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February 13, 2023

The Honorable Dana Stein
Maryland House of Delegates
251 Taylor House Office Building
Annapolis, Maryland 21401

Dear Delegate Stein:

You have inquired whether the State regulation of railroad crew sizes as proposed in House Bill 352 ("Railroad Company – Movement of Freight – Required Crew"), as introduced, would be preempted by the federal Regional Rail Reorganization Act of 1973 ("3RA"), particularly in light of a recent federal district court case that held that a similar Illinois crew-size statute was preempted under 3RA. *See Indiana Rail Road Company, et al. v. Illinois Commerce Commission*, 576 F. Supp. 3d 571 (N.D. Ill. 2021) ("*Indiana R.R. II*").

For the same reasons explained in greater detail in this office's earlier advice letter addressing 3RA preemption of an earlier similar bill, in my view, there is a possibility that a court would find that HB 352, as introduced, is preempted by 3RA, if there is an economic purpose for the enactment. *See* attached Letter of Advice of February 10, 2016 to the Hon. Brian J. Feldman from Asst. Atty. Gen. Jeremy M. McCoy ("Feldman Letter"). In light of the authority of the State to enact crew levels as a rail safety standard under the Federal Railroad Safety Act of 1970 ("FRSA"), however, it is also possible that if a court finds that the provisions of HB 352 serve the sole purpose of enhancing safety, HB 352 may be authorized as a safety standard under FRSA and would not be preempted by 3RA.

While there is also a possibility that a court could decide, as the court in the Illinois case did, that 3RA preempts an applicable state's crew size requirement regardless of a "broadly stated purpose […] to promote safety," *Indiana R.R. II*, 576 F. Supp. 3d at 577, that case is not binding precedent in Maryland and addressed an Illinois statute that was broader in scope than HB 352, which is limited to crew requirements for the movement of freight that shares a rail corridor with high-speed passenger or commuter trains. Additionally, that court also noted the possibility that state safety regulation of rail crew size might survive 3RA preemption. *Id*. at 577 n.4.

Consequently, in my view, the Illinois case does not alter the analysis and conclusion regarding the possibility of 3RA preemption or FRSA authorization for state rail crew size as addressed in the Feldman Letter.

House Bill 352, as introduced, 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 under the bill applies only to a train or light engine used in connection with the movement of railroad freight that "shares the same rail corridor as a high-speed passenger or commuter train[,]" and does not apply to the movement of freight involving hostler service or utility employees in yard service.

In light of the background and analysis of the 3RA and FRSA statutes and cases addressed at length in the Feldman Letter, and that the cases and analysis addressed therein appear to remain in effect, I will not repeat that background and analysis here. However, below I will address some subsequent developments in this area of the law since the Feldman Letter and examine the holding of the 2021 *Indiana R.R. II* case.

At the time of the Feldman Letter, the Federal Railroad Administration ("FRA") was preparing to, and subsequently issued notice of proposed rules for crew member sizes for trains based on the type of operation. FRA, *Train Crew Staffing*, 81 FR 13918 (Mar. 15, 2016). In 2019, the FRA withdrew its proposed regulation on crew staffing, and announced its intent that the withdrawal "preempted all state laws attempting to regulate train crew matters in any manner." FRA, *Train Crew Staffing*, 84 FR 24735, 24741 (May 29, 2019). However, in early 2021, the Ninth Circuit vacated FRA's Withdrawal Order, holding that the FRA's order did not implicitly preempt state safety laws on crew sizes, violated the federal Administrative Procedure Act and was arbitrary and capricious. *Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1184-85 (9th Cir. 2021). In July of 2022, the FRA re-proposed crew staffing regulations to require rail crew sizes of at least two persons except under certain circumstances. FRA Proposed Rule, 87 FR 45564 (July 28, 2022), which is currently pending.

In 2020, the federal district court in the *Indiana R.R. II* case had originally held that FRA's 2019 Withdrawal Order preempted the Illinois crew size statute, which generally prohibited the operation of a train or light engine used in the movement of freight unless it has an operating crew of at least two individuals. *Indiana Rail Road Company. v. Illinois Commerce Commission*, 491 F. Supp. 3d 344, 347 (N.D. Ill. 2020) ("*Indiana R.R. I*"). Following the Ninth Circuit's vacation of the FRA Withdrawal Order, the Seventh Circuit remanded the appeal in *Indiana R.R. I* back to the district court. 21 WL 6102922 (7th Cir. July 2, 2021). On remand, the court in *Indiana R.R. II* explained that "[n]ow that the Ninth Circuit has held that the Withdrawal Order was invalid, meaning the FRSA does not preempt the [Illinois] Crew Size Law, it is time to turn to the

Railroads' other arguments" that the court did not address in *Indiana R.R. I*, including a claim of federal preemption under 3RA. *Indiana R.R. II*, 576 F. Supp. 3d at 574.

