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February 7, 2024

Larry E. Kasecamp
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Dear Mr. Kasecamp:

You asked me to respond to the Office of Atorney General's memorandum dated February 5, 2024, relating to proposed railroad safety legislation. I was a principal draftsman of the Federal Railroad Safety Act of 1970. This law contains the statutory authority of states to regulate railroad safety and preemption. I am attaching my background and curriculum vitae. I have dealt with preemption issues raised by railroads for many years. I will discuss the issues that railroads have raised previously to oppose state legislation covering railroad safety. I am aware of the issues railroads have raised: Such law creates an undue burden on interstate commerce, it violates the Interstate Commerce Commission Termination Act, and it is preempted by the Federal Railroad Safety Act.

## SUMMARY

For a state law to be preempted under the Federal Railroad Safety Act,49 U.S.C. §20106 governs. The Supreme Court, interpreting the law, in *CSX v. Easterwood*,507 U.S. 658 (1993) held that a state law is not preempted unless the Secretary of Transportation issues a rule, regulation or order which "substantially subsumes" the subject matter of the state law. Id. at 664.

Regarding the issue of undue burden on interstate commerce under the above section, §20106(3), Congress expressly prohibited state regulation unduly burdening interstate commerce only when issuing local safety hazards regulations. A statewide blocked crossing laws is not a local safety hazard provision. Rather, itis statewide.

The issue of preemption under the Interstate Commerce Commission Termination Act (ICCTA) is one which some courts have ruled without knowing the position of the two agencies covering railroad operations. The FRSA, not the ICCTA, governs this issue. Congress authorized states to regulate safety, and it took into consideration that a safety law will have some economic impact on railroads. To adopt the railroads' preemption argument would mean that a state could never regulate railroad safety. That is clearly contrary to congressional intent. It is significant that both the STB and the FRA have rejected the railroads'

argument that the ICCTA preempts state laws regarding railroad safety. Each agency filed amicus briefs in *Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517 (6th Cir.2001) arguing that the FRSA, not the ICCTA, is the appropriate statute to determine state safety preemption. The court agreed with the two federal agencies. The court said that the railroad's analysis was "skewed [and] would arbitrarily pigeon-hole preemption analysis of state rail law under the ICCTA." Id.at 523.

## DETAILED DISCUSSION

### I. Preemption Law Under the Federal Railroad Safety Act

The discussion of state preemption under the Federal Railroad Safety Act (FRSA) (49 U.S.C. §20106) must begin with the Supreme Court decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). The Court interpreted the preemption provisions of the FRSA. The Court, in *Easterwood*, held that a subject matter is not preempted when the Secretary of Transportation has issued regulations which merely "touch upon" or "relate to" that subject matter. Id.,507 U.S. at 664. The Court stated that Congress' use of the word "covering" in § 20106 "indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Id. (Underlining added). The Court recognized the state interest and right to regulate railroad safety, noting that "[t]he term covering' is ... employed within a provision that displays considerable

solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses." Id.at 665. The Supreme Court's "substantially subsumes" language has been read to mean that, if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. *In re Miamisburg Derailment Litigation*, 626 N.E.2d 85, 93 (OHIO App. 1994).Similarly, in *Southern Pacific Transportation Co. v. Public Utilities Comm'n of Oregon*, 820 F. 2d 1111(9th Cir. 1987), the court noted that

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they 'touch upon' or 'relate to 'that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.
>
> Id., 9 F.3d at 812.

The court continued:

> ...in light of the restrictive term 'cover' and the express savings clauses in the FRSA, FRSA preemption is even more disfavored than preemption generally.
>
> Id.,at 813.

