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February 16, 2023

Chairman Barve and Members of the
Environment & Transportation Committee

REPRESENTATIVES

CUMBERLAND

Local 430
VACANT

Local 600
JASON WEAVER

BRUNSWICK

Local 631
TOM CAHILL

EDMONSTON

Local 1470
KENZELL CRAWFORD

BALTIMORE

Local 610
JOHNNY WALKER

Local 1949
ERIC BILSON

RE: SUPORT HB-352

I'm the Maryland Legislative Director for the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Worker's (SMART). We are the largest rail labor union in North America. Our members in Maryland are employees of CSX, Norfolk Southern Railway, Amtrak, Bombardier (MARC Service) and the Canton Railroad and work as conductors, engineers, switchmen, trainmen, utility persons and yardmasters. Our members operate freight and passenger trains that travel throughout the State. SMART represents over 216,000 members throughout the country.

My position as Legislative Director within our organization is first and foremost to seek to ensure our members have a safe work environment.

In that vein, I ask for your support for the rail safety legislation introduced in the House as **HB-352 "Railroad Company - Movement of Freight - Required Crew."** This proactive rail safety legislation would simply require that each freight train operating in the state and sharing tracks with passenger and commuter rail trains would have a minimum crew of at least two persons.

I hired on the B&O Railroad in 1977 and hold seniority as a freight Conductor with CSX Transportation for 46 years now. In 1977, each freight train had 4 to 5 crewmembers. Through advances in technologies, that number has been reduced. Today, the reality is over 99% of America's freight trains operate with two federally certified and licensed crewmembers: A Conductor and Engineer.

Several things happened that gave rise to the pursuit of this legislation. On July 6, 2013, a freight train derailed in Lac-Mégantic, Quebec that resulted in 47 lost lives and a town nearly destroyed. That accident happened because a Montreal, Maine & Atlantic Railway crewmember, working alone, had his 72-car crude oil train roll away and crash in the middle of a town causing horrific death and devastation.

There are many tasks that must be performed by the crewmembers on a freight train every day that one person just cannot accomplish alone, and this fact played a major role in the Lac-Mégantic tragedy. The train was left standing unattended on a steep grade several miles outside the town because that was the only stretch of track that could accommodate the entire train without blocking any highway grade crossings.

The train could have been secured and left unattended on flat terrain much closer to the town after having been separated, or “cut,” to keep the crossing open, but that task cannot be accomplished safely and in compliance with operating rules with a single crew member. Also, attempting to both secure the train with hand brakes and properly test the securement cannot be accomplished as safe operating standards dictate. The securement of the train failed, and the result was that the train traversed down the steep grade into the center of town where it eventually derailed resulting in explosions and fires killing 47 persons and causing millions of dollars in environmental damage.



Following this tragic accident, **Canadian regulators banned this type of one-person operations throughout Canada.**

In a letter to the head of the Montreal, Maine & Atlantic Railway, U.S. Federal Railroad Administrator Joseph Szabo said he expected the railroad to stop manning trains with one-person crews. He wrote, *“in the aftermath of the Montreal, Maine & Atlantic derailment at Lac-Mégantic, Canada, I was shocked to see that you changed your operating procedures to use two-person crews on trains in Canada, but not in the United States. Because the risk associated with this accident also exists in the United States, it is my expectation that the same safety procedures will apply to your operations here.”*

This rogue operator went on to operate with two-person train crews in Canada because the Canadian government acted to require it. Since there is no similar statutory or regulatory requirement in the United States, he continued to operate with a single crewmember on his U.S. trains.

Another thing that happened was in early 2014 the BNSF Railway negotiated a very lucrative proposed agreement with the United Transportation Union to staff trains with a single crew member. The proposal contained offers of increased wages, benefits and lifetime job protection for all employees covered by the proposal. The proposed agreement garnered just over 10% support and was voted down overwhelmingly by the membership who know that operating a train with a single crew member is inherently unsafe.

In 2013, following the Lac Magentic accident the Obama administration's Federal Railroad Administration (FRA) announced their intention to start a rulemaking process (NPRM) to regulate railroad crew size. In this effort U.S. Transportation Secretary Anthony Foxx stated, *"safety is our highest priority, and we are committed to taking the necessary steps to assure the safety of those who work for railroads and shippers, and the residents and communities along shipping routes."* The regulation was not finalized under the Obama administration.

On January 26th of 2017 the Trump Administration ended the rule making process initiated under the Obama administration and later issued a Withdrawal Order officially withdrawing the pending rule. In doing so, the FRA announced, *"that no regulation of train crew staffing is necessary or appropriate at this time and the FRA intends for the withdrawal to preempt all state laws attempting to regulate train crew staffing in any manner."*

Early in 2021, the Ninth Circuit Court of Appeals vacated the Withdrawal Order, holding that the Federal Railroad Administration violated the notice-and-comment requirements of the Administrative Procedure Act in issuing the Order, and that the Order was arbitrary and capricious.

In 2021 the Biden administration reinstated an FRA rulemaking process (NPRM) to regulate crew size. No regulation has been issued to date.

Bi-partisan two-person minimum freight crew legislation has been introduced in the U.S. House of Representatives and the U.S. Senate each election year since the accident occurred. Maryland Senators Cardin and Van Hollen, in addition to Congressmen Brown, Raskin and Trone are co-sponsors. In 2020 the legislation passed the House of Representatives as part of the INVEST in America Act. No Senate action has occurred.

This rail safety legislation has also been introduced in 34 states and has become law or regulation in Arizona, California, Colorado, Illinois, Kansas, Nevada, Washington, West Virginia, and Wisconsin.

Included with this testimony are 6 resolutions passed by various bodies in support of a minimum crew requirement: including from Prince George's County Council, Montgomery County Council, and the Baltimore City Council.

Freight train crews work long hours, day and night, with few set shifts, and are on call 24 hours 7 days a week. With as little as 1 hour and 15 minutes notice, they are required to report to work for a 12-hour shift, often operating trains laden with hazardous materials. Fatigue in the freight railroad industry is our organizations number one safety concern and having a minimum of two crewmembers is the primary way we help combat fatigue. Having a minimum of two crewmembers also is the best way to assure compliance with the railroads complex operating rules.

Some of you will remember the 1996 head-on collision of a MARC commuter train and an Amtrak passenger train that occurred in Silver Spring, Maryland in which 11 persons were killed and 13 injured.



Following a lengthy investigation, the FRA found that a one-person crew in the locomotive contributed to signal violations associated with the collision and issued an Emergency Order and subsequent safety regulations requiring communications between the operating cab and the train crew stationed in the passenger cars. As a result, commuter passenger trains today routinely have a crew of three qualified people on the crew who must work as a team with constant communication between the crew members and qualifications for emergency response and first responder training.

The SMART-TD Maryland State Legislative Board contracted a reputable consulting firm to gage the level of support by the public for such minimum crew legislation. We wanted to see where the public stood in relation to the Governor, since the General Assembly was on opposite ends. The survey covered

several demographic groupings with results separated based on gender, age, education, political self-identification, and geographic region. I'll just point out that the overall results of the survey are that the level of public support by Marylanders for this legislation is 88%. The entire survey is included with this testimony.

There is an increase in the transportation of hazardous and volatile materials on the railroads as well as significantly longer trains operating over the unique and widely varying geographical terrain existing in our state. This coupled with the possibility of decreasing train crew size, creates a significant localized safety hazard to the employees, the public, the communities, and the environment.

Adequate personnel are critical to insuring railroad operational safety, security, and in the event of a hazardous material incident, support of first responder activities. This legislation regulating minimum railroad crew staffing is a proactive effort to protect and promote worker health and safety, and the security and welfare of the residents of the state by reducing the risk exposure to local communities and protecting environmentally sensitive lands and waterways.

I am sure you have been approached by the railroads who are opposed to this legislation. I want to address some of their arguments against this legislation. Their first argument is that this legislation is preempted by federal law. We do not argue that there are many provisions in federal law covering a wide range of issues that are preempted from state regulation; however, crew member requirements on freight trains are not one of them.

Attached are two letters from the MD Attorney General's office wherein the first letter they reference this legislation and write "*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 was requested by the railroads representatives the AG's office wrote "*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. On the other hand, without such evidence, a court may conclude that the minimum crew size requirement regulates rail transportation and operation in the State, which may be preempted under the ICCTA,*" thereby leaving the door open for interpretation.

The AG's first opinion is reinforced by the Seventh District Court's decision rendered in *Burlington Northern and Santa Fe Railway Co. v. Doyle* which examined the Wisconsin law that required a minimum of two persons on freight trains. The court ruled that Wisconsin was "free to require two-person crews on over-the-road operations." This finding by the 7th District Court rendered in 1999 has not been challenged by the railroads.

They also attempt to use Section 711 of the Regional Rail Reorganization Act of 1973 (3R Act) stating that "Congress expressly intended to preempt state minimum crew laws." Again, we agree

that in 1973 Congress did intend to preempt 17 states and the District of Columbia from regulating minimum crew laws. However, this decision was rendered at a time when there were 4 or 5 crew members on each freight train, and it was not for the purpose of denying States the ability to provide for the safety of their towns, communities, and citizens. Congress was attempting to protect the Midwest and Northeast regions from financial collapse related to a disappearance of rail service as seven Class I railroads were in bankruptcy. As a result, they created the federally government owed Consolidated Rail Corporation known as Conrail.

They did afford the provisions of the preemption to the other railroads operating in the 17 states and the District of Columbia due to the potential for unfair competition in the states they all served. Their main concern in creating this provision was their fiduciary responsibility to the taxpayers. In 1998, Conrail was absolved through the purchase of their assets by CSX and Norfolk Southern Railway and is no longer a potential liability to the taxpayers.

On the issue of preemption, the critical question in any preemption analysis is always whether Congress intended that a federal regulation supersedes state law. In the case of *Louisiana Public Service Commission v. FCC* the court wrote:

“Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Moreover, the Supreme Court has also made it clear that “[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”

So, the key to the argument that Section 711 of the 3R Act was intended to “*expresses a clear intent to preempt state law*” would be based on the record as to why Congress passed a federal statute and to what it applies. We take no exception to the fact that Congress had a clear intent to preempt state law within the 17 states that Conrail operated in. What we do take exception to is that that law is still applicable.

The record clearly shows that Congress was attempting to protect the Midwest and Northeast regions (17 States) from financial collapse related to a disappearance of rail service as seven Class I railroads were in bankruptcy. They were not passing a law to preempt crew size throughout the United States. They limited the laws reach to these 17 States to level the playing field against Conrail, the taxpayer owned railroad.

