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## 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 the train blocks the public road without the requisite opening. This memorandum discusses possible conflict between these Kansas statutes and 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 regulation of railroad activity is unconstitutional because it violates the commerce clause;
- State regulation is preempted under the Interstate Commerce Commission Termination Act of 1995 (ICCTA); or
- State regulation is preempted under the Federal Railroad Safety Authorization Act of 1994 (FRSA).<sup>1</sup>

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 in this memorandum because the ICCTA and FRSA preemption portions of this memorandum address commerce issues that arise when states regulate railroad activity.

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<sup>1</sup> This portion of U.S. 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 *U.S. Constitution*, to preempt state laws that 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 the current law regarding the ICCTA’s preemption of Kansas statute (the ICCTA regulates railroad commerce), as well as possible preemption issues with the FRSA (which regulates railroad safety).

## **Preemption under the ICCTA (Federal Regulation of Railroad Commerce)**

### ***Background***

The Interstate Commerce Act (ICA) of 1887 established the Interstate Commerce Commission (ICC). Congress created this act in response to rural citizens’ widespread disdain for railroads. People believed railroad companies abused their economic power through rate discrimination.<sup>2</sup> The ICA established the ICC to regulate the railroads in accordance with the ICA. The ICA applied to all railroads engaged in interstate commerce. 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.<sup>3</sup> 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.<sup>4</sup> However, in the 1970s and 1980s, Congress passed many deregulation acts that diminished the ICC’s authority.<sup>5</sup> 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 independent in its authority to issue decisions, but

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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.

administratively affiliated with the Department of Transportation.<sup>6</sup> The STB is both an adjudicatory and regulatory body and has jurisdiction over several issues related to surface transportation.

### ***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.<sup>7</sup> 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. The STB also has jurisdiction 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.<sup>8</sup>

The language of the ICCTA expressly preempts state and local regulation that either contradicts the language set out in the ICCTA 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***

#### *State of Kansas Case Law*

Two recent appellate cases in Kansas have found Kansas law to be preempted.

- In *State v. BNSF Railway Company*, No. 118,095, 2018 WL 5726512 (Kan. Ct. App. 2018), the Kansas Court of Appeals held KSA 66-273 is preempted by the ICCTA. In this case, a BNSF train blocked two railroad crossings in Chase County for approximately four hours. (The amount of time the train was stopped was contentious.) The Chase County Sheriff issued BNSF a citation for blocking the railroad crossings for longer than ten minutes in violation of KSA 66-273. The District Court ruled that KSA 66-273 was not preempted by federal law, found BNSF guilty of violating it, and ordered BNSF to pay a \$4,200 fine and court costs.

BNSF appealed the conviction to the Court of Appeals, contending KSA 66-273 is preempted by federal law under both the ICCTA and the FRSA. The Court of Appeals held KSA 66-273 is preempted by the ICCTA and reversed BNSF's conviction. Because the Court found the ICCTA preempts KSA 66-273, it did not address possible preemption under the FRSA.

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

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

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

In finding the ICCTA preempts KSA 66-273, the Court found the statute infringes on the exclusive jurisdiction of the STB to regulate the rail transportation system. It found KSA 66-273 is not a law of general applicability because it is a “railroad regulation” that on its face applies only to railroad companies or companies leasing or operating railroads in Kansas. It specifically targets the operation of rail carriers by regulating the time trains may occupy railroad crossings without moving or uncoupling. The Court reviewed cases from other jurisdictions and found several reasons a train may be required to stop, including for emergencies and maintenance, and regulating how long a train may stop has both economic and practical effects that are not merely incidental to the operations of rail carriers.

Although this case provides clarity by specifically holding KSA 66-273 is preempted by the ICCTA, the STB has final and exclusive jurisdiction. As of the time this memorandum was written, KSA 66-273 is preempted by ICCTA through the decision of the Kansas Court of Appeals. However, the case may be brought to the STB, which has the final decision-making power.

- *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), although not directly dealing with KSA 66-273, deals with the STB’s preemption power. This case involved a dispute between a landowner and the operators of trains on railroad tracks. The railroad operators brought this action to prevent the landowner from restricting their 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 operators to build a crossing to allow the landowner to enter and exit the landowner’s property and ordered the railroad operators to build a crossing that would require the railroad operators to remove one of two tracks and to construct new track. The railroad operators did not build the crossing, and the landowner filed a motion for contempt. The railroad operators filed a motion for relief from judgment. The District Court denied the motion and amended the order. The railroad operators and the landowner appealed.

