

Testimony of Douglas R. Dalglish
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State of Kansas Department of Transportation
July 10, 2023, Hearing Regarding Proposed K.A.R. 36-43-1: Train Crew Requirements

Introduction

My name is Douglas R. Dalglish. I am a partner in the Stinson LLP law firm and work as outside counsel for BNSF Railway Company (“BNSF”). I appreciate the chance to speak with you today in response to the Kansas Department of Transportation’s (“KDOT”) Notice of Public Hearing on Proposed Administrative Regulation, K.A.R. 36-43-1, entitled “Crew requirements; exceptions” (the “Bill”), by which the State of Kansas seeks to regulate the size of locomotive crews operating within the State. BNSF opposes the Bill for multiple reasons, and incorporates the Comments of the Association of American Railroads.

I want to provide some information which BNSF believes is important as context to understand the issues involved.

Background on BNSF

BNSF is one of the largest railroads in the world and is proud of its extensive history, connections and operations within the State of Kansas. BNSF operates on more than 32,500 miles of track throughout America, and annually moves more than 10 million freight shipments throughout our country. BNSF has more than a thousand miles of tracks in Kansas and has approximately 3,200 employees here.

BNSF is particularly proud of its state of the art Logistics Park which it chose to locate in Edgerton, Kansas. That facility serves as a major intermodal hub for rail shipments throughout the United States. BNSF’s Logistics Park was developed with more than \$1 billion in private

investment, employs more than 4,700 people in the area, and provides billions of dollars of labor income annually.

BNSF's Approach to Safety

Nothing is more important to BNSF than safety, and our record demonstrates that commitment. At BNSF, we believe that every accident and injury is preventable. Operating without accident or injury is a core part of BNSF's vision and values, and our focus is on preventing accidents from happening in the first place. We do that by nurturing a culture of compliance and commitment within BNSF, and closely partnering with our customers and the communities in which we operate.

Our safety culture is continuously reinforced and improved through multi-faceted employee safety training and compliance programs, as well as significant capital investments that enable us to both maintain our network in world-class condition and pursue technology advancements that will increase the safety of our operations going forward.

This commitment to our safety culture has resulted in BNSF leading the industry in reducing the occurrence of rail equipment incidents over the past decade. Today 99.99% of all hazardous materials shipments on BNSF reach their destination without a derailment caused release. BNSF's safety performance has been part of significant improvement by the entire rail industry as well. Since 2000, the rail industry has achieved a 31% reduction in its train accident rate, and a 64% reduction in its hazmat accident rate.

There is no evidence that requiring two train crewmen will enhance safety. Vague anecdotes of train incidents, such as the Lac-Mégantic derailment in Canada and the Casselton derailment in North Dakota, have been offered to justify mandating crew sizes. But there are no facts establishing that if the crew size in those incidents were different, the accidents would not

have occurred. In fact, the exhaustive investigations of those incidents are to the contrary. Most train accidents occur with two person crews; that does not mean two person crews are unsafe. The Norfolk Southern Railway derailment in East Palestine involved a three-person crew.

Rail is the safest mode of land transportation in the United States. Accident and injury rates remain at historic lows. That record will continue to improve via BNSF's commitment to safety, adoption of developing safety technology, and partnership with our labor unions.

Railroads Have Unique Operational Issues Which Mandate Uniformity

Railroads are very complex operations and pose unique regulatory and legal issues. For example, unlike trucks and aircraft, which compete against rail for freight, railroads must purchase and maintain the tracks over which they operate, at great expense. Since 2014, BNSF has invested approximately \$40 billion in its network, and will invest \$3.96 billion in our network in 2023 alone. Over the last five years, we have invested approximately \$970 million in our infrastructure in Kansas, including \$248 million in 2022 alone.

Freight railroads compete aggressively against each other but also must cooperate to deliver customers' cargo. That is because no single railroad can cover America geographically; consequently, railroads must operate in multiple states, over tracks owned by others, share crews, engines and otherwise provide seamless service. Railroads operate around the clock, in all types of weather. All of this requires national uniformity.

