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March 23, 2021

TO: Senate Finance Committee

RE: Support for HB-492

CURRICULUM VITAE OF LAWRENCE M. MANN
ATTORNEY at LAW

Lawrence M. Mann, born Wilmington, North Carolina, January 30, 1940; admitted to bar, in 1967, District of Columbia. Education: University of North Carolina (B.A., 1962); Georgetown University (L.L.B., 1966). Special Assistant to United States Senator Vance Hartke, 1964-1965. Member, Legal Staff, U.S. House of Representatives Post Office and Civil Service Committee, 1965-1966. Counsel, Commission on Political Activity of Government Personnel, 1967. Member: The District of Columbia Bar; Bar Association of the District of Columbia.

I am a member in good standing of the Bars of the following Courts:

Court	Date Admitted
U.S. Supreme Court	03/27/72
U.S. District Court for the District of Columbia	01/20/67
U.S. Court of Appeals for the District of Columbia Circuit	02/16/67
U.S. Court of Appeals for the 11th Circuit	10/01/81
U.S. Court of Appeals for the 10th Circuit	11/06/78
U.S. Court of Appeals for the 9th Circuit	07/08/75
U.S. Court of Appeals for the 8th Circuit	02/13/75
U.S. Court of Appeals for the 7th Circuit	02/13/67
U.S. Court of Appeals for the 6th Circuit	03/27/90
U.S. Court of Appeals for the 5th Circuit	12/21/81
U.S. Court of Appeals for the 4th Circuit	03/14/75
U.S. Court of Appeals for the 3rd Circuit	06/05/87
U.S. Court of Appeals for the 2nd Circuit	10/25/88
U.S. Court of Federal Claims	02/11/70

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First, I would like to inform the Committee concerning my background. I was a principal draftsman of the Federal Railroad Safety Act of 1970. This law contains the statutory authority of states to regulate railroad safety and preemption. I am attaching my *curriculum vitae*. I have dealt with preemption issues raised by railroads for many years. I will discuss some of the issues that railroads have raised previously to oppose state regulation of two person crews.

A. The Authority Of A State To Require Two Person Crews Has Been Decided.

The Seventh Circuit Court of Appeals in a case entitled *Burlington Northern and Santa Fe Railway Co. v. Doyle*, 186 F. 3d 446 (7th Cir. 1999) held that the state of Wisconsin's requirement for a two person crew was valid and was not preempted by federal law. The court said that a state could require two persons on a train, but could not mandate that the crew members be either a certified engineer or a qualified trainman. It is valid simply to legislate that two persons are required to operate a train. The court determined that the federal regulations cover the actual qualifications of each employee.

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February 13, 2019

TO: Senate Finance Committee

RE: Support for SB-252

B. The Proposed Law Covering Two Person Crews is Not Preempted by 45 U.S.C. §797j.

The purpose for which 45 U.S.C. 797j was enacted, to return Conrail to private ownership, and thus the factual underpinnings of the statute no longer exist. The law has been rendered obsolete, is unconstitutionally vague and lacks any rational basis to withstand constitutional scrutiny.

In the Rail Safety Improvement Act of 2008, Congress required the Federal Railroad Administration to study the current relevance of that section. In 2011 FRA issued its report and concluded:

> The statutory purpose for which Section 711[Section 711 of the Regional Railroad Reorganization Act of 1973] was originally enacted has clearly been satisfied. Conrail has been successfully returned to the private sector and no longer requires a special statutory exemption from state laws requiring it to employ any specific number of persons to perform any particular task, function or operation.

FRA further stated "The primacy of Federal law over state law in this area existed in order to serve a narrow and specifically defined purpose: the privatization of Conrail. That purpose has been met and it is appropriate to return the primacy of state law."

Obsolete laws, such as 45 U.S.C. 797j, are without force. "[S]tatutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure." *State ex rel. S. M. B. v. D.A.P.*, 284 S.E.2d 912, 915 (W.Va.1981)

(citing *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978); *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978); *See also, State v. Stephens*, 591 P.2d 827, 832 (Wash. App.1979) *rev'd. on other grounds*, 607 P.2d 304 (1980) ("The statute is obsolete insofar as several of the 'inherently dangerous misdemeanors' listed ... no longer exist...."); *Brown v. Merlo*, 506 P.2d 212 (Cal. App.1973); *State v. Daley*, 287 N.E.2d 552, 555 (Ind. App. 1972) ("The assumption of the Insurance Statute is that sovereign immunity obtains. With that doctrine now abolished in this class of cases, the Insurance Statute is no longer a shield to limit the State's liability."); *Krause v. Baltimore & O. R. Co.*, 39 A.2d 795, 797 (1944) ("The absence of crossing gates under the circumstances in this case is not evidence of negligence, to which could be attributed this accident. We think the city law requiring crossing gates at this point is obsolete....").