The Court of Appeals affirmed in part and reversed, directing the parties to determine a viable option for implementing the injunction to build the crossing. The District Court then ordered the railroad operators to build the crossing. The operators appealed. The Court of Appeals held the STB has exclusive jurisdiction over requirements for railroad operators to remove tracks or build new tracks, and remanded the case back to the District Court, directing it to enter an order requiring the landowners to file an application with the STB to resolve any issues concerning the STB’s jurisdiction.

The STB issued a declaratory order on June 22, 2015, deciding a crossing in the location provided by the landowner would unreasonably burden interstate commerce and so any state or local regulation (including the Kansas courts’ orders) requiring construction of a crossing in that location is preempted by

federal law. However, if a state law requires a crossing, a permanent crossing at that location that would not unreasonably interfere with railroad operations would not be preempted by federal law.

### *10<sup>th</sup> Circuit Court of Appeals Case Law*

The 10<sup>th</sup> Circuit Court of Appeals is 1 of the 13 U.S. Courts of Appeals that serve as the intermediate appellate courts between the trial courts and the Supreme Court. The 10<sup>th</sup> Circuit's jurisdiction includes Kansas, Colorado, New Mexico, Oklahoma, Utah, Wyoming, and the portions of Yellowstone National Park that extend to Montana. While no cases in the 10<sup>th</sup> Circuit speak directly to statutes prohibiting train cars from blocking streets or intersections, a recent case in the 10<sup>th</sup> Circuit has addressed the STB's preemption power.

In *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 railroad ties, causing flooding on the landowners' 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 the facts did not warrant the lower court's entry of summary judgment based on implied preemption. In reaching its decision, the Court of Appeals discussed 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, the other type of implied preemption, occurs when the scope of the statute indicates Congress intended federal law to occupy a field exclusively.

### *STB Decisions*

The STB issues declaratory orders to end a controversy or remove uncertainty concerning the ICCTA.<sup>9</sup> The courts can also resolve preemption by applying the precedent set out in STB decisions. The STB has said 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.<sup>10</sup> Therefore, a matter must be brought before the STB to definitively determine whether a certain regulation is preempted. 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 STB's discussion of instances that would make preemption more or less likely.

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<sup>9</sup> See 5 USC 554e and 49 USC 721.

<sup>10</sup> *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"> <li>- Regulation concerns any kind of equipment related to the movement of property by rail.</li> <li>- Regulation concerns services related to railroad transportation.</li> <li>- Regulation would intrude on the STB's jurisdiction or a railroad's ability to conduct operations.</li> <li>- Law would have the effect of state regulation of railroads.</li> <li>- Regulation determines how railroad traffic should be routed.</li> <li>- Regulation prevents railroad from constructing, acquiring, operating, abandoning, or discontinuing a line.</li> <li>- Regulation unreasonably interferes with interstate commerce.</li> <li>- Regulations concern when and where particular products can be carried by rail.</li> </ul>	<ul style="list-style-type: none"> <li>- Regulations concerning operations that are not a part of the national rail network.</li> <li>- Regulation is an exercise of state police power that does not unreasonably interfere with rail transportation.</li> <li>- 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.</li> </ul>
<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"> <li>- Two types of categorically preempted state and local regulation:               <ol style="list-style-type: none"> <li>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.</li> <li>2) State regulation of matters regulated by the STB.</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>- Regulation is a health and safety rule (such as a fire or electric code) that is applied without discrimination.</li> </ul>
<p>Docket No. FD 35625 CITY OF MILWAUKIE – PETITION FOR DECLARATORY ORDER Decided March 25, 2013</p>	<ul style="list-style-type: none"> <li>- Statutes that “as applied” unreasonably burden or interfere with rail transportation.</li> </ul>	<ul style="list-style-type: none"> <li>- Laws have a more remote or incidental effect on rail transportation.</li> <li>- Laws that are an exercise of police powers that do not unreasonably interfere with railroad operations or STB's regulatory programs.</li> <li>- State laws are of general applicability to the extent that they are not otherwise preempted.</li> </ul>

<p>Docket No. FD 35765 WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY &amp; UNION PACIFIC RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER Decided June 22, 2015</p>	<ul style="list-style-type: none"><li>- Permitting or other laws/legal processes that try to regulate rail transportation directly or could be used to deny a railroad's ability to conduct rail operations.</li></ul>	<ul style="list-style-type: none"><li>- Disputes involving railroad/private road or sewer crossings with routing non-conflicting uses so long as they would not impede rail operations or pose undue safety risks.</li><li>- State courts' settling of crossing disputes so long as the crossing location would not unreasonably interfere with railroad operations.</li></ul>
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## ***Analysis of Kansas Statutes' Possible Preemption under the ICCTA***

The Kansas Court of Appeals has ruled KSA 66-273 is preempted by the ICCTA, and is law as of the date of this memorandum. However, the STB has the final decision-making authority to find this statute is, or is not, preempted by federal law. Using past STB decisions, the following analysis discusses factors that the STB may use if it rules on KSA 66-273.

