

March 2, 2023

The Honorable Melony Griffith, Chair
Senate Finance Committee
Miller Senate Office Building
Annapolis, Maryland 21401

Dear Chairwoman Griffith and Members of the Committee,

My name is Lydia McPherson, and I am the regional Government Relations Manager for Norfolk Southern. I am writing in regards Senate Bill 456 - Healthy Working Families Act - Railroad Employees - Unpaid Leave.

As stated in the Attorney General's letter (attached to this testimony for reference), this is an issue that is expressly preempted by the federal Railroad Unemployment Insurance Act (RUIA).

That being said, to be clear, every single railroad employee gets some form of very generous paid sick leave. All railroad employees receive sick leave benefits for each day beyond seven days of sickness or injury under the Railroad Unemployment Insurance Act (RUIA). These benefits - which include approximately 60 percent income replacement (subject to income caps) for up to 26 weeks - are unique to the rail industry and are funded by unemployment insurance taxes paid *entirely* by railroad employers.

Beyond the RUIA, the exact sick leave benefit differs by union based on terms negotiated over multiple rounds of collective bargaining. Many railroad employees receive even longer-term and more generous sick leave benefits. Workers who have bargained for what is known as "supplemental sickness benefits" and are eligible to receive sickness benefits after only four consecutive days and receive approximately 70 percent income replacement for up to 52 weeks. Other railroad employees have bargained for immediate (i.e., no four- or seven- day eligibility period) paid short-term sick leave in addition to longer-term sick leave benefits under the RUIA.

I am pleased to report that on February 22, Norfolk Southern reached agreement with one of its largest labor unions, the Brotherhood of Maintenance of Way Employees (BMWE), that provides its members with four new days of paid sick leave while also giving them the ability to use more flexibly up to three days of existing paid time off as sick leave. This agreement covers approximately 3,000 Norfolk Southern employees who maintain the company's track and infrastructure. On February 24 Norfolk Southern reached a second agreement with another of its unions, the National Conference of Firemen and Oilers (NCFO), to offer the same paid sick leave benefits. We remain actively engaged with all of our union leaders to collaboratively identify new ways to enhance quality of life and work predictability for our craft employees.

Additionally, railroad employees receive substantial paid time off each year. Between vacation, personal leave and holidays, the average employee receives 25-29 days of PTO depending upon craft, with the most senior employees receiving 37-39 days. The overall total compensation - including sick leave,

healthcare, retirement benefits and wages, places rail workers among the in the top 10% of all U.S. industries in terms of annual compensation.

I am hopeful that the above information is helpful to the committee when it comes to the existing benefits offered to rail employees and I respectfully ask for an unfavorable report on SB 456. Thank you for your time.

Sincerely,

Lydia McPherson
Manager of Government Relations
Norfolk Southern Corporation

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February 15, 2023

The Honorable Justin Ready
Maryland Senate
315 James Senate Office Building
Annapolis, Maryland 21401
Via email

Re: *Senate Bill 456 – “Healthy Working Families Act – Railroad Employees – Unpaid Leave”*

Dear Senator Ready:

You have inquired about the constitutionality of Senate Bill 456 (“Healthy Working Families Act – Railroad Employees – Unpaid Leave”). In my view, SB 456, as introduced, likely would be federally preempted by the federal Railroad Unemployment Insurance Act (“RUIA”). Although I have not found any binding federal precedent in Maryland, other federal courts that have recently examined challenges to the application of other states’ sick leave laws on railroad employees in those states have determined that the RUIA preempts those leave laws with respect to railroad employees. In my view, a federal court reviewing an enacted SB 456 likely would also find that law to be federally preempted by the RUIA.

Senate Bill 456, as introduced, requires a railroad employer in the State to provide a railroad employee with unpaid earned sick and safe leave under the Healthy Working Families Act. The RUIA is a federal law that provides “the exclusive source of unemployment and sickness benefits to railroad employees.” *National Railroad Passenger Corporation v. Su*, 41 F.4th 1147, 1149 (9th Cir. 2022).¹ The RUIA contains an express preemption provision that disallows railroad employees from having any right to “sickness benefits under a sickness law of any State.” 45 U.S.C. § 363(b).

In 1938, Congress enacted the RUIA to provide unemployment benefits to railroad employees. *See* 45 U.S.C. §§ 351-369. A rail employee who is eligible for RUIA benefits may receive up to 60% of the employee’s daily pay while unemployed. 45 U.S.C. § 352(a)(1)-(3). In 1946, Congress amended the RUIA to also provide railroad employees with “sickness benefits[.]”

