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December 15, 2014

AN ANALYSIS OF POSSIBLE FEDERAL PREEMPTION OF KANSAS LAW ON TRAINS BLOCKING HIGHWAYS

KSA 66-273 prohibits railroad companies from allowing trains to “stand upon” public roads for more than 10 minutes without leaving an opening that is at least 30 feet wide. KSA 66-274 makes blocking a public road a misdemeanor punishable by a fine that increases based on the amount of time that the train blocks the public road without the requisite opening. The discussion below examines whether these Kansas statutes would likely be found to be in conflict with federal regulation of railroads under federal commerce or railroad safety law and provides additional information on federal preemption in this context.

Federal Regulation of Railroads and Preemption, in General

The federal government has been regulating railroads since the 1800s. When conflicts between states and railroad companies arise in response to state regulation of railroad activity, railroad companies often make one or more of these three arguments:

- State regulations of railroad activity is unconstitutional because it violates the commerce clause;
- State regulation is preempted under the Interstate Commerce Commission Termination Act of 1994 (ICCTA);
- State regulation is preempted under the Federal Railroad Safety Authorization Act of 1994 (FRSA)¹.

The Commerce Clause, under Article 1 Section 8 of the *U.S. Constitution*, gives Congress the power to “regulate commerce with foreign nations, among several states, and with the Indian Tribes.” Under the Commerce Clause, Congress can regulate areas that would normally fall under the states’ police powers if those areas affect commerce. The Commerce Clause also prohibits states from passing laws that discriminate against or excessively burden interstate commerce. Trains transport goods within the stream of commerce, and when states regulate the trains or railroad activity, the regulations can potentially affect commerce. Hence, railroad companies argue that state regulations regarding railroad operations violate the Commerce Clause. The Commerce Clause argument will not be discussed further because the ICCTA and FRSA preemption portions of this memorandum address commerce issues that arise when states regulate railroad activity.

¹ This portion of United States Code has several titles. For the purposes of this memorandum, it will be referred to as the Federal Railroad Safety Authorization Act of 1994 or FRSA.

Preemption is the invalidation of state laws that conflict with federal laws. The concept of preemption comes from the Supremacy Clause (Article 6 Clause 2 of the *U.S. Constitution*). The Supremacy clause designates the *U.S. Constitution*, federal laws, and treaties as the “supreme law of the land.” The concept of preemption is well-established. Since the 1800s, courts have consistently found federal legislation, enacted in accordance with the legislative powers granted to Congress in the *Constitution*, to preempt state laws which conflict with the federal legislation.

Kansas laws regulating railroad activity may conflict with federal laws consistent with the Commerce Clause. Articles 2 through 5 of Chapter 66 of the Kansas statutes apply to railroads and rail carriers. This memorandum addresses the preemption issues that arise under the second (commerce) and third (safety) preemption arguments, and applies the preemption factors to Kansas law regarding trains blocking public highways. The discussion below examines whether the Kansas statutes conflict with ICCTA, which regulates railroad commerce, and the FRSA, which regulates railroad safety.

Preemption under the ICCTA (Federal Regulation of Railroad Commerce)

Background

The Interstate Commerce Act of 1887 (ICA) established the Interstate Commerce Commission (ICC). Congress created this act in response to citizens in rural areas’ widespread disdain for railroads. People believed railroad companies abused their economic power through rate discrimination.² The ICA established the ICC to regulate the railroads in accordance with the ICA. The ICA applied to all railroads engaged in interstate commerce.² It also applied to water carriers, such as riverboats, barges, and ferries, owned or controlled by railroads. The ICA states that rates charged by the railroads had to be “just and reasonable,” but it did not set standards for reasonableness. Railroads were forbidden to give preference, advantage, special rates, or rebates to any person, company, location, city or type of traffic.³ The ICA also prohibited pooling, which, in a railroad’s case, was the sharing of revenue or freight. Railroads were required to publish rates and give advance notice of change.

