

ASSOCIATION OF STATE RAIL SAFETY PROGRAM MANAGERS

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May 25, 2007

VIA ELECTRONIC & FIRST CLASS MAIL

The Honorable James L. Oberstar
Chairman
Transportation & Infrastructure Committee
Committee
2165 Rayburn House Office Building
Washington, DC 20515

The Honorable Corrine Brown
Chairwoman
Subcommittee on Railroads, Pipelines
and Hazardous Materials
2336 Rayburn House Office Building
Washington, DC 20515

**SUBJECT: Modifications to Federal Preemption of All State Safety
Regulations in 49 U.S.C. Section 20106**

Honorable Chairman Oberstar, Chairwoman Brown:

On behalf of the Association of State Safety Managers who work in partnership with the Federal Railroad Administration in the inspection and enforcement of federal rail safety regulations under State Safety Participation Plans, I wish to thank you for your efforts and those of the Subcommittee on Railroads, Pipelines, and Hazardous Materials to increase railroad safety nationwide. A reform of railroad safety regulations and the Federal Railroad Safety Act is long overdue. Recent catastrophic derailments and hazardous materials spills demonstrate the need for increased awareness and diligence regarding the safety of railroad transportation nationwide. One area of improvement not yet incorporated in H.R. 2095 is found in Representative Napolitano's amendment of 49 USC § 20106 which will empower State officials to better assure rail safety at the local level.

When the FRSA was first passed in 1970, the National Association of Regulatory Utility Commissioners (NARUC) strongly advocated Congress to retain existing state rail safety laws in place until federal regulations replaced them and, further, to allow the states to pass specific rail safety regulations at sites or for conditions even where they were the subject of federal regulations. (116 Cong. Rec. 27613 (August 6, 1970).) Subsection (1) of 49 U.S.C.

Consequently, Section 20106, the *essentially local* safety hazard exception to federal preemption, was adopted to permit the States to regulate rail safety at limited sites and conditions. Unfortunately, federal courts have interpreted this subsection so as to preclude state involvement. Since federal courts have interpreted that these so-called *essentially local* hazards “can be encompassed in federal regulations” (*National Ass’n of Regulatory Util. Com’rs v. Coleman*, 542 F.2d 11, 13 (3rd Cir. 1976)) and because those same courts have interpreted the FRSA to evidence “a total preemptive effect,” the States have been improperly excluded from specific, localized rail safety regulation as originally intended by FRSA Section 20106.

As a result of this “field” preemption of railroad safety, the States have been denied the rightful exercise of their normal police powers in the face of catastrophes, fatalities, and toxic releases. The Association joins NARUC, railroad labor, and others in calling for the elimination of subsection (1) of Section 20106.

Section 20106. National uniformity of regulation

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. 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--

~~(1) is necessary to eliminate or reduce an essentially local safety or security hazard;~~

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

Section 20106 will continue to protect the railroads from state rail safety laws that are: (1) incompatible with federal laws or regulations, and that (2) unreasonably burden interstate commerce. This well-respected two-prong test permits the States to protect its citizens through the exercise of established police powers under the Tenth Amendment while, at the same time, prohibiting state regulations that “conflict” with federal law or that enact a mandatory scheme which essentially usurps Congressional power to regulate interstate commerce.

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On behalf of the Association, I urge you and the Subcommittee to consider this modification to Section 20106. If you have questions concerning these issues, please feel free to contact me at your convenience. You may contact me at (304) 340-0474 or email me at: ibaldwin@psc.state.wv.us

Very truly yours,

Ira Baldwin

President, Assn. of State Safety Managers

cc: The Honorable Representative. Grace Napolitano
NARUC
California Public Utilities Commission
United Transportation Union
Brotherhood of Locomotive Engineers