

August 9, 2013
OPINION 13-0019

15-A CONSTITUTIONAL LAW
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60 LAW OFFICERS- Authority and Jurisdiction

La. R.S. 32:398
La. R.S. 32:661.2
La. Const. art. 1, § 15

Honorable Sabria J. McGuire
Chief of Police
508 Second Street
Franklin, Louisiana 70538

The Federal Railroad Safety Act preempts state laws in the area of post-accident toxicological testing, except in the limited circumstance where the state law is a criminal law that imposes sanctions for reckless conduct that leads to loss of life, injury, or damage to property. In order for local police to require a post-accident toxicological test of a locomotive operator under La. R.S. 32:661.2, they must have probable cause to believe the locomotive operator was operating or in physical control of the locomotive engine while under the influence of alcohol or other illegal controlled substances. If the locomotive operator refuses to take the test, then local law enforcement must obtain a court order as required by La. R.S. 32:661.2 (D).

Dear Chief McGuire:

Our office received your request for an opinion on whether the Federal Railroad Safety Act ("FRSA") and regulations promulgated therein, specifically 49 C.F.R. § 219.201, exempts operators of locomotives from the chemical testing set forth in La. R.S. 32:661.2. This request was precipitated by an accident involving a pedestrian and locomotive at the crossing guards on a city street of Franklin, Louisiana. You relayed the following facts concerning this accident. The investigation conducted by city police determined that the pedestrian committed suicide. During the investigation, detectives were denied access upon the locomotive and were not allowed to speak with either the conductor or the engineer of the locomotive. Per the advice of the attorney for the railroad, the engineer refused to exit the locomotive. After several hours of debate between local authorities and representatives from Union Pacific Railroad, Union Pacific Railroad Police, and Burlington Northern Santa Fe ("B.N.S.F") Railway, the engineer was taken by local authorities to the city of Franklin police station. At the station, the engineer refused to take the chemical test for intoxication. The attorney for the railroad asserted that the engineer was exempt from chemical testing pursuant to 49 C.F.R. § 219.201 (B), and city police contacted a local assistant district attorney for advice on how to proceed. During this time, the engineer left the station and the chemical test was not performed. Because the engineer left the police station, local authorities were unable to complete the Uniform Railroad Grade Crossing Crash Supplement, which is a form filled out by local or state police as part of their duty to investigate accidents pursuant to La. R.S. 32:398.

In light of this incident, you ask the following questions:

- 1) Does 49 C.F.R. § 219.201 (B) exempt operators of locomotives from the implied consent to chemical testing found in La. R.S. 32:661.2?
- 2) What is needed of local authorities to administer the chemical test in La. R.S. 32:661.2 to operators of locomotives during a crash investigation?
- 3) If the investigation is left incomplete, can the Uniform Railroad Grade Crossing Crash Supplement for the State of Louisiana remain incomplete as well?
- 4) If local authorities can utilize La. R.S. 32:661.2 to test operators of locomotives in the course of an investigation, can federal charges be filed against local authorities during the course of their official duties?

The Louisiana statute applicable to chemical testing of locomotive operators is La. R.S. 32:661.2, which provides in pertinent part:

A. (1) Any person who operates a locomotive engine upon the railroad tracks of this state shall be deemed to have given consent, subject to the provisions of R.S. 32:662, to a chemical test or tests of his blood, breath, urine, or other bodily substance for the purpose of determining the alcoholic content of his blood and the presence of any abused or illegal controlled dangerous substance as set forth in R.S. 40:964 in his blood if he is involved in a collision at a railroad crossing at any roadway of this state alleged to have occurred when he was driving or in actual physical control of the locomotive engine while believed to be under the influence of an alcoholic beverage or any abused or illegal controlled dangerous substance as set forth in R.S. 40:964.

(2) The test or tests shall be administered at the direction of the law enforcement officer having reasonable grounds to believe the person to have been operating or in physical control of the locomotive engine while under the influence of either an alcoholic beverage or any abused or illegal controlled dangerous substance as set forth in R.S. 40:964. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

The federal statutes that govern post-accident toxicological testing are contained in the FRSA, specifically 49 C.F.R. § 219.201, which provides as follows:

(b) Exceptions. No test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. **No test may be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g. flood, tornado, or other natural**

disaster) or to vandalism or trespass(s) as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) Good faith determinations:

(1)(i) The railroad representative responding to the scene of the accident must determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representatives must consider the need to obtain specimens as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

[Emphasis added.]

