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# Testimony of Lawrence M. Mann on H.R. 186

## Before the Ohio House Transportation & Public Safety Committee

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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. The discussion of preemption must begin with the Supreme Court decision. I will discuss the issues that the railroads have raised to oppose the pending legislation covering two person crew, blocked crossings, walkways, and yard illumination. There are no federal laws or regulations covering these subject matters, and, therefore, they are not preempted.

## I. Preemption Law

In *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993), the Supreme Court interpreted the preemption provisions of the Federal Railroad Safety Act. (FRSA). 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 preemption 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 preemption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665 (underlining added).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. *In re Miamisburg Derailment Litigation,* 626 N.E.2d 85, 93 (OHIO App. 1994).

Similarly in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of Oregon*, 820 F. 2d 1111 (9th Cir. 1987), 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 preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

*Id.,* 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.,* at 813.

Before finding that a state law is preempted, other courts since *Easterwood* have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law. *See, e.g.,Tyrrell v. Norfolk Southern Ry. Co.,*248 F. 3d 517 (6th Cir. 2001)(Ohio track clearance regulation not preempted by either the FRSA or the ICCTA); *Miller v. Chicago & North 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 v. Norfolk & Western Ry. Co.,* 68 F.3d 179, 183-184 (7th Cir. 1995) (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.

In testifying on the proposed bills in the House of Representatives, then Secretary of Transportation John Volpe discussed S 1933, as passed by the Senate, pointing out the federal-state partnership and 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..... 1

(Underlining added).

The railroad witnesses rely on FRA's withdrawal of its consideration of crew size regulation and its statement that state laws covering the subject are preempted. FRA's decision to withdraw its NPRM is not substantially regulating crew size. Rather, it fails to do anything in that regard. The congressional intent was to prevent having gaps in regulating safety. *See, Union Pacific R.R. v. California Public Utilities Commission, supra,* 346 F. 3d. at 868. FRA's inaction leaves a wide gap. As stated in *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166-67 (1989),

> The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.

That is clearly what Congress did in the FRSA.

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1 *Hearings on H R 7068, H R 14417, and H.R. 14478 (and similar, Bills), S.1933, Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong 2d Sess. 29 (March 1970)

The legislative history regarding state participation in the regulation of rail safety is clear. While Congress expressed its desire for national uniformity in rail safety to the extent practicable, *Id.,* (a)(1), the explicit authorization of state regulation, *Id.,*(a)(2), was a countervailing concern. *See, Spreitsma v. Mercury Marine,* 537 U.S. 51, 70(2002). Furthermore, the general policy outlined in the first sentence in 49 U.S.C. §20106 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:

> Section 105 expresses the congressional intent that Federal safety standards shall be nationally uniform to the extent practicable. On the other hand, 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.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969). (Underlining added).

The railroads conveniently ignore the specific language of the statute, 49 U. S. C. §20106, and the legislative history regarding state participation in the regulation of rail safety. "The words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *Parker Drilling Management Services, LTD v. Newton,* No. 18-389, Slip Opinion at 5, 587 U.S.____(2019).

At the October22 Hearing, the Norfolk Southern witness stated that the FRSA requires uniformity. While Congress expressed its desire for national uniformity in rail safety to the extent practicable, *Id.*,(a)(1), the explicit authorization of state regulation, *Id.*,(a)(2), was a countervailing concern. The Supreme Court has addressed "uniformity" in legislation similar to the FRSA. *Sprietsma v. Mercury Marine, supra,* 537 U.S. at 70 held that the goal of uniformity does not justify displacement of the Act' s[here FRSA] more prominent objective emphasized by its title to promote safety. *Sprietsma* involved the Supreme Court's interpretation of the Federal Boat Safety of 1971, which was enacted one year after the FRSA. The boat safety law has a similar provision as in the FRSA to foster uniformity. The FBSA contains similar language as the FRSA as it relates to uniformity. In connection with state preemption in the regulation of railroad safety, the FRSA states: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106.

