Nos. 19-71787, 19-71802, 19-71916, 19-71918

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

Petitioners,

v.

FEDERAL RAILROAD ADMINISTRATION, *et. al*.,

Respondents

and

ASSOCIATION OF AMERICAN RAILROADS,

Intervenor

OPENING BRIEF OF PETITIONERS TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS, AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

Lawrence M. Mann
Alper & Mann, P.C.
9205 Redwood Avenue
Bethesda, MD 20817
(202) 298-9191
mann.larrym@gmail.com

Kevin Brodar, General Counsel
SMART-TD
24950 Country Club Blvd.
North Olmsted, OH 44070
(216) 228-9400
kbrodar@smart-union.org

Michael S. Wolly
Michael S. Wolly, PLLC
1025 Connecticut Avenue NW, Suite 1000
Washington, DC 20036
(202) 857-5000
mwolly@zwerdling.com

Attorneys for Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers, and the Brotherhood of Locomotive Engineers and Trainmen

Corporate Disclosure Statement

Petitioners are unincorporated associations, and they have no subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Table of Authorities

Cases: **Page**

Statutes:

Legislative Materials:

Regulations

Miscellaneous:

STATEMENT OF JURISDICTION

Jurisdiction of this court to decide this case is based upon 28 U.S.C. §2342(7) (Add.1). Petitioners seek judicial review of a final agency action by the Federal Railroad Administration ("FRA")[1] dated May 29, 2019. Pursuant to 28 U.S.C. §2344, an aggrieved party from a final agency action may file a petition for review within 60 days from the date of the final order in the court of appeals wherein venue lies. The Petition was timely filed on July 18, 2019.

Venue is proper in this court because three of the petitioners, the states of California, Washington, and Nevada, reside in this Circuit. It is in the interest of judicial economy and the Court's order dated October 22, 2019, ECF No. 24, consolidating all four cases to hear all four of the Petitioners' arguments in a single proceeding, rather than transfer Petitioner's case to the Sixth or D.C. Circuit to be heard separately from the remaining three.

ISSUES PRESENTED FOR REVIEW

This case involves two issues:

1. Whether, in withdrawing a proposed regulation regarding the staffing of locomotive crews, the FRA violated the requirements of the Administrative Procedure Act ("APA") and the FRA's statutory mandate

[1] The Department of Transportation has delegated to the FRA authority to administer the federal railroad safety laws and regulations. 49 C.F.R. §1.89.

set forth in 49 U.S.C. §103(c) (Add.1) to make safety its highest priority.

2. Whether under Section 20106 of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §20106 (Add. 2), the FRA may negatively preempt a state from issuing a crew size regulation.

STATEMENT OF THE CASE

Under the Federal Advisory Committee Act, 5 U.S.C. App. §1 *et seq.*, agencies are given the authority to create advisory committees to make recommendations for proposed regulations. On March 25, 1996, the FRA created the Rail Safety Advisory Committee ("RSAC"), comprised of representatives from rail labor and rail management, as well as suppliers and manufacturers. RSAC operates by attempting to negotiate consensus regulatory language on any particular task that is delegated to it by the Administrator. Unless all the members of RSAC agree to a particular task, it will not be considered by RSAC, nor will it become a recommendation. Once all members agree to a task, a working group is established to develop recommendations for the FRA for action. When a working group established by RSAC unanimously agrees to a particular rule, it will be automatically forwarded to the FRA for consideration, even if there is no unanimous consent by the full RSAC. When a majority of the RSAC agrees to a proposal, it will be forwarded to the FRA for its consideration. Where there is no RSAC consensus, the matter will be

submitted to the FRA for a formal rulemaking proceeding. The FRA is directly involved in all deliberations of RSAC and its working groups. For a more detailed discussion of RSAC, *See*, 81 Fed. Reg. 13935-36.

As the result of two major accidents in 2013 that occurred at Lac-Megantic, Quebec, and Casselton, North Dakota, the FRA submitted a task entitled "Appropriate Train Crew Size" to the RSAC for consideration, announcing that the "FRA believes it is appropriate to review whether train crew staffing affect railroad safety." 81 Fed. Reg. 13936 (Mar. 15, 2016). On August 29, 2013, the RSAC accepted the task (No. 13-050) and established a Working Group to develop recommendations to FRA. The Working Group convened five times between October 29, 2013, and March 31, 2014. The FRA was directly involved with and facilitated each working group meeting. Throughout the Working Group deliberations, the FRA submitted draft regulatory text language for the RSAC's consideration.

In the first Working Group meeting on October 29, 2013, the FRA provided an overview of its position on the crew size issue, which indicated that two persons were necessary in most railroad operations. The FRA's Associate Administrator of Railroad Safety and Chief Safety Officer stated that "…rather than engaging in extensive discussions to determine and establish stakeholder positions, FRA intends to define its position on 'appropriate crew size' right up

front." Working Group Minutes of Meeting ("WG Minutes") at 6; (E.R. 768). He presented a document entitled "Appropriate Train Crew Size Working Group Update." It stated the Agency's position that:

> railroad safety is enhanced through the use of multiple crew members.
>
> it is difficult to comply with current safety regulations and operating rules when operating a 1-person crew.
>
> the Agency's safety regulations were written with at least a 2-person crew in mind and that operating with a 1-person crew may, in some cases, compromise railroad and public safety; and
>
> a second crew member provides safety redundancy and a method of checks and balances during train operations.

Id.

These points were repeated by the FRA throughout the Working Group meetings with a specific emphasis on the necessity for safety redundancy. *See, e.g.,* October 29, 2013, WG Minutes, 6, 10 (E.R. 768, 772); Dec. 18, 2013, WG Minutes, 5, 9, 15 (E.R. 743, 747, and 753); March 31, 2014, WG Minutes, 26-28 (E.R. 689-691). Even the Association of American Railroads ("AAR")[2], intervenor here, conceded that redundancy is important to safety. October 29, 2013, WG Minutes, 10 (E.R. 772); 81 Fed. Reg. 13936-37; (E.R. 382-83, 474, 690, and 706). A brief summary of each of the Working Group meetings is

[2] The AAR is a trade association whose members include all of the nation's largest freight railroads, smaller railroads, and passenger railroads.

discussed at 81 Fed. Reg. 13937-39. During the Working Group deliberations, the FRA repeated the necessity for safety oversight of crew size. Dec. 18, 2013, WG Minutes, 10-11 (E.R. 744, 748-749).

The Working Group was unable to reach a consensus; therefore, pursuant to RSAC procedures, the appropriate crew size issue was submitted to the FRA for a formal rulemaking. The FRA issued a formal Notice of Proposed Rulemaking ("NPRM") on March 15, 2016 (81 Fed. Reg. 13918). Following the comment period, the FRA conducted a hearing on July 15, 2016, to allow additional comments. 81 Fed. Reg. 39014 (June 15, 2016). No further action was taken until almost three years later, when on May 29, 2019, the FRA abruptly withdrew the NPRM, stating that no regulation of train crew staffing was required at this time. 84 Fed. Reg. 24737.

SUMMARY OF ARGUMENT

In *Department of Commerce, et. al. v. New York, et. al.,* 588 U.S.___ ,139 S. Ct. 2551 (2019), the Supreme Court rejected the decision by the Secretary of Commerce to add a citizenship question to the census because the record showed that the Secretary's reasons for doing so were pretextual, in that they "…reveal a significant mismatch between the decision the Secretary made and the rationale he provided" *Id*. at 2559; "the sole stated reason--seems to have been contrived" *Id*. at 2575; and the Court "cannot ignore the disconnect

between the decision made and the explanation given" *Id*. Each of those descriptions is equally applicable to the action of the FRA Administrator here under challenge.

On May 29, 2019, the FRA issued a notice not only withdrawing its NPRM governing train crew size, but also affirmatively declaring that states would be preempted from regulating this subject matter. The primary reason stated by the FRA for the withdrawal was that the "FRA did not have reliable or conclusive statistical data to suggest whether one-person crew operations are safer or less safe than multiple-person crew operations." 84 Fed. Reg. 24735. The record developed by RSAC and throughout the rulemaking process makes it clear that the FRA's decision failed to comply with the requirements of the APA and the congressional mandate that the FRA exercise the highest degree of safety in its administration of its jurisdiction.

As previously noted, the FRA had stated, both publicly, and within the RSAC Working Group, that it intended to regulate crew size because of the safety impact and the need to have federal safety oversight of crew size. In furthering the regulation, the FRA submitted the proposed regulation to the Office of Management and Budget for review and editing. FRA Docket No. FRA-2014-0033-0003. After that process was complete, the proposal was formally issued.

The underlying purpose of the proposed rulemaking was to continue in effect current crew size operations and to allow railroads to seek waivers when technological circumstances warranted a reduction in crew size. For safety reasons, the FRA had determined that oversight of railroad crew sizes was essential. Moreover, during the meetings of the RSAC Working Group, the FRA repeatedly stated that a second crew member provides safety redundancy and a method of checks and balances on train operations. The intervenor AAR conceded that redundancy is important to safety. While the FRA made it clear throughout the rulemaking that it intended to regulate crew size, the railroads sought to have the proposed rule withdrawn.

Despite its steadfast position that crew size must be regulated, in a complete about-face, the FRA ultimately concurred with the railroads and withdrew the proposed regulation. The FRA provided no real justification for the withdrawal. In doing so, the FRA acted in an arbitrary and capricious manner, and abused its discretion.

The withdrawal of the NPRM violates the edict of 49 U.S.C. §103(c) (Add.1) which requires the agency "in carrying out its duties…to consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation." By its withdrawal, the

FRA failed to address the many safety issues that two crew members provide in train operations. Moreover, it failed to consider the public interest.

In addition to the foregoing, the FRA's attempt to negatively preempt the states from regulating crew size is invalid. Where there exists a specific statutory preemption provision, as in the FRSA, the Agency cannot simply invoke implied negative preemption. Each state has a responsibility to act in the interest of public safety and is not restricted by FRA's minimum standards.

ARGUMENT

I. FRA'S WITHDRAWAL OF THE NPRM VIOLATED THE APA.

The first issue for this court to decide is whether the FRA complied with the requirements of the APA in withdrawing the NPRM by fully considering the relevant factors, including the application of 49 U.S.C. §103(c) (Add.1). The APA provides that agency action must be set aside by the reviewing court if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Add. 3). The APA requires agencies to "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Department of Commerce, et. al. v. New York, et. al., supra* at 2576.

The second issue is whether the FRA has authority under the FRSA to negatively preempt a state from issuing a law or regulation covering crew size.

The FRA's decision is contrary to Supreme Court precedent, and, historically, FRA has misinterpreted the preemption provision under the FRSA. Therefore, no deference is warranted to FRA's decision. *See, East Bay Automotive Council v. NLRB,* 483 F. 3d 628, 633 (9th Cir. 2007); *Lucas v. NLRB,* 333 F. 3d 927, 931 (9th Cir. 2003).

We acknowledge that the FRA, with the exception of congressional mandates, has discretion not to issue a regulation. However, the discretion is not unbounded, *Department of Commerce v. New York, supra,* 139 S. Ct. at 2574-2576, and cannot be exercised for blatantly false reasons. If there is bad faith by an agency, an inquiry may be warranted. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1967). As will be discussed, all of these considerations warrant review and reversal here.

The APA permits a court to review a "final agency action." 5 U.S.C. §704. Agency action is final if it is both "the consummation of the agency's decision-making process" and a decision by which "rights or obligations" have been determined" or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The FRA's withdrawal of the NPRM certainly fits within this definition.[3]

[3] There is no question the FRA was engaged in rulemaking. The FRA's action

This Court has the authority to set aside the FRA's decision if it determines the withdrawal of the NPRM was "arbitrary and capricious." 5 U.S.C. §706(2)(B) (Add. 3). While a court is "not to substitute its judgment for that of the agency," an agency is still required to "examine the relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, *supra* 463 U.S. 29, 43 (1983). Put another way, an agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003). "An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed

---

in withdrawing the NPRM is akin to a "rule" under the APA, which is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…" 5 U.S.C. §551(4) (Add. 4). Such a definition "is broad enough 'to include nearly every statement an agency may make…" *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983) citing *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980). The withdrawal is not an "order" as that term is defined in the APA, which is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than a rulemaking…" and is the result of an adjudication. 5 U.S.C. §551(6)-(7) (Add. 4).

to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm Mutual Auto Ins. Co.*, *supra,* 463 U.S. at 43. Vacatur of an agency action while remanding for further proceedings is the appropriate remedy for a violation of the APA. 5 U.S.C. § 706(2) (Add.3) ("The reviewing court shall… set aside agency action, findings, and conclusions found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); *See also, Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for unlawful agency action is to 'set aside' the action") *rev'd on other grounds, Coeur Alaska v. Bonneville Power Admin.*, 557 U.S. 261 (2009). Only in "rare circumstances" should an agency action be remanded without vacatur. *Humane Society v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).

When engaged in a rulemaking, a federal agency must comply with the notice and comment requirements of the APA. *See* 5 U.S.C. §553(b)-(c) (Add. 5). The FRA's notice must be published in the Federal Register, and contain: "(1) a statement of the time, place, and nature of public rulemaking proceedings, (2) reference to the legal authority under which the rule is

proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b) (Add. 5). Thereafter, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments…" 5 U.S.C. §553(c) (Add. 5).

