



November 10, 2008

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building Ground Floor
Room W12-140
Washington, DC 20590

**Re: Miscellaneous Amendments to the Federal Railroad Administration's
Accident/Incident Reporting Requirements**

Dear Sir or Madam:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA®), hereby submits comments in response to the Federal Railroad Administration's (FRA) proposed rule regarding amendments to the agency's accident/incident reporting requirements. *See* 73 Fed. Reg. 52496.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. Members of AAJ represent victims of train derailments. AAJ supports the agency's decision to update its current accident/incident reporting requirements. However, AAJ believes the agency should take additional steps to improve the effectiveness of these regulations. In addition, AAJ is concerned with the preamble language which seeks to preempt state tort law claims. Although preamble language has no substantive effect, AAJ believes the FRA should revise the section entitled "Executive Order 13132" to delete any language regarding the preemption of state common law claims. Contrary to the agency's assertions, the Federal Rail Safety Act (FRSA) does not authorize the preemption of state common law claims.

I. The FRA Must Take Additional Steps to Improve and Facilitate the Reporting Requirements

AAJ appreciates the agency's attempts to improve the accident/incident reporting requirements, as the information is vital to protect passengers and prevent future similar incidents. However, AAJ suggests that the agency make additional changes to improve the reporting process and to include certain incidents involving railroad contractors and subcontractors in this reporting process. These changes are necessary to help prevent future accidents and to improve passenger safety.

A. The FRA Should Further Amend its Telephonic Reporting Requirements

The FRA proposes to amend its telephone requirements under Section 225.9 to indicate that companies only need to report fatalities from highway-rail grade crossings that occur within 24 hours of the incident. AAJ proposes two changes to this rule. First, the agency can help to facilitate its reporting requirements by allowing the use of electronic transmission of reports directly to the FRA as an alternative to telephonic reporting. The ability to use electronic transmission would provide an additional means to comply with these requirements. Electronic reporting also might be preferable in some instances as certain details could be lost during a telephone call.

Second, the FRA must not limit this requirement only to incidents where fatalities occur within 24 hours of the accident. This will not accurately depict the state of safety at highway rail-grade crossings or provide the FRA with sufficient information to adequately address problem areas. The FRA should revise this rule to require reporting of fatalities and grievous injuries that are a direct result of accidents/incidents at highway rail-grade crossings.

B. The FRA Needs to Include Contractors and Subcontractors for Certain Reporting Requirements

The language proposed in Section 225.18 regarding alcohol or drug involvement should be expanded to include contractors and subcontractors. It is very common for railroad companies to utilize contractors and subcontractors in their daily operations. We believe that it is in the best interest of safety to include contractors and subcontractors within the scope of this regulation.

We propose amending the second sentence of Section 225.18(a) to include the redlined language as follows:

If the railroad comes into possession of any information whatsoever, whether or not confirmed, concerning alleged alcohol or drug use or impairment by an employee or a contractor or subcontractor to a railroad who was involved in, or arguably could be said to have been involved in, the accident/incident, the railroad shall report such alleged use or impairment as provided in the current FRA Guide.

II. Federal Railroad Regulations Have Never Lawfully Preempted State Law Claims

In the preamble to the regulation, the agency states that its regulations preempt State requirements, including State common law. Although we are persuaded that preamble language has no substantive effect,¹ AAJ believes the FRA must revise the preamble to remove any

¹ A federal court evaluated the preemption statements included in a regulatory preamble. *Perry v. Novartis*, Civ. Action No. 05-5330, 2006 U.S. Dist. LEXIS 75319 (E.D. Pa. Oct. 16, 2006). The court explained that preamble language is “not a binding portion of the regulations, but is instead an advisory opinion.” *Id.* at *13 (citing 21 C.F.R. § 10.85(d)(1) (identifying as an advisory opinion “[a]ny portion of a Federal Register notice other than the

language regarding the preemption of state common law claims under the FRSA. That language is contrary to Congressional intent and the explicit language of the FRSA.