Congress passed several acts in the period between 1893 and 1910 that expanded the ICC’s regulatory authority.⁴ However, in the 1970s and 1980s Congress passed many deregulation acts that diminished the ICC’s authority.⁵ By 1995 most of the ICC’s powers had been abolished. Congress officially terminated the ICC with the Interstate Commerce Commission Termination Act of 1995 (ICCTA).

The ICCTA also established the Surface Transportation Board (STB) to assume the regulatory functions of the ICC. The STB is decisionally independent, but administratively affiliated with the Department of Transportation.⁶ The STB is both an adjudicatory and regulatory body and has jurisdiction of over several issues related to surface transportation.

2 Sharfman, I. Leo (1915). *Railway Regulation*. Chicago: LaSalle Extension University.

3 Interstate Commerce Act of 1887, [Pub.L. 49–104](#), 24 [Stat.379](#), enacted February 4, 1887.

4 Safety Appliance Act of 1893 27[Stat.531](#); Safety Appliance Act of 1903 32[Stat.943](#); Safety Appliance Act of 1910 36[Stat.298](#); Hepburn Act of 1906, 34 Stat. 584; Mann-Elkins Act of 1910 36 Stat. 539.

5 [Railroad Revitalization and Regulatory Reform Act](#) of 1976;[Motor Carrier Act of 1980](#).

6 Surface Transportation Board Overview <http://www.stb.dot.gov/stb/about/overview.html>.

STB Jurisdiction

The ICCTA established the STB's jurisdiction over railway transportation. The STB has jurisdiction over transportation solely by railroad and transportation by railroad and water when the transportation is under common control for the shipment.⁷ Under the ICCTA, the STB has exclusive jurisdiction over transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state.⁸

The language of the ICCTA expressly preempts state and local regulation that contradicts the language set out in the Act or attempts to regulate a subject over which the STB has exclusive jurisdiction. The STB's preemption powers are broad. Case law and STB decisions clarify which state and local regulations are preempted.

Case Law and STB Decisions on Preemption under the ICCTA

The 10th Circuit Court of Appeals is one of the 13 United States courts of appeals that serve as the intermediate appellate courts between the trial courts and the Supreme Court. The 10th Circuit's jurisdiction includes Oklahoma, New Mexico, Colorado, Wyoming, Utah, the portions of Yellowstone National Park that extend to Montana and Kansas. While no cases in Kansas or the 10th Circuit speak directly to statutes prohibiting train cars from blocking streets or intersections, two recent cases in Kansas and the 10th Circuit have addressed the STB's preemption power:

- *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007). The landowners sued the railroad because the railroad improperly disposed of some railroad ties causing flooding on the landowner's property. The railroad removed the case to federal court, and the federal district court in Oklahoma entered summary judgment for the railroad. The landowners appealed. The Court of Appeals held that the ICCTA did not "expressly preempt" tort actions, and that the facts did not warrant that lower court's entering summary judgment based on implied preemption. In coming to this holding, the Court of Appeals discussed the three ways in which state and local laws are preempted:
 - Express preemption is when Congress clearly defines the extent to which enactments preempt state laws;
 - Conflict preemption, a type of implied preemption, occurs when it is impossible for a person to comply with both state and federal law or where state law is an obstacle to executing Congress' purpose; and
 - Field preemption is the other type of implied preemption and occurs when the scope of the statute indicates that Congress intended federal law to occupy a field exclusively.
- *Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad Company v. F.Y.G. Investments, Inc. and Treatco Inc.*, 48 Kan. App. 2D 1071 (WTI), involved a dispute between a landowner and the

⁷ Interstate Commerce Commission Termination Act 49 U.S.C. § 1050 (a)

⁸ Interstate Commerce Commission Termination Act 49 U.S.C. § 10501(b).

