

greeting SB 915.pdf

Uploaded by: Arthur Ellis

Position: FAV

(Opening)

Good Afternoon Madam Chair Griffith and Madam Vice Chair Klausmeier, members of the Finance committee.

I am Senator Arthur Ellis representing the 28th Legislative District of Maryland, Charles County.

I am here today to present **Senate Bill 915 - Railroad Company – Movement of Freight – Required Crew**. I will now ask that my witness panel come join me.

The purpose of this bill is to prohibit a train or light engine used in the movement of freight in the same rail corridor as a high-speed passenger or commuter train from being operated in the State unless it has at least two crew members; and establishing a penalty for a first offense of a \$500 fine and for subsequent offenses within a 3-year period, a fine of \$1,000 for each offense.

(Closing)

Thank you to Madam Chair and Madam Vice Chair for the opportunity to present **Senate Bill 915 and I ask for your favorable report.**

SB0915 Movement of Freight - Required Crew FAV.pdf

Uploaded by: Cecilia Plante

Position: FAV



TESTIMONY FOR SB0915
Railroad Company - Movement of Freight - Required Crew

Bill Sponsor: Senator Ellis

Committee: Finance

Organization Submitting: Maryland Legislative Coalition

Person Submitting: Cecilia Plante, co-chair

Position: FAVORABLE

I am submitting this testimony in favor of SB0915 on behalf of the Maryland Legislative Coalition. The Maryland Legislative Coalition is an association of individuals and grassroots groups with members in every district in the state. We have over 30,000 members across the state.

Downsizing and saving money are generally considered good things. But not when they put people's lives at risk. Allowing a freight train to run on the same tracks as a commuter train with only one person capable of operating the freight train on board is a ridiculous and potentially criminal idea. If that single person has a heart attack or a stroke, the freight train is left hurtling down the track with no one guiding it. The outcome would be nothing short of tragic. And preventable.

There should be two people on the train capable of operating it. Without question. The little bit of money it would save to have only one person cannot be measured against the lives of all the people on the commuter train.

The Maryland Legislative Coalition supports this bill and we recommend a **FAVORABLE** report in Committee.

Testimony SB 915 - Favorable.pdf

Uploaded by: David Pendleton

Position: FAV

Madam Chair Griffiths and Members of the Senate Finance Committee

My name is David Pendleton, legislative advisor for the SMART Transportation Division in Maryland and 19-year conductor for Amtrak here in support of SB915. SMART members work as the Conductors, and Engineers on-board freight and passenger trains operating in Maryland.

SB915 is a proactive rail safety legislation that protects the safety of the rail workers, the environment and the communities freight trains operate through by mandating a minimum 2 person crew on certain freight trains.

Freight trains share tracks with passenger and commuter trains. They carry hazardous materials, operating through many of Maryland's densely populated cities and towns. Bowie, Laurel, Rockville, Silver Spring, Gaithersburg, Hagerstown, and Baltimore just to name a few. Imagine how difficult it would be to evacuate any one of these areas if an East Palestine type of derailment were to occur.

Support for minimum 2 persons train crew size has been vast. **(1)** In 2016, more than 1,600 comments were submitted to the FRA concerning crew size regulations. 1,545 were submitted in support of a minimum 2-person train crew. This number included the general public, current and retired railroad employees, Government officials and organizations.

The 55 comments submitted against this regulation, all were officials from the railroads themselves, their paid lobbyists, and the organizations that they fund.

Historically, safe working rules and procedures for rail workers have been written in blood.

In 1996, in Weyauwega, Wisconsin the town had to be evacuated due to a train derailment containing hazardous materials. The conductor prevented a greater tragedy by separating the non-derailed cars from the fire engulfed derailed cars. Following the accident, Wisconsin passed their 2-person crew requirement into law.

In 2013, in Lac-Mégantic, Canada, a one-person freight train operation contributed to a runaway train that derailed, killing 47 persons and essentially destroyed the town. Following the accident Canada banned one-person freight train operations

Regrettably, there is no similar Federal or Maryland law or regulation requiring a minimum of 2-persons on freight trains. SB915 would fix this safety hazard.

The railroads consistently argue that states should not act on crew size because the Federal Railroad Administration is going to issue regulations. The FRA has been in the process of issuing a crew size rule since 2013. That is 10 years, 3 presidents, and numerous FRA administrators. Still no rule.

The railroads insist that crew size is a collective bargaining issue. No amount of money or benefits negotiated are worth the harm that could come to rail workers, the environment or the public if a tragic accident occurs due to a one-person operation.

The railroads have testified before members of the General Assembly that the FRA did not produce any evidence that showed where 2-person train operations were safer than single person train operations.

What they fail to say in their testimony is that the FRA doesn't collect data that would provide information regarding the total operating mileage for one-person crew operations in the United States and that according to former FRA administrator Ronald L Batory in his decision to withdraw the 2 person crew regulation, **(1)** "it is impossible for FRA to normalize the data and be able to compare the accident/incident rate of one-person operations to that of two-person train crew operations to see if one-person operations appear safer or less safe."

The railroads love to use Europe's single person operation as an argument for why 2-person train operations are not safer.

Again, what's left out of this argument is the fact that the rail system in Europe receives more investment in 10 years than the American system has in 40 years. **(2)** According to American Association of Railroads, a class 1 railroad funded Association, from 1980 to 2020, private railroads invested \$760 billion in infrastructure. In the last 10 years, they have invested \$250 Billion.

(3) In the last 10 years alone, the European rail system has invested \$830 billion Euros, a little over \$900 Billion dollars. The European rail system has a layer upon layer of safety systems. Furthermore, each member country has their own safety system as an additional layer of safety. They have the Automatic Warning System (AWS), Automatic Train Protection System (ATP) and European Train Control System (ETCS). Furthermore, each country has their own rail safety system that works in conjunction with these systems and acts as an additional layer of safety.

There is a culture of rail infrastructure investment. **(4)** Even though the European rail system receives a large amount of funding, the general public still feels it is underfunded.

The General Assembly understands that it is better to be proactive than reactive when it comes to rail safety. This is evidenced by their passage of this legislation numerous times. Sad to say, each time it was vetoed by Governor Hogan.

We sincerely urge another favorable report on SB915 to move this to the desk of our new Governor Wes Moore.

- 1) <https://www.regulations.gov/document/FRA-2014-0033-1606>
- 2) <https://www.aar.org/facts-figures>
- 3) <https://www.railtech.com/infrastructure/2021/11/24/more-money-invested-in-roads-than-rail-where-is-the-shift/>
- 4) <https://www.investigate-europe.eu/en/2021/despite-public-support-for-rail-trains-remain-underfunded-in-europe/>

SB 915 - Railroad Company - Movement of Freight -

Uploaded by: Donna Edwards

Position: FAV



MARYLAND STATE & D.C. AFL-CIO

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**SB 915 - Railroad Company - Movement of Freight - Required Crew
Senate Finance Committee
March 21, 2023**

SUPPORT

**Donna S. Edwards
President**

Maryland State and DC AFL-CIO

Chairman and members of the Committee, thank you for the opportunity to submit testimony in support of SB 915. My name is Donna S. Edwards, and I am the President of the Maryland State and District of Columbia AFL-CIO. On behalf of Maryland's 300,000 union members, I offer the following comments.

As union representatives, we all take pride in representing our members to provide them with good wages, health care benefits, safe working conditions and the ability to retire with a pension and dignity. Our members know their contribution to the labor force is valuable and appreciated. In the work environment, the safety and well-being of our members is of the utmost importance. None of the collectively bargained wages, benefits and working conditions are worth anything if our members do not make it to retirement due to being injured or killed on the job.

The thought of a two-mile long freight train operating through our communities 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.

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 crew member could have prevented it or mitigated the damages from it.

All of organized labor stands in solidarity with our rail worker brothers and sisters. 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 we know that you recognize where the collective bargaining process ends and public policy begins – especially when the safety of the public, the environment, and workers 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, reaffirming 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 SB 915, 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 SB 915.

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*

Committee: Industrial Safety
Delegate, SMART-TD Local 632

Convention Action: Unanimously passed

Supporting Testimony - Labor for Two Person Crew.p

Uploaded by: Donna Edwards

Position: FAV



Senate Finance Committee

To: Senator Melony Griffith, Chair; Senator Kathy Klausmeier, Vice-Chair; and Members of the Committee.
From: Jason Ascher, Political Director, Mid-Atlantic Pipe Trades Association.

STRONGLY SUPPORT – SB 915 - 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 SB 915 – 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 SB 915.**

Sincerely,

Jason Ascher
Political Director
Mid-Atlantic Pipe Trades Association



METROPOLITAN BALTIMORE COUNCIL AFL-CIO Unions

SB 915 - Railroad Company - Movement of Freight - Required Crew **Environment and Transportation Committee** **March 21, 2023**

Support

To: Hon. Melony Griffith, Chair & members of the Senate Finance Committee

From: Courtney Jenkins, President, Metropolitan Baltimore AFL-CIO

Chairman and members of the committee, thank you for the opportunity to present testimony in **support** of SB 915 - *Railroad Company - Movement of Freight - Required Crew*. My name is Courtney Jenkins, President of the Metropolitan Baltimore Council AFL-CIO—our central labor council coalition represents over 100 affiliated local unions and close to 80,000 proud union members in Anne Arundel, Baltimore, Carroll, Cecil, Harford, and Howard counties, and Baltimore City.