A party has "no legally cognizable interest in the constitutional validity of an obsolete statute."*Davidson v. Comm. for Gail Schoettler, Inc.*,24 P.3d 621, 623 (Colo.2001)(quoting *Citizens for Responsible Gov't State Political Action Comm.*,236 F.3d 1174, 1182 (10th Cir.2000)).

Additionally, given that Conrail has been returned to private ownership, 45 U.S.C. 797j is also unconstitutionally vague, as it is unclear to what entity the statute now applies. *See, Fellowship Baptist Church v. Benton,* 620 F. Supp. 308,

318 (D.C.Iowa, 1985),*aff'd. in part,*815 F.2d 485, 495–496 (8th Cir.1987) (Term "equivalent instruction" unconstitutionally vague, but remanded for further consideration in light of newly adopted standards by the state); *Ellis v. O'Hara,*612 F. Supp. 379 (D.C. Mo. 1985), (Reversed and remanded to consider mootness in light of legislative action);*Wisconsin v. Popanz,* 332 N.W.2d 750 (Wisc.1983), (Term "private school" vague where regulations and statute do not define, and each district administrator compiled a list by his own individual standard); *Minnesota v. Newstrom,*371 N.W.2d 525 (Minn.1985), (Phrase "essentially equivalent" held vague).

Although "the void for vagueness doctrine arose as an aspect of Fourteenth Amendment due process in the context of criminal statutes, ... [t]he doctrine has been extended to civil cases."*San Filippo v. Bongiovanni,* 961 F.2d 1125, 1135 (3d Cir.1992). Vague laws offend the assumption that "man is free to steer between lawful and unlawful conduct," and thus "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."*Grayned v. Rockford,*408 U.S. 104, 108 (1972); S*ee also, Connally v. General Constr. Co.,*269 U.S. 385, 391(1926)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *Bradley v.*

Pittsburgh Bd. of Educ.,910 F.2d 1172, 1177 (3d Cir.1990). A second justification for vagueness challenges is to prevent arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" *Grayned v. Rockford, supra,*408 U.S. at 108-109; *Kolender v. Lawson,*461 U.S. 352, 358 (1983).

Here, the statute at issue is no longer clear as to what is prohibited, given that Conrail has been returned to private ownership, and that statute would impermissibly delegate to judges and juries what the statute now means in light of Conrail becoming a private entity.

Thirdly, 45 U.S.C. 797j now unconstitutionally violates the Equal Protection Clause because it lacks any rational basis for is existence. The purpose of the statute, to return Conrail to private ownership, has now been satisfied; removing any rational basis that once existed for the statute's enactment. *Vacco v. Quill,* 521 U.S. 793 (1997) , where the Court noted that the Equal Protection Clause embodies a general rule that States must treat like cases alike, and that legislation must, at a minimum, bear a rational relationship to a legitimate state interest.; *Romer v. Evans,* 517 U.S. 620, 631(1996). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the

link between classification and objective gives substance to the Equal Protection Clause."

C. Views of the Maryland Attorney General Regarding Crews on Locomotives.

The Maryland Attorney General's office has written two letters to the legislature regarding the validity of a two person crew bill, one dated March 6, 2015 to the Honorable Cory v. McCray, and another dated February 10, 2016 to Honorable Brian J. Feldman. In both letters, it was concluded that such legislation is not preempted. The March, 2015 letter concludes "appears to neither violate, nor is preempted by, federal law as it relates to crew member requirements for trains used in connection with the movement of freight in the State." In the follow up letter, which i understand was requested by the railroads' representatives, it stated "if a sufficient legislative record is established to demonstrate that the minimum crew size requirements under the bill are primarily related to safety and will not interfere with rail transportation, a court is unlikely to find that the requirement is preempted under the ICCTA.

D. Argument By Railroads that the Federal Railroad Administration Adequately Enforces Railroad Safety.

A frequent argument by railroads throughout the country opposing two person crew legislation is that safety is adequately protected by the Federal

Railroad Administration. Nothing could be further from the truth. The U.S. General Accountability Office issued a report in December 2013, after studying FRA enforcement, entitled "Rail Safety: Improved Human Capital Planning Could Address Emerging Safety Oversight Challenges." It pointed out on pg. 9 "By FRA's own estimation, its inspectors have the ability to inspect less than 1 percent of the federally regulated railroad system." Moreover, additionally, there is very little incentive for railroads to comply with FRA regulations because every proposed fine is compromised pursuant to the Federal Claims Collection Act.