In order to facilitate rail transportation throughout the country, Congress decided long ago to implement a variety of federal laws and regulations to ensure uniformity, recognizing that if railroads faced different laws in every state and locality they could not operate efficiently. These federal laws and regulations, which preempt state and local regulation, are intended to

create one level playing field which balances the needs of the public, labor, and the railroads, and ensures healthy competition.

Railroad operational issues are best left to federal regulatory bodies which have extensive experience in the field and can balance all of the competing interests involved. As best BNSF can discern, this Bill is the first time Kansas has attempted to jump into the complex arena of railroad crew operations. Although the Bill may be well-intentioned, BNSF believes it is unfounded and is a supposed fix for a problem which does not exist. In fact, the Bill will be deleterious to railroad operations and safety.

The History of Train Crew Size

Up until the 1960s freight railroads typically had five crew members, including one who rode in the caboose. With the advent of diesel-electric locomotives, the crew Fireman, who in times past shoveled coal into the boiler, was eliminated. Similarly, with the development of electronic End of Train Devices, the caboose, with a person inside, was eliminated. Both of these crew size reductions were accomplished safely, increased rail efficiency, and were bargained for between the railroads and their labor unions.

Class 1 railroads generally utilize two-person crews (a certified Engineer and Conductor) in the locomotive cab for most over the road mainline operations. Right now BNSF utilizes two person crews for over the road operations pursuant to negotiated union labor agreements. But there is no factual or empirical evidence that two crewmen are inherently better or safer than one. In fact, the facts suggest otherwise.

For decades, single person crews have been utilized safely by railroads in the United States, and Europe, for both freight and passengers. Amtrak, which carries millions of passengers per year throughout the United States, has long utilized one train crew member.

Commuter railroads are the same. There is no evidence that crew practice is unsafe. Indeed, the National Transportation Safety Board has examined the issue and concluded that “[t]here is insufficient data to demonstrate that accidents are avoided by having a second qualified person in the cab. In fact, the NTSB has investigated numerous accidents in which both qualified individuals in a two-person crew made mistakes and failed to avoid an accident.”¹

Similarly, many short line railroads operating in Kansas and throughout the country safely utilize a single crewman for their over the road operations. The major railroads in Europe, which operate in congested and complex environments, have utilized one crewman for decades. Research has established that these railroads’ safety records are comparable to two-person crews.²

There is no evidence that this historical reduction of train crew size via technology has been unsafe. In fact, railroads have simultaneously improved their safety. Over the last 15 years, the Federal Railway Administration and other safety regulators have evaluated the crew size issue extensively and have never found any data showing two person crews are safer than one person crews.

The Impact of Positive Train Control

Technology is continuing to advance. For example, as a result of federal mandates, the major railroads have spent billions of dollars installing Positive Train Control (“PTC”) technology on thousands of miles of tracks in the United States. PTC is a computerized system which monitors train location, speed and direction, and if necessary, can stop a train automatically if the engineer fails to take necessary action. PTC makes it unnecessary for the

¹ National Transportation Safety Board, Accident Report, NTSB, RAR-16/02, *Derailment of Amtrak Passenger Train 188*, at 18-19 (May 17, 2016).

² Oliver Wyman, *Analysis of North American Freight Rail Single-Person Crews: Safety and Economics*, Association of American Railroads, (February 2015).

Conductor to perform many onboard functions. PTC technology can thus stop and prevent train accidents and collisions without input from the crew.

As this technology has evolved, cab-based Conductors leave the cab for unplanned activities outside the locomotive only infrequently. Instead of being required to staff all locomotives with a cab-based Conductor, it would be more efficient, and work-life desirable, for railroads to utilize ground-based Conductors. Those ground-based Conductors can be strategically located along the network to respond to unplanned events, and utilize mechanized equipment to get to and respond to those events. Ground-based Conductors would also enjoy being home at the end of their shifts instead of being gone overnight frequently. The latter convenience may be very attractive to the applicable labor unions and will enhance railroad safety and efficiency.

The Bill would stymie and frustrate rail technology improvements which history has demonstrated increase safety and efficiency.

