TR-200536

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BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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DOCKET NO. TR-200536
RULEMAKING TO IMPLEMENT HOUSE BILL 1841, CHAPTER 170 OF THE LAWS OF 2020, PERTAINING TO THE ESTABLISHMENT OF MINIMUM TRAIN CREW SIZES ON CERTAIN TRAINS

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APRIL 18, 2022 COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS

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The Association of American Railroads ("AAR"), on behalf of itself and its member railroads, submits the following comments in response to the State of Washington Utilities and Transportation Commission's ("Commission") March 18, 2022, notice of opportunity to respond to the proposed rule at Docket No. TR-200536.[1] AAR is a trade association whose membership includes freight railroads that operate approximately 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States, along with passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR members include numerous railroads that operate in, and employ thousands of residents of, the State of Washington. AAR members operating in Washington include the BNSF Railway Company, the Union Pacific Railroad, the National Railroad Passenger Corporation (Amtrak), and short line railroad companies that are considered to be small businesses.[2]

At Docket No. TR-200536, the Commission has proposed a rule to implement certain

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[1] *See* House Bill 1841 Rulemaking Proceeding Docket No. TR-200536; available online at: https://www.utc.wa.gov/documents-and-proceedings/rulemakings/hb-1841-rulemaking-tr-200536.

[2] *See, e.g.*, https://bnsfnorthwest.com/washington/.

provisions of Washington House Bill 1841, Laws of 2020, Chapter 170 ("H.B. 1841"), relating to minimum crew sizes for trains operating in Washington. H.B. 1841 primarily amended Chapter 81.40 of the Revised Code of Washington to generally require that trains operated in Washington have no fewer than two crewmembers, and assigned the Commission duties in carrying out the statute.

AAR incorporates by reference here its previous comments (attached) submitted to the docket in this proceeding on September 4, 2020, and June 7, 2021. For all the reasons previously stated in AAR's prior comments, the Commission's proposal to implement H.B. 1841 remains preempted by the ICC Termination Act of 1995, 49 U.S.C. § 10501(b)), and the dormant Commerce Clause of the United States Constitution. AAR urges the Commission to withdraw this rulemaking proceeding.

Respectfully submitted,

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April 18, 2022

Attachments:

A. AAR Comment filed 9/4/2020
B. AAR Comment filed 6/7/2021

# ATTACHMENT A

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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DOCKET NO. TR-200536;
RULEMAKING TO IMPLEMENT HOUSE BILL 1841, CHAPTER 170 OF THE LAWS OF 2020, PERTAINING TO THE ESTABLISHMENT OF MINIMUM CREW SIZES ON CERTAIN TRAINS

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SEPTEMBER 4, 2020 COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS

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The Association of American Railroads ("AAR"), on behalf of itself and its member railroads, submits the following comments in response to the State of Washington Utilities and Transportation Commission's ("Commission") July 21, 2020 notice of opportunity to comment on the rulemaking proceeding at Docket No. TR-200536.[1] AAR is a trade association whose membership includes freight railroads that operate approximately 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States, along with passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR members include numerous railroads that operate in, and employ thousands of residents of, the State of Washington.[2] AAR members operating in Washington include the BNSF Railway Company, the Union Pacific Railroad, the National Railroad

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[1] *See* House Bill 1841 Rulemaking Proceeding Docket No. TR-200536; available online at: https://www.utc.sa.go v/docs/Pages/HB1841Rulemaking-TR-200536.aspx.

[2] *See, e.g.*, https://bnsfnorthwest.com/washington/; https://www.aar.org/wp-content/uploads/2019/01/AAR-Washington-State-Fact-Sheet.pdf.

Passenger Corporation (Amtrak), and numerous short line railroad companies that are considered to be small businesses.