Congress placed Conrail back into the hands of the private sector through the sale of their assets. However, the obvious advantage the railroads operating in this limited 17 state area had over the rest of the railroads in the country, where the preemption did not apply, still existed. In response, Congress passed into law Section 408 of the Rail Safety Improvement Act that required the Department of Transportation (DOT) to complete a study regarding the impacts of repealing Section 711 of the 3R Act.

The DOT delegated this duty to the Federal Railroad Administration (FRA), the agency that Congress gave the jurisdiction over railroad safety to when they established it. The FRA completed the study and reported back to the Congress that ***“the goal of protecting the Midwest and Northeast regions from financial collapse related to a disappearance of rail service has been met. The rationale behind the preemption provision in the 3R Act of ensuring viable freight rail service no longer exists. Repealing Section 711 would restore the status quo that existed prior to its enactment and create a level playing field among rail carriers nationwide.”*** They concluded with ***“For the above stated reasons.....the purpose for which Section 711 was enacted was met a number of years ago***

and Section 711 should be repealed.”

This report was issued by the FRA, the federal agency assigned by Congress with the responsibilities of overseeing safety in the rail industry. The effect of their report is that all railroads are on a level playing field nationwide.

The issue of preemption related to the states that were not within the 17-state limit has been settled. The U.S. Seventh District Court found in the *Burlington Northern and Santa Fe Railway Company v. Doyle* that the state of Wisconsin was “*free to require two-person crews on over-the-road operations.*” This settled law will govern the country until the FRA decides to affirmatively regulate such operations as minimum crew size, which they have not done.

The railroads claim that requiring a minimum of two persons on their freight trains will be a major inconvenience and break the bank. We find this argument hypocritical. On one hand they argue to maintain the outdated special treatment contained in Section 711, which gives them an unfair advantage over the 2/3 of the United States where the exemption didn’t apply, and then argue they would be at a disadvantage if the same situation existed between Maryland and other states where they operate. In addition, the delay argument has no merit as crew changes already must occur over the routes and there is no additional cost for a second crew member if they board the freight train at the last regular crew change point before entering Maryland or at the border. So, no operational delay would be required.

We as an organization are cognizant of the fact the railroads are in business to make money for their owners and stockholders and we want them to secure more business and be as profitable as possible. After all, our member’s jobs depend on their success. But when it comes down to the wellbeing, health, and safety of the members we represent and the safety of the public, we will always side with safety.

Another argument we have heard is that this is a collective bargaining issue and legislators should not be injected into the fray between labor and management. To the contrary, we believe this issue falls under the purview of employee and public safety, which places it under the jurisdiction of the legislative department within our organization. Our legislative department will not relinquish our responsibilities to provide for the safety and well-being of our members to collective bargaining. There is no amount of money or benefits worth any harm that may come to our members or the public if a tragic accident should occur because of insufficient manpower.

In 2008 Congress passed the Rail Safety Improvement Act, which we have been in support of, that required Positive Train Control’s (PTC) implementation nationwide by 2015. The railroads had repeatedly requested delays in implementing this supplemental safety technology with full implementation just being completed in December 2020. The railroads now try to present this technology as their replacement for the second crew member.

On January 20, 2023, MARC had to cancel forty-one trains because of connectivity issues with PTC. While this was an inconvenience to thousands of Maryland commuters, fortunately no one was hurt because the trains were able to be canceled. Imagine this happening to a freight train loaded with hazardous material operating through Baltimore with one person.

Positive Train Control, or hot box detectors, or Deadman’s pedal or the myriad of other supplemental safety apparatus will not prevent every accident in the railroad industry. Each merely complements the other in making the industry safer, as does two persons on each crew. A single crewmember cannot perform all the tasks required of them and maintain the highest level of safety and respond to any emergency they may encounter.

15-year BNSF conductor Mike Rankin shared his harrowing story of how two freight rail crewmembers worked together to save someone's life — a feat that would have been impossible had just one person been operating their train the fateful night of December 23, 2004.

When the train Conductor Rankin and his colleague were operating hit a car that bypassed crossing gates, all three passengers in the vehicle were ejected. Two died instantly. The third, barely alive, needed immediate medical attention. An ambulance was on the way, but Rankin soon realized the ambulance was on the wrong side of the tracks. The only solution was to separate the train at the crossing, so the ambulance could drive through — a maneuver that requires two people to execute.

“There's no way a single crew member could have secured the train, briefed emergency personnel, uncoupled train cars and moved the front of the train forward all on his or her own,” Conductor Rankin said. “I've seen enough to know that those who want one-crew train operations are not fully grasping the risks, emergencies and close calls that my fellow conductors and engineers see on the rails regularly.

Conductors and engineers don't just operate trains. In emergency situations, our presence and teamwork can mean the difference between life and death.”

Another instance occurred when an engineer fell ill on their train in route to Cumberland, MD. They had to stop the train as the engineer was in severe pain and losing consciousness. The conductor summoned an ambulance via cell phone and was able to guide them to the rural location of the train since there was no physical address for GPS to work from. They transported the engineer to the nearest hospital where he underwent immediate surgery for acute appendicitis. The Doctor told the engineer he was close to having his appendix burst which may have resulted in his death had he not received the prompt attention to his condition. As you can imagine, he was extremely grateful for the conductor's presence and quick- thinking action.

This same legislation was introduced in the 2016 session of the General Assembly as SB-275. It was passed out of the Senate Finance Committee on a vote of 8 in support with 3 opposed. It went on to pass the full Senate on a bi-partisan vote of 32 in support with 14 opposed. Unfortunately, it did not make its way through the House of Delegates before the 2016 session ended.

This same legislation was introduced in the 2017 session of the General Assembly as HB-381. It was passed out of this committee on a vote of 16 in support with 7 opposed. It went on to pass the House of Delegates in a bi-partisan vote of 98 in support with 42 opposed.

HB-381 then crossed over to the Senate and was heard in the Senate Finance Committee where it was passed out of Committee on a vote of 6 in support and 3 opposed with 2 absent. Unfortunately, the bill didn't make it to 3rd reader in the Senate until the last day of session. At that time a question arose as to whether the legislation contained the proper language that would ensure that the railroad corporations, and not their employees, were responsible for any penalties as a result of a violation of such a law. The question was not resolved before the bell on sine die and the bill died as a result.

Following the end of the 2017 session of the General Assembly, I met with the maker of the motion who laid the bill over to address the questionable language. We proposed to the Senator an amendment to the bill language to clarify this shortcoming. We agreed on the proposed language as the resolution to the issue.

The issue of the questionable language was addressed through an amendment to the legislation by adding paragraph (E) (4) (II), which reads:

“Notwithstanding subparagraph (I) of this paragraph, a railroad company shall be solely responsible for the actions of its agents or employees in violation of this subsection.”

This amended language was sent to the office of the Attorney General of Maryland as an inquiry as to the legality of the language as proposed. The reply from the office of the Attorney General of Maryland, in pertinent part, concluded that their office was “*unaware of any legal impediment to the enactment of such a provision by the General Assembly*” thereby validating the resolution.

Following the resolution, this legislation was re-introduced as HB-180 in the 2018 General Assembly. It passed the House on a super majority bi-partisan vote of 101-37 and the Senate on a super majority bi-partisan vote of 33-12 only to be vetoed by then Governor Hogan. Unfortunately, a veto could not be overridden since it was an election year.

This legislation was re-introduced as HB-66/SB252 in the 2019 General Assembly. It passed the House on a super majority bi-partisan vote of 102-30 and the Senate on a super majority bi-partisan vote of 27-14 with 5 Senators who had voted for the legislation in the past absent, only to be again vetoed by Governor Hogan. And unfortunately, a veto override vote was not taken before the pandemic hit and the legislature adjourned early.

The merits of the legislation have been thoroughly debated over the last several years. Each time receiving a favorable report by the respective committees it went before. Each chamber has also spoken on the issue with their overwhelming support and votes in passing the legislation.

The arguments noted in the governor’s veto letter were the same arguments offered in committees and on the House and Senate floor prior to passage. The public saw through those arguments as reflected in the survey; our members saw through those arguments as reflected in their ratification votes, and The General Assembly saw through those arguments and passed the legislation on multiple occasions with a bi-partisan vote overwhelmingly.

WE THEREFORE URGE A FAVORABLE REPORT ON HB-352

Sincerely,



Lawrence E. Kasecamp
MD State Legislative Director
SMART Transportation Division

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND
2016 Legislative Session

Resolution No. CR-31-2016
Proposed by Council Member Harrison
Introduced by Council Members Harrison, Turner, Davis, Glaros,
Co-Sponsors Franklin, Taveras, Patterson and Toles
Date of Introduction May 17, 2016

RESOLUTION

A RESOLUTION concerning

2 Support for Federal Railroad Administration Regulation on Crew Size
3 For the purpose of supporting and encouraging the rail safety rulemaking proposed by the
4 Federal Railroad Administration concerning on-board crew size.

5 WHEREAS, the safe operation of freight and passenger trains are vital to commerce; and

6 WHEREAS, the Prince George's County Council supports efforts to keep train operations
7 safe in Prince George's County; and

8 WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed
9 Rulemaking (NPRM) (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 21 30-AC48; Train
10 Crew Staffing) regarding adequate staffing on trains, a factor that is vital in ensuring safe train
11 operations; and

12 WHEREAS, polling across America shows ov rwhelming bi-partisan support for two-
13 person crews, with 83 to 87 percent of those polled in favor of mandating that trains are operated
14 by a crew of at least two qualified individuals; and

15 WHEREAS, national studies show that a minimum of two on-board crew members are vital
16 to operate a train safely and minimize the likelihood of train-related accidents; and

17 WHEREAS, most trains in North America are already operated by crews of at least two
18 individuals, making the economic impact of this proposed rule minimal; and

19 WHEREAS, the FRA agrees that, while advancements in automated technology such as
20 Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a
21 train's on-board crew members; and

22 WHEREAS, the FRA asserts that this rulemaking will add minimum requirements for the

size of different train crew staffs depending on the type of operation; and

2 WHEREAS, the FRA asserts that the minimum crew staffing requirements will mitigate the
3 safety risks posed to railroad employees, the general public, and the environment and account for
4 differences in costs; and

5 WHEREAS, the FRA asserts that this rulemaking will also establish minimum
6 requirements for the roles and responsibilities of the second train crew member on a moving
7 train, and promote safe and effective teamwork; and

8 WHEREAS, the FRA asserts that this rulemaking will permit a railroad to submit
9 information to FRA and seek approval if it wants to continue an existing operation with a one-
10 person train crew or start up an operation with less than two crew members.

