

# **HB 352\_Railroad Company\_Movement of Freight\_Requir**

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Position: UNF



**LEGISLATIVE POSITION:**

**Unfavorable**

**House Bill 352**

**Railroad Company-Movement of Freight-Required Crew**

**House Environment & Transportation Committee**

**Tuesday, February 16, 2023**

Dear Chairman Barve and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 6,400 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

House Bill 352 would require a train or light engine that is used to transport freight via railroad to have at least two crewmembers while operating in the State.

Maryland's freight rail industry is one of its most critical - helping to minimize transportation costs, manage our carbon emissions levels and strengthen our competitiveness. Our rail industry is responsible for thousands of direct jobs and contributes to hundreds of thousands of indirect jobs. With this bill, railroad companies will be forced to comply with onerous regulations which mandate freight trains stop at the Maryland border, add a crewmember, and drop them off once they leave the State. This complicates what should be an easy flow of freight, especially when this industry is responsible for a significant portion of the movement of goods and services in the State.

We learn from the history of the United States railroad system that onerous regulations have significant negative impact on the industry. In order to mitigate the heavy regulatory climate that led to multiple railroad bankruptcies in the 1970s, Congress passed a series of laws meant to ease the burden on railroads and create uniformity in laws between states. These laws established federal preemption provisions because of the difficulty placed on railroads having to conform to different regulations and policies traveling from one State to another.

The Maryland Department of Transportation projects that freight rail demands will increase by 45% by 2040. To keep up with these demands and ensure the easy movement of goods into, out of, and through the State of Maryland, it is in the best interest of the State to support legislation that facilitates, not hinders, this movement. Private companies, the State and the Federal government have all made significant investments in freight rail, knowing that it creates jobs, expands the economy, and increases Maryland's competitive edge.

In addition, there have been two important developments since the last time the Committee was presented with this legislation, both of which establish that state laws regarding crew size are

preempted by federal law. In May 2019, the Federal Railroad Administration determined that there is no data showing that two-person crews are safer than one-person crews and concluded that regulation of minimum train crew is not justified. At that time, the FRA indicated its intent to preempt all state laws and regulations on that topic. More recently, in September 2020, the U.S. District Court for the Northern District of Illinois held that an Illinois state crew size law, similar to the bill before you, was preempted by the Federal Railroad Safety Act (FRSA).

Finally, this proposed policy was vetoed in 2019 and upheld by the members of the Maryland General Assembly in 2020.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **Unfavorable Report** on **House Bill 352**.



# **CSXHB352 Written Testimony\_Final.pdf**

Uploaded by: Brian Hammock

Position: UNF



Brian W. Hammock  
Resident Vice President  
CSX Transportation

February 14, 2017

The Honorable Kumar P. Barve  
Room 251  
House Office Building, Room 251  
Annapolis, MD 21401

**RE: LETTER IN OPPOSITION TO HB 352**

Dear Chairman Barve:

On behalf of CSX Transportation, I am writing to respectfully oppose HB 352. This bill would require two-person crews to operate freight trains in Maryland when operating on the same corridor as high-speed passenger or commuter trains. This mandate would make the Port of Baltimore less competitive and nearly double the cost to the state for the MARC Camden and Brunswick line commuter rail service. In addition, the potential negative impacts to interstate commerce and the supply chain are reasons why federal law preempts state-specific train crew mandates.

**Impacts to Maryland's supply chain**

If HB 352 becomes law, it would nearly double the cost of the Camden and Brunswick lines for the state, hindering efforts to increase commuter rail service in Maryland. The 2021 MARC Access Agreement between CSX and the Maryland Transit Administration includes reimbursement to CSX of up to \$6 million per year if the state imposes a train crew size mandate. This amount accounts for the potential future cost of having an additional crew member on freight trains when operating in the State of Maryland.

In general, a state crew size mandate would raise the cost of freight operations in Maryland compared to other East Coast ports and make it less competitive. Communities throughout Maryland are benefiting from the rapid growth in distribution, warehousing and logistics operations locating to the state. Logistics costs are a concern for cost-conscious shippers and adding to the cost of an important link in the supply chain could give them another reason to call on competing ports, such as Norfolk. The recently announced MSC container terminal at Trade Point Atlantic, and the state's historic investment in the Howard Street Tunnel project, highlight the importance of keeping Maryland's supply chain fluid and competitive.

**Collective Bargaining**

Train crew size is a complex issue that affects the efficiency and cost of train operations. As such, it is a matter of significant importance to both the workers and the employers in the railway industry. Collective bargaining provides a mechanism for these parties to negotiate and reach

agreements on a range of issues, including train crew size. This process allows both sides to have a voice in the decision-making process and to balance their respective interests.

Crew size has been raised in multiple rounds of bargaining dating back to the early 1900s. It has also been addressed by a variety of neutral fact finders, including presidential commissions, federal courts, arbitrators, and emergency boards appointed by the President. Crew size has historically been one of the most important issues in bargaining since at least World War II. The bargaining process has led to historic wages for railroad employees, including a recently announced 24 percent wage increase during the current five-year contract period.