At Docket No. TR-200536, the Commission seeks to implement certain provisions of Washington House Bill 1841, Laws of 2020, Chapter 170 ("H.B. 1841"), relating to minimum crew sizes for trains operating in Washington.[3] H.B. 1841 was signed into law on March 27, 2020, and took effect June 11.[4] H.B. 1841 primarily amends Chapter 81.40 of the Revised Code of Washington (RCW) to generally require that trains operated in Washington have not fewer than two crewmembers, and assigns the Commission duties in carrying out the statute.[5] Washington Governor Jay Inslee's signing statement accompanying his partial veto of Section 8 of H.B. 1841 indicated the Commission would need "time to engage stakeholders in a rulemaking process, which is necessary in order to implement the safety requirements of the bill."[6]

On July 20, 2020, the Commission issued a "Preproposal Statement of Inquiry" ("CR-101 Notice") announcing this rulemaking proceeding at Docket No. TR-200536, along with an accompanying July 21 notice requesting public comment on certain Commission questions regarding implementation of certain H.B. 1841 provisions.[7] The Commission cites H.B. 1841 and RCW 81.40, as amended, as authority for it to initiate a regulatory action involving train

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3 *Supra* note 1.

4 *See* Washington State Legislature Bill Information H.B. 1841, TRAINS—MINIMUM CREW SIZE; available online at: https://app.leg.wa.gov/billsummary?BillNumber=1841&Year=2019.

5 *See* http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/1841.SL.pdf?q=20200827105744. H.B. 1841 also repealed RCW 81.40.010 and 81.40.035.

6 *Id*.

7 *See* Docket No. TR-200536; available online at: https://www.utc. sa.go v/docs/Pages/HB1841Rulemaking-TR-200536.aspx.

crew size, stating that RCW 81.40 “vests the Commission with regulatory authority over train crews. H.B. 1841 adds new sections to, and repeals specific sections in Chapter 81.40 RCW, necessitating a rulemaking to define Class I railroads, develop a mechanism for reviewing automatic waivers, and establish a process for Commission-ordered crew size increases.”[8]

## I. H.B. 1841 Is Preempted Under the Federal Railroad Safety Act

The Commission’s rulemaking proceeding in this matter is unauthorized, and therefore invalid, because the provisions in H.B. 1841 that the Commission purports to implement are preempted under the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20106.
As acknowledged in the Commission’s CR-101 Notice, the Federal Railroad Administration (“FRA”), the expert federal regulatory agency that Congress has vested authority in at 49 U.S.C. § 20103(a) to establish national standards in every area of railroad safety, has made the affirmative decision not to issue regulations governing train crew size and indicated its intent to preempt state all laws and regulations on that topic. 84 Fed. Reg. 24,735, 24,741 (May 29, 2019).

H.B. 1841 is preempted because in 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); *see also Michigan S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1155 (7th Cir. 2001) (“Congress’ occupation of the field of railroad regulation is to ensure uniform national standards.”). To ensure national uniformity, FRSA generally provides that a 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). A federal regulation or order covers the subject

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[8] *Id*.

matter of a state law when "the federal regulations substantially subsume the subject matter of the relevant state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993).

When FRA regulates in an area related to railroad safety, states may not also regulate in that area. Likewise, when "FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted." *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999) (invalidating bulk of Wisconsin's law requiring two-person crews). In that circumstance, "[s]tates are not permitted to use their police power to enact such a regulation." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).

As applicable here, FRA determined in May 2019 that minimum crew-size requirements are unnecessary and that states may not regulate crew size. 84 Fed. Reg. 24,735, 24,741. FRA expressly concluded that "no regulation of train crew staffing is necessary or appropriate at this time" and made "an affirmative decision not to regulate with the intention to preempt state laws." *Id*.

FRA's determination was the result of many years of careful consideration by the agency. In 2013, FRA tasked the Railroad Safety Advisory Committee ("RSAC"), FRA's federal advisory committee that includes representatives from the agency's major stakeholder groups, with considering train crew size. FRA lacked "reliable or conclusive statistical data to suggest whether one-person crew operations are safer or less safe than multiple-person crew operations" and hoped the RSAC could fill in the gap. 84 Fed. Reg. at 24,735, 24,737. But the RSAC could not "identify conclusive, statistical data to suggest whether there is a safety benefit or detriment from crew redundancy." *Id*. at 24,736.