The importance of prioritizing the health and safety of our railroad crews is articulated through this critical piece of legislation. Currently, without the requirement to have at least two crew persons on freight rail the potential for emergency situations that cannot properly be addressed increases exponentially.

For example, without a second crew member, the engineer will not receive warnings about slow orders, work orders, block signals, road crossing mechanical failures, or other restrictions impacting the movement of their train. It is very possible that problems will occur and very possible that an engineer could fall short on receiving any of the stated messages needed to safely deliver freight. This bill does not just protect the safety of the train operators and engineers, it also protects the safety of the communities these trains travel through each day.

The movement of our nation's freight is directly related to the strength of our economy. With this legislation we ensure that we take all required measures to protect the prosperity of our state and safety of its workers.

For the above reasons, we ask for a **favorable report** on SB 915 - *Railroad Company - Movement of Freight - Required Crew*.



A Union of Professionals
AFT-Maryland

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Kenya Campbell
PRESIDENT

LaBrina Hopkins
SECRETARY-TREASURER

**Written Testimony Submitted to the Maryland Senate Finance Committee
SB 915 – Railroad Company - Movement of Freight - Required Crew
March 21, 2023**

SUPPORT

Chair Griffith and members of the committee, on behalf of the more than 20,000 members of the American Federation of Teachers – Maryland (AFT-Maryland), we ask a favorable report on SB 915 - Movement of Freight – Required Crew, as a safety measure for all citizens.

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 crews in response to the Lac-Mégantic 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 train crew requirement.

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

Again, we ask for a favorable report on SB 915. Thank you.

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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

National Safety Council



AFL-CIO-CLC

BALTIMORE, MARYLAND 21230

Written Testimony of

C. SAMUEL CURRERI, President

DAVID W. SPRINGHAM, JR., Recording Secretary

JEROME T. MILLER, Financial Secretary

MICHAEL J. McHALE, Business Manager

OFFICE:

2701 W. PATAPSCO AVE

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Rico Albacarys, Assistant Business Agent, IBEW LOCAL 24

Before the

Senate Finance Committee on

SB 915 Railroad Company – Movement of Freight – Required Crew

SUPPORT

March 17, 2023

Madame Chair Griffith and members of the Senate Finance Committee,

Thank you for the opportunity to submit my testimony **supporting** Senate Bill 915.

My name is Rico Albacarys and I am a member and employee of IBEW Local 24 in Baltimore. In industries where workers are exposed to hazards, a buddy system is crucial for safety. This is seen in transportation industries like commercial airlines, military air transport, ferry operations, and ocean shipping. In construction, a buddy system also protects workers, customer property, employees, and the public.

The idea of one person operating a freight train that could be over a mile long and carry hazardous cargo is concerning. Working alone can lead to fatigue, distraction, or missing important signals, instructions, or changing conditions that affect train safety. Accidents on the rails can be fatal and have costly environmental consequences. It is crucial that train engineers have a second person with them to focus on safe rail operations.

For these reasons, I am asking you to give a **favorable** report on SB 915.

Sincerely,

Rico Albacarys

Assistant Business Agent IBEW Local 24



WESTERN MARYLAND CENTRAL LABOR COUNCIL, AFL-CIO

152-154 N. Mechanic Street, Cumberland, MD 21502
PHONE: 301-777-1820 FAX: 301-777-0121
EMAIL: westmdclc@verizon.net

March 21, 2023

Chairman Melony Griffith and Members of Senate Finance Committee:

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Vice President
LARRY KASECAMP

Secretary - Treasurer
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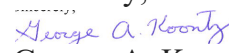
RE: SB-915 Support

For the record, my name is George Koontz. I am the President of IBEW Local 307 and the President of the Western Maryland Central Labor Council. I am employed through the Local as a licensed electrician. I am a lifelong resident of Maryland currently residing in Allegany County.

In my occupation I frequently work in and around hazardous conditions. I know how important it is to have a second set of eyes in these situations. In the construction industry, the skilled trades use a buddy system for workers to protect their safety as well as the safety of the customers property, the employees, and the public in general. In the transportation industry, most modes of operation have more than one person overseeing them too. This type of safety procedure on the operation of equipment 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 preposterous. Today's trains are up to two miles long and carry all kinds of hazardous material. And as experience tells us, accidents on the rails tend to be very costly with property damage, environmental damage, injuries and even deaths being the outcome.

Our Council and its affiliates strongly urge your committee to pass SB-915, this very valuable safety legislation, as your committee has previously done on several occasions and keep Maryland safe!

Sincerely,

George A. Koontz
President



UAW REGION 8 MARYLAND STATE COMMUNITY ACTION PROGRAMS CAP

Testimony in Support to SB 915 Railroad Company-Movement of Freight-Required Crew

March 21, 2023

To: The Honorable Chair and members of the Senate Finance Committee
From: Frederick V. Swanner, Chairman
UAW Local 239 Active & Retiree Council
Re: SB 915 Railroad Company-Movement of Freight-Required Crew

I am writing the Chair and all members of the Senate Finance Committee to urge you to support SB 915. It is a major safety item of concern; SB 915 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 SB 915. 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, Chairman UAW
Local 239 Active & Retiree Council**

SUPPORT SB915 - HHarris - Brotherhood of Locomotiv

Uploaded by: Herbert Harris Jr

Position: FAV

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

District of Columbia — State Legislative Board

Amtrak / MARC / VRE



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Tel: (202) 298-4598 • E-mail: HHarris@DCSLB.org

TESTIMONY IN SUPORT – SB 915

“ Railroad Company – Movement of Freight – Required Crew”

March 21, 2023

Herbert Harris, Jr.
Chairman
State Representative

Crew Bases

Pittsburg, PA

Huntington, WV

Baltimore, MD

Washington, DC

Manassas, VA

Charlottesville, VA

Fredericksburg, VA

Richmond, VA

Raleigh, NC

Charlotte, NC

Florence, SC

TO: Honorable Melany Griffith, Chairman
Maryland State Senate – Finance Committee

FROM: Herbert Harris, Jr
Chairman / State Representative
Brotherhood of Locomotive Engineers & Trainmen

Good afternoon, Chairperson Griffith, Vice Chairperson Klausmeir, and Members of the Senate – Finance Committee.

Thank you for the opportunity to provide comments on SB 915: “Railroad Company – Movement of Freight – Required Crew.”

I am Herbert Harris, Jr., State Chairman, Brotherhood of Locomotive Engineers and Trainmen – District of Columbia.

I am the legislative representative and safety officer for the passenger and commuter locomotive engineers that operate Amtrak; Acela, Regional, and Inter-City Service, and MARC – Penn Line Commuter Service. I have 29 years of experience as a locomotive engineer.

LEGISLATION

Today, we offer our full support for SB 915. and encourage the committee to give your favorably approval. The legislation will establish a minimal two-person safety standard for freight trains operated in the State of Maryland.

In the absence of federal regulations and legislation on this important public safety issue, the responsibility to protect the towns and communities along Maryland’s railroad network falls to the state legislature.

A Division of the Rail Conference – International Brotherhood of Teamsters

Secondly, your approval of this legislation is not preempted by federal law or any collective bargaining agreement.

In 2021, the Ninth Circuit Court of Appeals ruled against the FRA and rail carriers in a case brought by the states of California, Washington, and Nevada that attempted to preempt state crew size laws.

The Court of Appeals ruled that attempts by the FRA to preempt states laws enacted to establish minimum crew size was “arbitrary and capricious” and challenged assertions by the FRA and rail carriers reducing the number of crew members in the cab to one person could improve safety “did not withstand scrutiny” and was lacking.

Today, seven (7) states Arizona, California, Wisconsin, West Virginia, Washington, Nevada, and Illinois have enacted similar rail safety legislation. This legislation will establish a safety standard that places Maryland in the vanguard of state rail safety nationwide.

Third, your support and approval of this legislation will not only improve safety on the freight rail system it will also improve passenger and commuter rail safety.

FREIGHT AND PASSENGER RAIL CORRIDORS

Maryland has 770 miles of railroad owned by the Class I railroads, Norfolk Southern, CSX, and Amtrak. An overlay of the state rail network shows the most populated and traveled passenger and commuter rail corridors are also the primary (North – South) and (East – West) freight rail corridors.

High speed passenger trains: ACELA, Regional, InterCity, share the same rail corridors with mixed freight and unit trains. The co-mingled and shared freight and passenger corridors place greater importance on this legislation for the safety of the traveling public and railroad network.

Maryland also hosts two of the busiest passenger railroad stations in the entire Amtrak system. Prior to the pandemic, Baltimore Penn Station was the 8th busiest Amtrak station with BWI Marshall Airport ranking 14th nationwide.