The court in *Indiana R.R. II* held that the Illinois crew size statute was preempted by the federal 3RA. *Id*. at 575. As discussed in greater detail in the Feldman Letter (pages 4 and 5), the 3RA contains an express preemption clause against state laws requiring the employment of a specified number of persons to perform a particular operation. 45 U.S.C. § 797j. The court found that the Illinois statute mandating a minimum crew size "is exactly what the [3RA] prohibits." *Id*. at 576. The court appeared to dismiss earlier holdings of the Special Court created under 3RA with exclusive jurisdiction over proceedings relating to the 3RA,[1] which "held that the [3RA] did not preempt laws about crew sizes when those laws were concerned exclusively with safety[,]" and others that "focused on the economic regulatory purposes of the [3RA]." *Id*. at 576 (citing *Norfolk & Western Ry. Co. v. Public Service Com'n of West Virginia*, 858 F. Supp. 1213, 1217 (Spec. Ct. R.R.R.A. 1994)). (*See* detailed discussion of Special Court assessment of 3RA preemption of economic state action and state safety measures under FRSA in Feldman Letter (pages 4-7)). The court in *Indiana R.R. II* explained that "[n]one of these [Special Court] cases are binding precedent. And given the plain language of the statute, the reasoning of the Special Court, when it suggested that a safety-based regulation of crew sizes might not be preempted by the [3RA], is not especially persuasive[,]" concluding that "the Supreme Court has increasingly embraced a textualist jurisprudence that would not support the reasoning of the Special Court in *Norfolk & W. Ry. Co*.[,]" and "[n]or does it appear that the Special Court ever actually upheld a safety-based regulation of crew size after hinting that this might be possible[.]" *Id*. at 576-77.

The court acknowledged Illinois' argument that 3RA "is concerned mostly with economic matters" and that "[i]t is true that the [3RA] is not *generally* concerned with safety matters. But on the *specific* issue of crew sizes, the statute is clear. The prohibition on certain states passing laws related to crew size doubtless has some implications for safety, but this can be said of many economically motivated rules." *Id*. at 577 (emphasis in original). The court did note that other states under 3RA, including Massachusetts and New Jersey, have existing two-person crew statutes requiring safety findings and notice, explaining "[t]hat might be the key, litigation-preventing difference from the Illinois statute, which prohibits all one-person crews." *Id*. at 577 n.4.

While there is a possibility that a controlling federal court with jurisdiction over Maryland could similarly hold that HB 352 as introduced would be preempted under 3RA consistent with *Indiana R.R. II*, the holding of the U.S. District in the Northern District of Illinois in that case is not binding federal precedent in Maryland. Additionally, the Illinois statute at issue in *Indiana R.R. II* dealt with a blanket two-person crew minimum for the movement of rail freight, unlike the proposal in HB 352 as introduced, which limits the prohibition against a single crew member to

[1] Congress abolished the Special Court in 1997, transferring jurisdiction of that court to the U.S. District Court for the District of Columbia. 45 U.S.C. § 719(b)(2).

movement of railroad freight that shares the same rail corridor as high-speed passenger or commuter trains. Consequently, I cannot conclude that the court's analysis in *Indiana R.R. II* would necessarily apply to the more limited scope of HB 352.

To my knowledge, neither the Fourth Circuit nor the U.S. District Court for the District of Maryland has addressed this question of 3RA preemption of state crew size regulation. Other valid federal case law recognizes that a 3RA state measure regulating crew size enacted solely for safety purposes may be authorized under FRSA, while a state law enacted for economic purposes is subject to preemption under 3RA. (*See* Feldman Letter (pages 4-7)). As the Special Court explained, "the preemptive power of section [797j of the 3RA] is not absolute[.]" *Norfolk & Western Ry. Co.*, 858 F. Supp. at 1217. For the foregoing reasons, in my view, the holding in the *Indiana R.R. II* case does not alter the analysis and conclusion regarding the possibility of either 3RA preemption or FRSA authorization for state rail crew size as addressed in the Feldman Letter.

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,

Jeremy M. McCoy
Assistant Attorney General