operator of railroad tracks. The railroad operators brought this action to prevent the landowner from restricting its right to maintain the railroad tracks. The landowner counterclaimed for an easement to allow vehicles to cross the tracks. The trial court entered summary judgment for the railway operators. The landowner appealed. The court of appeals reversed and remanded. The district court granted the injunction requiring the railroad operator to build a crossing to allow the landowner to enter and exit the landowner's property. The railroad operator did not build the crossing, and the landowner filed a motion for contempt. The operator filed a motion of relief from judgment. The district court denied the motion and amended the order. The operator and the landowner appealed. The Court of Appeals affirmed in part and reversed, directing the operator to build the crossing. The District Court then ordered the operator to build the crossing. The operators appealed. The Court of Appeals held that the STB has exclusive jurisdiction over requirements for operators to remove tracks or build new tracks. The WTI case has been brought to the STB for declaratory order; however, no official decision has been published as of the writing of this memorandum.

Since Kansas does not have any case law that specifically deals with the issue of trains blocking intersections, and whether the ICCTA preempts state and local laws that prohibit trains blocking intersections for certain amounts of time, it is beneficial to explore how other states have adjudicated this issue:

- *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (2001). The United States Court of Appeals for the 5th Circuit held that the ICCTA preempted a Texas statute that prohibited trains from blocking intersections for more than five minutes. The court noted that the ICCTA did not give states any authority to impose operating limitations on railroads like the Texas Anti-Blocking Statute;
- *Eagle Marine Industries, Inc. v. Union Pacific R. Co.*, 363 Ill. App.3d 1166 (2006). The Appellate Court of Illinois held the ICCTA did not preempt the state's vehicle code which prohibited trains from obstructing an intersection for more than ten minutes because the vehicle code did not regulate the speed, length, or schedule of the trains or interfere with railroad operations, and because the statute does not apply to moving trains; and
- *Burlington Northern & Santa Fe Ry. Co. v. Department of Transp.*, 227 Or. App. 468 (2009). The Court of Appeals of Oregon disagreed with the Illinois Court in *Eagle*. In the *BNSF* case, Oregon's Department of Transportation imposed penalties for the railway company violating regulations that prohibited trains from blocking railroads for more than ten minutes. The Oregon Court of Appeals held because the Oregon regulation specifically targeted rail transportation, it is preempted by the ICCTA. The court also stated that the ICCTA applies to railroad operations, and not all railroad operations take place while trains are moving. For instance, according to the court in *BNSF*, a train must stop to add and remove cars. The court held that dictating where and for how long a train may stop is a regulation of railroad operations and is preempted.

The STB issues declaratory orders to end a controversy or remove uncertainty concerning the ICCTA.⁹ The courts can also resolve preemption by applying the precedent set

9 See 5 USC 554e and 49 USC 721

out in STB decisions. The STB has said that whether a particular activity is considered transportation or operation under ICCTA resulting in preemption of state and local regulations is a case-by-case, fact-specific determination.¹⁰ Therefore, the only way to be certain a regulation is preempted is for the matter to be brought before the STB. However, the table below is based on several STB declaratory orders and contains a list of factors that make preemption more likely or less likely. The list of factors are based on the analyst's reading the STB orders which discussed instances when preemption would be more or less likely.