An average 1.8 million travelers and commuters annually utilized the Aberdeen, Baltimore, Cumberland, Rockville, New Carrollton, and BWI Marshall Airport stations.

INFRASTRUCTURE, INVESTMENT, and JOBS ACT (IIJA)

The Infrastructure Investment and Jobs Act (IIJA) signed by President Biden will provide \$66 Billion dollars in federal support for the expansion and development of railroad projects.

Thirty six (\$36) Billion dollars of the federal funding is designated for competitive federal and state grants. Maryland is strategically positioned to maximize this new federal partnership.

We witnessed the potential of the IIJA with President Biden recent announcement in Baltimore launching the Frederick Douglas / B&P Tunnel replacement project. The project will eliminate a major rail infrastructure deficiency and provide a new modern rail tunnel into downtown Baltimore.

FUTURE POPULATIONS AND MOBILITY

The U.S. Census Bureau projects the population of Maryland from 2007 – 2030 will grow by 25% to 7.0 million residents.

New residents will select Maryland because of (5) five key factors: 1. Employment, 2. Higher Education, 3. Public Safety, and 4. Housing.

Transportation is the 5th key factor. Marylanders are demanding better and more frequent commuter and passenger rail service. The safety of the commuter and passenger rail network is a vital component of the future growth of Maryland.

Precision Schedule Railroading

The Precision Schedule Railroading (PSR) paradigm dominating operations of the U.S. Class I railroads in our opinion undermines rail safety in favor of reduced operation ratios and greater profitability.

Under PSR, a record 20,000 railroad workers were laid off in 2019. The Surface Transportation Board estimates the large freight carriers employ 30% fewer workers in comparison to 2018.

The reduction of the railroad workforce under PSR has placed greater demand on remaining employees. Employee fatigue due to unscheduled workdays and length away from home periods poses a major threat to public safety.

Draconian attendance policy and absence of paid sick and medical leave have reduced the quality of life for employees and prevents them from addressing family and medical obligations.

The size, length, and weight of trains have reached records numbers. Now, many trains exceed 12k – 15k feet and are two (2) stories tall. These long trains disrupt towns and communities and pose major challenges for crews and first responders.

Today, most railroad sidings and infrastructure are unable to accommodate the new behemoth sizes of these freight trains.

PREVENT THE NEXT TRAGEDY

You have an opportunity to prevent a major rail accident in Maryland. We have witnessed the tragedy and devastation that can occur in single person rail operations in Lac-Megantic Quebec, Canada.

In 2013, the rail disaster in Lac-Megantic Quebec, Canada killed 47 people and destroyed the city center. It is a chilling example of the risk and danger to public safety of single-person rail operations. A lone locomotive engineer, Jim Hardy, was assigned to operate and secure a 72-car crude oil train.

On February 3, 2023, the derailment of a Norfolk Southern freight train 32N in Palestine, Ohio showed the importance of a minimum two-person crew in the event of emergency.

The three (3) crew members after the derailment despite the danger took action to remove locomotives and secure the rail cars prior to the 10 derailed hazardous material cars. In the immediate aftermath of the derailment, they provided critical information to the Norfolk Southern train dispatcher to coordinate the emergency response preventing greater risk and loss of life in the surrounding communities.

Twenty four hundred (2400) residents had to be evacuated from their homes. The health and environmental impacts will be severe and long lasting for the residents of Palestine, Ohio and the surrounding communities.

Imagine if this incident occurring in Baltimore, Rockville, Frederick, La Plata, or Easton, MD ?

CONCLUSION

Our brothers and sisters in freight railroad service are professionals trained to safely transport crude oil, hazardous material, and important commercial commodities.

No technology including Positive Train Control (PTC), or Artificial Intelligence (AI) equals the vigilantes, knowledge, and experience of a trained rail professional.

Most importantly, railroad crews are the initial responders to any incident, or emergency and provide important information to FIRE / EMS responders.

My colleagues and I rely on the expertise of the freight railroad crews to safely navigate the shared passenger and freight rail corridors.

As we enter a new era of high speed passenger service transporting commuters, guests, and travelers, it will be reassuring to know with enactment of this legislation two trained rail professionals; engineer and conductor, will be in the cab of that adjacent freight train.

Thank you again for the opportunity to present these comments. Again, I strongly encourage your approval and favorable report of SB 915.

I would welcome any questions you may have at this time.

Testimony SB-915 FIN Full - 2023.pdf

Uploaded by: Larry Kasecamp

Position: FAV

LARRY KASECAMP
Legislative Director

THOMAS CAHILL
Assistant Director

JOHNNY WALKER
Secretary



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March 21, 2023

The Honorable Madam Chair Melony Griffith
and Members of the Senate Finance Committee

REPRESENTATIVES

CUMBERLAND

Local 430
VACANT

Local 600
JASON WEAVER

BRUNSWICK

Local 631
TOM CAHILL

EDMONSTON

Local 1470
KENZELL CRAWFORD

BALTIMORE

Local 610
JOHNNY WALKER

Local 1949
ERIC BILSON

RE: SUPORT SB-915

I'm 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 Senate as **SB-915 "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 hold seniority as a freight Conductor with CSX Transportation for 46 years now. 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 2013, following the Lac Magentic accident the Obama administration's Federal Railroad Administration (FRA) announced their intention to start a rulemaking process (NPRM) to regulate railroad crew size. 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.

On January 26th of 2017 the Trump Administration ended the rule making process initiated under the Obama administration and later issued a Withdrawal Order officially withdrawing the pending rule. In doing so, the FRA announced, *"that no regulation of train crew staffing is necessary or appropriate at this time and the FRA intends for the withdrawal to preempt all state laws attempting to regulate train crew staffing in any manner."*

Early in 2021, the Ninth Circuit Court of Appeals vacated the Withdrawal Order, holding that the Federal Railroad Administration violated the notice-and-comment requirements of the Administrative Procedure Act in issuing the Order, and that the Order was arbitrary and capricious.

In 2021 the Biden administration reinstated an FRA rulemaking process (NPRM) to regulate crew size. No regulation has been issued to date.

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.

Some of you will remember the 1996 head-on collision of a MARC commuter train and an Amtrak passenger train that occurred in Silver Spring, Maryland in which 11 persons were killed and 13 injured.



Following a lengthy investigation, the FRA found that a one-person crew in the locomotive contributed to signal violations associated with the collision and issued an Emergency Order and subsequent safety regulations requiring communications between the operating cab and the train crew stationed in the passenger cars. As a result, commuter passenger trains today routinely have a crew of three qualified people on the crew who must work as a team with constant communication between the crew members and qualifications for emergency response and first responder training.

The SMART-TD Maryland State Legislative Board contracted a reputable consulting firm to gauge the level of support by the public for such minimum crew legislation. We wanted to see where the public stood in relation to the Governor, since the General Assembly was on opposite ends. The survey covered several demographic groupings with results separated based on gender, age, education, political self-identification, and geographic region. I'll just point out that the overall results of the survey are that the level of public support by Marylanders for this legislation is 88%. The entire survey is included with this testimony.

There is an increase in the transportation of hazardous and volatile materials on the railroads as well as significantly longer trains operating over the unique and widely varying geographical terrain existing in our state. This coupled with the possibility of decreasing train crew size, creates a significant localized safety hazard to the employees, the public, the communities, and the environment.

Adequate personnel are critical to insuring railroad operational safety, security, and in the event of a hazardous material incident, support of first responder activities. This legislation regulating minimum railroad crew staffing is a proactive effort to protect and promote worker health and safety, and the security and welfare of the residents of the state by reducing the risk exposure to local communities and protecting environmentally sensitive lands and waterways.

I am sure you have been approached by the railroads who are opposed to this legislation. I want to address some of their arguments against this legislation. Their first argument is that this legislation is preempted by federal law. We do not argue that there are many provisions in federal law covering a wide range of issues that are preempted from state regulation; however, crew member requirements on freight trains are not one of them.

Attached are two letters from the MD Attorney General's office wherein the first letter they reference this legislation and write "*appears to neither violate, nor is preempted by, federal law as it relates to crew member requirements for trains used in connection with the movement of freight in the State.*" In the follow up letter, which was requested by the railroads representatives the AG's office wrote "*if a sufficient legislative record is established to demonstrate that the minimum crew size requirements under the bill are primarily related to safety and will not interfere with rail transportation, a court is unlikely to find that the requirement is preempted under the ICCTA. On the other hand, without such evidence, a court may conclude that the minimum crew size requirement regulates rail transportation and operation in the State, which may be preempted under the ICCTA,*" thereby leaving the door open for interpretation.

The AG's first opinion is reinforced by the Seventh District Court's decision rendered in *Burlington Northern and Santa Fe Railway Co. v. Doyle* which examined the Wisconsin law that required a minimum of two persons on freight trains. The court ruled that Wisconsin was "free to require two-person crews on over-the-road operations." This finding by the 7th District Court rendered in 1999 has not been challenged by the railroads.

