



**BUILDING AMERICA®**

April 9, 2021

The Honorable Nancy Nathanson  
900 Court St. NE H-279,  
Salem, Oregon 97301

Re: Union Pacific Railroad's Opposition to HB 3339

Representative Nathanson,

Union Pacific (UP) understands Oregon's concerns about occupied crossings, and we share your desire to mitigate these challenges. Often a rail line once located on the outskirts of town with minimal public interaction, today now bisects a bustling metropolitan area where citizens frequently cross as part of their daily travels. As rail and vehicle traffic continues to grow, UP remains committed to safely and efficiently serving customers while minimizing the impact of rail operations on surrounding communities, including at busy grade crossings where roads intersect with railroad tracks. Some steps UP currently takes to mitigate occupied crossings include:

- Working directly with local community leadership to avoid occupied crossings when possible, and coordinating with city services to identify alternative routing and emergency access plans.
- Working with ODOT to collaboratively identify within the State Rail Plan additional projects that would improve both freight and passenger performance as well as grade separation priorities to address congestion and crossing issues.
- Working with ODOT on three public private partnership projects to improve passenger rail reliability. Reliability and fluidity improvements often mitigate challenges at occupied crossings.
- The Oregon Rail Users League, of which Union Pacific is a founding member, spent time and resources developing a list of rail projects for the state's Connect Oregon/Industrial Rail Spur Fund that will help with efficient rail movement across the state (see attached list).
- UP has invested more than \$825 million strengthening our Pacific Northwest transportation infrastructure from 2015-2019. These private investments equal better rail efficiency and transportation fluidity.

HB 3339 deletes current Oregon statute, which was litigated, and replaces it with new language establishing civil penalties for occupied crossings. While the *ODOT vs. BNSF* case UP discussed with you found that the ODOT rule borne out of ORS 824.222 "specifically targets rail transportation, and is preempted by the ICCTA," you seemed to communicate that HB 3339 was based on emergency response and impacted more than just rail, making HB 3339 different than existing statute.

The Federal Railroad Safety Act (FRSA) has seen litigation at the U.S. Supreme Court with *CSX Transp. v. Easterwood* 507 US 658. The *Easterwood* case developed a two prong standard for rail safety legislation by states. In a nutshell:

1. Does the legislation address a unique safety issue? HB 3339 does not – occupied crossings occur across the nation- which means the issue must be regulated by the Federal Railroad Administration (FRA).

2. Does the legislation address a unique local safety hazard? HB 3339 does not – as you are looking to pass an overarching state law, it is not limited to a unique local concern.

Additionally, there is court precedent specific to occupied crossing legislation. *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th determined state rules regulating blockage of grade crossings were found to be preempted. “The State of California, by regulating the time a stopped train can occupy a public rail crossing, has necessarily and directly attempted to manage railroad operations. Accordingly, we conclude that general order No. 135 is preempted by the ICCTA.”

Specifically related to the Interstate Commerce Commission Termination Act (ICCTA), based on the U.S. Constitution’s dormant Commerce Clause, a patchwork of regulation burdens interstate commerce and is not permitted.

ICCTA has three triggers:

1. Does the law have the effect of directly managing or governing rail transportation?
2. Does the law discriminate over other transportation modes?
3. Does the law place a burden on interstate commerce?

Because rail moves between states, the burden of disparate laws is clear. As an example, if train regulation in Portland alters movement of rail, Seattle and Vancouver would be burdened by Portland’s regulation. 49 U.S.C. 20106 is all about safety – national uniformity of regulation and preemption of state laws.

Finally, you mentioned the issue of train length. This issue has also been taken to the U.S. Supreme Court. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) the Court held that the Constitution prohibits states from passing laws that unduly restrict the flow of interstate commerce. The Court further stated that a state train-length law violates this prohibition because it creates delay, impedes efficiency, and compromises the national concern for uniformity.

We respectfully submit that working on what can be done should be our focus, not litigating preemption afresh. Rail resources are better used making positive changes in Oregon today. Through ongoing local work to address occupied crossings and statewide public private partnerships that address the most congested crossings with grade separations, UP stands/remains committed to enhancing Oregon’s transportation infrastructure.

As always, we are available to discuss and are happy to link you with subject matter experts as necessary.

We continue to be thankful for your public service.

Sincerely,



Aaron Hunt