Similarly, the FBSA provides in its statement of purposes that the law is to encourage greater "uniformity of boating laws and regulations as among the several States and the Federal Government." Pub. L. 92-75, §2, 85 Stat.213- 214. When balancing uniformity against safety, the Court said:

Respondent ultimately relies upon one of the FBSA's

> main goals: fostering uniformity in manufacturing regulations. Uniformity is undoubtedly important to the industry, and the statute's preemption clause was meant to "assur[e] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. 20. Yet this interest is not unyielding, as is demonstrated both by the coast Guard's early grants of broad exemptions for state regulations and by the position it has taken in this litigation. Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.

537 U.S. at 370.

As in the boat safety law, the FRSA's primary purpose is safety. *See, CSX Transportation, Inc. v. Easterwood, supra,* 507 U.S. at 661-2.

Aside from the Supreme Court's decision in *Spreitsma*, 537 U.S. 51, 70 (2002), Congress has addressed this issue, and reaffirmed its original intent that safety takes precedence over uniformity. In the Rail Safety Improvement Act of 2008(P.L. 110-432), section 101 states:

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

As further emphasized in the House Report, H.R. Rep. No. 110-336, 110th Cong.,

1st Sess. 36(2007):

> This section[Sec.101] also directs the Administration to consider the assignment of maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

**II. The Interstate Commission Termination Act (ICCTA) Does Not Preempt State Railroad Safety Legislation.**

A favorite argument of railroads, and in this pending legislation, is that the Interstate Commerce Commission Termination Act preempts state regulation. However, the ICCTA is limited to economic legislation. The Federal Railroad Safety Act of 1970 (FRSA), not the ICCTA, governs state safety regulation of walkways, yard illumination, crew size and blocked crossings.

Congress allowed states to regulate safety, and it took into consideration that a safety law will have some economic impact on railroads. To adopt the railroads preemption argument would mean that a state could never regulate railroad safety. That is clearly contrary to congressional intent.

In 1995 Congress enacted the ICCTA to limit the economic regulation of various modes of transportation, and created the Surface Transportation Board to administer that 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 nothing in the ICCTA, nor its legislative history, to suggest that the STB could supplant the FRSA 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.

The remedies set out in the ICCTA at §§ 11701-11707 and 11901-11908 do not pertain to safety and are not intended to supplant remedies specifically designed to address safety under federal law such as the FELA. The railroad cannot point to any language in the ICCTA's statute or legislative history which suggests that it was intended to supplant the FELA, or any other safety law such as the extensive rail safety regulatory scheme administered by the Federal Railroad Administration.

The history of rail safety rulemaking since the passage of the ICCTA is equally indicative of how the STB and the FRA each have construed the ICCTA as not vesting preemptive jurisdiction for railroad safety in the STB. In the ensuing years of its existence, the STB has not issued any railroad safety regulations. By

contrast, since STB has been in existence, the FRA and states continue to issue numerous railroad safety regulations, covering a broad range of safety issues. It is significant that both the STB and the FRA 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.,* 248 F.3d 517 (6th Cir. 2001) arguing that the FRSA, not the ICCTA, is the appropriate statute to determine state safety preemption. The court reversed the district court stating that its decision erroneously preempted "state safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA."*Id.* at 522-523. At the hearing, the Norfolk Southern witness stated that the ICCTA is broader than the FRSA. That is not an accurate statement. As to this, the court said:

> 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' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia.* For example, while recognizing their joint responsibility for promoting rail safety in their 1998 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.

The administrative rulings of FRA and STB are equally instructive that the ICCTA has not vested preemptive jurisdiction for safety matters in the STB. As both the FRA and the STB recognized in a joint rulemaking:

> ...both FRA and STB are vested with authority to ensure safety in the railroad industry. Each agency, however, recognizes the other agency's expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations. Concurrently, the Board has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of the railroads complement each other's interest in promoting a safe and viable industry.

63 Fed. Reg. 72, 225(Dec. 31, 1998).

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 3.

