March 14, 2024

The Honorable Pamela Beidle
3 East
Miller Senate Office Building
Annapolis, MD 21401

RE: LETTER IN OPPOSITION TO SB1060

Good Afternoon

Dear Chair Beidle and Members of the Senate Finance Committee,

My name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. The purpose of my written testimony is to address the Maryland Railway Safety Act of 2024 (HB 1446/SB 1060). For the reasons set forth below, I believe the Act is preempted by federal law.

I do recognize that 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 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. Where that balance may be found lies in federal statutes and case law. The U.S. Congress has enacted four statutes that preempt various provisions of the Act – the Regional Rail Reorganization Act ("3R Act") (45 U.S.C. § 797j)), the ICC Termination Act of 1995

("ICCTA") (49 U.S.C. § 10501(b)), the Federal Railroad Safety Act ("FRSA") (49 U.S.C. § 20106(a)(2)), and the Hazardous Materials Transportation Act ("HMTA") (49 U.S.C. § 5125).

Preemption under the 3R Act

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

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

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

The **crew size provision** of the Act 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. Just three years 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 the ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." *Id*.

Several provisions of the Act are preempted by the ICCTA because they will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation – the **crew size provision**, the **blocked crossing provision**, the **train length provision**, and **the wayside detector provision**.

The **crew size provision** is preempted by the ICCTA because it imposes train crew staffing requirements that 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. The Act imposes exactly the balkanized and unreasonably burdensome system of transportation regulations that the ICCTA was designed to prevent.

The **blocked crossing provision**, which prohibits an operator of a train from blocking a highway crossing for more than five minutes, also is preempted by the ICCTA. It is well settled that state blocked crossing statutes like the one set forth in the Act "usurp[] the exclusive jurisdiction of the [Surface Transportation Board]." *State v. CSX Transp. Inc.*, 200 N.E.3d 215, 220 (Ohio 2022). "Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a rail carrier operates its trains, with concomitant economic ramifications." *Id.*, quoting *Friburg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001).

A state law dictating a **maximum train length**, as the Act does, is even more obviously preempted by the ICCTA (in addition to violating the Commerce Clause of the U.S. Constitution; *see, S. Pac. Co. v. Arizona,* 325 U.S. 761 (1945)). Such a law would purport to directly regulate railroads' operations, effectively requiring them to use greater numbers of shorter trains to move the same amount of freight. Not only would a train length law require significant adjustments to railroads' operating plans, which would have widespread impacts throughout their networks not only in Maryland but in other states, it also would require them to procure more locomotives, train crews, and other resources. States are not permitted by the ICCTA to manage rail operations in this way.

The **wayside detector provision** of the Act would require certain railroads to install wayside detector systems according to criteria dictated by the State Commissioner of Transportation, and to operate and maintain those systems in prescribed fashion. Although Norfolk Southern and other railroads have robust wayside detector systems already in place in Maryland, this provision also runs afoul of the ICCTA. Not only might it force railroads covered by the terms of the Act to devote capital to comply with the State's decisions about their operating

facilities, which is forbidden by the ICCTA (*see, City of Cayce v. Norfolk Southern Rwy. Co.,* 391 S.C. 395 (2011), it also purports to direct covered railroads to operate and maintain those facilities according to State requirements. Such State management of railroad operations is an intrusion on the Surface Transportation Board's exclusive jurisdiction and is preempted by the ICCTA.

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). While States are permitted to continue in force such laws where necessary to eliminate a local safety hazard, state-wide laws do not qualify for the local safety hazard exception.

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).

At least two provisions of the Act are preempted by the FRSA – the **blocked crossing provision** and the **property access provision**. The **crew size provision** will be preempted by the FRSA once FRA takes action on its proposed crew size regulation, which is expected soon.

Just as state **blocked crossing statutes** are preempted by the ICCTA, they also are preempted by the FRSA. *See, e.g., CSX Transp., Inc. v. Plymouth,* 283 F.3d 812 (6th Cir. 2002). This is so because, among other things, setting maximum times that trains may occupy crossings restricts a railroad's performance of federally mandated brake tests, a subject covered by FRA regulations. *Id.* at 817.

The **property access provision**, whereby the State would force railroads to authorize union representatives to conduct investigations of their property and facilities to discern, among other things, violations of state and federal safety laws, also is preempted by the FRSA. FRA has promulgated regulations at 49 C.F.R. Part 212 that establish "standards and procedures for State participation in investigative and surveillance activities." 49 C.F.R. § 212.1. Maryland is not permitted by the FRSA to create another scheme by effectively deputizing labor representatives to conduct these same or similar activities. Because the subject matter is covered by a regulation prescribed by FRA, this provision of the Act is not permitted under federal law.

Finally, the **crew size provision** will be preempted soon. 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.

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 been 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 crew size laws like the one proposed in the Act will be preempted by the FRSA. Note that, according to the Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions maintained by the Office of Information and Regulatory Affairs, a final rule on crew size is expected in March of 2024. Office of Information and Regulatory Affairs, Unified Agenda,https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2130-AC88 (last visited Mar 1, 2024).

Preemption under the HMTA

The Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101-5128, governs the transportation of hazardous materials in commerce and preempts, generally, state or local requirements when: (1) compliance with the state and local requirement and the requirements of the HMTA is not possible; (2) the state or local requirement is an obstacle to compliance with the HMTA; or (3) the state or local requirement relates to a subject covered by the HMTA and is not "substantively the same as" a requirement of the HMTA. "Covered Subjects" include the "designation, description, and classification of hazardous materials." 49 U.S.C § 5125(b) and 49 CFR §§ 107.201-202.

The **hazardous materials database provision** of the Act is preempted by the HMTA. The Act's requirement that railroads report information to the Commission of Labor and Industry is preempted as it could be substantively different than the requirements under the HMTA and would also represent an impermissible obstacle to a railroad's ability to comply with the HMTA. Both courts and the Department of Transportation have concluded that requirements for information or documentation in excess of federal requirements create potential delay, constitute an obstacle to accomplish the requirements of the HMTA, and are preempted. *See, Southern Pac. Transp. Co. v. Public Serv. Comm'n of Nevada*, 909 F.2d 352 (9th Cir. 1990). Additionally, the DOT has determined that there is not a *de minimis* exception to this "obstacle" test because thousands of jurisdictions could impose *de minimis* information requirements. Further, the Act's ability to create its own definition of "hazardous materials" and "hazardous waste," which may differ from those provided by the HMTA, has also been found to be preempted. *Missouri Pacific R.R. Co. v. Railroad Commission of Texas*, 671 F. Supp 466 (W.D. Tex 1987). For a complete review and index of decisions on the preemptive effect of the HMTA, see the U.S. DOT's Index to Preemption of State and Local Laws and Regulations Under the Federal Hazardous Material Transportation Law (dated March 15, 2022) available at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2022-03/Preemption-Index-June-2020-March-2022.pdf.

Conclusion

For the reasons set forth above, I respectfully submit that the Maryland Railway Safety Act of 2024 is preempted by federal law and ask this Committee to report unfavorably on the bill.