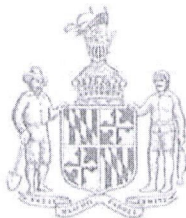


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March 6, 2015

The Honorable Cory V. McCray
Maryland House of Delegates
315 House Office Building
Annapolis, Maryland 21401

Dear Delegate McCray:

You have inquired about whether House Bill 1138 “Railroad Company – Movement of Freight – Required Crew” would “either violate or be preempted by” the Federal Railroad Safety Act of 1970 (“FRSA”). In my view, the requirement of a two-individual crew under the bill for the operation of a train or light engine in connection with the movement of freight, subject to certain exceptions, neither violates nor is preempted by federal law.

House Bill 1138 prohibits a train or light engine used in connection with the movement of railroad freight from being operated in the State unless the train or light engine has a crew of at least two individuals. The prohibition does not apply to a train or light engine being operated in hostler service or by a utility employee in yard service. A violation is a misdemeanor subject to a fine of \$500 for a first offense, and \$1,000 for a second offense or for any subsequent offense that occurs within 3 years of the second offense.

The purpose of the FRSA is to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. The FRSA also “advanced the goal of national uniformity of regulation because one of its provisions expressly preempts state laws regulating rail safety.” *Burlington Northern and Santa Fe Railway Co. v. Doyle*, 186 F.3d 790, 794 (7th Cir.1999). Section 20106 of the FRSA 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 a 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

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compatible with a law, regulation, or order of the United States Government; and
(3) does not unreasonably burden interstate commerce.

There does not appear to be any “federal regulation directly addressing when lone engineer or remote control operations are safe.” *Burlington Northern*, 186 F.3d at 797. In April of 2014, the Federal Railroad Administration (“FRA”) “announced its intention to issue a proposed rule requiring two-person train crews on crude oil trains and establishing minimum crew size standards for most main line freight and passenger rail operations.” U.S.D.O.T. News Release, FRA 03-14 (April 9, 2014), 2014 WL 1379820. No final action with respect to those proposals has been taken to date. “State regulations can fill gaps where the [U.S.] Secretary [of Transportation] has not yet regulated, and it can respond to safety concerns of a local rather than national character.” *Burlington Northern*, 186 F.3d at 795.

In *Burlington Northern*, the Seventh Circuit examined a similar statute enacted in Wisconsin, which required “that at least two crew members to be on the train or locomotive whenever it is moving, although it permits the second crew member to dismount the train to perform tasks such as switching and coupling or uncoupling[,]” which the court determined expressed “Wisconsin’s conclusion that the lone engineer and remote control operations are always unsafe.” *Id.* at 797. The court there found that since the FRA had earlier considered and promulgated regulations restricting single crew member operation of hostling or helper services, which are essentially rail yard work, but subsequently suspended those regulations, then that action is viewed as a final action or order by FRA in determining that single crew operations in those areas are allowable, thus preempting more restrictive state regulation in the area. As the Seventh Circuit explained, “[w]hen the 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.” *Id.* at 801. As a result, the court found that to the extent the two-person crew requirement applied to hostler and helper operations, it was preempted by federal law.

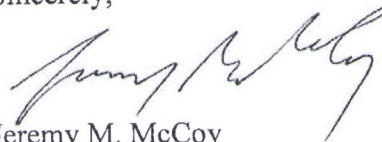
As to over-the-road or main line rail operations, however, the Seventh Circuit found that although FRA was aware of one-person crew operations, and has considered restrictions on the practice, it has not “affirmatively decided not to regulate such operations.” *Id.* at 802. Thus, as there was no final order or regulation by the FRA with respect to crew size during over-the-road operations, the issue was not preempted by federal law, and Wisconsin was “free to require two-person crews on over-the-road operations.” *Id.*

Consistent with this case, in my view, HB 1138, to the extent not in conflict with specific final determinations by the FRA with respect to the use of single-crew members for hostling and helper services as explained above, 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. Washington State is currently considering similar legislation. *See* Senate Bill 5697 of 2015, Senate of Washington State (<http://app.leg.wa.gov/documents/billdocs/2015-16> (last visited 3/5/15)).

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I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremy M. McCoy". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Jeremy M. McCoy
Assistant Attorney General