The Bill will Competitively Harm Railroads in General, and Harm Employment in Kansas in Particular

Rail is the most cost and fuel efficient mode of freight transport. The Bill's proposed creation of a separate crew size rule in Kansas will increase rail costs and thus have substantial negative economic consequences upon BNSF and Kansans. Increasing railroads' crew costs will inherently make railroads less competitive and shift freight traffic to alternate transportation modes, such as trucking.

Kansas has not proposed to regulate crew sizes for trucks and aircraft, BNSF's transportation competitors, although the Bill's apparent premise that "2 crewmen are better than 1" would apply equally well to trucking and aircraft. By making rail transportation absolutely

and relatively more expensive, freight will inevitably shift to other modes, such as trucking or air. This shift will adversely affect Kansans.

Trucking uses more fuel and creates highway congestion which will impact all Kansans. Kansans will pay to repair the roadways which trucks utilize (for free). Moving freight by truck, instead of rail, will also thus significantly increase greenhouse gas emissions.³ Rail is also by far the safest method of surface transportation. Trucks are involved in hundreds of accidents annually in Kansas but operate as we speak across the roadways of our state with single drivers, drivers who are not federally certified like train crewmen.

The Bill's distortion of the competitive freight market will also inevitably harm the utilization of the Logistics Park in Edgerton, Kansas. The loss of job of jobs there could be substantial. The Bill and its Economic Impact Statement ignore these issues.

Train Crew Size is Best Negotiated with the Applicable Labor Unions

Railroad workers are members of multiple labor unions which have negotiated the terms of their contracts, in great detail, with the various railroads for decades. Consequently, work and operational issues are a matter of balanced negotiation by parties who know the industry best. "Historically, crew size has been an issue for labor relations."⁴ Rail industry safety and efficiency have steadily improved via these negotiations.

Determination of the appropriate crew size is best left to specialists within the railroads and their unions who are most familiar with real world conditions. There is no need for Kansas to jump into this complex area of railroad operations and labor negotiations.

³ If 25% of highway freight moving more than 750 miles went by rail instead, annual greenhouse gas emissions would fall by approximately 13.1 million tons, the equivalent of taking 2.6 million cars off the roads for a year. AAR, Oppose Efforts to Mandate Train Crew Size, January 2023.

⁴ Fed. R.R. Admin., *Proposed Rule—Train Crew Staffing*, 81 Fed. Reg. 13918, 13937 (Mar. 15, 2016).

BNSF is negotiating with its employees' union leadership, pursuant to the Railway Labor Act, regarding the implementation of single-person crew operations on its network. BNSF has set monthly meetings during this year to further those discussions. BNSF believes that single-person crew operations, which could include ground-based Conductors, hold the promise to increase safety for our union workers, increase competitiveness, and provide more predictable work schedules for our employees and their families.

Creating a crew size law in Kansas, which may vary from and conflict with uniform federal law, would harm and distort the bargaining process between BNSF and its unions which has functioned well for decades. Any benefits unions might be able to negotiate for reduced crew size, including improved working conditions, would be frustrated. Mandatory crew size laws could also be deleterious to overall safety as technological innovations evolve.

Federal Regulation of the Rail Industry: Preemption of the Proposed Bill

BNSF believes the proposed Bill would be preempted by federal law and accomplish nothing other than create litigation. Federal law is designed to establish a uniform set of rules for railroads to operate to prevent railroads from having to deal with a patchwork of different laws across the country. This has very practical, common sense justifications. That uniformity would be ruined by the proposed Kansas Bill.

As an example, imagine a train travelling from Missouri to Colorado through Kansas. If the states were permitted to regulate crew size, Missouri could have a law requiring three crewmen, Kansas two, and Colorado might mandate only one. This would create operational chaos for railroads. Every train would be required to modify its crew at each state's border, which would be inefficient, unsafe, and contrary to union contracts. The uniformity of rail operations would be destroyed.

