

Norfolk Southern Railway.txt

Subject: Norfolk Southern Railway Comments in RIN 1601-AA14
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Attached in wordPerfect 10 Format are comments filed in RIN 1601-AA14 on behalf of Norfolk Southern Railway Company and its subsidiary railroads.

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BEFORE THE
DEPARTMENT OF HOMELAND SECURITY

RIN 1601-AA14

PROCEDURES FOR HANDLING CRITICAL
INFRASTRUCTURE INFORMATION:
NOTICE OF PROPOSED RULEMAKING

COMMENTS OF THE
NORFOLK SOUTHERN RAILWAY COMPANY AND ITS SUBSIDIARY RAILROADS

FILED ELECTRONICALLY JUNE 16, 2003 AT CIL.REGCOMMENTS@DHS.GOV

Norfolk Southern Railway Company and its subsidiary railroads (collectively referred to as “Norfolk Southern”) are common carriers by rail which operate in twenty-two (22) states, the District of Columbia, and the Province of Ontario, Canada. Norfolk Southern hereby adopts by reference, in their entirety, the comments filed in this proceeding by the Association of American Railroads (AAR). In addition, Norfolk Southern submits the following comments as a supplement to the comments filed by the AAR.

One provision of DHS’s proposed rules - i.e., §29.8(g)(2) - appears to undercut the overall goal of the HSA by stating that state or local agencies or authorities are not prohibited from independently obtaining Protected CII directly from the submitter of the Protected CII. This Proposed Rule is inconsistent both with the provisions of §214(c) of the HSA (6 U.S.C. §133(c)) and Proposed Rule §29.3(d) which both state that state and local governmental agencies may only acquire Protected CII independently if permitted to do so “under applicable [federal, state or local] law.”

Proposed rule §29.8(g)(2) appears to leave open the possibility that Protected CII Information could be collected and disclosed without restriction pursuant to a state or local disclosure law even though such collection and disclosure may be prohibited under applicable federal law. Such indiscriminate collection and

disclosure of CII information will not effectuate the Congressional purpose in enacting §214 of the HSA.

At the very least, Proposed Rule §29.8(g)(2) should be consistent with both §214(c) of the HSA and Proposed Rule §29.3(d.) Both the statutory provision and proposed rule §29.3(d) state that nothing in the HSA or HSA's proposed rules should limit the ability of a federal, state or local government agency to independently obtain information if authorized to secure such information "under applicable [federal, state or local] law." However, §28.9(g)(2) contains no such express limitation. Hence, Norfolk Southern submits that Proposed Rule §29.8(g)(2) should be amended to read as follow:

These procedures do not limit or otherwise affect the ability of a State or local government entity, agency, or authority to obtain, ***under applicable federal, state or local law***, information directly from the same person or entity voluntarily submitting information to DHS.

Such a change will clarify that the HSA confers no independent right on any governmental entity, or any third party, to obtain Protected CII information, and that such CII information may be obtained, if at all, only pursuant to otherwise applicable law. Such applicable laws may further restrict the right to receive or disseminate such information.

For example, in Section 1711 of the HSA, Congress amended the preemptive provision of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §5125, so that regulations issued by the Secretary of Homeland Security relating to transportation of hazardous materials would preempt state and local laws or regulations that are inconsistent with the purpose of the HMTA and/or are not substantially similar to the regulations issued by the Secretary. See, e.g., a Preemption Determination issued by the Research and Special Programs Administration (RSPA) that a Florida county's attempt to obtain information about hazardous materials being transported through the county was preempted under §49 U.S.C. 5125(b)(1)(D). 65 Fed. Reg. 81950 (2000).

Moreover, in Section 1710 of the HSA Congress amended the preemptive provision of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20106, to provide that regulations relating to railroad security

issued by the Secretary of Homeland Security would preempt any statewide law that regulates the same subject matter as a regulation issued by the Secretary of Homeland Security as well as any local law relating to the regulation of railroad security, regardless of whether the Secretary of Homeland Security had regulated the same subject matter. See, e.g., *CSX Transportation v. Plymouth*, 86 F.3d 626 (6th Cir. 1996) holding that “Congress expressly intended that the FRSA preempt[s] all railroad safety legislation except state law governing an area in which the Secretary of Transportation has not issued a regulation or order and state law more strict than federal regulations when necessary to address local problems” but that local ordinances relating to railroad safety are preempted regardless of whether the Secretary of Transportation has regulated the subject matter. *Id.* at 628.

In short, if the change recommended by Norfolk Southern should be adopted by the Secretary of Homeland Security, the change will ensure that state or local governments that have a need to obtain Protected CII data will do so within the parameters established in both the HSA and these proposed rules, rather than attempting to obtain this information independently from the submitter under newly enacted state or local laws or ordinances.

Respectfully submitted,

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