A. Congress Reiterated its Intent to Preserve State Tort Claims Against Negligent Railroads

On August 3, 2007, recognizing the harsh and unfair results that would occur if the FRSA were interpreted to preempt state law claims, Congress exercised its power with the passage of the “Implementing Recommendations of the 9/11 Commission Act of 2007” (the 9/11 Act). In enacting Section 1528 of the 9/11 Act (entitled “Railroad Preemption Clarification”), Congress made its intent with respect to federal preemption crystal clear.

Section 20106 of title 49, United States Code, is amended to read as follows:

(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

Congress passed Section 1528 with the specific intention of clarifying the preemption language of 49 U.S.C. § 20106, which is the exact provision the FRA claims may preempt state tort law claims. As Congress stated in the Conference Report, Section 1528 explains Congress’ intent when it passed the FRSA in 1970 and

clarifies that 49 U.S.C. § 20106 does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation or the Secretary of Homeland Security, its own plan or standard . . . , or a State law, regulation or order that is not incompatible with 49 U.S.C. § 20106(a)(2).³

Section 1528 sends a loud and clear message that 49 U.S.C. § 20106 in no way preempts state common law claims. To the extent the United States Supreme Court construed a Congressional intent in 49 U.S.C. § 20106 to federally preempt state law claims, Congress has now cleared up any confusion, real or imagined.

text of a proposed or final regulation, e.g., a notice to manufacturers or a preamble to a proposed or final regulation”).

² 49 U.S.C. § 20106.

³ H.R. Rep. No. 110-29, at 351 (Conf. Rep.).

There is no room for argument that the Railroad Preemption Clarification does anything but reaffirm the rights of victims to sue negligent railroads under state law. For example, the National Law Journal printed an article about the 9/11 Act entitled “State lawsuits against railroads have new life,” which had this to say:

Tucked inside the huge homeland security legislation signed into law by President Bush recently is a provision to ensure that the Federal Railroad Safety Act of 1970 does not preclude state lawsuits against railroads by injured persons in general and the residents of a small city in North Dakota in particular.

...

The new law's pre-emption provision makes clear that nothing in the FRSA shall be construed to pre-empt an action under state law seeking damages for personal injury, death or property damage. It also establishes that states may adopt additional or more stringent laws, regulations or orders relating to railroad safety or security under certain specified circumstances.⁴

Further, the agency provides no rationale for its sudden decision to claim that these standards preempt state common law. In 2003, the agency published what it considered to be extensive amendments to the incident reporting requirements, and the agency made no mention of these regulations preempting state common law.⁵ Yet, when the agency issued these “miscellaneous amendments,” the agency included language in the preamble regarding the preemption of state common law claims. There is no reason why the FRA should change its position on preemption for these miscellaneous amendments, particularly given Congress’ Railroad Preemption Clarification.

B. Agency Rules Must Clearly Follow the Federal Rail Safety Act’s *Limited* Preemption Language

A federal agency does not have the power to regulate with the force of law, absent a clear and express delegation of that authority from Congress. If a court were to give deference to the agency’s attempt to preempt state law, this would be akin to giving it the power to regulate with the force of law without regard to the will of Congress. Therefore, an agency may exercise preemptive authority if, and only if, Congress has explicitly delegated the authority, and does so in a way that is consistent with Congressional intent.⁶ Congress has never delegated the authority to preempt state law claims to the FRA and has indeed provided a very limited scope of preemption under the FRSA.

⁴ Marcia Coyle, *State law suits against railroads have new life*, The National Law Journal (Aug. 13, 2007).

⁵ *Conforming the Federal Railroad Administration’s Accident/Incident Reporting Requirements to the Occupational Safety and Health Administration’s Revised Reporting Requirements*, Final Rule, 68 Fed. Reg. 10107, 10134 (Mar. 3, 2003). The 2008 revisions to this rule referred to the 2003 version as “extensive amendments.” 73 Fed. Reg. at 52497.

⁶ See *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006).

