

# Update on Federal Pre-emption Issues

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**Craig J. Staudenmaier, Esquire**  
Nauman, Smith, Shissler & Hall, LLP

**Nauman Smith**  
Attorneys At Law

## The Good News:

- Federal Pre-emption of various state law claims under the Federal Rail Safety Act (FRSA) is alive and well

## The Pre-emption Clause:

- 49 U.S.C.A. § 20106(a)(2) provides:

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--



## The Pre-emption Clause (continued)

- (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (B) is not incompatible with a law, regulation, or order of the United States Government; and
- (C) does not unreasonably burden interstate commerce.

## The Bad News:

- Not all courts know the “good news”
- the “Clarifying Amendment”



## 49 U.S.C.A. § 20106(b) provides:

- b) **Clarification regarding State law causes of action.** --
- (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--
- (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

## Continued:

- (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
- (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

## The “New” Good News:



- The Courts are learning quickly and there are several recent opinions in both federal and state courts which are affirming and even expanding FRSA pre-emption in FELA and other railroad litigation
- The Clarifying Amendment is being correctly interpreted as having no effect on prior holdings dealing with FRSA pre-emption (e.g. speed and warning device claims)

➤ **Passenger Safety Equipment Standards, 75 Fed. Reg. 1180-01**

- FRA final rule issued Jan. 8, 2010 concerning enhancement requirements for cab car front ends and MU locomotives clarified its views on pre-emption.



- FRA restated the continuing validity of the Easterwood and Shanklin line of decisions of United States Supreme Court holding once the Secretary of Transportation has covered a subject matter by regulation and established a federal standard of care, state standards are pre-empted.
- FRA further stated if a railroad chooses to adopt a standard, plan or rule that exceeds the federal standard, it cannot be held liable for violation of that standard, rule or plan but only the federal one.
- Uniform, national standards to the fullest extent possible are the goal.

# Warning Devices

Missouri Pacific Railroad Co. v. Limmer, 299 S.W.3d 78 (Tex. 2009)

- Reflective tape on crossbucks at crossbuck only crossing under and paid for by federal program triggered FRSA pre-emption
- Reflective nature of tape was to alert drivers to signs and thus was a “warning device”



# Walkways

## Norfolk Southern Railway Co. v. Box, 556 F.3d 571 (7<sup>th</sup> Cir. 2009)

- RR argued roadbed construction and maintenance regulations covered “walkways” and thus Illinois statute requiring switching yards to have walkways parallel to each track was pre-empted.
- Court rejected RR argument because no express or conflict (implied) pre-emption.
- What about negative pre-emption?
  - Previous FRA statement to “ignore” OSHA regulation
  - FRA considered walkway regulations and decided not to act.
- Sixth Circuit, Michigan and Indiana decisions have expressly found such state requirements pre-empted by FRSA.



# Ballast

## Nickels v. Grand Trunk Western Railroad, 560 F.3d 426 (6<sup>th</sup> Cir. 2009)

- FELA Plaintiff alleged injury from walking on “oversized” ballast.
- Court found FRA ballast regulations (49 C.F.R. § 213.103) “covered” subject matter, thus, Plaintiff’s claims were pre-empted.
- Court took a broad view of “covers the subject matter”.
- There is a split of authority on this issue (Seventh Cir. federal decisions and Missouri state decisions refused to find pre-emption).



# Speed

**Veit v. Burlington Northern Sante Fe Corp.,**  
**207 P. 3d 1282 (Wash. App. 2009)**



- Plaintiff in crossing accident case asserted “excessive speed” claims against railroad based on train exceeding railroad timetable speed limits at crossing (25-30 mph) even though train was not exceeding Class 3 track speed of 40 mph
- Court rejected Plaintiff’s claims based upon FRSA pre-emption
- REMEMBER FRA STATEMENT: Railroad internal standards or rules do not defeat pre-emption
- Court also rejected “local safety hazard” exception to pre-emption

# ICCTA Pre-emption

Island Park LLC v. CSX Transportation et al., 559 F.3d 96 (2d Cir. 2009)

- NYSDOT obtained order to close a private road crossing based on safety issues. Property owner sought injunction against enforcement
- Property owner asserted ICCTA and FRSA pre-emption offensively
- Court rejected both ICCTA and FRSA pre-emption
  - ICCTA does not pre-empt all state action related to rail crossings but only those which burden rail transportation (i.e., interfere with rail operations)
  - Found no FRSA pre-emption since Plaintiff cited no federal regulation “covering” closure of rail crossings

# Contact Information

Craig J. Staudenmaier, Esquire  
Nauman, Smith, Shissler & Hall, LLP  
717.236.3010  
[cjstaud@NSSH.com](mailto:cjstaud@NSSH.com)