11 **NOW, THEREFORE, BE IT RESOLVED** by the County Council of Prince George's
12 County, Maryland, that the Prince George's County Council does hereby encourage and support
13 the FRA's proposed Rulemaking (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 2130-
14 AC48; Train Crew Staffing) requiring that trains operated in the United States be operated by no
15 less than a two-person crew; and

16 BE IT FURTHER RESOLVED that this resolution be filed with the United States
17 Department of Transportation in the form of comments in support of the proposed federal rule.

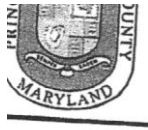
Adopted **this** day of May , 2016.

COUNTY COUNCIL OF PRINCE
GEORGE'S COUNTY, MARYLAND

BY: _____
Derrick Leon Davis
Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council



Prince George's County Council

Agenda Item Summary

Meeting Date:

Meeting Date: 5/17/2016

Effective Date:

Reference No.: CR-031-2016

Chapter Number:

Draft No.: 1

Public Hearing Date:

Proposer(s): Harrison

Sponsor(s): Harrison, Turner, Davis, Glaros, Franklin, Taveras, Patterson and Toles

Item Title: A RESOLUTION CONCERNING SUPPORT FOR FEDERAL RAILROAD ADMINISTRATION REGULATION ON CREW SIZE for the purpose of supporting and encouraging the rail safety rulemaking proposed by the Federal Railroad Administration concerning on-board crew size.

Drafter: Leroy D. Maddox, Jr., Legislative Officer

Resource Personnel: Rodney Streeter, Chief of Staff, District 5

LEGISLATIVE HISTORY:

Date:	Acting Body:	Action:	Sent To:
05/17/2016	County Council	introduced	
	Action Text: This Resolution was introduced by Council Members Harrison, Turner, Davis, Glaros, Franklin, Taveras, Patterson and Toles		
05/17/2016	County Council	rules suspended	
	Action Text: A motion was made by Vice Chair Glaros, seconded by Council Member Turner, that the Council Rules of Procedure be suspended to allow for the immediate adoption of this Resolution. The motion carried by the following vote: Aye: 8 Davis, Franklin, Glaros, Harrison, Patterson, Taveras, Toles and Turner Absent: 1 Lehman		
05/17/2016	County Council	adopted	
	Action Text: A motion was made by Council Member Harrison, seconded by Council Member Franklin, that this Resolution be adopted. The motion carried by the following vote: Aye: 8 Davis, Franklin, Glaros, Harrison, Patterson, Taveras, Toles and Turner Absent: 1 Lehman		

AFFECTED CODE SECTIONS:

BACKGROUND INFORMATION/FISCAL IMPACT:

Prince George's County Council supports efforts to keep train operations safe in Prince George's County.

Document(s): R2016031



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

TOM HUCKER
COUNCILMEMBER
DISTRICT 5

LEAD FOR ENVIRONMENT
TRANSPORTATION, INFRASTRUCTURE
ENERGY & ENVIRONMENT COMMITTEE
PUBLIC SAFETY COMMITTEE

May 11, 2016

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
W12-140
Washington, D.C. 20590

Train Crew Staffing, Docket #: FRA-2014-0033

Dear Administrator Feinberg:

Train safety has unfortunately become a top concern for local government officials, with a CSX freight train derailment and hazardous chemical spill in Northeast Washington, D.C. just last weekend and safety issues continuing to plague our Metrorail system. The Federal Railroad Administration (FRA) has published a notice of proposed rulemaking requiring that trains be operated by no less than a two person crew (FRA Docket # 2014-0033).

The Montgomery County Council strongly supports the FRA's proposed ruling, requiring that trains operated nationwide be operated by no less than a two person crew as the safe operation of freight and passenger trains are vital to commerce. National studies show that a minimum of two on-board crew members are vital to operate a train safely and minimize the likelihood of train-related accidents. Virtually all trains in North America are already operated by crews of at least two individuals, making the economic impact of this proposed rule minimal. Polling across the country shows overwhelming bipartisan support of two person train crews, with 83 to 87 percent of those polled in favor. The FRA agrees that, while advancements in automated technology such as Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a train's on-board crew members.

For these reasons, we urge you to adopt FRA 2014-33. This letter is filed with the United States Department of Transportation in the form of comments in support of the proposed federal rule.

Sincerely,



Tom Hucker (Dist. 5)



Council President Nancy Floreen (At-Large)



Council Vice-President Roger Berliner (Dist. 1)



Sidney Katz (Dist. 3)



Nancy Navarro (Dist. 4)



Marc Elrich (At-Large)



George Leventhal (At-Large)



Hans Riemer (At-Large)

**CITY OF BALTIMORE
COUNCIL BILL 16-0303R
(Resolution)**

Introduced by: Councilmembers Henry, Costello, Kraft, Branch, Clarke, President Young,
Councilmembers Middleton, Scott, Mosby, Curran, Holton, Welch, Spector, Reisinger,
Stokes

Introduced and read first time: April 18, 2016

Assigned to: Judiciary and Legislative Investigations Committee

Committee Report: Favorable

Adopted: November 14, 2016

A COUNCIL RESOLUTION CONCERNING

Request for Federal Action – Federal Railroad Administration Crew Size Rule

FOR the purpose of supporting the Federal Railroad Administration’s proposed ruling requiring that trains operated in America be operated by a crew of at least two people.

Recitals

WHEREAS, the safe operation of freight and passenger trains are vital to commerce; and Baltimore City Council supports efforts to keep train operations safe in the city of Baltimore.

WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed rulemaking (NPRM) regarding adequate staffing on trains, a factor we believe is vital to ensuring safe train operations.

WHEREAS, polling across America from North Dakota to Alabama shows overwhelming bi-partisan support of two-person crews, with 83 to 87 percent of those polled in favor of mandating that trains be operated by a crew of at least two qualified individuals.

WHEREAS, national studies show that a minimum of two on-board crew members are vital to operate a train safely and minimize the likelihood of train-related accidents.

WHEREAS, virtually all trains in North America are already operated by crews of at least two individuals, making the economic impact of this proposed rule minimal.

WHEREAS, the FRA agrees that, while advancements in automated technology such as Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a train’s on-board crew members.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF BALTIMORE, that the Baltimore City Council supports the Federal Railroad Administration’s proposed ruling requiring that trains operated in America be operated by a crew of at least two people.

EXPLANATION: Underlining indicates matter added by amendment.

~~Strike out~~ indicates matter stricken by amendment.

Council Bill 16-0303R

1 **AND BE IT FURTHER RESOLVED**, That a copy of this Resolution be sent to the Mayor, the
2 United States Secretary of Transportation, the Administrator of the Federal Railroad
3 Administration, and the Mayor’s Legislative Liaison to the City Council.

4 **AND BE IT FURTHER RESOLVED**, That this resolution be filed with the United States
5 Department of Transportation in the form of comments in support of the proposed federal rule.

Metropolitan Baltimore Council

FL-CIO Unions

7f.

May 3, 2016

RE: Support for FRA Crew Size Rule Making
Federal Railroad Administration
US Department of Transportation
Docket Number FRA-2014-0033
RIN 2130-AC48

Dear Sir or Madam:

The Metropolitan Baltimore Council, AFL-CIO, representing 175 local unions and 150,000 union members in the metro Baltimore area, supports the proposed rules identified above relating to crew size on freight and passenger trains.

Safety dictates that all trains operating in the US should have no less than two-person crews so that train workers and the public are protected.

We urge enactment and enforcement of these rules as soon as possible.

Sincerely,

Ernest R. Grecco
President

opeiu2/afl-cio

Resolution in support of Federal Railroad Administration crew size rule

WHEREAS, the safe operation of freight and passenger trains are vital to commerce; and the Metropolitan Baltimore Central Labor Council, AFL-CIO supports efforts to keep train operations safe in the Baltimore Metropolitan area; and

WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed rulemaking (NPRM) regarding adequate staffing on trains, a factor we believe is vital to ensuring safe train operations; and

WHEREAS, polling across America from North Dakota to Alabama shows overwhelming bi-partisan support of two-person crews, with 83 to 87 percent of those polled in favor of mandating that trains be operated by a crew of at least two qualified individuals; and

WHEREAS, national studies show that a minimum of two on-board crew members are vital to operate a train safely and minimize the likelihood of train-related accidents; and

WHEREAS, virtually all trains in North America are already operated by crews of at least two individuals, making the economic impact of this proposed rule minimal; and

WHEREAS, the FRA agrees that, while advancements in automated technology such as Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a train's on-board crew members.

NOW, THEREFORE be it resolved, that the Metropolitan Baltimore Central Labor Council, AFL-CIO does hereby support the FRA's proposed ruling, requiring that trains operated in America be operated by no less than a two-person crew; and

BE IT FURTHER RESOLVED that this resolution be filed with the United States Department of Transportation in the form of comments in support of the proposed federal rule.

Baltimore Council AFL-CIO

FAX COVER SHEET

2701 W. Patapsco Avenue, Suite 110
Baltimore, Maryland 21230
Phone 410-242-1300
Fax 410-247-3197

TO:	Federal Railroad Administration
COMPANY:	U.S. Department of Transportation
PHONE:	
FAX:	202-493-2251
DATE:	May 3, 2016
# OF PAGES, INCLUDING COVERSHEET	3
FROM:	Ernie Grecco

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Metropolitan Washington Council, AFL-CIO

888 16th Street, NW, Suite 520 • Washington, DC 20006 • (202) 974-8150 • Fax (202) 974-8152

An AFL-CIO "Union City"

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20 April 2016

RE :

Federal Railroad Administration
US Department of Transportation
Docket Number FRA-2014-0033
RIN 2130-AC48

Dear Sir or Madam:

The Metropolitan Washington Council, AFL-CIO, representing 175 local unions and 150,000 union members in the metro Washington DC area, supports the proposed rules identified above relating to crew size on freight and passenger trains.

Safety dictates that all trains operating in the US should have no less than two-person crews so that train workers and the public are protected.

We urge enactment and enforcement of these rules as soon as possible.

