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March 23, 2021

The Honorable Delores Kelley and Members of the Environment and Transportation Committee

Testimony in **Support of HB 492** "Railroad Company - Movement of Freight - Required Crew"

My name is Tom Cahill. I am Maryland-born and raised and have been a licensed locomotive engineer and conductor for CSX Transportation for 25 years. I want to share my insight and safety concerns as they pertain to HB 492 "Railroad Company - Movement of Freight - Required Crew" and the important benefits that the passage of this bill will have on public safety and the safety of railroad employees.

The bill as presented requires at least two railroad employees for freight train movements on shared hi-speed passenger or commuter lines within the state, which is critically important. As an engineer who has been involved in many accidents, I can tell you that the atmosphere after an accident is chaotic.

What's fortunate is that the conductor and engineer work together as a tightly coupled cooperative team to ensure safety and efficiency. As a team, conductors and engineers communicate constantly. They work together to monitor the train and track conditions, identify or anticipate problems, resolve or mitigate risks, and plan ahead during low periods of activity. Conductors also provide important support to engineers by reminding the engineer of upcoming changes, restrictions, or signals; helping to catch and mitigate mistakes; as well as helping the engineer to stay alert during monotonous conditions.

Along these lines, studies have shown that when working as a team, crewmembers are able to point out situations that may have escaped the other's cognitive and collaborative demands or physical ability; like finding the quickest exit, notifying multiple authorities, summoning emergency responders and preventing additional trains from becoming involved in their derailment.

In the 2016 Federal Railroad Administration's Notice of Proposed Rulemaking on freight train crew size, the FRA described a myriad of ways in which a single-person crew would have been unable to execute a similarly effective emergency response, confirming the important safety benefits that multiple-person crews bring to train operations.

A reduction in crew size would increase worker fatigue and lead to a higher risk of train accidents. Fatigue has long been recognized as one of the most critical safety issues in the railroad industry because we operate 24 hours a day, seven days a week, and work irregular hours, including nights and weekends, and holidays. Most crews are on long routes that keep them away from home for extended periods of time with work schedules that impact their duration of sleep, which can impact whether they're properly rested for their next assignment.

Since the engineer must remain in the locomotive cab to act quickly if the conditions warrant to move the train, having the second crew member to immediately assess the situation and act is paramount to public safety. A second crew member is vital in that they can instantly tend to the injured, contact emergency services and clear blocked road crossings for emergency vehicles or the public.

Even under the best operating circumstances, train crews have a myriad of intangibles that must be tactfully dealt with. A single employee cannot safely, efficiently, or properly perform all the required functions that are necessary on even the most routine trips, in addition to operating the train and keeping a vigilant lookout for the unexpected.

During deliberations of the federal Railroad Safety Advisory Committee Working Group (RSAC), which is comprised of rail labor, management and FRA participants, they identified the many responsibilities of train and yard service employees. These responsibilities encompassed 145 job functions. Additionally, locomotive engineer positions encompass many more distinct job functions. Requiring one employee to perform all of these job responsibilities combined creates a substantial threat to safety.

Representatives of the railroads argue that with the implementation of Positive Train Control (PTC) there is no longer a need to have a second person in the operating cab. Two-person train crews look out for each other in ways that no onboard electronic device can. Our freight trains approach three miles in length weighing over 18,000 tons and carry many hazardous materials. Any incident that would stop these trains could block off an entire town. It is critical that a second crew member be in position to immediately clear road crossings for emergency vehicles and the public.

In addition, a single crewmember cannot properly secure a freight train that is to be left unattended. This could result in a run-away that would wreak havoc on any one of our towns or metropolitan areas. One only has to recall what happened in Lac-Megantic, Quebec.

Following that disaster, a 2016 study of residents of Lac-Megantic found that two-thirds of residents suffered from moderate to severe post-traumatic stress disorder, and many reported being traumatized by the sight of a sunset, the sounds of slamming doors, and both real and toy trains.

In closing, on behalf of myself and my co-workers and for the safety of the public, I urge you to support the passage of HB 492!

Sincerely,

Tom Cahill
Westminster, MD

X HB 492 - Combined Labor Union Testimony - SUPPOR

Uploaded by: Edwards, Donna

Position: FAV

Musicians' Association of Metropolitan Baltimore

1055 Taylor Avenue, Suite 218, Baltimore, MD 21286

Local 40-543
American Federation of Musicians
Visit our web site at:
http://www.musiciansunion.org

Phone 410-337-7277
FAX 410-337-7279
Email office@musiciansunion.org
Office Hours Tues to Thurs 10 am to 4 pm

Michael Decker
President

Mary C. Plaine
Secretary-Treasurer

January 28, 2021

TESTIMONY IN SUPPORT OF HB 492
Movement of Freight - Required Crew
February 2, 2021

TO: Hon. Kumar Barve, Chair, and members of the Environment and Transportation Committee

FROM: Mary C. Plaine, Secretary-Treasurer, The Musicians' Association of Metropolitan Baltimore, Local 40-543

The Musicians' Association of Metropolitan Baltimore supports HB 492 and asks that the House Environment and Transportation Committee votes to support this bill and send it on to the full chamber for passage.

We do not understand how anyone can believe that having a crew of one on a freight train that moves through the State of Maryland is acceptable. HB 492 is common sense legislation. The legislature needs to ensure that freight trains operating in our state have, at minimum, two-person crews on board. This is a safety issue for all – for the public as well as for the operators of the trains. Maryland citizens should not have to worry about the safety of the freight trains that travel across our state.

Best practices of any system show that a team approach provides necessary backup and security – that one person alone managing the complexities of moving a freight train through the state cannot realistically be expected to handle safely repeatedly. Ultimately, we are talking about the safety of people, those who are working on the train and those who live in the vicinity of the tracks.

Again, Local 40-543 urges members of the House Environment and Transportation Committee to vote FAVORABLY on House Bill 492.

Sincerely,

Mary C. Plaine
Secretary-Treasurer

Support Live Music

AMALGAMATED TRANSIT UNION
LOCAL 689

2701 Whitney Place, Forestville, Maryland 20747-3457
Telephone 301-568-6899 Facsimile 301-568-0692
www.atulocal689.org

TESTIMONY IS SUPPORT OF HB 492
Movement of Freight – Required Crew
February 22, 2021

TO: Hon. Kumar Barve, Chair, and members of the House Environment and Transportation Committee

From: Gregory Bowen, Jr., Assistant Business Agent, ATU Local Union 689

Good afternoon, my name is Greg Bowen, Assistant Business Agent for Amalgamated Transit Union Local 689. Local 689 represents more than 14,000 member and operates in the Washington D.C. are crossing all three jurisdictional lines. Our train operators and bus operators transport more than 1 million passengers daily in around the DMV area.

Having been in the transportation industry for many years, let me give a few reasons why "Single Employee Train Crew Operation' doesn't work:

- The engineer of every train being discussed here today is a human being. Humans are prone to mistakes and mistakes are inevitable. Single crew members will never get a reminder from a second crew member of slow orders, block signals, road crossing mechanical failures and other restrictions of the movement of the train
- Often, dispatchers give instructions also knows as mandatory directives in order to keep the engineer safe as well as the community in which the train may be passing. These directives are often significant in length and require detail and must be written down. It is merely impossible to listen, record, and safely operate the locomotive while getting this valuable safety information.
- With a single operation crew, backing up a train is impossible without question to regards to safety. It just cannot happen. I believe we all can think of a few reasons why a train in distress my have to back up.

- Without a second crew member, think of the number of distractions that come into play while taking a 12-13 hour trip alone. Not only Is this single crew engineer required to be attentive to what's in front of him/her, but reaching for the radio when the dispatcher calls, watching for signal maintainers, gang foremen, and all the other duties required to remain compliant is left to that one single member.
- What happens if or when that single crew member becomes ill, has a heart attack, begins it experience sudden blindness, oxygen levels drops for some odd reason, who's there to assist him and who's there to get them the medical attention they need?
- Last and not least, I'm sure we all remember January 6, 2021. Just when we thought 9/11 was our biggest fear, the stakes became a bit higher. Since it is impossible to patrol the entire railroad on a regular basis, the government and the railroads rely in its workers to notice, report, and at times act upon suspicious activity. A lone operator having to absorb the duties of a second crew member in addition to running the train—cannot be relied upon to oversee even a fraction of what may be out there along the right-of-way.

When we began writing this testimony, we ended with 3-4 pages of reason why we should validate our support for HB 492. As you can see, I do not have 4 pages today. Local 689 and its members have faith and confidence in the leaders her that what needs to be done to protect our workers will be done.

Local 689 supports in its entirety, HB 492 and ask you without question to vote favorably on HB 492, thank you and I yield back any remaining time.

Maryland House of Delegates - Environment & Transportation Committee

Chair: Kumar P. Barve
Vice Chair: Dana Stein

House Bill 492 – Railroad Company - Movement of Freight - Required Crew

Position: Support

Electrical Workers
Insulators
Boilermakers
United Association
Roofers
Cement Masons
Teamsters
Laborers
Bricklayers
Ironworkers
Sheet Metal Workers
Elevator Constructors
Painters
Operating Engineers
Carpenters

The Baltimore DC Building Trades and its affiliated local Unions SUPPORT House Bill 492 Freight transportation demand is projected to nearly double by 2035--if present market trends continue, railroads will be expected to handle an 88% increase in tonnage during that same period (source: DOT Strategic Plan 2010-2015.) Amtrak, with ridership at record levels of 31.2 million passengers for fiscal year 2012, predicts those numbers could increase to 60 million by 2050. Most people are surprised to hear that in America, a person or vehicle is hit by a train about every three hours. A critical component to keeping them safe around an increasing number of trains on railroad-rights-of-way and rail property is to adopt the two-man crew legislation before you today. If one person goes down the other must act quickly to save lives. Safety can never be an afterthought, when time is of the essence. The goal of zero incidents begins with instituting a safety culture in every aspect of working lives.

We urge the Committee for a favorable report. Thank you.

Sincerely,

Jeffry Guido

(E) jguido@bdcbt.org (O) 301-909-1071 (C) 240-687-5195

Communications

LOCAL 2107

Workers of America

1825 George Avenue, Suite 4 • Annapolis, Maryland 21401
Telephone: 410-268-2107 • Fax: 410-268-2150

TESTIMONY IN SUPPORT OF HB 492
Movement of Freight-Required Crew
February 2, 2021

To: Hon. Kumar Barve, Chair, and members of the House Environment and Transportation Committee
From: Shannon Opfer, President CWA Maryland State Council, President CWA Local 2107

Chair Barve and members of the House Environment and Transportation Committee,

As Union members, we must look out for the safety and health of all workers in union jobs and those not covered by unions. The Movement of Freight –Required Crew bill is nothing more than a safety necessity. Currently when emergency situations occur, a two member train crew is needed to ensure the safety of the train, passengers, and the public.

When dealing with train-vehicle and train-pedestrian incidents, the lone crew member could not go back to assess the situation, assist the injured, "cut" (make a train separation to open up) a road crossing etc. without first securing the train, which may take an hour or more.

If a single person crew member suddenly becomes ill, has a heart attack, or stroke, there would be no one to assist him. For lone crew members, simple things can be distracting. Getting lunch from the refrigerator, retrieving a pen from the floor, grabbing a coat, looking up a rule, all of this is a huge distraction to a lone crew member than if he had a partner to lend some assistance.

The only safe train operation is one with a minimum of two persons in control. The Communications Workers of America is IN SUPPORT of the Movement of Freight-Required Crew bill.

Shannon Opfer
President CWA Local 2107
President Maryland State Council

TESTIMONY IN SUPPORT OF HB 492

Movement of Freight - Required Crew

February 2nd, 2021

TO: Hon. Kumar Barve, Chair, and Members of the House Environment and Transportation Committee

FROM: Marilyn Irwin, President

On behalf of the members of CWA Local 2108, I am writing in SUPPORT of HB 492. There are an abundance of reasons why two crew members are necessary on a train, all of which involve the safety of the crew, its load, and the public who live near tracks or drive over them.

Twelve hour runs are common in the freight rail industry, and the vast majority of these runs are unscheduled, with many taking place overnight. The interaction between the Conductor and the Engineer keeps both engaged and alert, therefore reducing the possibility of a lone crew member accidentally dozing off due to the inevitable fatigue. A lone engineer who experienced a stroke, heart attack or other medical emergency would have no one to offer aid or call for help, and could cause a catastrophe that affected citizens for miles around, based on the load being transported.

I'm also very concerned about the possibility of an increase in crime against train crews once thieves and vandals become aware that the trains are being operated by a single employee. A single employee would be extremely vulnerable, and could be alone for hours before anyone was aware that s/he was in trouble.

I'm proud of my Grandfather who was an engineer with the B&O Railroad for 50 years, but I have no first-hand knowledge of the important work train crews perform. It seems logical to me to compare the rules that affect train crews with those that affect truck drivers. Truck drivers are limited to 10 hours on duty, and have the ability to pull over when they need to eat, drink or rest. Truck stops are available 24/7 every 50 miles or so. Since they are on a highway with other motorists, emergency services are not far off if they are required. Train crews work longer hours and have none of this support infrastructure available to them. **Having a second crew member on board to help perform the multitude of duties each trip requires, and to assist or call for help in the event of an emergency is a small price to pay to help ensure the safety of the train, its load, and the train crew.**

I strongly SUPPORT HB 492 and ask that your committee votes FAVORABLY on it.

Respectfully,

WILLIAM C. SPROULE
EXECUTIVE SECRETARY-TREASURER

MICHAEL HAND
ASST. EXECUTIVE SECRETARY-TREASURER

Eastern Atlantic States
REGIONAL COUNCIL OF CARPENTERS

801 West Patapsco Avenue, Baltimore, MD 21230 | Phone: 443-915-0462 | EASCARPENTERS.ORG

HB 492 – Movement of Freight – Required Crew

FAVORABLE

Dear Chair Barve and members of the House Environment and Transportation Committee:

On behalf of the Eastern Atlantic Regional Council of Carpenters, please accept this letter in support of HB492.

Rail safety is of the utmost importance to the public and to the flow of goods and service throughout interstate commerce. This bill requires at least two crew members on all freight rail trains when traveling in Maryland, which is important to protect both the train workers and the public as these trains travel through the state.

Put simply, if a single train operator becomes ill, incapacitated, or focused on an urgent issue within the train, such as requiring the administration of complicated and labor-intensive hand braking procedures, there must be a second person who can take over operational crew tasks, assist, or tend to the emergency at hand. This legislation facilitates that greatly need redundancy and assistance.

For the forgoing reasons, we thank Delegate Stein for introducing this legislation, and we ask for a favorable committee report.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS - LOCAL UNION No. 24

AFFILIATED WITH:
Baltimore-D.C. Metro Building Trades Council — AFL-CIO
Baltimore Port Council
Baltimore Metro Council — AFL-CIO
Central MD Labor Council — AFL-CIO
Del-Mar-Va Labor Council — AFL-CIO
Maryland State - D.C. — AFL-CIO
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Written Testimony of

Peter Demchuk, Business Manager, IBEW, LOCAL 24

Before the

House Environment and Transportation Committee on

HB 492 Railroad Company – Movement of Freight – Required Crew

STRONGLY SUPPORT

January 27, 2021

Dear Hon. Kumar Barve, Chair, and members of the House Environment and Transportation Committee,

Thank you for the opportunity to submit my testimony supporting House Bill 492.

For the record, my name is Peter Demchuk. I am a 41-year member, and the Business Manager, of the International Brotherhood of Electrical Workers 24 located in Baltimore. Additionally, I am a lifelong resident of Maryland currently residing in District 7 of Baltimore County.

As a matter of great public safety, we support the required 2 person crew legislation before you today.

Industries where workers are exposed to hazardous activities, or when a failure to properly carry out their duties can cause serious injury or death to themselves or the public, use a buddy system. This is especially true in most of the transportation industry. Commercial airlines, military air transport, ferry operations, and ocean shipping are just a few examples where a second set of eyes and ears on the operation of equipment provides the operators and the public with an invaluable measure of safety. In the construction industry, the skilled trades use a buddy system for workers to protect their safety as well as the safety of customer property, their employees, and the public in general.

The idea of allowing one person to operate a freight train that could be over a mile long and contain hazardous cargo is alarming. When a person is working alone, it is possible for them to become tired, distracted, or so occupied with job tasks that they miss warning signals, instructions, or changing conditions that affect the safe operation of the train.

As we all know too well, accidents on the rails can easily be fatal and cost society a great deal in environmental damage. In this era of strained infrastructure, it is all the more important that train engineers be allowed to focus on their immediate responsibility i.e. running the train, and have another person with them to see to the other duties required to maintain safe rail operations.

In closing, I want to reiterate IBEW Local 24's strong support for HB 492 to insure safe rail operations for workers and the public.

Thank you,

Peter P. Demchuk

PPD:clr
AFL-CIO
OPEIU # 2

TESTIMONY IN SUPPORT OF HB 492
Movement of Freight-Required Crew
February 2, 2021

To: Hon. Kumar Barve, Chair, and members of the House Environment and Transportation
From: Tom Clark, Political Director, IBEW Local 26

Mr. Chair and distinguished members of the Committee, I strongly encourage you to **support** HB 492. A favorable vote on this bill is a vote for safety, not just for trains and personnel, but for the Maryland neighborhoods that surround the railroad tracks. This bill ensures we are not compromising the safe passage of trains for profit.

I consider a "one man" crew a recipe for disaster. The tragic lost of 47 lives in 2013 in Quebec Canada was a direct result of a "one man" crew. Accidents do happen, HB 492 will help prevent the loss of lives and property as these freight trains travel thru our great state. Heaven forbid we have such a horrific accident, even worse if we legislate after the fact. The only safe train operation is one with a minimum of two persons in control.

Since 9-11, the possibility of terrorism has been at the forefront. After January 6 of this year, the possibility of domestic terrorism has increased. Railroad personnel are the eyes and ears along the tracks of this nation. Let us not reduce our observation by half, let us remain vigilant and keep two sets of eyes on possible foul play. Another safety concern is that train crews are on duty all hours of the day and night for up to 12 hours at a time. In contrast truck drivers are limited to 10 hours on duty and they can pull over for rest. Train crews have nowhere to stop, and unlike truckers, there are no police or fellow motorists nearby to render aid if necessary. The only help a train engineer has would be that of a second crew member.

I ask you, the members of this committee, to enthusiastically **support** HB 492 and help ensure the safety of the passengers, the crew, the freight and the neighborhoods along the tracks. I believe this is a sensible bill that if enacted now, will prevent a "what if" scenario, later. Thank you

"All that is necessary for the triumph of evil is that good men do nothing"

LOCAL NO. 10
INTERNATIONAL
UNION OF
ELEVATOR
CONSTRUCTORS
Affiliated with the AFL-CIO
9600 MARTIN LUTHER KING
HIGHWAY
LANHAM, MARYLAND
20706
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FAX: (301) 459-3991

January 29, 2021

Testimony in Support of HB 492
Movement of Freight – Required Crew Size
State Finance Committee

To the Honorable Chairman Kumar Barve and Distinguished Members:

I am writing to you today to **support** SB 252. As a matter of great public safety, we support the required 2 person crew legislation before you today.

We are asking that the Committee vote **favorably** to correct this safety problem.

Thanking you in advance for your cooperation.

Sincerely,
Local #10

Matt Rusch/epv

Matthew H. Rusch
Business Agent

MHR/epv

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INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO DISTRICT COUNCIL NO. 51

January 28, 2021

House of Delegates Environment and Transportation Committee
Kumar P. Barve, Chair
Dana M. Stein, Vice-Chair
House Office Building, Room 251
Annapolis, MD 21401

Dear Honorable Member of the Committee:

My name is Roxana Mejia, Political Affairs Liaison for The International Union of Painters and Allied Trades, District Council 51, for Maryland, Virginia, and District of Columbia. We represent over 1,500 members in the finishing trades of the construction industry.

I want to thank the committee for reading our SUPPORT for HB-492- Rail Company- Movement of Freight – Required Crew

We ask the committee members for a favorable report on HB 492. A two-person train crew is a vital component of rail safety and sound public policy. In 2013 Transport Canada established a government mandate requiring two-person crew in response to the Lac-Megantic oil train disaster when a freight train carrying 72 tank cars of crude oil derailed and exploded, killing 47 people after its single crew member left the train unattended.

The United States has yet to follow suit with a federally promulgated rule or law, and only five states have implemented a two-person crew requirement.

The Federal Railroad Administration has signed plans to require two-person crews on trains carrying oil and freight trains, which is the industry's standard practice, but its proposed rule has not been issued.

Safety can never be an afterthought, and the only safe train operation is one with a minimum of two persons in control
We urge the Committee for a favorable report on HB 492.

Thank you,

Roxana Mejia
Political Affairs Liaison
International Union of Painters and Allied Trades, District Council 51

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www.midatlanticpipetrades.org

Maryland House of Delegates – Environment, and Transportation Committee

TO: Hon. Kumar Barve, Chair, and member of the House Environment and Transportation Committee
FROM: Jason Ascher, Political Director, Mid-Atlantic Pipe Trades Association.

STRONGLY SUPPORT – HB 492 - Movement of Freight – Required Crew

On behalf of the Mid-Atlantic Pipe Trades Association and its over 20,000 members and families across Maryland, I ask you to **SUPPORT HB 492 – Movement of Freight – Required Crew.**

We stand in solidarity with our brothers working on train crews. In the Pipe Trades, as with the rest of the building trades community, we train our members to think safety first and make sure apprentices receive the necessary training from OSHA and that they work under a licensed journeyman throughout their training. Not having two crew members on a train is like sending a day one first-year apprentice onto a construction site without a journeyman and telling them to weld two multi-ton pipes together. On the railways, as on the construction site, safety must come first.

In the construction industry, apprentices learn on the job by working with a journeyman. The journeyman is there to have a mentor to help teach them their craft, ensure compliance with safety standards, and teach them the ins and out of a job. Similarly, a single man crew leaves new conductors without that mentorship from an experienced engineer teaching them the locomotive system's ins and outs, signal systems, and tracks. A single crew member would lead to fewer experienced conductors and engineers and a less safe work environment.

Having a single crew member on a train also means there is no second set of eyes to remind them of slow orders, blocked signals, or mechanical failure at road crossings. A single crew member would also lead to unnecessary distractions, some of which would be mandatory, like copying directives and responding on the radio. These people are human, and that second set of eyes helps make sure tragic mistakes do not happen.

For the reasons listed above, I ask you to **SUPPORT HB 492**.

Metropolitan Washington Council, AFL-CIO

815 16th Street, NW, • Washington, DC 20006 • (202) 974-8150 • Fax (202) 974-8152

An AFL-CIO "Union City"

TO: Hon. Kumar Barve, Chair, and members of the House Environment and Transportation Committee
FROM: Dyana Forester, President

January 28, 2021

RE: HB 492 – Movement of Freight – Required Crew - Support

Thank you for the opportunity to provide written testimony in support of this essential bill. On behalf of our 150,000 union members affiliated with the Council throughout Metropolitan Washington D.C., we enthusiastically support this bill.

Many of the union workers affiliated with our Council work in and around hazardous conditions. Our union brothers and sisters know how important it is to have a second set of eyes in dangerous situations.

For a lone crew member operating over the road, even simple things can easily cause them to be distracted. Getting lunch from the refrigerator, retrieving a dropped pen from the floor, grabbing a coat from his bag, looking up a specific rule -- all of this becomes a far more significant hindrance and a distraction to the lone crew member than when he has a partner to lend assistance. A two-man crew provides the operators and the public with an invaluable measure of safety.

The thought of allowing freight trains to traverse through Maryland with only one crew member is extremely unsafe. Today's trains can be up to two miles long and carry all kinds of hazardous material.

Our Council and its affiliates strongly urge your committee to pass HB-492. This issue has been passed over for too long and we are counting on your committee to move this bill and keep Maryland safe!

Sincerely,

Dyana Forester

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International Association of Sheet Metal, Air, Rail & Transportation Workers,
Local Union 100— Sheet Metal Division
Affiliated with AFL-CIO

Richard D. LaBille, III
Business Manager/President
Russell K. Robinson
Financial Secretary-Treasurer

The Honorable Delegate Kumar Barve and Committee Members

House Committee on Environment and Transportation

January 21, 2021

We strongly support HB 492 for the following reasons and feel the state of Maryland and its residents would be safer with this bill becoming law.

- A single person on a train is a recipe for disaster, if the engineer were to become sick, have a heart attack or stroke there would be no one else present to operate the train.
- Without a second crew member to assist the train engineer, an endless number of distractions would create a number of safety issue that the engineer alone may not be able to overcome.
- Backing up a train is impossible with a single person and if an emergency would occur there's no way to do so.
- Without a second crew member on the train valuable mentoring time would be lost therefore creating a safety risk.
- Since the engineer is not allowed to leave the train at any time, per Federal regulation, it would be impossible for the engineer to secure the train, via setting hand brakes on each car if an emergency would occur.
- Since the engineer is not allowed to leave the train at any time, it would be impossible to patrol the entire train looking for suspicious activity as required by National security since 9-11.
- Train crews are on duty all hours of the day and night for up to 12 hours at a time and often multiple miles from a spot to take a break or get a cup of coffee if they find themselves getting sleepy, causing an unsafe situation.
- If an accident would occur at a grade crossing with motor vehicle the engineer would not be able to leave the train to inspect and assess the situation or to call for help if needed.

4725 Silver Hill Road, Suitland, MD 20746-2400 • Phone: 800-492-8004 Fax: 301-967-1683 • Email: info@smart100.org

- If a tanker car, while caring hazardous materials, were to spring a leak or become inoperable do to some unforeseen issue the engineer would not be able to leave the train to inspect and assess the situation or to call for help if needed.

In order to keep Marylanders safe we ask for a favorable vote on HB 492 for the betterment of the State of Maryland.

Sincerely,

Thomas Killeen
Bus. Rep/Legislative Director
SMART Local Union 100

Journeymen Pipe Fitters and Apprentices

Local Union No. 602

8700 ASHWOOD DRIVE • 2ND FLOOR • CAPITOL HEIGHTS, MD 20743

TELEPHONE: (301) 333-2356 • FAX: (301) 333-1730

AFFILIATED WITH AFL-CIO

HB 492 – Movement of Freight – Required Crew
FAVORABLE

Dear Chair Barve, Vice Chair Stein, and honorable members of the House Environment and Transportation Committee:

I'm pleased to present this letter in strong support of HB 492 – Movement of Freight – Required Crew, and in solidarity with the thousands of men and women who labor across 140,000 U.S. miles of rail, 24/7 to move America's freight across the great nation.

This is a simple, necessary and common-sense bill.

Rail operation is extremely difficult and dangerous work, and it is said that there is no civilian employment more dangerous than railroads. Beyond the safety of the rail workers themselves, and the importance of the seamless movement of goods through our complex commerce and port systems, is the vastly overlooked safety of the public.

To give some perspective of the dangerous instrumentality of rail lines, a typical freight train operated by a single crew member may be over 100 cars in length, some 2-4 miles long, and may take a mile or more to come to a stop. If anything goes wrong in that scenario, if a single train operator becomes incapacitated, or must tend to an emergency situation, there must be a second person who can step in to avoid catastrophic results.

It is inconceivable that there exists no requirement that such a safety protocol be in effect. By requiring at least 2 crew members in rail operation, this legislation provides the same level of redundancy found in far less dangerous modes of transportation.

For the forgoing reasons, we thank this committee for your consideration, and we ask for a favorable committee report.

UNITED AUTOMOBILE · AEROSPACE · AGRICULTURAL IMPLEMENT WORKERS of AMERICA (UAW)
INTERNATIONAL UNION
UAW
LOCAL 239
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UAW REGION 8 MARYLAND STATE COMMUNITY ACTION PROGRAMS (CAP)

Testimony in Support to HB 492 Railroad Company-Movement of Freight-Required Crew

February 2, 2021

To: **Hon. Kumar P. Barve, Chair and members of the Environment and Transportation Committee**
From: **Frederick V. Swanner, President UAW Maryland State CAP**
Re: **HB 492 Railroad Company-Movement of Freight-Required Crew**

I am writing the Chair and all members of the Environment and Transportation Committee to urge you to support HB 492. It is a major safety item of concern; HB 492 is designed to take care of the railroad workers and or pedestrians by communicating at all times by radio issues in and around the Train. Examples of why there should be a two-person crew on trains; the engineer is not allowed to leave the engine compartment for any reason other than maybe his/her safety. One reason of many is if one of the two crew members has a heart attack, slips and falls or is rendered unconscious for whatever reason who would know except his co-worker, to take control of the train. All workplaces need to be as safe as humanly possible.

In closing I would like to state that in all our General Motors, Ford and Chrysler plants around the country we have a Buddy System (two-member crew) whereas no one works in confined space or unpopulated work areas by themselves for safety reasons. So, I urge this committee to support HB 492. worker's and pedestrian's safety should be top priority and should not be traded for a company's bottom line. The communities' of my members and family that live in neighborhoods these trains travel through thank you for their safety as well.

Kind Regards,

Frederick V. Swanner, President
UAW Maryland State CAP

X HB 492 - MD DC AFL-CIO - SUPPORT.pdf
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MARYLAND STATE & D.C. AFL-CIO

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Donna S. Edwards

Secretary-Treasurer
Gerald W. Jackson

HB 492 – Railroad Company – Movement of Freight – Required Crew
Senate Finance Committee
March 23, 2021

SUPPORT

Donna S. Edwards
President
Maryland State and DC AFL-CIO

Madam Chair and members of the Committee, thank you for the opportunity to submit testimony supporting HB 492 – Railroad Company – Movement of Freight – Required Crew. My name is Donna S. Edwards, and I am the President of the Maryland State and District of Columbia AFL-CIO. On behalf of 340,000 union members, I offer the following comments.

In the work environment, the safety and well-being of our members is of the utmost importance as well as the communities our work impacts. None of us in this room want to be asked why we did not support this commonsense safety legislation if a tragic accident happened, and a second crewmember could have prevented it or mitigated the damages from it.

The thought of a two-mile long freight train operating through our communities with only one person in charge should be frightening to each and every one of you. I am from Cumberland, which has always been a railroad town and has many freight trains that operate on a daily basis, and commuter trains operating twice, daily. I cannot imagine an accident like those highlighted today happening in my hometown, or in nearby mountain communities. Common sense dictates that, for public safety reasons, two persons on the job are better than one.

The argument was put forth – during debate on this legislation on the floor in 2018 – that support testimony was only offered by one labor union. In your packet you have written testimony from many of our affiliates in support of this particularly important rail safety legislation. All of organized labor stands in solidarity with our rail worker brothers and sisters and our communities. We, in the labor movement, know that worker safety cannot be taken for granted, compromised, or given away through the collective bargaining process. As law makers you recognize where the collective bargaining process ends and public policy begins – especially when the safety of workers, the public, and the environment are at stake. To further prove the point that all of labor stands in solidarity with our brothers and sisters who work in rail transportation, I have attached to this testimony the resolution from our 32nd Biennial Convention

in 2019, affirming Labor's unanimous support for the veto override of this previously passed rail safety legislation. It was unfortunate that the override was never passed, but we have an opportunity in this Session, with the passage of HB 492, to finally make rail safety a priority.

The legislature has recognized the importance of this legislation, which was evident with the Senate passing it 33-13 and the House passing it 102-30, during the 2019 Legislative Session. This safety bill is extremely popular and has already been shown to receive wide support in the Maryland General Assembly.

We ask for a favorable report on HB 492.

Resolution #12: In Support of a Veto Override of HB 66 & SB 252 – Required Crew

WHEREAS the safety of the public in regard to the risks associated with the transportation of freight by rail is best served by BOTH implementing new safety technology AND assuring that freight trains continue to be operated by a crew of at least two professionals; and

WHEREAS to this end, the Maryland State Legislative Board of the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation (SMART), fought for and successfully got passed by an overwhelming and bipartisan vote legislation in the State of Maryland during the 2018 and 2019 sessions of the Maryland Legislature requiring freight train crews of at least two persons; and

WHEREAS the success in achieving this legislation involved the outstanding support of the Maryland State and District of Columbia AFL-CIO and its affiliates; and

WHEREAS this 2018 and 2019 legislation was vetoed by the Governor of Maryland; and

WHEREAS the Maryland Constitution prohibited the legislature from overriding the Governor's veto in 2018, but does not prevent the legislature from overriding the 2019 vetoes; now

THEREFORE, BE IT RESOLVED that the Maryland State & District of Columbia AFL-CIO and its affiliates hereby commit to support the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation (SMART) and urge the entire Maryland General Assembly to override the Governor's vetoes of HB 66 & SB 252 respectively; and

BE IT FURTHER RESOLVED that the Maryland State and District of Columbia AFL-CIO will provide the entire Maryland General Assembly with a copy of this resolution, upon passage, on the first day of the 2020 session of the Maryland General Assembly.

Submitted by: *Larry Kasecamp* *Delegate, SMART-TD Local 632*	**Committee: Industrial Safety**
Convention Action: Unanimously passed	

9th Circuit Court Opinion - State Crew Laws 2:23:2

Uploaded by: Kasecamp, Larry

Position: FAV

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS; BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, *Petitioners*, v. FEDERAL RAILROAD ADMINISTRATION; U.S. DEPARTMENT OF TRANSPORTATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71787 FRA No. FRA-2014-0033

CALIFORNIA PUBLIC UTILITIES COMMISSION, *Petitioner*, v. PETE BUTTIGIEG, Secretary of Transportation; U.S. DEPARTMENT OF TRANSPORTATION; RONALD L. BATORY, Administrator of the Federal Railroad Administration; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71802 FRA No. FRA-2014-0033

On Petition for Review of an Order of the
Federal Railroad Administration

STATE OF WASHINGTON, *Petitioner*, v. U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71916 TRAN No. FRA-2014-0033

STATE OF NEVADA, *Petitioner*, v. PETE BUTTIGIEG, Secretary of Transportation; U.S. DEPARTMENT OF TRANSPORTATION; RONALD L. BATORY, Administrator of the Federal Railroad Administration; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71918 TRAN No. FRA-2014-0033 OPINION

On Petition for Review of an Order of the
Department of Transportation

Argued and Submitted October 5, 2020
Seattle, Washington

Filed February 23, 2021

Before: Consuelo M. Callahan and Morgan Christen,
Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Callahan;
Concurrence by Judge Christen

SUMMARY**

Federal Railroad Administration

The panel dismissed a petition for review filed by two unions; granted petitions filed by California, Washington, and Nevada; vacated the Federal Railroad Administration ("FRA")'s Order, 84 Fed. Reg. 24,735, purporting to adopt a nationwide maximum one-person crew rule and to preempt any state laws concerning that subject matter; and remanded to the FRA.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

As a threshold matter, the panel addressed arguments concerning jurisdiction raised by the intervenor Association of American Railroads. First, the panel dismissed the Unions' petition because venue was not proper under 28 U.S.C. § 2343 where the Unions' principal offices were not in the Ninth Circuit. Second, the panel held that there was jurisdiction over the petitions filed by the States because all three States were sufficiently aggrieved to invoke jurisdiction under 28 U.S.C. § 2344.

The panel held that the Order did not implicitly preempt state safety rules.

Turning to the merits, the panel held that the FRA failed to comply with the Administrative Procedures Act ("APA")'s minimum notice-and-comment provisions in issuing the Order. Specifically, the panel held that there was nothing in the FRA's March 2016 Notice of Proposed Rulemaking ("NPRM") (proposing a national minimum requirement of two member crews for trains) to put a person on notice that the FRA might adopt a national one-person crew limit.

Finally, the panel held, on this record, that the Order was arbitrary and capricious, and must be vacated. Specifically, the panel held that the Order's basis for its action – that two-member crews were less safe than one-person crews – did not withstand scrutiny. Also, the panel held that the FRA's contemporaneous explanation – that indirect safety connections might be achieved with fewer than two crew members – was lacking. Despite the deference due FRA decisions, the panel concluded that the States met their burden of showing that the issuance of the Order violated the APA.

Judge Christen concurred, and joined parts I, II, III, and IV.C of the opinion. She would vacate the notice of withdrawal solely based on the conclusion that the Notice of Proposed Rulemaking did not provide adequate notice or opportunity to comment. She would not reach whether the notice of withdrawal negatively preempted state laws or whether the FRA provided a satisfactory explanation for the notice.

COUNSEL

Kristin Beneski (argued) and Harry Fukano, Assistant Attorneys General; Robert W. Ferguson, Attorney General; Office of the Attorney General, Seattle, Washington; Arocles Aguilar, General Counsel; Christine J. Hammond, Enrique Gallardo, and Vanessa Baldwin, California Public Utilities Commission, San Francisco, California; for Petitioners State of Washington and California Public Utilities Commission.

Kevin C. Brodar (argued), General Counsel, SMART-TD, North Olmsted, Ohio; Lawrence M. Mann, Alper & Mann P.C., Bethesda, Maryland; Michael S. Wolly, Michael S. Wolly PLLC, Washington, D.C.; Joshua D. McInerney BLET, Barkan Meizlish LLP, Columbus, Ohio; for Petitioners Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers, and Brotherhood of Locomotive Engineers and Trainmen.

Aaron D. Ford, Attorney General; Gregory L. Zunino, Deputy Solicitor General; Brandee Mooneyhan, Deputy Attorney General; Office of the Attorney General, Carson City, Nevada; Jill C. Davis, Assistant General Counsel,

Public Utilities Commission, Carson City, Nevada; for Petitioner State of Nevada.

Martin Totaro and Abby C. Wright, Appellate Staff; Joseph H. Hunt, Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; Steven G. Bradbury, General Counsel; Paul M. Geier, Assistant General Counsel for Litigation and Enforcement; Joy K. Park, Senior Trial Attorney; Brett A. Jortland, Acting Chief Counsel; Rebecca S. Behravesh, Senior Attorney; Federal Railroad Administration, Washington, D.C.; for Respondents.