¹⁰ Ibid

FACTORS AFFECTING PREEMPTION

| STB Decision | Factors Making Preemption More Likely | Factors Making Preemption Less Likely |
|---|---|--|
| <p>STB Finance Docket No. 34662 CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER Decided: March 14, 2005</p> | <ul style="list-style-type: none"> - Regulations concerns any kind of equipment related to the movement of property by rail. - Regulation concerns services related to railroad transportation. - Regulation would intrude on the STB's jurisdiction or a railroad's ability to conduct operations. - Law would have the effect of state regulation of railroads. - Regulation determines how railroad traffic should be routed. - Regulation prevents railroad from constructing, acquiring, operating, abandoning, or discontinuing a line. - Regulation unreasonably interferes with interstate commerce. - Regulations concern when and where particular products can be carried by rail. | <ul style="list-style-type: none"> - Regulations concerning operations that are not a part of the national rail network. - Regulation is an exercise of state police power that does not unreasonably interfere with rail transportation. - Railroad uses preemption as an excuse not to comply with an agreement it made with locality if enforcing that agreement would not interfere with interstate commerce. |
| <p>STB Finance Docket No. 34662 CSX TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER Decided: May 3, 2005 (requests for reconsidering the March 14, 2005, decision denied)</p> | <ul style="list-style-type: none"> - Two types of categorically preempted state and local regulation: <ol style="list-style-type: none"> 1) State or local permitting or preclearance that could be used to deny the railroad its ability to conduct any part of its operations or to carry on activities that the STB has authorized. 2) State regulation of matters regulated by the STB. | <ul style="list-style-type: none"> - Regulation is a health and safety rule (such as a fire or electric code) that is applied without discrimination. |
| <p>Docket No. FD 35625 CITY OF MILWAUKIE—PETITION FOR DECLARATORY ORDER decided March 25, 2013</p> | <ul style="list-style-type: none"> - Statutes that “as applied” unreasonably burden or interfere with rail transportation. | <ul style="list-style-type: none"> - Laws have a more remote or incidental effect on rail transportation. - Laws that are an exercise of police powers that do not unreasonably interfere with railroad operations or STB's regulatory programs. - State laws are of general applicability to the extent that they are not otherwise preempted. |

Analysis of Kansas Statutes' Possible Preemption under the ICCTA

The courts or the STB would determine whether the Kansas statutes concerning railroads are preempted under the ICCTA. The analysis below is based on available information, and should not be relied upon to predict how a court or the STB would decide in an action.

Some factors make these Kansas anti-blocking statutes more or less likely to be preempted under the ICCTA. KSA 66-273 differs from most of the statutes cited in the case law because it requires the trains to leave a gap for through traffic. As long as the gap is there the train can block the highway indefinitely. The interest is in preventing traffic congestion and ensuring that emergency vehicles are able to provide emergency services in a timely manner. These facts make the Kansas statute more of a health and safety statute. These laws fall within the states' general police power and are less likely to be preempted because they only incidentally affect railroad operations.

However, the fact that the Kansas statutes (KSA 66-273 and 66-274) are directly aimed at trains, and no other form of transportation, makes the statutes more likely to be preempted under the ICCTA. Also, because the statutes deal with the amount of time a train may be stationary on a track in Kansas, the statutes regulate railroad operations, an area over which the STB has exclusive jurisdiction. Based on the STB's guidance, preemption is more likely when the matters relate to core railroad operations and activities, and becomes less likely when matters are more attenuating from railroading. When statutes are less directed to railroads, the less likely they are to be preempted.

It is also important to note the STB has a history of encouraging railroad companies to work with local governments to make reasonable accommodations. For example, local government can ask railroad companies to give notice of upcoming projects or maintenance. (See *Township of Woodbridge v. Consolidated Rail Corp.*, STB Docket No. 42053).

Preemption under the FRSA (Federal Regulation of Railroad Safety)

Background

Federal regulation of railroad safety began in the late 1800s. With the country realizing railroads' economic value, railroad construction and travel increased significantly by the end of the 1860s.¹¹ With profit as top priority and safety not as important, the number of deaths and injuries continued to rise. As a result of public outcry for governmental action, several states passed railroad safety legislation. Many states' laws conflicted with a neighboring state's laws, making it difficult for railroad companies to comply with all relevant statutes. Congress passed the first Railroad Safety Act in 1893.¹⁰ In the next 100 years, Congress passed and amended several federal acts regulating railroads. Congress passed the Federal Railroad Safety Authorization Act of 1994 (FRSA) to promote safety in all railroad operations and to reduce railroad related accidents and incidents.¹²

¹¹ McDonald, Charles, *The Federal Railroad Safety Program: 100 years of Safer Railroads* (1993).

