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

Before the Ohio House Transportation & Public Safety Committee

November 19, 2019

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

> legitimate state interest....Once a legitimate interest is established, it is necessary to look to the degree of burden imposed by the regulation on interstate commerce.
> Applying the test, the court upheld a Pennsylvania regulation requiring locomotives to be equipped with sanitary toilets. The state interest in the health and safety of railroad employees was found to be substantial and justified the extra cost to the railroads.

See also, *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

The burden inquiry ends once the court finds a non-illusory safety interest to support the law. *See, Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 140 (1968) (the Court will leave to the legislature the question of balancing financial losses to the railroads against "the loss of lives and limbs of workers and [the public]"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 449 (1978) ("if safety justifications are not illusory, the court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.") (Blackmun, J. concurring); *Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981).

IV. The Railway Labor Act Does Not Preempt State Rail Safety Laws.

The FRSA has been in existence since 1970, and to my knowledge, no court has ever ruled that collective bargaining agreements or any rights under the Railway Labor Act preempted a safety law. *See, e.g., Hawaiian Airlines v. Norris,* 512 U.S. 246 (1994). This, of course, is the only rational conclusion that could be

drawn from the FRSA. Otherwise, the railroads and the unions could potentially negotiate away critical safety protections, which would undermine the protections afforded by the FRSA.

V. Walkway Standards are not Preempted.

The above preemption discussion relates to each of the proposals. However, walkways may need further discussion. More than one half of the states have walkway standards in effect. In recent years improved walkway regulations have been issued and upheld in Nevada, California, Arizona, Illinois, and West Virginia. Such requirements may vary from state to state, but all cover the subject matter of safe walkways. Class 1 railroads usually agree that walkway regulations by state agencies are valid. For example, the BN/SF, in its "Design Guidelines for Industrial Track Projects"(Oct. 2007) stated: "Walkways on bridges and adjacent to switches and trackage are governed by the appropriate State Public Service Commission, Railway Commission or other state and/or Federal agencies."

In 1976-7 the FRA was considering the issuance of a regulation covering walkways on bridges and trestles. FRA Docket No. RSB-1. The railroads opposed the issuing of the rule because of the wide variety of conditions that exists on railroads, including topography and weather. As a result, FRA decided against issuing a rule. In doing so it stated that:

> The issuance of a Federal standard for walkways might be counterproductive since it would generally preempt the States from carrying out their responsibilities under

> existing State laws except where an essentially local safety hazard could be identified.....
>
> Finally, if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response.

42 F.R. 22181, 22185, May 2, 1977.

The FRA rulemaking was directed to walkways on trestles and bridges, and that type of protection is different form ballasts in yards. Although, the analysis by FRA applies to the pending legislation. The conditions in each state may differ, and each state may tailor a walkway rule to meet its specific conditions.

At the Hearing on October 22, 2019, a railroad witness claimed that slips and falls primarily results from disembarking cars. That is even a further reason this legislation is needed. In an important study, it points out the hazards of employees walking on ballast. "If It's Not a Slip, Trip, or Fall, What Is It? Biomechanics of Walking on Railroad Ballast"(Robert O. Andres and Kenneth G. Holt, Barreca Motion Analysis Laboratory, Boston University). The study noted that "Railroad workers required to walk on ballast experience slips, trips, and falls, but they have also been developing lower extremity musculoskeletal disorders." Even the Association of American Railroads recognizes the hazards of walkways to employees. At the Railroad Safety Advisory Committee Railroad Operating Rules Working Group on February 8-9, 2007 in Ft. Worth Texas, the AAR's

spokesman stated: **"...slips, trips, and falls are the largest category of employee casualties in Yards."**(Draft Minutes at p. 8). When the railroads discuss ballasts, a few argue that it is regulated by FRA, citing 49 C.F.R. § 213.103. It is regulated by FRA only to the extent of supporting the track structure. Subpart D of the said FRA track standards, of which this section is included, is entitled "Subpart D-Track Structure". It has no application to walkways adjacent to tracks.