Sincerely,


Carlos Jimenez
Executive Director

Resolution in support of Federal Railroad Administration crew size rule

WHEREAS, the safe operation of freight and passenger trains is vital to commerce; and the Metropolitan Washington Council, AFL-CIO supports efforts to keep train operations safe in the Metropolitan Washington, DC area; and

WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed rulemaking (NPRM) regarding adequate staffing on trains, a factor we believe is vital to ensuring safe train operations; and

WHEREAS, polling across America from North Dakota to Alabama shows overwhelming bi-partisan support of two-person crews, with 83 to 87 percent of those polled in favor of mandating that trains be operated by a crew of at least two qualified individuals; and

WHEREAS, national studies show that a minimum of two on-board crew members are vital to operate a train safely and minimize the likelihood of train-related accidents; and

WHEREAS, virtually all trains in North America are already operated by crews of at least two individuals, making the economic impact of this proposed rule minimal; and

WHEREAS, the FRA agrees that, while advancements in automated technology such as Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a train's on-board crew members,

NOW, THEREFORE be it resolved, that the Metropolitan Washington Council, AFL-CIO does hereby support the FRA's proposed ruling, requiring that trains operated in America be operated by no less than a two-person crew; and

BE IT FURTHER RESOLVED that this resolution be filed with the United States Department of Transportation in the form of comments in support of the proposed federal rule.

Dated this 18th day of April, 2016.

WESTERN MARYLAND CENTRAL LABOR
COUNCIL, AFL-CIO

152-154 N. MECHANIC STREET
CUMBERLAND, MD 21502.
301-777-1820 FAX: 301-777-0121
west:mdclc@verizon.net

FAX COVER SHEET

DATE: tj.. Jq..... {.p

TO: >>> o - Jody Oliver
Council, AFL-CIO

FROM: W 11.1 C

OF PAGES TO FOLLOW: d

FAX# 902-493-2251

NOTES:



WESTERN MARYLAND CENTRAL LABOR COUNCIL, AFL-CIO

152-154 N. MECHANIC STREET, CUMBERLAND, MD 21502

301-777-1820 * FAX 301-777-0121

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SCOTT UPOLE

April 14, 2016

Dear Sirs:

I believe it is important for labor to get behind an initiative that will provide safety for all railroad workers in Allegany and Garrett Counties in Maryland.

Attached is a copy of a Resolution, in support of the proposed federal rule making process to require a minimum of two (2) qualified persons on freight trains, that was passed by the Executive Board of this Council for your consideration. If you have any comments or questions regarding this issue, please don't hesitate to contact me.

In Solidarity,

George A. Koontz,
President

Resolution in support of Federal Railroad Administration crew size rule

WHEREAS, the safe operation of freight and passenger trains are vital to commerce; and the Western Maryland Central Labor Council, AFL-CIO supports efforts to keep train operations safe in Garrett and Allegany Counties of Maryland; and

WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed rulemaking (NPRM) regarding adequate staffing on trains, a factor we believe is vital to ensuring safe train operations; and

WHEREAS, polling across America from North Dakota to Alabama shows overwhelming bi-partisan support of two-person crews, with 83 to 87 percent of those polled in favor of mandating that trains be operated by a crew of at least two qualified individuals; and

WHEREAS, national studies show that a minimum of two on-board crew members are vital to operate a train safely and minimize the likelihood of train-related accidents; and

WHEREAS, virtually all trains in North America are already operated by crews of at least two individuals, making the economic impact of this proposed rule minimal; and

WHEREAS, the FRA agrees that, while advancements in automated technology such as Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a train's on-board crew members.

NOW, THEREFORE be it resolved, that the Western Maryland Central Labor Council, AFL-CIO does hereby support the FRA's proposed ruling, requiring that trains operated in America be operated by no less than a two-person crew; and

BE IT FURTHER RESOLVED that this resolution be filed with the United States Department of Transportation in the form of comments in support of the proposed federal rule.

DFM Research

St. Paul, Minnesota

**MARYLAND STATEWIDE
RAIL ISSUE SURVEY**

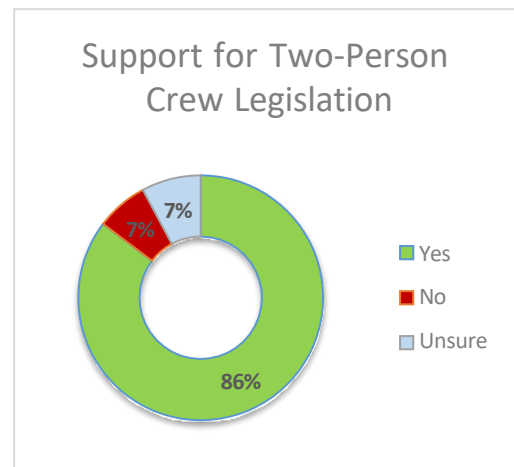
JANUARY 19-22, 2019

Executive Summary:

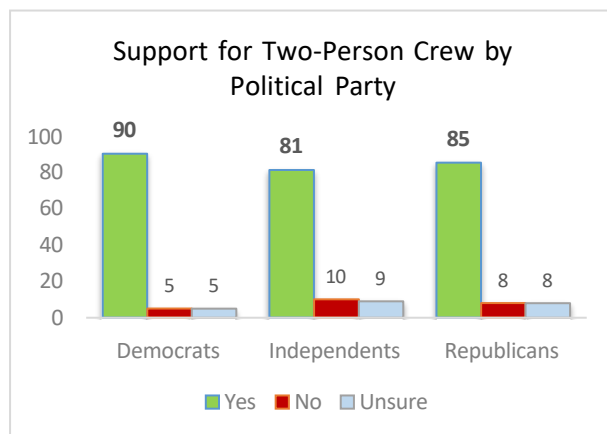
By a clear majority, Marylanders strongly support state legislation which would require a crew of two to operate any freight train in Maryland (introduced as H.B. 66). An overwhelming 86 percent of Maryland residents support two-person crew state legislation, to just 7 percent who reject proposed state legislation. The survey was conducted January 19-22, 2019 comprising 500 random Marylanders by live caller using landline and cell phones. Margin of error is \pm 4.4 percentage points.

The survey measures level of support both pre-and-post messaging using arguments by both the railroads and rail labor on their respective position. Each survey respondent heard two statement in support and two statements in opposition. Result shows survey respondents did not find the railroads arguments convincing, while finding support messages for two-person crew convincing. Consider:

- The railroads best argument in opposition of two-person crew state legislation is stating that passenger rail data (mostly use single crew) from the 1970s show an excellent safety record; yet only 33 percent found this to be convincing.
- In support of two-person state legislation, 89 percent of respondents found convincing the statement that two people on a train allows the crew members to supervise and communicate with each other to help avoid mistakes that may contribute to an accident.



At the conclusion of the arguments in support and opposition to two-person crew state legislation, the support level for two-person crew moved up to 88 percent (from 86 percent) voting 'yes to pass' legislation. The survey also shows that while Marylanders support the implementation of advance rail technology, only four percent support rail technology as a replacement of a crew member; and a clear majority of 79 percent do not trust advanced rail technology as a replacement of a train crew member.



Rail safety via two-person crew legislation is not a partisan issue; 85 percent of Republicans and 90 percent of Democrats support state legislation. The lowest support level by demographic groups are Marylanders under the age of 35 and men, both at robust 84 percent in support.

Bottom line, no matter the age, education level gender, partisan inclination or where one lives, Marylanders strongly support two-person crew state legislation.

Methodology:

The results presented are based on a stratified random sample of 500 Maryland residents over the age of 18. Unlike past surveys for SMART Transportation Division, the Maryland survey did not use a likely voter screen. The sample was stratified into four areas of Maryland (D.C. Suburbs, Baltimore City, Baltimore Suburbs/Central and rural Maryland, all by county lines) to ensure a statewide representative sample. All calls were conducted by live callers using both landline and mobile phones.

After the numbers were stratified into the appropriate region, telephone numbers were selected at random using a skip pattern to guarantee interviews were distributed throughout the region. Each number in the stratified sample had the same non-zero chance of being selected for an interview.

Telephone interviews were conducted by trained staff of KGS Research of Las Vegas, Nevada, using a computer-assisted telephone interview (CATI) system for landline phones. Mobile phone interviews are dialed manually to comply with the 1991 Telemarketing Consumer Protection Act. To ensure everyone in the household has an equal chance of being selected, callers ask to interview the resident over the age of 18 who had the most recent birthday.

Final results are weighted based on gender, age, race and education to conform approximately to the 2018 U.S. Census Bureau demographic data on file.

<u>Gender</u>		<u>Age</u>		<u>Race</u>		<u>Education</u>	
Male	48%	18-34	30%	White	65%	Non College	61%
Female	52%	35-49	33%	Black	27%	College Degree	39%
		50-64	22%	All Other	8%		
		65 plus	15%				

The final results are subject to sampling error, which is the difference between results obtained from the survey and those that would be obtained if every adult was interviewed in the district. The margin of error is ± 4.4 percentage points with a 95 percent confidence level; meaning that in 19 out of 20 times, the individual responses would be within the margin of error. For example, if a question produced a final result of 50 percent, the likely range would be between 45.6 to 54.4 percent had the entire state population been surveyed. Where appropriate in the survey, question and answer choices are randomized to help reduce bias. Due to rounding, results may not equal 100 percent.

Project management and final analysis of the data was completed by Dean Mitchell of DFM Research based in Saint Paul, Minnesota. In addition to his 28 years of political experience, Dean has completed course work in survey techniques and statistics as part of his Master in Public Policy (MPP) degree from the University of Minnesota's Humphrey School of Public Affairs.

Topline:

<u>Interviews:</u>	500 respondents by live caller
<u>Margin of Error:</u>	± 4.4 percentage points with a 95 percent confidence
<u>Interview Dates:</u>	January 19-22, 2019
<u>Sample:</u>	Landline and cell phone sample by live caller. Calls were stratified by four unique regions of Maryland. Final data weighted by gender, race, age, education and counties based on 2018 U.S. Census estimated demographics.
<u>Survey Sponsor:</u>	SMART Transportation Division's Maryland State Legislative Board

Q1: To start, do you think Maryland is moving in the right direction or is Maryland off on the wrong track?

Right Direction	65%
Wrong Track	21
(VOL) Unsure	14

Q2: I'm now going to read you some names of public figures and organizations. For each one, please tell me if you have a favorable or unfavorable opinion, and if you never heard of them before, just say so:

	<u>Favorable</u>	<u>Unfavorable</u>	<u>Neutral (VOL)</u>	<u>Never Heard Of</u>
a: Donald Trump	34%	61	4	0
b: Chris Van Hollen	41	20	14	26
c: Ben Cardin	51	24	12	13
d: Larry Hogan	78	12	5	5
e: Maryland General Assembly	49	21	19	11
f: Amtrak	56	9	31	5
g: D.C. Metro Subway	49	14	31	5
h: Labor Unions	56	25	15	3
i: Mike Locksley	7	3	9	81
j: University of Maryland	87	6	6	1

Q3: Generally speaking, do you approve or disapprove the overall job Donald Trump is doing as President of the United States?

