

Testimony of Randal Noe

Federal Preemption of H.B. 186

Mr. Chairman, Mr. Vice Chairman, Mr. Ranking Member, and Members of the Committee, my name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. I am going to focus the bulk of my testimony today explaining why the crew size provision of H.B. 186 is preempted by federal law. Then I would like to spend a few minutes discussing the application of federal preemption to other sections of the bill.

General Preemption Principles

The doctrine of federal preemption is rooted in the Supremacy Clause of the U.S. Constitution, which dictates that federal law is the “supreme law of the land.” There are several ways in which the doctrine can apply, but perhaps its clearest application comes when federal law expressly preempts state law. There are two federal statutes that expressly preempt crew size laws in Ohio – the Federal Railroad Safety Act (“FRSA”) and the Regional Rail Reorganization Act (“3R Act”). Either statute would independently preempt the crew size provision of H.B. 186 if enacted into law.

The Federal Railroad Safety Act

When it enacted the FRSA, Congress directed that “[l]aws, regulations, and orders related to railroad safety” must be “nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). To accomplish this important objective, Congress provided that a state law is preempted when the Secretary of Transportation “prescribes a regulation or issues an order covering the subject matter of the State requirement.” 49 U.S.C. § 20106(a)(2). The Secretary has delegated this authority to an expert federal agency, the Federal Railroad Administration (“FRA”).

What does it mean to “cover the subject matter”? This phrase has been interpreted by courts. The Sixth Circuit Court of Appeals, the federal appellate court whose jurisdiction includes Ohio, has said that one way the FRA “covers the subject matter” is by considering a regulation governing the topic and “affirmatively determin(ing)” that regulation is “not warranted.” *Norfolk & Western Ry. v. Pub. Utilities Com’n*, 926 F.2d 567, 571 (6th Cir. 1991). In the *Norfolk & Western* case, the Public Utilities Commission of Ohio (“PUCO”) had adopted a regulation requiring railroads to provide walkways on at least one side of all bridges in the state. 926 F.2d 567, 569. But the FRA had previously considered a safety regulation requiring walkways for train crews on rail bridges. After publishing an advance notice of proposed rulemaking, the FRA eventually determined that regulation of the subject was not warranted and terminated the proceeding. 926 F.2d 570-571. The Sixth Circuit held that by taking up the issue of bridge walkways and then affirmatively deciding not to regulate, the FRA had “covered the subject matter.” And by application of the FRSA, the PUCO’s bridge walkway regulation was preempted. 926 F.2d at 572.

Action Taken by the Federal Railroad Administration on Crew Size

In a fact pattern remarkably similar to that in the *Norfolk & Western* case, the FRA considered but ultimately rejected regulating crew size. The FRA initiated a rulemaking in 2016 which proposed to establish minimum train crew staffing regulations. As part of that rulemaking, the FRA received nearly 1,600 comments and held a public hearing. After careful consideration of the comments and testimony, the FRA concluded that a minimum crew size rule would be unnecessary for safe operations and even potentially harmful, so it withdrew the proposed regulation in May of this year. FRA, *Train Crew Staffing*, 84 Fed. Reg. 24,735 (May 29, 2019). In withdrawing the proposed rule, FRA noted that its data “does not establish that one-person operations are less safe than multi-person train crews.” The FRA further said that a train crew staffing rule “would unnecessarily impede the future of rail innovation and automation,” potentially getting in the way of new technologies that would “improve safety significantly by reducing accidents caused by human error.” And FRA expressly announced its intention “to negatively preempt any state laws concerning that subject matter.”

The Subject Matter of H.B. 186

The crew size provision of H.B. 186 provides that “a train or light engine used in connection with the movement of freight shall have a crew that consists of at least two individuals.” This proposed legislation is even more restrictive than the regulation FRA considered and withdrew. The withdrawn FRA proposal had a number of exceptions and would have allowed FRA to approve reduced crew operations on a case-by-case basis. H.B. No. 186 only excludes hostler service and utility employees.

The Section of H.B. 186 Regulating Crew Size is Preempted by the FRSA

Even though the FRA did not end up adopting a crew size rule, the FRA has covered the subject matter of crew size by considering such a rule and affirmatively deciding not to adopt it. Because the subject matter of crew size has now been covered by the expert federal agency empowered to regulate rail safety, the FRSA preempts state laws in this area.

The 3R Act

Preemption under the 3R Act is very straightforward. Section 711 of the 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). Ohio 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 Ohio 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 Section of H.B. 186 Regulating Crew Size is Preempted by the 3R Act

H.B. 186 clearly runs afoul of Federal law because it would do precisely what the 3R Act forbids – requiring railroads in Ohio to employ a specified number of persons to perform a particular task, function or operation. Like similar efforts to regulate crew size in the Region covered by the 3R Act – specifically, West Virginia and Indiana, H.B. 186 would be preempted by federal law if enacted. *See, e.g., Norfolk & W. Ry. Co. v. Pub. Serv. Comm’n of W. Va.*, 858 F. Supp. 1213, 1214 (Reg’l Rail Reorg. Ct. 1994) (West Virginia crew-size statute preempted); *Boettjer v. Chesapeake & Ohio Ry. Co.*, 612 F. Supp. 1207, 1209 (Reg’l Rail Reorg. Ct. 1985) (Indiana statute preempted); *Keeler v. Consol. Rail Corp.*, 582 F. Supp. 1546, 1550 (Reg’l Rail Reorg. Ct. 1984) (same).