The ballast sizes being proposed are taken directly from the American Railway Engineering and Maintenance of Way Association ("AREMA") *Manual for Railway Engineering* recommendations. It provides in part:

"Rail yards and some industrial tracks are generally graded from 1 inch to 3/8 inch (AREMA, No. 5 gradation, Table 2.2) to provide improved walkway and safety conditions along the track. The finer gradations for yard applications do not restrict track drainage..."

If it becomes necessary to deviate from the AREMA standards in certain conditions, the waiver provisions in the proposal would allow for the deviation, if warranted.

The validity of state laws covering walkways has been decided by many courts. In *Southern Pacific v. California Public Utilities Commission*, 820 F. 2d 1111 (9th Cir. 1987), the court held at the State of California had authority to issue and enforce regulations covering walkways. The railroad in that litigation argued, *inter alia,* that the

1978 FRA/ OSHA Policy Statement covering each agency's jurisdiction over railroads preempted the state's walkway regulations. The court rejected that argument. In accord that state walkway requirements are not preempted or precluded, *see, Norfolk Southern Ry. Co. v Box*, 556 F.3d 571 (7th Cir. 2009); *Grimes v. Norfolk Southern Ry. Co.,* 116 F. Supp. 2d 995, 1002-1003 (N.D. Ind. 2000); *Illinois Central Gulf R.R. v. Tennessee Public Service Commission*, 736 S.W. 2d 112, 116 (Tenn. Ct. App. 1987); *Booth v. CSX Transportation, Inc.*, 334 S.W. 3d 891(Ky. App., Jan. 28, 2011); *Ellis v. BNSF Railway Co.,* 2009 WL 2923108 (MN Dist. Ct., June 15, 2009); *Montes v. Union Pacific Railroad Co.*,2011 WL 1343200 (NE Dist. Ct., July 7, 2009); *Whitley v. Southern Pacific Transp. Co.,* 902 P.2d 1196 (OR 1995); *Kohn v. BNSF RR*, 77 P. 3d 809 (CO 2003); *Kelly v. Illinois Central Gulf RR*, 2010 WL 271959,*4 (C.D. Ill., 2010); *Grogg v. CSX Transportation, Inc.,* 659 F. Supp.2d 998, 1016 (N.D. Ind. 2009); *Davis v. Union Pacific RR,* 598 F. Supp.2d 955, 959-60 (W.D. Ark. 2009); *Wilcox v. CSX Transportation, Inc.,* 2007 WL 1576708 (N.D. Ill. 2007); *CSX Transportation, Inc. v. Miller*, 858 A. 2d 1025 (Md. App. 2006); *Hendrix v. Port Terminal Railroad Assoc.,* 196 S.W. 3d 188, 201 (Tex. App. 2006); *Dehahn v. CSX Transportation, Inc.,* 925 N.E. 2d 442 (Ind. Ct. of App. Apr.15, 2010); *Elston v. Union Pacific RR,* 74 P. 2d 478 (Colo. App. 2003); *Wilcox v. BNSF Ry. Co.,* 2017 WL 4296297(Ariz. App. 2017).

At the October 22 Hearing, the Norfolk Southern witness relied upon a 6th Circuit case to support that the pending rule is preempted. That case, *Norfolk & Western Ry. Co. v.*

Public Utilities Commission of Ohio, 926 F. 2d 567 (6th Cir. 1992), held that since the FRA declined to issue a walkway regulation on railroad bridges, the agency negatively preempted the state walkway regulations. That is directly contrary to the express language of FRSA's preemption clause, which applies only if the FRA "prescribes a regulation or issues an order." 49 U.S.C. §20106(a)(2). Moreover, the railroads position, and the above case, is directly contrary to legislative history of the FRSA, and numerous cases previously cited. Importantly, in a subsequent 6th Circuit case, *Tyrrell v. Norfolk Southern Ry. Co.,* 248 F.3d 517 (6th Cir.2001), the court rejected the Norfolk Southern's arguments concerning preemption by the ICCTA and negative preemption under the FRSA. This case involved the interpretation of clearances between tracks in yards. As to negative preemption, the court said "...there is no evidence in this case demonstrates that the FRA considered track clearance requirements and explicitly decided that no regulation in the area was necessary." Id. 248 F.3d at 525. The same is true with respect to walkways in yards. The FRA has not considered walkways in yards.