Strongly approve	25%	37 approve
Somewhat approve	12	
Somewhat disapprove	4	60 disapprove
Strongly disapprove.....	56	
(VOL) Unsure / Neutral	4	

Q4: Although it is a while away, suppose the election was today for President of the United States. Would you vote for Donald Trump the Republican or would you vote for the Democratic Party candidate?

Vote for Donald Trump	31%
Vote for the Democratic Party candidate.....	53
(VOL) Unsure / Other / Refused	16

Q5: Now thinking about Maryland’s transportation infrastructure – including roads, highways, bridges, rail, air, and public transportation – how would you rate it?

Excellent	4%
Good	34
Satisfactory	40
Poor	14
Failing	6
(VOL) Unsure	2

Q6: Based on what you know, how many people do you think operate a freight train that travels through Maryland?

One	7%
Two	14
Three	13
Four	8
Five or More	34
(VOL) Don’t know	24

Currently most freight trains in Maryland operate with a crew of two people; but there are efforts by some railroads to reduce train crew to just one person.

Q7: Let’s suppose freight trains in your area operated with only a crew of one; how worried would you be about a train derailling in your community?

Very Worried	49%
Fairly Worried.....	15
Just Somewhat Worried	20
Not that Worried	15

Q8: Some in Maryland want to enact a law, introduced as House Bill 66, which would require a crew of two individuals on all freight trains that operate in Maryland. Suppose you could vote on House Bill 66; would you vote YES to pass a two-person crew state law or would you vote NO and reject a two-person crew state law?

Yes, Pass	86%
No, Reject.....	7
(VOL) Unsure	7

SURVEY NOTE - Each respondent received two reasons to oppose House Bill 66 (questions 9a,b,c,d) and two reason to support House Bill 66 (questions 10a,b,c). Questions 9 and 10 were rotated and randomized. The margin of error ranges from $\pm 5.2\%$ pts to $\pm 6.3\%$ pts.

Q: I now want to read you a few reasons why some people oppose House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to reject House Bill 66:

Q9a: Railroads say that two-person crew legislation undermines the sanctity of collective bargaining between rail management and rail labor regarding train crew size. (n=260; MoE $\pm 6.1\%$ pts)

Convincing	12%
Not That Convincing	86
(VOL) Unsure	3

Q9b: Commuter rail operates thousands of trains a day with one person in the locomotive, and the data going back to the 1970s shows an excellent safety record. (n=240; MoE $\pm 6.3\%$ pts)

Convincing	33%
Not That Convincing	64
(VOL) Unsure	3

Q9c: If two-person train crew legislation passes, it will deter investment and implementation of safe, cost-saving technology like Positive Train Control, which is advanced technology designed to automatically stop a train before certain types of accidents. (n=248; MoE $\pm 6.2\%$ pts)

Convincing	33%
Not That Convincing	62
(VOL) Unsure	5

Q9d: Crew size mandates would hinder rail efficiencies and divert traffic from rail to highway-using trucks, which are less fuel efficient, create congestion and damage the nation's highway system. (n=252; MoE $\pm 6.2\%$ pts)

Convincing	23%
Not That Convincing	73
(VOL) Unsure	4

Q: I now want to read you a few reasons why some people support House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to pass House Bill 66?

Q10a: Having two crew members on a train provides better monitoring of traffic at public road crossings. (n=359; MoE $\pm 5.2\%$ pts)

Convincing	81%
Not that convincing	19
(VOL) Unsure	1

Q10b: Having two people on a train allows the crew members to supervise and communicate with each other to help avoid mistakes that may contribute to an accident. (n=322; MoE ±5.5%pts)

Convincing	89%
Not that convincing	10
(VOL) Unsure	1

Q10c: According to federal regulations, the engineer is not allowed to leave the locomotive cab while operating the train. A second crew member is necessary to investigate incidents such as derailment or a collision between a train and a motor vehicle at a crossing. (n=319; MoE ±5.5%pts)

Convincing	79%
Not that convincing	19
(VOL) Unsure	2

Q11: When it comes to train crew size, rail safety and the latest rail technology, which option makes the most sense to you?

Only two-person crew, no advanced rail technology	2%
Two person crew, using advanced rail technology	68
Advanced rail technology as replacement of a train crew member .	4
Let railroads and rail unions decide which option is safest	21
(VOL) Unsure	5

Q12: Do you trust advanced rail technology as a replacement of a train crew member?

Yes	13%
No.....	79
(VOL) Unsure	8

Q13: Now considering everything you just heard about a House Bill 66 that would require a crew of two individuals on all freight trains. If you could vote again, would you vote YES to pass a two-person crew state law, or would you vote NO and reject a two-person crew state law?

Yes, Pass	88%
No, Reject.....	8
(VOL) Unsure	4

Select Crosstabs:

Q5: Now thinking about Maryland’s transportation infrastructure – including roads, highways, bridges, rail, air, and public transportation – how would you rate it?

Excellent	4%
Good	34
Satisfactory	40
Poor	14
Failing	6
(VOL) Unsure	2

<u>Gender</u>	<u>Excellent</u>	<u>Good</u>	<u>Satisfactory</u>	<u>Poor</u>	<u>Failing</u>	<u>Unsure</u>
Men	4	34	40	14	7	1
Women	4	35	40	14	5	2
<u>Age</u>						
18-34	6	31	43	14	5	1
35-49	3	34	43	13	6	1
50-64	4	36	34	16	8	3
65+	4	39	39	11	4	4
<u>Education</u>						
No College Degree	3	33	41	14	7	2
College Degree	5	36	39	13	5	1
<u>Region</u>						
D.C. Suburbs	4	37	37	16	3	3
Baltimore City	2	27	44	20	7	0
Baltimore Suburbs / Central	4	30	45	12	7	2
Rural Maryland	6	41	36	9	9	0
<u>Party Identification</u>						
Democrat	3	33	41	14	7	2
Independent	5	39	38	11	4	3
Republican	5	30	42	16	7	0

Q6: Based on what you know, how many people do you think operate a freight train that travels through Maryland?

One	7%
Two	14
Three	13
Four	8
Five or More	34
(VOL) Don't know	24

<u>Gender</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four</u>	<u>Five +</u>	<u>DK</u>
Men	5	18	14	11	32	20
Women	8	11	13	5	35	27
<u>Age</u>						
18-34	7	13	17	7	35	20
35-49	5	14	10	13	35	22
50-64	7	13	13	8	35	25
65+	7	21	13	0	27	32
<u>Education</u>						
No College Degree	8	15	12	9	30	25
College Degree	5	13	15	7	39	22
<u>Region</u>						
D.C. Suburbs	6	15	14	6	34	24
Baltimore City	9	11	9	13	33	25
Baltimore Suburbs / Central	6	14	14	9	35	23
Rural Maryland	8	17	13	9	30	23
<u>Party Identification</u>						
Democrat	6	16	13	9	34	23
Independent	8	13	11	7	37	25
Republican	7	14	17	8	30	24

Q7: Let's suppose freight trains in your area operated with only a crew of one; how worried would you be about a train derailling in your community?

Very Worried	49%
Fairly Worried	15
Just Somewhat Worried	20
Not that Worried	15

<u>Gender</u>	<u>Very</u>	<u>Fairly</u>	<u>Somewhat</u>	<u>Not That</u>
Men	42	13	23	21
Women	56	16	18	10
<u>Age</u>				
18-34	42	16	23	20
35-49	51	13	18	19
50-64	49	18	24	8
65+	62	13	16	8
<u>Education</u>				
No College Degree	52	11	21	16
College Degree	46	21	19	14
<u>Region</u>				
D.C. Suburbs	48	17	21	15
Baltimore City	56	15	20	9
Baltimore Suburbs / Central	51	14	18	17
Rural Maryland	45	13	23	18
<u>Party Identification</u>				
Democrat	57	14	21	9
Independent	47	17	18	18
Republican	41	13	23	24

Q8: Some in Maryland want to enact a law, introduced as House Bill 66, which would require a crew of two individuals on all freight trains that operate in Maryland. Suppose you could vote on House Bill 66; would you vote YES to pass a two-person crew state law or would you vote NO and reject a two-person crew state law?

Yes, Pass	86%
No, Reject	7
(VOL) Unsure	7

<u>Gender</u>	<u>Yes, Pass</u>	<u>No, Reject</u>	<u>Unsure</u>
Men	84	8	8
Women	88	6	6
<u>Age</u>			
18-34	84	6	10
35-49	87	6	7
50-64	85	9	5
65+	88	9	3
<u>Education</u>			
No College Degree	85	9	6
College Degree	87	5	8
<u>Region</u>			
D.C. Suburbs	86	8	6
Baltimore City	84	9	7
Baltimore Suburbs / Central	85	7	9
Rural Maryland	91	4	4
<u>Party Identification</u>			
Democrat	90	5	5
Independent	81	10	9
Republican	85	8	8

Q9a: I now want to read you a few reasons why some people oppose House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to reject House Bill 66:

Railroads say that two-person crew legislation undermines the sanctity of collective bargaining between rail management and rail labor regarding train crew size.

Convincing	12%
Not That Convincing	86
(VOL) Unsure	3

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	13	85	2
Women	10	87	3
<u>Age</u>			
18-34	14	81	5
35-49	12	87	1
50-64	9	90	2
65+	10	87	3
<u>Education</u>			
No College Degree	18	79	3
College Degree	1	97	2
<u>Region</u>			
D.C. Suburbs	11	86	3
Baltimore City	5	86	9
Baltimore Suburbs / Central	10	88	2
Rural Maryland	18	82	0
<u>Party Identification</u>			
Democrat	13	84	3
Independent	11	86	2
Republican	10	89	2

Q9b: I now want to read you a few reasons why some people oppose House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to reject House Bill 66:

Commuter rail operates thousands of trains a day with one person in the locomotive, and the data going back to the 1970s shows an excellent safety record.