KSA 66-273 differs from most of the statutes cited in the case law from other states 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 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 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 attenuated from railroading. When statutes are less directed at railroads, they are less likely 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 governments 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.<sup>11</sup> With profit as the 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. In the subsequent 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.<sup>12</sup>

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

12 49 USC § 20101.



## **Secretary of Transportation Jurisdiction over Railroad Safety**

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

### **Does the Secretary of Transportation'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.<sup>15</sup> 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 this action was not preempted because, under the FRSA,

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<sup>13</sup> 49 USC § 20103a.

<sup>14</sup> 49 USC § 20134.

<sup>15</sup> 49 USC § 20106(b).

the states can continue to enforce laws or issue orders on subject matter until the Secretary creates a regulation or order covering the subject matter. The Court reasoned that since the Secretary of Transportation 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 this action was preempted under the FRSA. The Court reasoned that the cause of action was based on common law, and the Secretary of Transportation regulates trains' speed limits. Therefore, an action based on a failure to follow a speed limit that was not imposed by the Secretary of Transportation is preempted. The Court also pointed out 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 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 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 ten minutes. The Illinois Supreme Court held the FRSA preempted this ordinance. In coming to its conclusion, the Court noted in determining whether a law is preempted, a court must look at whether the Secretary of Transportation has issued a regulation covering the subject matter that the law covers. In determining the Secretary of Transportation issued regulations covering the same subject matter, the Court found:
  - The Secretary has also issued detailed regulations on air-brake testing. [49 C.F.R. pt. 232.] 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.] 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.] The movement of trains is restricted until the tests are completed and brake pipe pressure is restored. [49 C.F.R. §232.211.]
  - Further, the Secretary has issued regulations on grade crossing safety. See 49 C.F.R. §§ 234.105, 234.106, 234.107. 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.

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 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 preventing traffic congestion was only a secondary purpose. The Court refuted this argument because the ordinance, as applied, contradicted the Secretary's jurisdiction. The Court cited a U.S. 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 it is preempted as applied.

- *City of Weyauwega v. Wisconsin Central Ltd.*, WL 4522186 (*Court of Appeals of Wisconsin 2018*). The railroad company was cited several times for violating the City of Weyauwega's ordinance prohibiting trains from obstructing for more than ten minutes any street or highway that crosses railroad tracks unless the train is in continuous motion. Weyauwega argued the ordinance's validity based on its intent of health and safety because when trains block crossings, they cut off routes for emergency services, significantly increasing response times. The Circuit Court found the railroad company violated the ordinance and rejected its FRSA preemption claim. On appeal, The Wisconsin Court of Appeals held the city ordinance was preempted by the FRSA because:
  - The ordinance qualified as state law or regulation pursuant to 49 USC § 20106(a)(2);
  - The ordinance is related to railroad safety because the effect of the ordinance is regulation of the movement of trains; once a train is stopped, the entire train must restart and the entire length of the train must clear the crossing in less than ten minutes. This dictates when and where the train must stop and has no exception for accidents or unsafe conditions;
  - The subject matter of the ordinance is the regulation of the operation and movement of trains because it allows only continuous movement of the train or a stop at a crossing for less than ten minutes. The Court found the mechanism of the ordinance is the regulation of operation and movement of trains, even if the primary goal was health and safety; and

- Federal regulations cover the operation and movement of trains because federal regulations govern train speed, crossing safety, and air brake testing, and the ordinance provides no exception for a train to stop for these federally regulated situations.

### ***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 Secretary of Transportation. The following provides a general guideline as to what factors the STB may use in determining if the Kansas statute is preempted by the FRSA. This analysis should not be relied upon to predict how a court or the Secretary of Transportation 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 Secretary of Transportation 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 a majority of states have anti-blocking statutes, the matter varies from state to state, and no federal regulation creates a uniform standard.<sup>16</sup> In continuing to Step 2, the Secretary of Transportation 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 Secretary of Transportation created regulations 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 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 (e.g., 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

KSA 66-273 and KSA 66-274 may be preempted under the ICCTA and the FRSA. The only way to know for certain if a statute is preempted is for these issues to go before the STB or the Secretary of Transportation. One factor to consider is, 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 are more likely to be preempted, while statutes that are of general applicability are less likely to be preempted.

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