Current case law also supports this interpretation of the FRSA. For example, in a Minot train derailment case, the court relied upon the Supreme Court's presumption against preemption, as noted in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 668 (1993), to determine that the plaintiffs' claims were not preempted.⁷ The Supreme Court reaffirmed this presumption when it stated that the Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action."⁸ Numerous state court decisions also have found that state law tort claims were not preempted by the FRSA.⁹

Further, the Supreme Court has found that any Congressional desire to achieve uniformity in transportation safety regulation does not justify preemption of common law claims. For example, in a case involving a boating safety act that bears a substantial similarity to the FRSA, the Supreme Court determined that the importance of fostering uniformity among regulations does not warrant the wholesale elimination of an individual's common law right to remedies for tort violations.¹⁰ The Court stated that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting [] safety."¹¹

The preamble to this rule expands the settled interpretation of the FRSA preemption provision without any reasoned analysis and contrary to the direct intent of Congress. Simply asserting in the preamble that the proposed rules preempt not only state laws, regulations, and orders, as indicated in the FRSA, but also common law is unacceptable.

C. State Common Law Should Govern Railroad Safety Issues

Courts have recognized that railroad safety issues are unique to each community and, therefore, such issues are more effectively addressed under state law. For example, in a decision involving the Minot derailment,¹² the court recognized that state and local control of rail safety would better protect the public than would exclusively relying upon federal railroad regulation. The court observed:

⁷ *In re the Soo Line R.R. Co. Derailment of January 18, 2002 in Minot, ND*, Court File No. MC 04-007726, Supp. To Order on Motion to Dismiss on Issue of Federal Preemption (Minn. Apr. 24, 2006). The court reiterated the presumption against preemption and the Supreme Court's statement that "the States' historic power to regulate train safety must not be 'superceded ... unless that [is] the clear and manifest purpose of Congress.'" *Id.* at 10 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted)).

⁸ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S. Ct. 1788, 1801 (2005).

⁹ See, e.g., *Clark v. Illinois Central R.R. Co.*, 794 So.2d 191, 196 (Miss. 2001) (holding an obstructed view claim was not preempted by the FRSA's regulations regarding warning devices at railroad crossings); *In re Miamisburg Train Derailment Litig.*, 626 N.W.2d 85 (Ohio 1994) (holding the FRSA did not preempt a claim for negligent operation (failure to use reinforcing brake pads) because the regulation was adopted after the manufacture of the railroad car in question). See also Blake Nicholson, *Judge: Federal Pre-emption Not an Absolute for Railroads*, Bismarck Tribune (Apr. 26, 2006), <http://www.bismarcktribune.com/articles/2006/04/26/news/state/113758.txt>.

¹⁰ *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

¹¹ *Id.* at 70.

¹² *In re the Soo Line R.R. Co. Derailment of January 18, 2002 in Minot, ND*, Court File No. MC 04-007726, Supp. To Order on Motion to Dismiss on Issue of Federal Preemption (Minn. Apr. 24, 2006).

- The adequacy of problems and the local nature of the hazard itself result in an essentially local safety concern which is not even of a statewide character, much less capable of being adequately encompassed within national uniform standards.¹³
- These Plaintiffs' claims are not preempted because they are necessary to eliminate or reduce an essentially local safety hazard. Allowing such claims to go forth would not be incompatible with a law, regulation or order of the U.S. Government. Nor would it unreasonably burden interstate commerce.¹⁴

AAJ believes federal regulations alone cannot prevent railroad accidents/incidents. Federal regulations are a minimum standard and are not intended to provide the maximum protection. The justice system offers a deterrent against railroad companies' violations of federal, state, and local regulations. The public also needs a mechanism to compensate individuals for losses suffered at the hands of negligent railroad operators. Otherwise, these injured individuals can become a burden to the public (i.e., the taxpayers).

AAJ appreciates this opportunity to submit comments in response to the Agency's proposed rule regarding changes to its accident/incident reporting requirements. If you have any questions or comments, please contact Gerie Voss, AAJ's Director of Regulatory Affairs at (202) 965-3500 ext. 748.

Sincerely,



Les Weisbrod
President
American Association for Justice

/gv

¹³ *Id.* at 29.

¹⁴ *Id.* at 34.