

# **Testimony of Randal Noe**

## **H.B. 186**

**December 10, 2019**

Mr. Chairman, Mr. Vice Chairman, Mr. Ranking Member, and distinguished Members of the Committee, although I testified before you in October I hope you will allow me to re-introduce myself. My name is Randy Noe and I am Assistant Vice President Regulatory Affairs at Norfolk Southern Corporation. Thank you for the opportunity to appear before you a second time to testify against House Bill 186. The purpose of my testimony today is to address some of the issues raised by the proponent witness who appeared before this Committee on November 19.

### ***The Importance of Preemption***

When I was before this Committee in October I explained why I believe several provisions of HB 186 are preempted by federal law. I want to begin today by acknowledging 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. It is no small thing for someone to stand before you and tell you that you do not have the power to do something because the US Constitution forbids it. That message can sound confrontational, so I want to assure you that it is not intended to be. Railroads view themselves as partners with the states in which we operate. We work regularly with communities in Ohio 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 Ohio, 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 and to contribute to the economy.

This is not to say that states never have a role in regulating subjects involving our industry. For example, states like Ohio regulate grade crossing warning devices, deciding the types of devices appropriate for highway rail grade crossings given traffic levels, sight distances, and other factors. *See* O.R.C. § 4907.47. States like Ohio have the power to close grade crossings. *See* O.R.C. § 4907.474, 4907.475. And states like Ohio regulate livestock fences along railroad rights-of-way. *See* O.R.C. § 4959.02. All of these are areas 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 question is where do you draw the line? Which issues are exclusively regulated by the federal government and where can states lawfully exercise their power? The answers to those questions really depend on two things – what Congress has said and how the courts have

interpreted Congress's words. I will touch briefly on two statutes that the proponent witness addressed in his testimony – the 3R Act and the Federal Railroad Safety Act.

### ***The 3R Act Preempts the Crew Size Provision***

As I testified previously, Section 711 of the Regional Rail Reorganization Act (“3R Act”) forbids states within a defined “Region” from adopting laws requiring any railroad in that Region “to employ any specified number of persons to perform any particular task, function, or operation.” 45 U.S.C. § § 797j. Ohio is a state within the Region (*see* § 702(15) & (17)) and state crew size laws within the Region have been invalidated under the 3R Act. *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).

The proponent witness at the last hearing testified that the 3R Act is no longer valid because in 2011 the FRA issued a report that said the purpose of the Act had been satisfied and that it would be “appropriate to return to the primacy of state law.” But he left out some vitally important context in his testimony. The purpose of the FRA report he cited was to study the *impact of repealing* Section 797j, as the agency was directed to do by Congress. *See* Section 408 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-431, 122 Stat. 4848, 4881 (2008). But, critically, *Congress never acted on the FRA report*. The proponent witness told you that FRA gave states the authority to “take over” in this area, but of course the FRA cannot repeal a federal statute by issuing a report. That would take an act of Congress, and Congress

has not acted. Section 711 of the 3R Act therefore remains the law of the land, and it still prohibits Ohio from enacting a law regulating crew size.

***The Federal Railroad Safety Act Preempts the Crew Size Provision***

I testified in October that in addition to being preempted by the 3R Act, the crew size provision of HB 186 is preempted by the Federal Railroad Safety Act (“FRSA”). The FRSA says that state law is preempted when FRA “prescribes a regulation or issues an order covering the subject matter of the State requirement.” 49 U.S.C. § 20106(a)(2). In an FRSA case in this federal circuit, a court held that FRA “covers the subject matter” when it takes up an issue and affirmatively decides not to regulate it. *Norfolk & Western Ry. v. Pub. Utilities Com’n*, 962 F.2d 567, 571 (6<sup>th</sup> Cir. 1991). I concluded when I last testified that by similarly taking up and then declining to regulate crew size, the FRA has covered that subject matter, preempting state laws in this area.

The proponent witness testified that the case I cited was “distinguishable” but as far as I could tell from reading his written testimony and listening to a replay of his oral presentation he never actually bothered to distinguish it. The *PUCO* case has never been overruled and it remains controlling legal authority in the Sixth Circuit, which includes the State of Ohio.

He did testify that the FRA’s decision is being challenged in federal court, but as we sit here today that decision remains valid. The proponent witness has not given you any reason to question my earlier testimony that the crew size provision in HB 186 is preempted by the FRSA.

### ***The Federal Railroad Safety Act Preempts the Walkway Provision***

I also testified that the walkway provision was preempted by the FRSA. I noted that the FRA promulgated a regulation on track support material (49 C.F.R. § 213.103) and that the Sixth Circuit Court of Appeals held the FRSA precluded claims brought by two employees for injuries allegedly caused by walking on ballast adjacent to tracks. *Nickels, et al. v. Grand Trunk Western R.R., et al.*, 560 F.3d 426 (6<sup>th</sup> Cir. 2009). I pointed out that the carve-out language in this section of the bill – which attempts to reconcile any conflicting federal law – does not save it from preemption because the test under FRSA is not whether federal and state laws conflict. Rather, the test is whether they cover the same subject matter.

Once again I did not see anything in the written record or in the proponent witness's testimony that seriously disputed any of this. He cited to a 2001 FRA study on railroad yard worker safety, but did not engage on the preemption analysis. He has not given you any reason to question my earlier testimony that the walkway provision is preempted.