The Proposed Law Covering Two Person Crews is Not Preempted by the CONRAIL Law, 45 U.S.C. §797j.

The purpose for which 45 U.S.C. §797j was enacted, was to return Conrail to private ownership, and thus the factual underpinnings of the proposed crew size legislation no longer exist. The CONRAIL law has been rendered obsolete, is unconstitutionally vague and lacks any rational basis to withstand constitutional scrutiny. In the Rail Safety Improvement Act of 2008, Congress required the

Federal Railroad Administration to study the current relevance of that section. In 2011 FRA issued its report and concluded:

> The statutory purpose for which Section 711[Section 711 of the Regional Railroad Reorganization Act of 1973] was originally enacted has clearly been satisfied. Conrail has been successfully returned to the private sector and no longer requires a special statutory exemption from state laws requiring it to employ any specific number of persons to perform any particular task, function or operation.

FRA further stated "The primacy of Federal law over state law in this area existed in order to serve a narrow and specifically defined purpose: the privatization of Conrail. That purpose has been met and it is appropriate to return the primacy of state law."

Obsolete laws, such as 45 U.S.C. 797j, are without force. "[S]tatutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure." *State ex rel. S. M. B. v. D.A.P.*, 284 S.E.2d 912, 915 (W.Va.1981) (citing *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978); *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978); *See also, State v. Stephens*, 591 P.2d 827, 832 (Wash. App.1979) *rev'd. on other grounds*, 607 P.2d 304 (1980) ("The statute is obsolete insofar as several of the 'inherently dangerous misdemeanors' listed ... no longer exist...."); *Brown v. Merlo*, 506 P.2d 212 (Cal. App.1973); *State v. Daley*, 287 N.E.2d 552, 555 (Ind. App. 1972) ("The assumption of the Insurance Statute is that

sovereign immunity obtains. With that doctrine now abolished in this class of cases, the Insurance Statute is no longer a shield to limit the State's liability."); *Krause v. Baltimore & O. R. Co.,* 39 A.2d 795, 797 (1944) ("The absence of crossing gates under the circumstances in this case is not evidence of negligence, to which could be attributed this accident. We think the city law requiring crossing gates at this point is obsolete....").

A party has "no legally cognizable interest in the constitutional validity of an obsolete statute."*Davidson v. Comm. for Gail Schoettler, Inc.,*24 P.3d 621, 623 (Colo.2001)(quoting *Citizens for Responsible Gov't State Political Action Comm.,*236 F.3d 1174, 1182 (10th Cir.2000)).

Additionally, given that Conrail has been returned to private ownership, 45 U.S.C. 797j is also unconstitutionally vague, as it is unclear to what entity the statute now applies. *See, Fellowship Baptist Church v. Benton,* 620 F. Supp. 308, 318 (D. C. Iowa, 1985), *aff'd. in part,*815 F.2d 485, 495–496 (8th Cir.1987) (Term "equivalent instruction" unconstitutionally vague, but remanded for further consideration in light of newly adopted standards by the state); *Ellis v. O'Hara,*612 F. Supp. 379 (D.C. Mo. 1985), (Reversed and remanded to consider mootness in light of legislative action);*Wisconsin v. Popanz,* 332 N.W.2d 750 (Wisc.1983), (Term "private school" vague where regulations and statute do not define, and each district administrator compiled a list by his own individual standard); *Minnesota v.*

*Newstrom,*371 N.W.2d 525 (Minn.1985), (Phrase "essentially equivalent" held vague).

Although "the void for vagueness doctrine arose as an aspect of Fourteenth Amendment due process in the context of criminal statutes, ... [t]he doctrine has been extended to civil cases." *San Filippo v. Bongiovanni,* 961 F.2d 1125, 1135 (3d Cir.1992). Vague laws offend the assumption that "man is free to steer between lawful and unlawful conduct," and thus "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."*Grayned v. Rockford,*408 U.S. 104, 108 (1972); S*ee also, Connally v. General Constr. Co.,*269 U.S. 385, 391(1926)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *Bradley v. Pittsburgh Bd. of Educ.,*910 F.2d 1172, 1177 (3d Cir.1990). A second justification for vagueness challenges is to prevent arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" *Grayned v. Rockford, supra,*408 U.S. at 108-109; *Kolender v. Lawson,*461 U.S. 352, 358 (1983).