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Kwame Raoul, Attorney General; Jane Elinor Notz, Solicitor General; Sarah A. Hunger, Deputy Solicitor General; Christian Arizmendi, Assistant Attorney General; Office of the Attorney General, Chicago, Illinois; Xavier Becerra, Attorney General, Sacramento, California; Phil Weiser, Attorney General, Denver, Colorado; Kathleen Jennings, Attorney General, Wilmington, Delaware; Karl A. Racine, Attorney General, Washington, D.C.; Maura Healey, Attorney General, Boston, Massachusetts; Keith Ellison, Attorney General, St. Paul, Minnesota; Jim Hood, Attorney General, Jackson, Mississippi; Gurbir S. Grewal, Attorney General, Trenton, New Jersey; Letitia James, Attorney General, New York, New York; Ellen F. Rosenblum, Attorney General, Salem, Oregon; Mark R. Herring, Attorney General, Richmond, Virginia; Joshua L. Kaul, Attorney General, Madison, Wisconsin; for Amici Curiae

Illinois, California, Colorado, Delaware, District of Columbia, Massachusetts, Minnesota, Mississippi, New Jersey, New York, Oregon, Virginia, and Wisconsin.

William A. Mullins, Baker & Miller PLLC, Washington, D.C.; Sarah G. Yurasko, General Counsel, American Short Line and Regional Railroad Association, Washington, D.C.; for Amicus Curiae American Short Line and Regional Railroad Association.

OPINION

CALLAHAN, Circuit Judge:

In March 2016, the Federal Railroad Administration (FRA) issued a Notice of Proposed Rulemaking (NPRM) proposing a national minimum requirement of two crew members for trains. Over three years later, on May 29, 2019, the FRA issued an order purporting to adopt a nationwide maximum one-person crew rule and to preempt "any state laws concerning that subject matter." 84 Fed. Reg. 24,735 (the Order). Two Unions[1] and three states, Washington, California,[2] and Nevada (collectively referred to as the States), challenge the Order under the Administrative Procedure Act (APA). We hold that the Order does not implicitly preempt state safety rules, that the FRA failed to comply with the APA's notice-and-comment provisions in

[1] The petition for review was filed by the International Association of Sheet Metal, Air, Rail, and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen (collectively referred to as the Unions).

[2] The petition was actually filed by the California Public Utilities Commission (California PUC).

issuing the Order, and that the Order is arbitrary and capricious. We dismiss the Unions' petition for review but grant the States' petitions and vacate the Order.

I

The Safety Act empowers the Secretary of Transportation to "prescribe regulations and issue orders" addressing railroad safety. 49 U.S.C. § 20103(a). The Secretary has delegated that authority to the FRA, an agency within the Department of Transportation. *See* 49 C.F.R. § 1.89(a). However, the Safety Act also provides that states may adopt or continue in force laws and regulations related to railroad safety, even under certain conditions when they are more "stringent" than the FRA's rules. 49 U.S.C. § 20106(a)(2).

Following two major railroad accidents in 2013 at Lac-Mégantic, Quebec, and Casselton, North Dakota, the FRA asked the Rail Safety Advisory Committee (RSAC) to review whether train crew staffing affected railroad safety. The RSAC included representatives from all the major players concerning railroads, including railroads, labor organizations, suppliers, manufacturers, and the California PUC. The RSAC appointed a Working Group. At its first meeting, the FRA noted that it was concerned with railroad safety, that safety was enhanced through redundancy, and that the agency's safety regulations were written with at least a two-person crew in mind.

The Working Group was unable to reach a consensus. Accordingly, consideration of the appropriate crew size was submitted to the FRA for formal rulemaking. On March 15, 2016, the FRA issued an NPRM. 81 Fed. Reg. 13,918 (March 15, 2016). The first three sentences of the summary of the NPRM read:

> FRA proposes regulations establishing minimum requirements for the size of train crew staffs depending on the type of operation. *A minimum requirement of two crewmembers is proposed for all railroad operations*, with exceptions proposed for those operations that FRA believes do not pose significant safety risks to railroad employees, the general public, and the environment by using fewer than two-person crews. This proposed rule would also establish minimum requirements for the roles and responsibilities of the second train crew member on a moving train, and promote safe and effective teamwork.

Id. (emphasis added).

A public hearing on the NPRM was held on July 15, 2016, and the comment period was extended to August 15, 2016. The States assert that most commenters supported "some kind of train crew staffing requirements." No further action was taken until the FRA issued the Order on May 29, 2019. 84 Fed. Reg. 24,735.

II

The Order's summary states that the FRA "withdraws the March 15, 2016 NPRM concerning train crew staffing," but adds that "[i]n withdrawing the NPRM, FRA is providing notice of its affirmative decision that no regulation of train crew staffing is necessary or appropriate for railroad operations to be conducted safely at this time." *Id*.

The Order relates that the FRA had "hoped [the] RSAC would provide useful analysis, including conclusive data

addressing whether there is a safety benefit or detriment from crew redundancy (*i.e.*, multiple-person train crews)." *Id*. However, the RSAC was unable to reach consensus and the FRA issued the NPRM. The Order confirms that 1,545 out of nearly 1,600 comments supported some kind of multiple crew staffing requirement. *Id*. at 24,736. Those comments supporting staffing requirements came from individuals, a variety of government officials and organizations, and state and local governments. *Id*. They raised four main points: "(1) [a] train crew's duties are too demanding for one person; (2) new technology will make the job more complex; (3) unpredictable scheduling makes fatigue a greater factor when there is only a one-person crew; and (4) the idea of a one-person train crew is seemingly in conflict with the statutory and regulatory requirements for certification of both locomotive engineers and conductors." *Id*.

The Order notes that the proposal to adopt a minimum two-person crew rule was opposed primarily by railroads and railroad associations. *Id*. at. 24,737. The Order states that studies funded by the Association of American Railroads (AAR) "concluded that safety data analysis show single-person crew operations appear as safe as multiple-person crew operations, if not safer." *Id*. One study "concluded that the proposed rule would greatly reduce U.S. railroads' ability to control operating costs, without making the industry safer." *Id*. A second study funded by the AAR found that "European rail operations are comparable to U.S. rail operations and therefore the success of the European network in implementing single-person crew operations can serve as a model for the U.S. rail system." *Id*.

The Order finds that there "is no direct safety connection between train crew staffing and the Lac-Mégantic or

Casselton accidents." *Id*. It notes that the "FRA does not have information that suggests that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember." *Id*. at 24,738 (quoting 81 Fed. Reg. at 13,921). The Order further reasons that although there were "some indirect connections between crew staffing and railroad safety with respect to . . . the accidents, those connections are tangential at best and do not provide a sufficient basis for FRA regulation of train crew staffing requirements."[3] *Id*.

The Order states that the FRA's safety data "does not establish that one-person operations are less safe than multi-person train crews," that "existing one-person operations 'have not yet raised serious safety concerns,'" and that "it is

[3] Reviewing the Casselton accident, the FRA commented that it:

> believes that the same type of positive post-accident mitigating actions were achievable with: (1) [f]ewer than two crewmembers on the BNSF grain train involved in the accident, and (2) a well-planned, post-accident protocol that quickly brings railroad employees to the scene of an accident. In other words, the facts of the accident suggest that BNSF could have duplicated the mitigating moves of the grain train crew with responding emergency crewmembers. While FRA acknowledges the BSNF key train crew performed well, potentially saving each other's lives, it is possible that one properly trained crewmember, technology, and/or additional railroad emergency planning could have achieved similar mitigating actions. Thus, the indirect safety connections cited in the NPRM do not proved a sufficient basis for FRA regulation of train crew staffing.

Id. at 24,738.

possible that one-person crews have contributed to the [railroads'] improving safety record." *Id*. at 24,739 (quoting 81 Fed. Reg. at 13,950 and 13,932 (alteration in original)). The FRA asserts that data collected over a 17-year period did not allow it to "determine that any of the accidents/incidents involving a one-person crew would have been prevented by having multiple crewmembers." *Id*. The Order states that the reports to the Working Group "identify safety issues that railroads should consider when evaluating any reduction in the number of train crewmembers or a shift in responsibilities among those crewmembers" but "do not indicate that one-person crew operations are less safe and therefore do not form a sufficient basis for a final rule on crew staffing." *Id*. at 24,740.

The Order notes that the received comments "do not provide conclusive "data suggesting that . . . any previous accidents involving one-person crew operations . . . could have been avoided by adding a second crewmember." *Id*. Although "the comments note[d] some indirect connections between crew staffing and railroad safety, such as post-accident response or handling of disabled trains," the FRA believes that "the indirect safety connections cited in the comments could be achieved with fewer than two crewmembers with a well-planned, disabled-train/post-accident protocol."[4] *Id*.

[4] This section of the Order concludes with the following paragraph:

> FRA also does not concur with commenters who assert that the idea of a one-person train crew is seemingly in conflict with the statutory and regulatory requirements for certification of both locomotive engineers and conductors. There are no specific statutes or regulations prohibiting a one-person train crew, nor is

The Order next observes that railroads are moving away from traditional systems and that "the integration of technology and automation . . . has the potential to increase productivity, facilitate freight movement, create new kinds of jobs, and, most importantly, improve safety significantly by reducing accidents caused by human error." *Id*. It notes that "DOT's approach to achieving safety improvements begins with a focus on removing unnecessary barriers and issuing voluntary guidance, rather than regulations that could stifle innovation," and that "finalizing the train crew staffing rule would have departed from FRA's long-standing regulatory approach of not endorsing any particular crew staffing arrangement." *Id*. The Order suggests that the "lack of a legal prohibition means that each railroad is free to make train crew staffing decisions as part of their operational management decisions, which would include consideration of technological advancements and any applicable collective bargaining agreements." *Id*.

Despite concerns with the insufficiency or inconclusiveness of the data in the record, the last section of the Order notes that "nine states have laws in place regulating crew size," and states that the Order's intent is "to

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> there a specific requirement that would prohibit autonomous technology from operating a locomotive or train in lieu of a certified locomotive engineer. However, the NPRM identified several regulations that a railroad would need to be cognizant of when adjusting its crew staffing levels, while acknowledging that none of those regulations requires a minimum number of crewmembers to achieve compliance.

Id.

preempt all state laws attempting to regulate train crew staffing in any manner." *Id*. at 24,741. It explains:

> Provisions of the federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (FRSA), repealed and recodified at 49 U.S.C. § 20106, mandate that laws, regulations, and orders "related to railroad safety" be nationally uniform. The FRSA provides that a state law is preempted where FRA, under authority delegated from the Secretary of Transportation, "prescribes a regulation or issues an order covering the subject matter of the State requirement." A federal regulation or order covers the subject matter of a state law where "the federal regulations substantially subsume the subject matter of the relevant state law." A federal regulation or order need not be identical to the state law to cover the same subject matter. The Supreme Court has held preemption can be found from "related safety regulations" and "the context of the overall structure of the regulations." Federal and state actions cover the same subject matter when they address the same railroad safety concerns. FRA intends this notice of withdrawal to cover the same subject matter as the state laws regulating crew size and therefore expects it will have preemptive effect.

Id. **(**footnotes omitted).

The Order invokes "what the Supreme Court refer[s] to as 'negative' or 'implicit' preemption," quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978), for the proposition that "'[w]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' any state law enacting such a regulation is preempted." *Id*.

The Order concludes that the FRA has "determined that issuing any regulation requiring a minimum number of train crewmembers would not be justified because such a regulation is unnecessary for a railroad operation to be conducted safely at this time" and that "no regulation of train crew staffing is appropriate, and that FRA intends to negatively preempt any state laws concerning that subject matter." *Id*.

On July 16, 2019, the Unions were the first to file a petition for review. The California PUC filed its petition on July 18, followed by petitions by Washington and Nevada. All were timely filed within 60 days of the Order. *See* 28 U.S.C. § 2344.

III

Before reaching petitioners' challenges to the Order's merits, we address the arguments concerning jurisdiction raised by the intervenor, the AAR. It argues that the court lacks jurisdiction over the Unions' petition because 28 U.S.C. § 2343 states that venue is proper "in the judicial circuit in which petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." The argument is well taken, as the Unions' principal offices are not within the Ninth Circuit. Under other circumstances we might transfer the petition to

a sister circuit, but because we determine that we have jurisdiction over the petitions filed by the States and vacate the FRA's order, we dismiss the Unions' petition.

AAR also claims that we should dismiss the States' petitions, arguing that none of the States "participated in the crew-size rulemaking" and thus are not "parties aggrieved" and may not invoke our jurisdiction pursuant to § 2344. In support of its position, AAR argues that the comment letters submitted to the FRA by state public utilities commissions do not count as participation because the PUCs are separate entities from the states.

The FRA does not agree. It notes that the California PUC participated in the working group through the Association of State Rail Safety Managers and asserts that this "satisfies the requirement that an aggrieved party has participated in the challenged agency proceeding."

We determine that all three States are sufficiently aggrieved to invoke our jurisdiction under § 2344. All three States did participate in the proceedings. California's PUC was part of the working group, and both Nevada and Washington's PUCs submitted letters.[5]

[5] Citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015), the AAR further argues that the preemptive effect of the Order is not ripe for decision because preemption is determined by a court, not the FRA. *Armstrong*, is inapposite. It concerned a Medicaid provider's attempt to invoke the Supremacy Clause to force state compliance with federal law. Moreover, the Supreme Court recognized that it has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id*. at 326. There is no suggestion that the court may not enjoin a federal agency from violating the APA.

IV.

A. Standards of Review

There is no doubt that the FRA could withdraw the NPRM. Indeed, it makes sense that when the comments following the issuance of an NPRM do not convince the agency to take action, the agency should withdraw the NPRM. But the Order does much more than withdraw the NPRM; it appears to adopt a one-person train crew rule and purports to preempt any state safety laws concerning train crew staffing. 84 Fed. Reg. 24,741.

In reviewing the challenges to the Order, we take our guidance from two recent Supreme Court opinions, *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), and *Department of Comm. v. New York*, 139 S. Ct. 2551 (2019). In *Regents*, the Supreme Court reiterated that the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts" and "requires agencies to engage in reasoned decisionmaking." 140 S. Ct. at 1905 (internal citations omitted). The APA "directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious.'" *Id*. (quoting 5 U.S.C. § 706(2)(A)). "Under this narrow standard of review, . . . a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. (internal citations and quotations omitted). The Court explained that "[i]t is a foundational principle of administrative law" that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Id*. at 1907.

In *New York*, the Court set forth four steps for reviewing whether an agency's stated reasons for taking action are pretextual. "First, in order to permit meaningful judicial review, an agency must disclose the basis of its action." 139 S. Ct. at 2573 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962)). "Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Id*. "Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id*. Fourth, the Court "recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'" where there is "a strong showing of bad faith or improper behavior.'" *Id*. at 2573–74 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S 402, 420 (1971)).

In *New York*, the Court found that it had been presented "with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id.* at 2575. It explained that:

> [t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

Id. at 2575–76. The Court concluded: "We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction." *Id*. at 2576.

In reviewing the challenges to the Order, we first address the FRA's assertion that the Order implicitly preempts state safety rules. After determining that it does not, we consider whether the Order violates the APA's minimum notice-and-comment requirements and whether the Order is arbitrary and capricious. We conclude that the issuance of the Order violated the APA's notice-and-comment requirements and that the Order is arbitrary and capricious, and therefore must be vacated.

B. The States' Safety Rules are not Negatively Preempted by the Order

The FRA correctly asserts that cases such as *CSX Transportation*, *Inc. v. Easterwood*, 507 U.S. 658 (1993), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *Burlington Northern Railroad Co. v. Montana*, 880 F.2d 1104 (9th Cir. 1989), confirm that an order may implicitly preempt state laws. However, the cases do not support the FRA's assertion that this Order did so.

CSX Transportation was an action by the widow of a truck driver killed when hit by a train. The Court held that federal regulations setting maximum train speeds on certain classes of track preempted any common-law negligence claim that the conductor was travelling too fast, despite adhering to the federal speed limit. *See* 507 U.S. at 664, 676. *Ray* concerned Washington's safety regulations for tankers entering Puget Sound. The Court held that the state's

limitation on the maximum size of a tanker that could enter Puget Sound was preempted by federal regulation but that the state's requirements of local pilotage and tug escorts were not preempted. 435 U.S. at 177–79. *Burlington* concerned whether FRA regulations preempted a state law requiring a caboose on trains longer than 2,000 feet. We held that the state regulation was preempted because it covered the same subject matter as the FRA regulations. 880 F.2d at 1105–06. But *Burlington*'s application to this litigation is limited by two factors: in *Burlington* the FRA had "promulgated two regulations affecting cabooses"; and Montana conceded that "its caboose law is not designed to reduce an 'essentially local' safety hazard." *Id*. at 1105. Each of these cases concerned conduct that was subject to existing agency regulation. Thus, although they affirm that FRA regulations can preempt state safety regulations, they do not compel a determination that the Order did so.

The Supreme Court has indicated that when reviewing challenges to agency action under the APA a court should consider the particular statutes and the facts in each case. *See Regents*, 140 S. Ct. at 1905, 1908. Here, Congress limited the preemptive effect of an FRA order by providing in § 20106(a)(2) that states may "continue in force an additional or more stringent law" that is "necessary to eliminate or reduce an essentially local safety or security hazard" and "is not incompatible with a [federal] law, regulation, or order." Thus, a state regulation is not automatically preempted by FRA action. Rather, the state regulation is preempted only when incompatible with the FRA's decision.

The Order, although declaring it "negatively preempt[s] any state laws" concerning crew staffing, does not address why state regulations addressing local hazards cannot

coexist with the Order's ruling on crew size. The Order offers an economic rationale: "a train crew staffing rule would unnecessarily impede the future of rail innovation and automation." 84 Fed. Reg. 24,740. But this is not a safety consideration. The FRA also argues that state regulations that apply statewide do not address essentially local hazards. *Id*. at 24,741 n.46. This assertion is not fully addressed in the Order and does not appear to be ripe for judicial consideration at this time.

In sum, although preemption of state safety laws is not beyond the FRA's mandate, the Order does not do so implicitly. Next, we turn to the merits of the Order.

C. The Order Violates the APA's Minimum Notice-and-Comment Requirements

As noted by the States, the most fundamental of the APA's procedural requirements are that (1) a "notice of proposed rulemaking shall be published in the Federal Register," and (2) "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the agency's consideration. *See* 5 U.S.C. § 553(b) and (c). In *Nat. Res. Def. Council v. U.S. E.P.A.* (*NRDC II*), 279 F.3d 1180, 1186 (9th Cir. 2002), we stated that "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. We further reiterated that "a final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule" and "[t]he essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the [proposed rule]." *Id*. (quoting *NRDC v. EPA* (*NRDC I*), 863 F.2d 1420, 1429 (9th Cir. 1988)).

More recently, in *Empire Health Foundation for Valley Hospital Medical Center v. Azar*, 958 F.3d 873 (9th Cir. 2020), we reasserted that: (1) a decision made without adequate notice and comment is arbitrary or an abuse of discretion; (2) under the APA the adequacy of notice turns on whether interested parties reasonably could have anticipated the final rulemaking from the proposed rule; (3) the key inquiry is whether the changes in the final rule are a logical outgrowth of the notice and comments received; and (4) a further consideration is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Id*. at 882–883.

The States argue that the NPRM, which proposed a nationwide two-crewmember *minimum* requirement, gave no indication that FRA "would affirmatively *eradicate* all two-crewmember requirements, including those established under state law." They object that the Order "is far broader than the NPRM indicated," because it purports to preempt "all" state laws regulating train crew staffing "in any manner," which could encompass "not only the number of crewmembers, but also any non-federal requirements pertaining to topics such as education, training, and qualifications required for train crew staff." Moreover, according to the States, the FRA "did not cite *any* public comments to justify its preemption decision."

The FRA agrees that its final action is subject to the APA's rulemaking requirements and should be a logical outgrowth of the proposed rule. However, it asserts that the Order "plainly satisfies" the logical outgrowth requirement because the NPRM "provided 'fair notice' to interested parties of the possibility that the agency would determine that no regulation was appropriate," and thus the public

knew "that the agency was considering whether to allow one-person crews for 'most existing operations.'" The FRA further contends that it informed the public that it planned to approve on a case-by-case basis "operations with less than two crewmembers where a railroad provide[d] a thorough description of that operation, ha[d] sensibly assessed the risks associated with implementing it, and ha[d] taken appropriate measures to mitigate or address any risks or safety hazards that might arise from it."

AAR similarly argues that the Order is a logical outgrowth of the NPRM because it was reasonably foreseeable that the FRA would "examine the safety concerns regarding" one-person operations "and affirmatively decide that no regulation is needed." It asserts that "it was also foreseeable that the agency's final decision would preempt all state laws addressing that same subject matter."

Although federal regulation of crew size was clearly placed in issue by the NPRM, the Order's preemption of all state safety requirements was not a "logical outgrowth" of the NPRM. There was nothing in the NPRM to put a person on notice that the FRA might adopt a national one-person crew limit. Rather, the NPRM stated that the FRA was considering mandating a minimum requirement of two crewmembers. The purpose of the proposed rule was to "establish minimum requirements for the roles and responsibilities of the second train crew member." 81 Fed. Reg. 13,959. Indeed, the FRA's very argument that it had informed the public that it planned to approve on a case-by-case basis operations with fewer than two crewmembers suggests that it was not contemplating the adoption of a nationwide one-person train crew rule. The FRA does not

contend that it ever issued any notice modifying that stated purpose of the NPRM.

In sum, it appears that (1) the interested parties could not have reasonably anticipated the Order, *see Empire Health Found.*, 958 F.3d at 882, (2) the Order is not a "logical outgrowth of the notice and comments received," *id.* (quoting *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1288 (9th Cir. 1990)), and (3) "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* at 883 (quoting *NRDC II*, 279 F.3d at 1186).

D. On This Record We Conclude That the Order is Arbitrary and Capricious and Must be Vacated

Although the Order describes itself as withdrawing an NPRM, its real and intended effect is to authorize nationwide one-person train crews and to bar any contrary state regulations. In reviewing petitioners' claim that the FRA failed to comply with the APA, we look to "whether the [FRA] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *New York*, 139 S. Ct. at 2569 (citations and internal quotation marks omitted). Applying the approach set forth in *New York*, we determine that the record does not support the Order's embrace of a one-person train crew or its preemption of state laws.

1. The Order's Basis for Its Action Does Not Withstand Scrutiny

The Order's reasoning is problematic. It asserts that there is still no "reliable or conclusive statistical data to suggest whether one-person crew operations are generally

safer or less safe than multiple-person crew operations." 84 Fed. Reg. 24,737. Critically, this lack of data does not support the promulgation of a one-person train crew rule and the preemption of state safety laws.

A careful reading of the Order raises substantial questions as to the soundness of its effective establishment of a national one-person crew standard.[6] The Order recognizes that even as to the two accidents that prompted the NPRM there were "some indirect connections between crew staffing and railroad safety," but dismisses these as "tangential at best." *Id.* at 24,738. The Order recognizes that it is impossible to "compare the accident/incident rate of one-person operations to that of two-person train crew operations."[7] *Id*. at 24,739.

The Order further recognizes that the Working Group identified "safety issues that railroads should consider when evaluating any reduction in the number of train crewmembers," but opines that these "reports do not indicate that one-person crew operations are less safe" and "do not form sufficient basis for a final rule on crew staffing." *Id*. at 24,740. The Order again recognizes "some indirect connection between crew staffing and railroad safety, such as post-accident response or handling of disabled trains," but opines that these concerns "could be achieved with fewer than two crewmembers with a well-planned, disabled-train/post-accident protocol." *Id*. Similarly, addressing

[6] Indeed, it is not entirely clear whether the Order even establishes a one-person crew requirement or permits railroads, in their discretion, to operate trains without any operator aboard the train.

[7] It stands to reason that where a two-person crew avoided an accident that might not have been avoided by a one-person crew, there would be no accident report.

whether "the idea of a one-person train crew" conflicts with existing statutory and regulatory requirements, the Order notes that no specific statute or regulation prohibits a one-person train crew, but cautions that "the NPRM identified several regulations that a railroad would need to be cognizant of when adjusting its crew staffing levels." *Id*. The Order alludes to safety concerns but does not really address them.

It is not clear that there is a sound factual basis for the Order's suggestion that two-member crews are less safe than one-person crews. The Order seems to rely on a study submitted by the AAR that allegedly shows that "single-person crew operations appear as safe as multiple person crew operations, if not safer." *Id*. at 24,737. But a single study suggesting that one-person crew operations "appear as safe" as two-person crews seems a thin reed on which to base a national rule: particularly in light of all the comments supporting a two-person crew rule and the proffered anecdotal evidence.

Indeed, the Order fails to address the multiple safety concerns raised by the majority of the comments on the NPRM. For example, the States allege that the FRA's own research "identified crewmember fatigue as a critical component of the safety-related reasons for regulating crew size," and correctly note that the Order does not discuss crew fatigue at all. The States also argue that although the FRA had previously recognized that mountainous terrain presents technical challenges and complexities that favor multi-person crews, the Order fails to consider these concerns. Rather, the Order states that the FRA "*believes*" that "post-accident responses [and] handling of disabled trains . . . *could be achieved* with fewer than two crewmembers with a *well-planned disabled-train/post-accident protocol* that

quickly brings railroad employees to the scene of a disabled train or accident." *Id*. at 24,740 (emphases added). But the Order does not require that a railroad have "a well-planned disabled-train/post-accident protocol." Moreover, with trains crossing the Sierra and Cascade mountain ranges in the winter, it seems unlikely that pursuant to the best "well-planned" protocol, assistance could quickly reach a disabled train on a mountain pass.

Even the Order's assertion that "a train crew staffing rule would unnecessarily impede the future of rail innovation and automation," *id*. at 24,740, is not explained. The Order mentions that automation may reduce accidents caused by human error, that unnecessary barriers should be removed, and that some commentators "identified the train crew staffing rulemaking as a potential barrier to automation or other technology improvements." *Id*. But there is no discussion of how a two-person crew rule would actually interfere with innovation or automation. Instead, the section asserts that "requiring a minimum number of crewmembers for certain trains . . . would have departed from FRA's long-standing regulatory approach of not endorsing any particular crew staffing arrangement." *Id*. But this begs the question of why the promulgation of a one-person crew rule does not also violate the long-standing approach of not endorsing a particular crew staffing arrangement.

Finally, even if we were to accept the FRA's assertion that a "regulation requiring a minimum number of train crewmembers . . . is unnecessary for a railroad operation to be conducted safely," this is not a sufficient reason to "negatively preempt any state laws concerning that subject matter." *Id*. at 24,741. To the contrary, Congress recognized the need to consider local conditions when it provided in § 20106(a)(2) that a state could "continue in force an

additional or more stringent law" that is "necessary to eliminate or reduce an essentially local safety or security hazard." The FRA's assertion that it has the inherent authority to implicitly preempt state law does not address why preemption is necessary or desirable here.

Our review of the Order indicates that neither its promulgation of a one-person train crew rule nor its preemption of state safety laws fairly addresses the safety issues raised in the comments to the NPRM.

2. The Agency's Contemporaneous Explanation is Lacking.

An alternative motive such as economic efficiency might not render the Order arbitrary and capricious if it otherwise addressed the safety concerns which are the FRA's mandate. *See New York*, 139 S. Ct. at 2573. As noted, the FRA "believes" that indirect safety connections "could be achieved" with fewer than two crewmembers with a well-planned disabled-train/post-accident protocol" and that it "expects" railroads to consider such protocol. 84 Fed. Reg. at 24,740. Beliefs as to what "could be achieved" and expectations as to what railroads will do are not a legitimate ground for preempting state safety regulations. Furthermore, other than arguing that state regulations for "essentially local safety hazards" may not be "statewide in character," *see id*. at 24,741 n.46, the Order offers no safety or economic justification for preemption.

V.

Despite the deference due FRA decisions, the States have met their burden of showing that the issuance of the

Order violated the APA's minimum notice-and-comment requirements and that the Order is arbitrary and capricious.[8]

This case recalls a case commented on by the Supreme Court in *Regents*. There the Court wrote:

> That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* [463 U.S. 29 (1983)]. There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full.
>
> We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of" automatic seatbelts. It did "not cast doubt" on the "efficacy of airbag technology" or

[8] Because we vacate the Order on these grounds, we need not, and do not, consider the States' arguments that the Order was untimely and violates the Safety Act.

> upon "the need for a passive restraint standard." Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement."

140 S. Ct. at 1912 (internal citations omitted).

Here, too, the FRA seeks to change its position without fully explaining its reasons for doing so and without following its usual proceedings for rulemaking. The FRA went from proposing, as required by safety concerns, a national *minimum* two-person train crew rule, to imposing a *maximum* one-person train crew rule and preempting state safety laws based on a record that the FRA describes as insufficient to show "whether one-person crew operations are generally safer or less safe than multiple-person crew operations." 84 Fed. Reg at 24,737. As in *State Farm*, the issue is not whether the FRA has the authority to issue a rule that preempts state safety regulations, but whether it has done so in a manner that complies with the APA. On this record, we conclude that it did not.

Accordingly, the Order is vacated, and the matter is remanded to the FRA. Although the FRA asserts that vacatur "would result in a disruptive patchwork of state laws," it appears that Congress foresaw a variety of state laws when it provided in § 20106 that states may have more stringent laws as long as they are not incompatible with federal law.

The petition filed by the Unions is **DISMISSED**. The petitions filed by California, Washington, and Nevada are

GRANTED, the Order, 84 Fed. Reg. 24,735, is **VACATED**, and the matter is **REMANDED** to the Federal Railroad Administration.

CHRISTEN, Circuit Judge, concurring:

I join parts I, II, III and IV.C of the opinion. Because "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion," *Nat. Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002), I would vacate the notice of withdrawal solely based on our conclusion that the Notice of Proposed Rulemaking did not provide adequate notice or opportunity to comment. I would not reach whether the notice of withdrawal negatively preempted state laws or whether the Federal Railroad Administration provided a satisfactory explanation for the notice.

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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).

[1] 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.

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 Gen. 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,

Jeremy M. McCoy
Assistant Attorney General

AG Letter on Preemption #2 copy.pdf
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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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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.

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).

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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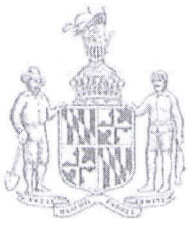

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House Bill 1138 prohibits a train or light engine used in connection with the movement of railroad freight from being operated in the State unless the train or light engine has a crew of at least two individuals. The prohibition does not apply to a 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:

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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.

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).

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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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 a 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

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,

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,

Jeremy M. McCoy
Assistant Attorney General

BNSF vs Doyle - WI Premption Appeal.pdf
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Position: FAV

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY v. DOYLE

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, Soo Line Railroad Company, Union Pacific Railroad Company, and Wisconsin Central Ltd., Plaintiffs-Appellants, Cross-Appellees, v. James E. DOYLE, Attorney General of Wisconsin, E. Michael McCann, District Attorney of Milwaukee County, Thomas L. Storm, District Attorney of Fond du Lac County, et al., Defendants-Appellees, Cross-Appellants, United Transportation Union, Intervening Defendant-Appellee, Cross-Appellant.

Nos. 98-4057, 98-4149 and 98-4166.

Argued May 19, 1999. -- July 23, 1999

Before WOOD, JR., FLAUM, and MANION, Circuit Judges.

Jon P. Axelrod, Dewitt, Ross & Stevens, Madison, WI, Ronald M. Johnson (argued), Akin, Gump, Strauss, Hauer & Feld, Washington, DC, for Plaintiffs-Appellants, Cross-Appellees.James E. Doyle, pro se, Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees and Defendants.Thomas C. Bellavia (argued), Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees and Defendants-Appellants.Marilyn Townsend, Madison, WI, Lawrence M. Mann (argued), Alper, Mann & Weisbaum, Washington, DC, for United Transportation Union.Thomas L. Smallwood, Borgelt, Powell, Peterson & Frauen, Milwaukee, WI, for Association of American Railroads, Amicus Curiae, American Short Line and Regional Railroad Association, Amicus Curiae and American Short Line Railroad Association, Amicus Curiae.Susan K. Ullman, Office of Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellants.

The plaintiffs, four railroads that operate in Wisconsin, sued the Wisconsin attorney general and three county district attorneys seeking a declaration that a Wisconsin law requiring train crews to consist of at least two persons and also requiring crew members to have certain qualifications is preempted by federal regulations promulgated under the Federal Rail Safety Act, 49 U.S.C. § 20101 et seq. The United Transportation Union, which represents nearly all unionized trainmen in the United States, intervened as a defendant. The district court decided the case on cross motions for summary judgment. It held that the parts of the statute requiring certain qualifications for engineers and train crew members were preempted, but held that the part requiring two-person crews was not. The railroads appeal from the ruling regarding the two-person crew requirement. We disagree with the district court's conclusion that the two-person crew requirement is preempted in no circumstances. We hold that federal regulations have approved the use of one-person crews in two types of operations but not in a third. Thus, Wisconsin's two-person crew requirement is preempted in part. The defendants cross-appeal from the finding that the statute's crew qualification provisions are preempted. We agree with the district court. We also hold that the state law is severable, so that the part that is not preempted

can survive on its own. We therefore affirm the judgment of the district court in part and reverse in part.

I.

A. Wisconsin's Two-Person Crew Law and This Suit

On December 15, 1997, Wisconsin enacted Wis. Stat. § 192.25 to regulate the qualifications of train crew members and to require at least two persons in all train crews. In its entirety, the statute provides:

(1) In this section:

(a) "Certified railroad locomotive engineer" means a person certified under 49 CFR 240 as a train service engineer, locomotive servicing engineer or student engineer.

(b) "Qualified railroad trainman" means a person who has successfully completed a railroad carrier's training program and passed an examination on railroad operation rules.

(2) No person operating or controlling any railroad, as defined in s. 85.01(5), may allow the operation of any railroad train or locomotive in this State unless the railroad train or locomotive has a crew of at least 2 individuals. One of the individuals shall be a certified railroad locomotive engineer. The other individual shall be either a certified railroad locomotive engineer or a qualified railroad trainman. A certified railroad locomotive engineer shall operate the control locomotive at all times that the railroad train or locomotive is in motion. The other crew member may dismount the railroad train or locomotive when necessary to perform switching activities and other duties in the course of his or her job.

(3)(a) The office, by rule, may grant an exception to sub. (2) if the office determines that the exception will not endanger the life or property of any person.

(b) Subsection (2) does not apply to the extent it is contrary to or inconsistent with a regulation or order of the federal railroad administration.

(4)Any person who violates sub. (2) may be required to forfeit not less than $25 nor more than $100 for a first offense, not less than $100 nor more than $500 for a 2nd offense committed within 3 years, and not less than $500 nor more than $1,000 for a 3rd offense committed within 3 years.

Section 192.25 was to become effective January 1, 1998. On December 31, 1997, the plaintiffs filed this suit, naming the Wisconsin Attorney General and three county district attorneys as defendants.[1] (For convenience, we will refer to these defendants as "Wisconsin.") Three of the plaintiffs are large, national railroads: Burlington Northern & Santa Fe Railway Company, Soo Line Railroad Company, and Union Pacific Railroad Company. The fourth plaintiff is a smaller, regional railroad: Wisconsin Central Limited.[2] Each plaintiff operates in Wisconsin. The complaint alleged that regulations promulgated under the Federal Rail Safety Act preempted

§ 192.25, and that the statute violated the federal and Wisconsin constitutions. The plaintiffs sought declaratory and injunctive relief. The parties agreed that Wisconsin would not enforce the statute in part pending the outcome of this litigation, or until December 31, 1998. (The parties have not informed us whether they have agreed to continue the stay.) The United Transportation Union (UTU) later intervened as a defendant. The parties filed cross motions for summary judgment, and subsequently stipulated that the plaintiffs would dismiss without prejudice the counts raising constitutional issues. The district court granted each side summary judgment in part. The court held that § 192.25's crew qualification requirements were preempted by federal law but held that its requirement for two-person crews was not. The parties have each appealed parts of the district court's decision.

B. FRSA Preemption

"[T]he 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. Federal law, therefore, preempts state law. The Supreme Court summarized how the courts are to analyze preemption issues:

In the interest of avoiding unintended encroachment on the authority of states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is the clear and manifest purpose of Congress. Evidence of preemptive purpose is sought in the text and structure of the statute at issue. If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 663-64, 113 S.Ct. 1732, 123 L.Ed.2d 387, (1993) (citations and internal quotations omitted). Because federal preemption is a question of statutory interpretation, we review this issue de novo.

In response to a perceived need for comprehensive rail safety regulation, Congress passed the Federal Rail Safety Act of 1970 (FRSA), as amended 49 U.S.C. § 20101 et seq.[3] The purpose of the FRSA was to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Thus, the Secretary of Transportation was given broad power to regulate and a mandate to use that power: "The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. The Secretary regulates rail safety through the Federal Railroad Administration (FRA). The FRSA also advanced the goal of national uniformity of regulation because one of its provisions expressly preempts state laws regulating rail safety. 49 U.S.C. § 20106. Because the FRSA contains an express preemption provision, our task principally is to apply the provision according to its terms. Section 20106 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 incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

Under this scheme, then, state regulations can fill gaps where the Secretary has not yet regulated, and it can respond to safety concerns of a local rather than national character. Wisconsin does not justify § 192.25 as a response to a local safety hazard, so the precise issue before us is whether the Secretary "prescribe[d] a regulation or issue[d] an order covering the subject matter" of § 192.25. This issue requires us to answer three sub-issues: What is the "subject matter" of the state requirement? What action by the Secretary amounts to issuing an "order"? ("Prescrib[ing] a regulation" is a clear enough term.) When does such an order or regulation "cover" the subject matter of a state requirement?

The third question is the most easily answered because in Easterwood the Supreme Court thoroughly analyzed when FRA regulations "cover" the subject matter of a state requirement. Noting that "cover" was a somewhat restrictive term, the Court held that "[the party asserting preemption] must establish more than that [the regulations] 'touch upon' or 'relate to' the subject matter... pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." 507 U.S. at 664-65, 113 S.Ct. 1732 (citations omitted). Importantly, preemption does not depend on a single federal regulation itself covering the subject matter of the state law. In Easterwood the Court found preemption by examining "related safety regulations" and "the context of the overall structure of the regulations." Id. at 674, 113 S.Ct. 1732.