That is why BNSF believes federal law preempts, and precludes, the proposed Bill (applicable statutory law is attached with annotations). There has been a federal agency dedicated to regulating the railroad industry since 1887, when Congress created the Interstate Commerce Commission. Today there are two federal agencies primarily devoted to regulating the freight rail industry. The first is the Surface Transportation Board ("STB") which Congress created in 1995 as a successor to the Interstate Commerce Commission. The second is the Federal Railroad Administration ("FRA"), which was created in 1966 as part of the U.S. Department of Transportation. And depending upon what type of activity BNSF is engaged in on any given day, there may be another dozen federal agencies separate and apart from the STB and FRA that are actively regulating some part of our operations.

The STB derives much of its statutory authority to regulate the rail industry from the Interstate Commerce Commission Termination Act, which is commonly referred to as "ICCTA" (49 USC § 10101, *et seq.*). While the preemptive power of the ICC's federal regulation of the rail industry had already long been recognized by the courts, ICCTA explicitly stated that the STB's jurisdiction over transportation by rail carriers and the operation of their networks is *exclusive*. 49 USC § 10501(b). Congress defined the broad scope of the STB's exclusive authority to include, among other things, the movement and storage of locomotives, railcars, and equipment, and the operation of a railroad's side tracks or facilities. 49 USC § 10102(9).

While Congress granted the STB that broad authority, Congress also reserved for the U.S. Department of Transportation the power to regulate "every area of railroad safety" via the Federal Railroad Safety Act (or "FRSA"). 49 USC § 20103(a). In the FRSA, Congress mandated that the regulation of railroad safety "shall be nationally uniform to the extent practicable", 49 USC § 20106(a), and explicitly preempted any state laws attempting to address any issue that is already covered by FRA

regulation. *Id.* The only exception from FRSA preemption is for state laws that are necessary to address an essentially local safety hazard, and do not unreasonably burden interstate commerce.

Congress purposefully created this federal regulatory scheme in recognition of the critical role that the national rail network plays in our economy, and with the intent to implement uniform rail operating and safety standards across the country. Congress wanted to avoid a patchwork of regulations adopted by individual states with potentially parochial interests. The courts have interpreted both ICCTA and the FRSA in a broad manner consistent with that intent. The explicit purpose for this strong policy of federal preemption is to provide national uniformity for rail transportation which constitutes interstate commerce. Treating crew size as a subject for Kansas “safety” regulation would override the careful balance which has been struck over the decades with railroad-union negotiation, and wreck the national uniformity of operational regulation which permits railroads to operate efficiently.

The “Local Safety” Exception does not Apply to Attempts to Regulate Railroad Crew Sizes

A very narrow and limited exception is provided wherein States may pass laws “necessary to eliminate or reduce **an essentially local safety** or security hazard.”⁵ But any law under that narrow exception may have only a “remote or incidental effect on rail transportation,” and cannot “unreasonably burden interstate commerce.”⁶ Moreover, any such state laws cannot “target the operation of rail carriers;” the exception is intended to apply to, *e.g.*, “electrical, plumbing and fire codes, direct economic regulations and other generally applicable, non-discriminatory regulations and permit requirement.”⁷

⁵ 49 U.S.C. § 20106(a)(2)(A).

⁶ 49 U.S.C. § 20106(a)(2)(C).

⁷ *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *See also State v. BNSF Ry. Co.*, 432 P.2d 77 (Kan. App. 2018); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001).

KDOT's Bill is allegedly premised upon this narrow statutory "local public safety" exception. But KDOT's interpretation would allow the narrow exception to swallow the longstanding rule of federal preemption over rail operations. Under KDOT's interpretation, Kansas could regulate all railroad operations so long as KDOT cited a "safety" rationale. That is not the law.

The size of railroad train crews is quintessentially a matter of rail operations and safety, issues which are expressly preempted by both the ICCTA and FRSA. The Bill does not mandate two person crews for all forms of transportation in Kansas; it expressly targets rail transportation. There are no unique "local" Kansas issues being addressed by the Bill. Instead, the Bill is an attempt by KDOT to dictate to railroads how their locomotives engaged in interstate commerce, passing through Kansas, should be staffed and operated. Consequently, the Bill is obviously preempted by federal law and will serve no purpose other than creating litigation over issues which Congress has settled long ago.