In *Petition of Paducah & Louisville Railway Inc., supra*, the FRA addressed the effect of the ICCTA preemption on its jurisdiction. While FRA found that the STB had exclusive jurisdiction on the matter at issue (access to a railroad bridge), the FRA order emphasized that the ICCTA preemption was limited to "non-safety" matters:

"Congress conferred on the STB and its predecessor (the ICC) exclusive administrative jurisdiction over the non-safety aspects of the operations of the nation's interstate rail system." Order at 5.

...

"the very hallmark of rail regulation has been the exclusive nature of the administrative jurisdiction over non-safety rail operations and practices which Congress had entrusted to the Interstate Commerce Commission ("Commission")

and which has been expanded and now reposes in the [Surface Transportation] Board." Order at 6.

...

"...delegation to the Commission (and now exclusively to the [Surface Transportation] Board) of all regulatory power over the economic affairs and the non-safety operating practices of railroads." Order at 6-7.

...

"At the time that it was established just a few years ago, Congress made it abundantly clear that the [Surface Transportation] Board was to be its sole delegatee of power to regulate non-safety rail matters." Order at 7.

....

"The enactment of the ICCTA with its unambiguous language preempting all other federal laws which encroach on the exclusive administrative expertise of the [Surface Transportation] Board in non-safety rail regulatory matters alone is dispositive of the issue..." Order at 18.

....

"Congress's unambiguously expressed intent in 49 U.S.C. §10501(b) to centralize non-safety rail regulation as part of its efforts to facilitate uniformity in the administration of legislation designed to achieve its deregulatory goals. Clearly, in Section 10501(b), Congress bestowed exclusive administrative jurisdiction over the non-safety aspects of rail operations on the [Surface Transportation] Board with no exceptions." Order at 19.

Similarly, the STB's orders have delineated the extent of its jurisdiction to emphasize that the ICCTA did not preempt federal safety laws. In Borough of Riverdale, STB Finance Docket No. 33466(Sept.9, 1999), the STB stated:

"Our view [is] that not all state and local regulations that affect railroads are preempted ....state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety." Decision at 6.

Thus, both the STB and the FRA take the position that the FRA and the states, as appropriate under the FRSA, retain primary jurisdiction over railroad safety regulation, while assisting the STB with its expertise in matters of principal

concern to the STB. Substantial deference should be given to the positions of the affected agencies that the ICCTA does not preempt/preclude the congressional scheme for railroad safety. The bottom line is that the railroads' argument regarding ICCTA preemption of state railroad safety laws has no merit.

*See also, Medtronic Inc. v. Lohr*, 518 U.S. 470, 486 (1996):

> ...because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.; Hillsborough Cty.*, 471 U. S., at 715-716; cf. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 22 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, see *Cipollone*, 505 U. S., at 545-546 (Scalia, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

**III. None of the Proposed Legislation Imposes An Undue Burden On Interstate Commerce.**

Congress has plenary power to regulate interstate commerce. In the FRSA, Congress expressly prohibited state regulation unduly burdening interstate commerce only when issuing local safety hazards regulations. 49 U.S.C

§ 20106(a)(2)(C). None of the proposed legislation is a local safety hazard provision. Rather, it is statewide. Therefore, undue burden on interstate commerce is not relevant here. The cardinal principle of interpretation of legislation is that courts must give effect, if possible, to every clause and word of a statute. *Loughrin v. U.S.*, 573 U.S. 351, 358 (2014); *Parker Drilling Management Services, LTD v. Newton, supra*, slip op. 9.

Furthermore, even assuming it was relevant, in determining whether a state regulation creates an undue burden on interstate commerce, the Supreme Court applies a balancing test between the state interest in issuing the regulation and the amount of burden created by the regulation. *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). In *Terminal*, the Court upheld an Illinois law requiring cabooses on trains moving through that state. The Court found that state interests, preventing injuries to railroad employees, outweighed the burden on interstate commerce (increased cost of interstate rail movement).

In *Norfolk and Western Ry. Company v. Pennsylvania Pub. Util. Comm'n*, 413 A.2d 1037, 1045-1046 (1980), the court adopted essentially the same balancing test stating:

> In determining whether a state regulation creates an undue burden on commerce, it must first be determined whether the state regulation serves a