What constitutes an "order" for FRSA preemption is less clear. This term is not defined in the FRSA, and the Supreme Court has not had occasion to define it. The district court relied upon the definition of "order" in the Administrative Procedures Act, 5 U.S.C. § 551(6), which defines an order to include "a final disposition, whether affirmative, negative, injunctive, or declaratory in form[,] . other than rulemaking." Certainly if an agency action constitutes an "order" under the APA definition, it would be an order for FRSA preemption. Because the actions in this case fit the APA definition, we need not decide whether an action that does not fit that definition could nonetheless be an order under § 20106. But we also note that "final disposition" includes informal decisions. See Atchison, Topeka & S. F. R.R. v. Pena, 44 F.3d 437, 441 (7th Cir.1994) (en banc) (letter from the FRA's Chief Counsel announcing change in the FRA's interpretation of law was "final agency action" because letter made the FRA's position "absolutely clear"), aff'd. sub nom. Brotherhood of Locomotive Engineers v. Atchison, T. & S. F.R.R., 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996) (not addressing issue of "final agency action"); see also United Transp. Union v. Lewis, 711 F.2d 233, 240 (D.C. Cir.1983) (court reviewed agency's interpretation of law expressed in letter). For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it. The particular form of the decision is not dispositive.

"The subject matter of the state requirement" is the safety concerns that the state law addresses. See Burlington Northern R.R. v. Montana, 880 F.2d 1104, 1106 (9th Cir.1989) ("[The FRSA] preempts all state regulations aimed at the same safety concerns addressed by FRA regulations."). Generally, determining the safety concerns that a state or federal requirement is aimed at will necessarily involve some level of generalization that requires backing away somewhat from the specific provisions at issue. See Shots v. CSX Transp., Inc., 38 F.3d 304, 307 (7th Cir.1994) (in analyzing preemption of state negligence claim for inadequate warning device at rail crossing, court referred to "subject matter of highway safety at that crossing"). Otherwise a state law could be preempted only if there were an identical federal regulation, and, as we noted, Easterwood teaches that this is not so. See 507 U.S. at 674, 113 S.Ct. 1732 (preemption found through series of related regulations and overall structure of the regulations, although no regulation directly addressed the state requirement); see also Burlington Northern R.R., 880 F.2d at 1106 (FRA regulation permitting telemetry device rather than visual inspection preempted state law requiring trains to have a caboose because both were aimed at the safety concern of monitoring brakes and signals at the rear of the train). But with too much generalizing-"public safety" or "rail safety"-our analysis would be meaningless because all FRA regulations cover those concerns.

II.

A. Whether Section 192.25's Crew Qualification Requirements Are Preempted

The broad safety concern that § 192.25 is aimed at is ensuring that a train or locomotive crew can operate safely. The statute addresses this broad concern by addressing two related concerns: (1) who is qualified to operate a train or locomotive safely, and (2) what is the minimum number of crew persons needed to operate a train or locomotive safely. This section of our opinion addresses the statute's provisions regarding the first concern, and the next section addresses the statute's provisions regarding the second concern.

The statute addresses who is qualified to operate a train in three ways: § 192.25(1)(a) requires certain qualifications for a "Certified railroad locomotive engineer"; § 192.25(1)(b) requires certain qualifications for a "Qualified railroad trainman"; and § 192.25(2) requires that a certified railroad locomotive engineer operate the controls of the locomotive any time the train or locomotive is moving. Federal regulations clearly cover the subject matter of these requirements. Section 192.25(1)(a) itself expressly incorporates the numerous federal regulations in 49 C.F.R. part 240 that set the qualifications of an engineer. Section 192.25(1)(b) requires that a trainman be instructed and tested in the railroad's operating procedures, and the training of railroad employees is covered by federal regulations. See, e.g., 49 C.F.R. § 217.11(c) (requires tests of employees). In the face of the federal regulations, Wisconsin argues that these provisions are not preempted not because the federal regulations do not cover the subject matter of the state requirements, but because the state statute does not impose contradictory requirements. The short answer to this argument is that the text of § 20106 provides that a state may enforce a law "related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement." (Emphasis supplied.) This language does not distinguish between contradictory state requirements and merely duplicative state requirements. We previously stated:

If the Secretary promulgates a regulation that covers the subject matter of some state safety requirement, the state requirement must give way (with an inapplicable exception) even if there is no direct conflict, that is, even if the federal and state requirements would not place the railroad under conflicting duties.

Shots, 38 F.3d at 307. Moreover, Wisconsin's requirement that an engineer be at the controls of the locomotive any time it moves does directly conflict with a federal regulation: 49 C.F.R. § 240.7, which excludes from the definition of locomotive engineers-and thus the requirement to satisfy all qualifications-persons who move the locomotive up to 100 feet in a repair or servicing area to inspect and maintain it. These three provisions of § 192.25 are therefore preempted by the federal regulations.

B. Whether § 192.25's Two-Person Crew Requirement Is Preempted

1. General Background

Section 192.25(2) also requires that at least two crew members 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. This provision expresses Wisconsin's conclusion that lone engineer and remote control operations are always unsafe. There is no federal regulation directly addressing when lone engineer or remote control operations are safe; if there were, this would be an easier case. So, as Easterwood teaches, we have to examine all related regulations and orders to see if the FRA has determined when these operations may be done. The parties make all-or-nothing arguments regarding the two-person crew requirement. That is, they argue either that the FRA has approved all one-person crew operations, or that it has approved none. We think a more flexible analysis is required because one-person crews are used in various types of operations that differ from each other considerably.

The number of crew persons on a train is determined by the operating conditions and, sometimes, by the terms of the railroad's collective bargaining agreements. Generally trains operate with two or three crew members: an engineer and a conductor and (possibly) a brakeman. (The crew members are sometimes called “trainmen.”) Prior to the demise of the steam locomotive, at least two crew members were needed in the locomotive itself: the engineer and the fireman. But with the advent of diesel locomotives, the engineer can operate the locomotive by himself, and in some operations, a conductor or brakeman is not essential. Thus, some railroads operate trains with only one crew member in three different situations that are relevant to this case: “hostling” movements, “helper” movements, and “over-the-road” movements. “Hostling” movements involve short distances at a train yard. After the train has arrived at the yard and its cars are uncoupled, an employee, called a “hostler,” will often move the locomotive to another area. Locomotive movements without any attached cars are called “light” movements. “Helper” movements are another type of light movement. Sometimes a train will have to ascend or descend a restrictive grade that requires more locomotive power than it has. To assist it over the grade, a “helper” locomotive is sent from the yard and connects to the front or back of the train, which then is able to make the ascent or descent. Afterwards, the helper locomotive is uncoupled and returns to the yard. Finally, “over-the-road” movements

involve hauling train cars between terminals. Presently it appears that none of the plaintiffs uses one-person crews for over-the-road movements in Wisconsin. Under their current collective bargaining agreements, Burlington Northern, Soo Line, and Union Pacific cannot use one-person crews for any over-the-road movements. They state that they would consider doing so when and if they are able to negotiate a change to their bargaining agreements. Wisconsin Central previously used one-person crews for over-the-road movements in Wisconsin, but its use of them has been dictated by the terms of safety agreements with the FRA.

The FRA has had several occasions in the 1990's to review the safety of some aspects of one-person crews. To decide the extent to which § 192.25's two-person crew requirement has been preempted, we must examine the FRA's various orders and regulations and determine whether they have "covered" the subject matter of safety for one-person crews in any of these different types of operations.

2. Federal Regulations and Orders Regarding Train Crew Size

a. The Blue Signal Regulations

In 1993, the FRA promulgated a new rule regarding "utility employees" temporarily assigned to work with train or yard crews. Some background is necessary to understand the FRA's rule-making. Since 1970, the FRA's regulations had distinguished "train and yard crews" from "workers."[4] The former were the engineers, conductors, and brakemen who were assigned to a particular train-"rolling equipment." "Workmen" were employees who were not a part of a particular crew but whose job required them to work on, under, or between rolling equipment doing such things as inspecting or repairing locomotives and cars. When a worker was working on, under, or between rolling equipment, he was required to comply with certain "blue signal" rules found in 29 C.F.R. part 218. Essentially, the worker posted a blue flag or sign on or near the train. No one could then move the train until he had found the worker who posted the blue signal and verified that the worker was not in danger when the train moved. Train and yard crew members were generally excluded from the blue signal requirement. The logic of the rule is simply that one of the greatest dangers to an employee working around rolling equipment is that the equipment might move unexpectedly because of a lack of communication between the crew and a worker. Because train and yard crews work together as a team and keep in constant communication, there is much less danger of the engineer unexpectedly moving the train while another crewman is, for example, uncoupling a car.

In 1993, however, the FRA modified its regulations to account for substantial changes in the typical size of train crews, and the development of a new type of employee: the "utility employee." In announcing the new regulation, the FRA stated:

Since promulgation of the regulation [in 1970], the size of train and yard crews has been significantly reduced through the collective bargaining process and increased operating efficiencies. Implementation of the recommendations of Presidential Emergency Board No. 219 ("PEB 219") (see Pub. L. No. 102-29, 1991) is greatly accelerating this process. Through this and prior processes, crews that once consisted of a locomotive engineer, fireman, conductor,

and two trainmen, have in many cases been reduced to a locomotive engineer and conductor only.

58 Fed.Reg. 43288. As the crew sizes decreased, many railroads began using "utility employees" who were attached temporarily to train and yard crews. Under the prior regulations, there was confusion and disagreement about whether these utility employees were train and yard crew members, thus excluded from the blue signal requirement, or were workers who were not. After studying the situation, in 1993 the FRA changed the regulations to expressly account for the changes in the industry. The new regulations defined train and yard crews, utility employees, and workers, and set out when each was subject to the blue signal requirement. In so doing, the FRA recognized that sometimes train or yard crews had only one person, and it adopted a different standard for such crews.

The regulations provided that a utility employee could be part of train and yard crews, and so excluded from the blue signal requirement, only when an engineer was at the controls of the locomotive, or at least in the cab. 29 C.F.R. § 218.22(c) & (e). The FRA explained that "[t]he presence and vigilance of the engineer at the controls (or, at the very least, in the cab) of the controlling locomotive is essential." 58 Fed.Reg. 43291. The FRA permitted, however, another member of the train or yard crew to go into the cab if the engineer had to perform some function outside. Id. The notice also explained:

A single locomotive engineer in helper service, or a single hostler may not take advantage of the exclusion from blue signal protection unless joined by a utility employee. Absent a crew member to monitor the locomotive, blue signal protection is required.

Id. The exclusion of single-person train and yard crews from the blue signal protection was noted only in the preamble to the new rule, not in the text itself. The FRA later explained why it had done so:

FRA's notice of proposed rule making requested comment on the protection needed for a single locomotive engineer performing helper or hostler service. Protecting one-member crews was therefore within the scope of the notice. FRA chose not to address the subject in rule text because no comments were received. In the preamble to the final rule, however, FRA expressed discomfort with one-member crews. It was stated that a lone engineer could not take advantage of the exclusion from blue signal protection unless joined by a utility employee to ensure that the locomotive cab was always occupied.

60 Fed.Reg. 11047.

In response to the preamble's making one-person train and yard crews subject to the blue signal requirement, the AAR petitioned the FRA for reconsideration. On March 1, 1995, the FRA announced an amendment to the rule. 60 Fed.Reg. 11047. The FRA summary stated "[t]he amendment will permit single-person crews to work within the protections provided for train and yard crews." Id. The FRA expressed its continued concern "with the unique risk faced by lone engineers despite the current lack of evidence of a substantial injury record for one-member crews. An engineer assigned to helper or hostler service must frequently perform work, such as

placing rear end markers or making connections between locomotives, that puts that employee in danger, particularly when this work is performed in congested terminals and rail yards." 60 Fed.Reg. 11047, 11048. So the FRA issued a new regulation, 49 C.F.R. § 218.24, which permitted a lone engineer to work on, under, or between rolling stock without blue signal protection only if certain specified conditions were met. The regulation also covered how a single engineer in helper service would communicate with the crew he was assisting and how the two crews would go about moving their respective trains. In response to this new rule for one-person crews, the FRA received numerous comments and petitions. After reviewing them, the FRA suspended the regulation as of its effective date, May 15, 1995. 60 Fed. Reg. 30469. The FRA also reopened the comment period on the amendment "regarding only the issue of one-person crews" and the comment period is apparently still open.

b. The Wheeling & Lake Erie Remote Control Test Program

By 1993 some railroads had begun using remote control devices with their one-person crews. These devices permitted a lone engineer working outside the cab to move the locomotive. Thus, a lone engineer would be able to perform a task that previously would have required the engineer to be in the cab moving the locomotive and communicating by radio with another crew member working on the ground. The use of these devices raised some significant regulatory compliance issues. In January 1993, the Wheeling & Lake Erie Railway Company petitioned the FRA for waivers from certain regulatory requirements so that it could use remote control devices with lone engineers. The FRA invited comment, conducted a public hearing, and then on November 18, 1994, issued a notice that it would conduct a two-year test program for remote control devices involving Wheeling & Lake Erie, although it encouraged other railroads to join the test program. 59 Fed. Reg. 59826. The FRA allowed the continued use of remote control devices by other railroads only if they participated in the two-year test program. 59 Fed. Reg. 59827. The UTU petitioned the FRA to prohibit any use of remote control devices, but the FRA denied that petition. See 61 Fed. Reg. 58737.

c. Wisconsin Central's Use of One-Person Crews for Over-the-Road Movements, Use of Remote Controls, and the FRA's Review

In 1996, Wisconsin Central proposed expanding its use of one-person crews for some over-the-road movements on four new routes. (At the time Wisconsin Central used one-person crews on four other routes.) On April 25, 1996, the UTU petitioned the FRA for an emergency order banning Wisconsin Central from using one-person crews for any over-the-road movements. (The FRA has not yet ruled on this petition.) The FRA then began reviewing Wisconsin Central's use of one-person crews and asked it not to expand its use of one-person crews for over-the-road movement during the review period. Wisconsin Central agreed.

In a May 8, 1996, letter to Wisconsin Central, the FRA stated:

We are aware that other railroads, as well as your own, currently operate one-person trains. For the most part, these operations are short, slow trains. You intend, however, to move mixed freight over long distances in these four routes. As you no doubt realize, your proposed operations are novel, and pose many complex problems.

Although there are no available data proving one-person crews are unsafe, there are also no data showing operations of the type you propose to be safe.

The FRA listed a number of safety concerns and directed Wisconsin Central to submit an action plan detailing its operating standards for one-person crews and addressing these issues. The FRA approved Wisconsin Central's continued use of one-person crews on the four existing routes while the FRA studied the matter.

In September 1996, Wisconsin Central notified the FRA that it wanted to begin using remote control devices to move locomotives at two of its rail yards in Wisconsin. On September 17, 1996, the UTU petitioned the FRA for an emergency order banning the use of remote control devices not only by Wisconsin Central but by all railroads. (The FRA has not yet ruled on this petition either.) On November 18, 1996, the FRA announced that it would conduct public hearings in Wisconsin on the issue of Wisconsin Central's use of one-person crews and the use of remote control devices in general. The hearings were held on December 4 and 5, 1996, in Appleton, Wisconsin. Numerous persons testified regarding the safety of one-person crews and remote control devices, including then-Wisconsin State Representative John Dobyns. Dobyns admitted he was no expert on railroads, but opined that one-person crews and remote control devices were not safe. Shortly after testifying at the FRA hearings, Dobyns introduced the bill that eventually became § 192.25.

On January 10, 1997, the FRA wrote a letter to Wisconsin Central in which it indicated that it was reviewing the issues raised at the December hearings. The FRA permitted Wisconsin Central to continue with its then-current use of one-person crews, but told it to wait until a final FRA decision before expanding its use of one-person crews. The FRA did bar Wisconsin Central from implementing remote controlled operations, however. Due to a high accident rate, the FRA began conducting a broad study of all of Wisconsin Central's operations. On February 8, 1997, Wisconsin Central and the FRA entered into a Safety Compliance Agreement. The agreement permitted Wisconsin Central to continue using one-person crews for light movements, that is,locomotive only, but not for over-the-road movements, and it prohibited Wisconsin Central from using remote control devices. Those restrictions did not apply to Wisconsin Central's Port Inland, Michigan, terminal. This agreement ended after 12 months and was replaced with a new Safety Compliance Agreement. The new agreement praised Wisconsin Central for its compliance with the prior agreement and as a result expanded slightly the types of one-person crew movements that Wisconsin Central could conduct. The second agreement also had a 12-month term, which has now expired. The record is silent as to whether Wisconsin Central has entered into another agreement.

3. The Preemptive Effect of The Federal Orders and Regulations

As we noted above, the record shows that there are three different kinds of one-person crew operations: hostling movements, helper movements, and over-the-road movements. As we discuss in detail below, on this record, we conclude that the FRA has issued final dispositions-"regulations" and "orders" under § 20106-permitting one-person crews to perform hostling and helper movements, but has not done so for one-person over-the-road operations. Thus, §

192.25(2)'s two-person crew requirement is preempted insofar as it bans one-person hostling and helper movements.

As we discussed above, between 1993 and 1995, the FRA considered and promulgated regulations governing when blue signal protection had to be used when a lone engineer performed hostling or helper service. In response to a petition for reconsideration, it suspended the regulation placing additional requirements on one-person crews (49 C.F.R. § 218.24). As our description of the rule-making process shows, the FRA considered the issue of safety for one-person crews conducting these two types of operations and whether additional precautions were needed. It ultimately decided not to impose any. When 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. See Norfolk & Western Ry. v. Public Util. Comm'n, 926 F.2d 567, 570 (6th Cir.1991) (FRA decision not to impose requirement of walkways on railroad bridges preempted state requirement of such walkways); Burlington Northern R.R., 880 F.2d at 1106-07 (FRA's considering adopting rule requiring caboose but declining to do so reinforced conclusion that telemetry regulation preempted state requirement for caboose); Missouri & Pacific R.R. v. Texas R.R. Comm'n, 850 F.2d 264, 267-68 (5th Cir.1988) (same). The district court was therefore incorrect to conclude that because 49 C.F.R. § 218.24 was suspended it is irrelevant to the issue of preemption. The decision to impose the added safety requirements for certain one-person operations and the decision to suspend it were final dispositions of the FRA's position on the matter, and were thus "orders" under § 20106.

Wisconsin argues that the subject matter of the FRA's orders and regulations was blue signal protection, not the minimum safe crew size. That argument too finely slices the subject matter of the federal regulations. The FRA considered whether a lone engineer could safely conduct hostling and helper service without blue signal or some other additional protection; it concluded that he could. Wisconsin argues that in deciding that these lone engineer operations were safe without blue signal protection, the FRA did not decide the more basic issue of whether the operations were safe at all. This argument is too narrow. So also is Wisconsin's argument that the FRA's decision that lone engineers could safely conduct hostling and helper operations without blue signal protection merely "touches upon" rather than substantially subsumes the subject of whether one-person crews were safe for these operations. The FRA's more specific conclusion that the operations were safe without added precautions encompasses the more general one that they are safe. Wisconsin's requirement that two persons conduct these operations directly contradicts the FRA's decision that one person may do them safely. Under § 20106, Wisconsin's requirement must give way. To the extent § 192.25(2)'s two-person crew requirement applies to hostling and helper operations, it is preempted.

We do not reach the same conclusion regarding one-person crews on over-the-road operations, however. The plaintiffs argue that the FRA has affirmatively approved all one-person operations, but the record does not support this argument. As we just discussed, the FRA's decisions regarding blue signal protection for one-person crews showed that the agency considered and decided the issue with regard to hostling and helper operations only. The FRA's regulations and its discussion of them in the Federal Register do not show that the agency considered the issue of one-person crews in other types of operations. The plaintiffs rely on the FRA's test program of remote control devices and the statements it made to Wisconsin Central

about other railroads conducting one-person operations as evidence that the FRA approves one-person operations generally. The plaintiffs seem to argue that because the FRA is aware of one-person operations and has not proscribed them, it must necessarily approve them as safe. This does not follow. Such a position gives too much weight to agency in action. The record shows unequivocally that the FRA is aware that the railroad industry uses one-person crews for some over-the-road operations. And it shows that the FRA has not prohibited this practice, although it currently has the matter under consideration. But what the record does not show is that the FRA has considered the issue and affirmatively decided not to regulate such operations. Only this sort of affirmative decision preempts state requirements. As the Supreme Court held in applying a different statute, " 'where failure of . federal officials affirmatively to exercise their authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' states are not permitted to use their police power to enact such a regulation." Ray v. Atlantic Richfield Co., 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (quoting Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947)) (omission in original). As the Fifth Circuit put it, the difference is between an agency saying " 'we haven't looked at [the issue] yet,' rather than, as Ray requires, 'we haven't done anything because we have determined it is appropriate to do nothing.' " Missouri P. R.R. v. Texas R.R. Comm'n, 833 F.2d 570, 576 (5th Cir.1987). The record does not show that the FRA's consideration of one-person crews on over-the-road operations has taken on the character of an affirmative decision to do nothing; if and when it does, that decision will preempt § 192.25. But until it does, Wisconsin is free to require two-person crews on over-the-road operations.

There are a few more aspects of this case that require further discussion. The first is the preemptive effect of the FRA's Safety Compliance Agreements with Wisconsin Central. The plaintiffs relied on these agreements to show that the FRA had generally approved one-person crews. As discussed above, the agreements show the FRA was aware that some railroads used one-person crews for over-the-road movements, but they do not show that the FRA had considered the issue of their safety and affirmatively approved these operations. This does not mean, however, that the agreements are totally without effect, as Wisconsin argues and as the district court seemed to think. The agreements showed that the FRA had taken jurisdiction over Wisconsin Central's operations in Wisconsin and had set out things the railroad could and could not do. These agreements, then, showed that the FRA had considered Wisconsin Central's operations and approved various aspects of it-including some one-person operations. Under Wisconsin's theory that these agreements had no preemptive effect, Wisconsin could prevent Wisconsin Central from doing precisely what the FRA had told the railroad it could do. The FRA, not Wisconsin, has the "whip hand" in railroad safety regulations, Shots, 38 F.3d at 307. The fact that the agreements were temporary and that the FRA was evaluating and revising its position does not mean the agreements are not final dispositions of the FRA's position on the operations expressly covered by the agreements. If a state could prohibit a railroad from doing that which the FRA expressly approved merely because the FRA was permitting the activity as part of an ongoing study of the matter, then the FRA's ability to make informed decisions would be severely curtailed. The FRA's affirmative decision that a specific activity should be permitted, even if just so that it can be studied, is a final disposition approving the activity. While the Safety Compliance Agreements don't have the broad preemptive effect that the

plaintiffs argue for, they do "cover" the subject matter of all operations that they specifically permit.

We have the same view of the preemptive effect of the FRA's 1994 test program for remote control devices. To the extent the FRA approved the use of a remote control device in a particular operation with a one-person crew-apparently the only type of crew that uses such devices-necessarily the FRA had to have approved a one-person crew for that operation. Again, the FRA's more specific conclusion necessarily had to encompass the more general conclusion. Wisconsin argues, and the district court seemed to agree, that because the test program did not apply to all railroads it had no preemptive effect. It did not have the broad preemptive effect the plaintiffs argue for. But the FRA's decision to permit the use of remote control devices by railroads participating in the test program was an affirmative decision to allow those operations specifically covered by the program, and any state requirement prohibiting them would have been preempted. But an affirmative decision to permit specific operations is not, as the plaintiffs argue, necessarily an affirmative decision to permit all similar operations conducted by railroads not part of the test program. We cannot definitively state what preemptive effect the remote control test program-which is apparently no longer being conducted-would have had on a two-person crew requirement because the record is unclear as to exactly what types of operations were involved. To the extent they were hostling or helper operations, its preemptive effect on a two-person crew requirement is irrelevant because other regulations specifically approved those operations. All that is certain is that to the extent the FRA decided to permit a particular activity as part of the test program, that decision preempted any state requirements on that same subject matter. But as noted, this record does not demonstrate exactly what that extent was.

In response to Wheeling & Lake Erie's request for waivers of certain regulations to conduct remote control operations, the UTU filed a petition for an emergency order banning all remote control operations and the FRA denied that petition. The amici argue that this denial was an affirmative decision that remote control operations were generally permitted and, necessarily, that one-person crews were as well. But the record does not give any details about the FRA's deliberations leading to its conclusion to deny the UTU's petition. It is unclear what conclusions the FRA reached in making that decision. Thus, as this record stands the denial of the petition does not necessarily mean that no regulation was appropriate.

In sum, § 192.25's two-person crew requirement is preempted for hostling and helper operations. It is also preempted to the extent the FRA through agreements with Wisconsin Central expressly permits that railroad to conduct one-person crew operations.

C. The Severability of § 192.25

We have held that nearly all of § 192.25 is preempted by federal regulations and orders. The only part remaining is the two-person crew requirement for operations that are neither hostling nor helper service. On appeal, the plaintiffs argue that the statute's provisions are not severable, and so in preempting part we should invalidate the whole. This issue seems not to have been raised in the district court, but neither Wisconsin nor the UTU argue that this issue was waived so we will address it.

Whether invalid provisions in a state law can be severed from the whole to preserve the rest is a question of state law. Leavitt v. Jane L., 518 U.S. 137, 116 S.Ct. 2068, 2069, 135 L.Ed.2d 443 (1996); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Both Leavitt and Brockett involved statutes that were partially invalid because some of their provisions were unconstitutional. We have found no case addressing the severability of a state statute that was partially preempted. We assume for purposes of deciding this case that state law would also govern this issue. Wisconsin's severability law was created by statute:

The provisions of the statutes are severable.. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Wis. Stat. § 990.001(11). "The factors to consider in deciding whether a statute should be severed from an invalid provision are the intent of the legislature and the validity of the severed portion standing alone." In re Hezzie R. (State v. Hezzie R.), 219 Wis.2d 848, 580 N.W.2d 660, 665 (1998) (quotation omitted). Section 192.25 (3) provides that subsection (2) of the statute, which contains the two-person crew requirement, shall not apply to the extent it is contrary to federal regulations. This provision of course has no practical effect because the Supremacy Clause of the U.S. Constitution makes the statute apply only to the extent it does not conflict with federal law. But it does evidence a legislative intent to keep whatever part of subsection (2) was not preempted. It does not, of course, expressly show an intent to keep a part of subsection (2) when subsection (1) had also been preempted. But we think the intent is clear enough and the purpose of § 192.25 is not thwarted by federal preemption of subsection (1). Although the state requirements for crew qualifications are ineffective this does not mean that any miscellaneous person could operate a train in Wisconsin. Subsection (1) is preempted precisely because the FRA has covered the subject matter of crew qualifications with its extensive regulations. Indeed, the Wisconsin legislature merely adopted the federal standards for engineers and its standards for trainmen are compatible with the federal requirements and certainly less extensive. Thus, we conclude that the remaining parts of § 192.25 can be given effect without the preempted parts, and that the legislature so intended. We therefore decline to strike down the statute in its entirety.

III.

In conclusion, the qualification requirements for locomotive engineers in § 192.25(1)(a) and for trainmen in § 192.25(1)(b) are preempted. Section § 192.25(2)'s requirement that a locomotive engineer be at the controls of a locomotive anytime it moves is also preempted. Section 192.25(2)'s two-person crew requirement is preempted for hostling and helper movements. It is also preempted to the extent that one-person operations are the subject of a Safety Compliance Agreement between Wisconsin Central and FRA. Finally, the preempted portions of the statute are severable from the rest so that those provisions not preempted may stand on their own.

The judgment of the district court is therefore affirmed in Part and reversed in Part.

FOOTNOTES

1. The defendants are James E. Doyle, Wisconsin Attorney General, E. Michael McCann, District Attorney of Milwaukee County, Thomas L. Storm, District Attorney of Fond du Lac County, and David Blank, District Attorney of Douglas County. Each defendant was sued in his individual and official capacities.

2. Two associations to which the plaintiffs belong filed an amicus curiae brief in this court and the district court. The Association of American Railroads (AAR) is a trade association whose members are large freight railroads and the National Railroad Passenger Corporation (Amtrak). Its members include plaintiffs Burlington Northern, Soo Line, and Union Pacific. AAR's members represent the substantial majority of all rail freight in the United States. The second amicus, the American Short Line and Regional Railroad Association (ASLRRA), is a trade association whose members are small and medium sized regional freight railroads. ASLRRA's members include plaintiff Wisconsin Central and two other regional railroads that operate in Wisconsin.

3. FRSA was formerly codified at 45 U.S.C. § 421 et seq. but was recodified without substantive change in Title 49 as part of a recodification of rail safety laws in 1994. See Pub. L. No. 103-272. Many prior court decisions interpreting FRSA refer to the prior U.S. Code sections. FRSA's preemption provision, 49 U.S.C. § 20106, was codified at 45 U.S.C. § 434.

4. Actually the regulations first called these employees "workmen," but that term was changed to "worker" in 1993. We use the current term for convenience.

MANION, Circuit Judge.

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HB-492 Response Letter to MDOT Opposition Letter F

Uploaded by: Kasecamp, Larry

Position: FAV

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March 23, 2021

The Honorable Delores Kelley, Chairman
Senate Finance Committee

RE: HB-492

Dear Chairman Kelley and Committee Members:

I want to respond to the House Bill 492 opposition letter dated February 2, 2021 from the Maryland Department of Transportation, which I've atached.

In their opening paragraph they state that HB-492 will "detrimentally impact the MDOT Maryland Port Administration (MDOT MPA) and the Port of Baltimore, and the MDOT Maryland Transit Administration (MDOT MTA) MARC Train Service" and base they're opposition on this assumption in addition to the federal preemption argument.

First and foremost, HB-492 will not require any changes in operations of the freight rail carriers covered in this legislation. Today all their freight trains operate with a 2-person crew and when the bill becomes law, they will still operate with a 2-person crew. Therefore, there are no added costs or regulatory requirements to any freight train operations and therefore no "detrimental impacts."

The reason there is no detrimental impact is because these freight railroads have collective bargaining agreements in place that require 2-person crew operations that will remain in effect for several more years. So, the detrimental impact arguments contained in their oppositional letter are moot.

This legislation regulating minimum freight train 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. It will reduce the risk exposure to local communities and protecting environmentally sensitive lands and waterways from future sought after profit over safety operational changes.

Even though their opposition is based on a false premise, I will address their arguments.

Even if this legislation increased costs minimally for the railroads, and let me be clear it does not, it is very speculative that it would deter shippers from using the Port of Baltimore.

There is actually evidence contrary to their claim. When the legislature in the state of California heard this legislation none of the 17 ports that operate in the state and compete with ports in Canada, Washington State, Oregon State and Mexico proffered this theory nor testified in opposition to this legislation. As you know, California passed 2- person crew legislation.

This legislation will not put the Port of Baltimore at a competitive disadvantage with neighboring ports. All the other ports referenced in their opposition have the ability to run double stack freight trains. Maryland does not. However, the Port of Baltimore is not lacking shippers and is growing. Each port has their positives and negatives, such as the Howard Street Tunnel is a major negative for the Port of Baltimore. This limitation is offset by the location of the port, which is a major positive as trains departing Baltimore for points west save substantial time as a result of its preferred inland location. CSX expects their trailer hauling business to double or triple after completion of the renovation of the Howard Street Tunnel when it will be able to accommodate double stack freight.

Their opposition also states that costs will be increased to the state as a result of CSX intending to require 2-persons in the operating cab of MARC trains, which is not a requirement of this legislation. This is also indicated in the fiscal note on the bill wherein it estimates increase costs for such a requirement by CSX at $2.4 million. I would refer you to the testimony of CSX at the hearing on this legislation. CSX was specifically asked if they intended to require 2-persons in the operating cab of MARC trains. They directly answered they would not impose this requirement, which effectively eliminates the $2.4 million estimate contained in the fiscal note. There will not be any increased costs to the state for the operation of MARC trains.

They also refer to technology being a significant benefit to increasing safety in the railroad industry. We agree! However, safety apparatuses such as positive train control, hot box detectors, dragging equipment detectors, dead-man pedals, attention alerters and the countless other safety devices and voluminous operating rules will not prevent all accidents in the railroad industry. Each individual safety apparatus and operating rules merely compliment the other in an effort to provide for safe railroad operations. But none more so than two sets of eyes, two minds and the ability to quickly react to emergency situations while working in collaboration.

They also enter into the fray of whether such a law is preempted by federal law. First off, I would say that this is not a question for interpretation by the legislature. This decision lays with the U.S. court system. In the case of *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 U.S. District Court rendered in 1999 was never challenged by the railroads.

The court case they refer to rendered by the U.S. District Court for the Northern District of Illinois was under appeal and the parties were awaiting a decision by the 9th U.S. District Court. At issue is whether the Trump administration's FRA could issue an opinion that states are preempted from regulating railroad crew size without actually regulating the subject matter at federal level. The court has spoken and rendered a decision in favor of the plaintiffs.

Every one of these arguments puts profits and potential costs ahead of the safety of workers, the public and the environment. This legislation is strictly proactive rail safety legislation and should be looked at through that lens! Not whether it may at some point in the future cost a billion-dollar industry a few hundred dollars per train for safe operations in Maryland.

We therefore urge a favorable report on HB-492.

Sincerely,

Larry

Lawrence E. Kasecamp
MD State Legislative Director
SMART Transportation Division

MARYLAND DEPARTMENT
OF TRANSPORTATION

Larry Hogan
Governor
Boyd K. Rutherford
Lt. Governor
Gregory Slater
Secretary

February 2, 2021

The Honorable Kumar P. Barve
Chairman, House Environment and Transportation Committee
251 House Office Building
Annapolis MD 21401

Re: Letter of Opposition – House Bill 492 – Railroad Company - Movement of Freight - Required Crew

Dear Chairman Barve and Committee Members:

The Maryland Department of Transportation (MDOT) respectfully opposes House Bill 492, as it would detrimentally impact the MDOT Maryland Port Administration (MDOT MPA) and the Port of Baltimore, and the MDOT Maryland Transit Administration (MDOT MTA) MARC Train Service.

House Bill 492 requires freight railroad companies to have a two-person crew when operating in the State in the same rail corridor as high-speed passenger or commuter trains. With both Amtrak (high-speed passenger) and MARC Train Service (commuter trains) operations in the State of Maryland, a large majority of freight rail operators in the State would be subject to the requirements of this bill. This legislation puts the Port of Baltimore at a competitive disadvantage with neighboring ports, as no other state on the U.S. East Coast has such a requirement. Mandating that carriers in the State of Maryland use a larger crew size than would be required on the same railroads operating out of Norfolk, Philadelphia, or New York will result in an increase in shipping costs and deter carriers from operating in the State, resulting in a loss of jobs and investment directly related to the Port.

It is also anticipated that this will increase the operating costs of MARC Train Service. Two of MARC's three service lines run on tracks owned by freight rail operators, which will likely require MARC to pay for any costs they incur from this bill and/or require MARC to operate its trains with additional crew. Furthermore, increased costs for MARC Train Service may result in service reductions due to budgetary constraints, and if service is reduced then train slots given back to the host railroads may be lost forever.

With the intention of safety in mind, technology has significantly contributed to a reduction in accident rates as crew sizes have decreased over the years. Over the last several years, freight rail operators and passenger train operators have spent billions of dollars nationwide implementing Positive Train Control (PTC), a risk reduction technology that makes rail travel even safer. With the implementation of PTC, this trend will continue.

Additionally, House Bill 492 is preempted by federal law. In May 2019, the Federal Railroad Administration (FRA) withdrew its Notice of Proposed Rulemaking that would have regulated crew size nationwide had it become law. Furthermore, the FRA stated that, a two-person crew mandate would "impede the future of rail innovation." In states where a two-person crew mandate has passed, it has been challenged through the legal system. Most recently in September 2020, the U.S. District

Court for the Northern District of Illinois ruled in favor of the railroad companies that the FRA's decision to withdraw a proposed crew-size mandate is federal regulation and therefore preempts state law.

At the Port of Baltimore, the MDOT MPA strives to accomplish its mission to increase waterborne commerce through the State of Maryland in a way that benefits the citizens of the State. In doing so, the Port has consistently proven its value as a good neighbor and strong partner throughout the State, generating 15,330 direct family-supporting jobs for Marylanders, where the average wage of these jobs exceeds the statewide average annual wage by 9.5%. The Port handles more automobiles, light trucks, and roll-on/roll-off farm and construction machinery than any other port in the U.S. During this challenging time amid the COVID-19 pandemic, Maryland's Port continues to play an integral role in maintaining our nation's supply chain, moving vital goods to the healthcare industry and consumers. The Port of Baltimore remains a beacon of optimism for the State's economic resiliency, where cargo numbers continue to climb.

For the Port of Baltimore to continue to operate successfully as an economic engine for the State, and retain its competitive edge over neighboring ports, Maryland cannot afford to be at a competitive disadvantage with our neighboring ports. The Port of Baltimore must remain open for business and investment, as the success of our Port directly benefits the State and the hardworking people who depend on it.

MDOT MTA's MARC Train Service works to provide safe, efficient, and reliable transit across Maryland with world-class customer service. MARC provides commuter rail service between Perryville, MD and Washington, DC through Baltimore, MD (Penn Line), Martinsburg, WV and Washington, DC through Brunswick, MD and Frederick, MD (Brunswick Line), and Baltimore, MD and Washington, DC (Camden Line). It serves 42 stations and carried over 9,000,000 trips annually prior to the pandemic, enabling Marylanders to commute to jobs across the state and in Washington, DC while enjoying the many benefits of living in the State of Maryland. For MARC Train Service to continue to provide vital commuter rail service to Marylanders, it cannot afford increased operating costs and the potential permanent loss of train slots for commuter rail service.

For these reasons, the Maryland Department of Transportation respectfully requests the Committee grant House Bill 492 an unfavorable report.

Respectfully Submitted,

William P. Doyle
MPA Executive Director
Maryland Port Administration
410-385-4401

Kevin B. Quinn, Jr.
Administrator
Maryland Transit Administration
410-767-3943

Pilar Helm
Director of Government Affairs
Maryland Department of Transportation
410-865-1090

Maryland Rail Survey, 2019 Topline[3] copy.pdf
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DFM Research
St. Paul, Minnesota

MARYLAND STATEWIDE RAIL ISSUE SURVEY

JANUARY 19-22, 2019

Topline

Interviews:	500 respondents by live caller
Margin of Error:	± 4.4 percentage points with a 95 percent confidence
Interview Dates:	January 19-22, 2019
Sample:	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.
Survey Sponsor:	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:

	Favorable	Unfavorable	Neutral (VOL)	Never Heard Of
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%**
Somewhat approve	**12**
Somewhat disapprove	**4**
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 derailing 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**

Q9: 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:

SURVEY NOTE - Each respondent received two reasons to oppose a House Bill 66 (question 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 ±5.4%pts to ±6.2%pts.