¹² 49 USC § 20101

Secretary of Transportation Jurisdiction over Railroad Safety

Under the FRSA, the Secretary of Transportation (SOT) has the authority to regulate and issue orders for every area of railroad safety.¹³ The FRSA also requires the SOT to develop and carry out solutions to the safety problems at grade crossings.¹⁴

Does the SOT's Jurisdiction Preempt Kansas' Statutes?

49 USC § 20106 covers preemption:

(a) National uniformity of regulation.--(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

However, this section does not preempt actions under state law seeking damages for personal injury, death, or property damage when the person bringing the action makes certain allegations.¹⁵ Typically, case law clarifies which state actions are preempted.

Case Law Regarding Preemption Under the FRSA

No Kansas case law answers the question of whether a statute regulating the amount of time a train may block a crossing is preempted, but there are two cases that address preemption under the FRSA:

- *Libel v. Union Pacific R.R.*, 33 Kan. App.2d 853 (2005). The plaintiff brought a suit for negligence after her car struck a stationary train car at night. The Kansas Court of Appeals held that this action was not preempted because, under the

¹³ 49 USC § 20103a

¹⁴ 49 USC § 20134

¹⁵ 49 USC § 20106(b)

FRSA, the states can continue to enforce laws or issues orders on subject matter until the SOT creates a regulation or order covering the subject matter. The court reasoned that since the SOT had not established a standard for the issue, the state court is permitted to hear the negligence case.

- *Seyler v. Burlington Northern Santa Fe Corp.*, 102 F. Supp.2d 1226 (2000). The plaintiff sued the train company for negligence after she sustained injuries during a train derailment. The federal district court held that this action was preempted under the FRSA. The court reasoned that the cause of action was based on common law, and the SOT regulates trains' speed limits. Therefore an action based on a failure to follow a speed limit that was not imposed by the SOT is preempted. The court also pointed out that the plaintiff's claim did not satisfy the savings clause set out in 49 USC § 20106(2)(a)-(c).

The cases summarized below from other states and circuits have fact patterns similar to those that would arise under the current Kansas statutes regarding trains blocking intersections.

- *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App.4th 1513 (2012). The railroad company was charged with a misdemeanor for violating California's Public Utility Code by blocking a railroad crossing for longer than ten minutes. The court held that the public utility law was preempted under the ICCTA. However, in coming to this conclusion, the court laid out the factors to consider when determining whether preemption would fall under the FRSA or the ICCTA. The court noted that when the law in question applies to railroad operations, it falls under the ICCTA, and when the law applies to railroad safety, it falls under the FRSA.
- *Village of Mundelein v. Wisconsin Cent. R.R.*, 227 Ill.2d 281 (2008). The railroad was charged with a misdemeanor for violating a village ordinance prohibiting trains from blocking railroad crossings for more than 10 minutes. The Illinois Supreme Court held the FRSA preempted this ordinance. In coming to its conclusion the court noted that in determining whether a law is preempted, a court must look at whether the SOT has issued a regulation covering the subject matter that the law covers. The court used these words to point out the SOT issued regulations covering the same subject matter:

The Secretary has also issued detailed regulations on air-brake testing. 49 C.F.R. pt. 232 (2006). Those regulations provide comprehensive requirements for inspection and testing of brake systems, and control the timing and performance of tests and inspections. 49 C.F.R. §§ 232.201 through 232.219 (2006). Relevant to this case, the Secretary has issued regulations establishing the testing required following the removal of a car from a train and the interruption of brake pipe continuity. 49 C.F.R. § 232.211(2006). The movement of trains is restricted until the tests are completed and brake pipe pressure is restored. 49 C.F.R. §232.211 (2006).

Further, the Secretary has issued regulations on grade crossing safety. See 49 C.F.R. §§ 234.105, 234.106, 234.107 (2006). Those regulations control the speed of trains in the event of a failure, partial activation, or false activation of a grade crossing warning system and, in some

circumstances, require trains to stop before proceeding through a crossing. 49 C.F.R. §§ 234.105, 234.106, 234.107 (2006).

