ASSOCIATION OF AMERICAN RAILROADS

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The Honorable Kumar P. Barve, Chair
Environmental & Transportation Committee
251 House Office Building
6 Bladen Street
Annapolis, MD 21401

Re: Federal Preemption of House Bill 492

Dear Chairman Barve and Committee Members:

I am the President of the Association of American Railroads (AAR), which is a trade association representing the interests of railroads in the United States. AAR members include numerous railroads that operate in, and employ many residents of, the State of Maryland. AAR members operating in Maryland include CSX Transportation, Inc., the Norfolk Southern Railway Company, the National Railroad Passenger Corporation (Amtrak), and short line railroad companies that are considered small businesses.

I write regarding House Bill 492 (HB 492), which would require freight railroads operating in the State of Maryland to have at least two crew members when a train or locomotive movement is conducted over a corridor that also hosts commuter train or high-speed rail traffic. As discussed in more detail in the attached memorandum, *there have been two important, recent developments* in this area since the last time the Committee considered crew size legislation, which firmly establish that state laws regarding crew size – like HB 492 – are preempted by federal law:

- **Federal Railroad Administration Rules State Crew Size Laws are Preempted**: On May 29, 2019, the Federal Railroad Administration, the expert federal regulatory agency that has authority to establish national standards in every area of railroad safety, determined that there is *no data showing two-person crews are safer* than one-person crews and concluded that regulation of minimum train crew is not justified, and indicated its intent to *preempt all state laws and regulations* on that topic.

- **Federal Court Rules State Crew Size Laws are Preempted**: On September 30, 2020, the U.S. District Court for the Northern District of Illinois held that an Illinois state crew size law very similar to HB 492 was preempted by the Federal Railroad Safety Act (FRSA),

49 U.S.C. § 20106(a)(2). *See Ind. R.R. Co. v. Ill. Commerce Comm'n*, No. 19-6466 (N.D. Ill. Sept. 30, 2020).

Efficient transportation of freight by rail is safe, environmentally friendly, and essential to the nation's economy. AAR appreciates your consideration of this matter, and please do not hesitate to contact me with any questions.

Respectfully,

Ian J. Jefferies

Attachment

ASSOCIATION OF AMERICAN RAILROADS

FEDERAL PREEMPTION OF HB 492

The Maryland House of Delegates recently proposed legislation in House Bill 492 (HB 492) regarding the conduct of freight railroad operations. HB 492, if enacted, would require freight railroads operating in the State of Maryland to have at least two crew members when a train or locomotive movement is conducted over a corridor that also hosts commuter train or high-speed rail traffic. This proposal parallels previous similar legislative proposals in Maryland. Under several applicable federal laws, however, state regulation of railroad operations and safety matters is preempted. Specifically, HB 492 is preempted by the Federal Railroad Safety Act ("FRSA")(49 U.S.C. § 20106(a)(2)), the Regional Rail Reorganization Act ("3R Act")(45 U.S.C. § 797j)), and the ICC Termination Act of 1995 ("ICCTA")(49 U.S.C. § 10501(b)).

Federal Railroad Safety Act Preemption

In FRSA, Congress directed that "[l]aws, regulations, and orders related to railroad safety" must be "nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1); *see also Michigan S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1155 (7th Cir. 2001) ("Congress' occupation of the field of railroad regulation is to ensure uniform national standards."). To ensure national uniformity, FRSA generally provides that a state law is preempted when FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). A federal regulation or order covers the subject matter of a state law when "the federal regulations substantially subsume the subject matter of the relevant state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993).

What this means is that when FRA regulates in an area related to railroad safety, states may not also regulate in that area. Likewise, when "FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted." *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999) (invalidating bulk of Wisconsin's law requiring two-person crews). In that circumstance, "[s]tates are not permitted to use their police power to enact such a regulation." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).

In May 2019 FRA determined that minimum crew-size requirements are unnecessary and inappropriate, and that states may not regulate crew size. 84 Fed. Reg. 24,735, 24,741. FRA expressly concluded that "no regulation of train crew staffing is necessary or appropriate at this time" and made "an affirmative decision not to regulate with the intention to preempt state laws." *Id*.