Q9a: 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**

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.

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.

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.

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

Q10: 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.

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.

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.

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**

Resolutions in Support of 2-Person Crew Legislatio

Uploaded by: Kasecamp, Larry

Position: FAV

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.

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

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 COVER SHEET	3
FROM:	Ernie Grecco

Metropolitan Baltimore Council
AFL-CIO Unions

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

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

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.

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"

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.

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)

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

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.

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

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

WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed Rulemaking (NPRM) (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 2130-AC48; Train Crew Staffing) regarding adequate staffing on trains, a factor that is vital in ensuring safe train operations; and

WHEREAS, polling across America shows overwhelming bi-partisan support for two-person crews, with 83 to 87 percent of those polled in favor of mandating that trains are 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, most 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; and

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

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

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

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

NOW, THEREFORE, BE IT RESOLVED by the County Council of Prince George's County, Maryland, that the Prince George's County Council does hereby encourage and support the FRA's proposed Rulemaking (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 2130-AC48; Train Crew Staffing) requiring that trains operated in the United States 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.

Adopted this 17th 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: 5/17/2016
Reference No.: CR-031-2016
Draft No.: 1
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.

Effective Date:
Chapter Number:
Public Hearing Date:

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

WESTERN MARYLAND CENTRAL LABOR
COUNCIL, AFL-CIO
152-154 N. MECHANIC STREET
CUMBERLAND, MD 21502
301-777-1820 FAX: 301-777-0121
westmdclc@verizon.net

FAX COVER SHEET

DATE: 4-18-16

TO: Docket Manager Jody Olives

FROM: W.MD Central Labor Council, AFL-CIO

OF PAGES TO FOLLOW: 2

FAX # 1-202-493-2251

NOTES:

WESTERN MARYLAND
CENTRAL LABOR COUNCIL, AFL-CIO

152-154 N. MECHANIC STREET, CUMBERLAND, MD 21502
301-777-1820 * FAX 301-777-0121
westmdclc@verizon.net

JODY OLIVER
COPE DIRECTOR

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 you 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.

Testimony HB-492 FIN - 2021.pdf
Uploaded by: Kasecamp, Larry
Position: FAV

LARRY KASECAMP
Legislative Director

THOMAS CAHILL
Assistant Director

JOHNNY WALKER
Secretary

MARYLAND STATE LEGISLATIVE BOARD

SHEET METAL | AIR | RAIL | TRANSPORTATION
SMART
TRANSPORTATION DIVISION

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

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 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 B*urlington 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 0excessive 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,

Larry

Lawrence E. Kasecamp
MD State Legislative Director
SMART Transportation Division

9th Circuit Court Opinion - State Crew Laws 2:23:2

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS; BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, *Petitioners*, v. FEDERAL RAILROAD ADMINISTRATION; U.S. DEPARTMENT OF TRANSPORTATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71787 FRA No. FRA-2014-0033

CALIFORNIA PUBLIC UTILITIES COMMISSION, *Petitioner*, v. PETE BUTTIGIEG, Secretary of Transportation; U.S. DEPARTMENT OF TRANSPORTATION; RONALD L. BATORY, Administrator of the Federal Railroad Administration; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71802 FRA No. FRA-2014-0033

On Petition for Review of an Order of the
Federal Railroad Administration

STATE OF WASHINGTON, *Petitioner*, v. U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71916 TRAN No. FRA-2014-0033

STATE OF NEVADA, *Petitioner*, v. PETE BUTTIGIEG, Secretary of Transportation; U.S. DEPARTMENT OF TRANSPORTATION; RONALD L. BATORY, Administrator of the Federal Railroad Administration; FEDERAL RAILROAD ADMINISTRATION, *Respondents*, ASSOCIATION OF AMERICAN RAILROADS, *Intervenor*.	No. 19-71918 TRAN No. FRA-2014-0033 OPINION

On Petition for Review of an Order of the
Department of Transportation

Argued and Submitted October 5, 2020
Seattle, Washington

Filed February 23, 2021

Before: Consuelo M. Callahan and Morgan Christen,
Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Callahan;
Concurrence by Judge Christen

SUMMARY**

Federal Railroad Administration

The panel dismissed a petition for review filed by two unions; granted petitions filed by California, Washington, and Nevada; vacated the Federal Railroad Administration ("FRA")'s Order, 84 Fed. Reg. 24,735, purporting to adopt a nationwide maximum one-person crew rule and to preempt any state laws concerning that subject matter; and remanded to the FRA.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

As a threshold matter, the panel addressed arguments concerning jurisdiction raised by the intervenor Association of American Railroads. First, the panel dismissed the Unions' petition because venue was not proper under 28 U.S.C. § 2343 where the Unions' principal offices were not in the Ninth Circuit. Second, the panel held that there was jurisdiction over the petitions filed by the States because all three States were sufficiently aggrieved to invoke jurisdiction under 28 U.S.C. § 2344.

The panel held that the Order did not implicitly preempt state safety rules.

Turning to the merits, the panel held that the FRA failed to comply with the Administrative Procedures Act ("APA")'s minimum notice-and-comment provisions in issuing the Order. Specifically, the panel held that there was nothing in the FRA's March 2016 Notice of Proposed Rulemaking ("NPRM") (proposing a national minimum requirement of two member crews for trains) to put a person on notice that the FRA might adopt a national one-person crew limit.

Finally, the panel held, on this record, that the Order was arbitrary and capricious, and must be vacated. Specifically, the panel held that the Order's basis for its action – that two-member crews were less safe than one-person crews – did not withstand scrutiny. Also, the panel held that the FRA's contemporaneous explanation – that indirect safety connections might be achieved with fewer than two crew members – was lacking. Despite the deference due FRA decisions, the panel concluded that the States met their burden of showing that the issuance of the Order violated the APA.

Judge Christen concurred, and joined parts I, II, III, and IV.C of the opinion. She would vacate the notice of withdrawal solely based on the conclusion that the Notice of Proposed Rulemaking did not provide adequate notice or opportunity to comment. She would not reach whether the notice of withdrawal negatively preempted state laws or whether the FRA provided a satisfactory explanation for the notice.

COUNSEL

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Illinois, California, Colorado, Delaware, District of Columbia, Massachusetts, Minnesota, Mississippi, New Jersey, New York, Oregon, Virginia, and Wisconsin.

William A. Mullins, Baker & Miller PLLC, Washington, D.C.; Sarah G. Yurasko, General Counsel, American Short Line and Regional Railroad Association, Washington, D.C.; for Amicus Curiae American Short Line and Regional Railroad Association.

OPINION

CALLAHAN, Circuit Judge:

In March 2016, the Federal Railroad Administration (FRA) issued a Notice of Proposed Rulemaking (NPRM) proposing a national minimum requirement of two crew members for trains. Over three years later, on May 29, 2019, the FRA issued an order purporting to adopt a nationwide maximum one-person crew rule and to preempt "any state laws concerning that subject matter." 84 Fed. Reg. 24,735 (the Order). Two Unions[1] and three states, Washington, California,[2] and Nevada (collectively referred to as the States), challenge the Order under the Administrative Procedure Act (APA). We hold that the Order does not implicitly preempt state safety rules, that the FRA failed to comply with the APA's notice-and-comment provisions in

[1] The petition for review was filed by the International Association of Sheet Metal, Air, Rail, and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen (collectively referred to as the Unions).

[2] The petition was actually filed by the California Public Utilities Commission (California PUC).

issuing the Order, and that the Order is arbitrary and capricious. We dismiss the Unions' petition for review but grant the States' petitions and vacate the Order.

I

The Safety Act empowers the Secretary of Transportation to "prescribe regulations and issue orders" addressing railroad safety. 49 U.S.C. § 20103(a). The Secretary has delegated that authority to the FRA, an agency within the Department of Transportation. *See* 49 C.F.R. § 1.89(a). However, the Safety Act also provides that states may adopt or continue in force laws and regulations related to railroad safety, even under certain conditions when they are more "stringent" than the FRA's rules. 49 U.S.C. § 20106(a)(2).

Following two major railroad accidents in 2013 at Lac-Mégantic, Quebec, and Casselton, North Dakota, the FRA asked the Rail Safety Advisory Committee (RSAC) to review whether train crew staffing affected railroad safety. The RSAC included representatives from all the major players concerning railroads, including railroads, labor organizations, suppliers, manufacturers, and the California PUC. The RSAC appointed a Working Group. At its first meeting, the FRA noted that it was concerned with railroad safety, that safety was enhanced through redundancy, and that the agency's safety regulations were written with at least a two-person crew in mind.

The Working Group was unable to reach a consensus. Accordingly, consideration of the appropriate crew size was submitted to the FRA for formal rulemaking. On March 15, 2016, the FRA issued an NPRM. 81 Fed. Reg. 13,918 (March 15, 2016). The first three sentences of the summary of the NPRM read:

> FRA proposes regulations establishing minimum requirements for the size of train crew staffs depending on the type of operation. *A minimum requirement of two crewmembers is proposed for all railroad operations*, with exceptions proposed for those operations that FRA believes do not pose significant safety risks to railroad employees, the general public, and the environment by using fewer than two-person crews. This proposed rule would also establish minimum requirements for the roles and responsibilities of the second train crew member on a moving train, and promote safe and effective teamwork.

Id. (emphasis added).

A public hearing on the NPRM was held on July 15, 2016, and the comment period was extended to August 15, 2016. The States assert that most commenters supported "some kind of train crew staffing requirements." No further action was taken until the FRA issued the Order on May 29, 2019. 84 Fed. Reg. 24,735.

II

The Order's summary states that the FRA "withdraws the March 15, 2016 NPRM concerning train crew staffing," but adds that "[i]n withdrawing the NPRM, FRA is providing notice of its affirmative decision that no regulation of train crew staffing is necessary or appropriate for railroad operations to be conducted safely at this time." *Id*.

The Order relates that the FRA had "hoped [the] RSAC would provide useful analysis, including conclusive data

addressing whether there is a safety benefit or detriment from crew redundancy (*i.e.*, multiple-person train crews)." *Id*. However, the RSAC was unable to reach consensus and the FRA issued the NPRM. The Order confirms that 1,545 out of nearly 1,600 comments supported some kind of multiple crew staffing requirement. *Id*. at 24,736. Those comments supporting staffing requirements came from individuals, a variety of government officials and organizations, and state and local governments. *Id*. They raised four main points: "(1) [a] train crew's duties are too demanding for one person; (2) new technology will make the job more complex; (3) unpredictable scheduling makes fatigue a greater factor when there is only a one-person crew; and (4) the idea of a one-person train crew is seemingly in conflict with the statutory and regulatory requirements for certification of both locomotive engineers and conductors." *Id*.

The Order notes that the proposal to adopt a minimum two-person crew rule was opposed primarily by railroads and railroad associations. *Id*. at. 24,737. The Order states that studies funded by the Association of American Railroads (AAR) "concluded that safety data analysis show single-person crew operations appear as safe as multiple-person crew operations, if not safer." *Id*. One study "concluded that the proposed rule would greatly reduce U.S. railroads' ability to control operating costs, without making the industry safer." *Id*. A second study funded by the AAR found that "European rail operations are comparable to U.S. rail operations and therefore the success of the European network in implementing single-person crew operations can serve as a model for the U.S. rail system." *Id*.

The Order finds that there "is no direct safety connection between train crew staffing and the Lac-Mégantic or

Casselton accidents." *Id*. It notes that the "FRA does not have information that suggests that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember." *Id*. at 24,738 (quoting 81 Fed. Reg. at 13,921). The Order further reasons that although there were "some indirect connections between crew staffing and railroad safety with respect to . . . the accidents, those connections are tangential at best and do not provide a sufficient basis for FRA regulation of train crew staffing requirements."[3] *Id*.

The Order states that the FRA's safety data "does not establish that one-person operations are less safe than multi-person train crews," that "existing one-person operations 'have not yet raised serious safety concerns,'" and that "it is

[3] Reviewing the Casselton accident, the FRA commented that it:

> believes that the same type of positive post-accident mitigating actions were achievable with: (1) [f]ewer than two crewmembers on the BNSF grain train involved in the accident, and (2) a well-planned, post-accident protocol that quickly brings railroad employees to the scene of an accident. In other words, the facts of the accident suggest that BNSF could have duplicated the mitigating moves of the grain train crew with responding emergency crewmembers. While FRA acknowledges the BSNF key train crew performed well, potentially saving each other's lives, it is possible that one properly trained crewmember, technology, and/or additional railroad emergency planning could have achieved similar mitigating actions. Thus, the indirect safety connections cited in the NPRM do not proved a sufficient basis for FRA regulation of train crew staffing.

Id. at 24,738.

possible that one-person crews have contributed to the [railroads'] improving safety record." *Id*. at 24,739 (quoting 81 Fed. Reg. at 13,950 and 13,932 (alteration in original)). The FRA asserts that data collected over a 17-year period did not allow it to "determine that any of the accidents/incidents involving a one-person crew would have been prevented by having multiple crewmembers." *Id*. The Order states that the reports to the Working Group "identify safety issues that railroads should consider when evaluating any reduction in the number of train crewmembers or a shift in responsibilities among those crewmembers" but "do not indicate that one-person crew operations are less safe and therefore do not form a sufficient basis for a final rule on crew staffing." *Id*. at 24,740.

The Order notes that the received comments "do not provide conclusive "data suggesting that . . . any previous accidents involving one-person crew operations . . . could have been avoided by adding a second crewmember." *Id*. Although "the comments note[d] some indirect connections between crew staffing and railroad safety, such as post-accident response or handling of disabled trains," the FRA believes that "the indirect safety connections cited in the comments could be achieved with fewer than two crewmembers with a well-planned, disabled-train/post-accident protocol."[4] *Id*.

[4] This section of the Order concludes with the following paragraph:

> FRA also does not concur with commenters who assert that the idea of a one-person train crew is seemingly in conflict with the statutory and regulatory requirements for certification of both locomotive engineers and conductors. There are no specific statutes or regulations prohibiting a one-person train crew, nor is

The Order next observes that railroads are moving away from traditional systems and that "the integration of technology and automation . . . has the potential to increase productivity, facilitate freight movement, create new kinds of jobs, and, most importantly, improve safety significantly by reducing accidents caused by human error." *Id*. It notes that "DOT's approach to achieving safety improvements begins with a focus on removing unnecessary barriers and issuing voluntary guidance, rather than regulations that could stifle innovation," and that "finalizing the train crew staffing rule would have departed from FRA's long-standing regulatory approach of not endorsing any particular crew staffing arrangement." *Id*. The Order suggests that the "lack of a legal prohibition means that each railroad is free to make train crew staffing decisions as part of their operational management decisions, which would include consideration of technological advancements and any applicable collective bargaining agreements." *Id*.

Despite concerns with the insufficiency or inconclusiveness of the data in the record, the last section of the Order notes that "nine states have laws in place regulating crew size," and states that the Order's intent is "to

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> there a specific requirement that would prohibit autonomous technology from operating a locomotive or train in lieu of a certified locomotive engineer. However, the NPRM identified several regulations that a railroad would need to be cognizant of when adjusting its crew staffing levels, while acknowledging that none of those regulations requires a minimum number of crewmembers to achieve compliance.

Id.

preempt all state laws attempting to regulate train crew staffing in any manner." *Id*. at 24,741. It explains:

> Provisions of the federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (FRSA), repealed and recodified at 49 U.S.C. § 20106, mandate that laws, regulations, and orders "related to railroad safety" be nationally uniform. The FRSA provides that a state law is preempted where FRA, under authority delegated from the Secretary of Transportation, "prescribes a regulation or issues an order covering the subject matter of the State requirement." A federal regulation or order covers the subject matter of a state law where "the federal regulations substantially subsume the subject matter of the relevant state law." A federal regulation or order need not be identical to the state law to cover the same subject matter. The Supreme Court has held preemption can be found from "related safety regulations" and "the context of the overall structure of the regulations." Federal and state actions cover the same subject matter when they address the same railroad safety concerns. FRA intends this notice of withdrawal to cover the same subject matter as the state laws regulating crew size and therefore expects it will have preemptive effect.

Id. **(**footnotes omitted).

The Order invokes "what the Supreme Court refer[s] to as 'negative' or 'implicit' preemption," quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978), for the proposition that "'[w]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' any state law enacting such a regulation is preempted." *Id*.

The Order concludes that the FRA has "determined that issuing any regulation requiring a minimum number of train crewmembers would not be justified because such a regulation is unnecessary for a railroad operation to be conducted safely at this time" and that "no regulation of train crew staffing is appropriate, and that FRA intends to negatively preempt any state laws concerning that subject matter." *Id*.

On July 16, 2019, the Unions were the first to file a petition for review. The California PUC filed its petition on July 18, followed by petitions by Washington and Nevada. All were timely filed within 60 days of the Order. *See* 28 U.S.C. § 2344.

III

Before reaching petitioners' challenges to the Order's merits, we address the arguments concerning jurisdiction raised by the intervenor, the AAR. It argues that the court lacks jurisdiction over the Unions' petition because 28 U.S.C. § 2343 states that venue is proper "in the judicial circuit in which petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." The argument is well taken, as the Unions' principal offices are not within the Ninth Circuit. Under other circumstances we might transfer the petition to

a sister circuit, but because we determine that we have jurisdiction over the petitions filed by the States and vacate the FRA's order, we dismiss the Unions' petition.

AAR also claims that we should dismiss the States' petitions, arguing that none of the States "participated in the crew-size rulemaking" and thus are not "parties aggrieved" and may not invoke our jurisdiction pursuant to § 2344. In support of its position, AAR argues that the comment letters submitted to the FRA by state public utilities commissions do not count as participation because the PUCs are separate entities from the states.

The FRA does not agree. It notes that the California PUC participated in the working group through the Association of State Rail Safety Managers and asserts that this "satisfies the requirement that an aggrieved party has participated in the challenged agency proceeding."

We determine that all three States are sufficiently aggrieved to invoke our jurisdiction under § 2344. All three States did participate in the proceedings. California's PUC was part of the working group, and both Nevada and Washington's PUCs submitted letters.[5]

[5] Citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015), the AAR further argues that the preemptive effect of the Order is not ripe for decision because preemption is determined by a court, not the FRA. *Armstrong*, is inapposite. It concerned a Medicaid provider's attempt to invoke the Supremacy Clause to force state compliance with federal law. Moreover, the Supreme Court recognized that it has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id*. at 326. There is no suggestion that the court may not enjoin a federal agency from violating the APA.

IV.

A. Standards of Review

There is no doubt that the FRA could withdraw the NPRM. Indeed, it makes sense that when the comments following the issuance of an NPRM do not convince the agency to take action, the agency should withdraw the NPRM. But the Order does much more than withdraw the NPRM; it appears to adopt a one-person train crew rule and purports to preempt any state safety laws concerning train crew staffing. 84 Fed. Reg. 24,741.

In reviewing the challenges to the Order, we take our guidance from two recent Supreme Court opinions, *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), and *Department of Comm. v. New York*, 139 S. Ct. 2551 (2019). In *Regents*, the Supreme Court reiterated that the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts" and "requires agencies to engage in reasoned decisionmaking." 140 S. Ct. at 1905 (internal citations omitted). The APA "directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious.'" *Id*. (quoting 5 U.S.C. § 706(2)(A)). "Under this narrow standard of review, . . . a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. (internal citations and quotations omitted). The Court explained that "[i]t is a foundational principle of administrative law" that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Id*. at 1907.

In *New York*, the Court set forth four steps for reviewing whether an agency's stated reasons for taking action are pretextual. "First, in order to permit meaningful judicial review, an agency must disclose the basis of its action." 139 S. Ct. at 2573 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962)). "Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Id*. "Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id*. Fourth, the Court "recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'" where there is "a strong showing of bad faith or improper behavior.'" *Id*. at 2573–74 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S 402, 420 (1971)).

In *New York*, the Court found that it had been presented "with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id.* at 2575. It explained that:

> [t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

Id. at 2575–76. The Court concluded: "We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction." *Id*. at 2576.

In reviewing the challenges to the Order, we first address the FRA's assertion that the Order implicitly preempts state safety rules. After determining that it does not, we consider whether the Order violates the APA's minimum notice-and-comment requirements and whether the Order is arbitrary and capricious. We conclude that the issuance of the Order violated the APA's notice-and-comment requirements and that the Order is arbitrary and capricious, and therefore must be vacated.

B. The States' Safety Rules are not Negatively Preempted by the Order

The FRA correctly asserts that cases such as *CSX Transportation*, *Inc. v. Easterwood*, 507 U.S. 658 (1993), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *Burlington Northern Railroad Co. v. Montana*, 880 F.2d 1104 (9th Cir. 1989), confirm that an order may implicitly preempt state laws. However, the cases do not support the FRA's assertion that this Order did so.

CSX Transportation was an action by the widow of a truck driver killed when hit by a train. The Court held that federal regulations setting maximum train speeds on certain classes of track preempted any common-law negligence claim that the conductor was travelling too fast, despite adhering to the federal speed limit. *See* 507 U.S. at 664, 676. *Ray* concerned Washington's safety regulations for tankers entering Puget Sound. The Court held that the state's

limitation on the maximum size of a tanker that could enter Puget Sound was preempted by federal regulation but that the state's requirements of local pilotage and tug escorts were not preempted. 435 U.S. at 177–79. *Burlington* concerned whether FRA regulations preempted a state law requiring a caboose on trains longer than 2,000 feet. We held that the state regulation was preempted because it covered the same subject matter as the FRA regulations. 880 F.2d at 1105–06. But *Burlington*'s application to this litigation is limited by two factors: in *Burlington* the FRA had "promulgated two regulations affecting cabooses"; and Montana conceded that "its caboose law is not designed to reduce an 'essentially local' safety hazard." *Id*. at 1105. Each of these cases concerned conduct that was subject to existing agency regulation. Thus, although they affirm that FRA regulations can preempt state safety regulations, they do not compel a determination that the Order did so.

The Supreme Court has indicated that when reviewing challenges to agency action under the APA a court should consider the particular statutes and the facts in each case. *See Regents*, 140 S. Ct. at 1905, 1908. Here, Congress limited the preemptive effect of an FRA order by providing in § 20106(a)(2) that states may "continue in force an additional or more stringent law" that is "necessary to eliminate or reduce an essentially local safety or security hazard" and "is not incompatible with a [federal] law, regulation, or order." Thus, a state regulation is not automatically preempted by FRA action. Rather, the state regulation is preempted only when incompatible with the FRA's decision.

The Order, although declaring it "negatively preempt[s] any state laws" concerning crew staffing, does not address why state regulations addressing local hazards cannot

coexist with the Order's ruling on crew size. The Order offers an economic rationale: "a train crew staffing rule would unnecessarily impede the future of rail innovation and automation." 84 Fed. Reg. 24,740. But this is not a safety consideration. The FRA also argues that state regulations that apply statewide do not address essentially local hazards. *Id*. at 24,741 n.46. This assertion is not fully addressed in the Order and does not appear to be ripe for judicial consideration at this time.

In sum, although preemption of state safety laws is not beyond the FRA's mandate, the Order does not do so implicitly. Next, we turn to the merits of the Order.

C. The Order Violates the APA's Minimum Notice-and-Comment Requirements

As noted by the States, the most fundamental of the APA's procedural requirements are that (1) a "notice of proposed rulemaking shall be published in the Federal Register," and (2) "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the agency's consideration. *See* 5 U.S.C. § 553(b) and (c). In *Nat. Res. Def. Council v. U.S. E.P.A.* (*NRDC II*), 279 F.3d 1180, 1186 (9th Cir. 2002), we stated that "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. We further reiterated that "a final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule" and "[t]he essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the [proposed rule]." *Id*. (quoting *NRDC v. EPA* (*NRDC I*), 863 F.2d 1420, 1429 (9th Cir. 1988)).

More recently, in *Empire Health Foundation for Valley Hospital Medical Center v. Azar*, 958 F.3d 873 (9th Cir. 2020), we reasserted that: (1) a decision made without adequate notice and comment is arbitrary or an abuse of discretion; (2) under the APA the adequacy of notice turns on whether interested parties reasonably could have anticipated the final rulemaking from the proposed rule; (3) the key inquiry is whether the changes in the final rule are a logical outgrowth of the notice and comments received; and (4) a further consideration is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Id*. at 882–883.

The States argue that the NPRM, which proposed a nationwide two-crewmember *minimum* requirement, gave no indication that FRA "would affirmatively *eradicate* all two-crewmember requirements, including those established under state law." They object that the Order "is far broader than the NPRM indicated," because it purports to preempt "all" state laws regulating train crew staffing "in any manner," which could encompass "not only the number of crewmembers, but also any non-federal requirements pertaining to topics such as education, training, and qualifications required for train crew staff." Moreover, according to the States, the FRA "did not cite *any* public comments to justify its preemption decision."

The FRA agrees that its final action is subject to the APA's rulemaking requirements and should be a logical outgrowth of the proposed rule. However, it asserts that the Order "plainly satisfies" the logical outgrowth requirement because the NPRM "provided 'fair notice' to interested parties of the possibility that the agency would determine that no regulation was appropriate," and thus the public

knew "that the agency was considering whether to allow one-person crews for 'most existing operations.'" The FRA further contends that it informed the public that it planned to approve on a case-by-case basis "operations with less than two crewmembers where a railroad provide[d] a thorough description of that operation, ha[d] sensibly assessed the risks associated with implementing it, and ha[d] taken appropriate measures to mitigate or address any risks or safety hazards that might arise from it."

AAR similarly argues that the Order is a logical outgrowth of the NPRM because it was reasonably foreseeable that the FRA would "examine the safety concerns regarding" one-person operations "and affirmatively decide that no regulation is needed." It asserts that "it was also foreseeable that the agency's final decision would preempt all state laws addressing that same subject matter."

Although federal regulation of crew size was clearly placed in issue by the NPRM, the Order's preemption of all state safety requirements was not a "logical outgrowth" of the NPRM. There was nothing in the NPRM to put a person on notice that the FRA might adopt a national one-person crew limit. Rather, the NPRM stated that the FRA was considering mandating a minimum requirement of two crewmembers. The purpose of the proposed rule was to "establish minimum requirements for the roles and responsibilities of the second train crew member." 81 Fed. Reg. 13,959. Indeed, the FRA's very argument that it had informed the public that it planned to approve on a case-by-case basis operations with fewer than two crewmembers suggests that it was not contemplating the adoption of a nationwide one-person train crew rule. The FRA does not

contend that it ever issued any notice modifying that stated purpose of the NPRM.

In sum, it appears that (1) the interested parties could not have reasonably anticipated the Order, *see Empire Health Found.*, 958 F.3d at 882, (2) the Order is not a "logical outgrowth of the notice and comments received," *id.* (quoting *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1288 (9th Cir. 1990)), and (3) "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* at 883 (quoting *NRDC II*, 279 F.3d at 1186).

D. On This Record We Conclude That the Order is Arbitrary and Capricious and Must be Vacated

Although the Order describes itself as withdrawing an NPRM, its real and intended effect is to authorize nationwide one-person train crews and to bar any contrary state regulations. In reviewing petitioners' claim that the FRA failed to comply with the APA, we look to "whether the [FRA] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *New York*, 139 S. Ct. at 2569 (citations and internal quotation marks omitted). Applying the approach set forth in *New York*, we determine that the record does not support the Order's embrace of a one-person train crew or its preemption of state laws.

1. The Order's Basis for Its Action Does Not Withstand Scrutiny

The Order's reasoning is problematic. It asserts that there is still no "reliable or conclusive statistical data to suggest whether one-person crew operations are generally

safer or less safe than multiple-person crew operations." 84 Fed. Reg. 24,737. Critically, this lack of data does not support the promulgation of a one-person train crew rule and the preemption of state safety laws.

A careful reading of the Order raises substantial questions as to the soundness of its effective establishment of a national one-person crew standard.[6] The Order recognizes that even as to the two accidents that prompted the NPRM there were "some indirect connections between crew staffing and railroad safety," but dismisses these as "tangential at best." *Id.* at 24,738. The Order recognizes that it is impossible to "compare the accident/incident rate of one-person operations to that of two-person train crew operations."[7] *Id*. at 24,739.

The Order further recognizes that the Working Group identified "safety issues that railroads should consider when evaluating any reduction in the number of train crewmembers," but opines that these "reports do not indicate that one-person crew operations are less safe" and "do not form sufficient basis for a final rule on crew staffing." *Id*. at 24,740. The Order again recognizes "some indirect connection between crew staffing and railroad safety, such as post-accident response or handling of disabled trains," but opines that these concerns "could be achieved with fewer than two crewmembers with a well-planned, disabled-train/post-accident protocol." *Id*. Similarly, addressing

[6] Indeed, it is not entirely clear whether the Order even establishes a one-person crew requirement or permits railroads, in their discretion, to operate trains without any operator aboard the train.

[7] It stands to reason that where a two-person crew avoided an accident that might not have been avoided by a one-person crew, there would be no accident report.

whether "the idea of a one-person train crew" conflicts with existing statutory and regulatory requirements, the Order notes that no specific statute or regulation prohibits a one-person train crew, but cautions that "the NPRM identified several regulations that a railroad would need to be cognizant of when adjusting its crew staffing levels." *Id*. The Order alludes to safety concerns but does not really address them.

It is not clear that there is a sound factual basis for the Order's suggestion that two-member crews are less safe than one-person crews. The Order seems to rely on a study submitted by the AAR that allegedly shows that "single-person crew operations appear as safe as multiple person crew operations, if not safer." *Id*. at 24,737. But a single study suggesting that one-person crew operations "appear as safe" as two-person crews seems a thin reed on which to base a national rule: particularly in light of all the comments supporting a two-person crew rule and the proffered anecdotal evidence.

Indeed, the Order fails to address the multiple safety concerns raised by the majority of the comments on the NPRM. For example, the States allege that the FRA's own research "identified crewmember fatigue as a critical component of the safety-related reasons for regulating crew size," and correctly note that the Order does not discuss crew fatigue at all. The States also argue that although the FRA had previously recognized that mountainous terrain presents technical challenges and complexities that favor multi-person crews, the Order fails to consider these concerns. Rather, the Order states that the FRA "*believes*" that "post-accident responses [and] handling of disabled trains . . . *could be achieved* with fewer than two crewmembers with a *well-planned disabled-train/post-accident protocol* that

quickly brings railroad employees to the scene of a disabled train or accident." *Id*. at 24,740 (emphases added). But the Order does not require that a railroad have "a well-planned disabled-train/post-accident protocol." Moreover, with trains crossing the Sierra and Cascade mountain ranges in the winter, it seems unlikely that pursuant to the best "well-planned" protocol, assistance could quickly reach a disabled train on a mountain pass.

Even the Order's assertion that "a train crew staffing rule would unnecessarily impede the future of rail innovation and automation," *id*. at 24,740, is not explained. The Order mentions that automation may reduce accidents caused by human error, that unnecessary barriers should be removed, and that some commentators "identified the train crew staffing rulemaking as a potential barrier to automation or other technology improvements." *Id*. But there is no discussion of how a two-person crew rule would actually interfere with innovation or automation. Instead, the section asserts that "requiring a minimum number of crewmembers for certain trains . . . would have departed from FRA's long-standing regulatory approach of not endorsing any particular crew staffing arrangement." *Id*. But this begs the question of why the promulgation of a one-person crew rule does not also violate the long-standing approach of not endorsing a particular crew staffing arrangement.

Finally, even if we were to accept the FRA's assertion that a "regulation requiring a minimum number of train crewmembers . . . is unnecessary for a railroad operation to be conducted safely," this is not a sufficient reason to "negatively preempt any state laws concerning that subject matter." *Id*. at 24,741. To the contrary, Congress recognized the need to consider local conditions when it provided in § 20106(a)(2) that a state could "continue in force an

additional or more stringent law" that is "necessary to eliminate or reduce an essentially local safety or security hazard." The FRA's assertion that it has the inherent authority to implicitly preempt state law does not address why preemption is necessary or desirable here.

Our review of the Order indicates that neither its promulgation of a one-person train crew rule nor its preemption of state safety laws fairly addresses the safety issues raised in the comments to the NPRM.

2. The Agency's Contemporaneous Explanation is Lacking.

An alternative motive such as economic efficiency might not render the Order arbitrary and capricious if it otherwise addressed the safety concerns which are the FRA's mandate. *See New York*, 139 S. Ct. at 2573. As noted, the FRA "believes" that indirect safety connections "could be achieved" with fewer than two crewmembers with a well-planned disabled-train/post-accident protocol" and that it "expects" railroads to consider such protocol. 84 Fed. Reg. at 24,740. Beliefs as to what "could be achieved" and expectations as to what railroads will do are not a legitimate ground for preempting state safety regulations. Furthermore, other than arguing that state regulations for "essentially local safety hazards" may not be "statewide in character," *see id*. at 24,741 n.46, the Order offers no safety or economic justification for preemption.

V.

Despite the deference due FRA decisions, the States have met their burden of showing that the issuance of the

Order violated the APA's minimum notice-and-comment requirements and that the Order is arbitrary and capricious.[8]

This case recalls a case commented on by the Supreme Court in *Regents*. There the Court wrote:

> That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* [463 U.S. 29 (1983)]. There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full.
>
> We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of" automatic seatbelts. It did "not cast doubt" on the "efficacy of airbag technology" or

[8] Because we vacate the Order on these grounds, we need not, and do not, consider the States' arguments that the Order was untimely and violates the Safety Act.

> upon "the need for a passive restraint standard." Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement."

140 S. Ct. at 1912 (internal citations omitted).

Here, too, the FRA seeks to change its position without fully explaining its reasons for doing so and without following its usual proceedings for rulemaking. The FRA went from proposing, as required by safety concerns, a national *minimum* two-person train crew rule, to imposing a *maximum* one-person train crew rule and preempting state safety laws based on a record that the FRA describes as insufficient to show "whether one-person crew operations are generally safer or less safe than multiple-person crew operations." 84 Fed. Reg at 24,737. As in *State Farm*, the issue is not whether the FRA has the authority to issue a rule that preempts state safety regulations, but whether it has done so in a manner that complies with the APA. On this record, we conclude that it did not.

Accordingly, the Order is vacated, and the matter is remanded to the FRA. Although the FRA asserts that vacatur "would result in a disruptive patchwork of state laws," it appears that Congress foresaw a variety of state laws when it provided in § 20106 that states may have more stringent laws as long as they are not incompatible with federal law.

The petition filed by the Unions is **DISMISSED**. The petitions filed by California, Washington, and Nevada are

GRANTED, the Order, 84 Fed. Reg. 24,735, is **VACATED**, and the matter is **REMANDED** to the Federal Railroad Administration.

CHRISTEN, Circuit Judge, concurring:

I join parts I, II, III and IV.C of the opinion. Because "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion," *Nat. Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002), I would vacate the notice of withdrawal solely based on our conclusion that the Notice of Proposed Rulemaking did not provide adequate notice or opportunity to comment. I would not reach whether the notice of withdrawal negatively preempted state laws or whether the Federal Railroad Administration provided a satisfactory explanation for the notice.

9th Circuit Petitioners Opening Brief - LM Mann 20

Uploaded by: Mann, Larry

Position: FAV

Nos. 19-71787, 19-71802, 19-71916, 19-71918

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

Petitioners,

v.

FEDERAL RAILROAD ADMINISTRATION, *et. al*.,

Respondents

and

ASSOCIATION OF AMERICAN RAILROADS,

Intervenor

OPENING BRIEF OF PETITIONERS TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS, AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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Corporate Disclosure Statement

Petitioners are unincorporated associations, and they have no subsidiaries or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

Jurisdiction of this court to decide this case is based upon 28 U.S.C. §2342(7) (Add.1). Petitioners seek judicial review of a final agency action by the Federal Railroad Administration ("FRA")[1] dated May 29, 2019. Pursuant to 28 U.S.C. §2344, an aggrieved party from a final agency action may file a petition for review within 60 days from the date of the final order in the court of appeals wherein venue lies. The Petition was timely filed on July 18, 2019.

Venue is proper in this court because three of the petitioners, the states of California, Washington, and Nevada, reside in this Circuit. It is in the interest of judicial economy and the Court's order dated October 22, 2019, ECF No. 24, consolidating all four cases to hear all four of the Petitioners' arguments in a single proceeding, rather than transfer Petitioner's case to the Sixth or D.C. Circuit to be heard separately from the remaining three.

ISSUES PRESENTED FOR REVIEW

This case involves two issues:

1. Whether, in withdrawing a proposed regulation regarding the staffing of locomotive crews, the FRA violated the requirements of the Administrative Procedure Act ("APA") and the FRA's statutory mandate

[1] The Department of Transportation has delegated to the FRA authority to administer the federal railroad safety laws and regulations. 49 C.F.R. §1.89.

set forth in 49 U.S.C. §103(c) (Add.1) to make safety its highest priority.

2. Whether under Section 20106 of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §20106 (Add. 2), the FRA may negatively preempt a state from issuing a crew size regulation.

STATEMENT OF THE CASE

Under the Federal Advisory Committee Act, 5 U.S.C. App. §1 *et seq.*, agencies are given the authority to create advisory committees to make recommendations for proposed regulations. On March 25, 1996, the FRA created the Rail Safety Advisory Committee ("RSAC"), comprised of representatives from rail labor and rail management, as well as suppliers and manufacturers. RSAC operates by attempting to negotiate consensus regulatory language on any particular task that is delegated to it by the Administrator. Unless all the members of RSAC agree to a particular task, it will not be considered by RSAC, nor will it become a recommendation. Once all members agree to a task, a working group is established to develop recommendations for the FRA for action. When a working group established by RSAC unanimously agrees to a particular rule, it will be automatically forwarded to the FRA for consideration, even if there is no unanimous consent by the full RSAC. When a majority of the RSAC agrees to a proposal, it will be forwarded to the FRA for its consideration. Where there is no RSAC consensus, the matter will be

submitted to the FRA for a formal rulemaking proceeding. The FRA is directly involved in all deliberations of RSAC and its working groups. For a more detailed discussion of RSAC, *See*, 81 Fed. Reg. 13935-36.