E. Preemption Under The Federal Railroad Safety Act.

1. Section 20106 Of The Federal Railroad Safety Act Explicitly Provides For State Regulation Of Rail Safety.

Despite the Federal Railroad Safety Act's general language vesting regulatory authority of rail safety matters in the Secretary of Transportation, section 20106 of the FRSA explicitly authorizes state regulation of railroad safety. A state may regulate railroad safety until such time as the Federal Railroad Administration has adopted a regulation covering the same specific subject matter. Even if the federal government has regulated the subject matter, the state may regulate safety if it is necessary to eliminate a local safety hazard.

The statute provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation 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 when the law, regulation, or order--

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

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

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See, Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Burlington Northern R.R. Co. v. Montana*, 880 F.2d 1104 (9th Cir. 1989).

After pointing out the policy of uniformity, Congress expressed a countervailing policy in granting states rail safety powers where there were no regulations covering a specific subject matter, and where local hazards necessitated more stringent requirements. 49 U.S.C. § 20106. The language of FRSA, its legislative history, and the court decisions interpreting it, make it clear that Congress did not intend to displace state rail safety regulations absent the specific exercise of federal regulatory authority. *See, Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).

2. The Legislative History Of The FRSA Evidences Congressional Intent That States Regulate Railroad Safety.

The railroads contend that the state law should be struck down by the court because Congress intended nationally uniform rail safety rules. The railroads ignore the specific language of the statute and the legislative history regarding state participation in the regulation of rail safety.

In testifying on the proposed rail safety legislation, then Secretary of Transportation John Volpe discussed Senate Bill 1933, as passed by the Senate,

pointing out the areas of permissible state jurisdiction over railroad safety. The relevant portion of Secretary Volpe's testimony states:

> To avoid a lapse in regulation, federal or state, after a federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the federal statute.... (underlining added).

Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d. Sess. 29 (1968).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in the same section, 49 U.S.C. § 20106, was a countervailing concern to avoid gaps in rail safety coverage. Furthermore, the general policy outlined in the first sentence of this section should yield to the more specific provisions contained in the remainder of that section.

The Congressional reports reiterated the authority of states to regulate railroad safety. The Senate Report explained:

> The committee recognizes the state concern for railroad safety in some areas. Accordingly, this section [105] preserves from Federal preemption two types of state power. First, the states may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All state requirements will remain in effect until preempted by federal action concerning the same subject matter. (underlining added).

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969) (hereinafter "Senate Report").

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the state would no longer have authority to establish state wide standards with respect to rail safety.

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess., 19 (1970), (hereinafter "House Report") (underlining added).[1]/

Harley Staggers, then Chairman of the House Committee on Interstate and Foreign Commerce, stated that "I would like to emphasize that the states will have an effective role under this legislation." 116 Cong. Rec. H27612 (daily ed. Aug. 6, 1970). Another member emphasized the importance of the states role:

> Here again, the State is actively intertwined as a working partner with the federal government. It will be the State, the unit closest to the ground, which conducts the investigation, which submits the recommendations, which finds the problem before disaster strikes.
>
> Contrary to some speculation that this version of the Railroad Safety Act cuts across state jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas of safety not covered by federal regulations; secondly, the State can deal directly with hazards of essentially local nature; and thirdly, the State can keep the Department of Transportation with their feet to the fire....

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[1]/ Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 49 U.S.C. § 20106.

116 Cong. Rec. H26613 (daily ed. August 6, 1970) (Statement of Rep. Pickle) (underlining added).

As Congress has explicitly stated, the FRSA prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, are intended to preempt state railroad safety regulations. Only where the FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Wisconsin v. Wisconsin Central Transportation Corp.*, 546 N.W.2d 206, 210 (Wis. 1996) (stating "[t]he use of ...'covering' in the preemption clause suggests that the Congressional purpose was to allow states to enact regulations relating to railroad safety up to the point that federal legislation enacted a provision which specifically covered the same material." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *CSX Transportation, Inc. v. Easterwood, supra.*

The initial inquiry in determining whether the Wisconsin law is preempted by federal law depends upon whether the federal government has prescribed a regulation covering the same subject matter of the State requirement.

