



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 12, 2021

Senator Brian Boquist
900 Court Street NE S311
Salem OR 97301

Re: Constitutional issues raised by House Bill 3339 (2021)

Dear Senator Boquist:

You have raised a concern that section 2 of House Bill 3339 is preempted by federal law. You also asked if a vice chairperson of a joint committee may request a witness to testify under oath or affirmation. First, I will address your questions regarding oaths and affirmations and then I will address your questions regarding the bill and federal preemption.

Oaths and affirmations

In answer to your question, yes, ORS 171.505 provides, in relevant part, that “the chairperson or vice chairperson of a statutory, standing, special or interim joint committee of the two houses, may administer oaths or affirmations to witnesses in any proceedings” The effect of placing a witness under oath or affirmation is to subject the witness to penalties for perjury if the witness does not tell the truth. The Legislative Assembly cannot itself prosecute someone for perjury, however. A perjury prosecution may only be conducted by a District Attorney’s office following an investigation by law enforcement.

House Bill 3339

We do not believe that section 2 of House Bill 3339, on its face, is preempted. However, a court may find that section 2 of the bill, as applied to railroads, is preempted.

The Supremacy Clause of the United States Constitution provides that “the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹ Thus, where a state law expressly conflicts with or frustrates a federal law, the state law is preempted.

The express language of the Interstate Commerce Commission Termination Act of 1995 (ICCTA) imparts to the federal Surface Transportation Board broad authority over all interstate and intrastate railroad activities and operations. The ICCTA contains an express preemption provision over regulation of rail transportation and preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation.² Yet, the board and courts

¹ Article VI, clause 2, United States Constitution.

² 49 U.S.C. 10501(b) and *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

have noted that states and local entities do retain their police powers to protect public health and safety under limited circumstances.³

Before the ICCTA was enacted, ORS 824.222 was already law in Oregon. ORS 824.222 grants the state the authority to regulate the length of time a public railroad-highway grade crossing may be blocked by rail equipment. The Department of Transportation is directed to enforce the law and establish time limits. ORS 824.222 also authorizes imposing civil penalties for failure to comply. Following the direction of ORS 824.222, the department enacted OAR 741-125-0010. The rule established time limits on blocking railroad-highway crossings. The rule applied only to rail.

As you are aware, in 2009 the Oregon Court of Appeals, in *Burlington Northern*, struck down the anti-blocking rule because the rule specifically targeted rail.⁴ Soon after the court ruling the department repealed the administrative rule. Similarly, ORS 824.222 has no operative legal effect after *Burlington Northern*; section 3 of House Bill 3339 repeals ORS 824.222.

In *Burlington Northern*, the court also noted that there are situations where state regulations that impact railroads may be upheld. A state regulation may survive if three requirements are met. One, the law does not discriminate against rail, meaning rail is not specifically targeted. Two, the law is generally applicable. Three, the law does not unreasonably burden railroads.⁵ OAR 741-125-0010 specifically targeted rail and was thus preempted on its face.

Section 2 of House Bill 3339 does not specifically target rail; it has wider applications. The section provides that a person may not “willfully obstruct, blockade, interfere with or prevent the use of a railroad-highway grade crossing.” The term “person” as used in Oregon statutes is defined broadly⁶ and would include pedestrians, passenger vehicles and possibly railroads. We say possibly because, under section 2 (3)(a) of the bill, the prohibition against blocking a railroad-highway crossing does not apply to the extent it is preempted by federal law.

The administrative rule invalidated in *Burlington Northern* by its express terms was a regulation of rail transportation.⁷ Section 2 of House Bill 3339 is a prohibition aimed at any person who might block a crossing for more than 10 minutes. Thus, the first requirement, that the law does not discriminate against rail, is satisfied. It is an open question whether a court would find the second and third requirements are satisfied, thereby finding section 2 of the bill not preempted as applied to railroads.

Under the second requirement, a court must find that section 2 of House Bill 3339 is a generally applicable exercise of the state’s police powers. If a court finds section 2 of the bill is not generally applicable, then the department may not enforce the section as it applies to railroads. If a court finds that section 2 of the bill is generally applicable, the next question to be answered is: Does section 2 of the bill unreasonably burden rail transportation?

Under the third requirement, a court must find that the regulation unreasonably burdens rail transportation. Rail transportation is unreasonably burdened when a regulation significantly

³ *Burlington Northern v. Department of Transportation*, 227 Or. App. 468, 473 (2009), quoting *New York Susquehanna v. Jackson*, 500 F.3d 238, 252 (3rd Cir. 2007).

⁴ *Burlington Northern* at 475.

⁵ *Id* at 474.

⁶ ORS 174.109.

⁷ *Burlington Northern* at 474.

interferes with the railroad's ability to conduct business.⁸ This is a fact-intensive inquiry. If a court finds that section 2 of the bill is unreasonably burdensome to railroads, then the law would remain valid as applied to others (e.g., pedestrians and other vehicles) but would no longer apply to railroads.

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Very truly yours,

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⁸ *New York Susquehanna* at 253.