As the result of two major accidents in 2013 that occurred at Lac-Megantic, Quebec, and Casselton, North Dakota, the FRA submitted a task entitled "Appropriate Train Crew Size" to the RSAC for consideration, announcing that the "FRA believes it is appropriate to review whether train crew staffing affect railroad safety." 81 Fed. Reg. 13936 (Mar. 15, 2016). On August 29, 2013, the RSAC accepted the task (No. 13-050) and established a Working Group to develop recommendations to FRA. The Working Group convened five times between October 29, 2013, and March 31, 2014. The FRA was directly involved with and facilitated each working group meeting. Throughout the Working Group deliberations, the FRA submitted draft regulatory text language for the RSAC's consideration.

In the first Working Group meeting on October 29, 2013, the FRA provided an overview of its position on the crew size issue, which indicated that two persons were necessary in most railroad operations. The FRA's Associate Administrator of Railroad Safety and Chief Safety Officer stated that "…rather than engaging in extensive discussions to determine and establish stakeholder positions, FRA intends to define its position on 'appropriate crew size' right up

front." Working Group Minutes of Meeting ("WG Minutes") at 6; (E.R. 768). He presented a document entitled "Appropriate Train Crew Size Working Group Update." It stated the Agency's position that:

> railroad safety is enhanced through the use of multiple crew members.
>
> it is difficult to comply with current safety regulations and operating rules when operating a 1-person crew.
>
> the Agency's safety regulations were written with at least a 2-person crew in mind and that operating with a 1-person crew may, in some cases, compromise railroad and public safety; and
>
> a second crew member provides safety redundancy and a method of checks and balances during train operations.

Id.

These points were repeated by the FRA throughout the Working Group meetings with a specific emphasis on the necessity for safety redundancy. *See, e.g.,* October 29, 2013, WG Minutes, 6, 10 (E.R. 768, 772); Dec. 18, 2013, WG Minutes, 5, 9, 15 (E.R. 743, 747, and 753); March 31, 2014, WG Minutes, 26-28 (E.R. 689-691). Even the Association of American Railroads ("AAR")[2], intervenor here, conceded that redundancy is important to safety. October 29, 2013, WG Minutes, 10 (E.R. 772); 81 Fed. Reg. 13936-37; (E.R. 382-83, 474, 690, and 706). A brief summary of each of the Working Group meetings is

[2] The AAR is a trade association whose members include all of the nation's largest freight railroads, smaller railroads, and passenger railroads.

discussed at 81 Fed. Reg. 13937-39. During the Working Group deliberations, the FRA repeated the necessity for safety oversight of crew size. Dec. 18, 2013, WG Minutes, 10-11 (E.R. 744, 748-749).

The Working Group was unable to reach a consensus; therefore, pursuant to RSAC procedures, the appropriate crew size issue was submitted to the FRA for a formal rulemaking. The FRA issued a formal Notice of Proposed Rulemaking ("NPRM") on March 15, 2016 (81 Fed. Reg. 13918). Following the comment period, the FRA conducted a hearing on July 15, 2016, to allow additional comments. 81 Fed. Reg. 39014 (June 15, 2016). No further action was taken until almost three years later, when on May 29, 2019, the FRA abruptly withdrew the NPRM, stating that no regulation of train crew staffing was required at this time. 84 Fed. Reg. 24737.

SUMMARY OF ARGUMENT

In *Department of Commerce, et. al. v. New York, et. al.,* 588 U.S.___ ,139 S. Ct. 2551 (2019), the Supreme Court rejected the decision by the Secretary of Commerce to add a citizenship question to the census because the record showed that the Secretary's reasons for doing so were pretextual, in that they "…reveal a significant mismatch between the decision the Secretary made and the rationale he provided" *Id*. at 2559; "the sole stated reason--seems to have been contrived" *Id*. at 2575; and the Court "cannot ignore the disconnect

between the decision made and the explanation given" *Id*. Each of those descriptions is equally applicable to the action of the FRA Administrator here under challenge.

On May 29, 2019, the FRA issued a notice not only withdrawing its NPRM governing train crew size, but also affirmatively declaring that states would be preempted from regulating this subject matter. The primary reason stated by the FRA for the withdrawal was that the "FRA did not have reliable or conclusive statistical data to suggest whether one-person crew operations are safer or less safe than multiple-person crew operations." 84 Fed. Reg. 24735. The record developed by RSAC and throughout the rulemaking process makes it clear that the FRA's decision failed to comply with the requirements of the APA and the congressional mandate that the FRA exercise the highest degree of safety in its administration of its jurisdiction.

As previously noted, the FRA had stated, both publicly, and within the RSAC Working Group, that it intended to regulate crew size because of the safety impact and the need to have federal safety oversight of crew size. In furthering the regulation, the FRA submitted the proposed regulation to the Office of Management and Budget for review and editing. FRA Docket No. FRA-2014-0033-0003. After that process was complete, the proposal was formally issued.

The underlying purpose of the proposed rulemaking was to continue in effect current crew size operations and to allow railroads to seek waivers when technological circumstances warranted a reduction in crew size. For safety reasons, the FRA had determined that oversight of railroad crew sizes was essential. Moreover, during the meetings of the RSAC Working Group, the FRA repeatedly stated that a second crew member provides safety redundancy and a method of checks and balances on train operations. The intervenor AAR conceded that redundancy is important to safety. While the FRA made it clear throughout the rulemaking that it intended to regulate crew size, the railroads sought to have the proposed rule withdrawn.

Despite its steadfast position that crew size must be regulated, in a complete about-face, the FRA ultimately concurred with the railroads and withdrew the proposed regulation. The FRA provided no real justification for the withdrawal. In doing so, the FRA acted in an arbitrary and capricious manner, and abused its discretion.

The withdrawal of the NPRM violates the edict of 49 U.S.C. §103(c) (Add.1) which requires the agency "in carrying out its duties…to consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation." By its withdrawal, the

FRA failed to address the many safety issues that two crew members provide in train operations. Moreover, it failed to consider the public interest.

In addition to the foregoing, the FRA's attempt to negatively preempt the states from regulating crew size is invalid. Where there exists a specific statutory preemption provision, as in the FRSA, the Agency cannot simply invoke implied negative preemption. Each state has a responsibility to act in the interest of public safety and is not restricted by FRA's minimum standards.

ARGUMENT

I. FRA'S WITHDRAWAL OF THE NPRM VIOLATED THE APA.

The first issue for this court to decide is whether the FRA complied with the requirements of the APA in withdrawing the NPRM by fully considering the relevant factors, including the application of 49 U.S.C. §103(c) (Add.1). The APA provides that agency action must be set aside by the reviewing court if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Add. 3). The APA requires agencies to "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Department of Commerce, et. al. v. New York, et. al., supra* at 2576.

The second issue is whether the FRA has authority under the FRSA to negatively preempt a state from issuing a law or regulation covering crew size.

The FRA's decision is contrary to Supreme Court precedent, and, historically, FRA has misinterpreted the preemption provision under the FRSA. Therefore, no deference is warranted to FRA's decision. *See, East Bay Automotive Council v. NLRB,* 483 F. 3d 628, 633 (9th Cir. 2007); *Lucas v. NLRB,* 333 F. 3d 927, 931 (9th Cir. 2003).

We acknowledge that the FRA, with the exception of congressional mandates, has discretion not to issue a regulation. However, the discretion is not unbounded, *Department of Commerce v. New York, supra,* 139 S. Ct. at 2574-2576, and cannot be exercised for blatantly false reasons. If there is bad faith by an agency, an inquiry may be warranted. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1967). As will be discussed, all of these considerations warrant review and reversal here.

The APA permits a court to review a "final agency action." 5 U.S.C. §704. Agency action is final if it is both "the consummation of the agency's decision-making process" and a decision by which "rights or obligations" have been determined" or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The FRA's withdrawal of the NPRM certainly fits within this definition.[3]

[3] There is no question the FRA was engaged in rulemaking. The FRA's action

This Court has the authority to set aside the FRA's decision if it determines the withdrawal of the NPRM was "arbitrary and capricious." 5 U.S.C. §706(2)(B) (Add. 3). While a court is "not to substitute its judgment for that of the agency," an agency is still required to "examine the relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, *supra* 463 U.S. 29, 43 (1983). Put another way, an agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003). "An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed

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in withdrawing the NPRM is akin to a "rule" under the APA, which is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…" 5 U.S.C. §551(4) (Add. 4). Such a definition "is broad enough 'to include nearly every statement an agency may make…" *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983) citing *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980). The withdrawal is not an "order" as that term is defined in the APA, which is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than a rulemaking…" and is the result of an adjudication. 5 U.S.C. §551(6)-(7) (Add. 4).

to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm Mutual Auto Ins. Co.*, *supra,* 463 U.S. at 43. Vacatur of an agency action while remanding for further proceedings is the appropriate remedy for a violation of the APA. 5 U.S.C. § 706(2) (Add.3) ("The reviewing court shall… set aside agency action, findings, and conclusions found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); *See also, Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for unlawful agency action is to 'set aside' the action") *rev'd on other grounds, Coeur Alaska v. Bonneville Power Admin.*, 557 U.S. 261 (2009). Only in "rare circumstances" should an agency action be remanded without vacatur. *Humane Society v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).

When engaged in a rulemaking, a federal agency must comply with the notice and comment requirements of the APA. *See* 5 U.S.C. §553(b)-(c) (Add. 5). The FRA's notice must be published in the Federal Register, and contain: "(1) a statement of the time, place, and nature of public rulemaking proceedings, (2) reference to the legal authority under which the rule is

proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b) (Add. 5). Thereafter, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments…" 5 U.S.C. §553(c) (Add. 5).

In addition to the foregoing, when reviewing the FRA's decision-making process here, it is critical to examine the result in the over-arching context that the FRA has an affirmative statutory duty to protect the public from unsafe railroad operations. A court "must not 'rubber stamp… administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.'" *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1236 (9th Cir. 2001), citing *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). This latest FRA decision was rendered despite the mandate from Congress that

> In carrying out its duties the Administration *shall consider the assignment and maintenance of safety as the highest priority*, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the *highest degree of safety in railroad transportation*.

49 U.S.C. §103(c) (Add.1) (emphasis added). This is the standard by which to judge FRA's actions here. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir.

2019) (a "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission…" citing *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004)). Congress's action in adding this provision to the FRSA in 2008 demonstrated a renewed emphasis on attention to safety concerns. At the same time, Congress mandated a number of safety regulations to be adopted by FRA. After more than 10 years, many of these requirements still have not been finalized.

We will demonstrate that in the rulemaking proceeding at issue here, the current Administrator failed to properly consider the relevant factors, including Congress's statutory mandate, and that the ensuing result was arbitrary and capricious.

A. Each of the Bases Relied Upon by FRA to Withdraw the NPRM is Contrived.

FRA stated four reasons for withdrawing the NPRM: (a) there is no direct safety connection between train crew staffing and the Lac-Megantic or Casselton accidents so no regulation is necessary (84 Fed. Reg. 24737-247390); (b) rail safety data does not support a train crew staffing rulemaking (84 Fed. Reg. 24739-24740); (c) comments to the NPRM do not support a train crew

staffing rulemaking (84 Fed. Reg. 24740); and (d) a train crew staffing rule would unnecessarily impede the future of rail innovation and automation. (84 Fed. Reg. 24740). None of these hold water.

(1) The FRA's Reliance on Just Two Accidents to Withdraw the NPRM Ignores Numerous Other Accidents and Its Analysis Does Not Honor the Agency's Duty to Protect the Public.

In its notice of withdrawal, FRA relies primarily upon just two accidents to support its position that two-person crews are not warranted. It states that other procedures currently in effect would have prevented those accidents. 84 Fed. Reg. 24738.[4]

The obvious question here is why FRA limited its examination to only these two accidents rather than a full examination of all the "relevant factors" in reaching its decision. Its own records reveal that, excluding accidents at rail-highway grade crossings (discussed *infra* at 16-17) there were 1,906 railroad accidents during 2018. FRA Office of Safety Analysis, 2.09 Train Accidents and Rates. [5] None of these accidents, or accidents from other years, were discussed in the withdrawal of the NPRM, even in a general sense. Rather, the

[4] This analysis ignores the fact that having two crew members in the Casselton, ND accident prevented much more destruction at the derailment site. Train Crew Staffing Public Hearing Transcript at 60 (E.R. 199) ("FRA Hearing").
[5] The source of all statistics cited in this brief is the FRA's Office of Safety Analysis; https://safetydata.fra.dot.gov.

FRA limited itself to review of only two train accidents, one of which did not even occur in the United States.

Further, the procedures put in place after the two identified accidents do not begin to address many of the safety issues involving crew size that have arisen nationwide. For example, the second crew member is the first and instant responder to render assistance to injured persons at highway-rail grade crossings, FRA Hearings, 60 (E.R.199). Today, many railroads operate trains exceeding two or more miles in length (FRA Hearings, 181 (E.R. 320)) and, therefore, frequently block crossings in local jurisdictions. But railroad operating rules prohibit the engineer from leaving the locomotive unattended, unless numerous and time-consuming steps are taken to ensure that the train is secured against any unintended movement. The FRA's own regulations render it infeasible for a train to be separated and reconnected at a crossing in an emergency. *See, e.g.,* 49 C.F.R. §§ 218.24(a)(2) (Add. 6) and 232.103(n) (Add. 7-10). This means that there must be a second crew member to disconnect and separate the cars on the train to open a crossing to allow emergency vehicles to cross over and then to reconnect the cars, which cannot physically be done by one person. And its Operating Practices Compliance Manual makes clear that any work related to operation a train—even the mere act of physically occupying the engineer's seat—may be performed only by a certified

locomotive engineer. Federal Railroad Administration Office of Railroad Safety, Operating Practices Compliance Manual (Nov. 2012 ed.) at 16-13 (Add.11); *See,* FRA Hearings, 176 (E.R. 315). This means that there must be a second crew member to disconnect and separate the cars on the train to open a crossing to allow emergency vehicles to cross over. And, when a train is disabled, only the second crew member can inspect the cars involved in the mishap and take appropriate real time action for the safety of the community because the engineer must remain in the cab. The explanation put forth by the FRA is devoid of evidence that it considered these relevant factors in determining whether a train crew staffing regulation was necessary.

Numerous examples illustrate how the FRA's analysis is flawed and fails to protect the public. The FRA states that post-accident response or handling of disabled trains are only indirectly related to railroad safety. 84 Fed. Reg. 24740. As for post-accident safety, FRA suggests protocols that bring railroad employees to the scene of an accident or disabled trains post-occurrence will be preferable to maintaining a two-person crew on a train. *Id.* One such protocol advanced by the railroads is to have an employee in a vehicle following trains. *See*, 81 Fed. Reg. 13938-39; March 5, 2014, WG Minutes 10-11 (E.R.702-703). But the FRA neglects to mention that there are thousands of train operations daily over 140,000 miles of track and more

than 200,000 highway-rail grade crossings in the U.S. Last year, there were 2,217 collisions at such crossings (which is more than 6 each day), resulting in 262 deaths and 840 injuries. FRA Office of Safety Analysis, 2.08 Highway-Rail Crossings. Even discounting congested highways and/or inclement weather, in most cases it is highly improbable that such transport vehicles would be near enough to a collision or a train derailment to render timely emergency assistance when needed. In the Working Group deliberations, AAR admitted that direct observation of a train by a vehicle may be impossible in a city. March 5, 2014, WG Minutes 20 (E.R. 712). Trains also travel through very isolated areas where there are no access roads that a vehicle can travel to assist a disabled train, derailment, or incapacitated crew member. Trains travel in many locations where the nearest town is many miles away. Eliminating a second crew member would place greater burdens upon local communities, because of the need to have prompt local emergency assistance available.

The explanation put forth by FRA is speculative and devoid of evidence that the FRA considered the reality of day-to-day domestic railroad operations in determining whether a train crew staffing regulation was necessary. The FRA "entirely fail[ed] to consider an important aspect of the problem." *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. Further,

the proposal that a portion of the safety functions of a conductor can be adequately handled by an employee following a train is "an explanation… that runs counter to the evidence before the agency" and is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

These issues, and more, confirm that FRA's analysis did not comply with the APA standards and 49 U.S.C. §103(c) (Add. 1) and must be set aside.

Another factor FRA failed to address is the impact of irregular work schedules that freight railroad operating employees endure. They are on call 7 days a week, 24 hours a day, must report to duty with as little as one hour and 15 minutes notice, and then work up to 12 hours per day. Little advance notice of on-duty times and unpredictable work schedules have contributed to significant fatigue among operating employees, which is among the most critical safety issues today in the railroad industry.[6] Two sets of eyes and ears minimize the risk of fatigue-induced accidents or rule violations. Having

[6] *See, Fatigue in the Railroad Industry*: *Hearing Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Transportation and Infrastructure Committee,* 110th Cong., 1st Sess. (February 13, 2007). *See, also,* FRA Working Group document FRA-2014-0033-0002 which discussed fatigue in the U.S. (E.R. 582).

two persons who constantly interact with each other in the locomotive cab provides a critical layer of safety protection and assures rules are complied with and the train is operated safely. This is the primary reason that the Federal Aviation Administration requires a minimum of two pilots in all commercial passenger airplanes. *See,* 14 C.F.R. §§61.55-.58.

In its deliberations, the RSAC Working Group identified the many responsibilities of train and yard service employees. E.R. 482-505.These responsibilities encompass 145 job functions. Additionally, locomotive engineer positions encompass many more distinct job functions. E.R. 478-481. Requiring one employee to perform all of these job responsibilities combined creates a substantial threat to safety. Many required work tasks in safely moving a train simply cannot be accomplished by a single crew member. *See* E.R. 374-378; E.R. 474-477; 81 Fed. Reg. 13927, 13929. These numerous tasks require two qualified crew members to function safely at different locations while coordinating their actions as a team. The FRA's statement in withdrawing the rulemaking contains no "satisfactory explanation" as to how these tasks are to be absorbed by a single crew member. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. As such, FRA's declination to regulate crew staffing size is "arbitrary and capricious" and should be set aside.

(2) There is Voluminous Safety Data to Support a Train Crew Staffing Rule.

In its withdrawal, FRA stated that there was insufficient data to demonstrate that two-person crews are safer than one-person crews. 84 Fed. Reg. 24735. The record does not support that conclusion**.** During the Working Group discussions, the FRA pointed out that the absence of data does not address the risk of an operation (December 18, 2013, WG Minutes at p. 11 (E.R. 749) and that data alone is not the only basis for safety. *Id.* at p. 13 (E.R. 751). The FRA stated that statistics do not reflect how many accidents have been prevented. October 29, 2013, WG Minutes at 10 (E.R. 772); *See also,* NPRM, 81 Fed. Reg. 13919, 13931-33. The data the current FRA contends is missing is absent solely due to the fault of the FRA and the railroads. As noted in the NPRM, "FRA relies on each railroad to self-report a description of the accident/incident, as well as the primary and contributing causes." 81 Fed. Reg. 13931. In proposing the NPRM, the FRA said that "qualitative studies show that one-person train operations pose increased risks by potentially overloading the sole crewmember with tasks" (81 Fed. Reg. 13919) and that "railroads have achieved a continually improving safety record during a period in which the industry largely employed two-person train crews." *Id.* Further,

> FRA believes that having a properly trained second crew person on board, or implementing risk mitigating actions that FRA

> believes are necessary to address any additional safety risks from using fewer than two-person crews, provides net safety benefits relative to using fewer than two-person crews or not implementing measures that FRA believes are necessary.

Id.

Beyond these basic points, with the exception of some shortline operations and yard movements, there is no data from U.S. single person freight or passenger operations establishing that a single person operation is as safe or safer than the standard two- person crew.[7] Furthermore, the NPRM, while mandating a minimum crew size generally, still allowed for existing one-person crews to continue to operate, and allowed Carriers to seek a waiver from the proposed requirement for new operations if they satisfied certain criteria. *See, infra,* at 30-31.

It is clear that FRA did not properly examine the relevant data, nor determine the safety of two crew members rather than one. There is an FRA program, known as Confidential Close Call Reporting System (C3RS), that could be utilized to determine prevention of potential accidents. *See,* October

[7] Foreign countries operating with single person crews cannot validly be compared because those operations are so dissimilar. *See, Hearing on Train Crew Staffing: Before the Federal Railroad Administration,* at 179-192 (July 15, 2016). (E.R. 318-331); Francisco Bastos and Andrade Furtado, *U.S. and European Freight Railways: The Differences That Matter,* 52 Journal of the Transportation Research Forum, 65-84 (Summer 2013).

29, 2013, WG Minutes, 19 (E.R. 781). More than 12 years ago the FRA sponsored, and funded, a voluntary confidential program allowing railroads and their employees to report close calls (i.e., accidents that would have happened but for crew intervention). Safety reporting under this program has been successful because the railroad employees participating receive protection from both discipline and FRA enforcement[8]. However, only nine of the more than 600 railroads agreed to participate in the program. Had the FRA mandated that all railroads participate, there would be significant data demonstrating, through close call reports, the safety benefit of two-person crews in accident prevention.

Simply put, the supposed lack of data supporting the maintenance of two-person crews is a result of the FRA shirking its responsibilities and allowing Carriers to have the final say in what gets reported. The FRA cannot be permitted to reach a conclusion based on a set of relevant data that is circumscribed by its own inaction. If the current Administrator was not satisfied with the data that formed the basis for the NPRM, the FRA, at a minimum, should have conducted additional research to quantify how many times two-person crews prevented accidents. Instead, the Agency did nothing.

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[8] *See, Confidential Close Call Reporting System(C3RS): Lessons Learned Evaluation Final Report,* DOT/FRA/ORD-19-01 (February2019);https://www.fra.dot.gov.eLib/Details/L19804

The FRA has substantial funds to conduct such research. During the FY 2019 congressional appropriation, the sum of $40,600,000 was provided for research and development. Pub. L. 116-6; H. J. Res. 31 at 405; 165 Cong. Rec. H2008 (Feb. 14, 2019); 165 Cong. Rec. H2037 (Feb. 15, 2019).

Nothing has occurred in the rail industry since 2013 to undermine the agency's initial analysis that a second qualified operating crew member on each train enhances safety. In the NPRM, the FRA identified crewmember tasks and stated that the positive attributes of teamwork raise concerns with one-person crews, especially when implementing new technology. 81 Fed. Reg. 13925-13930. To support the NPRM, the FRA referred to various authoritative reports by the John A. Volpe National Transportation Systems Center and the National Academy of Sciences' Transportation Research Board. These reports analyzed the cognitive and collaborative demands of freight conductor activities; the job of a passenger conductor; fatigue status in the railroad industry and its impact on crew size; implications of technology on a task analysis of a locomotive engineer; using cognitive task analysis to inform issues in railroad operations; and the impact of teamwork on safety of operations. 81 Fed. Reg. 13924-13930. The FRA referred to none of these issues raised in the reports when it withdrew the NPRM. Shockingly, the agency stated that there was no evidence supporting the proposition that two-person crews were safer. The foregoing

establishes that either the FRA did not consider this critical relevant data, or that it is unable to "articulate a satisfactory explanation" for why the data is not persuasive. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43. In either circumstance, the withdrawal of the NPRM cannot stand.

Moreover, the FRA's existing regulations and railroad operating rules suggest safety hazards are created when a train has less than two crewmembers working as a team. *See,* December 18, 2013, WG Minutes 5, 15 (E.R.743, 753). This teamwork includes receiving mandatory directives from the control center (October 29, 2019, WG Minutes 14-15, 19 (E.R. 776-77, 781)); communicating and interacting with other trains (FRA Hearings, 184-185, 190 (E.R. 322-23, 329) addressing issues regarding blocked crossings (FRA Hearings, 102, 169, 173-74 (E.R. 241, 308, 313-14)), protecting train passengers in an emergency (FRA hearings, 158, 165-69 (E.R. 297, 304-308)) ; observation for sudden incapacitation of a crewmember January 29 , 2014, WG Minutes 7 (E.R. 727); FRA Hearings, 173, 176, 183 (E.R. 312, 315, 322)); and movement through a grade crossing with identified highway-rail grade crossing signal failures. (FRA Hearings, 103, 173 (E.R. 242, 312). *See also,*75 Fed. Reg. 2668, 2671-72, 2674 (January 15, 2010) (Regarding Positive Train Control). The FRA's withdrawal of the NPRM ignores its own existing rules and regulations on these topics.

A recent additional burden was imposed on crew members on trains by

the implementation of FRA's Positive Train Control (PTC) regulation. 49 C.F.R. Part 236. This technology adds two more computer screens inside the locomotive cab (*See,* 49 C.F.R. §236.1006(d) (Add. 12), and locomotive engineers face a barrage of demands from the PTC system with prompts from the PTC screen. This technology adds significant additional duties on the locomotive engineer and causes distractions from the performance of other tasks, (*See,*75 Fed. Reg. 2670-73), which makes two-person crews even more necessary.

The FRA and the railroads maintain that PTC implementation is a major reason two crewmembers are not required. However, 82,000 of the nation's 140,000 miles of track (59%) will not be covered by the PTC. In addition, when the FRA promulgated the PTC regulations, it recognized the additional cognitive demands created by this technology. 75 Fed. Reg. 2671, *See also,* E.R. 402. This operating requirement impedes experienced crews from operating efficiently as possible. Further, the FRA stated that the PTC systems created new sources of workload distractions including the need to acknowledge frequent (and often non-informative) audio alerts, the need for extensive direct input into the locomotive computer screen during initialization, and the need to recognize error messages occurring while the train is in motion. 81 Fed. Reg. 13927. The FRA recognized that the increased complexity and workload

associated with PTC creates a need to have a computer screen for each of the two crew members (*See,* 49 C.F.R. §236.1006(d)[9] It said:

> The purpose of paragraph (f) is to ensure that those assigned tasks in the cab are able to perform those tasks, including constructive engagement with the PTC system. Furthermore, while the train is moving, the locomotive engineer would be prohibited from performing functions related to the PTC system that have the potential to distract the locomotive engineer from performance of other safety-critical duties.

75 Fed. Reg. 2598, 2671(Jan. 15, 2010).

None of these issues were addressed in the NPRM withdrawal. As the FRA fails to "examine the relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made," the withdrawal of the NPRM fails to comply with the APA and should be vacated and remanded for further rulemaking.

(3) The Evidence Supports the Promulgation of a Train Crew Staffing Rule.

In its withdrawal FRA stated that while the comments to the NPRM "note some indirect connections between crew staffing and railroad safety, such as post-accident response or handling of disabled trains, those indirect connections

[9] Originally, the requirement for two computer screens was contained in 49 C.F.R. § 1029(f). 75 Fed. Reg. 2598, 2713 (Jan. 15, 2010). It was subsequently moved to a new section. *See,* 79 Fed. Reg. 49705 (Aug. 22, 2014).

do not provide a sufficient basis for FRA regulation of train crew staffing requirements." 84 Fed. Reg. 24740. This statement is directly contradicted by the record, which contains numerous comments wherein train service employees provided examples of instances where a second crew member directly aided in avoiding an accident. For example, one commenter stated that while operating his train as an engineer with his conductor, said conductor "loudly alerted me to STOP! I stopped my light locomotive just in time to see a[]… man walk right past the plow of my locomotive. I never would have seen him on my own. Having the other person in the cabs has saved lives." FRA-2014-0033-1545. This is but one example of comments that directly addressed rail safety, contrary to the FRA's assertion that the comments only indirectly address the issue.[10]

[10] There are many other comments that describe similar incidents where a second crew member in the cab of the locomotive prevented an accident from occurring and/or saved lives. *See e.g.*, FRA-2014-0033-1525 (conductor's warning to engineer avoided a rail collision); FRA 2014-0033-1378 (conductor and engineer collaborated where dispatcher erroneously informed them the track was clear, leading directly to saving the life of the crew where a lone engineer would have died or suffered seriously bodily injury from subsequent head on collision); FRA 2014-0033-1391 (conductor's actions in observing and warning individuals operating ATVs near track prevented them from fouling the track and suffering significant injury, where engineer did not see them and would have provided no warning). The FRA's explanation for withdrawing the NPRM does not and cannot provide an adequate alternative to a second crew member that would address these concerns. Rather, the FRA chose to completely ignore them.

Under the APA, "[a]n agency must consider and respond to significant comments received during the period for public comment" *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199, 1203 (2015). "Significant comments" are "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1081 (9th Cir. 2019). The FRA not only does not respond to the numerous comments providing direct information on how a second crew member has led to increased safety, it suggests that such comments do not even exist. Such is not a "satisfactory explanation" for withdrawing the NPRM, and is therefore contrary to the procedural requirements of the APA.

Furthermore, there is an inherent fallacy in the FRA's statement that the comments did not provide conclusive data suggesting that any previous accidents involving one-person crew operations could have been avoided by having a second crewmember. 84 Fed. Reg. 24738. This fallacy is that one-person crews are virtually nonexistent, and those trains operating with them do so at slow speeds with relatively few cars. Class I railroads[11], by contrast,

[11] Pursuant to 49 U.S.C. § 20102, a Class I railroad currently is defined by the Surface Transportation Board as a railroad having revenues in excess of $489 million annually. *See,* Surface Transportation Board Decision, Docket No. EP 748 (June 10, 2019).

routinely operate trains in excess of two miles long at 60 mph or higher, many laden with hazardous materials through heavily-populated areas. The FRA ignored the facts at Lac-Megantic, which showed that one-person crews cannot properly secure a standing train nor make a required Class I air brake test.

In its withdrawal, the FRA did not mention the numerous duties performed by a conductor (*See,* E.R. 478-581) duties which cannot safely be performed by a single crewmember in most train operations. A more detailed discussion of train and engine service duties are found at E.R. 478. These many conductor duties were considered during the RSAC Working Group deliberations. They include proper handling of train make-up requirements, work orders, block signals, crossing signal failures, equipment failures, reporting accidents/incidents, copying mandatory directives from dispatchers, backing up a train, detection of by sight or electronic monitoring devices, dragging equipment, overheated wheels, shifted lading, setting out defective equipment, safety inspections of passing trains, interchange of cars at industries and yards. Correcting the problems, or isolating the cars involved, have prevented minor issues from escalating into major problems. A 2012 final FRA report[12] discussed the many activities in managing a train consist and noted that

[12] *Cognitive and Collaborative Demands of Freight Conductor Activities: Results and Implications of a Cognitive Task Analysis,* FRA Office of Railroad

unexpected situations run the gamut during a train's movements. *Id.* The NPRM withdrawal ignores it.

Significantly, the NPRM allowed for one-person crews during a number of operations, including helper service, on tourist railroads, for movements of light locomotives and work trains, remote control operations, passenger trains equipment without passengers. It also permitted some class III railroads (those with the lowest amount of trackage) that operate at slow speeds in non-mountainous territory to use one-person crews. *See,* proposed §§218.127-218.13 (81 Fed. Reg. 13963-13966). Moreover, there were two explicit waiver provisions in the NPRM (§ 218.135; 81 Fed. Reg. 13966) in addition to the existing statutory provision covering all rail safety regulations that allows for a waiver of two-person crews where the operations justify one person. 49 U.S.C. §20103(d) (Add.12).

These waiver provisions are crucial to the Court's consideration. They established a process whereby a railroad could be authorized to operate with a single crew member if it establishes that the operations would be as safe as operating a train with two crew members. The NPRM waiver provisions provided needed government oversight in the advent of automation. In every

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Policy and Development, pp. iv., 2-3 (E.R. 402).

other mode of transportation, the federal government and the states oversee automation in transportation to assure that such implementation is safe and does not provide a safety risk to the public or to the employees. The FRA's action would allow a railroad carte blanche to decide whether, and how to, operate with one crewperson. If the NPRM withdrawal is upheld, and the states are preempted, there will be no adequate oversight of railroads choosing to eliminate crew members based on whatever considerations they deem relevant. The NPRM recognized the numerous, varied operating conditions that make two-person crews an absolute necessity; the withdrawal is at odds with, and ignores, those salient facts.

(4) A Train Crew Staffing Rule Would Not Unnecessarily Impede the Future of Rail Innovation and Automation.

The FRA's withdrawal also speculates that a rule requiring two-person crews would unnecessarily impede the future of rail innovation and automation. 81 Fed. Reg. 24740. That is false. As discussed in detail above, the NPRM was carefully crafted so that exceptions and waivers were built into the requirements, and that compliance would add little or no additional costs for the railroads. This means that innovation and technology would not be limited by the adoption of the rule, as railroads would still have the opportunity to experiment with single-person crews where circumstances established that such

operations could be safe.

Rather than implement the waiver process that balances safety and innovation, the FRA now suggests that crew size should be determined by collective bargaining rather than safety. *See,* 84 Fed. Reg. 24740. But collective bargaining primarily addresses economics, not safety. *See,* FRA Hearings, 187-88 (E.R. 327-28). The primary purpose of a collective bargaining agreement is to set appropriate wages and benefits and establish mutually acceptable working conditions. Collective bargaining represents a tug and pull over how much management is willing to pay to maintain a productive work force. It is a private, not a public, process, that does not necessarily address public concerns. The safety of the public is primarily the responsibility of the government, mandated by statutes and implementing regulations. Despite this, the FRA would abdicate its safety responsibility to unions from whom management would extract economic concessions in exchange for assurances that trains are safely staffed. Furthermore, where no labor union serves as representative of a particular railroad, there is no one to advocate for safely staffed trains.

There can be no dispute that railroads have been able to introduce innovations even with the prevalence of two-person crews. However, with increased technology comes new concerns regarding safety. As pointed out earlier, present and future technology increases the potential for work overload.

Additional new electronic technologies, such as Trip Optimizer and Leader[13], and other software applications that manage train handling and in train buff forces[14], pose significant distractions to crews. The more complex operating rules and regulations that accompany new technology, much longer trains, and much longer work assignments[15], and the failure of the railroads to address fatigue as a safety issue, make the second crewmember even more vital. An extra set of eyes and ears watching all sides of the train and providing a division of tasks are safety measures that cannot be replaced by technology.

"Technology Implications of a Cognitive Task Analysis for Locomotive Engineers", a report by the Volpe Center, at pp. 12-14, discussed the technology interactions between the engineer and conductor and how the two crew members work jointly to operate the train in a safe and efficient manner. (E.R. 843). Again, the scientific findings in the report were a foundation of the NPRM. (E.R. 843).

While innovation has come, the intervenor railroads do not have clean hands when it comes to any claims that they have been stifled in developing and

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[13] Trip Optimizer and Leader are computerized locomotive programs designed to reduce fuel consumption by controlling braking and throttling.
[14] Buff forces cause cars to bunch together during braking.
[15] In some operations, crews are required to have specific knowledge of territory encompassing 1,000 or more miles over which they operate.

implementing technological improvements. The need for an overarching focus on safety by the FRA is underscored by the railroads' record regarding automation. The industry supports technological improvements only if they are economically beneficial to the industry.

Throughout history of railroading, the railroads have opposed many safety related technology improvements. In recent years, to mention a few, these include positive train control (75 Fed. Reg. 2598, Jan. 15, 2010), electronic controlled pneumatic brakes (Pipeline and Hazardous Materials Safety Administration, Docket No. PHMSA-2017-0102; *Association of American Railroads v. DOT, et. al.,* D. C. Cir. No. 15-1415 (Nov. 23, 2015), and rail safety technology in dark territory (RSAC Dark Territory Working Group Task No. 10-02, September 23, 2010).

Contrary to the FRA's statements, railroads have been able to introduce innovations when they saw fit and have stifled them when they did not. The withdrawal of the NPRM represents an abdication of the FRA's statutory obligation to make safety its "highest priority." 49 U.S.C. § 103(c) (Add.1). Consequently, the withdrawal of the NPRM cannot stand. *State Farm Mutual Auto. Ins. Co.*, *supra,* 463 U.S. at 43.

(5). The Withdrawal of the NPRM Failed to Comply with the Notice and Comment Requirements of the APA.

As stated previously, when engaged in rulemaking, a federal agency must comply with the notice and comment requirements of the APA. 5 U.S.C. § 553(b)-(c) (Add. 5). While an agency's decision in a rulemaking need not be the exact same as contained in the notice, "a final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule… [t]he essential inquiry focuses on *whether interested parties reasonably could have anticipated the final rulemaking from the draft*…." *Natural Resources Defense Council v. U.S. Environmental Protection Agency* ("*NRDC v. EPA*"), 279 F.3d 1180, 1186 (9th Cir. 2002) (emphasis added); *See also, Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (a final rule which departs from a proposed rule must be "in character with the original proposal and a logical outgrowth of the notice and comments"). "A decision made without adequate notice and comment is arbitrary or an abuse of discretion." *Id.* It is the province of this Court to determine the adequacy of the notice and comment opportunity provided by the FRA. *Id.* at 1186.

The NPRM proposed

> regulations establishing minimum requirements for the size of train crew staffs depending on the type of operation. A minimum requirement of two crewmembers is proposed for all railroad operations, with exceptions proposed for those

> operations that FRA believes to no pose significant safety risks to railroad employees, the general public, and the environment by using fewer than two-person crews. This proposed rule would also establish minimum requirements for the roles and responsibilities of the second train crewmembers on a moving train, and promote safe and effective teamwork.

81 Fed. Reg. 13918. The FRA did not indicate that it was considering whether a regulation was necessary; rather it announced that it was considering the contours of a rule mandating a minimum crew size. There was certainly no indication that the FRA might later withdraw the NPRM[16] and affirmatively declare that its action is the equivalent of a rule. Nevertheless, as part of the withdrawal, the agency announced that the withdrawal "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." 84 Fed. Reg. 24741 citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

The FRA's statement regarding the preemptive effect of the withdrawal is such a departure from the NPRM that interested parties reasonably could not have anticipated the final rulemaking from the draft…"[17] *NRDC v. EPA, supra*.

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[16] The Unions do not contend that the FRA does not generally have the right to withdraw the NPRM, but rather that the FRA's actions in doing so failed to comply with the APA.

[17] The NPRM briefly cites to the preemptive provisions of the FRSA, but gives no indication that the FRA would decline to regulate, and that in so doing it would consider such an action to be preemptive of state law.