### **Federal Preemption**

Federal law preempts state-specific train crew mandates as they would hinder the free flow of goods across state borders. The American supply chain depends on a unified and efficient transportation system, and a patchwork of state regulations would negatively impact the national economy.

The Rail Reorganization Act, also known as the 3R Act, was passed by Congress in 1974 in response to a railway crisis in the Northeast and Midwest. The Act was designed to reorganize the railroads to create an economically viable and cohesive railway system. The 3R Act has an express preemption clause that prohibits states in the Region from adopting laws or rules requiring a specified crew size for any task, function, or operation.

The United States District Court for the Northern District of Illinois recently struck down a similar state crew size law passed in Illinois. In that case, railroads in Illinois challenged a state-enacted two-person crew mandate similar in nature to HB351. Finding that the preemption language in the 3R Act is too specific to ignore, the court concluded: “Illinois wants to mandate a crew size of two to perform the task, function or operation of moving freight with a train or light engine; this is exactly what the 3R Act prohibits.” Indiana Rail Road Company v. Illinois Commerce Commission, No. 1:19-CV-06466 (N.D. Ill. 2021).

In conclusion, CSX respectfully requests the committee to issue an unfavorable report on HB 352. This bill would not enhance safety, increase the cost of commuter rail service, and make the Port of Baltimore less competitive. Thank you for your consideration.

Very truly yours,  
  
Brian W. Hammock

**HB 352\_OPPOSE\_Norfolk Southern LM .pdf**

Uploaded by: Lydia McPherson

Position: UNF

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 Lydia McPherson, and I am the regional Government Relations Manager for Norfolk Southern. I am writing to oppose House Bill 352 - Railroad Company - Movement of Freight - Required Crew. Crew size mandates like the one being proposed by HB 352 will reduce the rail industry's ability to innovate and compete in a rapidly changing freight transportation sector, with no empirical evidence of any safety benefits. In fact, in 2019 the industry's federal safety regulator stated that "accident and incident data does not support a train crew staffing regulation."<sup>1</sup>

In the U.S., crew sizes have safely and gradually been reduced over the past few decades through collective bargaining. Five-person crews that were prevalent in the 1970s evolved into two-person crews utilized by most U.S. freight railroads today. Over this same time-period, accident rates fell by more than 80 percent according to data collected by the Federal Railroad Administration (FRA).<sup>2</sup> These industry wide safety improvements can be attributed to a focus on safety culture and continuous advancements in technology. One such technology, Positive Train Control (PTC), automatically stops a train to help prevent collisions, derailments and other accidents that can be caused by human error and (taking on) the safety duties traditionally taken on by a second crew member in the cab. Maryland recognized the potential benefits for similar emerging technologies in trucks when the Maryland Department of Transportation applied for a USDOT grant back in 2016 which would have designated portions of the I-95 corridor as an Automated Vehicle testing and deployment area.<sup>3</sup>

Many European countries have safely operated with single-person crews since the 1930s. In fact, today more than 95 percent of European rail traffic is moved by one-person crews. Even though Europe has higher train density than U.S. railroads and more passenger trains on a shared network with freight, a 2021 study found that European operations "appear to suffer no reduction in crew-related safety" and "found no evidence that railroads operating with two-person crews are statistically safer than railroads operating with one-person crews."<sup>4</sup>

As the industry makes further investments in new safety-enhancing technologies and innovative staffing practices, such as ground-based conductors strategically located along the network rather than in-cab, we can expect to see a continued improvement in the level of safety at which our freight rail network

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<sup>1</sup> <https://www.regulations.gov/document/FRA-2014-0033-1606>

<sup>2</sup> <https://www.progressivepolicy.org/blogs/misguided-crew-size-legislation-risks-slowneeded-freight-rail-growth/>

<sup>3</sup> <https://mdot.maryland.gov/tso/pages/newsroomdetails.aspx?PagelId=0&newsId=187>

<sup>4</sup> <https://raillaborfacts.org/wp-content/uploads/2022/09/Carriers-Exhibit-11-Report-of-Oliver-Wyman-Comparison-of-European-and-US-Railways.pdf>

operates, just as we have over the last 50 years. However, staffing mandates, like the one put forth by HB 352, will hamper these types of innovation, limiting our industry's ability to efficiently serve our customers, build resiliency into our operations, and improve work-life balance for our employees. Furthermore, governmental restrictions on our operations will hinder our ability to compete with other modes of transportation, driving freight from the rails to already over-burdened highways.

Not only are crew size regulations are not backed by evidence, but they are also beyond the State of Maryland's power to adopt. Several federal laws bear on this issue as my colleague and Norfolk Southern's Assistant Vice President of Regulatory Affairs, Randy Noe, will testify in greater detail.

For these reasons I respectfully ask for an unfavorable report on HB 352. Thank you for your time.

Sincerely,

**Lydia McPherson**  
Manager of Government Relations  
Norfolk Southern Corporation

**MD Crew Size Testimony -UNF -Randy Noe.pdf**

Uploaded by: Randy Noe

Position: UNF

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 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. 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 (7<sup>th</sup> 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 (9<sup>th</sup> 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.