In addition to the foregoing, when reviewing the FRA's decision-making process here, it is critical to examine the result in the over-arching context that the FRA has an affirmative statutory duty to protect the public from unsafe railroad operations. A court "must not 'rubber stamp… administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.'" *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1236 (9th Cir. 2001), citing *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). This latest FRA decision was rendered despite the mandate from Congress that

> In carrying out its duties the Administration *shall consider the assignment and maintenance of safety as the highest priority*, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the *highest degree of safety in railroad transportation*.

49 U.S.C. §103(c) (Add.1) (emphasis added). This is the standard by which to judge FRA's actions here. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir.

2019) (a "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission…" citing *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004)). Congress's action in adding this provision to the FRSA in 2008 demonstrated a renewed emphasis on attention to safety concerns. At the same time, Congress mandated a number of safety regulations to be adopted by FRA. After more than 10 years, many of these requirements still have not been finalized.

We will demonstrate that in the rulemaking proceeding at issue here, the current Administrator failed to properly consider the relevant factors, including Congress's statutory mandate, and that the ensuing result was arbitrary and capricious.

A. Each of the Bases Relied Upon by FRA to Withdraw the NPRM is Contrived.

FRA stated four reasons for withdrawing the NPRM: (a) there is no direct safety connection between train crew staffing and the Lac-Megantic or Casselton accidents so no regulation is necessary (84 Fed. Reg. 24737-247390); (b) rail safety data does not support a train crew staffing rulemaking (84 Fed. Reg. 24739-24740); (c) comments to the NPRM do not support a train crew

staffing rulemaking (84 Fed. Reg. 24740); and (d) a train crew staffing rule would unnecessarily impede the future of rail innovation and automation. (84 Fed. Reg. 24740). None of these hold water.

(1) The FRA's Reliance on Just Two Accidents to Withdraw the NPRM Ignores Numerous Other Accidents and Its Analysis Does Not Honor the Agency's Duty to Protect the Public.

In its notice of withdrawal, FRA relies primarily upon just two accidents to support its position that two-person crews are not warranted. It states that other procedures currently in effect would have prevented those accidents. 84 Fed. Reg. 24738.[4]

The obvious question here is why FRA limited its examination to only these two accidents rather than a full examination of all the "relevant factors" in reaching its decision. Its own records reveal that, excluding accidents at rail-highway grade crossings (discussed *infra* at 16-17) there were 1,906 railroad accidents during 2018. FRA Office of Safety Analysis, 2.09 Train Accidents and Rates. [5] None of these accidents, or accidents from other years, were discussed in the withdrawal of the NPRM, even in a general sense. Rather, the

[4] This analysis ignores the fact that having two crew members in the Casselton, ND accident prevented much more destruction at the derailment site. Train Crew Staffing Public Hearing Transcript at 60 (E.R. 199) ("FRA Hearing").
[5] The source of all statistics cited in this brief is the FRA's Office of Safety Analysis; https://safetydata.fra.dot.gov.

FRA limited itself to review of only two train accidents, one of which did not even occur in the United States.

Further, the procedures put in place after the two identified accidents do not begin to address many of the safety issues involving crew size that have arisen nationwide. For example, the second crew member is the first and instant responder to render assistance to injured persons at highway-rail grade crossings, FRA Hearings, 60 (E.R.199). Today, many railroads operate trains exceeding two or more miles in length (FRA Hearings, 181 (E.R. 320)) and, therefore, frequently block crossings in local jurisdictions. But railroad operating rules prohibit the engineer from leaving the locomotive unattended, unless numerous and time-consuming steps are taken to ensure that the train is secured against any unintended movement. The FRA's own regulations render it infeasible for a train to be separated and reconnected at a crossing in an emergency. *See, e.g.,* 49 C.F.R. §§ 218.24(a)(2) (Add. 6) and 232.103(n) (Add. 7-10). This means that there must be a second crew member to disconnect and separate the cars on the train to open a crossing to allow emergency vehicles to cross over and then to reconnect the cars, which cannot physically be done by one person. And its Operating Practices Compliance Manual makes clear that any work related to operation a train—even the mere act of physically occupying the engineer's seat—may be performed only by a certified

locomotive engineer. Federal Railroad Administration Office of Railroad Safety, Operating Practices Compliance Manual (Nov. 2012 ed.) at 16-13 (Add.11); *See,* FRA Hearings, 176 (E.R. 315). This means that there must be a second crew member to disconnect and separate the cars on the train to open a crossing to allow emergency vehicles to cross over. And, when a train is disabled, only the second crew member can inspect the cars involved in the mishap and take appropriate real time action for the safety of the community because the engineer must remain in the cab. The explanation put forth by the FRA is devoid of evidence that it considered these relevant factors in determining whether a train crew staffing regulation was necessary.

Numerous examples illustrate how the FRA's analysis is flawed and fails to protect the public. The FRA states that post-accident response or handling of disabled trains are only indirectly related to railroad safety. 84 Fed. Reg. 24740. As for post-accident safety, FRA suggests protocols that bring railroad employees to the scene of an accident or disabled trains post-occurrence will be preferable to maintaining a two-person crew on a train. *Id.* One such protocol advanced by the railroads is to have an employee in a vehicle following trains. *See*, 81 Fed. Reg. 13938-39; March 5, 2014, WG Minutes 10-11 (E.R.702-703). But the FRA neglects to mention that there are thousands of train operations daily over 140,000 miles of track and more

than 200,000 highway-rail grade crossings in the U.S. Last year, there were 2,217 collisions at such crossings (which is more than 6 each day), resulting in 262 deaths and 840 injuries. FRA Office of Safety Analysis, 2.08 Highway-Rail Crossings. Even discounting congested highways and/or inclement weather, in most cases it is highly improbable that such transport vehicles would be near enough to a collision or a train derailment to render timely emergency assistance when needed. In the Working Group deliberations, AAR admitted that direct observation of a train by a vehicle may be impossible in a city. March 5, 2014, WG Minutes 20 (E.R. 712). Trains also travel through very isolated areas where there are no access roads that a vehicle can travel to assist a disabled train, derailment, or incapacitated crew member. Trains travel in many locations where the nearest town is many miles away. Eliminating a second crew member would place greater burdens upon local communities, because of the need to have prompt local emergency assistance available.

The explanation put forth by FRA is speculative and devoid of evidence that the FRA considered the reality of day-to-day domestic railroad operations in determining whether a train crew staffing regulation was necessary. The FRA "entirely fail[ed] to consider an important aspect of the problem." *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. Further,

the proposal that a portion of the safety functions of a conductor can be adequately handled by an employee following a train is "an explanation… that runs counter to the evidence before the agency" and is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

These issues, and more, confirm that FRA's analysis did not comply with the APA standards and 49 U.S.C. §103(c) (Add. 1) and must be set aside.

Another factor FRA failed to address is the impact of irregular work schedules that freight railroad operating employees endure. They are on call 7 days a week, 24 hours a day, must report to duty with as little as one hour and 15 minutes notice, and then work up to 12 hours per day. Little advance notice of on-duty times and unpredictable work schedules have contributed to significant fatigue among operating employees, which is among the most critical safety issues today in the railroad industry.[6] Two sets of eyes and ears minimize the risk of fatigue-induced accidents or rule violations. Having

[6] *See, Fatigue in the Railroad Industry*: *Hearing Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Transportation and Infrastructure Committee,* 110th Cong., 1st Sess. (February 13, 2007). *See, also,* FRA Working Group document FRA-2014-0033-0002 which discussed fatigue in the U.S. (E.R. 582).

two persons who constantly interact with each other in the locomotive cab provides a critical layer of safety protection and assures rules are complied with and the train is operated safely. This is the primary reason that the Federal Aviation Administration requires a minimum of two pilots in all commercial passenger airplanes. *See,* 14 C.F.R. §§61.55-.58.

In its deliberations, the RSAC Working Group identified the many responsibilities of train and yard service employees. E.R. 482-505.These responsibilities encompass 145 job functions. Additionally, locomotive engineer positions encompass many more distinct job functions. E.R. 478-481. Requiring one employee to perform all of these job responsibilities combined creates a substantial threat to safety. Many required work tasks in safely moving a train simply cannot be accomplished by a single crew member. *See* E.R. 374-378; E.R. 474-477; 81 Fed. Reg. 13927, 13929. These numerous tasks require two qualified crew members to function safely at different locations while coordinating their actions as a team. The FRA's statement in withdrawing the rulemaking contains no "satisfactory explanation" as to how these tasks are to be absorbed by a single crew member. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. As such, FRA's declination to regulate crew staffing size is "arbitrary and capricious" and should be set aside.

(2) There is Voluminous Safety Data to Support a Train Crew Staffing Rule.

In its withdrawal, FRA stated that there was insufficient data to demonstrate that two-person crews are safer than one-person crews. 84 Fed. Reg. 24735. The record does not support that conclusion**.** During the Working Group discussions, the FRA pointed out that the absence of data does not address the risk of an operation (December 18, 2013, WG Minutes at p. 11 (E.R. 749) and that data alone is not the only basis for safety. *Id.* at p. 13 (E.R. 751). The FRA stated that statistics do not reflect how many accidents have been prevented. October 29, 2013, WG Minutes at 10 (E.R. 772); *See also,* NPRM, 81 Fed. Reg. 13919, 13931-33. The data the current FRA contends is missing is absent solely due to the fault of the FRA and the railroads. As noted in the NPRM, "FRA relies on each railroad to self-report a description of the accident/incident, as well as the primary and contributing causes." 81 Fed. Reg. 13931. In proposing the NPRM, the FRA said that "qualitative studies show that one-person train operations pose increased risks by potentially overloading the sole crewmember with tasks" (81 Fed. Reg. 13919) and that "railroads have achieved a continually improving safety record during a period in which the industry largely employed two-person train crews." *Id.* Further,

> FRA believes that having a properly trained second crew person on board, or implementing risk mitigating actions that FRA

> believes are necessary to address any additional safety risks from using fewer than two-person crews, provides net safety benefits relative to using fewer than two-person crews or not implementing measures that FRA believes are necessary.

Id.

Beyond these basic points, with the exception of some shortline operations and yard movements, there is no data from U.S. single person freight or passenger operations establishing that a single person operation is as safe or safer than the standard two- person crew.[7] Furthermore, the NPRM, while mandating a minimum crew size generally, still allowed for existing one-person crews to continue to operate, and allowed Carriers to seek a waiver from the proposed requirement for new operations if they satisfied certain criteria. *See, infra,* at 30-31.

It is clear that FRA did not properly examine the relevant data, nor determine the safety of two crew members rather than one. There is an FRA program, known as Confidential Close Call Reporting System (C3RS), that could be utilized to determine prevention of potential accidents. *See,* October

[7] Foreign countries operating with single person crews cannot validly be compared because those operations are so dissimilar. *See, Hearing on Train Crew Staffing: Before the Federal Railroad Administration,* at 179-192 (July 15, 2016). (E.R. 318-331); Francisco Bastos and Andrade Furtado, *U.S. and European Freight Railways: The Differences That Matter,* 52 Journal of the Transportation Research Forum, 65-84 (Summer 2013).

29, 2013, WG Minutes, 19 (E.R. 781). More than 12 years ago the FRA sponsored, and funded, a voluntary confidential program allowing railroads and their employees to report close calls (i.e., accidents that would have happened but for crew intervention). Safety reporting under this program has been successful because the railroad employees participating receive protection from both discipline and FRA enforcement[8]. However, only nine of the more than 600 railroads agreed to participate in the program. Had the FRA mandated that all railroads participate, there would be significant data demonstrating, through close call reports, the safety benefit of two-person crews in accident prevention.

Simply put, the supposed lack of data supporting the maintenance of two-person crews is a result of the FRA shirking its responsibilities and allowing Carriers to have the final say in what gets reported. The FRA cannot be permitted to reach a conclusion based on a set of relevant data that is circumscribed by its own inaction. If the current Administrator was not satisfied with the data that formed the basis for the NPRM, the FRA, at a minimum, should have conducted additional research to quantify how many times two-person crews prevented accidents. Instead, the Agency did nothing.

---

[8] *See, Confidential Close Call Reporting System(C3RS): Lessons Learned Evaluation Final Report,* DOT/FRA/ORD-19-01 (February2019);https://www.fra.dot.gov.eLib/Details/L19804

The FRA has substantial funds to conduct such research. During the FY 2019 congressional appropriation, the sum of $40,600,000 was provided for research and development. Pub. L. 116-6; H. J. Res. 31 at 405; 165 Cong. Rec. H2008 (Feb. 14, 2019); 165 Cong. Rec. H2037 (Feb. 15, 2019).

Nothing has occurred in the rail industry since 2013 to undermine the agency's initial analysis that a second qualified operating crew member on each train enhances safety. In the NPRM, the FRA identified crewmember tasks and stated that the positive attributes of teamwork raise concerns with one-person crews, especially when implementing new technology. 81 Fed. Reg. 13925-13930. To support the NPRM, the FRA referred to various authoritative reports by the John A. Volpe National Transportation Systems Center and the National Academy of Sciences' Transportation Research Board. These reports analyzed the cognitive and collaborative demands of freight conductor activities; the job of a passenger conductor; fatigue status in the railroad industry and its impact on crew size; implications of technology on a task analysis of a locomotive engineer; using cognitive task analysis to inform issues in railroad operations; and the impact of teamwork on safety of operations. 81 Fed. Reg. 13924-13930. The FRA referred to none of these issues raised in the reports when it withdrew the NPRM. Shockingly, the agency stated that there was no evidence supporting the proposition that two-person crews were safer. The foregoing

establishes that either the FRA did not consider this critical relevant data, or that it is unable to "articulate a satisfactory explanation" for why the data is not persuasive. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. In either circumstance, the withdrawal of the NPRM cannot stand.

