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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.

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[1] 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,

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[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 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 sector[3] 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. CSX Transp.* 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. 2001), 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

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,

Jeremy M. McCoy
Assistant Attorney General

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

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 1379820. 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.

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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).

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