February 16, 2021

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

Dear Chairman Barve and Members of the Committee:

My name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. While my colleague Lydia McPherson is addressing important policy reasons to oppose House Bill 352, the focus of my testimony is on federal preemption. If enacted, I believe that HB 352 would be preempted by federal law.

At the outset, I want to acknowledge that in our federalist system, where the states have generally reserved to themselves the power to manage their own affairs and to enact legislation independently of the federal government, preemption can be a controversial topic. Railroads view themselves as partners with the states in which we operate. We work regularly with communities in Maryland and with those in state government to better serve our customers and to be good corporate citizens.

While we always will value our partnership with states like Maryland, there is no ignoring the fact that the federal government plays a large role in regulating our industry. Regulation of interstate commerce is one of Congress's enumerated powers set forth in the Constitution, and it is difficult to think of an industry that embodies interstate commerce more than railroading. It is important that rail transportation is generally regulated at the federal level because the efficient flow of freight between the states benefits the nation as a whole. If railroads were to be regulated by a patchwork of state laws that caused us to change our operations when one of our trains crossed a state border, it would hinder our ability to deliver the service product our customers are counting on.

This is not to say that states never have a role in regulating subjects involving our industry. For example, states typically regulate grade crossing warning devices, deciding the types of devices appropriate for highway rail grade crossings given traffic levels, sight distances, and other factors. This is an area in which states still exercise their traditional police powers without encroachment into fields occupied by the federal government, and they are areas in which states and railroads typically work as partners to improve safety.

The challenge is how to balance a state's police powers with the exclusive authority of the Federal government. To determine where that balance may be found lies in Federal statutes and case law. The U.S. Congress has enacted two statutes that preempt HB 352 – 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)). A third federal statute, the Federal Railroad Safety Act ("FRSA") (49 U.S.C. § 20106(a)(2)), will preempt HB 352 once the Federal Railroad Administration ("FRA") completes its proposed rulemaking on train crew size safety requirements. Each of these statutes would serve as an independent basis for invalidating HB

352 should it ever become law.

Preemption under the 3R Act

Preemption under the 3R Act is very straightforward. Section 711 of the 3R Act provides that:

> No 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 <u>any railroad</u> 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. 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 purpose of the 3R Act "was to give Conrail"—the Railroad created by Congress to continue operations over the lines of several 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).

HB 352 clearly runs afoul of Federal law because it would do precisely what the 3R Act forbids – requiring railroads in Maryland to employ a specified number of persons to perform a particular task, function or operation. A little more than a year ago a federal judge struck down a similar law in Illinois requiring a minimum of two crew members to operate freight trains in the state. *Ind. R.R. Co. v. Ill. Commerce Comm'n*, 576 F.Supp.3d 571 (N.D Ill. 2021). Finding that "[t]he preemption language of the 3R Act is too specific to ignore" (*Id.* at 757), the court held that the Act expressly preempted the state crew size law. The court rejected what it characterized as "several creative arguments" posed by the state law's defenders to avoid the 3R Act. *Id.* at 576. It dismissed the argument that while economic-based state laws are preempted by the Act, safety-based laws are not, noting that the text of the federal statute does not support such a distinction. *Id.* The court also made short work of the claim that the 3R Act is no longer valid in Illinois because Conrail no longer operates in the state, holding that there is neither a textual nor constitutional basis for the argument. *Id.* at 577.

Similar efforts to regulate crew size in other states in the Region covered by the 3R Act also have been invalidated. *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).

Preemption under the ICCTA

> The 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*.

HB 352 is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. HB 352 applies only to freight railroads, would regulate their staffing practices, and would prohibit them from operating certain trains with fewer than two crew members in certain circumstances. HB 352 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 352 imposes exactly the balkanized and unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.

Preemption under the FRSA

When it enacted the 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). To accomplish this important objective, Congress provided that a state law is preempted when the Secretary of Transportation – which has delegated its powers over rail safety to an expert federal agency, the Federal Railroad Administration ("FRA") – "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).

On July 28, 2022, the FRA published a proposed rule governing minimum requirements for train crew sizes. FRA, *Train Crew Size Safety Requirements*, 87 Fed. Reg. 45,564. As part of its justification for its proposed rule, FRA stated its intention to "prevent the multitude of State laws regulating crew size from creating a patchwork of rules governing train operations across the country." 87 Fed. Reg. at 45,565.

Once it considers all of the comments that it has received in response to its proposal, FRA will do one of three things – (1) it will promulgate the proposal as a final rule; (2) it will promulgate a modified version of the proposal regulating crew size as a final rule; or (3) it will not enact a rule regulating crew size. No matter what it does, once FRA takes final action on its proposal all state crew size laws, including the Maryland law proposed in HB 352, will be preempted by the FRSA.

When FRA regulates an area related to railroad safety, states may not also regulate that area. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993). 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). When FRA makes that decision, "States 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).

The Ninth Circuit's decision in *Transp. Div. of Int'l. Ass'n-SMART v. FRA*, 988 F.3d 1170 (2021) does not hold to the contrary. The court in that case considered FRA's withdrawal of a nationwide crew size regulation proposed by the agency in 2016. *Train Crew Staffing,* 84 Fed. Reg. 24,735 (May 29, 2019) (the "Order"). The court evaluated whether the Order preempted state crew size laws under the FRSA and found that the FRA's analysis came up short. The court found that the agency had failed to "address why state regulations addressing local hazards cannot coexist with the Order's ruling on crew size." In the absence of any safety rationale for preemption, the court held that the Order did not implicitly preempt state crew size laws. *Id.* at 1180. The court also criticized the agency for failing to give adequate notice of the preemptive effect of its decision at the notice of proposed rulemaking stage, holding that its failure to do so was a violation of the Administrative Procedure Act. *Id.* at 1181.

Whatever federal preemption deficiencies there may been in the 2019 Order were cured by the 2022 proposal. FRA specifically expressed its intention to preempt state law and analyzed why state crew size laws are incompatible with the national interest. Indeed, federal preemption is a principal justification for the rule, with FRA noting its concern that a lack of national uniformity "would likely result in significant cost and operational inefficiencies, and *even potential safety concerns*." 87 Fed. Reg. at 45,565 (emphasis added). As the agency further noted, "FRA could articulate FRA's preemption of crew size requirements through a rulemaking without establishing minimum crew size requirements," (87 Fed. Reg. at 45,571), setting the stage for preemption even if the agency ends up not adopting a national crew size rule.

One way or another, the FRA is poised to cover the subject matter of crew size. Once it does, state laws like the one proposed in HB 352 will be preempted by the FRSA.

Conclusion

For the reasons set forth above, I respectfully submit that HB 352 is preempted by Federal law and ask this Committee to report unfavorably on the bill.