IN THE COUNTY COURT OF DODGE COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, VS. THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, Defendant.	))))))))))	CASE NO. TR06-957, TR06-958, and TR06-1157 ORDER

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DODGE COUNTY NEBRASKA
A.G. SCHEER
COUNTY COURT CLERK

THIS MATTER came before the Court on May 26, 2006, on the Defendant's motion to quash citations issued on April 8, April 9, and April 16, 2006, against the defendant, Burlington Northern and Santa Fe Railroad for "Railroad Obstruction of Streets" in violation of Fremont City Ordinance 10-307 (the "anti-blocking ordinance"). Deputy Dodge County Attorney Mark Boyer appeared on behalf of the State, and Nichole Bogen appeared as counsel on behalf of the defendant, Burlington Northern Santa Fe Railroad. The Court finds that notice and service on the Nebraska Attorney General pursuant to Neb. Rev. Stat. section 25-21-159 was proper.

The defendant filed a motion and supporting brief to quash the anti-blocking ordinance citation for the following reasons:

1. Fremont City Ordinance 10-307 is preempted by federal law pursuant to the Supremacy Clause as applied under the Federal Railroad Safety Act, 49 U.S.C., Section 20101 et seq.;

2. Fremont City Ordinance 10-307 is preempted by federal law pursuant to the Supremacy Clause as applied under the Interstate Commerce Commission Termination Act, 49 U.S.C., Section 10501 et seq.; and

3. Fremont City Ordinance 10-307 is an unconstitutional burden on interstate commerce;

The Court received Exhibit No. 1 (a copy of Fremont's current anti-blocking ordinance, as amended by Ord. No. 5032, 9/13/05), Exhibit No. 2 (a copy of the previous anti-blocking ordinance ruled as preempted by federal law by this Court on June 25, 2005), Exhibit No. 3 (a copy of Neb. Rev. Stat. §16-221), and Exhibit No. 4 (a copy of General Index for Cities of the First Class) into evidence, heard argument on the motion to quash and took the matter under advisement.

A motion to quash pursuant to Neb. Rev. Stat. section 29-1808 is a proper method for challenging the facial validity of a statute. A motion to quash is not appropriate when attacking the constitutionality of a statute as applied due to the need to adduce evidence for such a challenge. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). In this case, only copies of the Fremont ordinances and state statutes were received into evidence. This Court will only address preemption challenges that can be determined from the language of the statute because no factual evidence was presented at the hearing.

On June 25, 2005, in Case No. TR05-369, this Court granted the defendant's motion to quash the criminal citation issued in violation of Fremont City Ordinance 10-307 (Exhibit No. 2) and found the anti-blocking ordinance preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20101 et seq. While the defendant raises additional arguments and cases in its supporting brief, the issue before this Court is whether the revised language, as amended on September 13, 2005 (Exhibit No. 1), is sufficient to resist the same constitutional challenges raised by the defendant in TR05-369.

saving clause" allows the state to adopt more stringent safety requirements when necessary to eliminate or reduce an essentially local safety hazard, as long as those standards are not incompatible with federal laws or regulations, and are not an undue burden on interstate commerce. Id.

The Eighth Circuit Court, in Burlington Northern Railroad Company vs. Minnesota, 882 F. 2d 1349 (8th Cir. 1989), affirmed the district court's determination that Minnesota statutes requiring an occupied caboose was preempted by the FRSA as well as by regulations promulgated by the Federal Railroad Administration. The Court held that while the preemption was not explicitly stated, it was implied by the federal statutory scheme creating a comprehensive and nationally uniform scheme for regulating railroad safety in 45 U.S.C. Section 434. In the absence of express preemption language, Congress may indicate an intent to occupy an entire field of regulation. Id. at 1352. "If Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with the federal law. Such a conflict arises when compliance with both state and federal law is impossible ...." Id.