Moreover, the FRA's existing regulations and railroad operating rules suggest safety hazards are created when a train has less than two crewmembers working as a team. *See,* December 18, 2013, WG Minutes 5, 15 (E.R.743, 753). This teamwork includes receiving mandatory directives from the control center (October 29, 2019, WG Minutes 14-15, 19 (E.R. 776-77, 781)); communicating and interacting with other trains (FRA Hearings, 184-185, 190 (E.R. 322-23, 329) addressing issues regarding blocked crossings (FRA Hearings, 102, 169, 173-74 (E.R. 241, 308, 313-14)), protecting train passengers in an emergency (FRA hearings, 158, 165-69 (E.R. 297, 304-308)) ; observation for sudden incapacitation of a crewmember January 29 , 2014, WG Minutes 7 (E.R. 727); FRA Hearings, 173, 176, 183 (E.R. 312, 315, 322)); and movement through a grade crossing with identified highway-rail grade crossing signal failures. (FRA Hearings, 103, 173 (E.R. 242, 312). *See also,*75 Fed. Reg. 2668, 2671-72, 2674 (January 15, 2010) (Regarding Positive Train Control). The FRA's withdrawal of the NPRM ignores its own existing rules and regulations on these topics.

A recent additional burden was imposed on crew members on trains by

the implementation of FRA's Positive Train Control (PTC) regulation. 49 C.F.R. Part 236. This technology adds two more computer screens inside the locomotive cab (*See,* 49 C.F.R. §236.1006(d) (Add. 12), and locomotive engineers face a barrage of demands from the PTC system with prompts from the PTC screen. This technology adds significant additional duties on the locomotive engineer and causes distractions from the performance of other tasks, (*See,*75 Fed. Reg. 2670-73), which makes two-person crews even more necessary.

The FRA and the railroads maintain that PTC implementation is a major reason two crewmembers are not required. However, 82,000 of the nation's 140,000 miles of track (59%) will not be covered by the PTC. In addition, when the FRA promulgated the PTC regulations, it recognized the additional cognitive demands created by this technology. 75 Fed. Reg. 2671, *See also,* E.R. 402. This operating requirement impedes experienced crews from operating efficiently as possible. Further, the FRA stated that the PTC systems created new sources of workload distractions including the need to acknowledge frequent (and often non-informative) audio alerts, the need for extensive direct input into the locomotive computer screen during initialization, and the need to recognize error messages occurring while the train is in motion. 81 Fed. Reg. 13927. The FRA recognized that the increased complexity and workload

associated with PTC creates a need to have a computer screen for each of the two crew members (*See,* 49 C.F.R. §236.1006(d)[9] It said:

> The purpose of paragraph (f) is to ensure that those assigned tasks in the cab are able to perform those tasks, including constructive engagement with the PTC system. Furthermore, while the train is moving, the locomotive engineer would be prohibited from performing functions related to the PTC system that have the potential to distract the locomotive engineer from performance of other safety-critical duties.

75 Fed. Reg. 2598, 2671(Jan. 15, 2010).

None of these issues were addressed in the NPRM withdrawal. As the FRA fails to "examine the relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made," the withdrawal of the NPRM fails to comply with the APA and should be vacated and remanded for further rulemaking.

(3) The Evidence Supports the Promulgation of a Train Crew Staffing Rule.

In its withdrawal FRA stated that while the comments to the NPRM "note some indirect connections between crew staffing and railroad safety, such as post-accident response or handling of disabled trains, those indirect connections

[9] Originally, the requirement for two computer screens was contained in 49 C.F.R. § 1029(f). 75 Fed. Reg. 2598, 2713 (Jan. 15, 2010). It was subsequently moved to a new section. *See,* 79 Fed. Reg. 49705 (Aug. 22, 2014).

do not provide a sufficient basis for FRA regulation of train crew staffing requirements." 84 Fed. Reg. 24740. This statement is directly contradicted by the record, which contains numerous comments wherein train service employees provided examples of instances where a second crew member directly aided in avoiding an accident. For example, one commenter stated that while operating his train as an engineer with his conductor, said conductor "loudly alerted me to STOP! I stopped my light locomotive just in time to see a[]… man walk right past the plow of my locomotive. I never would have seen him on my own. Having the other person in the cabs has saved lives." FRA-2014-0033-1545. This is but one example of comments that directly addressed rail safety, contrary to the FRA's assertion that the comments only indirectly address the issue.[10]

[10] There are many other comments that describe similar incidents where a second crew member in the cab of the locomotive prevented an accident from occurring and/or saved lives. *See e.g.*, FRA-2014-0033-1525 (conductor's warning to engineer avoided a rail collision); FRA 2014-0033-1378 (conductor and engineer collaborated where dispatcher erroneously informed them the track was clear, leading directly to saving the life of the crew where a lone engineer would have died or suffered seriously bodily injury from subsequent head on collision); FRA 2014-0033-1391 (conductor's actions in observing and warning individuals operating ATVs near track prevented them from fouling the track and suffering significant injury, where engineer did not see them and would have provided no warning). The FRA's explanation for withdrawing the NPRM does not and cannot provide an adequate alternative to a second crew member that would address these concerns. Rather, the FRA chose to completely ignore them.

Under the APA, "[a]n agency must consider and respond to significant comments received during the period for public comment" *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199, 1203 (2015). "Significant comments" are "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1081 (9th Cir. 2019). The FRA not only does not respond to the numerous comments providing direct information on how a second crew member has led to increased safety, it suggests that such comments do not even exist. Such is not a "satisfactory explanation" for withdrawing the NPRM, and is therefore contrary to the procedural requirements of the APA.

Furthermore, there is an inherent fallacy in the FRA's statement that the comments did not provide conclusive data suggesting that any previous accidents involving one-person crew operations could have been avoided by having a second crewmember. 84 Fed. Reg. 24738. This fallacy is that one-person crews are virtually nonexistent, and those trains operating with them do so at slow speeds with relatively few cars. Class I railroads[11], by contrast,

[11] Pursuant to 49 U.S.C. § 20102, a Class I railroad currently is defined by the Surface Transportation Board as a railroad having revenues in excess of $489 million annually. *See,* Surface Transportation Board Decision, Docket No. EP 748 (June 10, 2019).

routinely operate trains in excess of two miles long at 60 mph or higher, many laden with hazardous materials through heavily-populated areas. The FRA ignored the facts at Lac-Megantic, which showed that one-person crews cannot properly secure a standing train nor make a required Class I air brake test.

In its withdrawal, the FRA did not mention the numerous duties performed by a conductor (*See,* E.R. 478-581) duties which cannot safely be performed by a single crewmember in most train operations. A more detailed discussion of train and engine service duties are found at E.R. 478. These many conductor duties were considered during the RSAC Working Group deliberations. They include proper handling of train make-up requirements, work orders, block signals, crossing signal failures, equipment failures, reporting accidents/incidents, copying mandatory directives from dispatchers, backing up a train, detection of by sight or electronic monitoring devices, dragging equipment, overheated wheels, shifted lading, setting out defective equipment, safety inspections of passing trains, interchange of cars at industries and yards. Correcting the problems, or isolating the cars involved, have prevented minor issues from escalating into major problems. A 2012 final FRA report[12] discussed the many activities in managing a train consist and noted that

[12] *Cognitive and Collaborative Demands of Freight Conductor Activities: Results and Implications of a Cognitive Task Analysis,* FRA Office of Railroad

unexpected situations run the gamut during a train's movements. *Id.* The NPRM withdrawal ignores it.

Significantly, the NPRM allowed for one-person crews during a number of operations, including helper service, on tourist railroads, for movements of light locomotives and work trains, remote control operations, passenger trains equipment without passengers. It also permitted some class III railroads (those with the lowest amount of trackage) that operate at slow speeds in non-mountainous territory to use one-person crews. *See,* proposed §§218.127-218.13 (81 Fed. Reg. 13963-13966). Moreover, there were two explicit waiver provisions in the NPRM (§ 218.135; 81 Fed. Reg. 13966) in addition to the existing statutory provision covering all rail safety regulations that allows for a waiver of two-person crews where the operations justify one person. 49 U.S.C. §20103(d) (Add.12).

These waiver provisions are crucial to the Court's consideration. They established a process whereby a railroad could be authorized to operate with a single crew member if it establishes that the operations would be as safe as operating a train with two crew members. The NPRM waiver provisions provided needed government oversight in the advent of automation. In every

---

Policy and Development, pp. iv., 2-3 (E.R. 402).

other mode of transportation, the federal government and the states oversee automation in transportation to assure that such implementation is safe and does not provide a safety risk to the public or to the employees. The FRA's action would allow a railroad carte blanche to decide whether, and how to, operate with one crewperson. If the NPRM withdrawal is upheld, and the states are preempted, there will be no adequate oversight of railroads choosing to eliminate crew members based on whatever considerations they deem relevant. The NPRM recognized the numerous, varied operating conditions that make two-person crews an absolute necessity; the withdrawal is at odds with, and ignores, those salient facts.

(4) A Train Crew Staffing Rule Would Not Unnecessarily Impede the Future of Rail Innovation and Automation.

The FRA's withdrawal also speculates that a rule requiring two-person crews would unnecessarily impede the future of rail innovation and automation. 81 Fed. Reg. 24740. That is false. As discussed in detail above, the NPRM was carefully crafted so that exceptions and waivers were built into the requirements, and that compliance would add little or no additional costs for the railroads. This means that innovation and technology would not be limited by the adoption of the rule, as railroads would still have the opportunity to experiment with single-person crews where circumstances established that such

operations could be safe.

Rather than implement the waiver process that balances safety and innovation, the FRA now suggests that crew size should be determined by collective bargaining rather than safety. *See,* 84 Fed. Reg. 24740. But collective bargaining primarily addresses economics, not safety. *See,* FRA Hearings, 187-88 (E.R. 327-28). The primary purpose of a collective bargaining agreement is to set appropriate wages and benefits and establish mutually acceptable working conditions. Collective bargaining represents a tug and pull over how much management is willing to pay to maintain a productive work force. It is a private, not a public, process, that does not necessarily address public concerns. The safety of the public is primarily the responsibility of the government, mandated by statutes and implementing regulations. Despite this, the FRA would abdicate its safety responsibility to unions from whom management would extract economic concessions in exchange for assurances that trains are safely staffed. Furthermore, where no labor union serves as representative of a particular railroad, there is no one to advocate for safely staffed trains.

There can be no dispute that railroads have been able to introduce innovations even with the prevalence of two-person crews. However, with increased technology comes new concerns regarding safety. As pointed out earlier, present and future technology increases the potential for work overload.

Additional new electronic technologies, such as Trip Optimizer and Leader[13], and other software applications that manage train handling and in train buff forces[14], pose significant distractions to crews. The more complex operating rules and regulations that accompany new technology, much longer trains, and much longer work assignments[15], and the failure of the railroads to address fatigue as a safety issue, make the second crewmember even more vital. An extra set of eyes and ears watching all sides of the train and providing a division of tasks are safety measures that cannot be replaced by technology.

"Technology Implications of a Cognitive Task Analysis for Locomotive Engineers", a report by the Volpe Center, at pp. 12-14, discussed the technology interactions between the engineer and conductor and how the two crew members work jointly to operate the train in a safe and efficient manner. (E.R. 843). Again, the scientific findings in the report were a foundation of the NPRM. (E.R. 843).

While innovation has come, the intervenor railroads do not have clean hands when it comes to any claims that they have been stifled in developing and

---

[13] Trip Optimizer and Leader are computerized locomotive programs designed to reduce fuel consumption by controlling braking and throttling.
[14] Buff forces cause cars to bunch together during braking.
[15] In some operations, crews are required to have specific knowledge of territory encompassing 1,000 or more miles over which they operate.

implementing technological improvements. The need for an overarching focus on safety by the FRA is underscored by the railroads' record regarding automation. The industry supports technological improvements only if they are economically beneficial to the industry.

Throughout history of railroading, the railroads have opposed many safety related technology improvements. In recent years, to mention a few, these include positive train control (75 Fed. Reg. 2598, Jan. 15, 2010), electronic controlled pneumatic brakes (Pipeline and Hazardous Materials Safety Administration, Docket No. PHMSA-2017-0102; *Association of American Railroads v. DOT, et. al.,* D. C. Cir. No. 15-1415 (Nov. 23, 2015), and rail safety technology in dark territory (RSAC Dark Territory Working Group Task No. 10-02, September 23, 2010).

Contrary to the FRA's statements, railroads have been able to introduce innovations when they saw fit and have stifled them when they did not. The withdrawal of the NPRM represents an abdication of the FRA's statutory obligation to make safety its "highest priority." 49 U.S.C. § 103(c) (Add.1). Consequently, the withdrawal of the NPRM cannot stand. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43.

(5). The Withdrawal of the NPRM Failed to Comply with the Notice and Comment Requirements of the APA.