Louisiana Revised Statutes 32:661.2 was enacted in 1998, and was subsequently challenged in *United Transportation Union, et al. v. Foster, et al.*¹ In that case, the plaintiffs filed a Motion for Summary Judgment seeking a permanent injunction enjoining defendants, Michael Foster, Governor of the State of Louisiana, and Richard Ieyoub, Attorney General, from enforcing La. R.S. 32:661.2. The plaintiffs argued that federal law preempted La. R.S. 32:661.2 because the Federal Railroad Administration (“FRA”) had completely subsumed the matter of alcohol and drug testing in the railroad industry. Plaintiffs also asserted that La. R.S. 32:661.2 violated the Fourth Amendment of the United States Constitution because it allowed a Louisiana law enforcement officer who lacked probable cause to administer post-collision toxicological testing to a railroad employee as part of a criminal investigation.²

The Eastern District Court’s holding was as follows:

[T]he Court finds that there are no material issues of fact in dispute, and that as a matter of law, the plaintiffs’ motion for summary judgment should be granted, enjoining the enforcement of Louisiana Senate Bill No. 26, enacted as La. R.S. 32:661.2, because the subject matter of that statute has been pre-empted by the Federal Railroad Safety Act and because it is

¹ *United Transportation Union, et al. v. Foster, et al.*, Not Reported in F. Supp. 2d, 1998 WL 603284 (E.D. La. 1998), which granted Plaintiffs’ Motion for preliminary injunction and *United Transportation Union, et al. v. Foster, et al.* Not Reported in F. Supp. 2d, 1998 WL 751646 (E.D. La. 1998), which granted Plaintiffs’ Motion of Summary Judgment.

² *United Transportation Union, et al. v. Foster, et al.*, 205 F.3d 851, 856 (5th Cir. 2000).

unconstitutional as it violates the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.³

The Eastern District Court's ruling was appealed, and the United States Court of Appeal, Fifth Circuit reversed, finding the conflict between La. R.S. 32:661.2 and federal law was hypothetical and not ripe for review.⁴

Thus, as discussed in *United Transportation Union, et al. v. Foster, et al.*, our analysis of whether 49 C.F.R. § 219.201 exempts operators of locomotives from the implied consent to chemical testing found in La. R.S. 32:661.2 necessarily requires a consideration of both the doctrine of preemption and the rights granted under the Fourth Amendment.

Preemption

The Supremacy Clause in Article VI of the United States Constitution provides Congress with the power to preempt state law.⁵ Preemption occurs when Congress expresses a clear intent to preempt state law, when there is an actual conflict between state and federal law, and where compliance with both federal and state law is impossible.⁶ Prior to May 6, 2013, Part 219 of 49 C.F.R., which governs Control of Alcohol and Drug Use, contained a specific preemption provision in 49 C.F.R. § 219.13. which stated:

(a) Under section 20106 of title 49, United States Code, issuance of the regulations in this part preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

In the course of writing this opinion the law has changed; effective May 6, 2013, section (a) of 49 C.F.R. § 219.13 has been deleted, and the language in section (b) has been moved to section (c) of 49 C.F.R. § 219.17. In deleting section (a) of 49 C.F.R. § 219.13, the FRA said it was "removing the preemption language . . . because part 219 has preemptive effect by operation of law under the FRSA See 49 U.S.C. 20106."⁷ The

³ See *United Transportation Union, et al. v. Foster, et al.*, 1998 WL 751646 at 1.

⁴ See *United Transportation Union, et al. v. Foster, et al.* 205 F. 3d 851 at n. 14.

⁵ U.S. CONST. art. VI, cl. 2.

⁶ *La. Pub. Serv. Comm'n v. F.C.C. et al.*, 476 U.S. 355, 369 (1986).

⁷ Control of Alcohol and Drug Use: Addition of Post-Accident Toxicological Testing for Non-Controlled Substances, 78 Fed. Reg. 14217 - 14225 (March 5, 2013) (to be codified at 49 C.F.R. § 219).

deletion of 49 C.F.R. § 219.13 did not substantively change the law because the preemption language is contained in 49 U.S.C. § 20106.⁸

Here, the FRA has indicated that it intends to preempt state law with regard to post-accident toxicological testing, except in the limited instance where the law is a criminal law that imposes “sanctions for reckless conduct that leads to actual loss of life, injury or damage to property.”⁹ Thus, in the situation where 49 C.F.R. § 219.201 prohibits drug testing of a railroad employee, the testing requirement of La R.S. 32:661.2 is preempted, except in the limited circumstance where probable cause exists to believe the railroad employee has violated a criminal law which imposes sanctions for reckless conduct that leads to actual loss of life, injury or damage to property. We note that other State Attorneys General have examined this question and found that the FRA, through the FRSA, has preempted the area of post-accident toxicological testing except as provided above.¹⁰

Fourth Amendment

The United States Court of Appeal, Fifth Circuit, found the Fourth Amendment challenge in *United Transportation Union, et al. v. Foster, et al.* was not ripe for review because in order for the law to run afoul of the Fourth Amendment, the following events would necessarily have to occur:

1. “[A] train must be involved in a collision at a Louisiana railroad crossing.”¹¹
2. “[A] law enforcement officer must have ‘reasonable grounds to believe the person to have been operating or in physical control of the locomotive engine while under the influence’ of alcohol or other illegal controlled substances.”¹²
3. “[R]easonable grounds to believe’ would have to be interpreted to mean something other than ‘probable cause’”¹³
4. “[A] Louisiana officer would have to order such testing without actually having ‘probable cause.’”¹⁴

⁸ Section (a)(2) of this provision provides:

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 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.

