Appendix A

Federal Law Prohibits States from Regulating Train Crew Size

The Federal Railroad Administration has determined that no regulation of crew size is necessary or appropriate.

Congress has exercised broad regulatory authority over rail transportation for more than a century. During that time, Congress and expert federal regulatory agencies, including the Federal Railroad Administration ("FRA"), have allowed railroads to set minimum train crew sizes through collective bargaining, rather than imposing such requirements by law.

In May 2019, FRA, the expert federal agency with authority to regulate matters relating to rail safety, expressly concluded that "no regulation of train crew staffing is necessary or appropriate at this time." 84 Fed. Reg. at 24,741. FRA's determination was the conclusion of several years of careful consideration by the agency.

In March 2016, FRA initiated a formal rulemaking proceeding, proposing to establish minimum crew-size requirements depending on the type of operations. See 81 Fed. Reg. at 13,937. Notably, FRA's proposed regulation included multiple exceptions permitting one- person operations and contemplated that FRA would approve existing and new one-person operations on a case-by-case basis. Id. at 13,946-47, 13,949, 13,957. FRA also stated that it did not have valid data that showed one-person crews were safer than multiple-person crews. 81 Fed. Reg. 13918, 13919. During the rulemaking process, FRA received nearly 1,600 comments and held a public hearing. See 84 Fed. Reg. at 24,736.

After considering all the comments and testimony, FRA decided to withdraw its proposed regulations because it concluded that establishing a minimum crew size would be unnecessary, inappropriate, and potentially harmful. "[D]espite studying this issue in-depth and performing extensive outreach to industry stakeholders and the general public," FRA still could not "'provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations.'" 84 Fed. Reg. at 24,737.

In particular, "FRA's accident/incident safety data does not establish that one-person operations are less safe than multi-person train crews." Id. at 24,739. Reviewing data from 2001 through 2018, FRA "could not determine that any of the accidents/incidents involving a one-person crew would have been prevented by having multiple crewmembers." Id. FRA said, "existing one-person operations 'have not yet raised serious safety concerns' and, in fact, 'it is possible that one-person crews have contributed to the [railroads'] improving safety record.'" Id. Moreover, the comments FRA received did "not provide conclusive data suggesting that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember or that one-person crew operations are less safe." Id. at 24,740.

Although FRA's extensive review did not suggest any safety benefits from establishing a minimum crew size requirement, it concluded that establishing such a requirement would impose significant costs. Specifically, "[a] train crew staffing rule would unnecessarily impede the future of rail innovation and automation" and could impede the potential of technology and automation "to increase productivity,

facilitate freight movement, create new kinds of jobs, and, most importantly, improve safety significantly by reducing accidents caused by human error." 84 Fed. Reg. at 24,740.

Thus, FRA decided to close its rulemaking process and published a final order to that effect. In doing so, FRA expressly "determined that no regulation of train crew staffing is necessary or appropriate at this time." 84 Fed. Reg. at 24,741. FRA noted that several states had laws regulating crew size. Id. Because it concluded that no such regulation was justified, FRA announced its intent "to negatively preempt any state laws concerning that subject matter." Id.

FRA's Order Preempts State Crew Size Regulation, Pursuant to the Federal Railroad Safety Act.

In the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, 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 ensure national uniformity, FRSA provides that a state law is preempted when FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." § 20106(a)(2). A federal regulation or order covers the subject matter of a state law when "the federal regulations substantially subsume the subject matter of the relevant state law." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664-65 (1993).

When FRA regulates in an area related to railroad safety, states may not also regulate in that area. 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). In that circumstance, "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). Stated plainly, a federal determination not to regulate can "take[ ] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," and thus any state law enacting such a regulation is preempted. Ray v. Atl. Richfield Co., 435 U.S. 151, 178 (1978).

FRSA preempts state laws not just when FRA "prescribes a regulation," but also when it "issues an order." 49 U.S.C. § 20106(a)(2). "For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it. The particular form of the decision is not dispositive." Doyle, 186 F.3d at 795-96 (holding that a crew-size regulation that FRA suspended still had preemptive effect because it reflected FRA's affirmative decision not to regulate). FRA's decision indisputably qualifies as an "'order'" because it reflects FRA's "final disposition" of the rulemaking process. 5 U.S.C. § 551(6); see also Doyle, 186 F.3d at 795 ("Certainly if an agency action constitutes an 'order' under the APA definition, it would be an order for FRSA preemption."). And that final decision expressly preempts all laws imposing minimum crew-size requirements.

State Regulation of Railroad Operations is also Preempted by the ICC Termination Act.

The ICC Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), provides that "[t]he jurisdiction of the [Surface Transportation Board] 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).

Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

"Congress's intent in [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." Union Pac. R.R. Co. v. Chi. Transit Auth., 647 F.3d 675, 678 (7th Cir. 2011). "Congress recognized that continuing state regulation—of intrastate rail rates, for example—would risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." Iowa, Chi. & E. R.R. Corp. v. Wash. Cty., 384 F.3d 557, 559 (8th Cir. 2004).

ICCTA "preempts all 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." Delaware v. STB, 859 F.3d 16, 18 (D.C. Cir. 2017). "[S]tate or local statutes or regulations are preempted categorically if they have the effect of managing or governing rail transportation." Id. at 19. And even state laws "that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation." Id

State laws regulating the number of crew required to operate a train are categorically preempted by ICCTA.

The Regional Rail Reorganization Act ("3R Act"), 45 U.S.C. § 797j, also preempts regulation of crew size in some states.

Section 711 of the Regional Rail Reorganization Act ("the 3R Act"), as amended by Section 1143(a) of the Northeast Rail Service Act, 45 U.S.C. § 797j, 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.

Ohio is a "State in the Region" as defined by Section 102 of the 3R Act. 45 U.S.C. § 702(17) & (19). Railroads that operate in Ohio are "railroad[s] in the Region" as defined by Section 102 of the 3R Act. 45 U.S.C. § 702(15) & (17).

This express preemption provision applies to all railroads in the specified area, not just to Conrail and its successors. See Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n of Ohio, 582 F. Supp. 1552, 1556 (Reg'l Rail Reorg. Ct. 1984) ("The legislative goal was to give Conrail the opportunity to become profitable, but not necessarily to disadvantage all other railroads at the same time.").