As stated previously, when engaged in rulemaking, a federal agency must comply with the notice and comment requirements of the APA. 5 U.S.C. § 553(b)-(c) (Add. 5). While an agency's decision in a rulemaking need not be the exact same as contained in the notice, "a final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule… [t]he essential inquiry focuses on *whether interested parties reasonably could have anticipated the final rulemaking from the draft*…." *Natural Resources Defense Council v. U.S. Environmental Protection Agency* ("*NRDC v. EPA*"), 279 F.3d 1180, 1186 (9th Cir. 2002) (emphasis added); *See also, Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (a final rule which departs from a proposed rule must be "in character with the original proposal and a logical outgrowth of the notice and comments"). "A decision made without adequate notice and comment is arbitrary or an abuse of discretion." *Id.* It is the province of this Court to determine the adequacy of the notice and comment opportunity provided by the FRA. *Id.* at 1186.

The NPRM proposed

> regulations establishing minimum requirements for the size of train crew staffs depending on the type of operation. A minimum requirement of two crewmembers is proposed for all railroad operations, with exceptions proposed for those

> operations that FRA believes to no pose significant safety risks to railroad employees, the general public, and the environment by using fewer than two-person crews. This proposed rule would also establish minimum requirements for the roles and responsibilities of the second train crewmembers on a moving train, and promote safe and effective teamwork.

81 Fed. Reg. 13918. The FRA did not indicate that it was considering whether a regulation was necessary; rather it announced that it was considering the contours of a rule mandating a minimum crew size. There was certainly no indication that the FRA might later withdraw the NPRM[16] and affirmatively declare that its action is the equivalent of a rule. Nevertheless, as part of the withdrawal, the agency announced that the withdrawal "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." 84 Fed. Reg. 24741 citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

The FRA's statement regarding the preemptive effect of the withdrawal is such a departure from the NPRM that interested parties reasonably could not have anticipated the final rulemaking from the draft…"[17] *NRDC v. EPA, supra*.

---

[16] The Unions do not contend that the FRA does not generally have the right to withdraw the NPRM, but rather that the FRA's actions in doing so failed to comply with the APA.

[17] The NPRM briefly cites to the preemptive provisions of the FRSA, but gives no indication that the FRA would decline to regulate, and that in so doing it would consider such an action to be preemptive of state law.

This is evidenced by the fact that no state voiced concerns that the FRA would withdraw the NPRM and seek to preempt their laws regarding train crew staffing. The lone comment discussing potential preemption came from an engineer with twenty-one years' experience, who suggested that the proposed regulation "should be crafted so as NOT to preempt individual states who seek additional train crew staffing beyond a minimum Two-Persons." FRA-2014-0033-1097 (emphasis in original).

With one comment out of approximately 1,500 regarding preemption only requesting that states be allowed to mandate more than two person crews, there is no question that the interested parties to the NPRM were unaware that the FRA might withdraw the NPRM and declare all state law regarding crew size preempted. Therefore, the FRA's actions fail to comply with the notice and comment requirements of the APA, and the withdrawal should be vacated and remanded for further rulemaking.

II. THE FRA DOES NOT HAVE AUTHORITY TO NEGATIVELY PREEMPT A STATE FROM REGULATING CREW SIZE.

The FRA does not have the authority to make an affirmative determination that the withdrawal of the NPRM preempts state law. It is well-settled that "pre-emption is a matter of law…" *Indus. Truck Ass'n,*

Inc. v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997); *See also, Inland Empire Chapter of Associated General Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996). The FRA's withdrawal of the NPRM cannot be deemed to preempt state law, as such a conclusion is not supported by the plain meaning of the FRSA, its legislative history, or relevant case law.

A. The Plain Meaning of 49 U.S.C. § 20106(a)(2) Disfavors Pre-emption.

The Federal Railway Safety Act contains an explicit preemption provision that is unique to all safety laws. It states:

> (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 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.

49 U.S.C. § 20106(a) (Add. 2). "The interpretation of a statutory provision must begin with the plain meaning of its language." *U.S. v. Lillard*, 935 F.3d

827, 833 (9th Cir. 2019) citing *U.S. v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013). To determine the plain meaning, a court must "examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999). "If the language has a plain meaning or is unambiguous, the statutory interpretation inquiry ends there." *CVS Health Corp. v. Vividius, LLC*, 878 F.3d 703, 706 (9th Cir. 2017).

Here, the relevant FRSA provision reads "[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." 49 U.S.C. § 20106(a)(2) (Add.2) (emphasis added). To "prescribe" means to "lay down as a guide or rule of action." *The Merriam-Webster Dictionary*, Seventh Edition 2016. In the withdrawal of the NPRM, the FRA stated that "no regulation of train crew staffing is necessary or appropriate at this time." 84 Fed. Reg. 24737. It is clear that the FRA chose not to "prescribe," or "lay down" any regulation on the subject matter of crew size. Therefore, under the plain meaning of 49 U.S.C. § 20106(a)(2), the states may "adopt or continue in force a law, regulation, or order" governing crew size. Any other interpretation is contrary to Congress's intent as expressed through the text of the FRSA.

B. The Legislative History of the FRSA Supports the Position that Congress Intended for States to Have a Significant Role in Regulating Rail Safety.

If the language of 49 U.S.C. §20106(a)(2) (Add. 2) is ambiguous, a court may "employ other tools, such as legislative history, to construe the meaning of ambiguous terms." *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015). Here, the legislative history of the FRSA supports the interpretation that the FRA's conduct does not amount to prescribing a regulation such that states are forbidden from regulating crew size.

The FRSA provides concurrent authority between the federal government and the states to regulate rail safety. Only where a federal regulation "substantially subsume[s]" the subject matter is a state preempted. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The genesis of the FRSA occurred in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary.[18] Section Four of that bill would have eliminated all state railroad safety laws after two years, with the exception of four separate areas.

> Sec. 4. A State may regulate safety in rail commerce, in a manner which does not conflict with any Federal regulation, in the following areas and no others: (1) Vertical and horizontal clearance requirements; (2) grade crossing protection (including grade separation) which relates to the location of new crossings, closing of existing crossings, the type of crossing protection

[18] *See, Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong, 2d Sess. 1-6, (May-June 1968) (Add. 12-18).

> required or permitted, and rules governing train blocking of crossings; (3) the speed and audible signals of trains while operating within urban and other densely populated areas; and (4) the installation or removal of industrial and spur tracks. In exercising the authority reserved by clause (4), nothing herein shall be interpreted to diminish any authority which the Interstate Commerce Commission may have to require its approval of such actions. Other State laws and regulations affecting safety in rail commerce will continue in full force and effect for a period of two years following the date of enactment of this Act, unless abrogated prior to that time by court order, State legislative or administrative action, or by regulations issued by the Secretary.

Add.15

However, no further action was taken on the bill.

On April 18, 1969, the Secretary created a Task Force on railroad safety comprised of representatives from the FRA, the state regulatory commissions, the railroads, and the railroad unions. With respect to the preemption issue, the report of the Task Force, submitted to the Secretary on June 30, 1969, provided that "[e]xisting State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation."[19]

In the section-by-section analysis of the Administration's bill, which was

[19] Report of the Task Force on Railroad Safety, H. R. No. 91-1194, 91st Cong., 2d Sess. 71-76 (June 15, 1970) (Add. 19-24); *Hearings on S. 1933, S.2915, and S. 3061, Before the Subcommittee on Transportation, of the Senate Committee on Commerce,* 91st Cong., 1st Sess. 244-46, 375 (Oct. 28-29, 1969) ("Senate Hearings") (Add. 26-28, 30).

introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements.[20]

The preemptive language of S. 3061 and H.R. 14417, as introduced, provided:

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

Senate Hearings at 331 (Add. 29).

The substance of this language was incorporated into compromise legislation reported by both Senate and House Committees and passed by Congress as S. 1933.

In testifying on S. 1933 when it was under consideration in the House of Representatives, then-Secretary of Transportation John Volpe pointed out the federal-state partnership and areas of permissible state jurisdiction over railroad safety:

> To avoid a lapse in regulation, Federal or State, after a Federal

---

[20] Senate Hearings at 361; *Hearings on H.R. 7068, H.R. 14417 and H.R. 14478(and similar bills, S. 1933, Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce,*91st Cong., 2d Sess. 29, 124 (March 17, 1970) ("House Hearings") (Add. 33-34).

> safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute…[21]

Both the text and the legislative history of the FRSA are clear that Congress contemplated a substantial role for states in regulating rail safety. The initial version of the statute that would become the FRSA contemplated the elimination of all state law governing railroad regulation. This was considered and rejected. Instead, Congress adopted the proposition that states would have a role in said regulation, provided the federal government did not affirmatively prescribe regulations. "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989).

---

[21] House Hearings at 29 (Add. 33).

C. Case Law Interpreting Preemption Provisions Supports the Proposition that the State Laws Must Stand.

In *Altria Group, Inc. v. Good*, 55 U.S. 70 (2008), the Supreme Court said "[w]hen the text of an express preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Altria Group, Inc.*, 55 U.S. at 77 citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Therefore, to the extent the language of the preemption provision of the FRSA is ambiguous, courts should favor the reading that allows states to regulate, provided it is not explicitly prohibited. This is consistent with the Court's interpretation of 49 U.S.C. § 20106(a)(2), where it has noted that the "[t]he term 'covering' is employed within a provision that displays *considerable solicitude for state law* in that its express preemption clause is both prefaced and succeeded by express savings clauses." *Easterwood*, 507 U.S. at 668 (emphasis added). Quoting from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), the Court explained the effect of the inclusion of an express preemption clause in the statute:

> When Congress has considered the issue of preemption and has indicated in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to the authority," *Malone v White Motor Corp.*, 435 U.S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expression unius*

> *est exclusion alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

Here, the FRA has not issued a "regulation" as is expressly required by the terms of 49 U.S.C. § 20106(b)(2). Indeed, it has done the opposite and refused to prescribe a regulation. The Supreme Court has made clear that "implied 'conflict' pre-emption" is not valid under the FRSA. *Easterwood*, 507 U.S. at 673, n.12.

This Court should not "infer congressional intent to pre-empt state laws" by permitting the FRA to declare state laws pre-empted through its decision not to regulate, as it did in the withdrawal of the NPRM. Without a compelling reason to do so, the intent of Congress to allow states to regulate where the FRA has not done so should not be set aside. Therefore, the FRA's declaration that its decision not to regulate train crew size preempts state law governing train crew size is inconsistent with congressional intent and the Supreme Court's interpretations of 49 U.S.C. § 20106(a)(2). It should be set aside.

D. Other Ninth Circuit Precedent Regarding Preemption Under 49 U.S.C. § 20106(a)(2) is Inconsistent with Subsequent Supreme Court Precedent or is Non-Controlling.

In withdrawing the NPRM, the FRA relied upon this Court's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). That case held that where the FRA has rejected a requirement for regulation, a state is

preempted from requiring it. The FRA characterized this as "negative" or "implicit" preemption, which runs counter to the Supreme Court's findings regarding the necessary standard for preemption under the FRSA. This Court has recognized that precedent "can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent." *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) citing *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002). In view of subsequent Supreme Court decisions, particularly *Easterwood*, we believe that *Marshall* is no longer valid.

Furthermore, *Union Pacific R.R. Co. v. California Public Utilities Com'n*, 346 F.3d 851 (9th Cir. 2003) *("UPRR v. CPUC")*, postdates *Easterwood* and must be addressed here. *UPRR v. CPUC* considered whether a state regulation requiring railroads to comply with their own internal rules governing train configuration which also subjected railroads to civil penalties for failure to do so were "substantially subsumed" by FRA regulations under *Easterwood*'s preemption analysis.[22] In one facet of the case, the railroad argued that the

[22] In its analysis of 49 U.S.C. § 20106(a)(2), the Supreme Court in *Easterwood* found that a federal regulation only "covers" the same subject matter as a state regulation under the FRSA if it "substantially subsumes" the same subject matter. *Easterwood*, 507 U.S. at 664. This is a standard more than that the

FRA's explicit rejection of prior state approval for *training* programs carried over to the state law which required state approval of *operation* rules, where the FRA had only deferred to potential future rulemaking. *Union Pacific R.R. v. California Public Utilities C*ommission, 346 F.3d at 867. The Court rejected this argument, finding that "[t]here simply was no need for the FRA to have considered whether approval of operating rules was appropriate." *Id*. Therefore, no FRA action existed that would "substantially subsume" the state regulation regarding prior approval of operating rules, so that portion of the state statute was thus permitted to stand. In so holding, the Court stated that "[b]ecause the FRA merely deferred making a rule, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap." *Id* at 868. However, the central holding of the case was that there was no FRA regulation to consider, not that a federal agency's decision not to regulate preempted state law. The Court did not engage in any analysis of the FRSA's preemption provision, and did not engage in any post-*Easterwood* analysis of preemption via an agency's rejection of regulations. Therefore, the holding is not controlling here because the issue now squarely before the Court is whether an agency's refusal to issue a regulation regarding train crew size has preemptive

---

regulation(s) in question "touch upon" or "relate to" that subject matter. *Id*.

effect.

Further, FRA's reliance on *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (84 Fed. Reg. 24741 n.50) also is misplaced. While *Ray* does hold that state regulations are preempted when agency action "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," (435 U.S. at 178), the holding clearly acknowledges that a central consideration in making a preemption determination is "the policy of the statute." Here, the policy of the FRSA is unequivocal: Congress intended that there be "considerable solicitude for state law." *Easterwood*, *supra*. In the face of this clear policy enunciation, the FRA's reliance on *Ray* is misplaced, and its statement regarding the effect of the withdrawal of the NPRM is not binding and should be rejected.

