

FLETCHER & SIPPEL ALERT

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Friday, April 13, 2007

ASLRRRA/AAR RESPOND TO HOUSE AMENDMENT ON FEDERAL PREEMPTION

Following passage of a "federal preemption" amendment to H.B. 1401 (Rail and Transportation Security Act), the wording of which threatens to eliminate federal rail safety preemption precedent and expose railroads to broader negligence claims, the ASLRRRA and the AAR, along with other interested parties, responded with proposed substitute language.

The substitute language addresses the crux of the legislative concern behind the amendment, namely that a recent decision of a federal district court in North Dakota went too far in holding that the Federal Railroad Safety Act (FRSA) so completely preempts state law that an injured plaintiff's action is barred even if it is based on a railroad's alleged failure to comply with FRA regulations. The proposed substitute language reads as follows:

Nothing in this section shall be construed to preclude an action under state law seeking damages for personal injury or property damage alleging that a party has violated a specific requirement set forth in a regulation or order issued by the Secretary. This provision shall apply to all causes of action which accrue on or after the effective date of this Act. Nothing in this provision shall otherwise affect the scope of application of this section as interpreted by the U.S. Supreme Court in *CSX Transportation, Inc. v. Easterwood* and *Norfolk Southern Railroad v. Shanklin*.

The ASLRRRA and the AAR are urging those interested in weighing in on this issue to write members of the House Transportation and Infrastructure Committee and the House Homeland Security Committee. Attached are:

- Sample letter; and
- Talking points to assist in communicating concerns with H.B. 1401 Amendment.

[Date]

The Honorable James L. Oberstar

The Honorable Bennie G. Thompson

The Honorable John L. Mica

The Honorable Peter T. King

Committee on Transportation and Infrastructure

Committee on Homeland Security

Dear Chairmen Oberstar and Thompson and Ranking Members Mica and King:

I am **[insert title]** of the **[insert railroad name]**, a short line freight railroad in **[describe area of operation]**. I am concerned by a vote on March 27, 2007 in which the House approved an amendment to H.R. 1401 that could drastically reduce the effectiveness of federal rail safety regulations. While I understand that the authors of this amendment believe it to be very limited in scope, it is not.

Rail safety laws are most effective when a uniform national standard is used. Preemption of conflicting local regulations and legal interpretations will preserve consistent federal standards and allow our employees to be sure that their actions are safe and legal no matter where their duties may take them. It will be very burdensome for a small company like mine to alter practices as trains cross local boundaries.

Under Section 3 of H.R. 1401 a jury could second guess the Federal Railroad Administration rule making process and find my railroad negligent even where my railroad's conduct is fully consistent with every federal safety regulation. Different juries in different jurisdictions will have different opinions on how my railroad should operate, creating a crazy quilt of safety standards and making FRA guidelines meaningless.

Just one tort case could bankrupt my railroad and lead to a loss of rail service for my customers. Congress should not open the door to unnecessary claims by discarding federal standards, but should instead focus on providing relief for those in need. For this reason, I support compromise language put forth by the railroad industry that says, among other things:

Nothing in this section shall be construed to preclude an action under state law seeking damages... alleging that a party has violated a specific requirements set forth in a regulation... Nothing... shall otherwise affect the scope of... this section as interpreted by the... Supreme Court in... *Easterwood*... and... *Shanklin*.

Sincerely,

[Name]
[Title]

AMENDMENT TO ADDRESS MINOT LITIGATION

Overview

On March 27, 2007, the House approved an amendment to H.R. 1401 (The Rail and Transportation Security Act of 2007). That amendment, sponsored by House Homeland Security Chairman Bennie Thompson (D-MS), was purportedly in response to recent court decisions arising out of a train derailment in Minot, North Dakota which held that an injured plaintiff's claims under state law are preempted and therefore barred. However, the Thompson Amendment goes much farther than just addressing the Minot cases; and, in so doing, has significant adverse consequences for rail operations, rail safety and interstate commerce. Even though the Minot court decisions are currently under appellate review, if it is the intent of Congress to address the Minot cases at this time, the rail industry, through the Association of American Railroads, proposes an alternative to the Thompson Amendment. As described below, the AAR's proposal would directly address the Minot cases so that railroads will be subject to future lawsuits if they have violated federal requirements while at the same time preserving current federal authority over rail operations and safety.

AAR Proposal

- The court decisions involving the Minot derailment, which are now on appeal to the U.S. Court of Appeals, held that an injured plaintiff's claims for damages under state law are preempted by federal law, and therefore barred, even though the plaintiff's claims are based on a railroad's alleged failure to comply with FRA regulations.
- In addressing the concerns raised by the Minot holding, it is important to recognize that federal preemption has been and remains an essential aspect of Federal railroad safety law. The guiding principle underlying Federal railroad safety law is that safety and efficiency are best promoted if one set of uniform regulations applies to railroads: preemption assures, consistent with the Commerce Clause, that different or conflicting requirements can't be imposed at the state or local level and that federal regulations must remain the standard of conduct for railroads nationwide.
- AAR's proposal directly addresses the concern raised by the Minot cases so that railroads will not be immunized from future lawsuits if they have violated federal requirements. At the same time, AAR's proposal otherwise preserves federal preemption so that federal railroad safety regulations and

orders continue to govern the railroad industry as a single set of uniform requirements. AAR's proposal would add the following to 49 U.S.C. §20106:

Nothing in this section shall be construed to preclude an action under state law seeking damages for personal injury or property damage alleging that a party has violated a specific requirement set forth in a regulation or order issued by the Secretary. This provision shall apply to all causes of action which accrue on or after the effective date of this Act. Nothing in this provision shall otherwise affect the scope of application of this section as interpreted by the U.S. Supreme Court in *CSX Transportation, Inc. v. Easterwood* and *Norfolk Southern Railroad v. Shanklin*.

- The Thompson Amendment purports to address concerns about the victims of the Minot derailment; however, it goes well beyond that goal and would, as a practical matter, substantially undermines federal regulation of rail safety.
- Section (a) would allow juries to find railroads negligent even where DOT (or DHS) has established a standard and even if the railroad complied with that standard, simply by finding that the railroad should have done something different than what is required by the federal standard. As a result, railroads will no longer be able to rely on federal regulations to guide their conduct if juries can second-guess that conduct whenever there is an accident. Instead, they would need to pay heed to multiple, inconsistent regulatory dictates emanating from courts and juries in different states. As Congress determined in 1970, this can have an adverse impact on railroad safety.
- The only limitation on civil lawsuits would be if "compliance with State law would make compliance with federal requirements impossible." This attempt to preserve preemption in such instances is virtually meaningless as a jury will almost always find that it is "possible" to comply with both a federal regulation and a different or more restrictive state requirement.
- While section (b) also purports to preserve federal preemption of laws regulating rail safety issued by state legislatures and administrative agencies, this provision is unnecessary to address the Minot issue; moreover, it both permits states to regulate areas of railroad safety which are currently preempted and creates uncertainty regarding the type of agency action which would give rise to any preemption in the future.