This is evidenced by the fact that no state voiced concerns that the FRA would withdraw the NPRM and seek to preempt their laws regarding train crew staffing. The lone comment discussing potential preemption came from an engineer with twenty-one years' experience, who suggested that the proposed regulation "should be crafted so as NOT to preempt individual states who seek additional train crew staffing beyond a minimum Two-Persons." FRA-2014-0033-1097 (emphasis in original).

With one comment out of approximately 1,500 regarding preemption only requesting that states be allowed to mandate more than two person crews, there is no question that the interested parties to the NPRM were unaware that the FRA might withdraw the NPRM and declare all state law regarding crew size preempted. Therefore, the FRA's actions fail to comply with the notice and comment requirements of the APA, and the withdrawal should be vacated and remanded for further rulemaking.

II. THE FRA DOES NOT HAVE AUTHORITY TO NEGATIVELY PREEMPT A STATE FROM REGULATING CREW SIZE.

The FRA does not have the authority to make an affirmative determination that the withdrawal of the NPRM preempts state law. It is well-settled that "pre-emption is a matter of law…" *Indus. Truck Ass'n,*

Inc. v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997); *See also, Inland Empire Chapter of Associated General Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996). The FRA's withdrawal of the NPRM cannot be deemed to preempt state law, as such a conclusion is not supported by the plain meaning of the FRSA, its legislative history, or relevant case law.

A. The Plain Meaning of 49 U.S.C. § 20106(a)(2) Disfavors Pre-emption.

The Federal Railway Safety Act contains an explicit preemption provision that is unique to all safety laws. It states:

> (a) National Uniformity of Regulation –
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations and orders related to railroad security 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 or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), 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 or security when the law, regulation, or order –
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a) (Add. 2). "The interpretation of a statutory provision must begin with the plain meaning of its language." *U.S. v. Lillard*, 935 F.3d

827, 833 (9th Cir. 2019) citing *U.S. v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013). To determine the plain meaning, a court must "examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999). "If the language has a plain meaning or is unambiguous, the statutory interpretation inquiry ends there." *CVS Health Corp. v. Vividius, LLC*, 878 F.3d 703, 706 (9th Cir. 2017).

Here, the relevant FRSA provision reads "[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." 49 U.S.C. § 20106(a)(2) (Add.2) (emphasis added). To "prescribe" means to "lay down as a guide or rule of action." *The Merriam-Webster Dictionary*, Seventh Edition 2016. In the withdrawal of the NPRM, the FRA stated that "no regulation of train crew staffing is necessary or appropriate at this time." 84 Fed. Reg. 24737. It is clear that the FRA chose not to "prescribe," or "lay down" any regulation on the subject matter of crew size. Therefore, under the plain meaning of 49 U.S.C. § 20106(a)(2), the states may "adopt or continue in force a law, regulation, or order" governing crew size. Any other interpretation is contrary to Congress's intent as expressed through the text of the FRSA.

B. The Legislative History of the FRSA Supports the Position that Congress Intended for States to Have a Significant Role in Regulating Rail Safety.

If the language of 49 U.S.C. §20106(a)(2) (Add. 2) is ambiguous, a court may "employ other tools, such as legislative history, to construe the meaning of ambiguous terms." *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015). Here, the legislative history of the FRSA supports the interpretation that the FRA's conduct does not amount to prescribing a regulation such that states are forbidden from regulating crew size.

The FRSA provides concurrent authority between the federal government and the states to regulate rail safety. Only where a federal regulation "substantially subsume[s]" the subject matter is a state preempted. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The genesis of the FRSA occurred in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary.[18] Section Four of that bill would have eliminated all state railroad safety laws after two years, with the exception of four separate areas.

> Sec. 4. A State may regulate safety in rail commerce, in a manner which does not conflict with any Federal regulation, in the following areas and no others: (1) Vertical and horizontal clearance requirements; (2) grade crossing protection (including grade separation) which relates to the location of new crossings, closing of existing crossings, the type of crossing protection

[18] *See, Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong, 2d Sess. 1-6, (May-June 1968) (Add. 12-18).

> required or permitted, and rules governing train blocking of crossings; (3) the speed and audible signals of trains while operating within urban and other densely populated areas; and (4) the installation or removal of industrial and spur tracks. In exercising the authority reserved by clause (4), nothing herein shall be interpreted to diminish any authority which the Interstate Commerce Commission may have to require its approval of such actions. Other State laws and regulations affecting safety in rail commerce will continue in full force and effect for a period of two years following the date of enactment of this Act, unless abrogated prior to that time by court order, State legislative or administrative action, or by regulations issued by the Secretary.

Add.15

However, no further action was taken on the bill.

On April 18, 1969, the Secretary created a Task Force on railroad safety comprised of representatives from the FRA, the state regulatory commissions, the railroads, and the railroad unions. With respect to the preemption issue, the report of the Task Force, submitted to the Secretary on June 30, 1969, provided that "[e]xisting State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation."[19]

In the section-by-section analysis of the Administration's bill, which was

[19] Report of the Task Force on Railroad Safety, H. R. No. 91-1194, 91st Cong., 2d Sess. 71-76 (June 15, 1970) (Add. 19-24); *Hearings on S. 1933, S.2915, and S. 3061, Before the Subcommittee on Transportation, of the Senate Committee on Commerce,* 91st Cong., 1st Sess. 244-46, 375 (Oct. 28-29, 1969) ("Senate Hearings") (Add. 26-28, 30).

introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements.[20]

The preemptive language of S. 3061 and H.R. 14417, as introduced, provided:

> SEC 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rule, regulations, or standards covering the subject matter of the state or local laws, regulations, or standards.

Senate Hearings at 331 (Add. 29).

The substance of this language was incorporated into compromise legislation reported by both Senate and House Committees and passed by Congress as S. 1933.

In testifying on S. 1933 when it was under consideration in the House of Representatives, then-Secretary of Transportation John Volpe pointed out the federal-state partnership and areas of permissible state jurisdiction over railroad safety:

> To avoid a lapse in regulation, Federal or State, after a Federal

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[20] Senate Hearings at 361; *Hearings on H.R. 7068, H.R. 14417 and H.R. 14478(and similar bills, S. 1933, Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce,*91st Cong., 2d Sess. 29, 124 (March 17, 1970) ("House Hearings") (Add. 33-34).

> safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute…[21]

Both the text and the legislative history of the FRSA are clear that Congress contemplated a substantial role for states in regulating rail safety. The initial version of the statute that would become the FRSA contemplated the elimination of all state law governing railroad regulation. This was considered and rejected. Instead, Congress adopted the proposition that states would have a role in said regulation, provided the federal government did not affirmatively prescribe regulations. "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989).

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[21] House Hearings at 29 (Add. 33).

C. Case Law Interpreting Preemption Provisions Supports the Proposition that the State Laws Must Stand.

In *Altria Group, Inc. v. Good*, 55 U.S. 70 (2008), the Supreme Court said "[w]hen the text of an express preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Altria Group, Inc.*, 55 U.S. at 77 citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Therefore, to the extent the language of the preemption provision of the FRSA is ambiguous, courts should favor the reading that allows states to regulate, provided it is not explicitly prohibited. This is consistent with the Court's interpretation of 49 U.S.C. § 20106(a)(2), where it has noted that the "[t]he term 'covering' is employed within a provision that displays *considerable solicitude for state law* in that its express preemption clause is both prefaced and succeeded by express savings clauses." *Easterwood*, 507 U.S. at 668 (emphasis added). Quoting from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), the Court explained the effect of the inclusion of an express preemption clause in the statute:

> When Congress has considered the issue of preemption and has indicated in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to the authority," *Malone v White Motor Corp.*, 435 U.S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expression unius*

> *est exclusion alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

Here, the FRA has not issued a "regulation" as is expressly required by the terms of 49 U.S.C. § 20106(b)(2). Indeed, it has done the opposite and refused to prescribe a regulation. The Supreme Court has made clear that "implied 'conflict' pre-emption" is not valid under the FRSA. *Easterwood*, 507 U.S. at 673, n.12.

This Court should not "infer congressional intent to pre-empt state laws" by permitting the FRA to declare state laws pre-empted through its decision not to regulate, as it did in the withdrawal of the NPRM. Without a compelling reason to do so, the intent of Congress to allow states to regulate where the FRA has not done so should not be set aside. Therefore, the FRA's declaration that its decision not to regulate train crew size preempts state law governing train crew size is inconsistent with congressional intent and the Supreme Court's interpretations of 49 U.S.C. § 20106(a)(2). It should be set aside.

D. Other Ninth Circuit Precedent Regarding Preemption Under 49 U.S.C. § 20106(a)(2) is Inconsistent with Subsequent Supreme Court Precedent or is Non-Controlling.

In withdrawing the NPRM, the FRA relied upon this Court's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). That case held that where the FRA has rejected a requirement for regulation, a state is

preempted from requiring it. The FRA characterized this as "negative" or "implicit" preemption, which runs counter to the Supreme Court's findings regarding the necessary standard for preemption under the FRSA. This Court has recognized that precedent "can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent." *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) citing *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002). In view of subsequent Supreme Court decisions, particularly *Easterwood*, we believe that *Marshall* is no longer valid.

Furthermore, *Union Pacific R.R. Co. v. California Public Utilities Com'n*, 346 F.3d 851 (9th Cir. 2003) *("UPRR v. CPUC")*, postdates *Easterwood* and must be addressed here. *UPRR v. CPUC* considered whether a state regulation requiring railroads to comply with their own internal rules governing train configuration which also subjected railroads to civil penalties for failure to do so were "substantially subsumed" by FRA regulations under *Easterwood*'s preemption analysis.[22] In one facet of the case, the railroad argued that the

[22] In its analysis of 49 U.S.C. § 20106(a)(2), the Supreme Court in *Easterwood* found that a federal regulation only "covers" the same subject matter as a state regulation under the FRSA if it "substantially subsumes" the same subject matter. *Easterwood*, 507 U.S. at 664. This is a standard more than that the

FRA's explicit rejection of prior state approval for *training* programs carried over to the state law which required state approval of *operation* rules, where the FRA had only deferred to potential future rulemaking. *Union Pacific R.R. v. California Public Utilities C*ommission, 346 F.3d at 867. The Court rejected this argument, finding that "[t]here simply was no need for the FRA to have considered whether approval of operating rules was appropriate." *Id*. Therefore, no FRA action existed that would "substantially subsume" the state regulation regarding prior approval of operating rules, so that portion of the state statute was thus permitted to stand. In so holding, the Court stated that "[b]ecause the FRA merely deferred making a rule, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap." *Id* at 868. However, the central holding of the case was that there was no FRA regulation to consider, not that a federal agency's decision not to regulate preempted state law. The Court did not engage in any analysis of the FRSA's preemption provision, and did not engage in any post-*Easterwood* analysis of preemption via an agency's rejection of regulations. Therefore, the holding is not controlling here because the issue now squarely before the Court is whether an agency's refusal to issue a regulation regarding train crew size has preemptive

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regulation(s) in question "touch upon" or "relate to" that subject matter. *Id*.

effect.

Further, FRA's reliance on *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (84 Fed. Reg. 24741 n.50) also is misplaced. While *Ray* does hold that state regulations are preempted when agency action "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," (435 U.S. at 178), the holding clearly acknowledges that a central consideration in making a preemption determination is "the policy of the statute." Here, the policy of the FRSA is unequivocal: Congress intended that there be "considerable solicitude for state law." *Easterwood*, *supra*. In the face of this clear policy enunciation, the FRA's reliance on *Ray* is misplaced, and its statement regarding the effect of the withdrawal of the NPRM is not binding and should be rejected.

CONCLUSION

The decision of the FRA to withdraw its consideration of railroad crew size should be vacated and remanded to FRA, instructing FRA to comply with 49 U.S.C. §103(c) in accordance with this Court's opinion.

The FRA's decision regarding negative preemption is erroneous as a matter of law and should be vacated.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P.32(a)(7)(B) because this brief contains 11,178 words, excluding part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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Certificate of Service

I hereby certify that on this 4th day of December, 2019, I electronically filed the foregoing Petitioner's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lawrence M. Mann
Lawrence M. Mann

Statement of Related Cases

There is no pending related case in this Circuit.

ADDENDUM

8 U.S.C. § 2342. Jurisdiction of Court of Appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoy, set aside, suspend (in whole or in part), or to determine the validity of ----

(7) all final agency actions described in section 20014(c) of title 49. Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§103. Federal Railroad Administration

(a) In General.-The Federal Railroad Administration is an administration in the Department of Transportation.

(b) Safety.-To carry out all railroad safety laws of the United States, the Administration is divided on a geographical basis into at least 8 safety offices. The Secretary of Transportation is responsible for all acts taken under those laws and for ensuring that the laws are uniformly administered and enforced among the safety offices.

(c) Safety as Highest Priority.-In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

§20106. Preemption

(a) National Uniformity of Regulation.-(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security 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 or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), 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 or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification Regarding State Law Causes of Action.-(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.-Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§551. Definitions

For the purpose of this subchapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title-

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

§ 218.24 One-person crew.

(a) An engineer working alone as a one-person crew shall not perform duties on, under, or between rolling equipment, without blue signal protection that complies with § 218.27 or § 218.29, unless the duties to be performed are listed in § 218.22(c)(5) and the following protections are provided:

(1) Each locomotive in the locomotive engineer's charge is either:

(i) Coupled to the train or other railroad rolling equipment to be assisted; or

(ii) Stopped a sufficient distance from the train or rolling equipment to ensure a separation of at least 50 feet; and

(2) Before a controlling locomotive is left unattended, the one-member crew shall secure the locomotive as follows:

(i) The throttle is in the IDLE position;

(ii) The generator field switch is in the OFF position;

(iii) The reverser handle is removed (if so equipped);

(iv) The isolation switch is in the ISOLATE position;

(v) The locomotive independent (engine) brake valve is fully applied;

(vi) The hand brake on the controlling locomotive is fully applied (if so equipped); and

(vii) A bright orange engineer's tag (a tag that is a minimum of three by eight inches with the words ASSIGNED LOCOMOTIVE - DO NOT OPERATE) is displayed on the control stand of the controlling locomotive.

(b) When assisting another train or yard crew with the equipment the other crew was assigned to operate, a single engineer must communicate directly, either by radio in compliance with part 220 of this chapter or by oral telecommunication of equivalent integrity, with the crew of the train to be assisted. The crews of both trains must notify each other in advance of all moves to be made by their respective equipment. Prior to attachment or detachment of the assisting locomotive(s), the crew of the train to be assisted must inform the single engineer that the train is secured against movement. The crew of the train to be assisted must not move the train or permit the train to move until authorized by the single engineer.

§ 232.103 - General requirements for all train brake systems.

(n) *Securement of unattended equipment.* Unattended equipment shall be secured in accordance with the following requirements:

(1) A sufficient number of hand brakes, to be not fewer than one, shall be applied to hold the equipment unless an acceptable alternative method of securement is provided pursuant to paragraph (n)(11)(i) of this section. Railroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released.

(2) Except for equipment connected to a source of compressed air (*e.g.,* locomotive or ground air source), or as provided under paragraph (n)(11)(ii) of this section, prior to leaving equipment unattended, the brake pipe shall be reduced to zero at a rate that is no less than a service rate reduction, and the brake pipe vented to atmosphere by leaving the angle cock in the open position on the first unit of the equipment left unattended. A train's air brake shall not be depended upon to hold equipment standing unattended (including a locomotive, a car, or a train whether or not locomotive is attached).

(3) Except for distributed power units, the following requirements apply to unattended locomotives:

(i) All hand brakes shall be fully applied on all locomotives in the lead consist of an unattended train.

(ii) All hand brakes shall be fully applied on all locomotives in an unattended locomotive consist outside of a yard.

(iii) At a minimum, the hand brake shall be fully applied on the lead locomotive in an unattended locomotive consist within a yard.

(iv) A railroad shall develop, adopt, and comply with procedures for securing any unattended locomotive required to have a hand brake applied pursuant to paragraph (n)(3)(i) through (iii) of this section when the locomotive is not equipped with an operative hand brake.

(4) A railroad shall adopt and comply with a process or procedures to verify that the applied hand brakes will sufficiently hold an unattended locomotive consist. A railroad shall also adopt and comply with instructions to address throttle position, status of the reverse lever, position of the generator field switch, status of the independent brakes, position of the isolation switch, and position of the automatic brake valve on all unattended locomotives. The procedures and

instruction required in this paragraph shall take into account winter weather conditions as they relate to throttle position and reverser handle.

(5) Any hand brakes applied to hold unattended equipment shall not be released until it is known that the air brake system is properly charged.

(6)(i) The requirements in paragraph (n)(7) through (8) of this section apply to any freight train or standing freight car or cars that contain:

(A) Any loaded tank car containing a material poisonous by inhalation as defined in § 171.8 of this title, including anhydrous ammonia (UN 1005) and ammonia solutions (UN 3318); or

(B) Twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of a hazardous material listed in paragraph (n)(6)(i)(A) of this section, or any Division 2.1 (flammable gas), Class 3 (flammable or combustible liquid), Division 1.1 or 1.2 (explosive), or a hazardous substance listed at § 173.31(f)(2) of this title.

(ii) For the purposes of this paragraph, a tank car containing a residue of a hazardous material as defined in § 171.8 of this title is not considered a loaded car.

(7)(i) No equipment described in paragraph (n)(6) of this section shall be left unattended on a main track or siding (except when that main track or siding runs through, or is directly adjacent to a yard) until the railroad has adopted and is complying with a plan identifying specific locations or circumstances when the equipment may be left unattended. The plan shall contain sufficient safety justification for determining when equipment may be left unattended. The railroad must notify FRA when the railroad develops and has in place a plan, or modifies an existing plan, under this provision prior to operating pursuant to the plan. The plan shall be made available to FRA upon request. FRA reserves the right to require modifications to any plan should it determine the plan is not sufficient.

(ii) Except as provided in paragraph (n)(8)(iii) of this section, any freight train described in paragraph (n)(6) of this section that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard shall comply with the requirements contained in paragraphs (n)(8)(i) and (n)(8)(ii) of this section.

(8)(i) Where a freight train or standing freight car or cars as described in paragraph (n)(6) of this section is left unattended on a main track or siding outside of a yard, and not directly adjacent to a yard, an employee responsible

for securing the equipment shall verify with another person qualified to make the determination that the equipment is secured in accordance with the railroad's processes and procedures.

(ii) The controlling locomotive cab of a freight train described in paragraph (n)(6) of this section shall be locked on locomotives capable of being locked. If the controlling cab is not capable of being locked, the reverser on the controlling locomotive shall be removed from the control stand and placed in a secured location.

(iii) A locomotive that is left unattended on a main track or siding that runs through, or is directly adjacent to, a yard is excepted from the requirements in (n)(8)(ii) of this section where the locomotive is not equipped with an operative lock and the locomotive has a reverser that cannot be removed from its control stand or has a reverser that is necessary for cold weather operations.

(9) Each railroad shall implement operating rules and practices requiring the job briefing of securement for any activity that will impact or require the securement of any unattended equipment in the course of the work being performed.

(10) Each railroad shall adopt and comply with procedures to ensure that, as soon as safely practicable, a qualified employee verifies the proper securement of any unattended equipment when the railroad has knowledge that a non-railroad emergency responder has been on, under, or between the equipment.

(11) A railroad may adopt and then must comply with alternative securement procedures to do the following:

(i) In lieu of applying hand brakes as required under paragraph (n) of this section, properly maintain and use mechanical securement devices, within their design criteria and as intended within a classification yard or on a repair track.

(ii) In lieu of compliance with the associated requirement in paragraph (n)(2) of this section - and in lieu of applying hand brakes as required under paragraph (n) of this section - isolate the brake pipe of standing equipment from atmosphere if it:

(A) Initiates an emergency brake application on the equipment;

(B) Closes the angle cock; and

(C) Operates the locomotive or otherwise proceeds directly to the opposite end of the equipment for the sole purpose to either open the angle cock to vent to atmosphere or provide an air source.

(iii) Upon completion of the procedure described in paragraph (n)(11)(ii) of this section, the securement requirements of paragraph (n) of this section shall apply.

FRA Operating Practices Compliance Manual

16-13

Leaving the controls of the "operation" of a locomotive An individual who is at the controls of a moving locomotive is in a position to control the locomotive if the need arises. It does not mean there has to be actual manipulation of a control. Therefore, it is a violation of the rule for a non-certified person to "sit in the seat" and "watch" or "sound the horn" while the engineer is temporarily away, even if no controls are touched. This same rationale applies if nobody is at the controls (for example, if an engineer leaves the seat vacant and leaves the control compartment for any reason while the locomotive is in motion and there is no other certified locomotive engineer to take the engineer's place). FRA considers this a violation. As another example, an engineer may not vacate the seat to use the toilet in the cab nose. This does not prohibit an engineer from exiting the engineer's chair in order to move around the control compartment, but it does require that the engineer remain personally in charge of the operation of the locomotive at all times.

§ 236.1006 Equipping locomotives operating in PTC territory.

(d) ***Onboard PTC apparatus.***

(1) The onboard PTC apparatus shall be so arranged that each member of the crew assigned to perform duties in the locomotive can receive the same PTC information displayed in the same manner and execute any functions necessary to that crew member's duties. The locomotive engineer shall not be required to perform functions related to the PTC system while the train is moving that have the potential to distract the locomotive engineer from performance of other safety-critical duties.

49 U.S.C. §20103

(d) NONEMERGENCY WAIVERS.—
The Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety. The Secretary shall make public the reasons for granting the waiver.

FEDERAL STANDARDS FOR RAILROAD SAFETY

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

ON

H.R. 16980

A BILL TO AUTHORIZE THE SECRETARY OF TRANSPORTATION TO ESTABLISH SAFETY STANDARDS, RULES, AND REGULATIONS FOR RAILROAD EQUIPMENT, TRACKAGE, FACILITIES, AND OPERATIONS, AND FOR OTHER PURPOSES

(And Related Bills)

MAY 21, 22, 23, 27, 28, JUNE 3, 4, AND 5, 1968

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FEDERAL STANDARDS FOR RAILROAD SAFETY

TUESDAY, MAY 21, 1968

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Harley O. Staggers (chairman) presiding.

The CHAIRMAN. The committee will come to order.

This morning the Committee on Interstate and Foreign Commerce is commencing hearings on H.R. 16980, a bill drafted by the Secretary of Transportation which would establish safety standards, rules, and regulations for railroad equipment and facilities, and railroad operations.

This committee has had a longstanding interest in the field of safety of transportation operations, an interest that has been enhanced in recent years with the changing technologies and the changing requirements of today's modern transportation systems.

In 1958, this committee engaged in a thorough revision of the Federal Aviation Act with especial attention to the safety of aviation.

In 1965, the committee considered and the Congress enacted a bill providing for safety in oil pipeline operations.

In 1966, the committee considered and the Congress enacted a new and sweeping statute relating to the creation of safety standards for motor vehicles, both passenger cars and trucks.

The committee has just reported out a bill having to do with the safety standards for natural gas pipeline facilities.

This morning we come to railroad safety where for many years the Federal interest has been concerned only in a very limited way.

In the last few years there has been a steady increase in the number of railroad accidents. Five years ago it was said that part of this increase was attributable to a change in the statistical reporting requirements. But by 2 years ago when the report of the Bureau of Railroad Safety and Service of the Interstate Commerce Commission for fiscal year 1965 was issued, there could be no doubt that the increased number of railroad accidents was not a statistical fact but a most serious and grave situation.

When that report was issued, I wrote to President Daniel Loomis of the Association of American Railroads and to the then Chairman Bush of the Interstate Commerce Commission, asking of them what was causing this dismal picture and what could be done to improve the situation. This correspondence I will introduce as part of this record. (See pp. 392–406.)

Later in 1966 a subcommittee of the Committee on Government Operations issued a report on the operations of the Bureau of Railroad Safety and made a number of recommendations regarding the

improvement of the operations of that Bureau which it hoped might result in reducing these train accidents.

Subsequent to that time the Bureau of Railroad Safety was transferred to the Department of Transportation. That Department has necessarily become involved in doing something to improve safety for the record seems even worse now than it was 2 years ago.

It is my hope that in the course of the hearings on this legislation we may receive some encouragement as to what can be done about providing greater protection for passengers, for property, and for employees.

At this point in the record we shall insert the bill under consideration and such agency reports thereon that are available.

(The bill, H.R. 16980, and departmental reports thereon, follow:)

[H.R. 16980, 90th Cong., 2d sess.]

A BILL To authorize the Secretary of Transportation to establish safety standards, rules, and regulations for railroad equipment, trackage, facilities, and operations, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Railroad Safety Act of 1968".

DEFINITIONS

SEC. 2. As used in this Act, unless the context otherwise requires—

(1) "Board" means the National Transportation Safety Board.

(2) "Chairman" means the Chairman of the National Transportation Safety Board.

(3) "Department" means the Department of Transportation.

(4) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Railroad" means any contrivance now known or hereafter invented, used or designed for operating on, along or through a track, monorail, tube, or other guideway.

(6) "Rail commerce" means any operation by railroad in or affecting interstate or foreign commerce or the transportation of mail by railroad.

(7) "Rail carrier" means any person who engages in rail commerce.

(8) "Rail facilities and equipment" include, without limitation, trackage, roadbed and guideways, and any facility, building, property, locomotive, rolling stock, device, equipment, or appliance used or designated for use in rail commerce, and any part or appurtenance of any of the foregoing.

(9) "Secretary" means the Secretary of Transportation.

FEDERAL SAFETY REGULATION

SEC. 3. (a) The Secretary is empowered and it shall be his duty to promote safety in rail commerce by prescribing, and revising from time to time—

(1) minimum standards governing the use, design, materials, workmanship, installation, construction, and performance of rail facilities and equipment;

(2) rules, regulations, and minimum standards governing the use, inspection, testing, maintenance, servicing, repair, and overhaul of rail facilities and equipment, including frequency and manner thereof and the equipment and facilities required therefor; and

(3) rules, regulations, or minimum standards, governing qualifications of employees, and practices, methods, and procedures of rail carriers as the Secretary may find necessary to provide adequately for safety in rail commerce.

(b) Within ninety days following the date of enactment of this Act, the Secretary shall prescribe as interim Federal rail safety regulations the specific safety requirements prescribed in or under the statutes repealed by section 13. The interim regulations shall remain in effect for two years or until modified, terminated, superseded, set aside or repealed by the Secretary whichever is earlier. The provisions of the Administrative Procedure Act shall not apply to the establishment of interim regulations. In construing any interim regulation, all

orders, determinations, delegations, rules, regulations, standards, requirements, permits, and privileges which (1) have been issued, made, granted, or allowed to become effective under the statute from which that standard is derived and (2) are in effect on the date of enactment of this Act, shall apply and continue to be applicable according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary in the exercise of authority vested in him by this Act, by any court of competent jurisdiction, or by operation of law.

(c) The Secretary may grant such exemptions from the requirements of any regulation prescribed under this Act as he considers to be in the public interest.

STATE REGULATION AND ENFORCEMENT

SEC. 4. A State may regulate safety in rail commerce, in a manner which does not conflict with any Federal regulation, in the following areas and no others: (1) vertical and horizontal clearance requirements; (2) grade crossing protection (including grade separation) which relates to the location of new crossings, closing of existing crossings, the type of crossing protection required or permitted, and rules governing train blocking of crossings; (3) the speed and audible signals of trains while operating within urban and other densely populated areas; and (4) the installation or removal of industrial and spur tracks. In exercising the authority reserved by clause (4), nothing herein shall be interpreted to diminish any authority which the Interstate Commerce Commission may have to require its approval of such actions. Other State laws and regulations affecting safety in rail commerce will continue in full force and effect for a period of two years following the date of enactment of this Act, unless abrogated prior to that time by court order, State legislative or administrative action, or by regulations issued by the Secretary.

PROHIBITIONS

SEC. 5. (a) No person shall—

(1) fail to comply with any applicable standard, rule, or regulation established or continued in effect pursuant to this Act; or

(2) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 9.

(b) Compliance with any standard, rule, or regulation established under this Act does not exempt any person from any liabiilty which would otherwise accrue, except to the extent that the action creating the liability was specifically compelled by any such standard, rule, or regulation.

PENALTIES

SEC. 6. (a) Any person who violates any provision of section 5 shall be subject to a civil penalty of not less than $250 nor more than $1,000 for each violation. If the violation is a continuing one, each day of such violation shall constitute a separate offense. Any person who knowingly and willfully violates any such provision shall be fined not more than $10,000 or imprisoned not more than one year, or both. Imposition of any punishment under this section shall be in lieu of whatever civil penalty might otherwise apply.

(b) The civil penalties provided in this section may be compromised by the Secretary. The amount of any penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(c) Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person engaged in the performance of inspection or investigatory duties under this Act, or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever, in the commission of any such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Whoever kills any other person engaged in the performance of inspection or investigatory duties under this Act, or on account of the performance of such duties, shall be punished as provided under section 1111 and 1112 of title 18, United States Code.

INJUNCTIVE RELIEF

SEC. 7. (a) The United States district courts shall have jurisdiction, subject to the provisions of rule 65 (a) and (b) of the Federal Rules of Civil Procedure,

to restrain violations of this Act (including the restraint of operations in rail commerce) or to enforce standards, rules, or regulations established hereunder, upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowing and willful violation, shall afford him reasonable opportunity to achieve compliance. However, the failure to give such notice and afford such opportunity shall not preclude the granting of such relief.

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section, which violation also constitutes a violation of this Act, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of rule 42 (b) of the Federal Rules of Criminal Procedure.

(c) Actions under this Act may be brought in the district wherein any act or transaction constituting the violation occurred, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

(d) In any action brought under this Act, subpenas for witnesses who are required to attend a United States district court may run into any other district.

DESIGNATION OF AGENT FOR SERVICE

SEC. 8. It shall be the duty of every rail carrier to designate in writing an agent upon whom service of all administrative and judicial processes, notices, orders, decisions and requirements may be made for and on behalf of said rail carrier and to file such designation with the Secretary, which designation may from time to time be changed by like writing, similarly filed. Service of all administrative and judicial processes, notices, orders, decisions and requirements may be made upon said rail carrier by service upon such designated agent at his office or usual place of residence with like effect as if made personally upon said rail carrier, and in default of such designation of such agent, service of process, notice, order, decision or requirement in any proceeding before the Secretary or in any judicial proceeding for enforcement of this Act or any rule, regulation, or standard prescribed pursuant to this Act may be made by posting such process, notice, order, decision, or requirement in the Office of the Secretary.

RECORDS AND REPORTS

SEC. 9. (a) Every rail carrier shall establish and maintain such records, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such carrier has acted or is acting in compliance with this Act and rules, regulations, and standards issued thereunder, and to otherwise carry out his responsibilities under this Act. Each such rail carrier shall, upon request of an officer, employee, or agent authorized by the Secretary, permit such officer, employee, or agent to inspect and copy books, papers, records, and documents relevant to determining whether such person has acted or is acting in compliance with this Act and orders, rules, and regulations issued thereunder.

(b) To carry out the Board's and the Secretary's responsibilities under this Act, officers, employees, or agents authorized by the Secretary or Chairman, upon display of proper credentials, are authorized at all times to enter upon, inspect and examine rail facilities and equipment.

(c) All information reported to or otherwise obtained by the Secretary or the Board or their representatives pursuant to subsection (a) containing or relating to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers, employees, or agents concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this section shall authorize the withholding of information by the Secretary, Chairman, or any officer or employee under their control, from the duly authorized committees of the Congress.

GENERAL POWERS

SEC. 10. (a) The Secretary is authorized to conduct, or contract with individuals, States, or nonprofit institutions for the conduct of, research, development, testing, evaluation, and training as necessary to carry out the provisions of this Act.

(b) The Secretary may, subject to such regulations, supervision, and review as he may prescribe, delegate to any qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting the examination, inspection, and testing necessary to carry out his responsibilities under this Act.

(c) The Secretary is authorized to advise, assist, and cooperate with other Federal departments and agencies and State and other interested public and private agencies and persons, in the planning and development of (1) Federal rail safety standards, rules, and regulations, and (2) methods for inspecting and testing to determine compliance with Federal rail safety standards, rules, and regulations.

(d) The Secretary is empowered to perform such acts, to conduct such investigations, to issue such subpenas, to take such depositions, to issue and amend such orders, and to make and amend such special rules and regulations as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under this Act.

ACCIDENT INVESTIGATION

SEC. 11. (a) The Secretary is authorized to conduct investigations of any accident occurring in rail commerce, and may invite participation by State agencies.

(b) The Board shall have the authority to determine the cause or probable cause and report the facts, conditions, and circumstances relating to accidents investigated under subsection (a) above, but may delegate such authority to any office or official of the Board or to any officer or official of the Department, with the approval of the Secretary, as it may determine appropriate.

(c) No part of any report required of a rail carrier under this Act, or any report made to the Secretary by an employee of the Department, or any report of the Secretary or the Board, relating to any accident or the investigation thereof, shall be admitted as evidence or be used in any suit or action for damages growing out of any matter mentioned in such report or reports. Employees of the Board or Department who have engaged in the investigation of a railroad accident shall not give expert or opinion testimony concerning such accidents in any such suit or action. Factual testimony of Board or Department personnel on matters observed in accident investigation shall be required only where the Chairman or the Secretary initially, or the court before which such suit or action is pending, determines that the evidence is not available by other means. Unless otherwise ordered by the court, such factual testimony shall be taken only by deposition upon oral examination or written interrogatories, pursuant to regulations issued by the Secretary or the Board.

USE OF STATE SERVICES

SEC. 12. The Secretary is authorized to enter into agreements with appropriate State agencies for the provision of inspection and surveillance services as necessary to effective enforcement of Federal rail safety regulations. State services may be procured on such terms and conditions as the Secretary may prescribe and may be reimbursed from any appropriations available for expenditure under this Act. The Secretary may delegate to an officer of such State, and authorize successive redelegation of, any authority under this Act necessary to the conduct of an effective enforcement program.

STATUTES REPEALED; SAVING PROVISION

SEC. 13. (a) The Safety Appliance Acts including the Power or Train Brakes Safety Appliance Act of 1968 (45 U.S.C. 1–16), the Ash Pan Act (45 U.S.C. 17–21), the Locomotive Inspection Act (45 U.S.C. 22–34), the Accident Reports Act (45 U.S.C. 38–43), and the Signal Inspection Act (49 U.S.C. 26) are repealed as of the effective date of the interim regulations required to be promulgated by section 3(b) of this Act.

(b) No suit, action, or other proceeding and no cause of action under the statutes repealed by this Act shall abate by reason of enactment of this Act.

APPROPRIATION AUTHORIZATION

SEC. 14. There are hereby authorized to be appropriated $5,000,000 for the fiscal year ending June 30, 1969, and $6,000,000 each for the fiscal year ending June 30, 1970, and the fiscal year ending June 30, 1971.

SEPARABILITY

SEC. 15. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., May 28, 1968.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for comments on H.R. 16980, a bill "To authorize the Secretary of Transportation to establish safety standards, rules, and regulations for railroad equipment, trackage, facilities, and operations, and for other purposes." This bill would authorize the Secretary to promulgate safety standards for locomotives, rolling stock, trackage and roadbed, equipment, appliances, and facilities used in railroad operations in or affecting interstate or foreign commerce.

In his testimony before your committee on this bill, the Federal Railroad Administrator noted the difficulty of accurately determining at this time either the total staff or the level of Federal support necessary to carry out the work which H.R. 16980 would authorize. Because of this, the Administrator recommended the deletion of the specific limits on authorizations for appropriations now contained in section 14 of the bill.

The Bureau of the Budget concurs in the views of the Railroad Administrator and favors enactment of H.R. 16980, which would be in accord with the program of the President.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

The CHAIRMAN. Our first witness this morning is Mr. A. Scheffer Lang, Administrator of the Federal Railroad Administration.

Mr. Lang, we are pleased to have you here this morning in what, I think, is your first appearance before this committee.

I cannot refrain, however, from expressing some regret that the Secretary of Transportation, Mr. Boyd, is unable to be here this morning to open our discussion. I certainly wish that he could participate in our deliberations for I do not wish him to be in the disturbed position which he says that he is in, to do "everything within his legal power" to undo the work of this committee.

I have the greatest difficulty in comprehending the approach which your Department seems to take as to the tripartite form of government which our Founding Fathers established for this country.

Under this, it is my impression that it is the Congress which makes policy decisions and that it is the executive branch which carries them out.

Unfortunately, it seems to be our repeated experience as was evident when some labor legislation was pending before this committee some months ago that the Department feels that it is up to the Department to dictate rather than suggest what should be done and that if we have a view which differs in any respect, the Department then rushes into print in questionable rhetoric.

91st Congress, 2d Session - - - - - House Report No. 91-1194

RAILROAD SAFETY AND HAZARDOUS MATERIALS CONTROL

REPORT

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

ON

S. 1933

TO PROVIDE FOR FEDERAL RAILROAD SAFETY, HAZARDOUS MATERIALS CONTROL AND FOR OTHER PURPOSES

JUNE 15, 1970

JUNE 15, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

37-006 WASHINGTON : 1970

REPORT OF THE TASK FORCE ON RAILROAD SAFETY

DEPARTMENT OF TRANSPORTATION,
FEDERAL RAILROAD ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., June 30, 1969.

HON. JOHN A. VOLPE,
Secretary of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: I am pleased to transmit the report and recommendations of the task force on railroad safety, which you established on April 18, 1969. As chairman of the task force, I wish to commend to you the outstanding spirit of cooperation and dedication on the part of all the members which made this report possible.

Sincerely,

R. N. WHITMAN.

At the request of the Secretary of Transportation, we, the representatives of the railroad industry, railroad labor organizations, and State regulatory commissions, met as a task force to examine railroad safety and to advise the Secretary. The task force began meeting May 1, 1969, and concludes with this report. There has been a free exchange of information and open discussion. Data supplied by the Federal Railroad Administration and its Bureau of Railroad Safety were used for purposes of analysis of problem areas. The agreed upon time limit did not permit additional outside research.