When asked to identify what was considered when examining whether the Bill was preempted, the Kansas Attorney General identified two cases: *Transportation Div. of the International Association of Sheet Metal, Air, Rail and Transportation Workers v. Federal Railroad Administration*, 988 F.3d 1170 (9th Cir. 2021) ("*Transportation Division*"), and *Stonebarger v. Union Pac. R. Co.*, 76 F.Supp.3d 1228 (D. Kan. 2015).⁸ But neither case negates preemption.

Transportation Division held, on administrative procedural grounds, that the Federal Railway Administration failed to properly justify a nationwide maximum one-person crew rule for trains. Notably, the crew size regulation at issue was promulgated by the FRA itself, which

⁸ June 20, 2023 Email from Robert Hutchison, Deputy Attorney General- Civil Division, Office of the Kansas Attorney General, to Barb Wasinger.

has jurisdiction over the issue, not a State or labor union. The Court made no ruling, nor could it, that States such as Kansas have authority to regulate railroad crew sizes. Moreover, the Court made no finding that two-person crews would improve safety.

Stonebarger is equally inapt because it held, in a wrongful death case, that claims asserting inadequate railroad warning devices, excessive speed, etc., were preempted by federal law.⁹ Only fact questions involving state law claims survived dismissal. Neither case subverts the strong preemption policy Congress has articulated to ensure national railroad operational and safety uniformity.

Conclusion

The Bill's attempt to mandate the size of railroad crews operating within interstate commerce, travelling through Kansas, neither advances safety nor benefits Kansans. There is no evidence that two crew members would be safer or better than one. History has demonstrated that crew size reductions accomplished via advancing technology, and negotiations between railroads and their unions, have made rail the safest and most efficient mode of transportation. The Bill will increase rail costs and result in multiple detriments to Kansans. The Bill may be well intentioned but is indisputably an effort by the State to regulate in areas that Congress has reserved for the STB and the FRA, and thus would be unenforceable. Congress's creation of a federal regulatory regime for the rail industry appropriately recognizes the critical role that the industry plays in our national economy. It also allows the expert federal agencies to craft uniform national rules that best ensure the safe and efficient operation of trains throughout the country, including here in Kansas. The status quo regarding crew size is not broken so it does not need a regulatory fix. BNSF respectfully requests that the Bill be withdrawn.

⁹ 76 F.Supp.3d at 1251.

I appreciate the opportunity to deliver this testimony today, and would be happy to answer any questions you have.

§ 10102. Definitions

In this part--

- (1) “Board” means the Surface Transportation Board;
- (2) “car service” includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;
- (3) “control”, when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;
- (4) “person”, in addition to its meaning under [section 1 of title 1](#), includes a trustee, receiver, assignee, or personal representative of a person;
- (5) “rail carrier” means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;
- (6) “railroad” includes--
 - (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
 - (B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

(7) “rate” means a rate or charge for transportation;

(8) “State” means a State of the United States and the District of Columbia;

(9) “transportation” includes--

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

(10) “United States” means the States of the United States and the District of Columbia.

49 U.S.C.A. § 10501

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection--

(A) the term “local governmental authority”--

(i) has the same meaning given that term by [section 5302](#) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term “public transportation” means transportation services described in [section 5302](#) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over--

(A) public transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in [section 10908](#) of this title, except as provided under [sections 10908](#) and [10909](#) of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under [sections 11102](#) and [11103](#) of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C.A. § 20103

§ 20103. General authority

Effective: November 15, 2021

(a) Regulations and orders.--The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970. When prescribing a security regulation or issuing a security order that affects the safety of railroad operations, the Secretary of Homeland Security shall consult with the Secretary.

(b) Regulations of practice for proceedings.--The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) Consideration of information and standards.--In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

(d) Nonemergency waivers.--

(1) In general.--The Secretary of Transportation may waive, or suspend the requirement to comply with, any part of a regulation prescribed or an order issued under this chapter if such waiver or suspension is in the public interest and consistent with railroad safety.

