American Short Line and Regional Railroad Association

September 4, 2020

VIA WEBSITE (www.utc.wa.gov/e-filing)

Mark. L Johnson
Executive Director and Secretary
State of Washington
Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Docket No. TR-200536

Dear Mr. Johnson,

The American Short Line and Regional Railroad Association (ASLRRA) welcomes this opportunity to provide comments in response to the rulemaking by the Utilities and Transportation Commission (Commission) to implement House Bill (HB) 1841, Chapter 170 of the Laws of 2020, pertaining to the establishment of minimum crew sizes on certain trains.

ASLRRA is a nonprofit trade association representing the entrepreneurial owners and operators of short line and regional railroads throughout North America. Short line freight is a critical part of the U.S. freight network. The nation's approximately 600 short line carriers provide the first and last mile service for one in every five cars moving each year.[1] Operating nearly 50,000 track miles, or 30% of freight rail in the U.S., they play a vital role in the transportation network.[2] Short line rail service provides safe, efficient, competitive, and environmentally responsible access to transportation for nearly 10,000 rail customers.[3]

HB 1841 and any regulations that flow from it are preempted by federal law and impose a disincentive to short line railroads to invest in their infrastructure. The

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[1] Short Line and Regional Railroad Facts and Figures. American Short Line and Regional Railroad Association, 2017; reprint Dec. 2019. Page 1.

[2] *Id.*

[3] *See Id.; and* Webber, Michael. "Freight trains are our future." *Popular Science*, May 9, 2019. Available at: https://www.popsci.com/power-trip-excerpt/.

Commission should halt any efforts to further promote this misguided attempt to regulate rail transportation.

I. Short Line Railroads Are a Vital Part of the U.S. Freight Network in Washington, and Are Subject to Unnecessary and Burdensome Regulation by HB 1841

The economic vitality of Washington state requires a strong rail system capable of providing its businesses, ports and farms with competitive access to national and international markets.[4] Washington's railroads provide a competitive alternative to local businesses that would otherwise be forced to ship their commodities via truck over congested highways shared with motorists. Railroads in Washington employ almost 800 individuals, pay $1.8 million in state and local taxes, and save the state an estimated $72 million in pavement damage annually.[5] Today, 3,162 miles of track are operated in Washington – approximately 1,738 by Class I railroads and the remaining 1,424 by 19 short line railroads.[6] Certain of these short line railroads will be unduly burdened by the expansive definitions included in HB 1841 that disregard the small, independent nature of the individual short line railroads merely as a result of upstream holding companies that are not even common carrier railroads.

The definition of a "short line" railroad is well-established and maintained by the Surface Transportation Board and is universally accepted by professionals involved in the railroad industry. Within that definition there are certainly variabilities between individual railroads, but they all share common characteristics in their roles. Together they represent a diverse, dynamic and entrepreneurial collection of small businesses that make wise use of resources available to them. These small businesses operate the most vulnerable segments of the railroad system and, in some cases, are the lifeline to the nation's marketplace for many rural businesses. Most short line railroads must invest a minimum of 25% of their annual revenue in rehabilitating their infrastructure, which is a percentage far higher than almost any other industry in the country.[7]

The majority of railroads operating across America's 140,000-mile rail network are privately owned and pay for their own infrastructure – a point of departure from other transportation modes that utilize publicly funded roads and waterways.[8] The legacy FRA categories of short line railroads were made in recognition of the many differences in the operating regimes and financial and human resources that exist at short lines as compared to Class I railroads. HB 1841 ignores the fact that the classifications regime for railroads is well-established and preempted (as discussed in more detail below). Further, none of

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4 "Freight Rail," *Washington State Department of Transportation*, 2020. Available at: https://wsdot.wa.gov/Freight/Rail/default.htm.

5 *Id.*

6 Short Line and Regional Railroad Facts and Figures. American Short Line and Regional Railroad Association, 2017; reprint Dec. 2019.

7 *Id.* at 3.

8 McGurk, Russ. "Five Reasons Freight Rail is an Infrastructure Leader." *GoRail*, May 14, 2018. Available at: https://gorail.org/infrastructure/five-reasons-freight-rail-is-an-infrastructure-leader.

variances of characteristics within the defined 600 short line railroads regarding ownership structures have been used as the basis for differentiation of safety regulations in the past, and HB 1841's attempt to use this factor going forward is flawed.

II. House Bill 1841 is Preempted by Federal Law.

When a state or local law conflicts with or stands as an obstacle to the objectives of a federal law or intrudes on a field that Congress reserved for the federal government, the Supremacy Clause of the Constitution of the United States preempts that state or local law. HB 1841, and therefore any regulation flowing from it, is preempted as a matter of federal law under both the Federal Railroad Safety Act and the ICC Termination Act (ICCTA).