### ***The Federal Railroad Safety Act Preempts the Blocked Crossing Provision***

The FRSA preempts a third provision in HB 186, the blocked crossing section. As I testified in October, there are numerous cases holding that state blocked crossing laws are preempted and that the leading case in the Sixth Circuit is *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812 (6<sup>th</sup> Cir. 2002). The proponent witness acknowledges in his written testimony that there are numerous such cases, but disputes their validity. He does so by setting up a strawman

argument. He claims that blocked crossing laws are not an undue burden on interstate commerce, then states that the undue burden test is not the right inquiry because it only applies in the context of local safety hazards. This analysis completely ignores the real test under the FRSA, which is whether the FRA has issued regulations that cover the subject matter. The Sixth Circuit has held that by regulating train speed and brake inspections, the FRA has indeed covered the subject of blocked crossing regulation, leaving no role for the states to regulate in this area. This result also has been reached by numerous federal and state courts in other jurisdictions.

### ***Further Preemption Analysis***

I have attached to my testimony two appendices, A and B, that summarize in greater depth the application of federal law to the crew size and blocked crossing provisions of HB 186.

### ***Other Considerations***

I would like to turn now to something the proponent witness stated in his closing. He urged you to pass this legislation and “let the courts decide” whether it is actually lawful. In response to some skeptical questions by Members of this Committee about the wisdom of going down that path, he said it is “not your role” to worry about legalities and that you should move this legislation forward because, he claims, it is necessary to address urgent safety issues.

With all due respect to the proponent witness, I could not disagree with him more.

***It Is Appropriate to Consider whether HB 186 is Preempted***

First, I think it is well within your purview as Members of this Committee to concern yourselves with whether legislation that is before you is lawful. As elected representatives of the people of your State, it seems to me entirely appropriate that you consider whether sending a test case through the court system is a good use of the State's resources. You have heard a lot of testimony on federal preemption issues and you have asked a lot of probing and astute questions. And you have done so for a reason – to inform yourselves on this important topic before you take action. You are right to be cautious about legislating in an area that has clearly been occupied by the federal government. I would urge you not to enact a law just to see what lawyers and judges do with it. I think you should weigh the testimony you have heard and decide for yourselves whether it really makes sense for the State of Ohio to wade into this subject matter.

***The Proponents of HB 186 Have Not Identified any Safety Imperative***

Second, I simply fail to see the urgency to which the proponent witness speaks. He has not produced any safety data supporting the crew size provision. When he was specifically asked by a Member of this Committee how many accidents there have been in Ohio, he said he had not looked into it. He referred the member to the FRA's website.

But the FRA has never identified a statistical link between crew size and safety. That is one of the principal reasons why the agency withdrew its proposed rule earlier this year. When the FRA published a proposed crew size regulation under the *last* administration it stated: "FRA cannot provide reliable or conclusive statistical data to suggest whether one-person crew

operations are generally safer or less safe than multiple-crew operations.” 81 Fed. Reg. 13918, 13919. It went on to say “FRA does not have any information that suggests that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember.” 81 Fed. Reg. at 13921.

The proponent witness made the completely unfounded claim that the reason the FRA declined to move forward with a crew size regulation earlier this year is because the current Administrator does whatever the railroads tell him to do. But these statements about the absence of a link between crew size and safety performance were made by the FRA under the *last* Administration in 2016 when it first proposed the rule, years before Mr. Batory was at the agency. In withdrawing the proposed crew size rule the agency simply went in the direction in which it was led by the safety data. This data remains unrefuted by the proponents, and it completely undermines the claim that the State of Ohio should quickly move forward with crew size legislation to address an urgent safety issue.

The proponent witness also failed to provide any compelling support for the yard lighting and walkway measures. He cited to a nearly 20-year old FRA report studying railroad yard worker safety. And while the report did contain some recommended best practices for railroads, it is important to note, as the proponent witness did, that the FRA has gone no further. If the expert safety regulator only went so far as to issue recommendations nearly two decades ago, then I fail to see why the State of Ohio should regulate in this area today.

The proponent witness said walkway and lighting rules are necessary because slips, trips, and falls are the leading cause of injury in the railroad industry. But that is hardly a justification for

regulation. As the charts summarizing relevant Department of Labor statistics demonstrate (attached as Appendix C), strains, sprains, and tears – the injuries most commonly associated with trips, slips, and falls – are the most common type of injury or illness across *all* private industries as well as state and local government. Slips, trips and falls are hardly unique to the railroad industry, so how can the cause be the absence of yard lighting or walkway regulations?

Furthermore, overall employee injury rates in the rail industry are extremely low. Within the transportation sector, the rate of injuries per 200,000 employee hours worked is lower in rail than in water, truck, or air transportation. In fact, the injury rate in rail transportation is less than one third the rate in air transportation. And compared to other sectors of the workforce, rail transportation also is much safer – and remarkably so. The injury rate in rail transportation is lower than it is in construction, manufacturing, or logging. It is less than half the rate for grocery store workers and about one third of the rate for hospital workers.

Aside from the very real preemption issues this legislation presents, HB 186 is a solution in search of a problem. It seeks to impose stringent new rules on an industry that, when analyzed in the cold light of the safety data, turns out not to need them.

Thank you for this second opportunity to present testimony to you. I would be happy to answer any of your questions.