3. Pursuant To *CSX Transportation, Inc.. Easterwood*, State Laws Are Not Preempted Unless The Federal Government Has Adopted Regulations Which Substantially Subsume The Subject Matter Of The State Law.

With respect to preemption generally, the Supreme Court has observed that:

> Pre-emption fundamentally is a question of Congressional intent ... and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

Congress adopted the FRSA in response to growing concerns about threats to public safety, and did not intend to reduce public protection through this action by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law...." *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 184 (7th Cir. 1995). As another court said:

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but [the act creating the FRSA express preemption statute] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.

Civil City of South Bend, Ind. v. Consolidated Rail Corp., 880 F. Supp. 595, 600 (N.D. Ind. 1995).

The Supreme Court observed, "we have long presumed that Congress does not cavalierly pre-empt state-law...." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress clearly provided a continuing role for state regulation of railroad safety to avoid the creation of regulatory gaps. In addition, the Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, " Malone v. White Motor Corp., 435 U.S. at 505, "there is no need to infer congressional

intent to pre-empt state laws from the substantive provisions" of the legislation.

In *Easterwood*, the Supreme Court interpreted for the first time the preemptive scope of 49 U.S.C. § 20106, defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thus preempting the state regulation of the said subject matter. The Court began its preemption analysis citing the long held notion that, "[i]n the interest of avoiding unintended encroachment on the authority of the States, ... a court interpreting a federal statute ... will be reluctant to find pre-emption." *Id.* 507 U.S. at 663-64 (underlining added). Similarly, the Court observed that preemption of state law under the FRSA is subject to a "relatively stringent standard," and "presumption against preemption." *Id.* at 668 (underlining added). The *Easterwood* decision has been interpreted to mean that "a presumption against preemption is the appropriate point from which to begin [a preemption] analysis." *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 90 (Ohio 1994); *Southern Pacific Transportation, Co. v. Public Utility Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993) (stating "In evaluating a federal law's preemptive effect, however, we proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act 'unless that [is] the clear and manifest purpose of Congress'").

The Court, in *Easterwood*, held that a subject matter is not preempted when the Secretary has issued regulations which merely "touch upon" or "relate to" that subject matter. *Id.* 507 U.S. at 664. The Court stated that Congress' use of the word "covering" in § 20106 "indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Id. (underlining added). The Court recognized the state interest and right to regulate

railroad safety, noting that "[t]he term 'covering' is ... employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665 (underlining added).

Easterwood clearly rejects the position advanced by railroads that if federal regulations cover the same safety concerns, then the state law would be preempted. To determine preemption, a court must not conduct an inquiry into the purpose or effect of state regulations, or whether the federal rule addresses the same safety concerns. *See, Southern Pacific Transportation Co. v. Public Utility Comm'n of Oregon, supra,* 9 F.3d at 812. The Supreme Court, interpreting the FRSA preemption provisions, stated that,

> Section 434 [now recodified at 49 U.S.C. § 20106] does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter....

Easterwood, 507 U.S. at 675.

The Supreme Court's analysis of the facts in the *Easterwood* case is instructive. The Plaintiff in that wrongful death action alleged that the railroad company was negligent under state common law in two respects: for failing to maintain an adequate warning device at a highway crossing and for operating the train at excessive speeds. The railroad company defended on the ground that various FRSA regulations preempted both state law claims. The Court found that the Plaintiff's excessive speed claim was preempted because the FRA had adopted regulations specifically setting the maximum allowable operating speeds for such trains and that this "should be understood as covering the subject matter of train speed." *Id.*, 507 U.S. at 675. However, because federal regulations requiring

certain warning devices at some highway crossings[2/] did not apply to the specific crossing at issue, the Court found that the Plaintiff's second claim was not preempted. Id. at 670-73. The Court thus required evidence of very specific "clear and manifest" federal regulation on the same subject matter covered by state law before the state law was preempted.

The Supreme Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. *Miamisburg, supra,* 626 N.E.2d at 93.

Similarly in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of Oregon, supra,* the court noted that:

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

9 F.3d at 812.

The court continued:

> ...in light of the restrictive term "cover" and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.

Id., 9 F. 3d at 813.

Before finding that a state law is preempted, other courts have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law since *Easterwood. See, e.g., Miller v. Chicago & North*

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[2] / Namely, those in which the installation of warning devices were funded by the federal government. C.f. Norfolk Southern Railway Co. v. Shanklin, 2000 U.S. LEXIS 2519 (Apr. 17, 2000).