¹ Eligible railroad employees are also entitled to unpaid leave benefits for certain purposes under the federal Family and Medical Leave Act of 1993 (“FMLA”) (*See* 29 U.S.C. § 2612). *Brotherhood of Maintenance Way Employees v. CSX Transp., Inc.*, 478 F.3d 814, 815 (7th Cir. 2007). An “eligible employee” entitled to the FMLA benefit is an employee who has been employed by the employer for at least 12 months and who has at least 1,250 hours of service with the employer during the previous 12-month period. *See* 29 U.S.C. § 2611(2)(A).

which likewise provide up to 60% of daily pay “for each day of sickness after the 4th consecutive day of sickness in a period of continuing sickness.” 45 U.S.C. § 352(a)(1)(B)(i).

In pertinent part, the RUIA’s preemption provision states:

By enactment of this chapter the Congress makes *exclusive provision* for the payment of unemployment benefits for unemployment occurring after June 30, 1939, and for the payment of sickness benefits for sickness periods after June 30, 1947, based upon employment (as defined in this chapter). No employee shall have or assert any right to unemployment benefits under an unemployment compensation law of any State with respect to unemployment occurring after June 30, 1939, or *to sickness benefits under a sickness law of any State* with respect to sickness periods occurring after June 30, 1947, based upon employment (as defined in this chapter).

The Congress finds and declares that by virtue of the enactment of this chapter, the application of State unemployment compensation laws after June 30, 1939 or of State sickness laws after June 30, 1947, to such employment, except pursuant to section 362(g) of this title, would constitute an undue burden upon, and an undue interference with the effective regulation of, interstate commerce.

45 U.S.C. § 363(b) (emphasis added).

The Ninth Circuit recently examined a Supremacy Clause² and federal preemption challenge to the application of California’s Healthy Workplaces, Healthy Families Act (which requires employers in the state to provide a minimum number of paid sick and family care leave days to employees), to railroad employees in the state. *See Su*, 41 F.4th at 1151. The California law allows use of paid sick leave for health care for the employee or a family member, or for an employee who is a victim of domestic violence, sexual assault, or stalking. *Id.* (see Cal. Lab. Code §§ 245-249).

The Ninth Circuit held that, as applied to railroad employees, the California law “falls within RUIA’s preemption clause.” *Id.* at 1153. The court explained that the RUIA’s preemption provision “emphasizes that that RUIA is to be the ‘exclusive’ source for the payment of sickness benefits provided to railroad employees[,]” and “expressly communicates Congress’s concern that applying ‘State sickness laws’ to railroad employees would ‘constitute an undue burden upon, and an undue interference with the effective regulation of, interstate commerce.’” *Id.* The court found California’s leave law to be a “sickness law” that provides “sickness benefits,” for purposes of the RUIA, and that the fact that the California law allows leave for reasons related to an employee’s

² The Supremacy Clause provides that the laws of the United States “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. By operation of the Supremacy Clause, “it has long been settled that state laws that conflict with federal law are ‘without effect.’” *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479-80 (2013).

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family member's health, or leave relating to domestic violence, sexual assault, or stalking, remains "consonant with RUIA's broad conception of 'sickness.'" *Id.* at 1154. As the court explained, the "RUIA reflects a wide-ranging conception of 'sickness[,]'" which it found "broadly refers to compensation *or other assistance* provided to employees in connection with physical or mental well-being." *Id.* at 1153. Consequently, the court that, as applied to railroad employees, California's law "falls within RUIA's preemption clause." *Id.* (emphasis added).

For similar reasons, a federal court in Massachusetts also recently held that "earned sick time" under Massachusetts' Earned Sick Time Law, as applied to railroad workers, "comes within the RUIA's preemptive scope." *CSX Transp., Inc. et al v. Healey*, 327 F. Supp.3d 260, 266 (D. Mass. 2018). "Earned sick time" under the Massachusetts law provides "time off from work that is provided by an employer to an employee, whether paid or *unpaid*" for certain enumerated purposes. *Id.* at 267 (emphasis added). In response to a claim that RUIA's "sickness benefits" were more narrow than those provided under Massachusetts' law, the court found that "the breadth of the state law does not save it from RUIA preemption. Such a reading would allow a state to legislate creatively around the RUIA and thereby thwart the objective of Congress to create a uniform federal scheme of sickness benefits for railroad workers." *Id.*

Based on the broad preemptive interpretation of RUIA in the recent federal cases addressed above in examining the application of two state's sick leave laws on railroad employees in those states, and in the apparent absence of federal law to the contrary, in my view it is likely that a federal court examining SB 456, which requires a railroad employer to provide a railroad employee with unpaid earned sick and safe leave, would likewise find SB 456 to be preempted by the RUIA. Although SB 456 would require *unpaid* sick and safe leave for railroad employees, in my view and for the foregoing reasons, such leave would likely still be viewed as a "sickness benefit" that would be preempted under the RUIA.

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