FRA's determination was the result of several years of careful consideration of an extensive record. In 2013, FRA tasked the Railroad Safety Advisory Committee ("RSAC"), FRA's federal advisory committee that includes representatives from the agency's major stakeholder groups, with considering train crew size. FRA lacked "reliable or conclusive statistical data to suggest whether one-person crew operations are safer or less safe than multiple-person crew operations" and hoped the RSAC could fill in the gap. 84 Fed. Reg. at 24,735, 24,737. But the RSAC could not "identify conclusive, statistical data to suggest whether there is a safety benefit or detriment from crew redundancy." *Id*. at 24,736.

In March 2016, FRA initiated a formal rulemaking proceeding, proposing to establish minimum crew-size requirements depending on the type of operations. *See* 81 Fed. Reg. at

13,937. During the rulemaking process, FRA received nearly 1,600 comments and held a public hearing. 84 Fed. Reg. at 24,736. After considering all the comments and testimony, FRA decided to withdraw its proposed regulations because it concluded that establishing a minimum crew size would be unnecessary and inappropriate. "[D]espite studying this issue in-depth and performing extensive outreach to industry stakeholders and the general public," FRA still could not "'provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations.'" 84 Fed. Reg. at 24,737.

In particular, FRA noted that the relevant "accident/incident safety data does not establish that one-person operations are less safe than multi-person train crews." *Id*. at 24,739 (footnote omitted). Reviewing data from 2001 through 2018, FRA "could not determine that any of the accidents/incidents involving a one-person crew would have been prevented by having multiple crewmembers." *Id*. at n.30. Indeed, "existing one-person operations 'have not yet raised serious safety concerns' and, in fact, 'it is possible that one-person crews have contributed to the [railroads'] improving safety record.'" *Id*. at 24,739. Moreover, the comments FRA received did "not provide conclusive data suggesting that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember or that one-person crew operations are less safe." *Id*. at 24,740.

FRA's extensive review did not suggest any safety benefits from establishing a minimum crew size requirement. Rather, FRA concluded that establishing such a requirement would impose significant costs, including loss of future safety improvements through technological innovation. Specifically, "[a] train crew staffing rule would unnecessarily impede the future of

rail innovation and automation," despite the federal government's recognition that technology and automation have "the potential to increase productivity, facilitate freight movement, create new kinds of jobs, and, most importantly, improve safety significantly by reducing accidents caused by human error." *Id*. (italics and capitalization omitted).

Thus, FRA decided to close its rulemaking process and published a final order to that effect. In doing so, FRA expressly "determined that no regulation of train crew staffing is necessary or appropriate at this time." 84 Fed. Reg. at 24,741. FRA noted that several states had laws regulating crew size. *Id*. Because it concluded that no such regulation was justified, FRA announced its intent "to negatively preempt any state laws concerning that subject matter." *Id*.

Accordingly, as a matter of law any attempt by the Maryland Legislature to regulate in the area of train crew size is preempted. FRA "closely examin[ed] the train crew staffing issue" and affirmatively and expressly "determin[ed] that no regulation of train crew staffing is appropriate." *Id*. FRA explained that in issuing its final order the agency intended "to cover the same subject matter as the state laws regulating crew size and therefore expect[ed] it will have preemptive effect." *Id*. And FRA announced its intent "to preempt all state laws attempting to regulate train crew staffing in any manner." *Id*. That is precisely the "sort of affirmative decision [that] preempts state requirements." *Doyle*, 186 F.3d at 802.

Confirming that the FRA's decision not to regulate crew size prohibits state crew size regulation, on September 30, 2020, the U.S. District Court for the Northern District of Illinois held that a recently enacted Illinois crew size law (Pub. Act 101-0294, § 2) was preempted by FRSA. *See Ind. R.R. Co. v. Ill. Commerce Comm'n*, No. 19-6466 (N.D. Ill. Sept. 30, 2020), ECF 96.

The court held that the Illinois law's minimum train crew requirement directly conflicted with FRA's decision, explaining "the FRA considered the subject of a crew-size minimum, decided not to impose one, and indeed decided to preempt any state-law attempts to do so." *Id*. at 7 (citation omitted).

Regional Rail Reorganization Act Preemption

HB 492 also conflicts with and is expressly preempted by Section 711 of the 3R Act, as amended by Section 1143(a) of the Northeast Rail Service Act (45 U.S.C. § 797j). As amended, Section 711 of the 3R Act provides that:

> [n]o state may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation [Conrail] to employ any specified number of persons to perform any particular task, function, or operation, or requiring the Corporation to pay protective benefits to employees, and *no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to any railroad in the Region*.