Convincing	33%
Not That Convincing	64
(VOL) Unsure	3

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	37	61	3
Women	30	67	3
<u>Age</u>			
18-34	38	61	1
35-49	31	65	4
50-64	34	64	2
65+	26	69	5
<u>Education</u>			
No College Degree	33	64	4
College Degree	33	65	2
<u>Region</u>			
D.C. Suburbs	32	64	4
Baltimore City	38	59	3
Baltimore Suburbs / Central	33	64	3
Rural Maryland	33	67	0
<u>Party Identification</u>			
Democrat	30	66	4
Independent	30	68	3
Republican	42	56	2

Q9c: I now want to read you a few reasons why some people oppose House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to reject House Bill 66:

If two-person train crew legislation passes, it will deter investment and implementation of safe, cost-saving technology like Positive Train Control, which is advanced technology designed to automatically stop a train before certain types of accidents.

Convincing	33%
Not That Convincing	62
(VOL) Unsure	5

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	31	65	4
Women	35	59	6
<u>Age</u>			
18-34	39	57	4
35-49	31	65	4
50-64	22	69	9
65+	43	54	3
<u>Education</u>			
No College Degree	38	56	6
College Degree	25	71	4
<u>Region</u>			
D.C. Suburbs	28	64	7
Baltimore City	39	57	4
Baltimore Suburbs / Central	30	66	4
Rural Maryland	44	54	2
<u>Party Identification</u>			
Democrat	29	65	6
Independent	38	59	4
Republican	33	61	6

Q9d: I now want to read you a few reasons why some people oppose House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to reject House Bill 66:

Crew size mandates would hinder rail efficiencies and divert traffic from rail to highway-using trucks, which are less fuel efficient, create congestion and damage the nation’s highway system.

Convincing	23%
Not That Convincing	73
(VOL) Unsure	4

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	27	70	3
Women	20	75	5
<u>Age</u>			
18-34	25	75	0
35-49	18	79	3
50-64	24	70	6
65+	32	58	11
<u>Education</u>			
No College Degree	24	71	5
College Degree	22	75	2
<u>Region</u>			
D.C. Suburbs	21	73	7
Baltimore City	26	74	0
Baltimore Suburbs / Central	27	70	3
Rural Maryland	21	77	2
<u>Party Identification</u>			
Democrat	22	73	4
Independent	24	72	4
Republican	25	72	3

Q10a: I now want to read you a few reasons why some people support House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to pass House Bill 66?

Having two crew members on a train provides better monitoring of traffic at public road crossings.

Convincing	81%
Not that convincing	19
(VOL) Unsure	1

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	78	21	1
Women	83	16	1
<u>Age</u>			
18-34	80	19	1
35-49	84	15	2
50-64	73	27	0
65+	86	14	0
<u>Education</u>			
No College Degree	83	17	1
College Degree	77	22	1
<u>Region</u>			
D.C. Suburbs	79	20	1
Baltimore City	80	20	0
Baltimore Suburbs / Central	82	17	1
Rural Maryland	82	18	0
<u>Party Identification</u>			
Democrat	85	15	0
Independent	74	23	3
Republican	82	18	0

Q10b: I now want to read you a few reasons why some people support House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to pass House Bill 66?

Having two people on a train allows the crew members to supervise and communicate with each other to help avoid mistakes that may contribute to an accident.

Convincing	89%
Not that convincing	10
(VOL) Unsure	1

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	88	12	1
Women	91	9	1
<u>Age</u>			
18-34	90	9	1
35-49	92	7	1
50-64	84	16	0
65+	90	10	0
<u>Education</u>			
No College Degree	92	8	0
College Degree	86	13	1
<u>Region</u>			
D.C. Suburbs	93	7	0
Baltimore City	81	19	0
Baltimore Suburbs / Central	88	11	1
Rural Maryland	91	7	2
<u>Party Identification</u>			
Democrat	92	8	0
Independent	88	10	2
Republican	87	13	0

Q10c: I now want to read you a few reasons why some people support House Bill 66, which would requiring a crew of two individuals on all freight trains. For each reason, tell me if you find it a convincing reason or not that convincing reason to pass House Bill 66?

According to federal regulations, the engineer is not allowed to leave the locomotive cab while operating the train. A second crew member is necessary to investigate incidents such as derailment or a collision between a train and a motor vehicle at a crossing.

Convincing	79%
Not that convincing	19
(VOL) Unsure	2

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	77	21	1
Women	80	18	2
<u>Age</u>			
18-34	84	14	2
35-49	76	20	4
50-64	73	27	0
65+	83	17	0
<u>Education</u>			
No College Degree	79	18	3
College Degree	78	21	1
<u>Region</u>			
D.C. Suburbs	76	20	4
Baltimore City	87	13	0
Baltimore Suburbs / Central	77	22	1
Rural Maryland	80	18	2
<u>Party Identification</u>			
Democrat	81	19	0
Independent	77	19	4
Republican	76	21	3

Q11: When it comes to train crew size, rail safety and the latest rail technology, which option makes the most sense to you?

- A - Only two-person crew, no advanced rail technology **2%**
- B - Two person crew, using advanced rail technology **68**
- C - Advanced rail technology as replacement of a train crew member **4**
- D - Let railroads and rail unions decide which option is safest **21**
- E - (VOL) Unsure **5**

<u>Gender</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
Men	2	68	5	20	4
Women	3	67	2	22	6
<u>Age</u>					
18-34	3	65	4	26	3
35-49	2	74	3	16	5
50-64	3	64	4	26	4
65+	3	64	4	18	12
<u>Education</u>					
No College Degree	3	67	3	22	5
College Degree	2	68	4	20	5
<u>Region</u>					
D.C. Suburbs	2	74	3	16	5
Baltimore City	2	66	2	22	9
Baltimore Suburbs / Central	2	63	5	27	3
Rural Maryland	4	66	3	20	7
<u>Race / Ethnicity</u>					
White / Caucasian	2	67	5	21	5
Black / African-American	3	69	2	22	4
All Other	0	69	0	20	11
<u>Party Identification</u>					
Democrat	1	70	4	21	4
Independent	4	62	4	21	9
Republican	3	70	3	23	2

Q12: Do you trust advanced rail technology as a replacement of a train crew member?

Yes	13%
No	79
(VOL) Unsure	8

<u>Gender</u>	<u>Yes</u>	<u>No</u>	<u>Unsure</u>
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Men	18	76	6
Women	8	83	9

Age

18-34	16	75	9
35-49	11	83	6
50-64	10	85	5
65+	17	72	11

Education

No College Degree	14	79	7
College Degree	11	80	9

Region

D.C. Suburbs	12	80	8
Baltimore City	15	82	4
Baltimore Suburbs / Central	15	76	9
Rural Maryland	9	83	8

Party Identification

Democrat	11	84	4
Independent	16	71	13
Republican	12	81	7

Q13: Now considering everything you just heard about a House Bill 66 that would require a crew of two individuals on all freight trains. If you could vote again, would you vote YES to pass a two-person crew state law, or would you vote NO and reject a two-person crew state law?

Yes, Pass	88%
No, Reject	8
(VOL) Unsure	4

<u>Gender</u>	<u>Yes, Pass</u>	<u>No, Reject</u>	<u>Unsure</u>
Men	85	11	4
Women	90	5	5
<u>Age</u>			
18-34	85	10	5
35-49	88	6	6
50-64	87	11	2
65+	95	4	1
<u>Education</u>			
No College Degree	88	9	3
College Degree	88	7	6
<u>Region</u>			
D.C. Suburbs	89	6	5
Baltimore City	89	7	4
Baltimore Suburbs / Central	86	10	4
Rural Maryland	89	8	3
<u>Party Identification</u>			
Democrat	93	3	4
Independent	83	12	5
Republican	86	11	3

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DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

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

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 13798.20. 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)),

The Honorable Cory V. McCray
March 6, 2015
Page 3

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,

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February 10, 2016

The Honorable Brian J. Feldman
Maryland Senate
104 James Senate Office Building
Annapolis, Maryland 21401

Re: Senate Bill 275 - "Railroad Company - Movement of Freight - Required Crew"

Dear Senator Feldman:

You have inquired about possible federal preemption of Senate Bill 275 "Railroad Company - Movement of Freight - Required Crew," as it relates to the application of the federal Regional Rail Reorganization Act of 1973 ("3RA") to Maryland, and to the jurisdiction of the federal Surface Transportation Board ("STB") over rail transportation under 49 U.S.C. § 10501. Last year, I wrote an advice letter pertaining to identical legislation (House Bill 1138 of 2015), concluding that the bill, which required at least two crew members for the movement of railroad freight in the State, neither violated nor was preempted by the Federal Railroad Safety Act of 1970 ("FRSA"). *See* attached Letter of Advice of March 6, 2015 to the Hon. Cory V. McCray from Assistant Attorney General Jeremy M. McCoy.

In my view, there is a possibility that a court would find that SB 275 is preempted by 3RA, if there is an economic purpose for the enactment. In light of the authority of the State to enact crew levels as a rail safety standard under FRSA, however, it is also possible that if a court finds that the provisions of SB 275 serve the sole purpose of enhancing safety, SB 275 may be authorized as a safety standard under FRSA and would not be preempted by 3RA.

The Interstate Commerce Commission Termination Act ("ICCTA"), under 49 U.S.C. § 10501, establishing the jurisdiction of the STB, recognizes federal preemption of state regulation that has the effect of "managing" or "governing" rail transportation, while allowing the continued application of state laws that have a more remote or incidental effect on rail transportation. Case law suggests that if a state regulation relates primarily to the regulation of rail transportation in the state, the state regulation is subject to preemption analysis under the ICCTA. If the state regulation related primarily to rail safety, it is alternatively subject to preemption analysis under the FRSA, which regulates federal rail safety standards. Depending on how a court would view the minimum crew size requirements of SB 275, as primarily a regulation of rail transportation or as a rail safety

measure, the requirements of the bill may be subject to preemption under the ICCTA, or may be viewed as valid state safety measure that is allowable under FRSA preemption analysis.

Senate Bill 275, and its cross-file House Bill 92, 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. Each bill is identical to HB 1138 of 2015, which remained in the House Rules Committee.

State regulation of railroad safety authorized under FRSA

Last year, in response to an inquiry about whether HB 1138 of 2015 would "either violate or be preempted by" FRSA, I concluded, in light of existing federal case law that held that similar state crew size requirements were not preempted by FRSA, and the allowance for non-conflicting state regulation in FRSA, that HB 1138 neither violated nor was preempted by FRSA. Letter of Advice of March 6, 2015 to the Hon. Cory V. McCray from Assistant Attorney General Jeremy M. McCoy.