They also attempt to use Section 711 of the Regional Rail Reorganization Act of 1973 (3R Act) stating that "Congress expressly intended to preempt state minimum crew laws." Again, we agree

that in 1973 Congress did intend to preempt 17 states and the District of Columbia from regulating minimum crew laws. However, this decision was rendered at a time when there were 4 or 5 crew members on each freight train, and it was not for the purpose of denying States the ability to provide for the safety of their towns, communities, and citizens. Congress was attempting to protect the Midwest and Northeast regions from financial collapse related to a disappearance of rail service as seven Class I railroads were in bankruptcy. As a result, they created the federally government owed Consolidated Rail Corporation known as Conrail.

They did afford the provisions of the preemption to the other railroads operating in the 17 states and the District of Columbia due to the potential for unfair competition in the states they all served. Their main concern in creating this provision was their fiduciary responsibility to the taxpayers. In 1998, Conrail was absolved through the purchase of their assets by CSX and Norfolk Southern Railway and is no longer a potential liability to the taxpayers.

On the issue of preemption, the critical question in any preemption analysis is always whether Congress intended that a federal regulation supersedes state law. In the case of *Louisiana Public Service Commission v. FCC* the court wrote:

“Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Moreover, the Supreme Court has also made it clear that “[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”

So, the key to the argument that Section 711 of the 3R Act was intended to “*expresses a clear intent to preempt state law*” would be based on the record as to why Congress passed a federal statute and to what it applies. We take no exception to the fact that Congress had a clear intent to preempt state law within the 17 states that Conrail operated in. What we do take exception to is that that law is still applicable.

The record clearly shows that Congress was attempting to protect the Midwest and Northeast regions (17 States) from financial collapse related to a disappearance of rail service as seven Class I railroads were in bankruptcy. They were not passing a law to preempt crew size throughout the United States. They limited the laws reach to these 17 States to level the playing field against Conrail, the taxpayer owned railroad.

Congress placed Conrail back into the hands of the private sector through the sale of their assets. However, the obvious advantage the railroads operating in this limited 17 state area had over the rest of the railroads in the country, where the preemption did not apply, still existed. In response, Congress passed into law Section 408 of the Rail Safety Improvement Act that required the Department of Transportation (DOT) to complete a study regarding the impacts of repealing Section 711 of the 3R Act.

The DOT delegated this duty to the Federal Railroad Administration (FRA), the agency that Congress gave the jurisdiction over railroad safety to when they established it. The FRA completed the study and reported back to the Congress that ***“the goal of protecting the Midwest and Northeast regions from financial collapse related to a disappearance of rail service has been met. The rationale behind the preemption provision in the 3R Act of ensuring viable freight rail service no longer exists. Repealing Section 711 would restore the status quo that existed prior to its enactment and create a level playing field among rail carriers nationwide.”*** They concluded with ***“For the above stated reasons.....the purpose for which Section 711 was enacted was met a number of years ago***

and Section 711 should be repealed.”

This report was issued by the FRA, the federal agency assigned by Congress with the responsibilities of overseeing safety in the rail industry. The effect of their report is that all railroads are on a level playing field nationwide.

The issue of preemption related to the states that were not within the 17-state limit has been settled. The U.S. Seventh District Court found in the *Burlington Northern and Santa Fe Railway Company v. Doyle* that the state of Wisconsin was “*free to require two-person crews on over-the-road operations.*” This settled law will govern the country until the FRA decides to affirmatively regulate such operations as minimum crew size, which they have not done.

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 must 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.

In 2008 Congress passed the Rail Safety Improvement Act, which we have been in support of, that required Positive Train Control’s (PTC) implementation nationwide by 2015. The railroads had repeatedly requested delays in implementing this supplemental safety technology with full implementation just being completed in December 2020. The railroads now try to present this technology as their replacement for the second crew member.

On January 20, 2023, MARC had to cancel forty-one trains because of connectivity issues with PTC. While this was an inconvenience to thousands of Maryland commuters, fortunately no one was hurt because the trains were able to be canceled. Imagine this happening to a freight train loaded with hazardous material operating through Baltimore with one person.

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 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 then Governor Hogan. 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 Governor Hogan. 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 on multiple occasions with a bi- partisan vote overwhelmingly.

WE THEREFORE URGE A FAVORABLE REPORT ON SB-915

Sincerely,



Lawrence E. Kasecamp
MD State Legislative Director
SMART Transportation Division

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

2 Support for Federal Railroad Administration Regulation on Crew Size
3 For the purpose of supporting and encouraging the rail safety rulemaking proposed by the
4 Federal Railroad Administration concerning on-board crew size.

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

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

8 WHEREAS, the Federal Railroad Administration (FRA) has published a notice of proposed
9 Rulemaking (NPRM) (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 21 30-AC48; Train
10 Crew Staffing) regarding adequate staffing on trains, a factor that is vital in ensuring safe train
11 operations; and

12 WHEREAS, polling across America shows ov rwhelming bi-partisan support for two-
13 person crews, with 83 to 87 percent of those polled in favor of mandating that trains are operated
14 by a crew of at least two qualified individuals; and

15 WHEREAS, national studies show that a minimum of two on-board crew members are vital
16 to operate a train safely and minimize the likelihood of train-related accidents; and

17 WHEREAS, most trains in North America are already operated by crews of at least two
18 individuals, making the economic impact of this proposed rule minimal; and

19 WHEREAS, the FRA agrees that, while advancements in automated technology such as
20 Positive Train Control (PTC) systems improve railroad safety, they are not a substitute for a
21 train's on-board crew members; and

22 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

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

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

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

11 **NOW, THEREFORE, BE IT RESOLVED** by the County Council of Prince George's
12 County, Maryland, that the Prince George's County Council does hereby encourage and support
13 the FRA's proposed Rulemaking (49 CFR Part 218; Docket No. FRA-2014-0033; RIN 2130-
14 AC48; Train Crew Staffing) requiring that trains operated in the United States be operated by no
15 less than a two-person crew; and

16 BE IT FURTHER RESOLVED that this resolution be filed with the United States
17 Department of Transportation in the form of comments in support of the proposed federal rule.

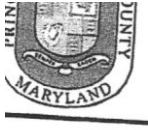
Adopted **this** day of May , 2016.

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:

Meeting Date: 5/17/2016

Effective Date:

Reference No.: CR-031-2016

Chapter Number:

Draft No.: 1

Public Hearing Date:

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.

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



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)

**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.

Council Bill 16-0303R

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

4 **AND BE IT FURTHER RESOLVED**, That this resolution be filed with the United States
5 Department of Transportation in the form of comments in support of the proposed federal rule.

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

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.

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 COVERSHEET	3
FROM:	Ernie Grecco

--



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"

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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



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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.

WESTERN MARYLAND CENTRAL LABOR
COUNCIL, AFL-CIO

152-154 N. MECHANIC STREET
CUMBERLAND, MD 21502.
301-777-1820 FAX: 301-777-0121
west:mdclc@verizon.net

FAX COVER SHEET

DATE: ti. Jq..... {p

TO: >>o -

*Jody Oliver
Council, AFL-CIO*

FROM: W. N. 1. f) C

OF PAGES TO FOLLOW: d

FAX#

902-493-2251

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

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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 your 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.

DFM Research

St. Paul, Minnesota

**MARYLAND STATEWIDE
RAIL ISSUE SURVEY**

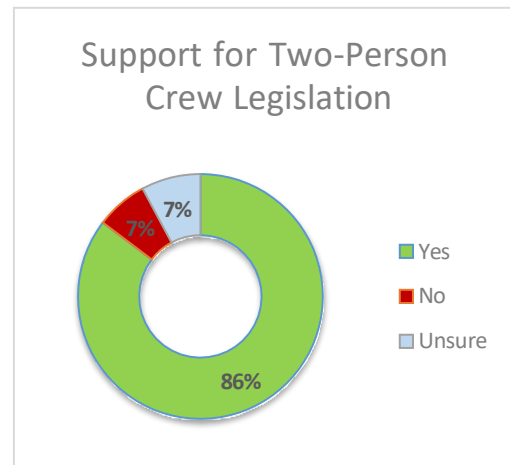
JANUARY 19-22, 2019

Executive Summary:

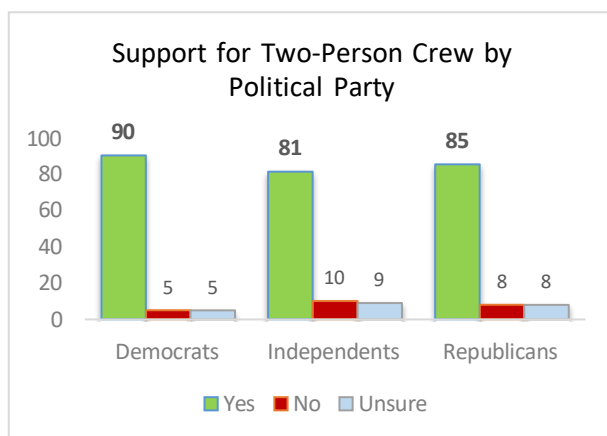
By a clear majority, Marylanders strongly support state legislation which would require a crew of two to operate any freight train in Maryland (introduced as H.B. 66). An overwhelming 86 percent of Maryland residents support two-person crew state legislation, to just 7 percent who reject proposed state legislation. The survey was conducted January 19-22, 2019 comprising 500 random Marylanders by live caller using landline and cell phones. Margin of error is ± 4.4 percentage points.

