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FEDERAL PREEMPTION OF STATE CREW SIZE LAWS

Introduction

At the behest of labor unions that represent railroad employees, several states are currently considering legislation that would require all railroads to operate with a minimum crew size of two persons. Such provisions, if enacted, would be preempted by federal law, including the Federal Railroad Safety Act ("FRSA"), 40 U.S.C. § 20101 *et seq.*, federal labor law, the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101 *et seq*., and/or the Regional Railroad Reorganization Act of 1973, 45 U.S.C. § 797j. A basic outline of the preemption analysis is set forth below.

Overview of Preemption

Under the Supremacy Clause of the U.S. Constitution, federal law overrides or preempts state law. U.S. Const. Art. VI, cl. 2. Federal preemption of state law can be either 'express or implied.' *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Express preemption exists when a federal law provides that it shall be exclusive. *Id.* Implied preemption can arise "in at least two circumstances." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). First, there is "conflict" preemption: a "state law is naturally preempted to the extent of any conflict with a federal statute." *Id*. Second, there is "field" preemption. This occurs when the scope or nature of federal law suggests that Congress intended to completely occupy a particular field, thereby forming the exclusive source of regulation for that area. *See CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993).

Preemption Under the FRSA

The FRSA is designed to "promote safety in every area of railroad operations" and authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. The Act contains an express preemption provision, which states that "[l]aws, regulations and orders related to railroad safety and law, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). It goes on to provide that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*

In *Burlington Northern Santa Fe Railway v. Doyle*, 186 F.3d 790 (7th Cir. 1999), the Seventh Circuit Court of Appeals held that the FRSA preempted (in part) a Wisconsin state law requiring two-man train crews. The state law in question was very similar to the proposed Illinois legislation. The court found that the Federal Railroad Administration ("FRA") has issued various orders relating to crew size, including in the context of hostling and helper movements. *Id.* at 800-01. As such, it concluded that the state law was preempted to the extent it required two-man crews in those circumstances. The court did not find preemption with respect to over-the-road operations because, it said, the record did not show that FRA had affirmatively decided not to regulate such operations. *Id.* at 802. But, the court noted, if the FRA did consider such operations and affirmatively decided to defer or reject any regulation on crew size, such a decision would preempt the Wisconsin law. *Id.*

Since *Doyle*, the FRA has taken substantial further action on the issue of crew size, thereby preempting any state law on this subject in any operational context. In particular, the FRA has issued a Safety Advisory requiring railroads to "review their crew staffing practices for over-the-road trains that transport" certain hazardous materials and "amend existing practices as necessary to ensure safe movement" of such trains. 78 Fed. Reg. 48224, 48228 (August 7, 2013). The FRA declined, however, to impose any such requirements for other over-the-road operations. In addition, the FRA has issued extensive regulations governing remote control locomotive operations. *See* 49 C.F.R. § 229.15 (2012). These regulations expressly contemplate and permit single-person crews. *Id.*; *see also* 66 Fed. Reg. 10340 (Feb. 14, 2001) (Safety Advisory on operation of remote control locomotives with single person crew). More recently, the FRA issued a notice of proposed rule-making on the subject of crew size. 81 Fed. Reg. 13917 (March 3, 2016). However, after a public hearing and the close of the comment period, FRA suspended the rule-making and has taken no further action to impose mandatory standards for train crews, thereby confirming that FRA does not believe crew size rules are warranted. *See Doyle*, 186 F.3d at 795-96 ("For preemption, the important thing is that the FRA considered a subject matter and made a decision regarding it. The particular form of the decision is not dispositive.").

Federal Labor Law Preemption

State crew size laws would also be preempted by federal labor law because they go beyond what the Supreme Court has called "minimum labor standards." In *Lodge 76, Int'l Assoc. of Machinists v. Wisconsin Employment Relations Comms'n*, 427 U.S. 132 (1976) ("*Machinists*"), the Supreme Court concluded that matters related to collective bargaining may not be regulated by states if federal labor law evidences an intent by Congress to leave such matters to the free play of economic forces. *Id.* at 147-48. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court clarified that, while states can regulate subjects of collective bargaining, they can do so only when they are exercising their power to set "minimal labor standards." *Id.* at 755; *see also, e.g., 520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119 (7th Circ. 2008) (finding preemption).

There is no doubt that crew size is a core subject of collective bargaining in the railroad industry, and has been for 100 years or more. *See, e.g.*, *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. R.R.*, 393 U.S. 129 (1968). By seeking to regulate the subject, Illinois is effectively "substitut[ing] itself as the bargaining representative." *Shannon*, 549 F.3d at 1136. Nor does the proposed legislation set forth a "minimum labor standard." Rather than being a law of general application, it is narrowly targeted to a particular industry, imposes terms that the unions have traditionally sought in bargaining, and sets a stringent, across-the-board rule that even the FRA has declined to adopt. *See id.* at 1136-38. Thus, the proposed legislation crosses the line from "minimum standard" to a direct imposition of collective bargaining terms, in derogation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*.