REVIEW OF THE PROBLEM

Railroad operations involve inherent dangers. Movement of large, heavy equipment at high speeds characterizes the industry. Daily, some 2 billion ton-miles of freight of all types move on the Nation's railroads. Hundreds of railroad yards receive, classify, and dispatch the 1.8 million freight car fleet on an around-the-clock, 7-day-a-week schedule. About 600,000 passengers daily commute to work and 200,000 travel intercity by rail; 630,000 railroad workers average 3.5 million man-hours of work per day.

It is logical to assume that operations of such magnitude will generate accidents. Thus, standards, procedures, and rules are necessary to provide for safety. The bulk of existing railroad safety practices were developed over the years by the industry itself. For many years they met the safety requirements and produced the present safety record.

Grade-crossing accidents rank as the major cause of fatalities in railroad operations. They account for 65 percent of the fatalities

resulting from all types of railroad accidents, and rank second only to aviation mishaps in severity. Annually, about 4,000 accidents produce approximately 1,600 deaths, which is also a matter of major public concern.

The yearly totals of crossing accidents, and accident casualties, in the 1920–67 period, can be related very closely to the combined amount of rail and highway miles traveled and to the effects of major crossing safety improvement programs. The trend in both accidents and casualties up to 1958 was generally downward. The situation has been reversed since 1958, however, with a disturbing general trend upward in both categories. Only 20 percent of the total 225,000 grade crossings are protected with automatic devices.

Grade-crossing safety receives attention from highway authorities as well as railroad organizations. Under existing law, Federal-aid highway funds may be used on grade crossings on the Federal-aid highway system. This includes interstate, primary, and secondary roads which together account for slightly more than 20 percent of the total number of crossings. However, Federal funds may not be used to reduce hazards at railroad crossings of city streets and on many State supplementary highways and local roads which are not on the Federal-aid system and which represent the remaining 80 percent of the total. A certain number of safety improvements are being made currently by the carriers and State and local agencies on crossings not on the Federal-aid system. There is an imperative need for an expanded public program to cover these crossings in order to reduce immediately this extremely high fatality rate.

The most obvious trend in any recent examination of railroad safety is the large and steady increase in the number of train accidents. The 8,028 train accidents recorded in 1968 represents a significant increase, by any yardstock, over the 4,148 recorded in 1961. Derailments account for two-thirds of the total.

General causes of train accidents are almost evenly divided among human error, defects in or failure of equipment, and defects in or improper maintenance of track and roadbed. Derailments are largely attributable to track and equipment problems while collisions are mostly caused by human error.

Employee safety in railroad operations is of continuing concern. In 1968, there were 146 employees killed and 17,993 injured. Employees involved in rail operations and track and roadbed maintenance are more exposed to the inherent hazards of the industry and, therefore, represent a major portion of the employee casualty figure. Contributing factors to the employee casualty rate include inadequate training programs, human errors, equipment defects, poor housekeeping, and noncompliance with safety and operating rules.

The need for transporting ever-increasing quantities and varieties of hazardous materials—chemicals, gases, explosives, and fuel—creates the possibility of serious accidents that have become a matter of major public concern. Thus, causal factors affecting train accidents—track, equipment, human factors, and train-motor vehicle collisions—take on added significance when dangerous commodities are transported.

The modern industrial economy is dependent upon hazardous materials that are shipped throughout the country. Consequently, the entire transportation network, particularly the railroads upon which a large share of chemicals, explosives, fuels, and the like travel, must have the capacity to transport them safely. A top priority should be the complete evaluation of all factors related to the transportation of these commodities. Particularly, container standards for hazardous materials must take into account impact and stress requirements commensurate with today's longer, heavier, and faster trains.

The motoring public is part of the safety problem at the grade crossing. Drivers must be educated to accept the meaning of warning devices and be required to heed them. Compliance must be enforced. Because this is a matter of public safety, public programs must be immediately initiated and properly funded to provide the motorist with positive, uniform, and adequate information about the hazard at the crossing. More emphatically, firm and prompt consideration must be given to better use of existing funds and the making available of additional public funds to meet the increasing costs of crossing protection and grade separation, and to increase the number of grade crossings with automatic protection. There should be a long-range public commitment to eliminate this unnecessary and tragic loss of life.

Other improvements in railroad safety must necessarily involve substantial commitment of public and private resources. For government, a major commitment should be toward research; for industry, upgrading and maintenance of plant should be foremost. Management and labor should cooperate to reduce human error. The economic restraints on the railroad industry make it essential that public policy be directed toward the development of financial incentives to support rail safety.

SUMMARY CONCLUSIONS

Recognizing that there have been longstanding differences among the three groups represented on the task force, the parties sought to emphasize areas of agreement rather than disagreement plus their mutuality of interest in railroad safety. The consensus view of the task force is as follows:

Railroad safety is a problem, national in scope, of concern to Federal and State Governments, as well as labor and management and which has been accented in recent years by the increase in the number of train accidents, particularly derailments.

Fatalities resulting from railroad accidents occur mostly at grade crossings. Trespassers rank second in the number of fatalities, and employees third.

Transportation of hazardous materials—chemicals, gases, explosives, and fuels—is an economic necessity. Involvement of these materials in train accidents creates a new dimension of public concern over railroad safety.

Reported causes of train accidents are almost evenly divided among defects in or failure of track and roadbed, defects in or failure of equipment, and human error.

Existing Federal and State rail safety regulations do not, in most instances, provide standards, for track, roadbed, equipment, employee training, and qualifications, or rules governing safe railroad operations.

RAILROAD SAFETY REGULATIONS

Government involvement in railroad safety regulation came early. In 1893, Congress passed the first Safety Appliance Act. Then and in later years various Federal statutes granted varying degrees of Federal authority over locomotives, signaling systems, hours of service limitations on certain employees, airbrakes, couplers, handbrakes, grab irons, running boards, sill steps, and draft gears on rolling stock, and accident reporting. The Federal authority to regulate shipment of hazardous materials is applied largely to the packaging of these commodities, although some rules governing handling in transit have been adopted.

Federal statutes do not cover the trucks, wheels, and axles of railroad cars nor their design, construction, or maintenance. Bridges and tunnels are not subject to Federal regulations and no Federal authority governs track and roadbed. There is no general authority to promulgate standards for employee qualifications, physical requirements, and training, nor to prescribe uniform railroad operating rules.

Almost all States have entered the field of rail safety regulation. However, there is no uniform pattern of involvement. Some are quite active in general rail safety matters, but most consideration is on grade-crossing safety regulation. Certain States feel they are adequately equipped by statute or existing regulations to deal with any rail safety problem that may arise.

Rules and regulations issued under present Federal and State authority cover only the specific areas reached by the legislative acts. The limitation imposed on the regulatory process by specific, rather than general scope, legislative authority results in only minimal public agency involvement in some problem areas of safety.

PRIORITIES

Railroad safety is wide in scope and requires a more comprehensive national approach. Of first priority is treatment of total rail safety by relating all its various facets to definite goals. This demands a coordinated approach by industry, labor, State, and Federal Governments.

To continue as the major transportation mode, railroads will require more innovation, advanced equipment, and higher speed capabilities. Achievement of these advanced capabilities calls for parallel advancement in safe, dependable, operation. Therefore, major safety research is essential to guarantee that tomorrow's railroads will not only be more efficient but more safe.

Railroad operating personnel will continue to be the group most involved with rail safety, or the lack of it. New equipment and higher speeds will place great demands on employee skills and railroad operating practices. It is recognized that employee training is inadequate today, and could become more critical as new technology reshapes the industry. It seems imperative that formal, intensive training programs be given high priority along with human factors research. At the same time, railroad rules and practices must be kept responsive to change so that a high level of safety may be maintained.

6. Formal employee training programs be expanded by railroad management, with the cooperation of labor and government, for the purpose of insuring compliance with safe operating practices and reducing the impact of human error in the accident experience.

7. An expanded, concerted program of grade-crossing safety be undertaken utilizing established Federal and State agencies and advisory groups to set uniform procedures and standards. Early attention must be given to the development of improved crossing protection at lower cost plus greater emphasis placed on driver education and traffic enforcement. In addition to more extensive use of existing Federal funds now allocable to present highway safety programs, there must be new sources of funding to finance an expanded grade-crossing program.

8. The Federal Railroad Administration should revise, in consultation with railroad management, labor, and State regulatory commissions, its rules for reporting of accidents. The aim should be to make the data more current, more uniform, and to identify causes more accurately.

9. The Secretary of Transportation in consultation with and assistance of the task force and appropriate congressional committees should draft proposed legislation to implement these recommendations.

R. N. Whitman, Chairman, Federal Railroad Administrator; George E. Leighty, subchairman, chairman, Railway Labor Executives' Association; Al H. Chesser, vice president, national legislative representative, United Transportation Union; Donald S. Beattie, executive secretary, Railway Labor Executives' Association; William E. Skutt, assistant grand chief engineer, Brotherhood of Locomotive Engineers; Charles J. Fain, subchairman, commissioner, Missouri Public Service Commission; Willis F. Ward, chairman, Michigan Public Service Commission; John P. Vukasin, Jr., commissioner, California Public Utilities Commission; Thomas M. Goodfellow, subchairman, president, Association of American Railroads; William D. Lamprecht, vice president, Systems Operations, Southern Pacific Co.; James R. Thorne, vice president, Operating Department, Seaboard Coast Line Railroad; C. V. Cowan, vice president, Operating Group, Baltimore & Ohio Chesapeake & Ohio Railroad Co.

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FEDERAL RAILROAD SAFETY ACT OF 1969

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST SESSION

ON

S. 1933, S. 2915, and S. 3061

FEDERAL RAILROAD SAFETY ACT OF 1969

MAY 20, 21, JULY 14, OCTOBER 28 AND 29, 1969

Serial No. 91–32

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examined the issues that have made railroad safety a matter of public concern and agreed on a list of eight recommendations. The report and recommendations were presented to the Secretary on June 30, for his consideration and released publicly at that time.

In general the task force found that railroad safety is a problem, national in scope, of concern to Federal and State governments, as well as labor and management, and which has been accented in recent years by the increase in the number of train accidents, particularly derailments.

The task force further recognized that solutions to the problem, short of broad Federal regulation, may not adequately meet the situation. Accordingly, the three groups on the task force unanimously agreed that regulation and research are necessary parts of an overall program to meet the rail safety problem.

Their specific recommendations were, and I will quote these:

1. That the Secretary of Transportation, through the Federal Railroad Administration, have authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety, through such notices, hearing and review procedures as will protect the rights of all interested parties.

2. In order to strengthen the administration of Federal rail safety regulations, there should be established a National Railroad Safety Advisory Committee to advise, consult with, and make recommendations to the Secretary on matters relating to the activities and functions of the Department in the field of railroad safety. The Committee would be chaired by the Federal Railroad Administrator with the remaining members appointed by the Secretary to represent equally the state regulatory commissions, railroad management and labor. The Secretary would submit to the Committee proposed safety standards and amendments and afford it a reasonable opportunity to prepare a report on the technical feasibility, reasonableness, and practicability of each such proposal prior to adoption. The Committee may propose safety standards to the Secretary for his consideration.

Senator HARTKE. Mr. Whitman, let me interrupt you at that point.

In regard to recommendation No. 1, which provides for the authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety, in substance, the bill which is under consideration, does the same thing, isn't that right?

This is sort of an endorsement of that general principle.

Mr. WHITMAN. We think that S. 1933 Senator Hartke, is certainly in the right direction. It has made a greater awareness of this problem that we probably didn't have before, and with some reservations, we think that the bill is good. It is in the right direction. We think it might go a little farther.

Senator HARTKE. I understand that. We also want to have a little bit of difference between the administration and legislative branch.

Now, I want to come back to part 2 here, the creation of a National Railroad Safety Advisory Committee.

There is not, in this recommendation, a provision for public members on this advisory committee.

Mr. WHITMAN. Yes, the State regulatory commissions are the public members. They represent the States.

Senator HARTKE. They represent the States; yes, I know, but in most of the advisory committees which have been established, for example, under the Pipeline Safety Act, it provided for public members to be appointed to represent the public interest as contrasted to the Federal, State, local, management, or labor representatives.

I would hope when you go back with the task force for drafting additional legislation that you would bring that point to their attention.

I just completed, in Washington, a review of the Pipeline Act itself, and in that case I was disappointed that the public members which had been selected in many instances seemed to have some conflict of interest that is associated with the industry itself, and therefore, might be biased.

And what we are looking for is general safety for the public. These bills are not being passed except for the purpose of providing safety for the public.

One other thing, is it your idea that the advisory committee must review safety regulations and give approval prior to their issuance by the Department?

Mr. WHITMAN. No; I don't believe that was our intention, although this certainly has not been made final yet.

Senator HARTKE. Yes; I understand.

Mr. WHITMAN. Their role would be one of review, and to make sure that each segment of the industry, both labor and management, and the public interest were protected——

Senator HARTKE. Generally speaking, I am in favor of it, it works extremely well with Social Security.

All right, you may proceed.

Mr. WHITMAN (reading).

3. Existing State rail safety statutes and regulations remain in force until and unless pre-empted by Federal regulation. Administration of the program should be through a Federal-State partnership, including State certification similar to the certification principles set forth in the Federal Natural Gas Pipeline Safety Act of 1968.

Senator HARTKE. On that point I recall that in our review of the Natural Gas Pipeline Safety Act of 1968, it seemed evident that if the law had not provided for State participation nothing at all would have happened because the Federal Government was incapable of action.

Mr. WHITMAN. Thank you.

4. The Advisory Committee be directed to study the present delegation of authority to the Association of American Railroads' Bureau of Explosives in certain areas of the Transportation of Explosives and Other Dangerous Articles Act.

5. A research program be initiated by Government and industry into railroad safety technology, which should be funded immediately for an initial three year period, over and above existing research programs.

6. Formal employee training programs be expanded by railroad management, with the cooperation of labor and government, for the purpose of insuring compliance with safe operating practices and reducing the impact of human error in the accident experience.

7. An expanded, concerted program of grade crossing safety be undertaken utilizing established Federal and State agencies and advisory groups to set uniform procedures and standards. Early attention must be given to the development of improved crossing protection at lower cost plus greater emphasis placed on driver education and traffic enforcement. In addition to more extensive use of existing Federal funds now allocable to present highway safety programs, there must be new sources of funding to finance an expanded grade crossing program.

8. The Federal Railroad Administration should revise, in consultation with railroad management, labor, and state regulatory commissions, its rules for reporting of accidents. The aim should be to make the data more current, more uniform and to identify causes more accurately.

Now, these are the eight recommendations of the task force.

In my opinion, these recommendations are strong guidelines from the railroad industry, its employees, and State regulators for the Federal role in promoting railroad safety.

Of great significance is the fact that the recommendations represent the unanimous views of management, labor, and the States. We have here a landmark development in labor-management cooperation. The report sets the stage for a new era of cooperation in building a safer railroad system. We hope to build from this base of mutual interest and commitment to rail safety, a meaningful program that will get the job done.

The task force had one final recommendation and that was for the secretary to draft legislation to implement the report. We are holding our first meeting on that subject July 16.

The many aspects of the railroad safety problem have been discussed at some length by me and other witnesses at the first hearing in Washington. I do not plan to go into them today, but I am impressed that there are two areas of railroad safety where the public becomes particularly involved. These are the involvement of hazardous materials in train accidents and grade crossing safety.

Railroad tracks crisscross the Nation and virtually every area is affected. For a moment, I would like to discuss the two public-involved segments of rail safety in reference to their impact on Indiana.

Earlier, I supplied the committee a list of some 39 communities, which, since 1964, had to have some of their residents evaculated when a train accident caused a public hazard. Of these 39, three were located in Indiana according to our records.

On November 9, 1965, 15 cars of a Pennsylvania Railroad freight train derailed. One of the cars was a tank car which caught fire during the wrecking operations. Residents of a house near the track had to be evacuated.

At Dunreith, Ind., on January 1, 1968, 33 cars of a Pennsylvania Railroad train derailed including five cars containing explosive or dangerous chemicals. A fire and explosion resulted and 236 persons were evacuated. Extensive property damage also resulted.

This year on February 25, a Penn Central derailment at Pershing, Ind. (East Germantown), involved 63 cars, 17 of which carried hazardous materials. One tank car burned and another was punctured. About 400 persons were evacuated.

In addition, there was another train accident at Rensselaer——

Senator HARTKE. Rennselaer is the home of a colleague and also the home of a former U.S. Congressman, Charles S. Halleck.

Mr. WHITMAN. I am sorry, I should have known that.

[Laughter.]

Mr. WHITMAN (continuing). Rensselaer, Ind., March 1, 1969, which involved hazardous cargoes but which did not require evacuation of any citizens.

Movement of chemicals, gases, and explosives in interstate commerce is a necessary fact of life. The Nation's economy and quite often public health and welfare depend on the availability of these commodities for production, fertilizers, and water purification. By all estimates the

afforded all interested parties. Hearings shall be conducted in accordance with the provisions of section 553 of title 5 of the United States Code. Rules, regulations, and standards may be amended or repealed under the Secretary's own motion or on the petition of an interested party and shall be so amended or repealed when in the public interest and consistent with railroad safety.

(c) The Secretary may grant such exemptions from the requirements of any of the rules, regulations, or standards prescribed under this Act or incorporated herein by subsection (a) of section 7 as he finds to be in the public interest and consistent with railroad safety.

(d) Any final agency action taken under this section is subject to judicial review as provided in chapter 7 of title 5 of the United States Code.

HAZARDOUS MATERIALS

SEC. 3. (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents to provide technical and other information and advice to the law enforcement and firefighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4. (a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with, and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the State commissions referred to in section 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards, and amendment or repeals thereof and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATIONS

SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, rules, regulations, or standards.

STATE PARTICIPATION

SEC. 6. (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, the Secretary shall encourage maximum cooperation between the Federal Government and the various State governments in carrying out this Act.

33-417—69——22

(c) The Secretary may grant such exceptions from the requirements of any of the rules, regulations, or standards prescribed under this Act or incorporated herein by subsection (a) of section 7 as he finds to be in the public interest and consistent with railroad safety. Notice that an exemption is under consideration shall be given all interested parties. Exemptions shall be granted without hearing unless an interested party shall demand a hearing in which case a hearing in accordance with § 553 of Title 5 of the United States Code shall be held. Such hearing shall be held in advance of action on any proposed exemption unless the Secretary shall find that an emergency exists and that the circumstances make advance hearing inappropriate in which case such hearings shall be held as soon as practicable thereafter to determine whether such exemption should be continued.

HAZARDOUS MATERIALS

SEC. 3 (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents and incidents to provide technical and other information and advice to the law enforcement and fire fighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(4) Make rules and regulations with respect to the packaging, handling, and all other aspects of safety in the transportation of hazardous materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of Title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4(a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the state commissions referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards and amendments or repeals thereof and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATIONS

SEC. 5 Existing state or local laws, rules, regulations or standards relating to railroad safety, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the state or local laws, rules, regulations or standards.

STATE PARTICIPATION

SEC. 6 (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, there shall be maximum cooperation between the Federal Government and the various state governments. To that end the following provisions shall apply:

RAILROAD SAFETY AND HAZARDOUS MATERIALS CONTROL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

ON

H.R. 7068, H.R. 14417, and H.R. 14478

BILLS PROVIDING FOR FEDERAL RAILROAD SAFETY AND ALSO TO AUTHORIZE THE SECRETARY OF TRANSPORTATION TO PRESCRIBE RULES, REGULATIONS, AND PERFORMANCE AND OTHER STANDARDS AS HE FINDS NECESSARY FOR ALL AREAS OF RAILROAD SAFETY AND TO CONDUCT RAILROAD SAFETY RESEARCH

(and similar bills)

S. 1933

A BILL TO PROVIDE FOR FEDERAL RAILROAD SAFETY, HAZARDOUS MATERIALS CONTROL AND FOR OTHER PURPOSES

MARCH 17, 19, 22, AND 23, 1970

Serial No. 91–51

Printed for the use of the Committee on Interstate and Foreign Commerce

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HAZARDOUS MATERIALS

SEC. 3. (a) The Secretary shall:

(1) Establish such facilities and technical staff as are necessary to maintain within the Federal Government the capability to evaluate the hazards connected with and surrounding the various hazardous materials being shipped.

(2) Maintain a central reporting system for hazardous materials accidents to provide technical and other information and advice to the law enforcement and fire fighting personnel of communities and to carriers and shippers for meeting emergencies connected with the transportation of hazardous materials.

(3) Conduct an accelerated review of all aspects of hazardous materials transportation to determine and recommend appropriate steps which can be taken immediately to provide greater control over the safe movement of such materials.

(b) The authority granted the Secretary by this Act shall be in addition to the authority granted by sections 831 to 835, inclusive, of title 18 of the United States Code.

RAILROAD SAFETY ADVISORY COMMITTEE

SEC. 4. (a) The Secretary shall establish a Railroad Safety Advisory Committee to advise, consult with and make recommendations to the Department concerning railroad safety. The Committee shall consist of the Federal Railroad Administrator, who shall be chairman, and eight members appointed by the Secretary as follows: two public members and two members each from railroad management, railroad labor organizations, and the national organization of the State commissions referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, as amended. Members shall be appointed by the Secretary for a term not to exceed three years. Members of the Committee, other than those regularly employed by the Federal Government, may be compensated in accordance with the provisions of section 9 of the Department of Transportation Act (80 Stat. 931, 944). Service under this section shall not render such appointed members of the Committee employees or officials of the United States for any purpose.

(b) The Secretary shall prior to publication submit to the Committee all proposed rules, regulations, and standards, and amendments or repeals thereof, and afford such Committee a reasonable opportunity, not to exceed sixty days unless extended by the Secretary, to submit a report on the necessity, technical feasibility, reasonableness, and practicability of such proposal. Each report by the Committee shall be included in the record of any proceeding that may be held on such proposal.

STATE REGULATION

SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, rules, regulations, or standards.

STATE PARTICIPATION

SEC. 6. (a) It is the policy of the Congress that in order to promote the safety of common carriers by railroad in the most practicable and economic manner, the Secretary shall encourage maximum cooperation between the Federal Government and the various State governments in carrying out this Act.

(b) State participation shall be by agreement entered into with the State by the Secretary. The Secretary may, upon the request of the State, authorize it to provide all or any part of the inspection services and related programs necessary or desirable to obtain compliance with rules, regulations, and standards prescribed by the Secretary under this Act where he finds that such State participation will assist in achieving the purpose of this Act and that the State has the capacity to carry out the agreement under the guidance of the Secretary. The Secretary shall require annual reports from participating States containing such information as he may require to determine if such agreements will be continued.

(c) In the event of State participation, the Secretary may provide for reimbursement of all or a part of the funds to be expended by the State on a fair and equitable basis under rules and regulations promulgated by the Secretary under this Act.

In surveying the situation shortly after taking office as Secretary, several things became apparent to me. While it was clear that the Federal Government had not been active enough, it was equally clear that the Federal Government acting alone could not solve the problem. We needed the cooperation of the other principal parties involved; namely, railroad management, railroad labor, and the State regulatory agencies. Since the Department had been unable to obtain support for the bill it submitted to the last session of the 90th Congress, I felt a new approach was imperative. Consequently, in April of last year, I invited representatives from railroad management and labor and the State regulatory commissions to participate in a task force chaired by the Federal Railroad Administrator. Its mission was to identify the problems of rail safety and recommend appropriate courses of action.

The task force submitted its report on June 30, 1969, and recommended:

That the Secretary of Transportation have authority to promulgate regulations in all areas of railroad safety.

That a national Railroad Safety Advisory Committee be established to advise the Secretary.

That present State and local rail safety laws and regulations remain in force until and unless preempted by Federal action.

That a research program into railroad safety technology be initiated by Government and industry.

That an expanded and concerted program on grade-crossing safety be undertaken.

Based on the task force's work, the administration submitted a legislative proposal to the Congress on October 15, 1969. This proposal was introduced in the House as H.R. 14417 and H.R. 14419, and in the Senate as S. 3061. Hearings were held by the Senate Commerce Committee in October of 1969. The bill which the Senate passed on December 20, 1969, and sent to the House (S. 1933) embodies some desirable features from the administration bill, and some entirely new provisions. I would like to compare S. 1933 with the administration's proposal and indicate the provisions which are of concern to us. I will also submit separately for consideration by the committee several technical amendments to S. 1933.

The basic areas of difference between S. 1933 and the administration's proposal are (1) the scope of Federal regulatory authority; (2) the time schedule by which regulations must be promulgated; (3) the scope of State regulatory authority; (4) the nature and extent of State participation; (5) the extent of the repeal of existing statutes; (6) the use of safety accident reports in damage suits; and (7) the establishment of an advisory committee. I will discuss each of these in order.

First, the scope of Federal regulatory authority: The scope of regulatory authority under S. 1933 varies significantly from the administration proposal with respect to the railroads to be regulated. The Senate report accompanying S. 1933 states that "the term 'railroads' is intended to encompass all those means of rail transportation as are commonly included within the term." So described, the bill would cover private railroads and purely intrastate railroads such as logging lines and steel and plant railroads.

my far right, Mr. Henry Wakeland, Director of our Bureau of Surface Transportation Safety; on my immediate right, Mr. Thomas Styles, Chief of our Railroad and Pipeline Safety Division; and to my left, Mr. David Zimmermann, who is our Deputy General Counsel.

The Safety Board welcomes this opportunity to testify in support of legislation which would authorize the Secretary of Transportation to prescribe rules, regulations, and performances and other standards for all areas of railroad safety and to conduct railroad safety research.

The Board in early 1968 conducted a general review of railroad accident data for train accidents covering the period of 1961–67. Our study revealed a progressively worsening trend in rates of occurrences, deaths, and damage. Especially disturbing was the fact that many freight train accidents in recent years involved hazardous or toxic materials, resulting in fires, or the escape of poisonous or hazardous materials followed by mass evacuation of populated areas. We indicated our concern to the Department of Transportation on April 3, 1968.

In our letter we noted that total train accidents, excluding train service and nontrain accidents had increased dramatically between 1961 and 1967. Derailments were the single most important cause of train accidents, accounting for 65 percent of all train accidents in 1966, and over 80 percent of the damage to track and equipment. Collisions were the next most important cause, 23 percent of 1966 train accidents.

We urged the Department of Transportation to study the problem and initiate either new or augmented action to improve the railroad safety picture. We stated that we believed the primary responsibility for improved railroad safety should rest upon railroad management and labor but that if it should appear to the Department that management and labor could not or were unable to meet the challenge promptly and arrest the worsening railroad accident picture, consideration should be given to supporting or proposing Federal legislation which would provide the Department with additional safety regulatory authority.

During 1968 and 1969 little has occurred to cause the Board to believe that the railroad safety problem has improved or that the challenge of effecting specific solutions in hazard areas has been met. The updating of railroad accident statistics indicates that total train accidents, excluding train service and non-train accidents, had risen to 8,028 in 1968, and an estimated 8,529 in 1969.

The Board's investigations and determinations of cause of railroad accidents has confirmed what the statistics tell us and indicate a relationship between accidents and the absence of the regulatory authority in the Department of Transportation. The Safety Board's initial involvement in railroad safety began when it participated in the investigation of a fatal head-on collision of two New York Central Railroad freight trains which occurred in New York City in May of 1967 taking the lives of six employees.

We do have some pictures, Mr. Chairman and members, that have been distributed, and pictures 1 and 2 are in reference to the New York City accident.

(For pictures referred to see pp 130–140.)

Mr. REED. In July 1967, the Board held a hearing in this case, and on January 26, 1968, issued a report. In our report we identified

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March 23, 2021

TO: Senate Finance Committee

RE: Support for HB-492

CURRICULUM VITAE OF LAWRENCE M. MANN
ATTORNEY at LAW

Lawrence M. Mann, born Wilmington, North Carolina, January 30, 1940; admitted to bar, in 1967, District of Columbia. Education: University of North Carolina (B.A., 1962); Georgetown University (L.L.B., 1966). Special Assistant to United States Senator Vance Hartke, 1964-1965. Member, Legal Staff, U.S. House of Representatives Post Office and Civil Service Committee, 1965-1966. Counsel, Commission on Political Activity of Government Personnel, 1967. Member: The District of Columbia Bar; Bar Association of the District of Columbia.

I am a member in good standing of the Bars of the following Courts:

Court	Date Admitted
U.S. Supreme Court	03/27/72
U.S. District Court for the District of Columbia	01/20/67
U.S. Court of Appeals for the District of Columbia Circuit	02/16/67
U.S. Court of Appeals for the 11th Circuit	10/01/81
U.S. Court of Appeals for the 10th Circuit	11/06/78
U.S. Court of Appeals for the 9th Circuit	07/08/75
U.S. Court of Appeals for the 8th Circuit	02/13/75
U.S. Court of Appeals for the 7th Circuit	02/13/67
U.S. Court of Appeals for the 6th Circuit	03/27/90
U.S. Court of Appeals for the 5th Circuit	12/21/81
U.S. Court of Appeals for the 4th Circuit	03/14/75
U.S. Court of Appeals for the 3rd Circuit	06/05/87
U.S. Court of Appeals for the 2nd Circuit	10/25/88
U.S. Court of Federal Claims	02/11/70

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First, I would like to inform the Committee concerning my background. I was a principal draftsman of the Federal Railroad Safety Act of 1970. This law contains the statutory authority of states to regulate railroad safety and preemption. I am attaching my *curriculum vitae*. I have dealt with preemption issues raised by railroads for many years. I will discuss some of the issues that railroads have raised previously to oppose state regulation of two person crews.

A. The Authority Of A State To Require Two Person Crews Has Been Decided.

The Seventh Circuit Court of Appeals in a case entitled *Burlington Northern and Santa Fe Railway Co. v. Doyle*, 186 F. 3d 446 (7th Cir. 1999) held that the state of Wisconsin's requirement for a two person crew was valid and was not preempted by federal law. The court said that a state could require two persons on a train, but could not mandate that the crew members be either a certified engineer or a qualified trainman. It is valid simply to legislate that two persons are required to operate a train. The court determined that the federal regulations cover the actual qualifications of each employee.

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February 13, 2019

TO: Senate Finance Committee

RE: Support for SB-252

B. The Proposed Law Covering Two Person Crews is Not Preempted by 45 U.S.C. §797j.

The purpose for which 45 U.S.C. 797j was enacted, to return Conrail to private ownership, and thus the factual underpinnings of the statute no longer exist. The law has been rendered obsolete, is unconstitutionally vague and lacks any rational basis to withstand constitutional scrutiny.

In the Rail Safety Improvement Act of 2008, Congress required the Federal Railroad Administration to study the current relevance of that section. In 2011 FRA issued its report and concluded:

> The statutory purpose for which Section 711[Section 711 of the Regional Railroad Reorganization Act of 1973] was originally enacted has clearly been satisfied. Conrail has been successfully returned to the private sector and no longer requires a special statutory exemption from state laws requiring it to employ any specific number of persons to perform any particular task, function or operation.

FRA further stated "The primacy of Federal law over state law in this area existed in order to serve a narrow and specifically defined purpose: the privatization of Conrail. That purpose has been met and it is appropriate to return the primacy of state law."

Obsolete laws, such as 45 U.S.C. 797j, are without force. "[S]tatutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure." *State ex rel. S. M. B. v. D.A.P.*, 284 S.E.2d 912, 915 (W.Va.1981)

(citing *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978); *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978); *See also, State v. Stephens*, 591 P.2d 827, 832 (Wash. App.1979) *rev'd. on other grounds*, 607 P.2d 304 (1980) ("The statute is obsolete insofar as several of the 'inherently dangerous misdemeanors' listed ... no longer exist...."); *Brown v. Merlo*, 506 P.2d 212 (Cal. App.1973); *State v. Daley*, 287 N.E.2d 552, 555 (Ind. App. 1972) ("The assumption of the Insurance Statute is that sovereign immunity obtains. With that doctrine now abolished in this class of cases, the Insurance Statute is no longer a shield to limit the State's liability."); *Krause v. Baltimore & O. R. Co.*, 39 A.2d 795, 797 (1944) ("The absence of crossing gates under the circumstances in this case is not evidence of negligence, to which could be attributed this accident. We think the city law requiring crossing gates at this point is obsolete....").

A party has "no legally cognizable interest in the constitutional validity of an obsolete statute."*Davidson v. Comm. for Gail Schoettler, Inc.*,24 P.3d 621, 623 (Colo.2001)(quoting *Citizens for Responsible Gov't State Political Action Comm.*,236 F.3d 1174, 1182 (10th Cir.2000)).

Additionally, given that Conrail has been returned to private ownership, 45 U.S.C. 797j is also unconstitutionally vague, as it is unclear to what entity the statute now applies. *See, Fellowship Baptist Church v. Benton,* 620 F. Supp. 308,

318 (D.C.Iowa, 1985),*aff'd. in part,*815 F.2d 485, 495–496 (8th Cir.1987) (Term "equivalent instruction" unconstitutionally vague, but remanded for further consideration in light of newly adopted standards by the state); *Ellis v. O'Hara,*612 F. Supp. 379 (D.C. Mo. 1985), (Reversed and remanded to consider mootness in light of legislative action);*Wisconsin v. Popanz,* 332 N.W.2d 750 (Wisc.1983), (Term "private school" vague where regulations and statute do not define, and each district administrator compiled a list by his own individual standard); *Minnesota v. Newstrom,*371 N.W.2d 525 (Minn.1985), (Phrase "essentially equivalent" held vague).

Although "the void for vagueness doctrine arose as an aspect of Fourteenth Amendment due process in the context of criminal statutes, ... [t]he doctrine has been extended to civil cases."*San Filippo v. Bongiovanni,* 961 F.2d 1125, 1135 (3d Cir.1992). Vague laws offend the assumption that "man is free to steer between lawful and unlawful conduct," and thus "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."*Grayned v. Rockford,*408 U.S. 104, 108 (1972); S*ee also, Connally v. General Constr. Co.,*269 U.S. 385, 391(1926)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *Bradley v.*

Pittsburgh Bd. of Educ.,910 F.2d 1172, 1177 (3d Cir.1990). A second justification for vagueness challenges is to prevent arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" *Grayned v. Rockford, supra,*408 U.S. at 108-109; *Kolender v. Lawson,*461 U.S. 352, 358 (1983).

Here, the statute at issue is no longer clear as to what is prohibited, given that Conrail has been returned to private ownership, and that statute would impermissibly delegate to judges and juries what the statute now means in light of Conrail becoming a private entity.

Thirdly, 45 U.S.C. 797j now unconstitutionally violates the Equal Protection Clause because it lacks any rational basis for is existence. The purpose of the statute, to return Conrail to private ownership, has now been satisfied; removing any rational basis that once existed for the statute's enactment. *Vacco v. Quill,* 521 U.S. 793 (1997) , where the Court noted that the Equal Protection Clause embodies a general rule that States must treat like cases alike, and that legislation must, at a minimum, bear a rational relationship to a legitimate state interest.; *Romer v. Evans,* 517 U.S. 620, 631(1996). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the

link between classification and objective gives substance to the Equal Protection Clause."

C. Views of the Maryland Attorney General Regarding Crews on Locomotives.

The Maryland Attorney General's office has written two letters to the legislature regarding the validity of a two person crew bill, one dated March 6, 2015 to the Honorable Cory v. McCray, and another dated February 10, 2016 to Honorable Brian J. Feldman. In both letters, it was concluded that such legislation is not preempted. The March, 2015 letter concludes "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 i understand was requested by the railroads' representatives, it stated "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.

D. Argument By Railroads that the Federal Railroad Administration Adequately Enforces Railroad Safety.

A frequent argument by railroads throughout the country opposing two person crew legislation is that safety is adequately protected by the Federal

Railroad Administration. Nothing could be further from the truth. The U.S. General Accountability Office issued a report in December 2013, after studying FRA enforcement, entitled "Rail Safety: Improved Human Capital Planning Could Address Emerging Safety Oversight Challenges." It pointed out on pg. 9 "By FRA's own estimation, its inspectors have the ability to inspect less than 1 percent of the federally regulated railroad system." Moreover, additionally, there is very little incentive for railroads to comply with FRA regulations because every proposed fine is compromised pursuant to the Federal Claims Collection Act.

E. Preemption Under The Federal Railroad Safety Act.

1. Section 20106 Of The Federal Railroad Safety Act Explicitly Provides For State Regulation Of Rail Safety.

Despite the Federal Railroad Safety Act's general language vesting regulatory authority of rail safety matters in the Secretary of Transportation, section 20106 of the FRSA explicitly authorizes state regulation of railroad safety. A state may regulate railroad safety until such time as the Federal Railroad Administration has adopted a regulation covering the same specific subject matter. Even if the federal government has regulated the subject matter, the state may regulate safety if it is necessary to eliminate a local safety hazard.

The statute 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 any 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 incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See, Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Burlington Northern R.R. Co. v. Montana*, 880 F.2d 1104 (9th Cir. 1989).

After pointing out the policy of uniformity, Congress expressed a countervailing policy in granting states rail safety powers where there were no regulations covering a specific subject matter, and where local hazards necessitated more stringent requirements. 49 U.S.C. § 20106. The language of FRSA, its legislative history, and the court decisions interpreting it, make it clear that Congress did not intend to displace state rail safety regulations absent the specific exercise of federal regulatory authority. *See, Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).

2. The Legislative History Of The FRSA Evidences Congressional Intent That States Regulate Railroad Safety.

The railroads contend that the state law should be struck down by the court because Congress intended nationally uniform rail safety rules. The railroads ignore the specific language of the statute and the legislative history regarding state participation in the regulation of rail safety.

In testifying on the proposed rail safety legislation, then Secretary of Transportation John Volpe discussed Senate Bill 1933, as passed by the Senate,

pointing out the areas of permissible state jurisdiction over railroad safety. The relevant portion of Secretary Volpe's testimony states:

> To avoid a lapse in regulation, federal or state, after a federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the federal statute.... (underlining added).

Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d. Sess. 29 (1968).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in the same section, 49 U.S.C. § 20106, was a countervailing concern to avoid gaps in rail safety coverage. Furthermore, the general policy outlined in the first sentence of this section should yield to the more specific provisions contained in the remainder of that section.

The Congressional reports reiterated the authority of states to regulate railroad safety. The Senate Report explained:

> The committee recognizes the state concern for railroad safety in some areas. Accordingly, this section [105] preserves from Federal preemption two types of state power. First, the states may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All state requirements will remain in effect until preempted by federal action concerning the same subject matter. (underlining added).