Before finding that a state law is preempted, other courts have required parties to demonstrate this high degree of specificity of federal regulation on the same subject as state law since Easterwood. See, e.g., *Miller v. Chicago & North Western Transp. Co.*,925 F. Supp. 583, 589-90 (N.D. Ill. 1996) (state claim based

on violation of building code requiring railings around inspection pits not preempted because FRA had adopted no affirmative regulations on the subject);*Thiele v. Norfolk & Western Ry. Co.*,68 F.3d 179, 183-184 (7th Cir. 1995) (no preemption of state law "adequacy of warning claims" prior to time that warning devices "explicitly prescribed" by federal regulations are actually installed);*Miamisburg*,626 N.E.2d at 93 (federal regulation allowing continued use of old tank cars lacking safety equipment required on newer cars does not preempt state tort law claim of duty to retrofit old cars with such equipment

## II. The Proposed Legislation Does Not Impose An Undue Burden On Interstate Commerce.

Congress has plenary power to regulate interstate commerce. In the FRSA, Congress expressly prohibited state regulation unduly burdening interstate commerce only when issuing local safety hazards regulations. 49 U.S.C. §20106(3).

Furthermore, even assuming it was relevant, in determining whether a state regulation creates an undue burden on interstate commerce, the Supreme Court applies a balancing test between the state interest in issuing the regulation and the amount of burden created by the regulation. *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). ln *Terminal*, the Court upheld an Illinois law requiring cabooses on trains moving through that

state. The Court found that state interests, preventing injuries to railroad employees, outweighed the burden on interstate commerce (increased cost of interstate rail movement).ln *Norfolk and Western Ry. Company v. Pennsylvania Pub. Util. Comm'n*,413 A.2d 1037, 1045-1046 (1980), the court adopted essentially the same balancing test stating:

> In determining whether a state regulation creates an undue burden on commerce, it must first be determined whether the state regulation serves a legitimate state interest. Once a legitimate interest is established, it is necessary to look to the degree of burden imposed by the regulation on interstate commerce.

Applying the test, the court upheld a Pennsylvania regulation requiring locomotives to be equipped with sanitary toilets. The state interest in the health and safety of railroad employees was found to be substantial and justified the extra cost to the railroads. See also, *Bibb v. Navaho Freight Lines, lnc.*,359 U.S. 520, 524(1959).

The burden inquiry ends once the court finds a non-illusory safety interest to support the law. See, *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad*,393 U.S. 129,140 (1968) (the Court will leave to the legislature the question of balancing financial losses to the railroads against "the loss of lives and limbs of workers and the public"); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 449 (1978) ("if safety justifications arenot illusory, the court will not second-guess legislative judgment about the

importance in comparison with related burdens on interstate commerce.") (Blackmun, J. concurring); *Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981).

## III. The Interstate Commission Termination Act (ICCTA) Does Not Preempt State Railroad Safety Legislation.

A favorite argument of railroads is that the Interstate Commerce Commission Termination Act preempts state regulation. However, the ICCTA is limited to economic legislation. The FRSA, not the ICCTA, governs railroad safety. Congress allowed states to regulate safety, and it took into consideration that a safety law will have some economic impact on railroads. To adopt the railroads preemption argument would mean that a state could never regulate railroad safety. That is clearly contrary to congressional intent.

In 1995, Congress enacted the ICCTA to limit the economic regulation of various modes of transportation, and created the Surface Transportation Board to administer that Act. The STB has exclusive jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities..." 49 U.S.C. § 10501(b). The ICCTA confers upon the STB "all regulatory power over the economic affairs and non safety operating practices of railroads." *Petition of Paducah & Louisville Ry., Inc.*,FRA Docket No. 1999-6138, at 6-7 (Jan. 13, 2000); See also, S. Rep. No.104-176,at 5-6

(1995). There exists nothing in the ICCTA, nor its legislative history, to suggest that the STB could supplant the FRSA provisions.

While the STB may consider safety, along with other issues under its jurisdiction, it cannot adopt safety rules or standards. That is the duty of the Secretary of Transportation, or the states if the DOT has not prescribed a regulation covering the subject matter involved. The remedies set out in the ICCTA at §§ 11701-11707 and 11901-11908 do not pertain to safety and are not intended to supplant remedies specifically designed to address safety under federal law.

The railroads cannot point to any language in the ICCTA's statute or legislative history which suggests that it was intended to supplant a state safety law.