Field Preemption

"Railroads have been subject to comprehensive federal regulation for nearly a century." *UTU v. Long Island R.R.*, 455 U.S. 678, 687 (1982). In particular, the "Interstate Commerce Act [ICA] is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile*, 450 U.S. 311, 318 (1981). The pervasive congressional regulation of the railroad industry can also be seen in a wide array of related laws, including the Hours of Service Act, 45 U.S.C. §§ 61-64b, the Locomotive Inspection Act, 45 U.S.C. §§ 1-43a, the Railroad Retirement Act, 45 U.S.C. §§ 231-231u, the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369, the Regional Rail Reorganization Act, 45 U.S.C. §§ 701-797m, the Rail Safety Improvement Act, PL 110-432 (Oct. 16, 2008), the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, the Adamson Act, 49 U.S.C. § 2830, and many others.

While the ICA and other federal railroad laws do not directly regulate crew size, they form a comprehensive set of regulations that so thoroughly occupy the field of interstate railroad labor, operations, equipment, and service "as to make reasonable the inference that Congress left no room for the States to supplement it." *R.J. Corman v. Palmore*, 999 F.2d 149, 151 (6th Cir. 1993). As the Supreme Court has explained, "[t]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. . . . To allow individual states . . . to circumvent . . . any of the elements of the federal regulation of railroads would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *UTU*, 455 U.S. at 688-89.

These concepts – including a need for national uniformity – are especially pertinent here. It would be unduly disruptive to interstate commerce to force railroads to stop their trains in order to add or subtract crew members as they cross state lines. Moreover, even if there were a plausible safety argument for mandating two-person crews – and there is no empirical evidence of any link whatsoever between crew size and safety – that would be a matter for federal oversight or congressional legislation at the national level.

The 3R Act

Finally, the Regional Railroad Reorganization Act ("3R Act") expressly prohibits state regulation of train crew size on any railroad property that was once part of the Conrail system. The law stated in pertinent part that "[n]o State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation to employ any specified number of persons to perform any particular task, function, or operation . . . ." 45 U.S.C. § 797j. The Act defines the "Corporation" as "the Consolidated Rail Corporation . . . ***or its successor by merger, consolidation or other form of succession*** carried out under applicable law for the purpose of changing the State of its incorporation." 45 U.S.C. § 702(5) (emphasis added). Thus, the 3R Act applies to all "successors" of Conrail, which includes modern railroads such as CSX Transportation, Inc. and Norfolk Southern Railway.

In a January 19, 2019 memorandum, counsel for the railroad labor unions argues that the 3R Act is "obsolete," is unconstitutionally vague, and lacks any "rational basis." More specifically, labor counsel contends that the sole "purpose" of the 3R Act expired with the privatization of Conrail, and therefore the statute is "without force" and "is no longer clear as to what is prohibited."

That is not correct. On its face, the 3R Act applies to the successors of Conrail, which continue to operate today, and so is obviously not "obsolete."[1] Moreover, since Conrail was privatized, Congress has repeatedly amended the 3R Act, yet has never seen fit to repeal or modify the provisions of § 797j. See Pub. L. 95–473 (1978); Pub. L. 97–35 (1981); Pub. L. 97–375 (1982); Pub. L. 99–509 (1986). Congress clearly intended, therefore, to retain the bar on state regulation of crew size for Conrail's successors. Nor was it "irrational" for Congress to do so. Under rational basis scrutiny, a statute "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *City of Chicago v. Shalala*, 189 F.3d 598, 605–06 (7th Cir. 1999). Among other rationales, Congress may have simply sought to maximize freedom from regulation for any entity that purchased Conrail's assets, thereby potentially increasing the value of the property that had been privatized. Congress may also have recognized that the 3R Act's express bar on state regulation of crew size merely replicates the effect of field preemption of such laws in other contexts, and so saw no reason to suspend the provision after privatization was complete.

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[1] The cases cited in labor counsel's memorandum regarding statutory obsolescence are inapposite. All of those cases involve situations where laws were deemed "obsolete" because they had been repealed by the legislature or had previously been deemed unconstitutional. *See, e.g.*, *State v. Stephens*, 591 P.2d 827, 832 n.4 (Wash. App. 1979) (observing that relevant criminal provisions had been repealed); *State ex rel. S. M. B. v. D. A. P.*, 168 W. Va. 455, 460 (1981) (state law drawing distinction between "legitimate" and "illegitimate" children was unconstitutional in light of prior Supreme Court rulings); *Davidson v. Committee for Gail Schoettler, Inc.*, 24 P.2d 621, 623 (Colo. 2001) ("the General Assembly has repealed the statute on which the court is being asked to rule").