45 U.S.C. § 797j (emphasis added). Maryland is a "State in the Region" as defined by Section 102 of the 3R Act. *See* 45 U.S.C. § 702(17) & (19). And railroads that operate in Maryland are "railroad[s] in the Region" under Section 711 of the 3R Act. *See* § 702(15) & (17).

"The legislative goal of the 3R act was to give Conrail"—the federally created successor to numerous bankrupt rail carriers—"the opportunity to become profitable, but not necessarily to disadvantage all other railroads at the same time." *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 582 F. Supp. 1552, 1556 (Reg'l Rail Reorg. Ct. 1984). Thus, Congress extended

the 3R Act's preemption provision not just to Conrail and its successors (and the two Class I freight railroads operating in Maryland, CSX and Norfolk Southern, are Conrail successors), but to *all* railroads in the specified area. *See id.*; 45 U.S.C. § 797j.

HB 492 directly conflicts with this express preemption provision. The proposed legislation specifies that "a crew of at least two individuals" *must* be used to operate certain freight trains or light engines in Maryland. If enacted, HB 492 would indisputably be a "law" requiring a "specified number of persons to perform any particular task, function, or operation." 45 U.S.C. § 797j. Thus, HB 492 is preempted under the 3R Act, like many other previous attempts by "States in the Region" to regulate minimum crew size. *See*, *e.g.*, *Norfolk & W. Ry. Co. v. Pub. Serv. Comm'n of W. Va.*, 858 F. Supp. 1213, 1214 (Reg'l Rail Reorg. Ct. 1994) (West Virginia crew-size statute preempted); *Boettjer v. Chesapeake & Ohio Ry. Co.*, 612 F. Supp. 1207, 1209 (Reg'l Rail Reorg. Ct. 1985) (Indiana statute preempted); *Keeler v. Consol. Rail Corp.*, 582 F. Supp. 1546, 1550 (Reg'l Rail Reorg. Ct. 1984) (same).

ICC Termination Act of 1995 Preemption

HB 492 is also preempted by ICCTA. ICCTA establishes that the U.S. Surface Transportation Board's jurisdiction over "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 … is *exclusive*." 49 U.S.C. § 10501(b) (emphasis added). Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." *Id*.

"Congress's intent in [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. Co. v. Chi. Transit*

Auth., 647 F.3d 675, 678 (7th Cir. 2011) (collecting cases). ICCTA "preempts *all* state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) (emphasis added). "Congress recognized that continuing state regulation—of intrastate rail rates, for example—would risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." *Iowa, Chi. & E. R.R. Corp. v. Wash. Cty.*, 384 F.3d 557, 559 (8th Cir. 2004). "[S]tate or local statutes or regulations are preempted *categorically* if they have the effect of managing or governing rail transportation." *Delaware,* 859 F.3d at 19 (emphasis added; quotation marks omitted). And even state laws "that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation." *Id.*

HB 492 conflicts with and is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. HB 492 is not of general applicability: it applies only to freight railroads, specifically purporting to regulate their staffing practices and prohibiting them from operating certain trains with fewer than two crew members. HB 492 imposes train crew staffing requirements that are not mandated by states neighboring Maryland and will burden interstate commerce. Trains moving between states with differing crew-size requirements would need to stop to add or remove crew members, causing railroads to incur additional costs for rest facilities and crew transportation and—ultimately—reducing efficiencies for shippers and the public. HB 492 imposes exactly the balkanized and

unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.[1]

Conclusion

The above-described federal statutes, judicial decisions interpreting those laws, and recent action by FRA all firmly establish that state laws regarding minimum train crew size are preempted. AAR urges the Maryland House of Delegates to withdraw this legally invalid legislative proposal.

[1] Similarly, HB 492 is also invalid under the dormant Commerce Clause of the Federal Constitution. U.S. Const. art. I, § 8, cl. 3. HB 492 would require trains with fewer than two crew members entering Maryland to stop and add additional crew members. This burden specifically imposed on railroads engaged in interstate commerce is akin to the situation in *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945), where the Supreme Court of the United States held that a State of Arizona law attempting to regulate the length of trains entering or operating within Arizona violated the Commerce Clause.