The survey measures level of support both pre-and-post messaging using arguments by both the railroads and rail labor on their respective position. Each survey respondent heard two statements in support and two statements in opposition. Result shows survey respondents did not find the railroads arguments convincing, while finding support messages for two-person crew convincing. Consider:

- The railroads best argument in opposition of two-person crew state legislation is stating that passenger rail data (mostly use single crew) from the 1970s show an excellent safety record; yet only 33 percent found this to be convincing.
- In support of two-person state legislation, 89 percent of respondents found convincing the statement that 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.



At the conclusion of the arguments in support and opposition to two-person crew state legislation, the support level for two-person crew moved up to 88 percent (from 86 percent) voting 'yes to pass' legislation. The survey also shows that while Marylanders support the implementation of advance rail technology, only four percent support rail technology as a replacement of a crew member; and a clear majority of 79 percent do not trust advanced rail technology as a replacement of a train crew member.



Rail safety via two-person crew legislation is not a partisan issue; 85 percent of Republicans and 90 percent of Democrats support state legislation. The lowest support level by demographic groups are Marylanders under the age of 35 and men, both at robust 84 percent in support.

Bottom line, no matter the age, education level gender, partisan inclination or where one lives, Marylanders strongly support two-person crew state legislation.

Methodology:

The results presented are based on a stratified random sample of 500 Maryland residents over the age of 18. Unlike past surveys for SMART Transportation Division, the Maryland survey did not use a likely voter screen. The sample was stratified into four areas of Maryland (D.C. Suburbs, Baltimore City, Baltimore Suburbs/Central and rural Maryland, all by county lines) to ensure a statewide representative sample. All calls were conducted by live callers using both landline and mobile phones.

After the numbers were stratified into the appropriate region, telephone numbers were selected at random using a skip pattern to guarantee interviews were distributed throughout the region. Each number in the stratified sample had the same non-zero chance of being selected for an interview.

Telephone interviews were conducted by trained staff of KGS Research of Las Vegas, Nevada, using a computer-assisted telephone interview (CATI) system for landline phones. Mobile phone interviews are dialed manually to comply with the 1991 Telemarketing Consumer Protection Act. To ensure everyone in the household has an equal chance of being selected, callers ask to interview the resident over the age of 18 who had the most recent birthday.

Final results are weighted based on gender, age, race and education to conform approximately to the 2018 U.S. Census Bureau demographic data on file.

<u>Gender</u>		<u>Age</u>		<u>Race</u>		<u>Education</u>	
Male	48%	18-34	30%	White	65%	Non College	61%
Female	52%	35-49	33%	Black	27%	College Degree	39%
		50-64	22%	All Other	8%		
		65 plus	15%				

The final results are subject to sampling error, which is the difference between results obtained from the survey and those that would be obtained if every adult was interviewed in the district. The margin of error is ± 4.4 percentage points with a 95 percent confidence level; meaning that in 19 out of 20 times, the individual responses would be within the margin of error. For example, if a question produced a final result of 50 percent, the likely range would be between 45.6 to 54.4 percent had the entire state population been surveyed. Where appropriate in the survey, question and answer choices are randomized to help reduce bias. Due to rounding, results may not equal 100 percent.

Project management and final analysis of the data was completed by Dean Mitchell of DFM Research based in Saint Paul, Minnesota. In addition to his 28 years of political experience, Dean has completed course work in survey techniques and statistics as part of his Master in Public Policy (MPP) degree from the University of Minnesota's Humphrey School of Public Affairs.

Topline:

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

	<u>Favorable</u>	<u>Unfavorable</u>	<u>Neutral (VOL)</u>	<u>Never Heard Of</u>
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%	37 approve
Somewhat approve.....	12	
Somewhat disapprove	4	60 disapprove
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 derailling 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

SURVEY NOTE - Each respondent received two reasons to oppose House Bill 66 (questions 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 $\pm 5.2\%$ pts to $\pm 6.3\%$ pts.

Q: 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:

Q9a: Railroads say that two-person crew legislation undermines the sanctity of collective bargaining between rail management and rail labor regarding train crew size. (n=260; MoE $\pm 6.1\%$ pts)

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. (n=240; MoE $\pm 6.3\%$ pts)

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. (n=248; MoE $\pm 6.2\%$ pts)

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. (n=252; MoE $\pm 6.2\%$ pts)

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

Q: 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. (n=359; MoE $\pm 5.2\%$ pts)

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. (n=322; MoE ±5.5%pts)

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. (n=319; MoE ±5.5%pts)

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

Select Crosstabs:

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

<u>Gender</u>	<u>Excellent</u>	<u>Good</u>	<u>Satisfactory</u>	<u>Poor</u>	<u>Failing</u>	<u>Unsure</u>
Men	4	34	40	14	7	1
Women	4	35	40	14	5	2
<u>Age</u>						
18-34	6	31	43	14	5	1
35-49	3	34	43	13	6	1
50-64	4	36	34	16	8	3
65+	4	39	39	11	4	4
<u>Education</u>						
No College Degree	3	33	41	14	7	2
College Degree	5	36	39	13	5	1
<u>Region</u>						
D.C. Suburbs	4	37	37	16	3	3
Baltimore City	2	27	44	20	7	0
Baltimore Suburbs / Central	4	30	45	12	7	2
Rural Maryland	6	41	36	9	9	0
<u>Party Identification</u>						
Democrat	3	33	41	14	7	2
Independent	5	39	38	11	4	3
Republican	5	30	42	16	7	0

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

<u>Gender</u>	<u>One</u>	<u>Two</u>	<u>Three</u>	<u>Four</u>	<u>Five +</u>	<u>DK</u>
Men	5	18	14	11	32	20
Women	8	11	13	5	35	27
<u>Age</u>						
18-34	7	13	17	7	35	20
35-49	5	14	10	13	35	22
50-64	7	13	13	8	35	25
65+	7	21	13	0	27	32
<u>Education</u>						
No College Degree	8	15	12	9	30	25
College Degree	5	13	15	7	39	22
<u>Region</u>						
D.C. Suburbs	6	15	14	6	34	24
Baltimore City	9	11	9	13	33	25
Baltimore Suburbs / Central	6	14	14	9	35	23
Rural Maryland	8	17	13	9	30	23
<u>Party Identification</u>						
Democrat	6	16	13	9	34	23
Independent	8	13	11	7	37	25
Republican	7	14	17	8	30	24

Q7: Let's suppose freight trains in your area operated with only a crew of one; how worried would you be about a train derailling in your community?

Very Worried	49%
Fairly Worried	15
Just Somewhat Worried	20
Not that Worried	15

<u>Gender</u>	<u>Very</u>	<u>Fairly</u>	<u>Somewhat</u>	<u>Not That</u>
Men	42	13	23	21
Women	56	16	18	10
<u>Age</u>				
18-34	42	16	23	20
35-49	51	13	18	19
50-64	49	18	24	8
65+	62	13	16	8
<u>Education</u>				
No College Degree	52	11	21	16
College Degree	46	21	19	14
<u>Region</u>				
D.C. Suburbs	48	17	21	15
Baltimore City	56	15	20	9
Baltimore Suburbs / Central	51	14	18	17
Rural Maryland	45	13	23	18
<u>Party Identification</u>				
Democrat	57	14	21	9
Independent	47	17	18	18
Republican	41	13	23	24

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

<u>Gender</u>	<u>Yes, Pass</u>	<u>No, Reject</u>	<u>Unsure</u>
Men	84	8	8
Women	88	6	6
<u>Age</u>			
18-34	84	6	10
35-49	87	6	7
50-64	85	9	5
65+	88	9	3
<u>Education</u>			
No College Degree	85	9	6
College Degree	87	5	8
<u>Region</u>			
D.C. Suburbs	86	8	6
Baltimore City	84	9	7
Baltimore Suburbs / Central	85	7	9
Rural Maryland	91	4	4
<u>Party Identification</u>			
Democrat	90	5	5
Independent	81	10	9
Republican	85	8	8

Q9a: 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:

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	13	85	2
Women	10	87	3
<u>Age</u>			
18-34	14	81	5
35-49	12	87	1
50-64	9	90	2
65+	10	87	3
<u>Education</u>			
No College Degree	18	79	3
College Degree	1	97	2
<u>Region</u>			
D.C. Suburbs	11	86	3
Baltimore City	5	86	9
Baltimore Suburbs / Central	10	88	2
Rural Maryland	18	82	0
<u>Party Identification</u>			
Democrat	13	84	3
Independent	11	86	2
Republican	10	89	2

Q9b: 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:

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	37	61	3
Women	30	67	3
<u>Age</u>			
18-34	38	61	1
35-49	31	65	4
50-64	34	64	2
65+	26	69	5
<u>Education</u>			
No College Degree	33	64	4
College Degree	33	65	2
<u>Region</u>			
D.C. Suburbs	32	64	4
Baltimore City	38	59	3
Baltimore Suburbs / Central	33	64	3
Rural Maryland	33	67	0
<u>Party Identification</u>			
Democrat	30	66	4
Independent	30	68	3
Republican	42	56	2

Q9c: 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:

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	31	65	4
Women	35	59	6
<u>Age</u>			
18-34	39	57	4
35-49	31	65	4
50-64	22	69	9
65+	43	54	3
<u>Education</u>			
No College Degree	38	56	6
College Degree	25	71	4
<u>Region</u>			
D.C. Suburbs	28	64	7
Baltimore City	39	57	4
Baltimore Suburbs / Central	30	66	4
Rural Maryland	44	54	2
<u>Party Identification</u>			
Democrat	29	65	6
Independent	38	59	4
Republican	33	61	6

Q9d: 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:

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	27	70	3
Women	20	75	5
<u>Age</u>			
18-34	25	75	0
35-49	18	79	3
50-64	24	70	6
65+	32	58	11
<u>Education</u>			
No College Degree	24	71	5
College Degree	22	75	2
<u>Region</u>			
D.C. Suburbs	21	73	7
Baltimore City	26	74	0
Baltimore Suburbs / Central	27	70	3
Rural Maryland	21	77	2
<u>Party Identification</u>			
Democrat	22	73	4
Independent	24	72	4
Republican	25	72	3

Q10a: I now want to read you a few reasons why some people support House Bill 66, which would require 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?

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	78	21	1
Women	83	16	1
<u>Age</u>			
18-34	80	19	1
35-49	84	15	2
50-64	73	27	0
65+	86	14	0
<u>Education</u>			
No College Degree	83	17	1
College Degree	77	22	1
<u>Region</u>			
D.C. Suburbs	79	20	1
Baltimore City	80	20	0
Baltimore Suburbs / Central	82	17	1
Rural Maryland	82	18	0
<u>Party Identification</u>			
Democrat	85	15	0
Independent	74	23	3
Republican	82	18	0

Q10b: I now want to read you a few reasons why some people support House Bill 66, which would require 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?

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	88	12	1
Women	91	9	1
<u>Age</u>			
18-34	90	9	1
35-49	92	7	1
50-64	84	16	0
65+	90	10	0
<u>Education</u>			
No College Degree	92	8	0
College Degree	86	13	1
<u>Region</u>			
D.C. Suburbs	93	7	0
Baltimore City	81	19	0
Baltimore Suburbs / Central	88	11	1
Rural Maryland	91	7	2
<u>Party Identification</u>			
Democrat	92	8	0
Independent	88	10	2
Republican	87	13	0

Q10c: 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?

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

<u>Gender</u>	<u>Convincing</u>	<u>Not That</u>	<u>Unsure</u>
Men	77	21	1
Women	80	18	2
<u>Age</u>			
18-34	84	14	2
35-49	76	20	4
50-64	73	27	0
65+	83	17	0
<u>Education</u>			
No College Degree	79	18	3
College Degree	78	21	1
<u>Region</u>			
D.C. Suburbs	76	20	4
Baltimore City	87	13	0
Baltimore Suburbs / Central	77	22	1
Rural Maryland	80	18	2
<u>Party Identification</u>			
Democrat	81	19	0
Independent	77	19	4
Republican	76	21	3

Q11: When it comes to train crew size, rail safety and the latest rail technology, which option makes the most sense to you?

- A - Only two-person crew, no advanced rail technology **2%**
- B - Two person crew, using advanced rail technology **68**
- C - Advanced rail technology as replacement of a train crew member **4**
- D - Let railroads and rail unions decide which option is safest **21**
- E - (VOL) Unsure **5**

<u>Gender</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
Men	2	68	5	20	4
Women	3	67	2	22	6
<u>Age</u>					
18-34	3	65	4	26	3
35-49	2	74	3	16	5
50-64	3	64	4	26	4
65+	3	64	4	18	12
<u>Education</u>					
No College Degree	3	67	3	22	5
College Degree	2	68	4	20	5
<u>Region</u>					
D.C. Suburbs	2	74	3	16	5
Baltimore City	2	66	2	22	9
Baltimore Suburbs / Central	2	63	5	27	3
Rural Maryland	4	66	3	20	7
<u>Race / Ethnicity</u>					
White / Caucasian	2	67	5	21	5
Black / African-American	3	69	2	22	4
All Other	0	69	0	20	11
<u>Party Identification</u>					
Democrat	1	70	4	21	4
Independent	4	62	4	21	9
Republican	3	70	3	23	2

Q12: Do you trust advanced rail technology as a replacement of a train crew member?

Yes	13%
No	79
(VOL) Unsure	8

Gender **Yes** **No** **Unsure**

Men	18	76	6
Women	8	83	9

Age

18-34	16	75	9
35-49	11	83	6
50-64	10	85	5
65+	17	72	11

Education

No College Degree	14	79	7
College Degree	11	80	9

Region

D.C. Suburbs	12	80	8
Baltimore City	15	82	4
Baltimore Suburbs / Central	15	76	9
Rural Maryland	9	83	8

Party Identification

Democrat	11	84	4
Independent	16	71	13
Republican	12	81	7

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

<u>Gender</u>	<u>Yes, Pass</u>	<u>No, Reject</u>	<u>Unsure</u>
Men	85	11	4
Women	90	5	5
<u>Age</u>			
18-34	85	10	5
35-49	88	6	6
50-64	87	11	2
65+	95	4	1
<u>Education</u>			
No College Degree	88	9	3
College Degree	88	7	6
<u>Region</u>			
D.C. Suburbs	89	6	5
Baltimore City	89	7	4
Baltimore Suburbs / Central	86	10	4
Rural Maryland	89	8	3
<u>Party Identification</u>			
Democrat	93	3	4
Independent	83	12	5
Republican	86	11	3

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

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 13798.20. 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.

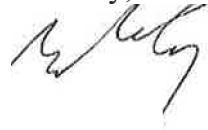
As to over-the-road or main line rail operations, however, the Seventh Circuit found that although FRA was aware of one-person crew operations, and has considered restrictions on the practice, it has not "affirmatively decided not to regulate such operations." *Id.* at 802. Thus, as there was no final 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)),

The Honorable Cory V. McCray
March 6, 2015
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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,

A handwritten signature in black ink, appearing to read "J. McCoy", written in a cursive style.

Jeremy M. McCoy
Assistant Attorney General

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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.

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,

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 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 sector³ 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. CSXTransp.* 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. 200 I), 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

The Honorable Brian J. Feldman
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Page 9

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

BRIAN E. FROSH
ATTORNEY GENERAL



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DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

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).

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.

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Page 2

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 den. 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,

A handwritten signature in black ink, appearing to read 'J. McCoy', written in a cursive style.

Jeremy M. McCoy
Assistant Attorney General

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DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

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 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

The Honorable Robert L. Flanagan
March 9, 2018
Page 2

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,

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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,

A handwritten signature in black ink, appearing to read "J. McCoy", written in a cursive style.

Jeremy M. McCoy
Assistant Attorney General

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ASSISTANT ATTORNEY GENERAL

February 13, 2023

The Honorable Dana Stein
Maryland House of Delegates
251 Taylor House Office Building
Annapolis, Maryland 21401

Dear Delegate Stein:

You have inquired whether the State regulation of railroad crew sizes as proposed in House Bill 352 (“Railroad Company – Movement of Freight – Required Crew”), as introduced, would be preempted by the federal Regional Rail Reorganization Act of 1973 (“3RA”), particularly in light of a recent federal district court case that held that a similar Illinois crew-size statute was preempted under 3RA. *See Indiana Rail Road Company, et al. v. Illinois Commerce Commission*, 576 F. Supp. 3d 571 (N.D. Ill. 2021) (“*Indiana R.R. II*”).

For the same reasons explained in greater detail in this office’s earlier advice letter addressing 3RA preemption of an earlier similar bill, in my view, there is a possibility that a court would find that HB 352, as introduced, is preempted by 3RA, if there is an economic purpose for the enactment. *See* attached Letter of Advice of February 10, 2016 to the Hon. Brian J. Feldman from Asst. Atty. Gen. Jeremy M. McCoy (“Feldman Letter”). In light of the authority of the State to enact crew levels as a rail safety standard under the Federal Railroad Safety Act of 1970 (“FRSA”), however, it is also possible that if a court finds that the provisions of HB 352 serve the sole purpose of enhancing safety, HB 352 may be authorized as a safety standard under FRSA and would not be preempted by 3RA.

While there is also a possibility that a court could decide, as the court in the Illinois case did, that 3RA preempts an applicable state’s crew size requirement regardless of a “broadly stated purpose [...] to promote safety,” *Indiana R.R. II*, 576 F. Supp. 3d at 577, that case is not binding precedent in Maryland and addressed an Illinois statute that was broader in scope than HB 352, which is limited to crew requirements for the movement of freight that shares a rail corridor with high-speed passenger or commuter trains. Additionally, that court also noted the possibility that state safety regulation of rail crew size might survive 3RA preemption. *Id.* at 577 n.4.