In March 2016, FRA initiated a formal rulemaking proceeding, proposing to establish minimum crew-size requirements depending on the type of operations. *See* 81 Fed. Reg. at 13,937. During the rulemaking process, FRA received nearly 1,600 comments and held a public hearing. 84 Fed. Reg. at 24,736. After considering all the comments and testimony, FRA decided to withdraw its proposed regulations because it concluded that establishing a minimum crew size would be unnecessary and inappropriate. "[D]espite studying this issue in-depth and performing extensive outreach to industry stakeholders and the general public," FRA still could not "'provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations.'" 84 Fed. Reg. at 24,737.

In particular, FRA noted that the relevant "accident/incident safety data does not establish that one-person operations are less safe than multi-person train crews." *Id*. at 24,739 (footnote omitted). Reviewing data from 2001 through 2018, FRA "could not determine that any of the accidents/incidents involving a one-person crew would have been prevented by having multiple crewmembers." *Id*. at n.30. Indeed, "existing one-person operations 'have not yet raised serious safety concerns' and, in fact, 'it is possible that one-person crews have contributed to the [railroads'] improving safety record.'" *Id*. at 24,739. Moreover, the comments FRA received did "not provide conclusive data suggesting that there have been any previous accidents involving one-person crew operations that could have been avoided by adding a second crewmember or that one-person crew operations are less safe." *Id*. at 24,740.

FRA's extensive review did not suggest any safety benefits from establishing a minimum crew size requirement. Rather, FRA concluded that establishing such a requirement would impose significant costs, including loss of future safety improvements through technological

innovation. Specifically, "[a] train crew staffing rule would unnecessarily impede the future of rail innovation and automation," despite the federal government's recognition that technology and automation have "the potential to increase productivity, facilitate freight movement, create new kinds of jobs, and, most importantly, improve safety significantly by reducing accidents caused by human error." *Id*. (italics and capitalization omitted).

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

Accordingly, any attempt by the Washington State Legislature, or the Commission, to regulate train crew size is preempted. FRA "closely examin[ed] the train crew staffing issue" and affirmatively and expressly "determin[ed] that no regulation of train crew staffing is appropriate." *Id*. FRA explained that in issuing its final order the agency intended "to cover the same subject matter as the state laws regulating crew size and therefore expect[ed] it will have preemptive effect." *Id*. And, FRA announced its intent "to preempt all state laws attempting to regulate train crew staffing in any manner." *Id*. That is precisely the "sort of affirmative decision [that] preempts state requirements." *Doyle*, 186 F.3d at 802.

## II. H.B. 1841 is Preempted Under the ICC Termination Act of 1995

H.B. 1841 is also preempted under the ICC Termination Act of 1995 (ICCTA) 49 U.S.C. § 10501(b). ICCTA establishes that the U.S. Surface Transportation Board's ("STB") jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating

rules), practices, routes, services, and facilities of such carriers … is *exclusive*." 49 U.S.C. § 10501(b) (emphasis added). Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law." *Id*.

"Congress's intent in [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011) (collecting cases). ICCTA "preempts *all* state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) (emphasis added). "Congress recognized that continuing state regulation—of intrastate rail rates, for example—would risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." *Iowa, Chi. & E. R.R. Corp. v. Wash. Cty.*, 384 F.3d 557, 559 (8th Cir. 2004). "[S]tate or local statutes or regulations are preempted *categorically* if they have the effect of managing or governing rail transportation." *Delaware,* 859 F.3d at 19 (emphasis added; quotation marks omitted). And even state laws "that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation." *Id.*

H.B. 1841 conflicts with and is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. H.B. 1841 and the Commission's subsequent regulatory proceeding here are of not general applicability; H.B. 1841 applies only to railroads, specifically attempting to regulate their staffing practices and prohibiting them from operating trains with fewer than two crew members. H.B. 1841 imposes train crew staffing requirements that are not mandated by neighboring states of Washington and

will burden interstate commerce. Trains moving between states with differing crew-size requirements would need to stop to add or remove crew members (or so staff the train in advance), causing railroads to incur additional costs for rest facilities and crew transportation and—ultimately—reducing efficiencies for shippers and the public. H.B. 1841 imposes the balkanized and unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.