HB 1841 imposed minimum crew size requirements one year after the Federal Railroad Administration (FRA) determined "that no regulation of train crew staffing is necessary or appropriate for railroad operations to be conducted safely at this time."[9] H.B. 1841 and thus any implementing regulations are preempted by the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106, and the ICC Termination Act, 49 U.S.C. § 10501(b), and are void and unenforceable under their own terms.

Congress directed under FRSA that "[l]aws, regulations, and orders related to railroad safety" must be "nationally uniform to the extent practicable."[10] To ensure national uniformity, FRSA provides that a state law is preempted when FRA, under authority delegated from the Secretary of Transportation, "prescribes a regulation or issues an order covering the subject matter of the State requirement." § 20106(a)(2). A federal regulation or order covers the subject 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).

In withdrawing its notice of proposed rulemaking regarding train crew size, FRA "determined that no regulation of train crew staffing is necessary or appropriate at this time and intend[ed] for the withdrawal to preempt all state laws attempting to regulate train crew staffing in any manner."[11] As FRA explained, a federal determination not to regulate can "'take[ ] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,'" and accordingly "any state law enacting such a regulation is preempted." Id. (quoting *Ray v. Atl. Richfield Co*., 435 U.S. 151, 178 (1978)); accord *BNSF Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999) ("When the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted.").

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9 *See* 84 Fed. Reg. 24,735, 24,735 (May 29, 2019).
10 49 U.S.C. § 20106(a)(1).
11 84 Fed. Reg. at 24,741.

After closely examining the train crew staffing issue and conducting significant outreach to industry and public stakeholders, FRA "determined that issuing any regulation requiring a minimum number of train crewmembers would not be justified because such a regulation is unnecessary for a railroad operation to be conducted safely at this time."[12] Thus, FRA's notice withdrawing its proposed regulation of train crew size "provide[d] FRA's determination that no regulation of train crew staffing is appropriate" and conveyed FRA's intent "to negatively preempt any state laws concerning that subject matter."[13]

Because FRA "examine[d] a safety concern regarding [train crew staffing] and affirmatively decide[d] that no regulation is needed," its order withdrawing the NPRM "has the effect of being an order that the activity is permitted." *Doyle*, 186 F.3d at 801. FRSA preempts HB 1841 because HB 1841 mandates a minimum number of crew members, despite FRA's determination that no regulation of train crew staffing is necessary or appropriate. FRA's "order covering the subject matter" of minimum crew size leaves no room for Washington to adopt or continue in force a law regulating train crew staffing.[14]

HB 1841 also conflicts with and is preempted by ICCTA, which provides that "[t]he jurisdiction of the [Surface Transportation Board] 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."[15] Because ICCTA's remedies are "exclusive," they "preempt the remedies provided under Federal or State law."[16]

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). "[S]tate or local statutes or regulations are preempted categorically if they have the effect of managing or governing rail transportation." *Id.* at 19. 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.*

HB 1841 conflicts with and is preempted by ICCTA because it will manage, govern, unreasonably burden, and unreasonably interfere with rail transportation. HB 1841 prohibits freight railroads from operating with a single crew member. Under the statute, it does not matter whether operating with a single crew member is just as safe as operating with multiple crew members, or whether a railroad operates with a single crew member in adjacent states.

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12 *Id.*
13 *Id.*
14 49 U.S.C. § 20106(a)(2).
15 49 U.S.C. § 10501(b).
16 Id.

Further, by seeking to categorize certain short line railroads based on the upstream ownership structure, HB 1841 directly conflicts with and is preempted by ICCTA in its definition of a "Class I" railroad. Under ICCTA, the United States Surface Transportation Board (STB) groups carriers into the following three classes:

- Class I: Carriers having annual carrier operating revenues of $504,803,294 or more.
- Class II: Carriers having annual carrier operating revenues of less than $504,803,294 but in excess of $40,384,263.
- Class III: Carriers having annual carrier operating revenues of $40,384,263 or less.

Although the STB clarifies that families of railroads operating within the United States as a single, integrated rail system will be treated as a single carrier for classification purposes, this amalgamation does not extend to discrete short lines that are separate legal entities that do not operate a single integrated rail system, but are merely owned upstream by a non-railroad holding company.[17] Under HB 1841, a "Class I" railroad means a railroad carrier designated as a class I railroad by the United States surface transportation board and its subsidiaries *or is owned and operated by entities whose combined total railroad operational ownership and controlling interest meets the United States surface transportation board designation as a Class I railroad carrier*. (Emphasis added.) HB 1841 is seeking to set forth rules that are clearly inconsistent with the well-established STB groups. Pursuant to federal law, Washington state cannot create its own independent railroad carrier classifications that conflict with ICCTA. Additionally, there is no factual information supporting a completely arbitrary differentiation of short line (Class III) railroads based on type of ownership.

