



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
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September 1, 2020

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Ms. Gelene Savage
Kansas Department of Transportation
Eisenhower State Office Building, 3rd – West
700 SW Harrison
Topeka, KS 66603

RE: K.A.R. 36-43-1

Dear Ms. Savage:

Pursuant to K.S.A. 2019 Supp. 77-420(b), we have completed our review for legality of the above-referenced regulation. We met with you on Friday, August 28, 2020, to discuss our concerns about the proposed regulation. For the reasons discussed below, we are unable to approve the proposed regulation at this time.

1. The history section of the regulation lists two statutes, K.S.A. 66-1,216 and K.S.A. 75-5078, as the authorizing statutes. K.S.A. 75-5078 transfers "all the powers, duties, and functions" of the Kansas Corporation Commission (KCC), as it relates to railroads, to the KDOT. K.S.A. 66-1,216 authorizes the KCC the "full power, authority and jurisdiction to supervise and control common carriers . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." However, neither statute authorizes the KCC to adopt rules and regulations concerning the subject of K.S.A. 36-43-1. If the KCC had no such statutory authority, then none transferred to the KDOT.

2. The Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 *et seq.*, authorizes the Secretary of Transportation to regulate and issue orders for every area of railroad safety. 49 U.S.C. § 20103(a). The FRSA also has a broad preemptive provision for railroad safety: "Laws, regulations and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). There are two savings clauses (or exceptions) to the preemption provision, see 49 U.S.C. § 20106(a)(2), but we have deemed neither to be applicable to K.A.R. 36-43-1.

The Federal Railroad Administration (FRA) studied the issue about the minimum number of crewmembers for locomotives and issued a Notice of Proposed Rulemaking (NPRM) to determine whether it should adopt a federal regulation on the size of locomotive crewmembers. On May 29, 2019, the FRA issued an agency action decision that withdrew the NPRM. The decision stated the FRA had "determined that no regulation of train crew staffing is necessary or appropriate at this time" and that its "notice of withdrawal provides FRA's determination that no regulation of train crew staffing is appropriate and that FRA intends to negatively preempt any state laws concerning that subject matter." 84 FR 24735-1, 2019.

Based upon *Burlington Northern and Santa Fe Railway Company v. Doyle*, 186 F.3d 790,795-96 (7th Cir. 1999), we have determined the FRA's decision constitutes an order under the FRSA; this "negative preemption" by the FRA preempts state law. Accordingly, K.A.R. 36-43-1 lacks legality.

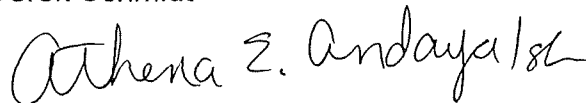
3. The Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq.*, gives the Surface Transportation Board (STB) exclusive jurisdiction over certain activities of the railroads. See 49 U.S.C. 10501(b). The ICCTA's preemption provision states, in pertinent part: "[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b). However, under the principle of federalism, a state maintains its traditional police powers *to the extent the laws protect public health and safety concerns and do not target the operation of railroads*. *State v. BNSF Ry. Co.*, 56 Kan. App. 2d 503, 511 (2018). Although the intent may be public safety, the plain language of K.A.R. 36-43-1 targets the railroad industry by prohibiting one-person train crews for locomotives traveling in or through Kansas. As such, the ICCTA preempts K.A.R. 36-43-1 because it has an effect on railroad operations that is more than incidental or remote. See 56 Kan. App. 2d at 513 (the ICCTA preempted K.S.A. 66-723 because it prohibited any railroad company operating in Kansas from allowing its trains, engines, or cars to block any public road within one-half mile of any city or town for more than 10 minutes at a time).

As we stated above, we are unable to approve the proposed regulation at this time. The original regulation is enclosed with this letter, along with the Economic Impact Statement.

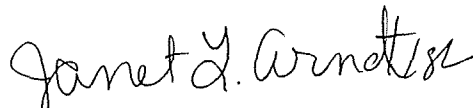
Do not hesitate to contact our office if you have questions.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
Derek Schmidt



Athena E. Andaya
Deputy Attorney General



Janet L. Arndt
Assistant Attorney General

Encl.: Original Regulation and Economic Impact Statement

cc: Sen. Caryn Tyson, Chair, Joint Committee on Rules and Regulations
Rep. Ron Highland, Vice Chair, Joint Committee on Rules and Regulations
Sen. Oletha Faust-Goudeau, Ranking Minority Member, Joint Committee on Rules
and Regulations
Jill Shelley, Legislative Research, State Capitol, Room 68-W
Natalie Scott, Office of Revisor, State Capitol, Room 24-E