Consequently, in my view, the Illinois case does not alter the analysis and conclusion regarding the possibility of 3RA preemption or FRSA authorization for state rail crew size as addressed in the Feldman Letter.

House Bill 352, as introduced, 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 under the bill applies only to a train or light engine used in connection with the movement of railroad freight that “shares the same rail corridor as a high-speed passenger or commuter train[,]” and does not apply to the movement of freight involving hostler service or utility employees in yard service.

In light of the background and analysis of the 3RA and FRSA statutes and cases addressed at length in the Feldman Letter, and that the cases and analysis addressed therein appear to remain in effect, I will not repeat that background and analysis here. However, below I will address some subsequent developments in this area of the law since the Feldman Letter and examine the holding of the 2021 *Indiana R.R. II* case.

At the time of the Feldman Letter, the Federal Railroad Administration (“FRA”) was preparing to, and subsequently issued notice of proposed rules for crew member sizes for trains based on the type of operation. FRA, *Train Crew Staffing*, 81 FR 13918 (Mar. 15, 2016). In 2019, the FRA withdrew its proposed regulation on crew staffing, and announced its intent that the withdrawal “preempted all state laws attempting to regulate train crew matters in any manner.” FRA, *Train Crew Staffing*, 84 FR 24735, 24741 (May 29, 2019). However, in early 2021, the Ninth Circuit vacated FRA’s Withdrawal Order, holding that the FRA’s order did not implicitly preempt state safety laws on crew sizes, violated the federal Administrative Procedure Act and was arbitrary and capricious. *Transp. Div. of the Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1184-85 (9th Cir. 2021). In July of 2022, the FRA re-proposed crew staffing regulations to require rail crew sizes of at least two persons except under certain circumstances. FRA Proposed Rule, 87 FR 45564 (July 28, 2022), which is currently pending.

In 2020, the federal district court in the *Indiana R.R. II* case had originally held that FRA’s 2019 Withdrawal Order preempted the Illinois crew size statute, which generally prohibited the operation of a train or light engine used in the movement of freight unless it has an operating crew of at least two individuals. *Indiana Rail Road Company v. Illinois Commerce Commission*, 491 F. Supp. 3d 344, 347 (N.D. Ill. 2020) (“*Indiana R.R. I*”). Following the Ninth Circuit’s vacation of the FRA Withdrawal Order, the Seventh Circuit remanded the appeal in *Indiana R.R. I* back to the district court. 21 WL 6102922 (7th Cir. July 2, 2021). On remand, the court in *Indiana R.R. II* explained that “[n]ow that the Ninth Circuit has held that the Withdrawal Order was invalid, meaning the FRSA does not preempt the [Illinois] Crew Size Law, it is time to turn to the

Railroads' other arguments" that the court did not address in *Indiana R.R. I*, including a claim of federal preemption under 3RA. *Indiana R.R. II*, 576 F. Supp. 3d at 574.

The court in *Indiana R.R. II* held that the Illinois crew size statute was preempted by the federal 3RA. *Id.* at 575. As discussed in greater detail in the Feldman Letter (pages 4 and 5), the 3RA contains an express preemption clause against state laws requiring the employment of a specified number of persons to perform a particular operation. 45 U.S.C. § 797j. The court found that the Illinois statute mandating a minimum crew size "is exactly what the [3RA] prohibits." *Id.* at 576. The court appeared to dismiss earlier holdings of the Special Court created under 3RA with exclusive jurisdiction over proceedings relating to the 3RA,¹ which "held that the [3RA] did not preempt laws about crew sizes when those laws were concerned exclusively with safety[,] and others that "focused on the economic regulatory purposes of the [3RA]." *Id.* at 576 (citing *Norfolk & Western Ry. Co. v. Public Service Com'n of West Virginia*, 858 F. Supp. 1213, 1217 (Spec. Ct. R.R.R.A. 1994)). (See detailed discussion of Special Court assessment of 3RA preemption of economic state action and state safety measures under FRSA in Feldman Letter (pages 4-7)). The court in *Indiana R.R. II* explained that "[n]one of these [Special Court] cases are binding precedent. And given the plain language of the statute, the reasoning of the Special Court, when it suggested that a safety-based regulation of crew sizes might not be preempted by the [3RA], is not especially persuasive[.]" concluding that "the Supreme Court has increasingly embraced a textualist jurisprudence that would not support the reasoning of the Special Court in *Norfolk & W. Ry. Co.*[,] and "[n]or does it appear that the Special Court ever actually upheld a safety-based regulation of crew size after hinting that this might be possible[.]" *Id.* at 576-77.

The court acknowledged Illinois' argument that 3RA "is concerned mostly with economic matters" and that "[i]t is true that the [3RA] is not *generally* concerned with safety matters. But on the *specific* issue of crew sizes, the statute is clear. The prohibition on certain states passing laws related to crew size doubtless has some implications for safety, but this can be said of many economically motivated rules." *Id.* at 577 (emphasis in original). The court did note that other states under 3RA, including Massachusetts and New Jersey, have existing two-person crew statutes requiring safety findings and notice, explaining "[t]hat might be the key, litigation- preventing difference from the Illinois statute, which prohibits all one-person crews." *Id.* at 577 n.4.

While there is a possibility that a controlling federal court with jurisdiction over Maryland could similarly hold that HB 352 as introduced would be preempted under 3RA consistent with *Indiana R.R. II*, the holding of the U.S. District in the Northern District of Illinois in that case is not binding federal precedent in Maryland. Additionally, the Illinois statute at issue in *Indiana R.R. II* dealt with a blanket two-person crew minimum for the movement of rail freight, unlike the proposal in HB 352 as introduced, which limits the prohibition against a single crew member to

¹ 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).

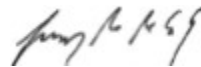
The Honorable Dana Stein
February 13, 2023
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movement of railroad freight that shares the same rail corridor as high-speed passenger or commuter trains. Consequently, I cannot conclude that the court's analysis in *Indiana R.R. II* would necessarily apply to the more limited scope of HB 352.

To my knowledge, neither the Fourth Circuit nor the U.S. District Court for the District of Maryland has addressed this question of 3RA preemption of state crew size regulation. Other valid federal case law recognizes that a 3RA 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. (See Feldman Letter (pages 4-7)). As the Special Court explained, "the preemptive power of section [797j] of the 3RA] is not absolute[.]" *Norfolk & Western Ry. Co.*, 858 F. Supp. at 1217. For the foregoing reasons, in my view, the holding in the *Indiana R.R. II* case does not alter the analysis and conclusion regarding the possibility of either 3RA preemption or FRSA authorization for state rail crew size as addressed in the Feldman Letter.

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

Testimony SB-915 - Larry Mann.pdf

Uploaded by: Larry Mann

Position: FAV

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March 21, 2023

TO: Senate Finance Committee

RE: Support for SB-915

LAWRENCE M. MANN

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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.

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. MB. 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. Rociford*,408 U.S. 104, 108 (1972); *See 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. Rocliford*, *supra*, 408 U.S. at 108-109; *Ko/ender 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 its 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. *Vacca 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 HR. 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. v. 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 Plaintiffs 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 Plaintiffs 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*

^{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 AdministratorFRA 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.

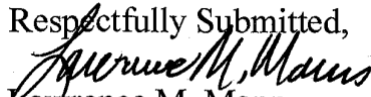
F. The Railway Labor Act Does Not Preempt State Rail Safety Laws.

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

Testimony SB-915 FIN - Cahill - Written.pdf

Uploaded by: Tom Cahill

Position: FAV

March 21, 2023

The Honorable Melony Griffith and Members of the Senate Finance Committee

Testimony in **Support of SB915** “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 SB915 “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 SB915!

Sincerely,

Tom Cahill
Westminster, MD

SB 915_MDCC_Railroad Company_Movement of Freight_R

Uploaded by: Andrew Griffin

Position: UNF



LEGISLATIVE POSITION:

Unfavorable

Senate Bill 915

Railroad Company – Movement of Freight – Required Crew

Senate Finance Committee

Tuesday, March 21, 2023

Dear Chairwoman Griffith 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 6,400 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.

Senate Bill 915 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).

Finally, this proposed policy was vetoed in 2019 and upheld by the members of the Maryland General Assembly in 2020.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **Unfavorable Report** on **Senate Bill 915**.



SB915 Written TestimonyHammock.pdf

Uploaded by: Brian Hammock

Position: UNF



Brian W. Hammock
Resident Vice President
CSX Transportation

March 20, 2023

The Honorable Melony Griffith
Miller Senate Office Building, 3 East
Annapolis, MD 21401

RE: LETTER IN OPPOSITION TO SB 915

Dear Chair Griffith:

On behalf of CSX Transportation, I am writing to respectfully oppose SB 915. This bill would require two-person crews to operate freight trains in Maryland when operating on the same corridor as high-speed passenger or commuter trains. The Fiscal and Policy Note indicates that if this legislation is enacted, the Maryland Transit Administration (MTA) faces a fiscal impact of up to \$30 million over a 5-year period. The potential negative impacts to interstate commerce and the supply chain are reasons why federal law preempts state-specific train crew mandates. Congress and the Federal Railroad Administration are both actively considering a national policy on this topic. For these reasons, we respectfully request an unfavorable report.