CONCLUSION

The decision of the FRA to withdraw its consideration of railroad crew size should be vacated and remanded to FRA, instructing FRA to comply with 49 U.S.C. §103(c) in accordance with this Court's opinion.

The FRA's decision regarding negative preemption is erroneous as a matter of law and should be vacated.

Respectfully submitted,

/s/Lawrence M. Mann
Lawrence M. Mann
Alper & Mann, P.C.
9205 Redwood Avenue
Bethesda, MD 20817
(202) 298-9191
Mann.larrym@gmail.com

Kevin Brodar, General Counsel
SMART-TD
24950 Country Club Blvd.
North Olmsted, OH 44070
(216) 228-9400
kbrodar@smart-union.org

Michael S. Wolly
Michael S. Wolly, PLLC
1025 Connecticut Avenue, NW,
Suite 712
Washington, D.C. 22036
(202) 857-5000
mwolly@zwerdling.com

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P.32(a)(7)(B) because this brief contains 11,178 words, excluding part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

/s/Lawrence M. Mann
Lawrence M. Mann

Certificate of Service

I hereby certify that on this 4th day of December, 2019, I electronically filed the foregoing Petitioner's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lawrence M. Mann
Lawrence M. Mann

Statement of Related Cases

There is no pending related case in this Circuit.

ADDENDUM

8 U.S.C. § 2342. Jurisdiction of Court of Appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoy, set aside, suspend (in whole or in part), or to determine the validity of ----

(7) all final agency actions described in section 20014(c) of title 49. Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§103. Federal Railroad Administration

(a) In General.-The Federal Railroad Administration is an administration in the Department of Transportation.

(b) Safety.-To carry out all railroad safety laws of the United States, the Administration is divided on a geographical basis into at least 8 safety offices. The Secretary of Transportation is responsible for all acts taken under those laws and for ensuring that the laws are uniformly administered and enforced among the safety offices.

(c) Safety as Highest Priority.-In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

§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 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.

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§551. Definitions

For the purpose of this subchapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title-

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

§ 218.24 One-person crew.

(a) An engineer working alone as a one-person crew shall not perform duties on, under, or between rolling equipment, without blue signal protection that complies with § 218.27 or § 218.29, unless the duties to be performed are listed in § 218.22(c)(5) and the following protections are provided:

(1) Each locomotive in the locomotive engineer's charge is either:

(i) Coupled to the train or other railroad rolling equipment to be assisted; or

(ii) Stopped a sufficient distance from the train or rolling equipment to ensure a separation of at least 50 feet; and

(2) Before a controlling locomotive is left unattended, the one-member crew shall secure the locomotive as follows:

(i) The throttle is in the IDLE position;

(ii) The generator field switch is in the OFF position;

(iii) The reverser handle is removed (if so equipped);

(iv) The isolation switch is in the ISOLATE position;

(v) The locomotive independent (engine) brake valve is fully applied;

(vi) The hand brake on the controlling locomotive is fully applied (if so equipped); and

(vii) A bright orange engineer's tag (a tag that is a minimum of three by eight inches with the words ASSIGNED LOCOMOTIVE - DO NOT OPERATE) is displayed on the control stand of the controlling locomotive.

(b) When assisting another train or yard crew with the equipment the other crew was assigned to operate, a single engineer must communicate directly, either by radio in compliance with part 220 of this chapter or by oral telecommunication of equivalent integrity, with the crew of the train to be assisted. The crews of both trains must notify each other in advance of all moves to be made by their respective equipment. Prior to attachment or detachment of the assisting locomotive(s), the crew of the train to be assisted must inform the single engineer that the train is secured against movement. The crew of the train to be assisted must not move the train or permit the train to move until authorized by the single engineer.

§ 232.103 - General requirements for all train brake systems.

(n) *Securement of unattended equipment.* Unattended equipment shall be secured in accordance with the following requirements:

(1) A sufficient number of hand brakes, to be not fewer than one, shall be applied to hold the equipment unless an acceptable alternative method of securement is provided pursuant to paragraph (n)(11)(i) of this section. Railroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released.

(2) Except for equipment connected to a source of compressed air (*e.g.,* locomotive or ground air source), or as provided under paragraph (n)(11)(ii) of this section, prior to leaving equipment unattended, the brake pipe shall be reduced to zero at a rate that is no less than a service rate reduction, and the brake pipe vented to atmosphere by leaving the angle cock in the open position on the first unit of the equipment left unattended. A train's air brake shall not be depended upon to hold equipment standing unattended (including a locomotive, a car, or a train whether or not locomotive is attached).

(3) Except for distributed power units, the following requirements apply to unattended locomotives:

(i) All hand brakes shall be fully applied on all locomotives in the lead consist of an unattended train.

(ii) All hand brakes shall be fully applied on all locomotives in an unattended locomotive consist outside of a yard.

(iii) At a minimum, the hand brake shall be fully applied on the lead locomotive in an unattended locomotive consist within a yard.

(iv) A railroad shall develop, adopt, and comply with procedures for securing any unattended locomotive required to have a hand brake applied pursuant to paragraph (n)(3)(i) through (iii) of this section when the locomotive is not equipped with an operative hand brake.

(4) A railroad shall adopt and comply with a process or procedures to verify that the applied hand brakes will sufficiently hold an unattended locomotive consist. A railroad shall also adopt and comply with instructions to address throttle position, status of the reverse lever, position of the generator field switch, status of the independent brakes, position of the isolation switch, and position of the automatic brake valve on all unattended locomotives. The procedures and

instruction required in this paragraph shall take into account winter weather conditions as they relate to throttle position and reverser handle.

(5) Any hand brakes applied to hold unattended equipment shall not be released until it is known that the air brake system is properly charged.

(6)(i) The requirements in paragraph (n)(7) through (8) of this section apply to any freight train or standing freight car or cars that contain:

(A) Any loaded tank car containing a material poisonous by inhalation as defined in § 171.8 of this title, including anhydrous ammonia (UN 1005) and ammonia solutions (UN 3318); or

(B) Twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of a hazardous material listed in paragraph (n)(6)(i)(A) of this section, or any Division 2.1 (flammable gas), Class 3 (flammable or combustible liquid), Division 1.1 or 1.2 (explosive), or a hazardous substance listed at § 173.31(f)(2) of this title.

(ii) For the purposes of this paragraph, a tank car containing a residue of a hazardous material as defined in § 171.8 of this title is not considered a loaded car.

(7)(i) No equipment described in paragraph (n)(6) of this section shall be left unattended on a main track or siding (except when that main track or siding runs through, or is directly adjacent to a yard) until the railroad has adopted and is complying with a plan identifying specific locations or circumstances when the equipment may be left unattended. The plan shall contain sufficient safety justification for determining when equipment may be left unattended. The railroad must notify FRA when the railroad develops and has in place a plan, or modifies an existing plan, under this provision prior to operating pursuant to the plan. The plan shall be made available to FRA upon request. FRA reserves the right to require modifications to any plan should it determine the plan is not sufficient.

(ii) Except as provided in paragraph (n)(8)(iii) of this section, any freight train described in paragraph (n)(6) of this section that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard shall comply with the requirements contained in paragraphs (n)(8)(i) and (n)(8)(ii) of this section.

(8)(i) Where a freight train or standing freight car or cars as described in paragraph (n)(6) of this section is left unattended on a main track or siding outside of a yard, and not directly adjacent to a yard, an employee responsible

for securing the equipment shall verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures.

(ii) The controlling locomotive cab of a freight train described in paragraph (n)(6) of this section shall be locked on locomotives capable of being locked. If the controlling cab is not capable of being locked, the reverser on the controlling locomotive shall be removed from the control stand and placed in a secured location.

(iii) A locomotive that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard is excepted from the requirements in (n)(8)(ii) of this section where the locomotive is not equipped with an operative lock and the locomotive has a reverser that cannot be removed from its control stand or has a reverser that is necessary for cold weather operations.

(9) Each railroad shall implement operating rules and practices requiring the job briefing of securement for any activity that will impact or require the securement of any unattended equipment in the course of the work being performed.

(10) Each railroad shall adopt and comply with procedures to ensure that, as soon as safely practicable, a qualified employee verifies the proper securement of any unattended equipment when the railroad has knowledge that a non-railroad emergency responder has been on, under, or between the equipment.

(11) A railroad may adopt and then must comply with alternative securement procedures to do the following:

(i) In lieu of applying hand brakes as required under paragraph (n) of this section, properly maintain and use mechanical securement devices, within their design criteria and as intended within a classification yard or on a repair track.

(ii) In lieu of compliance with the associated requirement in paragraph (n)(2) of this section - and in lieu of applying hand brakes as required under paragraph (n) of this section - isolate the brake pipe of standing equipment from atmosphere if it:

(A) Initiates an emergency brake application on the equipment;

(B) Closes the angle cock; and

(C) Operates the locomotive or otherwise proceeds directly to the opposite end of the equipment for the sole purpose to either open the angle cock to vent to atmosphere or provide an air source.

(iii) Upon completion of the procedure described in paragraph (n)(11)(ii) of this section, the securement requirements of paragraph (n) of this section shall apply.

FRA Operating Practices Compliance Manual

16-13

Leaving the controls of the "operation" of a locomotive An individual who is at the controls of a moving locomotive is in a position to control the locomotive if the need arises. It does not mean there has to be actual manipulation of a control. Therefore, it is a violation of the rule for a non-certified person to "sit in the seat" and "watch" or "sound the horn" while the engineer is temporarily away, even if no controls are touched. This same rationale applies if nobody is at the controls (for example, if an engineer leaves the seat vacant and leaves the control compartment for any reason while the locomotive is in motion and there is no other certified locomotive engineer to take the engineer's place). FRA considers this a violation. As another example, an engineer may not vacate the seat to use the toilet in the cab nose. This does not prohibit an engineer from exiting the engineer's chair in order to move around the control compartment, but it does require that the engineer remain personally in charge of the operation of the locomotive at all times.

§ 236.1006 Equipping locomotives operating in PTC territory.

(d) ***Onboard PTC apparatus.***

(1) The onboard PTC apparatus shall be so arranged that each member of the crew assigned to perform duties in the locomotive can receive the same PTC information displayed in the same manner and execute any functions necessary to that crew member's duties. The locomotive engineer shall not be required to perform functions related to the PTC system while the train is moving that have the potential to distract the locomotive engineer from performance of other safety-critical duties.

49 U.S.C. §20103

(d) NONEMERGENCY WAIVERS.—
The Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety. The Secretary shall make public the reasons for granting the waiver.

FEDERAL STANDARDS FOR RAILROAD SAFETY

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

ON

H.R. 16980

A BILL TO AUTHORIZE THE SECRETARY OF TRANSPORTATION TO ESTABLISH SAFETY STANDARDS, RULES, AND REGULATIONS FOR RAILROAD EQUIPMENT, TRACKAGE, FACILITIES, AND OPERATIONS, AND FOR OTHER PURPOSES

(And Related Bills)

MAY 21, 22, 23, 27, 28, JUNE 3, 4, AND 5, 1968

Serial No. 90–39

Printed for the use of the
Committee on Interstate and Foreign Commerce

U.S. GOVERNMENT PRINTING OFFICE
95-388 WASHINGTON : 1968

FEDERAL STANDARDS FOR RAILROAD SAFETY

TUESDAY, MAY 21, 1968

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Harley O. Staggers (chairman) presiding.

The CHAIRMAN. The committee will come to order.

This morning the Committee on Interstate and Foreign Commerce is commencing hearings on H.R. 16980, a bill drafted by the Secretary of Transportation which would establish safety standards, rules, and regulations for railroad equipment and facilities, and railroad operations.

This committee has had a longstanding interest in the field of safety of transportation operations, an interest that has been enhanced in recent years with the changing technologies and the changing requirements of today's modern transportation systems.

In 1958, this committee engaged in a thorough revision of the Federal Aviation Act with especial attention to the safety of aviation.

In 1965, the committee considered and the Congress enacted a bill providing for safety in oil pipeline operations.

In 1966, the committee considered and the Congress enacted a new and sweeping statute relating to the creation of safety standards for motor vehicles, both passenger cars and trucks.

The committee has just reported out a bill having to do with the safety standards for natural gas pipeline facilities.

This morning we come to railroad safety where for many years the Federal interest has been concerned only in a very limited way.

In the last few years there has been a steady increase in the number of railroad accidents. Five years ago it was said that part of this increase was attributable to a change in the statistical reporting requirements. But by 2 years ago when the report of the Bureau of Railroad Safety and Service of the Interstate Commerce Commission for fiscal year 1965 was issued, there could be no doubt that the increased number of railroad accidents was not a statistical fact but a most serious and grave situation.

When that report was issued, I wrote to President Daniel Loomis of the Association of American Railroads and to the then Chairman Bush of the Interstate Commerce Commission, asking of them what was causing this dismal picture and what could be done to improve the situation. This correspondence I will introduce as part of this record. (See pp. 392–406.)

Later in 1966 a subcommittee of the Committee on Government Operations issued a report on the operations of the Bureau of Railroad Safety and made a number of recommendations regarding the

improvement of the operations of that Bureau which it hoped might result in reducing these train accidents.

Subsequent to that time the Bureau of Railroad Safety was transferred to the Department of Transportation. That Department has necessarily become involved in doing something to improve safety for the record seems even worse now than it was 2 years ago.