The Sixth Circuit Court, in Norfolk and Western Railway Company vs. City of Oregon, 210 F. 3d 372 (6th Cir. 2000) (unpublished), affirmed the district court's permanent injunction against the city of Oregon, Ohio from enforcing its anti-blocking ordinance, which prohibited the obstruction of its public streets by non-moving trains for longer than five minutes. The Norfolk & Western Railroad, while building trains in its railroad yard in preparation for traveling onto interstate railways, was cited 131 times by the city of Oregon for crossing obstructions from January 1, 1993 to October 26, 1996. The obstructions occurred because the length of the train extended onto the public streets

of Oregon and were caused by the railroad's performance of federally mandated airbrake testing, which required a minimum of 6 to 8 minutes to perform even if no problem was detected. The district court concluded that the ordinance was preempted by the FRSA, and that the Norfolk & Western Railroad could not comply with the anti-blocking ordinance in a manner that would not impact railroad safety. *See also CSX Transportation, Inc. vs. City of Mitchell*, 105 F. Supp 2d 949 (S. D. Ind. 1999) (Indiana anti-blocking statute preempted by FRSA when blockage caused by compliance with federally mandated law, other causes of blockage require further inquiry by law enforcement).

In *Plymouth II*, the railroad (CSX Transportation, Inc.) was issued more than 892 citations with potential fines exceeding $446,000.00 for violation of the Michigan anti-blocking statute, which prohibited the obstruction of vehicular traffic on a public street or highway for no longer than five minutes at any one time. The Sixth Circuit Court applied the two "saving clauses" provided in 49 U.S.C. Section 20106 to the Michigan anti-blocking statute and held that the statute was preempted by the FRSA.

With regard to the "first saving clause", the *Plymouth II* Court affirmed the district court in *Plymouth I*, which held that the subject matter of the state statute necessarily involved the regulation of train speed, train length, and airbrake tests. These areas constitute the subject area of the state statute by limiting the amount of time a train can block a grade crossing, which has the inevitable effect of regulating a train's speed, length, and performance of airbrake testing. The "first saving clause" did not apply to the Michigan anti-blocking statute. *Id.* at 817; *See also City of Mitchell*, 105 F. Supp 2d at 949 (Federal regulations promulgated by the Secretary of Transportation under the FRSA

- as well as the greater and more convincing weight of case law construing the same – make clear that federal law has expressly occupied (and thus preempts any state law or any enforcement of state law inconsistent with) areas of train operations involving speed, length, physical motion including obstruction, airbrake testing, and flagmen); *The City of Seattle vs. Burlington Northern Railroad Company*, 145 Wn. 2d 661, 41 P.3d 1169 (Wash. 2002) (City's ordinance regulated street blockage for periods in excess of four consecutive minutes, required the railroad to schedule two-minute intervals between blocking incidents, and prohibited rail car switching during peak traffic hours. The Court held that city ordinances impacted areas of safety regulated by FRSA because they affect the speed at which trains travel, train length, and trains in physical motion. "Under these precedents, [city anti-blocking ordinance] does more than 'touch upon' or 'relate to' safety, and the FRSA preempts the City's ordinances.").

With regard to the "second saving clause", the *Plymouth II* Court held that the Michigan anti-blocking law was applicable to the entire state and was not concerning the elimination of an essentially local hazard. *Id*. at 816. In *City of Seattle* , the Washington Supreme Court found that "for purposes of the FRSA, municipal regulation should be treated the same as state regulation." 145 Wn. at 671, 41 P.3d at 1173. While Fremont's anti-blocking ordinance is not applicable to the entire state, the "second saving clause" does not apply in this case because the blocking of crossings is not "an essentially local safety hazard". Without question, the blocked passage of emergency vehicles in response to an emergency situation is a serious hazard and is of local concern to Fremont, but this potentially hazardous situation is repeated at every blocked roadway-railway intersection in every city, town, and village in this country through which a railroad travels.

Fremont's anti-blocking ordinance is not significantly distinguishable from the language of the following anti-blocking laws which were declared unconstitutional by preemption in the federal courts: *Plymouth II*, (Michigan statute prohibiting 5 minute blocking or for not longer than 7 minutes if continuously moving in same direction at not less than 10 miles per hour); *Friberg v Kansans City S. Ry. Co.*, 267 F. 3d 439 (5th Cir. 2001) (Texas statute prohibiting the railroad from willfully allowing a standing train to obstruct for more than 5 minutes); *Norfolk & W. Ry Co. v. City of Oregon*, No. 3:96CV7695 (N.D. Ohio May 26, 1997) (unpublished), *aff'd*, 210 F. 3d 372 (6th Cir. 2000) (unpublished) (City ordinance prohibiting obstruction of a public street for longer than 5 minutes and after 5 minutes shall remove obstruction for not less than 3 minutes to allow passage); and *CSX Transp. Inc. v. City of Mitchell*, 105 F. Supp. 2d 949 (D. Ind 1999) (Indiana statute prohibiting blocking in excess of 10 minutes unless railroad has no control over circumstances).