Here, the statute at issue is no longer clear as to what is prohibited, given that Conrail has been returned to private ownership, and that statute would impermissibly delegate to judges and juries what the statute now means in light of Conrail becoming a private entity.

Thirdly, 45 U.S.C. 797j now unconstitutionally violates the Equal Protection Clause because it lacks any rational basis for is existence. The purpose of the statute, to return Conrail to private ownership, has now been satisfied; removing any rational basis that once existed for the statute's enactment. *Vacco v. Quill,* 521 U.S. 793 (1997) , where the Court noted that the Equal Protection Clause embodies a general rule that States must treat like cases alike, and that legislation must, at a minimum, bear a rational relationship to a legitimate state interest.; *Romer v. Evans,* 517 U.S. 620, 631(1996). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause."

The Lighting in Yards Provision is Not Preempted.

There can be no valid argument that sate lighting requirements are preempted. The FRA has never considered regulating lighting in yards. I will not repeat the legal arguments against preemption under the FRSA

and the ICCTA. Rather, I request that the Committee refer to the arguments already stated herein.

I want to mention a point raised by the railroads at the hearing. The NS witness said that those residents abutting the rail yards will object to lighting. Lighting already exists in the rail yards. Moreover, homes have curtains and drapes. The proposal is simply to provide some oversight and enforcement of the safety requirement. Also, the NS witness forgot to mention that the noise in railroad yards is overwhelming, and the operations continue 24 hours a day. If residents object, it is for the excessive noise. Some safety lighting requirement is a comparatively minor issue.

If the Committee does not prefer the current draft, which incorporates the lighting standard of the Engineering Society of North America, a substitute is available. That is, American Railway Engineering and Maintenance of Way Association has adequate standards for the rail industry.(See, AREMA Manual, Chapter 14, Yards and Terminals). The AREMA standards are established by the railroads.

The Blocked Crossing Provisions are not Preempted.

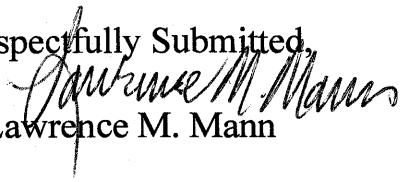
The railroads allege that there are many cases holding that state

blocked crossing standards are preempted. While there are such cases, I seriously question their validity, for two reasons. First, such laws are not an undue burden on interstate commerce. Secondly, an undue burden on interstate commerce is relevant only for local safety hazards. 49 U.S.C. §20106(a)(2)(C).

CONCLUSION

Based upon the above analysis, it is my opinion that the state proposals for yard walkways, two person crews, yard illumination, and blocked crossings are not preempted by any law.

Respectfully Submitted,



Lawrence M. Mann

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I am a member in good standing of the Bars of the following Courts:

	Date Admitted
U.S. Supreme Court	03/27/72
U.S. District Court for the District of Columbia	01/20/67
U.S. Court of Appeals for the District of Columbia Circuit	02/16/67
U.S. Court of Appeals for the 11th Circuit	10/01/81
U.S. Court of Appeals for the 10th Circuit	11/06/78
U.S. Court of Appeals for the 9th Circuit	07/08/75
U.S. Court of Appeals for the 8th Circuit	02/13/75
U.S. Court of Appeals for the 7th Circuit	02/13/67
U.S. Court of Appeals for the 6th Circuit	03/27/90
U.S. Court of Appeals for the 5th Circuit	12/21/81
U.S. Court of Appeals for the 4th Circuit	03/14/75
U.S. Court of Appeals for the 3rd Circuit	06/05/87
U.S. Court of Appeals for the 2nd Circuit	10/25/88
U.S. Court of Federal Claims	02/11/70