In addition, HB 1841 uses ambiguous phrases such as "owned" and "operated" to distinguish certain short lines that may be affiliated with other short lines through a holding company structure without an appropriate understanding of the fact that these short lines are discrete legal entities. The language has no acknowledgement of direct or indirect ownership, recognition of minority ownership, where there are clear limits of influence, or the implications for short lines that may be affiliated with a publicly traded entity that would be deemed "owned" by individual public shareholders. Further, the use of "operated" is also flawed in that the majority of holding companies are not common carrier railroads, and as such could not "operate" the short lines at issue. Finally, on a practical level, each railroad is a separate legal entity, with its own employees, customers, assets and operating plan designed to meet its business objectives.

Washington's railroads are part of a large national network that benefits from efficiencies through seamless operations across state lines, which benefits both the shipper and the public. HB 1841 reduces those efficiencies and burdens interstate

[17] 49 C.F.R. § 1201.

commerce. Some trains moving between Washington and neighboring states with differing crew-size requirements will need to stop to add crew members, causing railroads to incur additional transportation costs, which reduce efficiencies for shippers and the public. HB 1841 creates the balkanized and unreasonably burdensome system of transportation regulations that ICCTA was designed to prevent.

III. House Bill 1841 is a Disincentive for Investment and Will Have Negative Environmental Consequences.

Short line and regional railroads are innovators in the selective and safe use of single-person crews and have used single-person crews for years. Utilizing safe alternative crew staffing operations is one of the ways short lines have been able to remain successful in a competitive economic environment. Freight rail is not only a very safe, but also an environmentally friendly method of transportation. Freight rail accounts for only 2.1 percent of transportation-related greenhouse gas emissions, while accounting for at least 40 percent of long-distance freight volume.[18] Railroads can move one ton of freight more than 470 miles with a single gallon of fuel.[19]

HB 1841 suggests that Class III short line operations would be excluded from the crew size restrictions because they would choose to operate at speeds less than 25 m.p.h., qualifying for an exemption from the minimum crew size requirement. This assumption poses a Hobson's choice to short lines to either increase their operating costs by adding crew or slow their operations to 25 m.p.h. The statute creates a financial disincentive for small railroads to invest in their infrastructure, upgrade their track, and improve their performance times.

With absolutely no safety benefit, this proposal simply strikes at the heart of short line railroads' ability to compete with trucks for freight business in the state of Washington. This minimum crew size mandate will increase the cost of shipping commodities by rail in Washington, which could result in a modal shift of traffic from rail to the less-environmentally friendly option of trucks on the highway.

IV. HB 1841 is Untimely.

HB 1841 was introduced on February 1, 2019 and passed both the Washington House and Senate by March 12, 2019. Section 8 of HB 1841, as passed by the legislature, made the legislation effective immediately by declaring the act "necessary for the immediate preservation of the public peace, health or safety, or support of state government and its existing public institutions." On March 27, Governor Inslee vetoed Section 8 with the explanation that the UTC needed time to engage stakeholders in a rule making process due to the complexity of the legislation. HB 1841 became effective June 11, 2020.

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[18] "Freight Rail & Preserving the Environment." *Association of American Railroads*, July 2020. Available at: https://www.aar.org/wp-content/uploads/2020/06/AAR-Sustainability-Fact-Sheet.pdf.

[19] *Id.*

HB 1841 is untimely, as it was issued while the United States Court of Appeals for the Ninth Circuit, the controlling court for federal preemption questions in Washington, is currently weighing a challenge to FRA's crew-size order. *See* CA9 No. 19-71787, Transportation Div.—SMART v. Fed. R.R. Admin. The briefing is complete, and argument is scheduled for October 5, 2020.[20] The Commission should not issue any implementing regulations in a matter that has the potential to be rendered null and void by the federal court.

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ASLRRA urges the Commission to discontinue the rulemaking to implement HB 1841as the statute is preempted by federal law, uses a definition of "Class I" railroads inconsistent with that of ICCTA, imposes a disincentive to short line railroads to invest in their infrastructure, and it will result in negative environmental consequences. At a minimum, HB 1841 should be stayed until the proceedings in the Court of Appeals for the Ninth Circuit are concluded.

Respectfully submitted,

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General Counsel

[20] Additionally, a federal court in Illinois is considering whether an Illinois statute requiring two-person crews is preempted under FRSA or ICCTA. *See* N.D. Ill. No. 1:19-cv-06466, Indiana R.R. Co. v. Illinois Commerce Commission. In that case, cross-motions for summary judgment are fully briefed and the parties are awaiting a decision.