Responses to Preemption Arguments from Bill Proponents

Some of the proponents of this legislation indicated during this Committee’s September 10 hearing that state crew size laws are not preempted because they are on the books in other states. But as I indicated previously, some of those state laws have been struck down by federal courts because they were found to be preempted by the 3R Act. Just because those laws may not have been repealed by the legislatures in those states does not make them constitutional. Remaining “on the books” is completely irrelevant to the preemption analysis. Furthermore, all but one of these state laws were passed before the FRA covered the subject matter of crew size by considering and rejecting a rule, so it is particularly out of place to point to them as evidence of constitutional validity.

In the case of Illinois, which *did* act after the FRA withdrew the proposed federal rule, that state’s crew size law is now being tested in federal court. That law is being challenged by the Indiana Railroad Company, the Association of American Railroads, and the American Short Line and Regional Railroad Association on the grounds that it is preempted by both the FRSA and the 3R Act. By the way, many years ago in the Seventh Circuit, where the validity of the Illinois law will be decided, the court addressed Wisconsin’s crew size legislation and stated that “when the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is preempted.” *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999). In that case, the court found elements of the Wisconsin law that regulated crew size for certain kinds of operations were preempted as the FRA had affirmatively decided not to regulate crew size for

those operations. This holding has an even broader effect now in light of FRA's withdrawal of its crew size rule, which is clear and comprehensive as to all aspects of train crew size.

Preemption of other Provisions of H.B. 186

I would like to turn away from crew size for a few minutes and speak briefly about how federal preemption applies to the walkway, lighting and blocked crossing provisions of H.B. 186.

The FRSA Preempts the Walkway Provision of H.B. 186

Just as it has covered the subject matter of crew size, the FRA also has covered the subject matter of track support material in rail yards. The FRA has adopted a regulation that requires railroads to support track with material that holds the track in place, transmits the loads placed on that track to the subgrade, and allows the track to drain properly. 49 C.F.R. § 213.103. The Sixth Circuit has found that this regulation covers the subject matter of track support material and, citing the preemption provision of the FRSA, held that two railroad employees could not recover for injuries they claimed were caused by walking on crushed rock adjacent to tracks where they performed their job duties. *Nickels, et al. v. Grand Trunk Western R.R., et al.*, 560 F.3d 426 (6th Cir. 2009).

The walkway section of H.B. 186 clearly intrudes on the subject matter of track support material. It directly regulates the areas adjacent to tracks within a rail yard "where railroad company employees frequently perform switching activities" by specifying, among other things, the size of the crushed rock in those areas. The authors of this section of the bill appear to recognize that regulating these areas squarely presents a federal preemption issue because they tried to side-step it by exempting areas where the construction of a walkway will prevent the railroad from "complying with federal law governing track stability or track support." But this effort at curing the bill's constitutional defect by attempting to avoid a direct conflict with the federal track safety standards does not save it from preemption under the FRSA. The Sixth Circuit has stated that "preemption under the FRSA [is] not limited to situations where the...state standard is incompatible with a regulation." 560 F.3d 432. The test under the FRSA is whether a federal regulation covers the subject matter of a state law, not whether the federal regulation and the state law conflict. And a state law that purports to regulate the material adjacent to tracks in a rail yard necessarily ventures into an area that is already covered by FRA regulation.

The Lighting Provision of H.B. 186 is Likely Preempted by the Interstate Commerce Commission Termination Act

Next I will turn to the lighting provision of H.B. 186, which would require all railroads in Ohio to illuminate their rail yards in accordance with standards promulgated by the illuminating engineering society of North America. Presumably, if this bill became law, all railroads in Ohio would need to choose between eliminating or curtailing operations at night or making whatever capital investment is necessary to come into compliance with the society's standards,

and then continually re-invest in rail yard lighting to keep up with whatever changes the society makes to its standards.

This provision is likely preempted by the Interstate Commerce Commission Termination Act (“ICCTA”). ICCTA vests exclusive jurisdiction over the regulation of rail transportation in the federal Surface Transportation Board. 49 U.S.C. § 10501(b). The preemption provision of ICCTA is extremely broad. As one court has noted, “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). One state supreme court has held that a local nuisance ordinance requiring railroads to paint bridges is preempted by ICCTA, recognizing that forcing railroads to devote resources to such capital projects is forbidden regulation of rail operations. *City of Cayce v. Norfolk Southern Rwy. Co.*, 391 S.C. 395 (2011). Similarly, regulation of rail operations by dictating yard lighting patterns, or, in the alternative, limiting yard operations to daylight hours, is preempted by ICCTA.

The Blocked Crossing Section of H.B. 186 is Preempted by Federal Law

Lastly, I will turn to the blocked crossing section of H.B. 186. That state blocked crossing laws are preempted by federal law is well-established and I won’t take your time today reciting the numerous cases in Ohio and in other jurisdictions that have shared this holding. I will just note that the leading case on the subject in the Sixth Circuit is *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002), and I will end with these words from a state court judge in Erie County, Ohio:

[S]ince early October of 2001, the enforceability of state and municipal blocked crossing legislation has been considered by numerous courts (federal and state) throughout the country. In each instance, this legislation has been determined to be preempted by federal law – in other words, it does not and cannot withstand constitutional scrutiny.”

State of Ohio v. Norfolk Southern Rwy. Co., Case No. 16CRB00344 et al. (Erie County Court, Jan. 30, 2017).

Thank you for the opportunity to present this testimony today. I would be glad to answer any of your questions.