The history of rail safety rulemaking since the passage of the ICCTA is equally indicative of how the STB and the FRA each have construed the ICCTA as not vesting preemptive jurisdiction for railroad safety in the STB. In the ensuing years of its existence, the STB has not issued any railroad safety regulations. By contrast, since STB has been in existence, the FRA and states continue to issue numerous railroad safety regulations, covering a broad range of safety issues, many of which have economic impact on the railroads.

It is significant that both the STB and the FRA have rejected the railroads' argument that the ICCTA preempts state laws regarding railroad safety. Each agency filed amicus briefs in *Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517 (6th Cir.2001) arguing that the FRSA, not the ICCTA, is the appropriate statute to determine state safety preemption. The court reversed the district court stating that its decision erroneously preempted "state safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA." Id.at522-523. Also, the court said:

> While the STB must adhere to federal policies encouraging "safe and suitable working conditions in the railroad industry," the ICCTA and its legislative history contains no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. $10101(11). Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia.* For example, while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 et seq., while the STB handled economic regulation and environmental impact assessment.

Id. at 523.

The court held further that the railroad's analysis was "skewed [and] would arbitrarily pigeon-hole preemption analysis of state rail law under the ICCTA." Id. "Based on the federal railway statutes, the STB and FRA's jurisdictional management, and the resulting regulatory systems...Congress vested the FRA with primary authority over national rail safety policy and assigned the STB the duty to

encourage 'safe and suitable working conditions' for railway employees through its assessment of individual railway proposals subject to its authority." Id. Finally, the court held that "[a]s the Ohio regulation has a connection with rail safety based on its terms, the safety benefits of compliance, and its legally recognized purpose, FRSA provides the applicable standard for assessing federal preemption." Id. at 524.

The administrative rulings of FRA and STB are equally instructive that the ICCTA has not vested preemptive jurisdiction for safety matters in the STB.As both the FRA and the STB recognized in a joint rule making,

> ...both FRA and STB are vested with authority to ensure safety in the railroad industry. Each agency, however, recognizes the other agency's expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations. Concurrently, the Board has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of the railroads complement each other's interest in promoting a safe and viable industry.

63 Fed. Reg. 72,225(Dec.31, 1998).

The brief of the STB in the above case states that the lower court's ruling in favor of the railroad would "...undermine the primary authority of the Federal Railroad Administration (FRA) (or states where the FRA has no Federal standards) to regulate railroad safety under FRSA." STB Brief at 3.

In *Petition of Paducah & Louisville Railway Inc., supra*, the FRA addressed the effect of the ICCTA preemption on its jurisdiction. While FRA found that the STB had exclusive jurisdiction on the matter at issue (access to a railroad bridge), the FRA order emphasized that the ICCTA preemption was limited to "non-safety" matters:

"Congress conferred on the STB and its predecessor (the ICC) exclusive administrative jurisdiction over the non-safety aspects of the operations of the nation's interstate rail system." Order at 5.....

In analyzing the ICCTA, as to preemption or preclusion, the inquiry should be "tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch v. Ware*, 414 U.S. 117, 127(1973). When interpreting a law, interpretations that would produce absurd results are disfavored when alternative readings of the text that would comport with Congress' purpose ae available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Expansive claims of ICCTA preemption have been criticized and rejected by courts. See, *Emerson v. Kansas Southern Railway Co.*, 503 F. 3d 1126, 1132 (10thCir. 2007), where the court noted that the ICCTA preemption argument "has no obvious limit, and if adopted would lead to absurd results." As the United States

Supreme Court has explained, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive '"to give effect to both. *Epic Sys. Corp. v. Lewis,*_ U.S. _, _, 138 S. Ct. 1612, 1624, 200 L.Ed.2d 889 (2018), quoting *Morton v. Mancari*, 417 U.S. 535,551 (1974), *United States v. Borden Co.*, 308 U.S. 188, a clearly expressed congressional intention that such a result should follow. Id., quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,515 U.S. 528, 533 (1995). It is presumed that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." Id., quoting *United States v. Fausto*, 484 U.S. 439,453 (1988)