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969) (hereinafter "Senate Report").

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the state would no longer have authority to establish state wide standards with respect to rail safety.

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess., 19 (1970), (hereinafter "House Report") (underlining added).[1]/

Harley Staggers, then Chairman of the House Committee on Interstate and Foreign Commerce, stated that "I would like to emphasize that the states will have an effective role under this legislation." 116 Cong. Rec. H27612 (daily ed. Aug. 6, 1970). Another member emphasized the importance of the states role:

> Here again, the State is actively intertwined as a working partner with the federal government. It will be the State, the unit closest to the ground, which conducts the investigation, which submits the recommendations, which finds the problem before disaster strikes.
>
> Contrary to some speculation that this version of the Railroad Safety Act cuts across state jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas of safety not covered by federal regulations; secondly, the State can deal directly with hazards of essentially local nature; and thirdly, the State can keep the Department of Transportation with their feet to the fire....

---

[1]/ Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 49 U.S.C. § 20106.

116 Cong. Rec. H26613 (daily ed. August 6, 1970) (Statement of Rep. Pickle) (underlining added).

As Congress has explicitly stated, the FRSA prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, are intended to preempt state railroad safety regulations. Only where the FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Wisconsin v. Wisconsin Central Transportation Corp.*, 546 N.W.2d 206, 210 (Wis. 1996) (stating "[t]he use of ...'covering' in the preemption clause suggests that the Congressional purpose was to allow states to enact regulations relating to railroad safety up to the point that federal legislation enacted a provision which specifically covered the same material." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *CSX Transportation, Inc. v. Easterwood, supra.*

The initial inquiry in determining whether the Wisconsin law is preempted by federal law depends upon whether the federal government has prescribed a regulation covering the same subject matter of the State requirement.

3. Pursuant To *CSX Transportation, Inc.. Easterwood*, State Laws Are Not Preempted Unless The Federal Government Has Adopted Regulations Which Substantially Subsume The Subject Matter Of The State Law.

With respect to preemption generally, the Supreme Court has observed that:

> Pre-emption fundamentally is a question of Congressional intent ... and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

Congress adopted the FRSA in response to growing concerns about threats to public safety, and did not intend to reduce public protection through this action by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law...." *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 184 (7th Cir. 1995). As another court said:

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but [the act creating the FRSA express preemption statute] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.

Civil City of South Bend, Ind. v. Consolidated Rail Corp., 880 F. Supp. 595, 600 (N.D. Ind. 1995).

The Supreme Court observed, "we have long presumed that Congress does not cavalierly pre-empt state-law...." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress clearly provided a continuing role for state regulation of railroad safety to avoid the creation of regulatory gaps. In addition, the Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, " Malone v. White Motor Corp., 435 U.S. at 505, "there is no need to infer congressional

intent to pre-empt state laws from the substantive provisions" of the legislation.

In *Easterwood*, the Supreme Court interpreted for the first time the preemptive scope of 49 U.S.C. § 20106, defining the circumstances under which the Secretary is deemed to have issued regulations "covering the subject matter" of state regulations, and thus preempting the state regulation of the said subject matter. The Court began its preemption analysis citing the long held notion that, "[i]n the interest of avoiding unintended encroachment on the authority of the States, ... a court interpreting a federal statute ... will be reluctant to find pre-emption." *Id.* 507 U.S. at 663-64 (underlining added). Similarly, the Court observed that preemption of state law under the FRSA is subject to a "relatively stringent standard," and "presumption against preemption." *Id.* at 668 (underlining added). The *Easterwood* decision has been interpreted to mean that "a presumption against preemption is the appropriate point from which to begin [a preemption] analysis." *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 90 (Ohio 1994); *Southern Pacific Transportation, Co. v. Public Utility Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993) (stating "In evaluating a federal law's preemptive effect, however, we proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act 'unless that [is] the clear and manifest purpose of Congress'").

The Court, in *Easterwood*, held that a subject matter is not preempted when the Secretary has issued regulations which merely "touch upon" or "relate to" that subject matter. *Id.* 507 U.S. at 664. The Court stated that Congress' use of the word "covering" in § 20106 "indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Id. (underlining added). The Court recognized the state interest and right to regulate

railroad safety, noting that "[t]he term 'covering' is ... employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665 (underlining added).

Easterwood clearly rejects the position advanced by railroads that if federal regulations cover the same safety concerns, then the state law would be preempted. To determine preemption, a court must not conduct an inquiry into the purpose or effect of state regulations, or whether the federal rule addresses the same safety concerns. *See, Southern Pacific Transportation Co. v. Public Utility Comm'n of Oregon, supra,* 9 F.3d at 812. The Supreme Court, interpreting the FRSA preemption provisions, stated that,

> Section 434 [now recodified at 49 U.S.C. § 20106] does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter....

Easterwood, 507 U.S. at 675.

The Supreme Court's analysis of the facts in the *Easterwood* case is instructive. The Plaintiff in that wrongful death action alleged that the railroad company was negligent under state common law in two respects: for failing to maintain an adequate warning device at a highway crossing and for operating the train at excessive speeds. The railroad company defended on the ground that various FRSA regulations preempted both state law claims. The Court found that the Plaintiff's excessive speed claim was preempted because the FRA had adopted regulations specifically setting the maximum allowable operating speeds for such trains and that this "should be understood as covering the subject matter of train speed." *Id.*, 507 U.S. at 675. However, because federal regulations requiring

certain warning devices at some highway crossings[2/] did not apply to the specific crossing at issue, the Court found that the Plaintiff's second claim was not preempted. Id. at 670-73. The Court thus required evidence of very specific "clear and manifest" federal regulation on the same subject matter covered by state law before the state law was preempted.

The Supreme Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. *Miamisburg, supra,* 626 N.E.2d at 93.

Similarly in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of Oregon, supra,* the court noted that:

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

9 F.3d at 812.

The court continued:

> ...in light of the restrictive term "cover" and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.

Id., 9 F. 3d at 813.

Before finding that a state law is preempted, other courts have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law since *Easterwood. See, e.g., Miller v. Chicago & North*

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[2] / Namely, those in which the installation of warning devices were funded by the federal government. C.f. Norfolk Southern Railway Co. v. Shanklin, 2000 U.S. LEXIS 2519 (Apr. 17, 2000).

Western Transp. Co., 925 F. Supp. 583, 589-90 (N.D. Ill. 1996) (state claim based on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject); *Thiele, supra,*68 F.3d at 183-84 (no preemption of state law "adequacy of warning claims" prior to time that warning devices "explicitly prescribed" by federal regulations are actually installed); *Miamisburg, supra,* 626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment). *Compare, Peters v. Union Pacific R.R. Co.*, 80 F.3d 257, 261 (8th Cir. 1996) (FRA promulgation of, "specific, detailed scheme" of regulations concerning revocation of locomotive engineers certification preempts state law conversion action to recover revoked certificate).

The *Easterwood* decision is in keeping with an earlier decision of the United States District Court for the Northern District of California in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd. per curiam*, 820 F.2d 1111 (9th Cir. 1987). That court held that in order for there to be federal "subject matter" preemption of state regulations, the federal regulation must address the same safety concern as addressed by the state regulation. Judge William Schwarzer explained:

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was 'to promote safety in all areas of railroad operations.' H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted.

Id. at 1225 (underlining added).

See also, National Association of Regulatory Utility Comm'rs v. Coleman, 542 F.2d 11 (3d. Cir. 1976), where the Third Circuit held that only the precise subject matter of the FRA regulations (monthly accident reporting requirements) was beyond a state's regulatory authority. However, FRA regulation of monthly accident reporting requirements would not preclude states from requiring immediate notification of rail accidents, nor from requiring railroads to furnish copies of monthly FRA reports to the state. *Id.* at 15.

E. The Federal Railroad Safety Act Governs Whether A State Safety Law Is Preempted, Not The Interstate Commerce Commission Termination Act.

Another favorite argument of railroads is that the Interstate Commerce Commission Termination Act preempts state regulation here. In 1995 Congress enacted the ICCTA to limit the economic regulation of various modes of transportation, and created the Surface Transportation Board to administer the Act. The STB has exclusive jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities..." 49 U.S.C. § 10501(b). The ICCTA confers upon the STB "all regulatory power over the economic affairs and non-safety operating practices of railroads." *Petition of Paducah & Louisville Ry., Inc.*, FRA Docket No. 1999-6138, at 6-7 (Jan. 13, 2000); See also, S. Rep. No. 104-176, at 5-6 (1995). There exists absolutely nothing in the ICCTA nor its legislative history to suggest that the STB could supplant the Federal Railroad Safety Act provisions. The relevant statute for

any safety preemption analysis is the FRSA, not the ICCTA. While the STB may consider safety along with other issues under its jurisdiction, it cannot adopt safety rules or standards. That is the duty of the Secretary of Transportation, or the states if the DOT has not prescribed a regulation

covering the subject matter involved.

It is significant that both the STB and the Federal Railroad Administration have rejected the railroads argument that the ICCTA preempts state laws regarding railroad safety. Each agency filed *amicus* briefs in *Tyrrell v. Norfolk Southern Ry.*, No. 99-306 (6th Cir.), arguing that the FRSA , not the ICCTA, is the appropriate statute to determine state safety preemption. As noted also in FRA Docket No. SIP-1, Notice No. 1, STB Ex Parte No. 574 (Joint FRA/STB Notice of Proposed Rulemaking, 63 Fed. Reg. 72,225-26 (Dec. 31, 1998) :

> [u]nder Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad. Administrator....FRA has authority to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries ...[and by] actively participating in STB rail proceedings, and monitoring railroad operations during the implementation of STB-approved transactions. The Board is also responsible for promoting a safe rail transportation system.

The brief of the STB in the above case states that the lower court's ruling in favor of the railroad would:

Undermine the primary authority of the Federal Railroad Administration (FRA) (or states where the FRA has no Federal standards) to regulate railroad safety under FRSA.
(STB Brief at p.3).

The bottom line is that the railroads argument regarding ICCTA preemption of state railroad safety laws has no merit.

F. The Railway Labor Act Does Not Preempt State Rail Safety Laws.

The Federal Railroad Safety Act has been in existence since 1970, and to my knowledge, no court has ever ruled that collective bargaining agreements or any railroads rights under the Railway Labor Act preempted a state safety law. This, of course, is the only rational conclusion that could be drawn from the FRSA. Otherwise, the railroads and the unions could potentially negotiate away critical safety protections, which would undermine the protections afforded by the FRSA.

CONCLUSION

Maryland is not preempted from adopting legislation covering two person crews on freight locomotives.

Respectfully Submitted,
Lawrence M. Mann

HB492_CleanWaterAction_EmilyRanson_favorable.pdf
Uploaded by: Ranson, Emily
Position: FAV

CLEAN WATER ACTION
MARYLAND

Railroad Company - Movement of Freight - Required Crew

Senate Finance Committee

March 23, 2021

Dear Chairwoman Kelley and Members of the Committee,

Clean Water Action thanks Delegate Stein for continuing to champion two man crew legislation and supports its passage. We have a keen interest in making sure that trains in Maryland have adequate crew available to not only respond to disasters, but also to prevent them.

April marks the three year anniversary of Baltimore City's Crude Oil Terminal Prohibition, banning the construction of new and the expansion of existing crude oil terminals in Baltimore. It marked the culmination of a multiyear campaign that we entered into at the request of communities in South Baltimore who were concerned about the increasing shipments of highly volatile crude oil. The land use ordinance, the first in an East Coast city, prevents the expansion of crude oil terminals, but concerns remain about the safety of existing shipments through the City, and throughout the State.

We've seen the consequences of one-person crews in the transport of crude oil. On July 6, 2013, a freight train carrying 72 tank cars of crude oil derailed in the small town of Lac-Megantic, Quebec. Many of the town's residents were gathered at a local bar for a birthday party when the runaway train barreled into downtown. When the train derailed at a sharp curve in the tracks, its highly flammable cargo exploded and wrought devastation, killing 47 people, orphaning 27 children, destroying 44 buildings, and leaving 160 people homeless.[1]

The rail company that operated the ill-fated train, Montreal Maine and Atlantic Railway Ltd. (MMA) made the switch to one-person crews shortly before the deadly derailment in Lac-Megantic. Shortly after the disaster, Transport Canada banned one-person crews.[2]

Three railroad workers who were on trial for the derailment were all acquitted on January 19th of this year. After a months-long trial in which the defense outlined the inattention to safety at MMA, emphasizing the one-person crew policy, the jury concluded that the individual workers were not at fault for this incident. Thankfully, those workers were not scapegoated for their employer's dangerous policies.

While Canada has learned from this tragedy, in the U.S. we continue to be endangered by freight trains operated by one-person crews. Operating a freight train is a challenging and dangerous job, and no one should be expected to do it alone.

Train derailments are not uncommon in Maryland, and many of our rail lines parallel rivers or run through communities. At grade crossings are a particular concern. In Baltimore, 26th Street collapsed onto the freight line in 2014 and 2018, a freight train exploded in Rosedale in 2013, and derailments occurred in the Howard Street Tunnel in 2001 and 2016. More recently, in

[1] "Lac-Mégantic residents still suffering 2 years after deadly derailment,"CBC News, February 4, 2016.
[2] Alison Brunett, "MMA railway created 'perfect storm,' defence for Tom Harding tells Lac-Mégantic trial," CBC News, January 9, 2018.

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March 2019, a freight train derailed over the 1900 block of Falls Road, along the Jones Falls. In 2017, a freight train heading to the Port of Baltimore derailed in Ijamsville, in Frederick County.

Two crew members are not a panacea to prevent all derailments and accidents, but it gives an emergency backstop to prevent something from going awry, or to better handle a problem. Our trains carry many hazardous materials along our waterways and through our rural, suburban, and urban neighborhoods.

HB 492 will help create safer working conditions for rail workers, improve the safety of communities living near rail lines, and protect the environment by limiting the likelihood of a derailment and subsequent explosion or spill. We urge a favorable report.

Thank you,

Emily Ranson
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Clean Water Action
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Stein Testimony HB 492 in Finance.pdf
Uploaded by: Stein, Dana
Position: FAV

DANA M. STEIN
Legislative District 11
Baltimore County

Vice Chair
Environment and Transportation Committee

Subcommittees

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Natural Resources, Agriculture and Open Space

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The Maryland House of Delegates
ANNAPOLIS, MARYLAND 21401

Testimony of Delegate Dana Stein in Support of House Bill 492
Railroad Company – Movement of Freight – Required Crew

Chair Kelly, Vice-Chair Feldman, and Committee members:

House Bill 492, also known as the "two-man crew" or "two-person crew" bill, has been heard and passed by this committee four times and by the Senate three times: in 2016, 2018, and 2019. This legislation would require that each freight train operating in Maryland and sharing tracks with passenger and commuter rail trains have a minimum crew size of two persons. The impetus for this bill was a train disaster that happened several years ago in Canada, when a freight train with a one-person crew derailed and killed 47 people and destroyed a large portion of a town. After the accident, the Canadian government mandated two-person crews on their freight trains. Since then, ten states have mandated two-person crews.

The basic premise of the bill is that operating a freight train is not an easy task. These trains frequently carry hazardous cargo and are often more than two miles long. A single crew member cannot perform all of the required tasks, maintain the highest level of safety, and respond to an emergency. That's why nearly every freight train in the U.S. today is operated by two crew members: a licensed conductor and engineer.

Having a two-person crew is particularly important when there's an emergency such as at a grade crossing, where railroad tracks and roads cross. A single crew member cannot assess an accident, secure the train, and notify all emergency responders. The engineer is required to stay on board to communicate with dispatchers and other trains and make sure the locomotive is secure. *Only if there is a* second crew member can that person get off the train, assess the situation, and address any life-threatening issues.

Grade-crossing accidents are not a rare occurrence and they can be deadly. In 2019, the last year for which we have data, there were 2,216 grade crossing accidents across the country, with 807 injuries and 293 deaths. In addition to grade-crossing accidents, there are plenty of freight train derailments.

One of those happened last November 24, 2020, when 21 rail cars derailed in a freight train accident in Baltimore. Fortunately no one was killed or injured, partly because the train had no hazardous materials.

Two years ago, the legislature passed this bill with bipartisan support, but it was vetoed by the Governor, so we are back asking for your support. A 2018 poll indicated that 86% of

Marylanders supported two-person crew legislation. President Biden, in a video made before he became president, also has said he supports two-person crews.

I'd also like to address MDOT's claims that this bill would increase MARC's operating costs. In its letter of opposition during the hearing before the House Environment and Transportation Committee, MDOT wrote: "Two of MARC's three service lines run on tracks owned by freight rail operators, which will likely require MARC to pay for any costs they incur from this bill and/or require MARC to operate its trains with additional crew."

I asked MDOT for the operating agreement that MTA has with CSX. Turns out, the most recent amendment to the MTA Access Agreement with CSX doesn't require MARC to pay for any costs they incur from the bill. What it says, is that if this type of bill is enacted, the parties shall discuss impacts on costs and operations. That's it.

Also, CSX's costs would not increase because it committed to not changing crew size under the current collective bargaining agreement, and that provision should last at least through this decade.

MTA also claimed, per the Fiscal Note:

"While the bill does not require two-person crews for passenger trains, MTA advises that CSX is likely to create an internal operational rule requiring all trains to have two engineers (both freight and passenger), which would affect MARC train service. If that were to occur as a direct result of the bill, MTA advises expenditures for the additional engineers would total at least $2.4 million annually."

During the hearing in the House, a delegate asked CSX point blank if it was their intention to "create an internal operational rule requiring all trains to have two engineers (both freight and passenger)" if this legislation passed. Their answer was no, they have no intention of making this change. Therefore, there is no fiscal effect to the State.

I ask you again for a favorable vote on this bill, which is about protecting the employees, the environment, and the citizens of Maryland by insuring a safe and efficient railroad operation within the State.

HB 492_Railroad Company_Movement of Freight_Requir
Uploaded by: Griffin, Andrew
Position: UNF

MARYLAND
Chamber of Commerce

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

Tuesday, March 23, 2021

Dear Chairwoman Kelley and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 4,500 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

House Bill 492 would require a train or light engine that is used to transport freight via railroad to have at least two crewmembers while operating in the State.

Maryland's freight rail industry is one of its most critical - helping to minimize transportation costs, manage our carbon emissions levels and strengthen our competitiveness. Our rail industry is responsible for thousands of direct jobs and contributes to hundreds of thousands of indirect jobs. With this bill, railroad companies will be forced to comply with onerous regulations which mandate freight trains stop at the Maryland border, add a crewmember, and drop them off once they leave the State. This complicates what should be an easy flow of freight, especially when this industry is responsible for a significant portion of the movement of goods and services in the State.

We learn from the history of the United States railroad system that onerous regulations have significant negative impact on the industry. In order to mitigate the heavy regulatory climate that led to multiple railroad bankruptcies in the 1970s, Congress passed a series of laws meant to ease the burden on railroads and create uniformity in laws between states. These laws established federal preemption provisions because of the difficulty placed on railroads having to conform to different regulations and policies traveling from one State to another.

The Maryland Department of Transportation projects that freight rail demands will increase by 45% by 2040. To keep up with these demands and ensure the easy movement of goods into, out of, and through the State of Maryland, it is in the best interest of the State to support legislation that facilitates, not hinders, this movement. Private companies, the State and the Federal

government have all made significant investments in freight rail, knowing that it creates jobs, expands the economy, and increases Maryland's competitive edge.

In addition, there have been two important developments since the last time the Committee was presented with this legislation, both of which establish that state laws regarding crew size are preempted by federal law. In May 2019, the Federal Railroad Administration, determined that there is no data showing that two-person crews are safer than one-person crews and concluded that regulation of minimum train crew is not justified. At that time, the FRA indicated its intent to preempt all state laws and regulations on that topic. More recently, in September 2020, the U.S. District Court for the Northern District of Illinois held that an Illinois state crew size law, similar to the bill before you, was preempted by the Federal Railroad Safety Act (FRSA).

What is more, Governor Larry Hogan vetoed a previous iteration of this legislation, and that veto was upheld by members of the Maryland General Assembly last year.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **Unfavorable Report** on House Bill 492

HB492 CSX Written Testimony Signed.pdf
Uploaded by: Hammock, Brian
Position: UNF

Brian W. Hammock
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March 19, 2021

The Honorable Delores G. Kelley
3 East
Miller Senate Office Building
Annapolis, MD 21401

RE: OPPOSITION TO HB 492 - Railroad Company – Movement of Freight – Required Crew

Dear Chairwoman Kelley:

I write to oppose HB 492 and ask for your continued support for good jobs at the Port of Baltimore and a robust mass transportation system. At a time when CSX and the State of Maryland are close to finalizing an unprecedent $466 million investment to expand the Howard Street Tunnel Project – the largest rail infrastructure project on the east coast; one that will unlock great potential for the Port of Baltimore and create 6,500 new jobs in the Baltimore region – unnecessary legislation like HB 492 threaten continued private investments in the Maryland economy.

This bill seeks to legislate the number of crew members it takes to operate a freight train; an issue that has been the subject of collective bargaining for over a century. HB 492 threatens important State priorities while offering no fact-based evidence it will improve railroad safety. For these reasons, CSX Transportation encourages the Senate Finance Committee ("Committee") to deliver an unfavorable report.

HB 492 RISKS SIGNIFICANT PRIVATE INVESTMENT IN MARYLAND'S ECONOMY

The positive impact from the Port of Baltimore cannot be overstated. Approximately 33,920 jobs in Maryland are generated by Port activity. Average salaries at the Port are 16.4% higher than the average annual wage across other sectors in the State of Maryland. In 2014, the Port generated $2.9 billion in personal income, $310 million in state, county and municipal tax revenues, and $2.2 billion in business revenues in 2014.[1] Economic results like this is why Maryland entered into a historic $466 million agreement with CSX to expand the Howard Street Tunnel that provided direct rail service to the Port of Baltimore.

If HB 492 becomes law, investments like the Howard Street Tunnel would suffer a serious blow due to the increase costs for industry to operate in the State of Maryland when compared to other East Coast ports. Cost conscious shippers are sensitive to logistics costs. As the furthest

[1] *See The 2014 Economic Impact of the Port of Baltimore,* October 6, 2015, retrieved 2/1/17 at Total Economic Impacts Generated by the Port of Baltimore, December 2011, retrieved 7/1/2015 at http://www.mpa.maryland.gov/_media/client/planning/EconomicImpactOct15.pdf.

inland East Coast Port, to call at Baltimore a container ship generally sails an additional 10 hours, resulting in increased fuel costs and other expenses. Vessels calling on Baltimore also pass the Port of Norfolk on their way into the Chesapeake Bay, a direct competitor which has enhanced double-stack rail capabilities. Adding costs to an important link in the logistics chain in Maryland gives shippers just one more reason to stop in Norfolk.

The Howard Street Tunnel project is currently in the public comment period of the National Environmental Policy Act (NEPA) process, which is scheduled to end March 20, 2021. Once the NEPA process is finalized, the Federal Railroad Administration and the State of Maryland will finalize their funding agreements relating to the project. In turn, the State of Maryland and CSX will finalize our funding agreements. These steps are necessary before the project can move forward. This is an important project for all of Maryland and one we should all ensure is made a reality in the very near future.

HB 492 THREATENS THE MARC CAMDEN AND BRUNSWICK LINES

Should Maryland choose to become the only state east of the Mississippi River to impose a minimum crew size mandate, the ripple effect will be felt well beyond the cab of freight train locomotives. On the average day, 12,000 Marylanders rely on the MARC Camden and Brunswick lines. Both operate on the privately-owned CSX rail network pursuant to an Operating Agreement set to expire next year. By penalizing CSX with new regulations and cost increases, simply for letting MARC operate on the CSX network, the Committee should recognize this will significantly alter the current relationship between the parties.

CSX estimates the incremental cost of a two-person crew compared to a one-person crew is $5.1 million annually, based on current operations. CSX has informed the Maryland Transit Administration that the costs associated with HB 492 will be passed on to the State. The Access Agreement negotiated between CSX and MTA now includes specific language to allow CSX to recoup these costs.

Governor Hogan agrees. In his veto of House Bill 180 in 2019, Governor Hogan said a crew size mandate will have "**a significant impact** on the pending renewal of the State's access agreement." If such a mandate became law, the Governor stated it "will **undoubtedly impact MARC** Train service…" (emphasis added).

If Maryland's policy is that freight and passenger trains operating on the same network creates an inherently dangerous condition, the best path forward may be for the elimination of passenger rail operations on the State's freight rail network. This result merits serious consideration before such a significant action — one that has no safety rational — is progressed further in Maryland.

For these reasons, we ask that the Committee to deliver an unfavorable report on HB 492.

Very truly yours,

Brian W. Hammock

HB 492 - Oppose - Norfolk Southern.pdf
Uploaded by: Noe, Randal
Position: UNF

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

Randal Noe
Assistant Vice President of Regulatory Affairs
Norfolk Southern Corporation

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.

HB 492 - Oppose - BIG.pdf
Uploaded by: Tompsett, Thomas
Position: UNF

March 19, 2021

The Delores Kelley
3 East, Miller Senate Office Building
Annapolis, Maryland 21401

RE: Oppose – House Bill 492: Railroad Company - Movement of Freight - Required Crew

Dear Chairman Kelley and Honorable Members of the Committee:

The Baltimore Industrial Group (BIG) was established in 2005 by public and private business organizations in the Baltimore metropolitan region to advocate for industry and maritime operations. The group represents businesses involved in manufacturing, transportation, maritime, shipping, and warehousing. BIG members alone employ 16,000 workers directly and indirectly in the Baltimore metropolitan area and generate billions of dollars in annual revenue.

BIG opposes House Bill 492: Railroad Company - Movement of Freight - Required Crew (HB 492) as many of our members depend on moving products to customers by truck or train. Should the State of Maryland enact HB 492 and require an additional crew member on freight locomotive, BIG foresees an increase in cost and a decrease in efficiency for freight movement through the Port of Baltimore. In addition, since other East Coast ports do not have to contend with the crew size requirement proposed by HB 492, the Port of Baltimore's regional competitiveness and its ability to innovate and pivot to new technology will be negatively impacted.

The people of Baltimore need good jobs – the kind of family-sustaining jobs that BIG members provide. Given the lack of compelling or empirical safety benefits promised in this legislation, BIG requests that the committee give HB 492 an unfavorable report.

BIG looks forward to working with the State on solutions that work for the efficient movement of freight. If you have questions on this testimony or need additional information, please contact Thomas Tompsett Jr at tommy.tompsett@mdlobbyist.com.

Jeff Fraley
Chair - Baltimore Industrial Group
jeff@fraleycorportation.com

HB 492 - Oppose - Delmarva Central RR.pdf
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Position: UNF

Delmarva Central Railroad Company

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March 19, 2021

The Honorable Delores G. Kelley, Chair
Finance Committee
Miller Senate Office Building, 3 East Wing
11 Bladen Street
Annapolis, MD 21401

RE: LETTER IN OPPOSITION TO HB 492 "Railroad Company - Movement of Freight- Required Crew"

Dear Chairwoman Kelley and Committee Members:

I am the President and CEO of Carload Express, Inc. and its subsidiary the Delmarva Central Railroad Company ("DCR"). The DCR operates 188 route miles of railroad track on the Delmarva Peninsula. Our lines start in Delaware, run though Maryland and end in Hallwood Virginia, approximately 15 miles south of Pocomoke City, Maryland. I am writing in opposition to HB 492 "Railroad Company – Movement of Freight – Required Crew" as this legislation to regulate the size of freight train crews will have a negative effect on all industries in the State of Maryland that rely on rail freight service. HB 492 will also have a negative impact road safety, road congestion, air quality, and will ultimately increase costs for road maintenance in the State of Maryland.

Short line railroads like Delmarva Central are small businesses and we rely on the revenues generated by every railcar shipment received from our connecting partner railroads to pay our employees as well as to cover expenses such as fuel, locomotive maintenance, utilities, property taxes, crossing signals, track maintenance, and to make investments to upgrade our tracks. Mandating the size of freight train crews will ultimately make rail freight shipments more expensive and negatively impact service levels. As a result, our rail customers could switch to truck and our ability to grow rail freight traffic on our line in Maryland will be hindered. Should this occur, it would have negative financial effects on our company and could even result in a loss of jobs. In addition, rail customers switching to truck would increase truck traffic on Maryland roads and highways, which will have a negative impact on highway safety, congestion, air quality and increase costs for road maintenance.

Prior to becoming President & CEO of the Delmarva Central Railroad and its parent Carload Express, I spent a number of years managing and/or consulting for railways in both Europe and Australia where the use of "single-person" freight train crews is much more common and, in many instances, the accepted norm. Many countries view the use of single-person train crews as an enhancement to safety since only one person in the cab of a locomotive reduces distractions and increases situational awareness. In addition, there is no scientific data or historical evidence that larger crew sizes improve rail safety.

In recent years, the rail industry has spent billions of dollars making significant investments in safety technology including federally mandated Positive Train Control ("PTC"). I believe that PTC has been

implemented on the types or railroad lines coved that would be covered by HB 492 (i.e. High-Speed Passenger and Commuter Lines) and will protect against human error by automating safety-related functions currently performed by crew members. As you know, there is no substitute for technological innovations that eliminate human error. At a time when the U.S. Department of Transportation (as well as the Maryland Department of Transportation through its CAV working group) is promoting the use of autonomous vehicles on public highways, it is unreasonable to burden rail carriers with requirements for misplaced or redundant crewmembers. I should also point out that in 2019 the Federal Railroad Administration concluded that regulation of minimum train crew size is not justified and indicated its intent to preempt all state laws and regulations on this topic. In fact, in September of last year, the U.S. District Court for the Northern District of Illinois held that an Illinois state crew size law, which was very similar to what has been proposed by HB 492, was preempted by the Federal Railroad Safety Act.

In summary, while HB 492 does not currently affect our company directly, it will be disadvantageous to all railroads. It will increase costs, reduce productivity, and have a negative effect on all industries in the State of Maryland that rely on rail freight service, all while not providing any improvements to safety. This legislation will also have a negative impact on road safety, congestion, air quality and increase costs for road maintenance in the State of Maryland.

Sincerely,

Mark A. Rosner

HB 492 - Oppose - MDDE.pdf
Uploaded by: Tompsett, Thomas
Position: UNF

THE MARYLAND AND DELAWARE RAILROAD COMPANY
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January 28, 2021

Via First Class Mail and Email to Kumar.Barve@house.state.md.us
The Honorable Kumar P. Barve
House Office Building, Room 251
6 Bladen St.
Annapolis, MD 21401

RE: HB 492 "Railroad Company – Movement of Freight – Required Crew"

Dear Chairman Barve:

I am writing to express The Maryland and Delaware Railroad Company's (MDDE) concerns regarding HB 492, "Railroad Company – Movement of Freight – Required Crew."

While HB 492 is ostensibly targeted towards freight operations that share the same corridor as high-speed passenger or commuter trains, we believe this type of legislation is disadvantageous not only to Class I Railroads, but also to short line railroads like MDDE.

MDDE believes that safety is of the utmost importance. We are very proud to have built an exemplary record of safety over the past 40 years of serving freight customers on Delmarva. We also believe, however, that regulations should be based on empirical, scientific and/or historical evidence. The Federal Railroad Administration (FRA) recently acknowledged that there is no "reliable and conclusive data" to suggest that trains operating with two-member crews are safer than single-person crews. This was also supported by the findings of Oliver Wyman, a leading management research firm commissioned by the American Association of Railroads (AAR) to analyze data on rail operations and crew size. In 2013/2014, the American Short Line and Regional Railroad Association (ASLRRA) also undertook a series of surveys of its membership and analysis of accident databases and concluded that "nothing in this study or in the data we examined indicated that two-person crews might be safer than one-person crews."

In fact, railroad operations in the United States have become remarkably safer even as crew size has decreased, with the overall train accident rate having declined 44 percent from 2000 to 2017, according to data collected by the Federal Railroad Administration.

Although MDDE currently operates with a two-person crew, many small business short line railroads often operate with one person in the cab of the locomotive, or on the ground controlling a remote-control locomotive, and continue to operate safely and efficiently nonetheless.

You may be aware that we have opposed similar legislation in the past. I would note that there have been two notable developments since the last time a crew size bill was being considered by the Legislature:

- On May 29, 2019, the Federal Railroad Administration, the expert federal regulatory agency that has authority pursuant to 49 U.S.C. § 20103(a) to establish national standards in every area of railroad safety, determined after review of an extensive record that there is no data showing two-person crews are safer than one-person crews. 84 Fed. Reg. 24,735-40 (May 29, 2019). FRA concluded that regulation of minimum train crew is not justified and indicated its intent to preempt all state laws and regulations on that topic. Id. at 24,735, 24,741.

- 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 H.B. 492 was preempted by the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106(a)(2). See *Ind. R.R. Co. v. Ill. Commerce Comm'n*, No. 19-6466 (N.D. Ill. Sept. 30, 2020). This decision provides a very compelling argument against the legitimacy of state minimum crew size laws.

In conclusion, I would like to reiterate that laws like HB 492 will increase operating costs of small business railroads, hinder advancements in safety, reduce the likely development of increased freight for small business short line railroads, and increase truck traffic on the highways. New developments in transportation – including driverless trucks – already pose a significant threat to the ability of small railroads like ours to remain competitive, especially on shorter hauls. Mandating crew size only exacerbates this difficulty and makes it more challenging for small businesses to survive and thrive.

For these reasons, we ask that the committee deliver an unfavorable report on HB 492.

Sincerely,

Cathrin S. Banks
President

CC: *(Via Email)*
Delegate Jay Jacobs, *jay.jacobs@house.state.md.us*
Delegate Christopher Adams, *christopher.adams@house.state.md.us*
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HB0492 - MPA - Two Man Crew - FINAL_OPP_CO.pdf
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March 23, 2021

The Honorable Delores G. Kelley
Chair, Senate Finance Committee
3 East, Miller Senate Building
Annapolis MD 21401

Re: Letter of Opposition – House Bill 492 – Railroad Company - Movement of Freight - Required Crew

Dear Chair Kelley and Committee Members:

The Maryland Department of Transportation (MDOT) respectfully opposes House Bill 492, as it would detrimentally impact the MDOT Maryland Port Administration (MDOT MPA) and the Port of Baltimore, and the MDOT Maryland Transit Administration (MDOT MTA) MARC Train Service.

House Bill 492 requires freight railroad companies to have a two-person crew when operating in the State in the same rail corridor as high-speed passenger or commuter trains. With both Amtrak (high-speed passenger) and MARC Train Service (commuter trains) operations in the State of Maryland, a large majority of freight rail operators in the State would be subject to the requirements of this bill. This legislation puts the Port of Baltimore at a competitive disadvantage with neighboring ports, as no other state on the U.S. East Coast has such a requirement. Mandating that carriers in the State of Maryland use a larger crew size than would be required on the same railroads operating out of Norfolk, Philadelphia, or New York will directly result in an increase in shipping costs and deter carriers from operating in the State, resulting in a loss of jobs and investment directly related to the Port.

It is also anticipated that this will increase the operating costs of MARC Train Service. Two of MARC's three service lines run on tracks owned by freight rail operators, which will likely require MARC to pay for any costs they incur from this bill and/or require MARC to operate its trains with additional crew. Furthermore, increased costs for MARC Train Service may result in service reductions due to budgetary constraints, and if service is reduced then train slots given back to the host railroads may be lost forever.

With the intention of safety in mind, technology has significantly contributed to a reduction in accident rates as crew sizes have decreased over the years. Over the last several years, freight rail operators and passenger train operators have spent billions of dollars nationwide implementing Positive Train Control (PTC), a risk reduction technology that makes rail travel even safer. With the implementation of PTC, this trend will continue.

Additionally, House Bill 492 is preempted by federal law. In May 2019, the Federal Railroad Administration (FRA) withdrew its Notice of Proposed Rulemaking that would have regulated crew size nationwide had it become law. Furthermore, the FRA stated a two-person crew mandate would "impede the future of rail innovation." In states where a two-person crew mandate has passed, it has

been challenged through the legal system. Most recently in September 2020, the U.S. District Court for the Northern District of Illinois ruled in favor of the railroad companies that the FRA's decision to withdraw a proposed crew-size mandate is federal regulation and therefore preempts state law.

At the Port of Baltimore, the MDOT MPA strives to accomplish its mission to increase waterborne commerce through the State of Maryland in a way that benefits the citizens of the State. In doing so, the Port has consistently proven its value as a good neighbor and strong partner throughout the State. The Port of Baltimore generates 15,330 direct family-supporting jobs for Marylanders, where the average wage of these jobs exceeds the statewide average annual wage by 9.5%. The Port handles more automobiles, light trucks, and roll-on/roll-off farm and construction machinery than any other port in the U.S. During this challenging time amid the COVID-19 pandemic, Maryland's Port continues to play an integral role in maintaining our nation's supply chain, moving vital goods to the healthcare industry and consumers. The Port of Baltimore remains a beacon of optimism for the State's economic resiliency, where cargo numbers continue to climb.

For the Port of Baltimore to continue to operate successfully as an economic engine for the State, Maryland cannot afford to be at a competitive disadvantage with our neighboring ports. The Port of Baltimore must remain open for business and investment, as the success of our Port directly benefits the State and the hardworking men and women who depend on it.

MDOT MTA's MARC Train Service works to provide safe, efficient, and reliable transit across Maryland with world-class customer service. MARC provides commuter rail service between Perryville, MD and Washington, DC through Baltimore, MD (Penn Line), Martinsburg, WV and Washington DC through Brunswick, MD and Frederick, MD (Brunswick Line), and Baltimore, MD and Washington, DC (Camden Line). It serves 42 stations and carried over 9,000,000 trips annually prior to the pandemic, enabling Marylanders to commute to jobs across the State and in Washington, DC while enjoying the many benefits of living in the State of Maryland. For MARC Train Service to continue to provide vital commuter rail service to Marylanders, it cannot afford increased operating costs and the potential permanent loss of train slots for commuter rail service.

For these reasons, the Maryland Department of Transportation respectfully requests the Committee grant House Bill 492 an unfavorable report.

Respectfully Submitted,

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