(2) Notice required.--The Secretary shall--

(A) provide timely public notice of any request for a waiver under this subsection or for a suspension under subpart E of part 211 of title 49, Code of Federal Regulations, or successor regulations;

(B) make available the application for such waiver or suspension and any nonconfidential underlying data to interested parties;

(C) provide the public with notice and a reasonable opportunity to comment on a proposed waiver or suspension under this subsection before making a final decision; and

(D) publish on a publicly accessible website the reasons for granting each such waiver or suspension.

(3) Information protection.--Nothing in this subsection may be construed to require the release of information protected by law from public disclosure.

(4) Rulemaking.--

(A) In general.--Not later than 1 year after the first day on which a waiver under this subsection or a suspension under subpart E of part 211 of title 49, Code of Federal Regulations, or successor regulations, has been in continuous effect for a 6-year period, the Secretary shall complete a review and analysis of such waiver or suspension to determine whether issuing a rule that is consistent with the waiver is--

(i) in the public interest; and

(ii) consistent with railroad safety.

(B) Factors.--In conducting the review and analysis under subparagraph (A), the Secretary shall consider--

(i) the relevant safety record under the waiver or suspension;

(ii) the likelihood that other entities would have similar safety outcomes;

(iii) the materials submitted in the applications, including any comments regarding such materials; and

(iv) related rulemaking activity.

(C) Notice and comment.--

(i) In general.--The Secretary shall publish the review and analysis required under this paragraph in the Federal Register, which shall include a summary of the data collected and all relevant underlying data, if the Secretary decides not to initiate a regulatory update under subparagraph (D).

(ii) Notice of proposed rulemaking.--The review and analysis under this paragraph shall be included as part of the notice of proposed rulemaking if the Secretary initiates a regulatory update under subparagraph (D).

(D) Regulatory update.--The Secretary may initiate a rulemaking to incorporate relevant aspects of a waiver under this subsection or a suspension under subpart E of part 211 of title 49, Code of Federal Regulations, or successor regulations, into the relevant regulation, to the extent the Secretary considers appropriate.

(5) Rule of construction.--Nothing in this subsection may be construed to delay any waiver granted pursuant to this subsection that is in the public interest and consistent with railroad safety.

(e) Hearings.--The Secretary shall conduct a hearing as provided by [section 553 of title 5](#) when prescribing a regulation or issuing an order under this part, including a regulation or order establishing, amending, or providing a waiver, described in subsection (d), of compliance with a railroad safety regulation prescribed or order issued under this part. An opportunity for an oral presentation shall be provided.

(f) Tourist railroad carriers.--In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to Congress not later than September 30, 1995, on actions taken under this subsection.

(g) Emergency waivers.--

(1) In general.--The Secretary may waive compliance with any part of a regulation prescribed or order issued under this part without prior notice and comment if the Secretary determines that--

(A) it is in the public interest to grant the waiver;

(B) the waiver is not inconsistent with railroad safety; and

(C) the waiver is necessary to address an actual or impending emergency situation or emergency event.

(2) Period of waiver.--A waiver under this subsection may be issued for a period of not more than 60 days and may be renewed upon application to the Secretary only after notice and an opportunity for a hearing on the waiver. The Secretary shall immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this part.

(3) Statement of reasons.--The Secretary shall state in the decision issued under this subsection the reasons for granting the waiver.

(4) Consultation.--In granting a waiver under this subsection, the Secretary shall consult and coordinate with other Federal agencies, as appropriate, for matters that may impact such agencies.

(5) Emergency situation; emergency event.--In this subsection, the terms “emergency situation” and “emergency event” mean a natural or manmade disaster, such as a hurricane, flood, earthquake, mudslide, forest fire, snowstorm, terrorist act, biological outbreak, release of a dangerous radiological, chemical, explosive, or biological material, or a war-related activity, that poses a risk of death, serious illness, severe injury, or substantial property damage. The disaster may be local, regional, or national in scope.

49 U.S.C.A. § 20106

§ 20106. Preemption

Effective: August 3, 2007

(a) National uniformity of regulation.--(1) 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.

(2) 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 safety 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.

(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) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.