It is my hope that in the course of the hearings on this legislation we may receive some encouragement as to what can be done about providing greater protection for passengers, for property, and for employees.

At this point in the record we shall insert the bill under consideration and such agency reports thereon that are available.

(The bill, H.R. 16980, and departmental reports thereon, follow:)

[H.R. 16980, 90th Cong., 2d sess.]

A BILL To authorize the Secretary of Transportation to establish safety standards, rules, and regulations for railroad equipment, trackage, facilities, and operations, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Railroad Safety Act of 1968".

DEFINITIONS

SEC. 2. As used in this Act, unless the context otherwise requires—

(1) "Board" means the National Transportation Safety Board.

(2) "Chairman" means the Chairman of the National Transportation Safety Board.

(3) "Department" means the Department of Transportation.

(4) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Railroad" means any contrivance now known or hereafter invented, used or designed for operating on, along or through a track, monorail, tube, or other guideway.

(6) "Rail commerce" means any operation by railroad in or affecting interstate or foreign commerce or the transportation of mail by railroad.

(7) "Rail carrier" means any person who engages in rail commerce.

(8) "Rail facilities and equipment" include, without limitation, trackage, roadbed and guideways, and any facility, building, property, locomotive, rolling stock, device, equipment, or appliance used or designated for use in rail commerce, and any part or appurtenance of any of the foregoing.

(9) "Secretary" means the Secretary of Transportation.

FEDERAL SAFETY REGULATION

SEC. 3. (a) The Secretary is empowered and it shall be his duty to promote safety in rail commerce by prescribing, and revising from time to time—

(1) minimum standards governing the use, design, materials, workmanship, installation, construction, and performance of rail facilities and equipment;

(2) rules, regulations, and minimum standards governing the use, inspection, testing, maintenance, servicing, repair, and overhaul of rail facilities and equipment, including frequency and manner thereof and the equipment and facilities required therefor; and

(3) rules, regulations, or minimum standards, governing qualifications of employees, and practices, methods, and procedures of rail carriers as the Secretary may find necessary to provide adequately for safety in rail commerce.

(b) Within ninety days following the date of enactment of this Act, the Secretary shall prescribe as interim Federal rail safety regulations the specific safety requirements prescribed in or under the statutes repealed by section 13. The interim regulations shall remain in effect for two years or until modified, terminated, superseded, set aside or repealed by the Secretary whichever is earlier. The provisions of the Administrative Procedure Act shall not apply to the establishment of interim regulations. In construing any interim regulation, all

orders, determinations, delegations, rules, regulations, standards, requirements, permits, and privileges which (1) have been issued, made, granted, or allowed to become effective under the statute from which that standard is derived and (2) are in effect on the date of enactment of this Act, shall apply and continue to be applicable according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary in the exercise of authority vested in him by this Act, by any court of competent jurisdiction, or by operation of law.

(c) The Secretary may grant such exemptions from the requirements of any regulation prescribed under this Act as he considers to be in the public interest.

STATE REGULATION AND ENFORCEMENT

SEC. 4. A State may regulate safety in rail commerce, in a manner which does not conflict with any Federal regulation, in the following areas and no others: (1) vertical and horizontal clearance requirements; (2) grade crossing protection (including grade separation) which relates to the location of new crossings, closing of existing crossings, the type of crossing protection required or permitted, and rules governing train blocking of crossings; (3) the speed and audible signals of trains while operating within urban and other densely populated areas; and (4) the installation or removal of industrial and spur tracks. In exercising the authority reserved by clause (4), nothing herein shall be interpreted to diminish any authority which the Interstate Commerce Commission may have to require its approval of such actions. Other State laws and regulations affecting safety in rail commerce will continue in full force and effect for a period of two years following the date of enactment of this Act, unless abrogated prior to that time by court order, State legislative or administrative action, or by regulations issued by the Secretary.

PROHIBITIONS

SEC. 5. (a) No person shall—

(1) fail to comply with any applicable standard, rule, or regulation established or continued in effect pursuant to this Act; or

(2) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 9.

(b) Compliance with any standard, rule, or regulation established under this Act does not exempt any person from any liabiilty which would otherwise accrue, except to the extent that the action creating the liability was specifically compelled by any such standard, rule, or regulation.

PENALTIES

SEC. 6. (a) Any person who violates any provision of section 5 shall be subject to a civil penalty of not less than $250 nor more than $1,000 for each violation. If the violation is a continuing one, each day of such violation shall constitute a separate offense. Any person who knowingly and willfully violates any such provision shall be fined not more than $10,000 or imprisoned not more than one year, or both. Imposition of any punishment under this section shall be in lieu of whatever civil penalty might otherwise apply.

(b) The civil penalties provided in this section may be compromised by the Secretary. The amount of any penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(c) Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person engaged in the performance of inspection or investigatory duties under this Act, or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever, in the commission of any such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Whoever kills any other person engaged in the performance of inspection or investigatory duties under this Act, or on account of the performance of such duties, shall be punished as provided under section 1111 and 1112 of title 18, United States Code.

INJUNCTIVE RELIEF

SEC. 7. (a) The United States district courts shall have jurisdiction, subject to the provisions of rule 65 (a) and (b) of the Federal Rules of Civil Procedure,

to restrain violations of this Act (including the restraint of operations in rail commerce) or to enforce standards, rules, or regulations established hereunder, upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowing and willful violation, shall afford him reasonable opportunity to achieve compliance. However, the failure to give such notice and afford such opportunity shall not preclude the granting of such relief.

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section, which violation also constitutes a violation of this Act, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of rule 42 (b) of the Federal Rules of Criminal Procedure.

(c) Actions under this Act may be brought in the district wherein any act or transaction constituting the violation occurred, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

(d) In any action brought under this Act, subpenas for witnesses who are required to attend a United States district court may run into any other district.

DESIGNATION OF AGENT FOR SERVICE

SEC. 8. It shall be the duty of every rail carrier to designate in writing an agent upon whom service of all administrative and judicial processes, notices, orders, decisions and requirements may be made for and on behalf of said rail carrier and to file such designation with the Secretary, which designation may from time to time be changed by like writing, similarly filed. Service of all administrative and judicial processes, notices, orders, decisions and requirements may be made upon said rail carrier by service upon such designated agent at his office or usual place of residence with like effect as if made personally upon said rail carrier, and in default of such designation of such agent, service of process, notice, order, decision or requirement in any proceeding before the Secretary or in any judicial proceeding for enforcement of this Act or any rule, regulation, or standard prescribed pursuant to this Act may be made by posting such process, notice, order, decision, or requirement in the Office of the Secretary.

RECORDS AND REPORTS

SEC. 9. (a) Every rail carrier shall establish and maintain such records, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such carrier has acted or is acting in compliance with this Act and rules, regulations, and standards issued thereunder, and to otherwise carry out his responsibilities under this Act. Each such rail carrier shall, upon request of an officer, employee, or agent authorized by the Secretary, permit such officer, employee, or agent to inspect and copy books, papers, records, and documents relevant to determining whether such person has acted or is acting in compliance with this Act and orders, rules, and regulations issued thereunder.

(b) To carry out the Board's and the Secretary's responsibilities under this Act, officers, employees, or agents authorized by the Secretary or Chairman, upon display of proper credentials, are authorized at all times to enter upon, inspect and examine rail facilities and equipment.

(c) All information reported to or otherwise obtained by the Secretary or the Board or their representatives pursuant to subsection (a) containing or relating to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers, employees, or agents concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this section shall authorize the withholding of information by the Secretary, Chairman, or any officer or employee under their control, from the duly authorized committees of the Congress.

GENERAL POWERS

SEC. 10. (a) The Secretary is authorized to conduct, or contract with individuals, States, or nonprofit institutions for the conduct of, research, development, testing, evaluation, and training as necessary to carry out the provisions of this Act.

(b) The Secretary may, subject to such regulations, supervision, and review as he may prescribe, delegate to any qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting the examination, inspection, and testing necessary to carry out his responsibilities under this Act.

(c) The Secretary is authorized to advise, assist, and cooperate with other Federal departments and agencies and State and other interested public and private agencies and persons, in the planning and development of (1) Federal rail safety standards, rules, and regulations, and (2) methods for inspecting and testing to determine compliance with Federal rail safety standards, rules, and regulations.

(d) The Secretary is empowered to perform such acts, to conduct such investigations, to issue such subpenas, to take such depositions, to issue and amend such orders, and to make and amend such special rules and regulations as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under this Act.

ACCIDENT INVESTIGATION

SEC. 11. (a) The Secretary is authorized to conduct investigations of any accident occurring in rail commerce, and may invite participation by State agencies.

(b) The Board shall have the authority to determine the cause or probable cause and report the facts, conditions, and circumstances relating to accidents investigated under subsection (a) above, but may delegate such authority to any office or official of the Board or to any officer or official of the Department, with the approval of the Secretary, as it may determine appropriate.

(c) No part of any report required of a rail carrier under this Act, or any report made to the Secretary by an employee of the Department, or any report of the Secretary or the Board, relating to any accident or the investigation thereof, shall be admitted as evidence or be used in any suit or action for damages growing out of any matter mentioned in such report or reports. Employees of the Board or Department who have engaged in the investigation of a railroad accident shall not give expert or opinion testimony concerning such accidents in any such suit or action. Factual testimony of Board or Department personnel on matters observed in accident investigation shall be required only where the Chairman or the Secretary initially, or the court before which such suit or action is pending, determines that the evidence is not available by other means. Unless otherwise ordered by the court, such factual testimony shall be taken only by deposition upon oral examination or written interrogatories, pursuant to regulations issued by the Secretary or the Board.

USE OF STATE SERVICES

SEC. 12. The Secretary is authorized to enter into agreements with appropriate State agencies for the provision of inspection and surveillance services as necessary to effective enforcement of Federal rail safety regulations. State services may be procured on such terms and conditions as the Secretary may prescribe and may be reimbursed from any appropriations available for expenditure under this Act. The Secretary may delegate to an officer of such State, and authorize successive redelegation of, any authority under this Act necessary to the conduct of an effective enforcement program.

STATUTES REPEALED; SAVING PROVISION

SEC. 13. (a) The Safety Appliance Acts including the Power or Train Brakes Safety Appliance Act of 1968 (45 U.S.C. 1–16), the Ash Pan Act (45 U.S.C. 17–21), the Locomotive Inspection Act (45 U.S.C. 22–34), the Accident Reports Act (45 U.S.C. 38–43), and the Signal Inspection Act (49 U.S.C. 26) are repealed as of the effective date of the interim regulations required to be promulgated by section 3(b) of this Act.

(b) No suit, action, or other proceeding and no cause of action under the statutes repealed by this Act shall abate by reason of enactment of this Act.

APPROPRIATION AUTHORIZATION

SEC. 14. There are hereby authorized to be appropriated $5,000,000 for the fiscal year ending June 30, 1969, and $6,000,000 each for the fiscal year ending June 30, 1970, and the fiscal year ending June 30, 1971.

SEPARABILITY

SEC. 15. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., May 28, 1968.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for comments on H.R. 16980, a bill "To authorize the Secretary of Transportation to establish safety standards, rules, and regulations for railroad equipment, trackage, facilities, and operations, and for other purposes." This bill would authorize the Secretary to promulgate safety standards for locomotives, rolling stock, trackage and roadbed, equipment, appliances, and facilities used in railroad operations in or affecting interstate or foreign commerce.

In his testimony before your committee on this bill, the Federal Railroad Administrator noted the difficulty of accurately determining at this time either the total staff or the level of Federal support necessary to carry out the work which H.R. 16980 would authorize. Because of this, the Administrator recommended the deletion of the specific limits on authorizations for appropriations now contained in section 14 of the bill.

The Bureau of the Budget concurs in the views of the Railroad Administrator and favors enactment of H.R. 16980, which would be in accord with the program of the President.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

The CHAIRMAN. Our first witness this morning is Mr. A. Scheffer Lang, Administrator of the Federal Railroad Administration.

Mr. Lang, we are pleased to have you here this morning in what, I think, is your first appearance before this committee.

I cannot refrain, however, from expressing some regret that the Secretary of Transportation, Mr. Boyd, is unable to be here this morning to open our discussion. I certainly wish that he could participate in our deliberations for I do not wish him to be in the disturbed position which he says that he is in, to do "everything within his legal power" to undo the work of this committee.

I have the greatest difficulty in comprehending the approach which your Department seems to take as to the tripartite form of government which our Founding Fathers established for this country.

Under this, it is my impression that it is the Congress which makes policy decisions and that it is the executive branch which carries them out.

Unfortunately, it seems to be our repeated experience as was evident when some labor legislation was pending before this committee some months ago that the Department feels that it is up to the Department to dictate rather than suggest what should be done and that if we have a view which differs in any respect, the Department then rushes into print in questionable rhetoric.

91st Congress, 2d Session - - - - - House Report No. 91-1194

RAILROAD SAFETY AND HAZARDOUS MATERIALS CONTROL

REPORT

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

ON

S. 1933

TO PROVIDE FOR FEDERAL RAILROAD SAFETY, HAZARDOUS MATERIALS CONTROL AND FOR OTHER PURPOSES

JUNE 15, 1970

JUNE 15, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE

37-006 WASHINGTON : 1970

REPORT OF THE TASK FORCE ON RAILROAD SAFETY

DEPARTMENT OF TRANSPORTATION,
FEDERAL RAILROAD ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., June 30, 1969.

