

Sen Boquist

From: Sen Boquist
Sent: Tuesday, May 11, 2021 2:06 PM
To: LC Request
Cc: Sen Findley; Rep Noble; Brecht Justin
Subject: HB 3339 Work Session Thursday - LC Opinion

Opinion Request – Work Session May 13, 2021

Counsel:

According to the Committee Chair's belief you have rendered an LC Opinion that says HB 3065 cannot be pre-empted by federal law regarding railroad crossing regulations. True or false is really unknown but it does mean you know the issue.

Please outline your LC Opinion for me as to why Legislative Counsel believes it can reverse a 2009 Oregon Court of Appeals decision eliminating federal preemption? Is there a newer Oregon case? Another case regarding rail road crossings?

This is a quote from the Oregon Court of Appeals ruling: **"judicial review of an order of the Oregon Department of Transportation (ODOT) imposing civil penalties for violations of OAR 741-125-0010, which generally prohibits trains from blocking railroad-highway grade crossings for more than 10 minutes. BNSF argues that ODOT's order is invalid because, among other reasons, OAR 741-125-0010 is preempted by 49 USC section 10501(b), the preemption clause of the federal Interstate Commerce Commission Termination Act (ICCTA). We agree and therefore reverse."**

Your HB 3339 texts states: **"may not willfully obstruct, blockade, interfere with or prevent the use of a railroad-highway grade crossing, for longer than 10 consecutive minutes."**

If the exact same wording in an OAR was struck down by the Oregon Court of Appeals in 2009 why do you think a draft statute in 2021 is now legal? Or is Legislative Counsel misquoted meaning this bill is illegal?

Lastly, given I listened to numerous witnesses lie in the joint committee please refresh my memory of the oath requirement if requested by a vice chair in a joint committee? Fully aware a vice chair in a chamber committee can require an oath to be administered to a witness under the law but how does this apply in a joint committee as seems to be some confusion with the committee. If the witness is a legislator can they be put under oath?

Please explain and opine briefly as the Joint Transportation work session is Thursday ay 8:00 am.

Sincerely requested,

Brian J. Boquist
State Senator

Court of Appeals of Oregon.

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, Petitioner, v. DEPARTMENT OF TRANSPORTATION, Respondent.

115831; A133519.

Decided: April 15, 2009

Before HASELTON, Presiding Judge, and ARMSTRONG, Judge, and ROSENBLUM, Judge. Kathryn M. Pratt, Portland, argued the cause for petitioner. On the briefs were James L. Hiller and Hitt Hiller Monfils Williams LLP. Erin C. Lagesen, Salem, argued the cause for respondent. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

<https://caselaw.findlaw.com/or-court-of-appeals/1237095.html>

Sen Boquist

From: Elliott Heidi
Sent: Wednesday, May 12, 2021 6:12 PM
To: Sen Boquist
Subject: RE: YOUR LEGISLATIVE COUNSEL REQUEST LC3811 (2021)

Follow Up Flag: Follow up
Flag Status: Completed

Good evening Senator Boquist,

In analyzing a bill for the purpose of providing a legal analysis of the language, it is vital to look at the entire scope of the bill, not just one piece. The focus of the testimony may have been on one piece of the bill but the opinion focuses on the entirety of the language of the bill. As the opinion states, the language of the bill prohibits all persons from blocking crossings. Railroads are included in the definition of person. The fact that section 2 applies to all persons and not just railroads is important. Applying to all persons is what sets section 2 apart from ORS 824.222 and the administrative rule later adopted by the Department of Transportation. As I detail in the opinion, whether or not a court would ultimately uphold application of the bill against railroads is to be determined.

As to your question regarding Representative Nathanson and the process of developing the bill, all members are free to share as many or as few details about the process and motivations for preparing a bill. It is improper for me, as counsel, to do so as such knowledge is privileged.

All the best,

Heidi Elliott
Senior Deputy Legislative Counsel

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From: Sen Boquist <Sen.BrianBoquist@oregonlegislature.gov>
Sent: Wednesday, May 12, 2021 4:07 PM
To: Elliott Heidi <Heidi.Elliott@oregonlegislature.gov>
Subject: FW: YOUR LEGISLATIVE COUNSEL REQUEST LC3811 (2021)

Counsel:

Want to make sure I understand LC's position. I sat through all the hearings. The premise and intent of the bill was to regulate railroads. The sponsor of the bill clearly stated in the record it was about regulating railroads. The witnesses testified it was about regulating railroads. The LPRO Administration stated it was about regulating railroads. ODOT claimed it was about regulating railroads. Thus 100% of the members and public believe the bill is about railroads blocking crossings for more than ten minutes.

Yet, the opinion says it is not about railroads, and rail roads are likely preempted. Given the language matches the Oregon Court of Appeals case this appears to be a game. So be it then.

It is very clear the committee members were lied to on the intent of the bill if it is not about railroads blocking crossings.

Was Representative Nathanson correct in stating DOJ helped craft the language?

And am I reading the LC Opinion correctly in LC's claim the bill is not about regulating the time a railroad train uses to transit a railroad crossings on the tracks?

Senator Boquist

Committee Staff Measure Summary & Written Testimony:

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/242156>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24619>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24645>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24660>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24733>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24785>

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24792>

From: LC Delivery

Sent: Wednesday, May 12, 2021 3:39 PM

To: Sen Boquist <Sen.BrianBoquist@oregonlegislature.gov>

Subject: YOUR LEGISLATIVE COUNSEL REQUEST LC3811 (2021)

Attached is your Opinion or Research request. If you have any questions upon reviewing your response, please contact our office at 503-986-1243 or via email at lc.request@state.or.us.

Thank you,
Legislative Counsel