Western Transp. Co., 925 F. Supp. 583, 589-90 (N.D. Ill. 1996) (state claim based on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject); *Thiele, supra,*68 F.3d at 183-84 (no preemption of state law "adequacy of warning claims" prior to time that warning devices "explicitly prescribed" by federal regulations are actually installed); *Miamisburg, supra,* 626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment). *Compare, Peters v. Union Pacific R.R. Co.*, 80 F.3d 257, 261 (8th Cir. 1996) (FRA promulgation of, "specific, detailed scheme" of regulations concerning revocation of locomotive engineers certification preempts state law conversion action to recover revoked certificate).

The *Easterwood* decision is in keeping with an earlier decision of the United States District Court for the Northern District of California in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd. per curiam*, 820 F.2d 1111 (9th Cir. 1987). That court held that in order for there to be federal "subject matter" preemption of state regulations, the federal regulation must address the same safety concern as addressed by the state regulation. Judge William Schwarzer explained:

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was 'to promote safety in all areas of railroad operations.' H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted.

Id. at 1225 (underlining added).

See also, National Association of Regulatory Utility Comm'rs v. Coleman, 542 F.2d 11 (3d. Cir. 1976), where the Third Circuit held that only the precise subject matter of the FRA regulations (monthly accident reporting requirements) was beyond a state's regulatory authority. However, FRA regulation of monthly accident reporting requirements would not preclude states from requiring immediate notification of rail accidents, nor from requiring railroads to furnish copies of monthly FRA reports to the state. *Id.* at 15.

E. The Federal Railroad Safety Act Governs Whether A State Safety Law Is Preempted, Not The Interstate Commerce Commission Termination Act.

Another favorite argument of railroads is that the Interstate Commerce Commission Termination Act preempts state regulation here. In 1995 Congress enacted the ICCTA to limit the economic regulation of various modes of transportation, and created the Surface Transportation Board to administer the Act. The STB has exclusive jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities..." 49 U.S.C. § 10501(b). The ICCTA confers upon the STB "all regulatory power over the economic affairs and non-safety operating practices of railroads." *Petition of Paducah & Louisville Ry., Inc.*, FRA Docket No. 1999-6138, at 6-7 (Jan. 13, 2000); See also, S. Rep. No. 104-176, at 5-6 (1995). There exists absolutely nothing in the ICCTA nor its legislative history to suggest that the STB could supplant the Federal Railroad Safety Act provisions. The relevant statute for

any safety preemption analysis is the FRSA, not the ICCTA. While the STB may consider safety along with other issues under its jurisdiction, it cannot adopt safety rules or standards. That is the duty of the Secretary of Transportation, or the states if the DOT has not prescribed a regulation

covering the subject matter involved.

It is significant that both the STB and the Federal Railroad Administration have rejected the railroads argument that the ICCTA preempts state laws regarding railroad safety. Each agency filed *amicus* briefs in *Tyrrell v. Norfolk Southern Ry.*, No. 99-306 (6th Cir.), arguing that the FRSA , not the ICCTA, is the appropriate statute to determine state safety preemption. As noted also in FRA Docket No. SIP-1, Notice No. 1, STB Ex Parte No. 574 (Joint FRA/STB Notice of Proposed Rulemaking, 63 Fed. Reg. 72,225-26 (Dec. 31, 1998) :

> [u]nder Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad. Administrator....FRA has authority to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries ...[and by] actively participating in STB rail proceedings, and monitoring railroad operations during the implementation of STB-approved transactions. The Board is also responsible for promoting a safe rail transportation system.

The brief of the STB in the above case states that the lower court's ruling in favor of the railroad would:

Undermine the primary authority of the Federal Railroad Administration (FRA) (or states where the FRA has no Federal standards) to regulate railroad safety under FRSA.
(STB Brief at p.3).

The bottom line is that the railroads argument regarding ICCTA preemption of state railroad safety laws has no merit.

F. The Railway Labor Act Does Not Preempt State Rail Safety Laws.

The Federal Railroad Safety Act has been in existence since 1970, and to my knowledge, no court has ever ruled that collective bargaining agreements or any railroads rights under the Railway Labor Act preempted a state safety law. This, of course, is the only rational conclusion that could be drawn from the FRSA. Otherwise, the railroads and the unions could potentially negotiate away critical safety protections, which would undermine the protections afforded by the FRSA.

CONCLUSION

Maryland is not preempted from adopting legislation covering two person crews on freight locomotives.

Respectfully Submitted,
Lawrence M. Mann