HON. JOHN A. VOLPE,
Secretary of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: I am pleased to transmit the report and recommendations of the task force on railroad safety, which you established on April 18, 1969. As chairman of the task force, I wish to commend to you the outstanding spirit of cooperation and dedication on the part of all the members which made this report possible.

Sincerely,

R. N. WHITMAN.

At the request of the Secretary of Transportation, we, the representatives of the railroad industry, railroad labor organizations, and State regulatory commissions, met as a task force to examine railroad safety and to advise the Secretary. The task force began meeting May 1, 1969, and concludes with this report. There has been a free exchange of information and open discussion. Data supplied by the Federal Railroad Administration and its Bureau of Railroad Safety were used for purposes of analysis of problem areas. The agreed upon time limit did not permit additional outside research.

REVIEW OF THE PROBLEM

Railroad operations involve inherent dangers. Movement of large, heavy equipment at high speeds characterizes the industry. Daily, some 2 billion ton-miles of freight of all types move on the Nation's railroads. Hundreds of railroad yards receive, classify, and dispatch the 1.8 million freight car fleet on an around-the-clock, 7-day-a-week schedule. About 600,000 passengers daily commute to work and 200,000 travel intercity by rail; 630,000 railroad workers average 3.5 million man-hours of work per day.

It is logical to assume that operations of such magnitude will generate accidents. Thus, standards, procedures, and rules are necessary to provide for safety. The bulk of existing railroad safety practices were developed over the years by the industry itself. For many years they met the safety requirements and produced the present safety record.

Grade-crossing accidents rank as the major cause of fatalities in railroad operations. They account for 65 percent of the fatalities

resulting from all types of railroad accidents, and rank second only to aviation mishaps in severity. Annually, about 4,000 accidents produce approximately 1,600 deaths, which is also a matter of major public concern.

The yearly totals of crossing accidents, and accident casualties, in the 1920–67 period, can be related very closely to the combined amount of rail and highway miles traveled and to the effects of major crossing safety improvement programs. The trend in both accidents and casualties up to 1958 was generally downward. The situation has been reversed since 1958, however, with a disturbing general trend upward in both categories. Only 20 percent of the total 225,000 grade crossings are protected with automatic devices.

Grade-crossing safety receives attention from highway authorities as well as railroad organizations. Under existing law, Federal-aid highway funds may be used on grade crossings on the Federal-aid highway system. This includes interstate, primary, and secondary roads which together account for slightly more than 20 percent of the total number of crossings. However, Federal funds may not be used to reduce hazards at railroad crossings of city streets and on many State supplementary highways and local roads which are not on the Federal-aid system and which represent the remaining 80 percent of the total. A certain number of safety improvements are being made currently by the carriers and State and local agencies on crossings not on the Federal-aid system. There is an imperative need for an expanded public program to cover these crossings in order to reduce immediately this extremely high fatality rate.

The most obvious trend in any recent examination of railroad safety is the large and steady increase in the number of train accidents. The 8,028 train accidents recorded in 1968 represents a significant increase, by any yardstock, over the 4,148 recorded in 1961. Derailments account for two-thirds of the total.

General causes of train accidents are almost evenly divided among human error, defects in or failure of equipment, and defects in or improper maintenance of track and roadbed. Derailments are largely attributable to track and equipment problems while collisions are mostly caused by human error.

Employee safety in railroad operations is of continuing concern. In 1968, there were 146 employees killed and 17,993 injured. Employees involved in rail operations and track and roadbed maintenance are more exposed to the inherent hazards of the industry and, therefore, represent a major portion of the employee casualty figure. Contributing factors to the employee casualty rate include inadequate training programs, human errors, equipment defects, poor housekeeping, and noncompliance with safety and operating rules.

The need for transporting ever-increasing quantities and varieties of hazardous materials—chemicals, gases, explosives, and fuel—creates the possibility of serious accidents that have become a matter of major public concern. Thus, causal factors affecting train accidents—track, equipment, human factors, and train-motor vehicle collisions—take on added significance when dangerous commodities are transported.

The modern industrial economy is dependent upon hazardous materials that are shipped throughout the country. Consequently, the entire transportation network, particularly the railroads upon which a large share of chemicals, explosives, fuels, and the like travel, must have the capacity to transport them safely. A top priority should be the complete evaluation of all factors related to the transportation of these commodities. Particularly, container standards for hazardous materials must take into account impact and stress requirements commensurate with today's longer, heavier, and faster trains.

The motoring public is part of the safety problem at the grade crossing. Drivers must be educated to accept the meaning of warning devices and be required to heed them. Compliance must be enforced. Because this is a matter of public safety, public programs must be immediately initiated and properly funded to provide the motorist with positive, uniform, and adequate information about the hazard at the crossing. More emphatically, firm and prompt consideration must be given to better use of existing funds and the making available of additional public funds to meet the increasing costs of crossing protection and grade separation, and to increase the number of grade crossings with automatic protection. There should be a long-range public commitment to eliminate this unnecessary and tragic loss of life.

Other improvements in railroad safety must necessarily involve substantial commitment of public and private resources. For government, a major commitment should be toward research; for industry, upgrading and maintenance of plant should be foremost. Management and labor should cooperate to reduce human error. The economic restraints on the railroad industry make it essential that public policy be directed toward the development of financial incentives to support rail safety.

SUMMARY CONCLUSIONS

Recognizing that there have been longstanding differences among the three groups represented on the task force, the parties sought to emphasize areas of agreement rather than disagreement plus their mutuality of interest in railroad safety. The consensus view of the task force is as follows:

Railroad safety is a problem, national in scope, of concern to Federal and State Governments, as well as labor and management and which has been accented in recent years by the increase in the number of train accidents, particularly derailments.

Fatalities resulting from railroad accidents occur mostly at grade crossings. Trespassers rank second in the number of fatalities, and employees third.

Transportation of hazardous materials—chemicals, gases, explosives, and fuels—is an economic necessity. Involvement of these materials in train accidents creates a new dimension of public concern over railroad safety.

Reported causes of train accidents are almost evenly divided among defects in or failure of track and roadbed, defects in or failure of equipment, and human error.

Existing Federal and State rail safety regulations do not, in most instances, provide standards, for track, roadbed, equipment, employee training, and qualifications, or rules governing safe railroad operations.

RAILROAD SAFETY REGULATIONS

Government involvement in railroad safety regulation came early. In 1893, Congress passed the first Safety Appliance Act. Then and in later years various Federal statutes granted varying degrees of Federal authority over locomotives, signaling systems, hours of service limitations on certain employees, airbrakes, couplers, handbrakes, grab irons, running boards, sill steps, and draft gears on rolling stock, and accident reporting. The Federal authority to regulate shipment of hazardous materials is applied largely to the packaging of these commodities, although some rules governing handling in transit have been adopted.

Federal statutes do not cover the trucks, wheels, and axles of railroad cars nor their design, construction, or maintenance. Bridges and tunnels are not subject to Federal regulations and no Federal authority governs track and roadbed. There is no general authority to promulgate standards for employee qualifications, physical requirements, and training, nor to prescribe uniform railroad operating rules.

Almost all States have entered the field of rail safety regulation. However, there is no uniform pattern of involvement. Some are quite active in general rail safety matters, but most consideration is on grade-crossing safety regulation. Certain States feel they are adequately equipped by statute or existing regulations to deal with any rail safety problem that may arise.

Rules and regulations issued under present Federal and State authority cover only the specific areas reached by the legislative acts. The limitation imposed on the regulatory process by specific, rather than general scope, legislative authority results in only minimal public agency involvement in some problem areas of safety.

PRIORITIES

Railroad safety is wide in scope and requires a more comprehensive national approach. Of first priority is treatment of total rail safety by relating all its various facets to definite goals. This demands a coordinated approach by industry, labor, State, and Federal Governments.

To continue as the major transportation mode, railroads will require more innovation, advanced equipment, and higher speed capabilities. Achievement of these advanced capabilities calls for parallel advancement in safe, dependable, operation. Therefore, major safety research is essential to guarantee that tomorrow's railroads will not only be more efficient but more safe.

Railroad operating personnel will continue to be the group most involved with rail safety, or the lack of it. New equipment and higher speeds will place great demands on employee skills and railroad operating practices. It is recognized that employee training is inadequate today, and could become more critical as new technology reshapes the industry. It seems imperative that formal, intensive training programs be given high priority along with human factors research. At the same time, railroad rules and practices must be kept responsive to change so that a high level of safety may be maintained.

6. Formal employee training programs be expanded by railroad management, with the cooperation of labor and government, for the purpose of insuring compliance with safe operating practices and reducing the impact of human error in the accident experience.

7. An expanded, concerted program of grade-crossing safety be undertaken utilizing established Federal and State agencies and advisory groups to set uniform procedures and standards. Early attention must be given to the development of improved crossing protection at lower cost plus greater emphasis placed on driver education and traffic enforcement. In addition to more extensive use of existing Federal funds now allocable to present highway safety programs, there must be new sources of funding to finance an expanded grade-crossing program.

8. The Federal Railroad Administration should revise, in consultation with railroad management, labor, and State regulatory commissions, its rules for reporting of accidents. The aim should be to make the data more current, more uniform, and to identify causes more accurately.

9. The Secretary of Transportation in consultation with and assistance of the task force and appropriate congressional committees should draft proposed legislation to implement these recommendations.

R. N. Whitman, Chairman, Federal Railroad Administrator; George E. Leighty, subchairman, chairman, Railway Labor Executives' Association; Al H. Chesser, vice president, national legislative representative, United Transportation Union; Donald S. Beattie, executive secretary, Railway Labor Executives' Association; William E. Skutt, assistant grand chief engineer, Brotherhood of Locomotive Engineers; Charles J. Fain, subchairman, commissioner, Missouri Public Service Commission; Willis F. Ward, chairman, Michigan Public Service Commission; John P. Vukasin, Jr., commissioner, California Public Utilities Commission; Thomas M. Goodfellow, subchairman, president, Association of American Railroads; William D. Lamprecht, vice president, Systems Operations, Southern Pacific Co.; James R. Thorne, vice president, Operating Department, Seaboard Coast Line Railroad; C. V. Cowan, vice president, Operating Group, Baltimore & Ohio Chesapeake & Ohio Railroad Co.

O

FEDERAL RAILROAD SAFETY ACT OF 1969

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST SESSION

ON

S. 1933, S. 2915, and S. 3061

FEDERAL RAILROAD SAFETY ACT OF 1969

MAY 20, 21, JULY 14, OCTOBER 28 AND 29, 1969

Serial No. 91–32

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE
33-417 WASHINGTON : 1969

examined the issues that have made railroad safety a matter of public concern and agreed on a list of eight recommendations. The report and recommendations were presented to the Secretary on June 30, for his consideration and released publicly at that time.

In general the task force found that railroad safety is a problem, national in scope, of concern to Federal and State governments, as well as labor and management, and which has been accented in recent years by the increase in the number of train accidents, particularly derailments.

The task force further recognized that solutions to the problem, short of broad Federal regulation, may not adequately meet the situation. Accordingly, the three groups on the task force unanimously agreed that regulation and research are necessary parts of an overall program to meet the rail safety problem.

Their specific recommendations were, and I will quote these:

1. That the Secretary of Transportation, through the Federal Railroad Administration, have authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety, through such notices, hearing and review procedures as will protect the rights of all interested parties.

2. In order to strengthen the administration of Federal rail safety regulations, there should be established a National Railroad Safety Advisory Committee to advise, consult with, and make recommendations to the Secretary on matters relating to the activities and functions of the Department in the field of railroad safety. The Committee would be chaired by the Federal Railroad Administrator with the remaining members appointed by the Secretary to represent equally the state regulatory commissions, railroad management and labor. The Secretary would submit to the Committee proposed safety standards and amendments and afford it a reasonable opportunity to prepare a report on the technical feasibility, reasonableness, and practicability of each such proposal prior to adoption. The Committee may propose safety standards to the Secretary for his consideration.

Senator HARTKE. Mr. Whitman, let me interrupt you at that point.

In regard to recommendation No. 1, which provides for the authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety, in substance, the bill which is under consideration, does the same thing, isn't that right?

This is sort of an endorsement of that general principle.

Mr. WHITMAN. We think that S. 1933 Senator Hartke, is certainly in the right direction. It has made a greater awareness of this problem that we probably didn't have before, and with some reservations, we think that the bill is good. It is in the right direction. We think it might go a little farther.

Senator HARTKE. I understand that. We also want to have a little bit of difference between the administration and legislative branch.

Now, I want to come back to part 2 here, the creation of a National Railroad Safety Advisory Committee.

There is not, in this recommendation, a provision for public members on this advisory committee.

Mr. WHITMAN. Yes, the State regulatory commissions are the public members. They represent the States.

Senator HARTKE. They represent the States; yes, I know, but in most of the advisory committees which have been established, for example, under the Pipeline Safety Act, it provided for public members to be appointed to represent the public interest as contrasted to the Federal, State, local, management, or labor representatives.

I would hope when you go back with the task force for drafting additional legislation that you would bring that point to their attention.

I just completed, in Washington, a review of the Pipeline Act itself, and in that case I was disappointed that the public members which had been selected in many instances seemed to have some conflict of interest that is associated with the industry itself, and therefore, might be biased.

And what we are looking for is general safety for the public. These bills are not being passed except for the purpose of providing safety for the public.

One other thing, is it your idea that the advisory committee must review safety regulations and give approval prior to their issuance by the Department?

