

May 18, 2021

Joint Transportation Committee

We offer the following information in response to questions we have heard and to share for the record information we emailed to members.

First, however, assurances that we heard you – we have stressed concerns to our companies and told them they are right to be making this issue a focus and that we appreciate their pledge to intensify work on improving occupied crossings and delays.

We also need to continue to advocate for public-private partnerships to help. Communities have built up around rail lines - often without planning for the growth and daily travel that exasperates this issue. Grade separation is the best congestion management tool we have. Railroads have proactively identified and advocated for potential grade separation candidates in partnership with ODOT and respective road authorities. Continued ODOT prioritization of troublesome crossings statewide and funding of Connect Oregon, incentivizing local governments and railroads to improve infrastructure, is the correct solution.

Respectfully,

Cindy Robert

for Union Pacific Railroad

Tom Barrows

for BNSF Railway

Regarding Rail Efforts in Oregon:

Restating the verbal testimony provided at public hearing and documents in OLIS from UPRR:

Through ongoing local work to address occupied crossings and statewide public private partnerships that address the most congested crossings with grade separations, we can enhance Oregon's transportation infrastructure.

- UP & BNSF are 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.
- UP & BNSF are 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.
- UP is 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 & BNSF are founding members, 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 and is currently bringing that to the legislature (see attached list).
- UP has invested more than \$825 million strengthening our Pacific Northwest transportation infrastructure from 2015-2019. BNSF spends roughly \$100-\$200 million per year in the PNW. These private investments equal better rail efficiency and transportation fluidity.

Furthermore, our efforts to assist improvement of on-time performance of passenger rail has been of question. We do not foresee that HB 3339 and the suggestion of “train splitting” would have a positive impact on that issue and would suggest some research into answering questions:

- Would an increased number of trains impact capacity, not just for Class I but also for short line use?
- Would an increased number of trains impact Amtrak's on-time performance and the potential for future Amtrak growth?
- Would an increase in shorter trains on the rail network exasperate delays more than fewer but longer trains?

Regarding Other State Laws:

At hearing, a question was asked about WA which has a blocked crossing law. The [state regulator's web page](#) makes it clear that the Washington law is completely unenforceable with the following disclosure:

This regulation is unenforceable due to several federal court rulings. This is a national problem and states are strongly requesting that the Federal Railroad Administration (FRA) develop regulations to address the issue. The FRA is the only government agency that could consider creating rules to address blocked crossings. **Until federal rules are developed, UTC staff will work with railroads where there is an imminent safety hazard resulting from a blocked crossing.**

Additionally, proponent provided a chart listing 32 states with laws regarding blocked crossings. As with the Oregon blocked crossing statute that was overturned in the Appeals Court, other states where laws were adjudicated saw similar fate. We sent to some committee members a cursory review of the internet that revealed 14 of the states on that list were either litigated and laws were overruled by courts or an Attorney General said the law is not enforceable due to other court decisions. Below the list has been expanded from original email and includes 20 states where laws not enforced:

Union Pacific Work Product Cases and Opinions Anti-Blocked Crossings Last updated May 17, 2021

California

(PUC Order 134)

People v. Burlington N. Santa Fe R.R., 209 Cal. App. 4th 1513, 1531 (Cal. App. 2012) (ICCTA; concurrence says FRSA)

Illinois

(625 ILCS 5/18c-7402)

Vill. of Mundelein v. Wisconsin Cent. R.R., 882 N.E.2d 544, 556 (Ill. 2008); Eagle Marine Indus., Inc. v. Union Pac. R. Co., 882 N.E.2d 522, 524 (Ill. 2008) (FRSA)

Indiana

(Code § 8-6-7.5-1)

Indiana v. Norfolk S. Ry. Co., 107 N.E.3d 468 (Ind. 2018) (ICCTA)

CSX Transportation, Inc. v. City of Mitchell, Ind., 105 F. Supp. 2d 949 (S.D. Ind. 1999) (FRSA, to extent interferes with FRA regs)

Iowa

(Code § 327G.32)

Driesen v. Iowa, Chicago & E. R.R. Corp., 777 F. Supp. 2d 1143, 1154 (N.D. Iowa 2011) (FRSA)

Kansas

(K.S.A. 66-273)

State v. BNSF Ry. Co., 432 P.3d 77, 87 (Kan. App. 2018) (ICCTA)

Kentucky

(KRS 277.200)

Ass'n of Am. Railroads v. Hatfield, 435 F. Supp. 3d 769 (E.D. Ky. 2020) (FRSA)

Louisiana

(La.R.S. 48:391)

A.G. Opinion, 11-0080, at *1 (Ops. La. Atty. Gen. Jul. 12, 2011) (ICCTA)

Michigan

(MCL § 462.391)

Michigan

(Plymouth ordinance)

CSX Transp., Inc. v. City of Plymouth, 283 F.3d 812, 817 (6th Cir. 2002) (FRSA)

CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626, 630 (6th Cir. 1996) (FRSA)

Mississippi

(Code § 77-9-235)

Elam v. Kansas City S. Ry. Co., 635 F.3d 796, 808 & n.11 (5th Cir. 2011) (ICCTA)

Nebraska

(Fremont ordinance)

State v. Burlington N. & Santa Fe Ry. Co., No. TR06-957, slip. op. at 10 (Neb. Cnty. Ct., Dodge Cnty. July 14, 2006) (ICCTA and FRSA)

North Dakota

Won't enforce - North Dakota PUC - <https://www.psc.nd.gov/jurisdiction/railroad/BlockedCrossings.php>

Ohio

(Code § 5589.21)

CSX Transportation, Inc. v. Williams, 2017 WL 1544958, at *3 (N.D. Ohio Apr. 28, 2017) (ICCTA)

