THE LAW OFFICES OF

LAWRENCE M. MANN

Member, D.C. Bar
Federal Practice

ALPER & MANN, P.C.

9205 REDWOOD AVENUE
BETHESDA, MARYLAND 20817
(202)298-9191
1-800-747-6266
FAX (301) 469-8986
E-MAIL: LM.MANN@VERIZON.NET

May 18, 2021

STATEMENT OF LAWRENCE M. MANN ON HB 3339

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 *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 legislation covering blocked rail-highway grade crossings. I am aware of three 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

A few courts have ruled that state blocked crossing legislation has been preempted. My review of these cases demonstrate that 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.

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.

The proposed LC 3465 is not a local safety hazard provision. Rather, it is 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.

An Oregon Court of Appeals decision, *Burlington Northern v. Dept. of Transportation*, 227 Or. App. 468, 206 P.3d 261(2009), is in direct conflict with the FRA, STB, and the *Tyrrell* decision. An analysis of the legislative history of the ICCTA and FRSA should have resulted in a different conclusion by the Oregon court. The facts in the current bill are distinguishable from the law interpreted by the Oregon court. HB3339 directly addresses safety by facilitating the access of emergency vehicles. Moreover, the state appellate court overlooked a critical point.

Except for local safety hazards, states have equal authority to regulate railroad safety subject matters as does the FRA. Clearly, FRA could regulate blocked crossings. States can also.

DETAILED DISCUSSION

I. Preemption Law

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 8l3.

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. I1l. 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 (7thCir. 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*,626N.E.2d at93 (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). The proposed HB3339 is not a local safety hazard provision. Rather, it is statewide. Therefore, undue burden on interstate commerce is not relevant here.

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 are not illusory, the court will not second-guess legislative judgment about their 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 this issue.

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.* at 522-523. 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 rulemaking:

> ...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.

ln *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.

….

"the very hallmark of rail regulation has been the exclusive nature of the administrative jurisdiction over non-safety rail operations and practices which Congress had entrusted to the Interstate Commerce Commission ("Commission") and which has been expanded and now reposes in the [Surface Transportation] Board." Order at 6.

….

"...delegation to the Commission (and now exclusively to the [Surface Transportation] Board) of all regulatory power over the economic affairs and the non-safety operating practices of railroads." Order at 6-7.

“At the time that it was established just a few years ago, Congress made it abundantly clear that the [Surface Transportation] Board was to be its sole delegatee of power to regulate non-safety rail matters." Order at 7.

“The enactment of the ICCTA with its unambiguous language preempting all other federal laws which encroach on the exclusive administrative expertise of the [Surface Transportation] Board in non-safety rail regulatory matters alone is

dispositive of the issue..." Order at 18.

….

"Congress's unambiguously expressed intent in 49 U.S.C. § 10501(b) to centralize non-safety rail regulation as part of its efforts to facilitate uniformity in the administration of legislation designed to achieve its deregulatory goals. Clearly, in Section 10501(b), Congress bestowed exclusive administrative jurisdiction over the non-safety aspects of rail operations on the [Surface Transportation] Board with no exceptions." Order at 19.

Similarly, the STB's orders have delineated the extent of its jurisdiction to emphasize that the ICCTA did not preempt federal safety laws. In *Borough of Riverdale*, STB Finance Docket No. 33466(Sept.9, L999), the STB stated:

> Our view [is] that not all state and local regulations that affect railroads are preempted ...state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.

Decision at 6.

Thus, both the STB and the FRA take the position that the FRA and the states, as appropriate under the FRSA, retain primary jurisdiction over railroad safety regulation, while assisting the STB with its expertise in matters of principal concern to the STB. Substantial deference should be given to the positions of the affected agencies that the ICCTA does not preempt/preclude the congressional

scheme for railroad safety. The bottom line is that the railroads argument regarding ICCTA preemption of state railroad safety laws has no merit.

See also, Medtronic Inc. v. Lohr, 518 U.S. 470,486 (1996):

> ...because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*,331 U.S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.; Hillsborough Cty*., 471U. S., at 715-716; *cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S.1, 22 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any preemption at all, as opposed to questions concerning the scope of its intended invalidation of state law, *see Cipollone*, 505 U. S., at 545-546 (Scalia, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone. Id.,* at 518, 523.

That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety. The same legal analysis applies in regard to LC 3465. The ICCTA simply does not apply to LC 3465.

An Oregon Court of Appeals decision, *Burlington Northern v. Dept. of Transportation*, 227 Or. App. 468, 206 P.3d 261(2009), is in direct conflict with the FRA, STB, and the *Tyrrell* decision. An analysis of the legislative history of the ICCTA and FRSA should have resulted in a different conclusion by the Oregon

court. Also, the facts in the current bill are distinguishable from the law interpreted by the Oregon court. HB3339 directly addresses safety by facilitating the access of emergency vehicles. Moreover, the state appellate court overlooked a critical point. Except for local safety hazards, states have equal authority to regulate railroad safety subject matters as does the FRA. 49 U.S.C. §20106. It is noteworthy that the ICCTA preemption provision covers both federal and state laws. 49 U.S.C. §10501(b)(2). Clearly, FRA can regulate blocked crossings. States can also.

CONCLUSION

It is my opinion that LC 3465, to prevent railroads from blocking rail-highway grade crossings for safety reasons, is not preempted by any law.

Respectfully Submitted,

Lawrence M. Mann

CURRICULUM VITAE OF LAWRENCE M. MANN

Lawrence M. Mann, born in Wilmington, North Carolina, January 30, 1940; admitted to bar, in 1967, District of Columbia. Education: University of North Carolina (B.A., 1962); Georgetown University (L.L.B., 1966). Special Assistant to United States Senator Vance Hartke, 1964-1965. Member, Legal Staff, U.S. House of Representatives Post Office and Civil Service Committee, 1965-1966. Counsel, Commission on Political Activity of Government Personnel, 1967. Member: The District of Columbia Bar; Bar Association of the District of Columbia.

I am a member in good standing of the Bars of the following Courts:

	Date Admitted
U.S. Supreme Court	03/27/72
U.S. District Court for the District of Columbia	01/20/67
U.S. Court of Appeals for the District of Columbia Circuit	02/16/67
U.S. Court of Appeals for the 11th Circuit	10/01/81
U.S. Court of Appeals for the 10th Circuit	11/06/78
U.S. Court of Appeals for the 9th Circuit	07/08/75
U.S. Court of Appeals for the 8th Circuit	02/13/75
U.S. Court of Appeals for the 7th Circuit	02/13/67

U.S. Court of Appeals for the 6th Circuit	03/27/90
U.S. Court of Appeals for the 5th Circuit	12/21/81
U.S. Court of Appeals for the 4th Circuit	03/14/75
U.S. Court of Appeals for the 3rd Circuit	06/05/87
U.S. Court of Appeals for the 2nd Circuit	10/25/88
U.S. Court of Federal Claims	02/11/70
U.S. Tax Court	04/22/70