According to *Plymouth II*, *City of Mitchell*, and *City of Seattle*, Fremont's anti-blocking ordinance has the inevitable effect of regulating a train's speed and length even if the train is stopped, switching, loading, or unloading, which triggers preemption by the FRSA.

INTERSTATE COMMERCE COMMISSION TERMINATION ACT

The express preemptive language of the Interstate Commerce Commission Termination Act (the "ICCTA") imparts to the Surface Transportation Board broad federal authority over all interstate railroad activities and operations. *City of Seattle*, 145 Wn. 2d 661, 41 P.3d 1169.

The 5th Circuit Court of Appeals, in *Friberg vs. Kansas City Southern Railroad*, 267 F. 3d 439 (5th Cir. 2001), held that the Texas anti-blocking statute was a criminal provision that reached into the area of economic regulation of railroads and was preempted by the ICCTA. Regarding the ICCTA's preemptive provision in 49 U.S.C. Section 10501 (b), the *Friberg* Court further held as follows:

> The language of the statute could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise. The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm.
>
> The trial court, in finding no preemption, delved into the legislative history of the ICCTA. We respect that effort, but find that the plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent. We cannot accept the trial court's reasoning that the Texas Anti-Blocking Statute is a criminal provision that does not reach into the area of economic regulation of railroads. 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, with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty.

Id. at 443 (Citations omitted).

According to *Friberg*, Fremont's anti-blocking ordinance is preempted by the ICCTA because the ordinance impacts a train's speed, length, and, with the "switching, loading or unloading operations" provision, especially impacts scheduling and the way a railroad operates its trains.

THE SUPREMACY CLAUSE

It is extremely unsettling to this Court that the defendant's blocking of an intersection in Fremont could result in loss of life and property due to the inability of fire,

rescue, and law enforcement personnel to promptly respond. The significant increase in rail traffic in the last decade only emphasizes the seriousness of the situation. However, in the event of conflicting laws, federal supremacy, especially in the area of railroad commerce and regulation, preempts any state or local ordinance without regard to the seriousness of the local interest. "It is beyond peradventure that federal power over commerce is superior to that of the State to provide for the welfare or necessities of their inhabitants however legitimate **or dire** those necessities may be." *Gonzales v. Raich*, 125 S.Ct. 2195, 2213 (2005) (Emphasis added).

In *Green Mountain Railroad Corporation vs. Vermont*, 2003 U.S. District Lexus 23774, *Aff'd* 404 F. 3d 638 (2nd Cir. 2005), the state's position that the railroad construction of a spur in a buffer zone required environmental regulation to protect fish habitat, prevent erosion of a stream bank, help maintain water quality, and provide aesthetic benefit was not enough to overcome the ICCTA's preemption. Because the buffer zone had an economic impact on the railroad and its business, the court determined that state environmental regulation, "**however laudable**," was preempted by the ICCTA. (Emphasis added).

State Attorney Generals are entitled to defend state laws from constitutional challenge. *See* Neb. Rev. Stat. § 25-21,159. While not binding on this Court, recent Attorney General Opinions from three states are a clear indication that anti-blocking laws lack a viable defense in the event of a constitutional challenge under the Supremacy Clause. The Louisiana Attorney General in Opinion 96-228A reversed a previous opinion and, relying on *Plymouth II*, concluded that a parish anti-blocking ordinance "related to public safety" and was "expressly preempted by FSRA." The Kansas

Attorney General in Opinion 2000-65, also relying on *Plymouth II*, concluded that a Kansas anti-blocking statute "that imposes time limits on trains obstructing traffic is vulnerable to attack on the same grounds as ordinances regulating train speed." The Texas Attorney General in Opinion GA-0331, relying on *Friberg*, believed that a court would conclude that the Texas anti-blocking statute would be preempted by the ICCTA, and relying on *Plymouth II* (with reference to *City of Oregon* and *City of Seattle*), further believed that a court would conclude that the anti-blocking statute would be preempted by the FRSA.

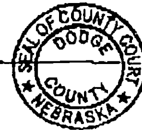
CONCLUSION AND ORDER

For the reasons stated above, the court finds that Fremont City Ordinance 10-307 is preempted by the FRSA and the ICCTA. The defendant's motion to quash the citations is granted.

DATED this 14th day of July, 2006.

BY THE COURT:

COUNTY JUDGE



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