

LARRY KASECAMP
Legislative Director

THOMAS CAHILL
Assistant Director

JOHNNY WALKER
Secretary



11505 Caboose Road, SW
Frostburg, MD 21532
PH: 301-697-2695
utusldmd@gmail.com

ANNAPOLIS OFFICE
176 Conduit St., Suite 206
Annapolis, MD 21401-2597

March 23, 2021

The Honorable Chairman Delores Kelley,
Vice Chairman Brian Feldman,
Members of the Senate Finance 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-492

I am 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-492 "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 held seniority as a freight Conductor with CSX Transportation for 43 years. 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 2014, the Federal Railroad Administration (FRA) announced their intention to issue a rule requiring minimum two-person crews. 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 and on January 26th of 2017 the Trump Administration officially withdrew the pending rule.

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.

Many 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 gauge 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.

In 2013, following the Lac Magentic accident the FRA started a rulemaking process (NPRM) to regulate crew size. In 2017 the Trump administration withdrew the FRA from the process. In 2020, the Trump administration issued an opinion through the FRA that the withdrawal of the NPRM preempts states from regulating crew size. That opinion was appealed to the U.S. 9th Circuit Court where the court ruled in favor of the plaintiffs. The decision is provided in attached documents.

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 have to 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.

You may have been told that two persons on the lead locomotive of the Amtrak train that recently derailed in Washington State with fatalities and injuries didn't prevent that accident. That is basically true, however; the Conductor on the train was not qualified on the territory the train was operating over and the engineer was also new to the territory and lost situation awareness of his location and failed to slow the train as required and the train derailed as a result of excessive speed.

What would have prevented this accident is Positive Train Control (PTC), a supplemental safety apparatus for certain situations. In 2008 Congress passed the Rail Safety Improvement Act, which we have been in support of, that required PTC's implementation nationwide by 2015.

The National Transportation Safety Board, in response to this accident stated: *“Positive Train Control (PTC), an advanced train control system mandated by Congress in the Rail Safety Improvement Act of 2008, is designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position. If a train does not slow for an upcoming speed restriction, PTC will alert the engineer to slow the train. If an appropriate action is not taken, PTC will apply the train brakes before it violates the speed restriction. In this accident, PTC would have notified the engineer of train 501 about the speed reduction for the curve; if the engineer did not take appropriate action to control the train's speed, PTC would have applied the train brakes to maintain compliance with the speed restriction and to stop the train.”*

Since this requirement passed in the Rail Safety Bill in 2008, the railroads had repeatedly requested delays in implementing this supplemental safety technology with full implementation just being completed in December 2020.

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 of 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 the governor. 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 the governor. 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 with a bi-partisan vote overwhelmingly.

WE THEREFORE URGE A FAVORABLE REPORT ON HB-492

Sincerely,



Lawrence E. Kasecamp
MD State Legislative Director
SMART Transportation Division