⁹ 49 C.F.R. § 219.17(c).

¹⁰ See Ark. Op. Atty. Gen. No. 91-286; Kan. Atty. Gen. Op. No. 93-44; 81 Wis. Op. Atty. Gen. 78; and 1990 Ind. OAG No. 11.

¹¹ See *United Transportation Union, et al. v. Foster, et al.*, 205 F. 3d 851 at 858.

¹² *Id.*

¹³ *Id.*

The Fourth Amendment of the United States Constitution grants the following rights:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

These rights are also granted in the La. Const. art. I, § 15. In order to enforce La. R.S. 32:661.2 and avoid a violation of La. Const. art. I, § 15 and the Fourth Amendment of the United States Constitution, local authorities must have probable cause to believe the person operating or in physical control of the locomotive is under the influence of either an alcoholic beverage or an abused or illegal controlled dangerous substance before administering a chemical test, or test of blood, breath, urine, or other bodily substances.¹⁵ However, even if probable cause exists, if the operator of the locomotive refuses the test, then the test cannot be given without a court order under La. R.S. 32:661.2(D).¹⁶

Uniform Railroad Grade Crash Supplement

You indicate in your opinion request that the investigation was left incomplete and ask whether the Uniform Railroad Grade Crossing Crash Supplement may remain incomplete. If circumstances prevent local or state police from completing the accident report, notwithstanding their best efforts, then the report should be submitted with the information obtained in accordance with applicable law. We note that La. R.S. 32:398 does not prohibit the use of subsequent interviews and investigations to complete accident reports.

Federal Charges

Lastly, you ask if local authorities do utilize La. R.S. 32:661.2 to test locomotive operators in the course of an investigation, then can federal charges be filed against local authorities during the course of their official duties? As indicated above, certain

¹⁴ *Id.*

¹⁵ See *United Transportation Union, et al. v. Foster et al.*, 205 F.3d 851 at n12 [citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602,617 (1989)] which said, "the taking of bodily fluids constitutes a search within the scope of the Fourth Amendment. See also *Missouri v. McNeely*, 133 S.Ct. 1552, 1557 (2013) which held "the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency which justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases."

¹⁶ La. R.S. 32:661.2 (D) provides that:

If a person refuses the request of the law enforcement officer to submit to a chemical test offered pursuant to the provisions of this Section, a test shall not be given without a court order. A written report shall be forwarded by the enforcement officer to the United States Department of Transportation. The report shall state that the officer had reasonable grounds to believe that the person had committed a crime pursuant to the provisions of R.S. 14:98 and that the person had refused to submit to the test upon the request of the peace officer and had been advised of the consequences of the refusal.

portions of La. R.S. 32:661.2 are preempted by the FRSA and an officer must have probable cause to believe the person operating or in physical control of the locomotive is under the influence of either an alcoholic beverage or any abused or illegal controlled dangerous substance before administering a chemical test. Moreover, if the locomotive operator refuses to take the test, La. R.S. 32:661.2 (D) requires the officer obtain a court order to administer the test. As to the more general question of whether federal charges may be filed against local officers during the course of their official duties, our office is unable to answer this general question since the answer depends on the facts of the specific incident. Additionally, the United States Department of Justice is the appropriate entity to determine whether federal charges will be filed against a local officer.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY: _____
Emily G. Andrews
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SYLLABUS

OPINION 13-0019

La. R.S. 32:661.2
La. Const. art. 1, § 15

La. R.S. 42:61
La. R.S. 33:423

The Federal Railroad Safety Act preempts state laws in the area of post-accident toxicological testing, except in the limited circumstance where the state law is a criminal law that imposes sanctions for reckless conduct that leads to loss of life, injury, or damage to property. In order for local police to require a post-accident toxicological test of a locomotive operator under La. R.S. 32:661.2, they must have probable cause to believe the locomotive operator was operating or in physical control of the locomotive engine while under the influence of alcohol or other illegal controlled substances. If the locomotive operator refuses to take the test, then local law enforcement must obtain a court order as required by La. R.S. 32:661.2 (D).

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508 Second Street
Franklin, Louisiana 70538

DATE ASSIGNED:

DATE RELEASED: August 9, 2013