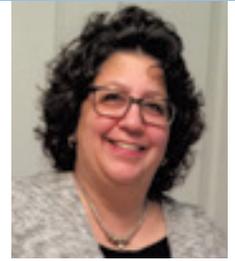


# FRSA Preempts Ordinance Prohibiting Trains from Obstructing RR Crossings

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The Wisconsin Court of Appeals recently held that the Federal Railroad Safety Act (FRSA) and regulations promulgated pursuant to that act preempt a City of Weyauwega ordinance prohibiting any train from obstructing, for more than 10 minutes, any railroad street crossing unless the train is in continuous motion. *City of Weyauwega v. Wisconsin Central Ltd.*, 2018 WI App 65.

Wisconsin Central is a railroad carrier that owns railroad tracks in the city and operates trains that pass through the city. Wisconsin Central's tracks cross streets and a highway at three points within the city. A portion of the city is located north of the Wisconsin Central tracks. When trains obstruct any of the crossings, motor vehicles are forced to take alternate routes to reach northern parts of the city. When not in use, the city's police, fire, and emergency service vehicles are located south of the railroad tracks. The response time for police, fire, and emergency services vehicles to reach northern portions of the city can increase from about one minute to anywhere between 12 to 15 minutes when Wisconsin Central trains obstruct some or all of the crossings.

In March 2015, a Wisconsin Central train stopped at and blocked one of the crossings for 69 minutes. The city cited Wisconsin Central for violating the ordinance. In a stipulation ratified by the New London/Weyauwega Joint Municipal Court, the parties agreed to conduct a trial regarding that citation. The agreement incorporated by reference

39 other pending citations issued by the city to Wisconsin Central for violating the ordinance, with proposed forfeitures totaling over \$25,000.00. The parties agreed that a final appellate decision as to that citation would apply with equal force to the remaining outstanding citations issued to Wisconsin Central. The municipal court found in favor of the city after a trial on the citation. The Wisconsin Court of Appeals reversed.

The court of appeals explained that in 1970, and in response to a call for comprehensive rail safety regulation, Congress enacted the FRSA to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Id.* at ¶ 12 quoting 49 U.S.C. § 20101. The FRSA grants the Secretary of Transportation broad powers to prescribe regulations for every area of railroad safety. An express preemption clause declares that laws related to railroad safety shall be nationally uniform to the extent practicable and to facilitate uniformity, expressly preempts state law in areas covered by the FRSA. *Id.* at ¶ 14. In two "saving clauses," the FRSA permits state regulation related to railroad safety only in the following situations:

Under the first saving clause, states can "adopt or continue in force a law, regulation, or order related to railroad safety ... until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* citing § 20106(a)(2). The second

saving clause permits a state to adopt a more stringent law, regulation or order regarding railroad safety if it meets three requirements: (A) it is "necessary to eliminate or reduce an essentially local safety ... hazard"; (B) it is compatible with federal laws and regulations; and (C) it does not create an undue burden on interstate commerce. *Id.* at ¶ 15 citing § 20106(a)(2)(A)-(C).

The court assumed, without deciding, that the city's ordinance qualifies as a state law or regulation under the FRSA. The court rejected the city's argument that its ordinance was related to the public health, safety, and welfare and concluded that the ordinance is related to railroad safety and that the subject matter of the ordinance is regulating the operation and movement of trains. It next determined that federal regulations concerning train speed, crossing safety, and air brake testing cover the subject of the ordinance (operation and movement of trains) and there is no exception to preemption under the first saving clause. Looking to the second saving clause, the court determined that because it is written in the conjunctive, the ordinance must satisfy all three requirements to be excepted from preemption. The court concluded that the ordinance does not address an essentially local safety hazard and therefore fails to satisfy the requirements of the second saving clause. The court concluded that the ordinance was preempted.

In the wake of this decision, cities and villages with ordinances similar to the preempted City of Weyauwega ordinance should read the decision and consult with their municipal attorney to determine whether the municipality's ordinance can be defended under the requirements of the second saving clause (i.e., is necessary to eliminate or reduce an essentially local safety hazard) which would allow the ordinance to survive preemption.

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