

Norfolk Southern Railway Company
Reply in Support of Transfer

In the Indiana Supreme Court

No. _____ - _____ - _____

STATE OF INDIANA,

Appellant-Defendant,

v.

NORFOLK SOUTHERN RAIL-
WAY COMPANY,

Appellee-Plaintiff.

On Petition to Transfer from the
Indiana Court of Appeals,
No. 02A03-1607-IF-1524

Appeal from the Allen Superior Court

Trial Court Case Nos.: 02D05-1503-IF-002039;
02D05-1505-IF-002988; 02D05-1505-IF-003070;
02D05-1505-IF-003071; 02D05-1505-IF-003312;
02D05-1505-IF-003082; 02D05-1505-IF-003084;
02D05-1505-IF-003183; 02D05-1505-IF-003246;
02D05-1505-IF-003248; 02D05-1505-IF-003251;
02D05-1505-IF-003255; 02D05-1505-IF-003262;
02D05-1505-IF-003263; 02D05-1505-IF-003264;
02D05-1505-IF-003362; 02D05-1505-IF-003363;
02D06-1506-IF-006379; 02D06-1506-IF-006383;
02D06-1508-IF-009742; 02D04-1508-IF-009744;
02D04-1512-IF-015577; 02D06-1511-IF-013718

The Honorable Wendy Davis, Judge
The Honorable David M. Zent, Magistrate

APPELLEE'S REPLY IN SUPPORT OF TRANSFER

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ARGUMENT

The State's Response confirms this case is an ideal candidate for Transfer. The State accepts the fundamental principle that it may not regulate railroad operations (i.e., the movement of trains). Yet it expects this Court to close its eyes to the numerous cases finding blocked-crossing statutes preempted as attempts to regulate the length and speed of trains, or the scheduling of rail operations.¹ The U.S. Supreme Court has declared that states may not regulate train speeds or train lengths. The Ninth and D.C. Circuits have held that states may not regulate how long a train idles on the track. The Supreme Courts of Pennsylvania, Washington and Illinois (as well as the Fifth and Sixth Circuits) have held that regulating rail operations via blocked-crossing statutes is preempted. The State disregards this impressive body of law with arguments that are irrelevant or wrong.

First, the fact that the Indiana law was on the books for years has no bearing on its validity. *Cf. Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012)(summarily striking down one-hundred year old Montana statute for violating the First Amendment); *Indiana v. Kuebel*, 241 Ind. 268 (1961)(striking down 80-year old obscenity statute). While the State also points to a number of other existing state blocked-crossing statutes, (State Response 6), it fails to disclose whether those laws

¹ See, e.g., (Transfer Pet. 12 & n.1.)

are currently enforced.² Unenforced state laws routinely go unchallenged because they do not impact rail operations.

Second, there is no presumption against preemption here. The State argues there should be because of its interest in regulating the use of public roadways. State Response at 6-7. However, an “assumption of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000). “Both Congress and the courts have traditionally recognized a need to regulate railroad operations at a national level” and have “created an extensive federal statutory and regulatory scheme” to do so. *CSX Transp. Inc. v. City of Plymouth*, 92 F.Supp.2d 643, 648 (E.D. Mich.2000), *aff’d by*, 283 F.3d 812 (6th Cir.2002). Accordingly, where, as here, “the state statute at issue bears upon an area traditionally regulated by the federal government, ‘there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.’” *Id.* (rejecting presumption against preemption in a challenge to a blocked-crossing regulation) (quoting *United States v. Locke* 529 U.S. 89, 109 (2000)).

Third, the State again confuses a state’s right to use its police powers to regulate certain aspects of railroad grade crossings with the impermissible regulation of railroad operations via blocked-crossing regulations. *Compare* (State Response 8-9),

² In fact, the Ohio statute cited by the State has been categorically preempted. *CSX Transp., Inc. v. Williams*, 2017 WL 1544958 (N.D.Ohio Apr. 28, 2017).

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with (Transfer Pet. 14); MULVEY/NOTTINGHAM BRIEF at 9-12. For example, in *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658, 673-74 (1993), the Supreme Court held that a state may regulate grade crossing issues including maintenance of adequate warning devices, but may not regulate aspects of grade crossings impacting rail operations, such as train speed. And in 1995, Congress confirmed that a state's police powers do not extend into areas of railroad regulation reserved to the federal regulators when it passed the ICC Termination Act, 49 U.S.C. §10101, *et seq.* ("ICCTA"):

[A]lthough States retain the policy powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation.

H.R. Rep. No. 104-311, at 96, 1995 U.S.C.C.A.N. at 808.

This is why other jurisdictions find blocked-crossing regulations preempted. As the Fifth Circuit has explained, these statutes seek to regulate "a railroad's economic decisions such as those pertaining to train length, speed, or scheduling" by requiring a railroad to modify its operations to avoid blocking crossings. *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 444 (5th Cir.2001); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 806 (5th Cir.2011). These regulations "reach[] into the area of economic regulation...in a direct way" and are expressly preempted by ICCTA. *Elam*, 635

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F.3d at 807 (internal quotations omitted). The State’s response is to label the Fifth Circuit’s reasoning “superficial.” (State Response 11.)

Similarly, courts have found that FRA regulations regarding train speed and length cover the area of regulation encompassed within state blocked-crossing regulations and therefore those state laws are preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20101, *et seq.* (“FRSA”). *See, e.g., City of Plymouth*, 92 F.Supp.2d at 662-63; *City of Seattle v. Burlington N. & Santa Fe Ry. Co.*, 41 P.3d 1169 (Wash.2002). These courts have explicitly rejected the same argument that the state’s historic police powers are sufficient to overcome preemption. *City of Plymouth*, 92 F.Supp.2d at 662-63 (“[T]he state statute at issue here directly regulates railroads.... The state’s power to regulate highway safety does not reach so far . . .”); *City of Seattle*, 41 P.3d at 1174 (finding city blocked-crossing ordinance an invalid exercise of the police power). As to these blocked-crossing cases, the State stands mute.

Finally, the State’s reliance on *dicta* in *CSX Transp., Inc. v. City of Mitchell, Ind.*, 105 F. Supp.2d 949, 953 (S.D.Ind.1999) is misplaced. The Supreme Courts of Washington, Illinois, and Pennsylvania (and an appellate court in California) all reviewed the *Mitchell* case and concluded that it supported their uniform conclusions that blocked crossing statutes are facially preempted by FRSA. *City of Seattle*, 41 P.3d at 1174; *Vill. of Mundelein v. Wis. Cent. R.R.*, 882 N.E.2d 544, 553 (Ill.2008);

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Krentz v. Consolidated Rail Corp., 910 A.2d 20, 37 n.19 (Pa.2006); *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1529, n.7 (1st Dist.2012).

CONCLUSION

Transfer is warranted.

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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 1,000 words.



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CERTIFICATE OF SERVICE

I certify that on February 20, 2018, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date, the foregoing document was served upon the following person(s) via IEFS:

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