## IV. Validity of State Blocked Crossing Regulation

My review of blocked crossing decisions demonstrate that, in some cases, the issues were not fully presented to the courts. Those courts relied upon the Interstate Commerce Commission Termination Act (ICCTA), or undue burden on interstate commerce to decide states were preempted. As will be shown herein, those courts were not provided the correct application of the law. For example, not one case even mentioned the views of the agencies administering the laws. As to the ICCTA, the Federal Railroad Administration (which administers the railroad safety laws) and the surface Transportation Board (which administers the ICCTA) both

disagree with the those' courts analysis. As to undue burden on interstate commerce, under the federal railroad safety laws, that issue is relevant only when determining a local safety hazard. A statewide blocked crossing law directly addresses safety by facilitating the access of emergency vehicles. Except for local safety hazards, states have equal authority to regulate railroad safety subject matters as does the FRA.

As the above discussion demonstrates, state blocked crossing regulation should not be preempted, particularly on grounds of economic ramifications. All rail safety regulations have some economic burden on railroads. Cases that have concluded state regulations here are preempted did not consider that if economic impact preempted State regulation, even the Federal Railroad Administration could not regulate regulate safety. Congress authorized states to regulate safety in the FRSA, and took into consideration that a safety law will have some economic impact on railroads. Otherwise, it would mean that neither the FRA, nor a state, could ever regulate railroad safety. That, clearly, is contrary to congressional intent. Each railroad safety law or regulation has some economic impact on a railroad. Any incident where a railroad's actions or inactions result in injury or death, is a railroad safety matter. Each substantive regulation by a state and FRA has an economic impact upon railroads. Therefore, if economic impact is the

criteria for ICCTA preemption/preclusion, neither the FRA nor a state could ever regulate railroad safety.

A statewide blocked crossing law directly addresses safety by facilitating the access of emergency vehicles. Except for local safety hazards, states have equal authority to regulate railroad safety subject matters as does the FRA.

## V. Uniformity Under the FRSA Does Not Preempt State Regulation of the Reporting Requirements of Hazardous Materials.

The Attorney General's memo at pp.2 and 9 discusses the uniformity provision in the rail safety law and concludes the uniformity provision in the FRSA preempts state regulation of hazardous materials reporting requirements. In connection with state preemption, the FRSA states: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. The Supreme Court has addressed "uniformity" in legislation similar to the FRSA. *Sprietsma v. Mercury Marine*, 537U.S. 51,70(2002) held that the goal of uniformity does not justify displacement of the Act' s[here FRSA] more prominent objective emphasized by its title to promote safety. *Sprietsma* involved the Supreme Court's interpretation of the Federal Boat Safety of 1971, which was enacted one year after the FRSA. The boat safety law has a similar provision as in the FRSA to foster uniformity. The FBSA contains similar language as the FRSA as it relates to uniformity. Similarly, the FBSA provides in its statement of purposes that the law is to encourage greater "uniformity of boating laws and

regulations as among the several States and the Federal Government." Pub. L. 92-75, §2, 85 Stat.213-214.When balancing uniformity against safety, the Court said:

> Respondent ultimately relies upon one of the FBSA's main goals: fostering uniformity in manufacturing regulations. Uniformity is undoubtedly important to the industry, and the statute's preemption clause was meant to "assur[e] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. 20. Yet this interest is not unyielding, as is demonstrated both by the coast Guard's early grants of broad exemptions for state regulations and by the position it has taken in this litigation. Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.
> 537 U.S. at 70.

As in the boat safety law, the FRSA's primary purpose is safety. See, *CSX Transportation, Inc. v. Easterwood, supra*, 507U.S. at 661-2.

Aside from the Supreme Court's decision in *Spreitsma*, Congress has addressed this issue, and reaffirmed its original intent that safety takes precedence over uniformity. In the Rail Safety Improvement Act of 2008 (Pub. L. 110-432), section 101 states:

> Safety as Highest Priority--In carrying out its duties the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

As further emphasized in the House Report, H.R. Rep. No. 110-336, 110th Cong., 1st Sess. 36(2007):

> This section [Sec.101] also directs the Administration to consider the assignment of maintenance of safety as the highest priority, recognizing the clear

intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

## VI. State Can Regulate Train Length and Reliance on *So. Pac. Co. v. State of Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) is No Longer Controlling.