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(a) of the FRSA provides:

- (1) Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable.
- (2) 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:
 - (A) is necessary to eliminate or reduce an essentially local safety hazard;
 - (B) is not compatible with a law, regulation, or order of the United States Government; and
 - (C) 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.¹ "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.*

Consequently, the provisions of SB 275, as with HB 1138 of 2015, do not appear to be in conflict with specific final determinations by the FRA with respect to the use of single-crew members for hostling and helper services, and neither violates, nor is preempted by FRSA as it relates to crew member requirements for trains used in connection with the movement of freight in the State. Thus, the State is not prohibited under FRSA from establishing minimum crew standards as provided in SB 275, as a safety measure.

If the federal crew size regulations are adopted, to the extent the provisions of SB 275 conflict with the federal regulations, those state crew size provisions would then be preempted under the FRSA.

Federal preemption of rail staffing levels under 3RA

On its face, Maryland is prohibited under 45 U.S.C § 797j, as part of 3RA, from enacting minimum staffing levels for the movement of freight in the State. Following bankruptcy reorganizations of eight northeastern and midwestern railroads in the late 1960s and early 1970s, Congress concluded that its interest in interstate rail commerce required "reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit corporation" reestablishing the combined rail companies as the Consolidated Rail Corporation (Conrail) through enactment of 3RA in 1974. *See* 45 U.S.C. §§ 701 *et seq.* *Consolidated Rail Corp. v. Ray, ex rel. Boyd*, 693 F.Supp.2d 39, 41 (D.D.C. 2010). That Act "was intended to wipe the slate clean, to allow those rail systems to correct mistakes that led them into financial collapse and to enable them to start anew and continue on a profitable basis." *Id.*

The provisions of 3RA apply in a "Region" of seventeen northeastern and midwestern states, including Maryland, as well as the District of Columbia and "those portions of contiguous States in which are located rail properties" operated by the affected rail companies. 45 U.S.C § 702(17). The 3RA also established a "Special Court" with exclusive jurisdiction over proceedings relating to the 3RA, 45 U.S.C. § 719.² Subsequent to the enactment of 3RA, Congress enacted the Northeast Rail Services Act of 1981 ("NRSA"), which amended 3RA to establish a preemption provision under 45 U.S.C. § 797j, which provides the following:

No State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation 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.

In enacting this preemption provision, Congress explained at the time that 3RA "has failed to create a self-sustaining railroad system in the Northeast region," resulting "in the payment of benefits [of the affected rail employees] far in excess of levels anticipated at the time of enactment[.]" NRSA § 1132, and that "[g]iven the dire circumstances of these rail corporations, such a preemption is necessary." Congressional Record, July 31, 1981 at S. 9056.

Following the enactment of the preemption provision in 1981, the Special Court established to consider application of 3RA found that Region state laws establishing crew size and benefits to be preempted by federal law. In 1984, the Special Court held that the federal preemption in 3RA was a valid exercise of federal commerce power, prohibiting an Indiana state law establishing minimum crew sizes in the state. *Keeler v. Consolidated Rail Corp.*, 582 F.Supp. 1546 (Spec. Ct. R.R.R.A. 1984). The Special Court rejected Indiana's claim that its law was a safety measure,

² 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).

whereas 3RA, which applied to Indiana, addressed only economic issues. The court found that the Indiana law was "not concerned solely with safety," and that state approval of crew size was "contingent on findings of safety *and* employment protection." *Id.* at 1550. The court also explained that in light of 3RA preemption, "Congress evidently saw no legitimate safety reasons for Conrail to employ the numbers of firemen and brakemen required under Indiana law." *Id.* The Special Court similarly found other minimum crew laws in Region states to be preempted under 3RA. *See, e.g., Boettjer v. Chesapeake & Ohio Ry. Co.*, 612 F.Supp. 1207 (Spec. Ct. R.R.R.A. 1985) (Indiana minimum crew law preempted); *Norfolk & Western Ry. Co. v. Public Util. Comm. of Ohio*, 582 F.Supp. 1552 (Spec. Ct. R.R.R.A. 1984).

Co-existence of state safety measures allowed under FRSA and preempted economic state action under 3RA

Federal case law has also recognized that a Region 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. As the Special Court explained, "the preemptive power of section [797j] is not absolute[.]" *Norfolk & Western Ry. Co. v. Public Service Com'n of West Virginia*, 858 F.Supp. 1213, 1217 (Spec. Ct. R.R.R.A. 1994). Although holding in that instance that the West Virginia crew size statute at issue was preempted by 3RA because the state law provisions indicated an economic purpose, the court nevertheless recognized that "where the state regulation is solely related to safety, and the Secretary of Transportation has not acted [under the FRSA], [§ 797j] will not preempt a state statute that requires a minimum crew complement on trains." *Id.*

In that case, the Special Court examined one of its earlier unpublished decisions in which it reasoned that "the primary purpose behind the federal regulation of crew sizes [under 3RA] is to promote the continued economic viability of the railroads through the elimination of excess employees[.]" and that 3RA did not address safety concerns. *Id.* (citing *Consolidated Rail Corp. v. United Transp. Union & Pennsylvania Pub. Util. Comm.*, Civil Action 81-10, slip op. 6 (Spec. Ct. R.R.R.A., August 30, 1984)). The court rejected the argument that FRSA was repealed by 3RA by implication, applying the Supreme Court's analysis in *Watt v. Alaska*, 451 U.S. 259 (1981), in which two conflicting applicable statutes should be interpreted to give effect to both. *Id.* *See also Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133 (1974) (since federal Tucker Act and 3RA are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to reward each as effective").

The Special Court in the West Virginia case found 3RA preemption because the statute there had "none of the indicia necessary to conclude it was enacted solely for the sake of safety[.]" and that a provision requiring an extra crew member "shall come from the railroad's train or engine service personnel indicates that the measure is at least in part economic, rather than safety-oriented." *Norfolk & Western*, 858 F.Supp. at 1217. The court also found that "[t]he legislature of West Virginia made no findings related to the safety need for extra crewmen in pusher

locomotives. Further, the statute is a blanket prohibition on one person crewed locomotives, regardless of safety circumstances." *Id.* at 1218. The court also found that West Virginia's crew-level exception for trains coming into the state demonstrated that the concern was not solely safety-related. *Id.*

Safety standard vs. economic purpose

With respect to SB 275, the text of the bill itself appears to be neutral with respect to its purpose. The fact that a violation of the minimum crew requirement under the bill is a criminal offense might suggest the existence of a public safety element. *See Bowie Inn, Inc. v. City of Bowie*, 275 Md. 230 (1975) (valid exercise of State's police power requires a real and substantial relation to the public health, morals, safety, and welfare of the citizens of the State). To the extent, however, that the bill establishes a blanket requirement for two crew members for the movement of freight, regardless of the safety need, a court may find an economic purpose that may be subject to preemption. *See Norfolk & Western*, 858 F.Supp. at 1218.

To the extent federal regulators view minimum crew size as a safety issue and view the historic economic necessity of the 3RA to be satisfied, a court may be more likely to find that 3RA would not preempt state safety measures that are otherwise allowable under FRSA. For example, in proposing the pending federal rules on minimum crew size, FRA Administrator Joseph C. Szabo explained that the FRA "believe[s] that safety is enhanced with the use of a multiple crew - safety dictates that you never allow a single point of failure[.]" and that "[e]nsuring that trains are adequately staffed for the type of service operated is critically important to ensure safety redundancy." U.S.D.O.T. News Release, FRA 03-14. Additionally, subject to Section 408 of the Rail Safety Improvement Act of 2008 (Pub. L. No. 110-432 (2008)), the U.S. Secretary of Transportation completed a study of the impact of repealing the preemption provision of 3RA (45 U.S.C. § 797j), and issued his recommendations to Congress in 2011. *See U.S.D.O.T. Study of Repeal of Conrail Provision*, May 26, 2011. In the study, the Secretary concluded that the statutory purpose for which the preemption provision of 45 U.S.C. § 797j was originally enacted "has been clearly satisfied[.]" explaining that "Conrail has been successfully returned to the private sector³ and no longer requires a special statutory exemption from state laws requiring it to employ any specified number of persons to perform any particular task, function or operation." *Id.* at 5. Conversely, to date, Congress has not seen fit to repeal the preemption provisions of 45 U.S.C. § 797j. As that federal preemption law remains in effect, courts remain bound by its provisions and are likely to view federal case law interpreting its provisions persuasively.

In summary, in light of federal case law interpreting both the FRSA and 3RA, in my view, a court may find that the minimum crew size requirements of SB 275 is preempted by 3RA, if

³ Citing to the Surface Transportation Board's approval of the acquisition and restructuring of Conrail in 1998, in which Norfolk Southern Corporation and CSX Corporation acquired Conrail through a joint stock purchase. U.S.D.O.T. *Study of Repeal of Conrail Provision*, May 26, 2011.

there is an economic purpose for the enactment. In light of the authority of the State to enact crew levels as a rail safety standard under FRSA, however, and federal cases acknowledging the authority of states subject to 3RA to establish crew levels solely for safety purposes, it is also possible that if a court finds that the provisions of SB 275 serve the sole purpose of enhancing safety, SB 275 may be authorized as a safety standard under FRSA, and is not preempted by 3RA.

Preemption by STB under the ICCTA

You additionally inquired whether the STB preempts state regulation contemplated in SB 275 under the provisions of the ICCTA in 49 U.S.C. § 10501 relating to the regulation of rail transportation. In my view, to the extent a court could find that the crew size requirements of SB 275 constitutes state regulation of an area of law directly regulated by the STB, there is a possibility that the bill may be preempted under the ICCTA. To the extent, however, that the crew size requirement under SB 275 may be construed to relate to railroad safety, as opposed to the management of rail transportation, the provisions of FRSA that allow for state safety regulations may provide the applicable standard for assessing federal preemption, rather than the ICCTA.

Congress established the STB through its enactment of the ICCTA, providing the STB with exclusive jurisdiction over certain aspects of railroad transportation. 49 U.S.C. § 10501. The remedies provided under the ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. § 10501(b).

Therefore, "Congress narrowly tailored the ICCTA preemption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (citing *Fla. E. Coast Ry. Co. v. City of W Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). Courts and the STB have recognized two broad categories of state and local actions that are "categorically" preempted: (1) any form of state or local permitting or preclearance that could be used to deny a railroad the ability to conduct operations; or (2) a state or local regulation of a matter "directly regulated" by the STB, such as the construction, operation, and abandonment of rail lines, mergers, acquisitions, consolidations, or railroad rates or services. *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 332 (5th Cir. 2008).