Mr. WHITMAN. No; I don't believe that was our intention, although this certainly has not been made final yet.

Senator HARTKE. Yes; I understand.

Mr. WHITMAN. Their role would be one of review, and to make sure that each segment of the industry, both labor and management, and the public interest were protected——

Senator HARTKE. Generally speaking, I am in favor of it, it works extremely well with Social Security.

All right, you may proceed.

Mr. WHITMAN (reading).

3. Existing State rail safety statutes and regulations remain in force until and unless pre-empted by Federal regulation. Administration of the program should be through a Federal-State partnership, including State certification similar to the certification principles set forth in the Federal Natural Gas Pipeline Safety Act of 1968.

Senator HARTKE. On that point I recall that in our review of the Natural Gas Pipeline Safety Act of 1968, it seemed evident that if the law had not provided for State participation nothing at all would have happened because the Federal Government was incapable of action.

Mr. WHITMAN. Thank you.

4. The Advisory Committee be directed to study the present delegation of authority to the Association of American Railroads' Bureau of Explosives in certain areas of the Transportation of Explosives and Other Dangerous Articles Act.

5. A research program be initiated by Government and industry into railroad safety technology, which should be funded immediately for an initial three year period, over and above existing research programs.

6. Formal employee training programs be expanded by railroad management, with the cooperation of labor and government, for the purpose of insuring compliance with safe operating practices and reducing the impact of human error in the accident experience.

7. An expanded, concerted program of grade crossing safety be undertaken utilizing established Federal and State agencies and advisory groups to set uniform procedures and standards. Early attention must be given to the development of improved crossing protection at lower cost plus greater emphasis placed on driver education and traffic enforcement. In addition to more extensive use of existing Federal funds now allocable to present highway safety programs, there must be new sources of funding to finance an expanded grade crossing program.

8. The Federal Railroad Administration should revise, in consultation with railroad management, labor, and state regulatory commissions, its rules for reporting of accidents. The aim should be to make the data more current, more uniform and to identify causes more accurately.

Now, these are the eight recommendations of the task force.

In my opinion, these recommendations are strong guidelines from the railroad industry, its employees, and State regulators for the Federal role in promoting railroad safety.

Of great significance is the fact that the recommendations represent the unanimous views of management, labor, and the States. We have here a landmark development in labor-management cooperation. The report sets the stage for a new era of cooperation in building a safer railroad system. We hope to build from this base of mutual interest and commitment to rail safety, a meaningful program that will get the job done.

The task force had one final recommendation and that was for the secretary to draft legislation to implement the report. We are holding our first meeting on that subject July 16.

The many aspects of the railroad safety problem have been discussed at some length by me and other witnesses at the first hearing in Washington. I do not plan to go into them today, but I am impressed that there are two areas of railroad safety where the public becomes particularly involved. These are the involvement of hazardous materials in train accidents and grade crossing safety.

Railroad tracks crisscross the Nation and virtually every area is affected. For a moment, I would like to discuss the two public-involved segments of rail safety in reference to their impact on Indiana.

Earlier, I supplied the committee a list of some 39 communities, which, since 1964, had to have some of their residents evaculated when a train accident caused a public hazard. Of these 39, three were located in Indiana according to our records.

On November 9, 1965, 15 cars of a Pennsylvania Railroad freight train derailed. One of the cars was a tank car which caught fire during the wrecking operations. Residents of a house near the track had to be evacuated.

At Dunreith, Ind., on January 1, 1968, 33 cars of a Pennsylvania Railroad train derailed including five cars containing explosive or dangerous chemicals. A fire and explosion resulted and 236 persons were evacuated. Extensive property damage also resulted.

This year on February 25, a Penn Central derailment at Pershing, Ind. (East Germantown), involved 63 cars, 17 of which carried hazardous materials. One tank car burned and another was punctured. About 400 persons were evacuated.

In addition, there was another train accident at Rensselaer——

Senator HARTKE. Rennselaer is the home of a colleague and also the home of a former U.S. Congressman, Charles S. Halleck.

Mr. WHITMAN. I am sorry, I should have known that.

[Laughter.]

Mr. WHITMAN (continuing). Rensselaer, Ind., March 1, 1969, which involved hazardous cargoes but which did not require evacuation of any citizens.

Movement of chemicals, gases, and explosives in interstate commerce is a necessary fact of life. The Nation's economy and quite often public health and welfare depend on the availability of these commodities for production, fertilizers, and water purification. By all estimates the

afforded all interested parties. Hearings shall be conducted in accordance with the provisions of section 553 of title 5 of the United States Code. Rules, regulations, and standards may be amended or repealed under the Secretary's own motion or on the petition of an interested party and shall be so amended or repealed when in the public interest and consistent with railroad safety.

(c) The Secretary may grant such exemptions from the requirements of any of the rules, regulations, or standards prescribed under this Act or incorporated herein by subsection (a) of section 7 as he finds to be in the public interest and consistent with railroad safety.

(d) Any final agency action taken under this section is subject to judicial review as provided in chapter 7 of title 5 of the United States Code.

HAZARDOUS MATERIALS

SEC. 3. (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents to provide technical and other information and advice to the law enforcement and firefighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4. (a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with, and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the State commissions referred to in section 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards, and amendment or repeals thereof and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATIONS

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

STATE PARTICIPATION

SEC. 6. (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, the Secretary shall encourage maximum cooperation between the Federal Government and the various State governments in carrying out this Act.

33-417—69——22

(c) The Secretary may grant such exceptions from the requirements of any of the rules, regulations, or standards prescribed under this Act or incorporated herein by subsection (a) of section 7 as he finds to be in the public interest and consistent with railroad safety. Notice that an exemption is under consideration shall be given all interested parties. Exemptions shall be granted without hearing unless an interested party shall demand a hearing in which case a hearing in accordance with § 553 of Title 5 of the United States Code shall be held. Such hearing shall be held in advance of action on any proposed exemption unless the Secretary shall find that an emergency exists and that the circumstances make advance hearing inappropriate in which case such hearings shall be held as soon as practicable thereafter to determine whether such exemption should be continued.

HAZARDOUS MATERIALS

SEC. 3 (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents and incidents to provide technical and other information and advice to the law enforcement and fire fighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(4) Make rules and regulations with respect to the packaging, handling, and all other aspects of safety in the transportation of hazardous materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of Title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4(a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the state commissions referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards and amendments or repeals thereof and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATIONS

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

STATE PARTICIPATION

SEC. 6 (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, there shall be maximum cooperation between the Federal Government and the various state governments. To that end the following provisions shall apply:

RAILROAD SAFETY AND HAZARDOUS MATERIALS CONTROL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

ON

H.R. 7068, H.R. 14417, and H.R. 14478

BILLS PROVIDING FOR FEDERAL RAILROAD SAFETY AND ALSO TO AUTHORIZE THE SECRETARY OF TRANSPORTATION TO PRESCRIBE RULES, REGULATIONS, AND PERFORMANCE AND OTHER STANDARDS AS HE FINDS NECESSARY FOR ALL AREAS OF RAILROAD SAFETY AND TO CONDUCT RAILROAD SAFETY RESEARCH

(and similar bills)

S. 1933

A BILL TO PROVIDE FOR FEDERAL RAILROAD SAFETY, HAZARDOUS MATERIALS CONTROL AND FOR OTHER PURPOSES

MARCH 17, 19, 22, AND 23, 1970

Serial No. 91–51

Printed for the use of the Committee on Interstate and Foreign Commerce

U.S. GOVERNMENT PRINTING OFFICE

44-340 WASHINGTON : 1970

HAZARDOUS MATERIALS

SEC. 3. (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents to provide technical and other information and advice to the law enforcement and fire fighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4. (a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the State commissions referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards, and amendments or repeals thereof, and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATION

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

STATE PARTICIPATION

SEC. 6. (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, the Secretary shall encourage maximum cooperation between the Federal Government and the various State governments in carrying out this Act.

(b) State participation shall be by agreement entered into with the State by the Secretary. The Secretary may, upon the request of the State, authorize it to provide all or any part of the inspection services and related programs necessary or desirable to obtain compliance with rules, regulations, and standards prescribed by the Secretary under this Act where he finds that such State participation will assist in achieving the purpose of this Act and that the State has the capacity to carry out the agreement under the guidance of the Secretary. The Secretary shall require annual reports from participating States containing such information as he may require to determine if such agreements will be continued.

(c) In the event of State participation, the Secretary may provide for reimbursement of all or a part of the funds to be expended by the State on a fair and equitable basis under rules and regulations promulgated by the Secretary under this Act.

In surveying the situation shortly after taking office as Secretary, several things became apparent to me. While it was clear that the Federal Government had not been active enough, it was equally clear that the Federal Government acting alone could not solve the problem. We needed the cooperation of the other principal parties involved; namely, railroad management, railroad labor, and the State regulatory agencies. Since the Department had been unable to obtain support for the bill it submitted to the last session of the 90th Congress, I felt a new approach was imperative. Consequently, in April of last year, I invited representatives from railroad management and labor and the State regulatory commissions to participate in a task force chaired by the Federal Railroad Administrator. Its mission was to identify the problems of rail safety and recommend appropriate courses of action.

The task force submitted its report on June 30, 1969, and recommended:

That the Secretary of Transportation have authority to promulgate regulations in all areas of railroad safety.

That a national Railroad Safety Advisory Committee be established to advise the Secretary.

That present State and local rail safety laws and regulations remain in force until and unless preempted by Federal action.

That a research program into railroad safety technology be initiated by Government and industry.

That an expanded and concerted program on grade-crossing safety be undertaken.

Based on the task force's work, the administration submitted a legislative proposal to the Congress on October 15, 1969. This proposal was introduced in the House as H.R. 14417 and H.R. 14419, and in the Senate as S. 3061. Hearings were held by the Senate Commerce Committee in October of 1969. The bill which the Senate passed on December 20, 1969, and sent to the House (S. 1933) embodies some desirable features from the administration bill, and some entirely new provisions. I would like to compare S. 1933 with the administration's proposal and indicate the provisions which are of concern to us. I will also submit separately for consideration by the committee several technical amendments to S. 1933.

The basic areas of difference between S. 1933 and the administration's proposal are (1) the scope of Federal regulatory authority; (2) the time schedule by which regulations must be promulgated; (3) the scope of State regulatory authority; (4) the nature and extent of State participation; (5) the extent of the repeal of existing statutes; (6) the use of safety accident reports in damage suits; and (7) the establishment of an advisory committee. I will discuss each of these in order.

First, the scope of Federal regulatory authority: The scope of regulatory authority under S. 1933 varies significantly from the administration proposal with respect to the railroads to be regulated. The Senate report accompanying S. 1933 states that "the term 'railroads' is intended to encompass all those means of rail transportation as are commonly included within the term." So described, the bill would cover private railroads and purely intrastate railroads such as logging lines and steel and plant railroads.

my far right, Mr. Henry Wakeland, Director of our Bureau of Surface Transportation Safety; on my immediate right, Mr. Thomas Styles, Chief of our Railroad and Pipeline Safety Division; and to my left, Mr. David Zimmermann, who is our Deputy General Counsel.

The Safety Board welcomes this opportunity to testify in support of legislation which would authorize the Secretary of Transportation to prescribe rules, regulations, and performances and other standards for all areas of railroad safety and to conduct railroad safety research.

The Board in early 1968 conducted a general review of railroad accident data for train accidents covering the period of 1961–67. Our study revealed a progressively worsening trend in rates of occurrences, deaths, and damage. Especially disturbing was the fact that many freight train accidents in recent years involved hazardous or toxic materials, resulting in fires, or the escape of poisonous or hazardous materials followed by mass evacuation of populated areas. We indicated our concern to the Department of Transportation on April 3, 1968.

In our letter we noted that total train accidents, excluding train service and nontrain accidents had increased dramatically between 1961 and 1967. Derailments were the single most important cause of train accidents, accounting for 65 percent of all train accidents in 1966, and over 80 percent of the damage to track and equipment. Collisions were the next most important cause, 23 percent of 1966 train accidents.

We urged the Department of Transportation to study the problem and initiate either new or augmented action to improve the railroad safety picture. We stated that we believed the primary responsibility for improved railroad safety should rest upon railroad management and labor but that if it should appear to the Department that management and labor could not or were unable to meet the challenge promptly and arrest the worsening railroad accident picture, consideration should be given to supporting or proposing Federal legislation which would provide the Department with additional safety regulatory authority.

During 1968 and 1969 little has occurred to cause the Board to believe that the railroad safety problem has improved or that the challenge of effecting specific solutions in hazard areas has been met. The updating of railroad accident statistics indicates that total train accidents, excluding train service and non-train accidents, had risen to 8,028 in 1968, and an estimated 8,529 in 1969.

The Board's investigations and determinations of cause of railroad accidents has confirmed what the statistics tell us and indicate a relationship between accidents and the absence of the regulatory authority in the Department of Transportation. The Safety Board's initial involvement in railroad safety began when it participated in the investigation of a fatal head-on collision of two New York Central Railroad freight trains which occurred in New York City in May of 1967 taking the lives of six employees.

We do have some pictures, Mr. Chairman and members, that have been distributed, and pictures 1 and 2 are in reference to the New York City accident.

(For pictures referred to see pp 130–140.)

Mr. REED. In July 1967, the Board held a hearing in this case, and on January 26, 1968, issued a report. In our report we identified