposed changes, we are still of the opinion that the "communicating device" required by LB 1172 would mandate the use and installation of equipment on locomotives not required by federal law, in violation of the LBIA. The Federal Railroad Safety Administration [FRSA] has promulgated regulations which set forth specifications and requirements for certain telemetry devices which are permitted (not required) to be used on trains subject to its jurisdiction. 49 C.F.R. § 232.19. Apart from the fact that the use of such devices under federal regulations is

permissive, and not mandatory, it is evident that the specifications sought to be imposed by LB 1172 would impose requirements in addition to those provided under federal law. For example, while LB 1172 mandates the front-of-train device be capable of receiving information from the rear-of-train device as to "rear car movement," the federal regulations governing telemetry systems are silent as to this issue. In any event, to the extent that LB 1172, if amended as proposed under AM3540, would still mandate installation of equipment on locomotives not required by federal law, it is our opinion that the imposition of such equipment requirements affecting locomotives is preempted by the LBIA.

Furthermore, even if the proposed amendment to LB 1172 could save the bill from being struck down in the event of a preemption challenge under the LBIA, we still believe the bill, if amended in the manner proposed, would, if challenged, be held to contravene the FRSA, and, as such, would be preempted on this basis.

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 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).

As stated in our prior opinion, "[t]here can be no question that the federal government has enacted rules or regulations covering the `subject matter' sought to be addressed by LB 1172." Attorney General Opinion No. 92044, at 6. Nothing in the proposed amendment to LB 1172 alters the fact that the bill continues to address areas affecting railroad safety issues (i.e. telemetry/communicating device requirements or occupied caboose requirements) already covered by federal regulation.[1]

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[1] As to the proposed addition of language providing that "[s]ection 4 of this act shall terminate at such time as any federal law or regulation is adopted which sets standards and operating requirements which satisfy the requirements of this section," we note that the inclusion of such language seemingly reflects a lack of understanding regarding the preemption principles articulated in our prior opinion. Where the "subject matter" addressed by a state or local rail safety requirement has

This leaves, of course, the question of whether the proposed amendment to LB 1172 could place the requirements sought to be imposed within the "local safety hazard" exception. In our view, the bill, even if amended as proposed, could not satisfy each of the three elements necessary for application of this exception.

First, while section 1 of LB 1172 still 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 again does not identify what specific "local safety hazard" issues are sought to be remedied by imposing such requirements in these areas. As noted in our prior opinion, 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. Union Pacific Railroad Co. v. Public Utility Comm'n of Oregon, 723 F.Supp. 526, 530 (D. Or. 1989). Similarly, when the State of Virginia imposed telemetry equipment requirements on cabooseless trains, including those trains operating in "local safety hazard" areas such as mainline tracks passing through railroad switching yards, the federal district court nonetheless held the requirements to be preempted by federal law. CSX Transportation, Inc. v. Griffith, Civ. 2:89-0480 and Norfolk and Western Ry. Co. v. Public Service Comm'n of West Virginia, Civ. 2:89-0676 (S.D. W.Va. Nov. 22, 1989).

While we still are not aware of the basis upon which the areas specified in section 3 of LB 1172 were selected as identifying particular "local safety hazard" areas, we continue to question whether these 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. Indeed, given the particular locations identified in section 3 of the bill, it appears that compliance with the requirements imposed would, for all practical purposes, have statewide effect, thus producing a result wholly contrary to the purpose behind the "local safety hazard" exception to the FRSA. See National Association of

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been addressed by federal regulation (as is clearly the case in this instance), state or local governments are simply not free to impose additional or conflicting requirements. Where federal regulations have covered the subject matter sought to be reached by state or local rail safety enactments, the state or local safety regulations will fail unless they fall within the "local safety hazard" exception.

Regulatory Commissioners v. Coleman, supra. In our view, the bill, either in its original form or under the amendment proposed by AM3540, simply does not address a truly "local safety hazard" issue subject to state regulation.

As to the second element of the "local safety hazard" exception, we must still question whether the bill, if amended as proposed, could be deemed compatible with existing federal regulations. While the "emergency braking" provision, noted in our previous opinion as being contrary to federal regulations, would be eliminated under AM3540, we note that, as pointed out in our discussion of the application of the LBIA, the specifications and requirements sought to be imposed under LB 1172 continue to differ from those permitted (not required) under federal regulations governing telemetry devices. In our view, a conflict with existing federal law requirements still exists under the proposed amendment to LB 1172.

Finally, the "local safety hazard" exception is not applicable if the state law places an undue burden on interstate commerce. We reiterate the admonition of the Fifth Circuit, which 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, 850 F.2d 264, 268 (5th Cir. 1988), cert. denied 488 U.S. 1009 (1989). The changes to LB 1172 proposed under AM3540 do not alter our prior conclusion that imposition of the requirements contained in the bill would, if enacted, create an undue and 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, if amended as proposed under AM3540, would be invalid and unenforceable as being preempted by federal law.

Very truly yours,

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cc: Patrick O'Donnell
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7-346-7.12

APPROVED BY:

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