LEGISLATIVE POSITION:
Unfavorable
House Bill 492
Railroad Company – Movement of Freight – Required Crew
Senate Finance Committee

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Federal Preemption of HB 492

Dear Chairwoman Kelley and Members of the Committee:

My name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. The focus of my testimony is on federal preemption of HB 492, which if enacted would require freight railroads operating in the State of Maryland to have at least two crew members when a train or locomotive movement is conducted over a corridor that also hosts commuter train or high-speed rail traffic. I believe that HB 492 would be preempted by federal law.

At the outset, I want to acknowledge that in our federalist system, where the states have generally reserved to themselves the power to manage their own affairs and to enact legislation independently of the federal government, preemption can be a controversial topic. It is a challenge to provide testimony to any state legislator to assert preemption, no matter how well intentioned your proposal may be. Railroads view themselves as partners with the states in which we operate. We work regularly with communities in Maryland and with those in state government to better serve our customers and to be good corporate citizens.

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

This is not to say that states never have a role in regulating subjects involving our industry. For example, states typically regulate grade crossing warning devices, deciding the types of devices appropriate for highway rail grade crossings given traffic levels, sight distances, and other factors. This is an area in which states still exercise their traditional police powers without

encroachment into fields occupied by the federal government, and they are areas in which states and railroads typically work as partners to improve safety.

The challenge is how to balance a state's police powers with the exclusive authority of the Federal government. To determine where that balance may be found lies in Federal statutes and case law. The U.S. Congress has enacted no fewer than three statutes that preempt HB 492 – the Federal Railroad Safety Act ("FRSA")(49 U.S.C. § 20106(a)(2)), the Regional Rail Reorganization Act ("3R Act")(45 U.S.C. § 797j)), and the ICC Termination Act of 1995 ("ICCTA")(49 U.S.C. § 10501(b)).

Preemption under the Federal Railroad Safety Act

When it enacted the FRSA, Congress directed that "[l]aws, regulations, and orders related to railroad safety" must be "nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish this important objective, Congress provided that a state law is preempted when the Secretary of Transportation – which has delegated its powers over rail safety to an expert federal agency, the Federal Railroad Administration ("FRA") – "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).

The FRA initiated a rulemaking in 2016 which proposed to establish minimum train crew staffing regulations. As part of that rulemaking, the FRA received nearly 1,600 comments and held a public hearing. After careful consideration of the comments and testimony, the FRA concluded that a minimum crew size rule would be unnecessary for safe operations and even potentially harmful, so it withdrew the proposed regulation in May of this year. FRA, *Train Crew Staffing,* 84 Fed. Reg. 24,735 (May 29, 2019). In withdrawing the proposed rule, FRA noted that its data "does not establish that one-person operations are less safe than multi-person train crews." The FRA further said that a train crew staffing rule "would unnecessarily impede the future of rail innovation and automation," potentially getting in the way of new technologies that would "improve safety significantly by reducing accidents caused by human error." And FRA expressly announced its intention "to negatively preempt any state laws concerning that subject matter."

Even though the FRA did not adopt a final rule on crew size, the FRA has covered the subject matter of crew size by considering such a rule and affirmatively deciding not to adopt it. Because the subject matter of crew size has now been covered by the expert federal agency empowered to regulate rail safety, the FRSA preempts state laws in this area. In fact, on September 30, 2020, the U.S. District Court for the Northern District of Illinois held that an Illinois state crew size law very similar to HB 492 was preempted by the FRSA. *See Ind. R.R. Co. v. Ill. Commerce Comm'n*, No. 19-6466 (N.D. Ill. Sept. 30, 2020).

It should be noted that a 3-judge panel of the 9th Circuit Court of Appeals similarly considered the FRA's 2019 actions and issued a decision in February 2021 vacating the FRA's 2019 withdrawal of the proposed crew size regulation. However, that decision is not final because it is subject to motions for rehearing from the parties. The deadline for filing motions for rehearing is April 9. If any party files a motion for rehearing, FRA's withdrawal order will not be vacated, if it is vacated at all, until the court rules on the motion.

The Illinois decision is being reviewed by the 7th Circuit Court of Appeals, which is awaiting a final decision from the 9th Circuit on the challenge to the FRA's withdrawal order. But should the 9th Circuit vacate the FRA's withdrawal order, that will not end the case. Just as HB 492 would be subject to preemption under two other federal statutes, which I discuss below, the Illinois law is also being challenged under those same statutes.

Furthermore, it remains to be seen what the FRA will do regardless of the 9th Circuit's decision becoming final. If the FRA prescribes a regulation or issues an order covering the subject of crew size, any crew size rule enacted by Maryland or any other state will be preempted under the FRSA. Whatever uncertainty may have been created by last month's decision of the 9th Circuit, it is at best premature to conclude that FRSA preemption is no obstacle the enactment of state crew size laws.

Preemption under the 3R Act

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

> No state may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation [Conrail] to employ any specified number of persons to perform any particular task, function, or operation, or requiring the Corporation to pay protective benefits to employees, and *no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to <u>any railroad</u> in the Region*.

45 U.S.C. § 797j (emphasis added). Maryland is a "State in the Region" as defined by Section 102 of the 3R Act. 45 U.S.C. § 702(17) & (19). And railroads that operate in Maryland are "railroad[s] in the Region" under Section 711 of the 3R Act. *See* § 702(15) & (17). The purpose of the 3R Act "was to give Conrail"—the Railroad created by Congress to continue operations over the lines of several bankrupt rail carriers—"the opportunity to become profitable, but not necessarily to disadvantage all other railroads at the same time." *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 582 F. Supp. 1552, 1556 (Reg'l Rail Reorg. Ct. 1984).

HB 492 clearly runs afoul of Federal law because it would do precisely what the 3R Act forbids – requiring railroads in Maryland to employ a specified number of persons to perform a particular task, function or operation. Like similar efforts to regulate crew size in the Region covered by the 3R Act – specifically, West Virginia and Indiana, HB 492 would be preempted by federal law if enacted. *See*, *e.g.*, *Norfolk & W. Ry. Co. v. Pub. Serv. Comm'n of W. Va.*, 858 F. Supp. 1213, 1214 (Reg'l Rail Reorg. Ct. 1994) (West Virginia crew-size statute preempted); *Boettjer v. Chesapeake & Ohio Ry. Co.*, 612 F. Supp. 1207, 1209 (Reg'l Rail Reorg. Ct. 1985) (Indiana statute preempted); *Keeler v. Consol. Rail Corp.*, 582 F. Supp. 1546, 1550 (Reg'l Rail Reorg. Ct. 1984) (same).

Preemption under the ICCTA

The ICCTA establishes that the U.S. Surface Transportation Board's jurisdiction over

"transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers… is *exclusive*." 49 U.S.C. § 10501(b) (emphasis added). Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." *Id*.

HB 492 is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. HB 492 applies only to freight railroads, would regulate their staffing practices and prohibit them from operating certain trains with fewer than two crew members. HB 492 imposes train crew staffing requirements that are not mandated by states neighboring Maryland and will burden interstate commerce. Trains moving between states with differing crew-size requirements would need to stop to add or remove crew members, causing railroads to incur additional costs for rest facilities and crew transportation and—ultimately— reducing efficiencies for shippers and the public. HB 492 imposes exactly the balkanized and unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.

Conclusion

For the reasons set forth above, I respectfully submit that HB 492 is preempted by Federal law.