In a parallel example to the burdens on interstate rail transportation imposed by H.B. 1841, the Supreme Court of Washington held two Seattle ordinances attempting to regulate railroad switching operations and blocking of streets or alleys were preempted by ICCTA and FRSA. *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661 (2002). The Court explained that both ICCTA and FRSA "unambiguously express a clear congressional intent to regulate railroad operations as a matter of federal law. Both federal acts preempt [Seattle's] railroad switching and blocking ordinances." *Id*. at 663. "The express language of the ICCTA imparts to the STB broad federal authority over all interstate and intrastate railroad activities and operations." *Id*. at 674. "[Seattle's] ordinance that reserves to it the authority to control railroad activities that interfere with city traffic is subject to preemption under the ICCTA and the FRSA." *Id*. H.B. 1841, and the Commission's corresponding rulemaking proceeding at issue here, similarly attempt to control intrastate and interstate railroad activities and operations in a manner equally preempted by ICCTA.[9]

[9] Similarly, H.B. 1841 is also invalid under the dormant Commerce Clause of the Federal Constitution. U.S. Const. art. I, § 8, cl. 3. H.B. 1841 would require trains with fewer than two crew members entering Washington to stop and add additional crew members. This burden specifically imposed on railroads engaged in interstate commerce is akin to the situation in *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945), where the Supreme Court of the United States held that a State of Arizona law attempting to regulate the length of trains entering or operating within Arizona violated the Commerce Clause.

## III. Conclusion

Because H.B. 1841 is preempted under applicable federal laws, the Commission's rulemaking proceeding at Docket No. TR-200536 is unauthorized and invalid. AAR urges the Commission to withdraw this rulemaking proceeding.

Respectfully submitted,

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September 4, 2020

# ATTACHMENT B

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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DOCKET NO. TR-200536
RULEMAKING TO IMPLEMENT HOUSE BILL 1841, CHAPTER 170 OF THE
LAWS OF 2020, PERTAINING TO THE ESTABLISHMENT OF MINIMUM TRAIN CREW SIZES
ON CERTAIN TRAINS

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JUNE 7, 2021 COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS

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` The Association of American Railroads ("AAR"), on behalf of itself and its member railroads, submits the following comments in response to the State of Washington Utilities and Transportation Commission's ("Commission") May 6, 2021, notice of opportunity to respond to the proposed rule at Docket No. TR-200536.[1] AAR is a trade association whose membership includes freight railroads that operate approximately 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States, along with passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR members include numerous railroads that operate in, and employ thousands of residents of, the State of Washington. AAR members operating in Washington include the BNSF Railway Company, the Union Pacific Railroad, the National Railroad Passenger Corporation (Amtrak), and short line railroad companies that are considered to be small businesses.[2]

At Docket No. TR-200536, the Commission has proposed a rule to implement certain

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[2] *See, e.g.*, https://bnsfnorthwest.com/washington/; https://www.aar.org/wp-content/uploads/2019/01/AAR-Washington-State-Fact-Sheet.pdf.

provisions of Washington House Bill 1841, Laws of 2020, Chapter 170 ("H.B. 1841"), relating to minimum crew sizes for trains operating in Washington. H.B. 1841 primarily amended Chapter 81.40 of the Revised Code of Washington to generally require that trains operated in Washington have not fewer than two crewmembers, and assigned the Commission duties in carrying out the statute.

AAR incorporates by reference here its previous comments (see attachment) submitted to the docket in this proceeding in response to the Commission's July 20, 2020, "Preproposal Statement of Inquiry" announcing this rulemaking. Putting aside the question of Federal Railroad Safety Act preemption (49 U.S.C. § 20106), H.B. 1841 and the Commission's rulemaking proposal to implement remain preempted by the ICC Termination Act of 1995 (ICCTA) 49 U.S.C. § 10501(b)) and the dormant Commerce Clause of the Federal Constitution. AAR urges the Commission to withdraw this rulemaking proceeding.

Respectfully submitted,

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June 7, 2021