\$6 Million Annual Fiscal Impact to Maryland Department of Transportation

If SB 915 becomes law, it would nearly double the cost of the Camden and Brunswick lines for the state, hindering efforts to increase commuter rail service across Maryland. The 2021 MARC Access Agreement, between CSX and MTA, includes reimbursement to CSX of up to \$6 million per year – \$30 million over the five-year agreement – if the state imposes a train crew size mandate. This amount accounts for the potential future cost of having an additional crew member on freight trains when operating in the State of Maryland.

There is a direct nexus between SB 915 and the MTA/CSX Access Agreement. Under the Access Agreement, MTA operates the MARC Camden and Brunswick lines on CSX-owned tracks.¹ SB 915 penalizes CSX for allowing commuter trains to operate on CSX's network by requiring freight trains to operate with two person crews.

In general, a state crew size mandate would raise the cost of freight operations in Maryland compared to other East Coast ports and make it less competitive. Communities throughout Maryland are benefiting from the rapid growth in distribution, warehousing and logistics operations locating to the state. Logistics costs are a concern for cost-conscious shippers and adding to the cost of an important link in the supply chain could give them another reason to call on competing ports, such as Norfolk. The recently announced MSC container terminal at Trade Point Atlantic, and the state's historic investment in the Howard Street Tunnel project, highlight the importance of keeping Maryland's supply chain fluid and competitive.

¹ MARC Penn Line service operates on Amtrak-owned railroad.

Collective Bargaining

Train crew size is a complex issue that affects the efficiency and cost of train operations. As such, it is a matter of significant importance to both the workers and the employers in the railway industry. Collective bargaining provides a mechanism for these parties to negotiate and reach agreements on a range of issues, including train crew size. This process allows both sides to have a voice in the decision-making process and to balance their respective interests.

Crew size has been raised in multiple rounds of bargaining dating back to the early 1900s. It has also been addressed by a variety of neutral fact finders, including presidential commissions, federal courts, arbitrators, and emergency boards appointed by the President. Crew size has historically been one of the most important issues in bargaining since at least World War II. The bargaining process has led to historic wages for railroad employees, including a recently announced 24 percent wage increase during the current five-year contract period.

Federal Preemption

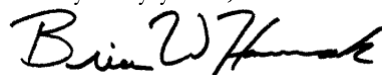
Federal law preempts state-specific train crew mandates as they would hinder the free flow of goods across state borders. The American supply chain depends on a unified and efficient transportation system, and a patchwork of state regulations would negatively impact the national economy.

The Rail Reorganization Act, also known as the 3R Act, was passed by Congress in 1974 in response to a railway crisis in the Northeast and Midwest. The Act was designed to reorganize the railroads to create an economically viable and cohesive railway system. The 3R Act has an express preemption clause that prohibits states in the Region from adopting laws or rules requiring a specified crew size for any task, function, or operation.

The United States District Court for the Northern District of Illinois recently struck down a similar state crew size law passed in Illinois. In that case, railroads in Illinois challenged a state-enacted two-person crew mandate similar in nature to SB915. Finding that the preemption language in the 3R Act is too specific to ignore, the court concluded: “Illinois wants to mandate a crew size of two to perform the task, function or operation of moving freight with a train or light engine; this is exactly what the 3R Act prohibits.” Indiana Rail Road Company v. Illinois Commerce Commission, No. 1:19-CV-06466 (N.D. Ill. 2021).

The Federal government is actively working on a national crew size policy for railroads. Congress is considering the Railway Safety Act of 2023 introduced on March 1, 2023, which includes a crew size mandate. The Federal Railroad Administration issued a Notice of Proposed Rulemaking on train crew size safety requirements on July 28, 2022. State action on this matter, without proper coordination with surrounding states, would only disrupt local supply chains already strained from disruptions to the global economy.

In conclusion, CSX respectfully requests the committee to issue an unfavorable report on SB915. Thank you for your consideration.

Very truly yours,


Brian W. Hammock

NS Crew Size Testimony_UNF_SB915.pdf

Uploaded by: Randy Noe

Position: UNF

March 20, 2023

The Honorable Kumar P. Barve, Chair
Senate Finance Committee
3 East Miller Senate Office Building Annapolis, Maryland 21401

Dear Chairwoman Griffith and Members of the Committee:

My name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. If enacted, I believe that HB 352 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. 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 two statutes that preempt HB 352 – 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)). A third federal statute, the Federal Railroad Safety Act ("FRSA") (49 U.S.C. § 20106(a)(2)), will preempt HB 352 once the Federal Railroad Administration ("FRA") completes its proposed rulemaking on train crew size safety requirements. Each of these statutes would serve as an independent basis for invalidating HB 352 should it ever become law.

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 any railroad 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 352 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. A little more than a year ago a federal judge struck down a similar law in Illinois requiring a minimum of two crew members to operate freight trains in the state. *Ind. R.R. Co. v. Ill. Commerce Comm’n*, 576 F.Supp.3d 571 (N.D Ill. 2021). Finding that “[t]he preemption language of the 3R Act is too specific to ignore” (*Id.* at 757), the court held that the Act expressly preempted the state crew size law. The court rejected what it characterized as “several creative arguments” posed by the state law’s defenders to avoid the 3R Act. *Id.* at 576. It dismissed the argument that while economic-based state laws are preempted by the Act, safety-based laws are not, noting that the text of the federal statute does not support such a distinction. *Id.* The court also made short work of the claim that the 3R Act is no longer valid in Illinois because Conrail no longer operates in the state, holding that there is neither a textual nor constitutional basis for the argument. *Id.* at 577.

Similar efforts to regulate crew size in other states in the Region covered by the 3R Act also have been invalidated. *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 352 is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. HB 352 applies only to freight railroads, would regulate their staffing practices, and would prohibit them from operating certain trains with fewer than two crew members in certain circumstances. HB 352 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 352 imposes exactly the balkanized and unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.

Preemption under the FRSA

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).

On July 28, 2022, the FRA published a proposed rule governing minimum requirements for train crew sizes. FRA, *Train Crew Size Safety Requirements*, 87 Fed. Reg. 45,564. As part of its justification for its proposed rule, FRA stated its intention to “prevent the multitude of State laws regulating crew size from creating a patchwork of rules governing train operations across the country.” 87 Fed. Reg. at 45,565.

Once it considers all of the comments that it has received in response to its proposal, FRA will do one of three things – (1) it will promulgate the proposal as a final rule; (2) it will promulgate a modified version of the proposal regulating crew size as a final rule; or (3) it will not enact a rule regulating crew size. No matter what it does, once FRA takes final action on its proposal all state crew size laws, including the Maryland law proposed in HB 352, will be preempted by the FRSA.

When FRA regulates an area related to railroad safety, states may not also regulate that area. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). Likewise, when “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.” *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999). When FRA makes that decision, “States are not permitted to use their police power to enact such a regulation.” *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).

The Ninth Circuit's decision in *Transp. Div. of Int'l. Ass'n-SMART v. FRA*, 988 F.3d 1170 (2021) does not hold to the contrary. The court in that case considered FRA's withdrawal of a nationwide crew size regulation proposed by the agency in 2016. *Train Crew Staffing*, 84 Fed. Reg. 24,735 (May 29, 2019) (the "Order"). The court evaluated whether the Order preempted state crew size laws under the FRSA and found that the FRA's analysis came up short. The court found that the agency had failed to "address why state regulations addressing local hazards cannot coexist with the Order's ruling on crew size." In the absence of any safety rationale for preemption, the court held that the Order did not implicitly preempt state crew size laws. *Id.* at 1180. The court also criticized the agency for failing to give adequate notice of the preemptive effect of its decision at the notice of proposed rulemaking stage, holding that its failure to do so was a violation of the Administrative Procedure Act. *Id.* at 1181.

Whatever federal preemption deficiencies there may be in the 2019 Order were cured by the 2022 proposal. FRA specifically expressed its intention to preempt state law and analyzed why state crew size laws are incompatible with the national interest. Indeed, federal preemption is a principal justification for the rule, with FRA noting its concern that a lack of national uniformity "would likely result in significant cost and operational inefficiencies, and *even potential safety concerns.*" 87 Fed. Reg. at 45,565 (emphasis added). As the agency further noted, "FRA could articulate FRA's preemption of crew size requirements through a rulemaking without establishing minimum crew size requirements," (87 Fed. Reg. at 45,571), setting the stage for preemption even if the agency ends up not adopting a national crew size rule.

One way or another, the FRA is poised to cover the subject matter of crew size. Once it does, state laws like the one proposed in HB 352 will be preempted by the FRSA.

Conclusion

For the reasons set forth above, I respectfully submit that HB 352 is preempted by Federal law and ask this Committee to report unfavorably on the bill.