At p.5 of the Attorney General's memo, it discusses the commerce clause, and concludes that a state law covering train length would be preempted. In view of the above discussion, reliance on *So. Pac. Co. v. State of Arizona ex rel. Sullivan*,325 U.S. 761 (1945), is no longer controlling. That case preceded the Federal Railroad Safety Act, which gave the states broad authority to regulate railroad safety, and prohibited undue burden on interstate commerce only when a state attempts to regulate a local safety hazard. 49 U.S.C. §20106.

## VII. Negative Preemption is Not Relevant Under the Federal Railroad Safety Act.

At pp.6-7, the Attorney General's memo suggests that negative preemption would preempt a state wayside detector regulation. The FRA has only issued a Safety advisory regarding wayside detectors. The is currently a FRA working group considering such potential regulation. Not until FRA makes a decision as to the specifics of a regulation, could a state law be preempted under the FRSA.

Since there is an explicit preemption provision in the Federal Railroad Safety Act, negative preemption is not a relevant argument. If there is a specific intent to preempt a state provision, that must be stated explicitly." It is appropriate

to expect an administrative regulation to declare any intention to preempt state law with some specificity." *California Coastal Commission v. Granite Rock Company,* 480 U.S. 572, citing *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 718 (1985) (Federal agencies should "make their intentions clear if they intend for their regulations to be exclusive."). When a statute contains an express preemption clause, the plain wording of the clause is necessarily the best evidence of Congress's preemptive intent. *CSX RR v. Easterwood, supra,* 507 U.S. at 664. Since the railroad safety law contains an express provision, only when the FRA has enacted a regulation covering the same subject matter as a state regulation, can there be a clear manifestation of preemptive intent. There can be no express preemption by negative implication, because express preemption, by its very definition, cannot be implied. See, *Gadda v. Ashcroft,* 377 F.3d 934, 944 (9th Cir. 2004); *S. Pac. Transp. Co. v. Publ. Utils. Comm'n*, 647 F. Supp. 1220, 1226 (N.D. Cal. 1986)("When the FRA decided not to adopt a regulation requiring walkways on trestles and bridges, its reasons related specifically to conditions affecting those structures. . . . [The 1978 policy statement] did not purport to limit state jurisdiction. . . . The FRA thus did not claim to have adopted regulations covering that subject."), aff'd, 820 F.2d 1111 (9th Cir. 1987); *In re Speed Limit for the Union Pacific R.R.,* 610 N.W. 2d 677, 683-684 (MN. App. 2000).

**VIII. States Have the Authority to Require Reporting of Hazardous Materials Transportation.**

At pp.8-9, the Attorney General's memo states that the state requirement "may" be preempted. The Federal Hazardous Materials Transportation Law, 49 U.S.C. 5101–5128, contains express preemption provisions (49 U.S.C. 5125), which sets forth in detail what is preempted. There is no provision preempting states from requiring the reporting of what hazardous materials are transported throughout the state. The Attorney General also states that the FRSA preemption provision applies. (49 U.S.C. §20106). That is error. FRA does not have jurisdiction to regulate hazardous materials. Rather, that is regulated by the Pipeline and Hazardous Materials Safety Administration.

**IX. States are Permitted to Require Railroads to Allow Certain Employees Onto Railroad Property to Inspect for Safety Problems.**

At pp. 9-10, the Attorney General's memo once again suggests that state regulation may be preempted. Title 49 U.S.C. §20106, as discussed in detail previously, determines whether the issue here is preempted. The Supreme Court case cited by the Attorney General memo is not relevant. Union organizing on a company's property is far removed from regulating railroad safety, particularly where a specific preemption law exists.

Sincerely,

Lawrence M. Mann

Lawrence M. Mann