State actions that do not fall under one of those categories may be preempted "as applied," which involves a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation. *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 332 (5th Cir. 2008). With respect to as-applied preemption analysis, the issue is whether state regulation "imposes an unreasonable burden on railroading" *N Y Susquehanna & W Ry. Corp. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007). The STB has found that a state regulation is permissible if: (1) it is not unreasonably burdensome; and (2) does not

discriminate against railroads. *Id.* Under the burdensome prong, the substance of the state regulation "must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion." *Id.* at 254. Under the discrimination prong, the regulation must address state concerns generally without targeting the railroad industry. *Id.* Under such analysis, "[s]tates retain their police powers, allowing them to create health and safety measures, but 'those rules must be clear enough that the rail carrier can follow them and ... the state cannot easily use them as a pretext for interfering with or curtailing rail service.'" *Adrian & Blissfield Railroad Co. v. Village of Blissfield*, 550 F.3d 533,541 (6th Cir. 2008) (quoting *Jackson*, 500 F.3d at 254).

Although the ICCTA's preemption language "is unquestionably broad, it does not categorically sweep up all state regulation that touches upon railroads [...] interference with rail transportation must always be demonstrated." *Island Park, LLC v. CSXTransp.* 559 F.3d 96, 104 (2d Cir. 2009). Not all state regulation is preempted by the ICCTA, and "local bodies retain certain police powers which protect public health and safety." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638,643 (2d Cir. 2005). Railroad safety measures enacted by states may be alternatively subject to preemption under FRSA.

Some courts have examined the interplay of the FRSA and the ICCTA in analyzing preemption of state rail safety measures. In *Tyrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 200 I), the Sixth Circuit upheld an Ohio track clearance rule as a rail safety issue that was subject to preemption challenge under the FRSA and ICCTA. Although both federal statutes address railroads, the court rejected the idea that ICCTA preemption "implicitly repeals FRSA's first saving clause." *Id.* at 522-23. The court explained that:

While the STB must adhere to federal policies encouraging 'safe and suitable working conditions in the railroad industry,' the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. § 10101(11). Rather, the agencies' complimentary exercise of their authority accurately reflects Congress's intent for the ICCTA and the FRSA to be construed *in pari materia*. For example, while recognizing their joint responsibility for promoting rail safety in their 1988 Safety Integration Plan rulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 *et seq*, while the STB handled economic regulation and environmental impact assessment.

Id. at 523.

Under similar analysis, but with a different outcome, a California order limiting the amount of time a train may block a public grade crossing was found to be preempted under the ICCTA, rather than allowed under the savings provision in the FRSA. *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App.4th 1513 (2012). In determining whether the order primarily relates to a "regulation of rail transportation" subject to the ICCTA, or "rail safety" subject to the FRSA, the

The Honorable Brian J. Feldman
February 10, 2016
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court examined the "order's terms, benefits of compliance, and legally recognized purpose." *Id.* at 1524. As evidence was presented to the court demonstrating that enforcement of the grade blocking order "will necessarily impact both scheduling and the length of BNSF trains," and "[b]y its clear terms and effects of compliance, [the order] regulates how trains operate on railroad tracks." *Id.* at 1525. As a result, the court held that as the order "primarily relates to railroad transportation," it was preempted under the ICCTA, and was not subject to the FRSA. *Id.* at 1528.

In this instance, 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. On the other hand, without such evidence, a court may conclude that the minimum crew size requirement regulates rail transportation and operation in the State, which may be preempted under the ICCTA.

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 stylized handwritten signature consisting of the letters 'JC' followed by a colon and another 'J'.

Assistant Attorney General

BRIAN E. FROSH
ATTORNEY GENERAL



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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

October 17, 2017

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

Dear Delegate McCray:

You have inquired about whether proposed new language added to a possible reintroduction of legislation from the 2017 session (House Bill 381 of 2017 - "Railroad Company - Movement of Freight - Required Crew"), would violate State or federal law. House Bill 381 sought to establish a misdemeanor prohibition against the operation in the State of a train or light engine used in connection with the movement of freight, unless the train or engine has a crew of at least two individuals.

The new language proposed in your inquiry would add a provision to the language of HB 381 to require that a railroad company be held exclusively liable for a criminal violation of the bill by an agent or employee of the railroad company. A violation under the bill would be a misdemeanor subject to a fine of \$500 for a first offense, and \$1,000 for a second or subsequent offense committed within three years of the second offense.¹

I am unaware of any legal impediment to the enactment of such a provision by the General Assembly to hold an employer criminally liable for the actions of an employee. *See, e.g.*, Alcoholic Beverages Article, Title 6, Subtitle 3 (criminal liability of alcoholic beverage licensee for unlawful alcohol sales). *See also Dawson v. State*, 329 Md. 275,283 (1993) (recognizing that the General Assembly has broad authority, under the exercise of the State's police power, to criminalize certain conduct and to decide what penalties to impose for the commission of crimes).

There may be an ambiguity with respect to the language of the penalty provision of House Bill 381 of 2017, as it relates to a third or subsequent offense that occurs beyond three years of a second offense. The bill provides for a fine of \$1,000 for a second offense and "any subsequent offense committed within a period of 3 years of the second offense." It is unclear under the bill what criminal penalty would apply to a third or subsequent offense that occurs beyond three years of a second offense.

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To the extent the proposal would still require two-person crews on certain trains operating in the State, however, as this office has previously indicated, there remains a possibility that a court could find that the two-person crew requirement in HB 381 is preempted by the federal Regional Rail Reorganization Act of 1973 ("3RA"). *See* Letter of Advice to Hon. Brian J. Feldman from Asst. Atty den. Jeremy M. McCoy (February 10, 2016) (advising that there is a possibility that a court would find Senate Bill 275 of 2016, which similarly required a two-person crew, to be preempted by the federal 3RA if there is an economic purpose for the enactment, but if the sole purpose of the proposal is to enhance safety, the proposal may be authorized as a safety measure under the Federal Railroad Safety Act of 1970, and would not be preempted by 3RA).

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 stylized handwritten signature in black ink, appearing to read 'J. McCoy'.

Jeremy M. McCoy
Assistant Attorney General

BRIAN E. FROSH
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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 9, 2018

The Honorable Robert L. Flanagan
Maryland House of Delegates
430 House Office Building
Annapolis, Maryland 21401

Re: House Bill 180 - "Railroad Company - Movement of Freight - Required Crew"

Dear Delegate Flanagan:

You have inquired whether, based on the possible enactment of House Bill 180 "Railroad Company - Movement of Freight - Required Crew," there is any law that would force CSX Transportation, Inc. ("CSX") to enter into a contract with the Maryland Transit Administration ("Administration"), if the Administration refused to pay CSX's extra operating costs that may be incurred in a two-person crew requirement.

Although there is no express requirement that CSX provide the Administration access to its property under *any* condition, CSX is a rail carrier that is nevertheless obligated under federal law to provide transportation or common carrier service upon reasonable request. If CSX refused to provide the Administration access to its rail property on the basis of the Administration's refusal to pay CSX's cost to implement HB 180, the Administration could file an action with the federal Surface Transportation Board ("Board"), which regulates interstate common carrier and rail carrier service, to obtain such access. CSX and the Administration are free to enter into a contract, as they have done in the past, setting out the terms of the Administration's access to CSX rail property. Such contract may include an agreement allocating certain costs, but if the parties failed to agree on a contract, the Administration may still make a reasonable request of access to CSX rail property, subject to the jurisdiction of the Board.

To the extent CSX's compliance with HB 180 may raise CSX's operating costs, under the conditions established by the Board for contracts for the provision of services under certain rates and conditions, such an operating cost may be factored into the contract for service between CSX and the Administration, and it may be possible that such a cost may be factored into the consideration paid by the Administration in its contract with CSX. Absent a contractual agreement between CSX and the Administration regarding the allocated costs, it appears to be within the discretion of the Board whether it would be reasonable to allow CSX to refuse the Administration's

The Honorable Robert L. Flanagan
March 9, 2018
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access to its rail property based on the Administration's refusal to pay the entirety of CSX's operating costs of a two-person crew requirement.

Under federal law, the Board has jurisdiction, in pertinent part, over transportation in the United States between a place in a State and: (1) a place in the same or another State as part of the interstate rail network; or (2) a place in a territory or possession of the United States. 49 U.S.C. § 10501(a). By CSX's and the Administration's operations of rail service as part of an interstate rail network and operations between Maryland and Washington, D.C., their rail operations are subject to the jurisdiction of the Board. The Board's jurisdiction is exclusive 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" and over remedies for the regulation of rail transportation. 49 U.S.C. § 10501(b).

In terms of the obligation of a rail carrier like CSX to provide access to common carrier passenger rail service, federal law requires the following:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.

49 U.S.C. § 11101(a). A rail carrier is required to provide transportation or service in accordance with rates and service terms, and the Board shall establish regulations for the disclosure of rates and service terms, including classifications, rules, and practices of carriers. 49 U.S.C. § 11101(e) and (f).

Contracts for rail services are authorized under 49 U.S.C. § 10709, allowing rail carriers and purchasers of rail services to provide specified services under specified rates and conditions. An authorized contract (a summary of which must be filed with the Board) may not be challenged before the Board, and an exclusive remedy for an alleged breach of contract is a contract action before an appropriate State or federal court. 49 U.S.C. § 10709(c). Complaints with respect to contracts may be filed with the Board by a shipper on the grounds that the shipper will be harmed because the contract "unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101[.]" 49 U.S.C. § 10709(g)(2).

Accordingly, it appears under federal law that the parties are free to enter into a contract for the Administration to have access and use of CSX rail property, as is currently the case. The parties appear to be free to negotiate and agree on the allocation of costs for providing such service,

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including whether or not the parties agree that CSX may pass along all or part of its operating costs to the Administration. If the parties do not agree to contract terms, it appears that if the Administration makes a reasonable request to CSX for common carrier services, the Board has the authority to grant such use. Whether or not a demand from CSX that the Administration pay for all or part of its operating costs for CSX operating two-person crew service is a reasonable condition of granting the Administration common carrier authority on its property, appears to be a determination within the discretion of the Board.

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 stylized, handwritten signature in black ink, appearing to read "fy/ 1".

Jeremy M. McCoy
Assistant Attorney General

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ASSISTANT ATTORNEY GENERAL

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).

The Honorable Dana Stein
February 13, 2023
Page 4

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