



## Federal Railroad Administration

In 2006, the Federal Railroad Administration (FRA) began to include language in the preamble to its regulations which would expand the preemption provision included in the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20106, beyond just preempting state statutes and regulations but also to preempt state common law. Although Congress passed legislation to address the wrongful preemption of state common law claims, the FRA has attempted to erode that language through preamble language in several different regulations.

**We suggest that the Obama Administration issue a revised Executive Order 13132 to express its disapproval of the agency's attempts to continue to preempt state common law claims.** In addition, the Chief of Staff of the new Administration must send a memorandum to all agencies on January 20, 2009, which would stay regulations that have not yet taken effect.<sup>1</sup>

The FRA's attempts to preempt state common law claims occurred around the same time that courts were dismissing cases brought by victims of the Minot, North Dakota derailment, in which a train carrying anhydrous ammonia derailed and caused serious injuries. 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 Section 1528 included in the "Implementing Recommendations of the 9/11 Commission Act of 2007" (the 9/11 Act). 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).<sup>2</sup>

Although Section 1528 clarifies that 49 U.S.C. § 20106 in no way preempts state common law claims, the FRA has issued several rules intending to preempt state tort law. Accordingly, AAJ requests that the agency issue a revised Executive Order 13132 to express its disapproval of this preemption language and the Administration's belief that FRA regulations do not preempt state tort law claims. This should apply to the following completed or on-going rulemaking proceedings, some of which are further detailed below:

- *Track Safety Standards; Inspections of Joints in Continuous Welded Rail (CWR)*, Docket No. FRA-2005-22522, Final Rule, 71 Fed. Reg. 59677 (Oct. 11, 2006).
- *Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Derails*, Docket No. FRA-2006-25267, Proposed Rule, 71 Fed. Reg. 60372 (Oct. 12, 2006); Final Rule, 73 Fed. Reg. 8442 (Feb. 13, 2008).

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<sup>1</sup> This would be similar to the memo issued by Andrew H. Card, Jr. on January 20, 2001. *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies*, 66 Fed. Reg. 7702 (2001).

<sup>2</sup> H.R. Rep. No. 110-29, at 351 (Conf. Rep.).



- *Passenger Equipment Safety Standards; Front-End Strength of Cab Cars and Multiple-Unit Locomotives*, Docket No. FRA-2006-25268, Proposed Rule, 72 Fed. Reg. 42016 (Aug. 1, 2007).
- *Electronically Controlled Pneumatic Brake Systems*, Docket No. FRA-2006-26175, Proposed Rule, 72 Fed. Reg. 50820 (Sept. 4, 2007); Final Rule, 73 Fed. Reg. 61512 (Oct. 16, 2008).
- *Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, Docket No. FRA-2006-25169, Proposed Rule, 73 Fed. Reg. 17818 (April 1, 2008).
- *Miscellaneous Amendments to the Federal Railroad Administration's Accident/Incident Reporting Requirements*, Docket No. FRA-2006-26173, Proposed Rule, 73 Fed. Reg. 52496 (Sept. 9, 2008).

**The Administration needs to recommend strong Congressional oversight to keep the agency on track.** The agency has continually either ignored or misinterpreted the FRSA Amendment that Congress passed in 2007 to ensure that the federal regulations do not preempt state tort law claims. This illustrated by the agency's actions regarding the following rules:

- August 1, 2007 - Just four days after passage of Section 1528, the FRA issued a proposed rule regarding passenger safety standards that sought to provide total immunity to railroad companies that violate these standards. The FRA did not even mention Congress' new language. Although six Members of Congress filed comments to the object to the FRA's proposal, the FRA issued a final rule which included the preemption language. Copies of AAJ comments and letters from Members of Congress are attached here.
- September 4, 2007 – Approximately one month later, the FRA issued its proposed rule regarding electronically controlled pneumatic (ECP) brake systems. Despite Congress' intent and the fact that this is such a new technology, the FRA again included language that would give railroad companies total immunity for any injuries that arose from the use of this technology. The prospect of accountability is necessary to encourage railroads to enhance their systems, especially during this critical time period. Again, the FRA's proposal never referred to the newly-passed language from Congress.
- April 1, 2008 – The FRA, in conjunction with the Pipeline Hazardous Materials Safety Administration (PHMSA), issued a proposed rule regarding the crashworthiness protection of railroad tank cars designed to transport hazardous materials. While the FRA finally acknowledged Congress' clarification of the FRSA, the agency has used an absurd application of the language. In the preamble to the rule, the FRA states its belief that the FRSA only allows citizens to hold negligent railroad companies accountable where the company attempts to follow standards that meet the FRA's minimum requirements. However, where the company attempts to provide additional safety beyond the FRA's minimum requirements, then the railroad company would have total immunity for any injuries that may occur. It is completely nonsensical to believe that Congress ever intended for their clarification of the FRSA to be interpreted this way. AAJ's comments on this issue are attached for your reference.
- October 16, 2008 – The FRA issued its final rule on ECP brake systems. As the agency did on April 1<sup>st</sup>, the FRA again said that the FRSA only allows citizens to hold negligent railroad companies accountable where the company attempts to follow standards that meet the FRA's



minimum requirements. But, if the railroad tries to offer additional safety protections, then the company should have total immunity for any injuries that may occur.

**The Administration should consider a new policy position at the agency level to address problems with current career personnel.** The agency's current structure includes civil servants who have been firmly entrenched in the agency and have been ardent supporters of the Bush Administration's policy to preempt state law claims and provide immunity to railroad companies. If the FRA continues to enforce its preemption policy under the next Administration, railroad companies and manufacturers will continue to claim immunity from claims based on compliance with federal regulations. Therefore, the Administration should consider adding a position titled "Special Assistant for Railroad Policy" to ensure that travelers on the Nation's railways are adequately protected and permitted to access the civil justice system when necessary to hold manufacturers and transportation companies accountable for their injuries.



# Congress of the United States

Washington, DC 20515

September 27, 2007

The Honorable Joseph H. Boardman  
Administrator  
Federal Railroad Administration  
1120 Vermont Avenue, NW  
Washington, DC 20590

**Re: Passenger Equipment Safety Standards; Front-End Strength of Cab Cars  
and Multiple Unit Locomotives; Notice of Proposed Rulemaking (Docket No.  
FRA-2006-25268)**

Dear Administrator Boardman:

We are writing to express our strong concern over preemption language included in the preamble to the proposed rule in the above-entitled notice published in the Federal Register on August 1, 2007. We request that the FRA issue a Revised Notice of Proposed Rulemaking to delete portions of the preamble which are inconsistent with recently passed legislation. In the alternative, we believe that the Federal Railroad Administration (FRA) should include a revised preemptive effect discussion in the preamble to the final rule to reflect Congress' clear intent that such regulations do not preempt state tort claims.

In the preamble to the proposed rule, the FRA claims that the rule preempts "any State law, regulation, or order, *including State common law*, concerning the operation of a cab car or [multiple-unit] MU locomotive as the leading unit of a passenger train..." emphasizing that the "operation of cab cars and MU locomotives is a matter regulated by FRA, and not one which ~~FRA has left subject to State statutory, regulatory, or common law standards on this matter.~~" The FRA claims to base this on Congress' intent to "promote national uniformity and security standards." While the preamble to a rule should not have any substantive effect, we fear that this language may serve to immunize negligent railroad companies and prevent train derailment victims from holding these companies accountable for their injuries. Congress did not intend that the Federal Rail Safety Act (FRSA) would be interpreted to prevent injured victims from asserting their rights under common law, as emphasized by the recent clarification included in Public Law No. 110-53.

Public Law No. 110-53, signed by the President last month, contains language to clarify that 49 U.S.C. § 20106 of the FRSA was intended as a limited preemption provision to prevent states from implementing their own rail safety regulations in certain instances. However, it was not designed to preempt cases brought by victims of railroad derailments. Congress added a new

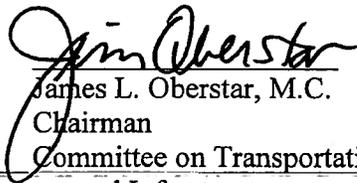


subsection (b) to 49 U.S.C. § 20106 titled "Clarification Regarding State Law Causes of Action" which specifically states that the law should not "be construed to preempt an action under State law seeking damages for personal injury, death, or property damage." This language sends a loud and clear message that the FRSA in no way preempts state common law claims. To the extent the United States Supreme Court construed a Congressional intent to federally preempt state law claims against railroads, Congress has now cleared up any confusion, real or imagined. Accordingly, the FRA's preamble containing language attempting to preempt state common law standards directly contradicts Congressional intent and subverts the legislative determination.