The court in *Village* determined these regulations worked together to control train movement at rail crossings, particularly whether a train may be moved and the train's speed. The court then held that the village's ordinance was aimed at the movement of trains. In coming to this conclusion, the court examined the plain language of the ordinance and its location within the code. The court noted the ordinance was located in a sub-chapter of the Illinois Transportation Code titled "Rail Carriers" and that the plain language of the ordinance applied only to rail carriers and was, therefore, preempted. The village pointed out the ordinance was in place to allow police, fire, and ambulance vehicles to respond to calls in a timely manner and that preventing traffic congestion was only a secondary purpose. The court refuted this argument because the ordinance, as applied, contradicted the SOT's jurisdiction. The court cited a United Supreme Court decision in making this point:

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 105, 112 S.Ct. 2374, 2387, 120 L.Ed.2d73, 89 (1992). A state law may not frustrate the operation of federal law by claiming some purpose other than that specifically addressed by the federal law. Rather, the supremacy clause renders invalid any state legislation that frustrates the full effectiveness of federal law.

The *Village* case was decided upon the wording of the ordinance, its location in the ordinances, and the fact that it is preempted as applied.

Analysis of Preemption under FRSA

Again, to truly determine whether the Kansas statutes concerning railroads are preempted under the FRSA, this matter would have to be litigated in court or go before the SOT. The analyst developed the analysis below based on available information. This analysis should not be relied upon to predict how a court or the SOT would decide in an action.

Based on the relevant statutes and case law, an analysis of whether the Kansas statutes are preempted under the FRSA is a four-step process:

Step 1: Are the statutes uniform with national laws concerning railroad safety?

If yes: The statutes are not preempted.

If no: Continue to next step.

Step 2: Has the SOT or the Secretary of Homeland Security created a regulation concerning this subject matter?

If no: The statutes are not preempted.

If yes: Continue to next step

Step 3: Is the statute in question an additional or more stringent law than the prescribed regulations?

If yes: Continue to next step.

If no: The statutes are preempted.

Step 4: Is the statute:

a. Necessary to reduce a local safety hazard?

If yes: Continue to next question.

If no: The statutes are preempted.

b. Compatible with federal laws?

If yes: Continue to the next question.

If no: The statutes are preempted.

c. Placing no unreasonable burden on interstate commerce?

If yes: The statutes are not preempted.

If no: The statutes are preempted.

Under Step 1, the Kansas statutes (KSA 66-273 and KSA 66-274) are not uniform to all national railroad statutes. Although 38 states have anti-blocking statutes, the matter varies from state to state, and there is no federal regulation creating a uniform standard.¹⁶ In continuing to Step 2, the SOT has prescribed regulations concerning train operations, safety, and air-brake testing, which, according to the court in the *Village* case, control train movement at railroad crossings. This would mean the SOT created regulation covering the subject matter in the Kansas statutes.

Considering Step 3, there is no federal requirement that a train blocking a crossing for more than 10 minutes leave a 30-foot gap for through traffic. So the Kansas statute is definitely more stringent. Under Step 4a, the safety issues of the locality in which the statutes are being enforced would have to be considered for an accurate answer. (*i.e.*, Are there many rural towns with only one route for emergency vehicles to take?). Kansas does have these communities, so presumptively, the answer would be yes. The answers to steps 4b and 4c would largely depend on whether the Kansas statutes are preempted under the ICCTA and certain other federal railroad regulations. These are issues for a court or a federal regulatory agency to decide.

Conclusion

The Kansas statutes may be preempted under the ICCTA and the FRSA. The only way to know for certain is for these issues to go before a court, the STB, or the SOT. One factor to consider is that under both federal statutes, local statutes' titles, wording, location, and applicability play a significant role in determining preemption. Statutes that are specifically aimed at regulating railroads tend to be preempted, while statutes that are of general applicability tend not to be preempted.

¹⁶ The Federal Railroad Administration's Compilation of State laws and Regulations Affecting Highway-Rail Grade Crossings. <http://www.fra.dot.gov/StateLaws>