Norfolk & W. Ry. Co. v. City of Oregon, 210 F.3d 372 (6th Cir. 2000) (unpublished) (FRSA)

Oklahoma

(Title 66, § 190)

BNSF Ry. Co. v. City of Edmond, Oklahoma, No. CIV-19-769-G,
2019 WL 5608680, at *2 (W.D. Okla. Oct. 30, 2019) (ICCTA and
FRSA)

Oregon

(OAR 741-125-0010)

Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp., 206 P.3d 261,
262 (Or. App. 2009) (ICCTA)

Pennsylvania

(18 Pa. C.S. § 6907)

Krentz v. Consol. Rail Corp., 910 A.2d 20, 35 (Pa. 2006) (FRSA)

South Dakota

Won't enforce - https://rapidcityjournal.com/news/local/tired-of-waiting-for-trains-city-cant-help-you/article_55546d2c-752c-5c40-a58a-7229b0f45ccb.html

Tennessee

(Memphis ordinance)

Lewis v. Norfolk Southern Ry. Co., 618 F. Supp. 2d 833, 846 (W.D.
Tenn. 2008) (FRSA)

Texas

(Transp. Code 471.007(a))

Friberg v. Kansas City Southern Ry. Co., 267 F.3d 439, 444 (5th
Cir. 2001) (ICCTA)

Opinion No. GA-0331, at *1 (Ops. Tex. Atty. Gen. Jun. 17, 2005)
(ICCTA)

Washington

(Seattle ordinances)

City of Seattle v. Burlington N. R. Co., 41 P.3d 1169 (Wash. 2002)
(ICCTA and FRSA)

Wisconsin

(City ordinance)

City of Weyauwega v. Wisconsin Cent. Ltd., 2018 WI App 65, 2018
WL 4522186 (Wisc. App. 2018) (FRSA)

Regarding Inclusivity of HB 3339:

Committee question arose as to the application of preemption when the bill included more than just rail – language applies to anyone blocking a crossing – an attempt to make the discrimination provision within the Interstate Commerce Commission Termination Act (ICCTA) not triggered and federal preemption not assured.

We submit, the two other ICCTA triggers for preemption must also be considered - most specifically the requirement that a state law not unreasonably burden rail transportation. Courts have made clear that state laws regulating railroad crossings, train noise, and the closing of local railroad depots are also impermissible regulation of rail transportation.

And, interestingly, the other ICCTA requirement is that there be general applicability of police powers – that would mean you would have to fine pedestrians (including homeless people) and cars that often block crossings \$3,000, which we do not see the state doing.

Furthermore, as stated below, preemption also comes from Federal Railroad Safety Act (FRSA).

Regarding Preemption Generally:

In addition to testimony from UPRR in OLIS, this further information was provided via email to some committee members by UPRR at time of work session:

The following summary arguments outline why HB 3339 is expressly preempted. First, Congress broadly preempted state regulation of rail transportation in the ICC Termination Act (“ICCTA”), which includes operational matters of occupying crossings. Second, the Federal Railroad Safety Act (“FRSA”), preempts HB 3339, as FRSA expressly preempts state laws that regulate railroad safety.

- In *Burlington Northern v. Dept. of Transportation*, 227 Or. App. 468, 474 (Or. Ct. App. 2009), the Oregon Court of Appeals held that the state’s prior anti-blocking statute was preempted by ICCTA. The court held that the law was preempted because it “is not a law of general applicability” and “specifically targets rail transportation.”
- While the bill on its face does not solely target railroads, as applied it would do so. And given the legislative history and notes, it is clear the intent is to target railroads.
- Numerous courts have ruled anti-blocked crossing laws such as HB 3339 has the effect of managing or governing rail transportation, therefore are preempted. *Burlington Northern*, 227 Or. App. at 472.
 - Generally applicable laws can be preempted on this basis as applied to railroads. For example, courts have held condemnations of railroad property categorically preempted even though state condemnation laws obviously do not target railroads. E.g., *Soo Line R.R. Co. v. City of St. Paul*, 827 F. Supp. 2d 1017, 1022 (D. Minn. 2010).
 - What matters is that the law would govern rail operations. That is clearly true here, for the reasons *Burlington Northern* already explained. “Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains ...” *Id.* at 474 (quoting *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir 2001)). Indeed, every court to consider the question has held that anti-blocking laws “stymie railroads’ key operational choices,” like “train length, speed, and scheduling.” *Indiana v. Norfolk S. Ry. Co.*, 107 N.E.3d 468, 477 (Ind. 2018).

- Entirely apart from ICCTA, FRSA also preempts anti-blocking laws.
 - FRSA expressly preempts state laws “related to railroad safety” if federal regulations “substantially subsume the subject matter.” *CSX Transp. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002).
 - As many courts have held, blocked-crossing statutes relate to railroad safety because “compliance ... would require either shorter or faster trains,” which “unquestionably relate to railroad safety.” *CSX Transp. v. City of Plymouth*, 86 F.3d 626, 629–30 (6th Cir. 1996).
 - It does not matter if a state law was “enacted to promote the general welfare of its residents and was not directed towards and does not regulate any aspect of ‘railroad safety.’” *Id.* at 629. What matters, for these purposes, is what the bill requires in terms of compliance. *Id.*
 - And federal regulations governing train speed, train length, and air-brake testing “substantially subsume the subject matter” of highway-rail crossings, including “the time that trains may block highway traffic.” *Plymouth*, 283 F.3d at 817.
 - FRSA’s savings clauses do not apply to state-wide laws like HB3339. *Norfolk & W. Ry. Co. v. Pub. Utilities Comm’n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991).
 - Many courts have applied the FRSA to hold blocked-crossing laws preempted.