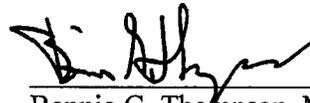
If the FRA does not correct this language, victims of terrible commuter train derailments will be denied the ability to seek fair compensation, like the victims of the 2005 Metrolink commuter train accident in California. On January 26, 2005, shortly after 6:00 am, a Metrolink Train 100 was traveling in push mode, which means the locomotive was at the rear end of the train pushing three passenger cars ahead of it. The Metrolink Train 100 collided with another Metrolink train traveling in the opposite direction, causing that train to derail. This double train derailment resulted in eleven deaths and approximately 150 injured passengers, with injuries varying in degree from very severe with permanent residual disabilities to minor. If the FRA does not remove the preemption language seeking to eliminate state common law claims, courts may interpret this rule to prevent victims of commuter train derailments from holding railroads accountable for their injuries. Congress has clearly stated that it did not want to leave victims of negligent railroads without any recourse.

We urge you to address this inequity by issuing a revised NPRM clarifying that the FRA does not intend to act inconsistently with congressional intent, or to include this in the preamble to the final rule addressing this matter.

Sincerely,



James L. Oberstar, M.C.  
Chairman  
Committee on Transportation  
and Infrastructure



Bennie G. Thompson, M.C.  
Chairman  
Committee on Homeland Security

cc: FRA Docket Management Facility



# Congress of the United States

Washington, DC 20515

October 5, 2007

The Honorable Joseph H. Boardman  
Administrator  
Federal Railroad Administration  
1120 Vermont Avenue, NW  
Washington, DC 20590

**Re: Proposed Amendments to 49 CFR Part 238, Passenger Equipment Safety Standards  
(Docket No. FRA-2006-25268)**

Dear Administrator Boardman:

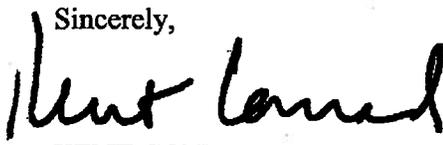
We write to express our concern with the discussion of federal preemption included in the preamble to the proposed rule cited above which was published on August 1, 2007. We request that the FRA revise the preamble in light of the passage of Public Law No. 110-53, which was signed into law by the President on August 3, 2007.

Section 1528 of Public Law No. 110-53 contains language clarifying the intent of Congress with respect to the preemptive effect of the Federal Railroad Safety Act (FRSA). The preamble to the proposed rule discusses this law, but makes no reference to the changes instituted by Congress this summer. Perhaps this omission was purely a result of chronology, but no matter what the cause, it would be inappropriate to issue a final rule that does not accurately reflect current law.

Certain statements in the preamble could be interpreted to contradict the language that Congress has just enacted. For instance, the preamble refers to a railroad safety issue and states that the "FRA believes that it has preempted any State law, regulation, or order, including State common law." This language could be read to undermine the intent of Congress that the FRSA not preclude victims of railroad accidents from seeking redress under state law for their injuries and losses. Although the preamble should ostensibly not have any binding authority, we worry that it could nonetheless inform the interpretation of the FRSA by the courts or other interested parties.

We respectfully request that the FRA revise the preamble to the proposed rule to: 1) make explicit reference to the amendment made to 49 U.S.C. § 20106 by §1528 of Public Law No. 110-53; and 2) make clear that the FRSA does not prevent victims of railroad accidents from holding railroad companies to account for their actions in a court of law.

Sincerely,

  
KENT CONRAD  
United States Senator

  
BYRON DORGAN  
United States Senator

  
EARL POMEROY  
Member of Congress

Cc: FRA Docket Management facility