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DEPARTMENT OF JUSTICE

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Mr. Daniel W. Blank
District Attorney
Douglas County
1313 Belknap Street, Rm. 201
Superior, WI 54880

Dear Mr. Blank:

You indicate that, while operating within Douglas County, a number of railroad company trains have blocked county highways and town roads at railroad crossings. A newspaper article you have provided indicates that from October 2007 through February 10, 2008, there were at least twelve instances in which county highways or town roads had been blocked at crossings for periods of time ranging from thirty minutes to three hours and forty-five minutes. The newspaper article also indicates that the blockages resulted because the railroad company did not use enough locomotives to accommodate the train tonnage, given the hilly nature of the terrain involved. You advise that the railroad company has been asked by county officials and by residents of the county to address the problems created by the highway blockages, but apparently has made no commitment to do so. You also indicate that your office has received complaints about the blockages that have occurred.

You ask for "an opinion, advice and/or consultation" with respect to whether 49 U.S.C. § 20106 of the Federal Railroad Safety Authorization Act ("FRSA") preempts enforcement of Wis. Stat. § 192.292, which prohibits trains, locomotives, or train cars from stopping or standing upon or across any highway or street crossing outside of cities for longer than ten minutes except where there is an accident.

Although there are no published cases addressing whether Wis. Stat. § 192.292 is preempted in whole or in part by the FRSA, it is my informal opinion that under current case law a court would likely hold that enforcement of the state statute is wholly preempted under federal law.

Wisconsin Stat. § 192.292 provides:

> Trains obstructing highways. It shall be unlawful to stop any railroad train, locomotive or car upon or across any highway or street crossing, outside of cities, or leave the same standing upon such crossing longer than 10 minutes, except in cases of accident; and any railroad company that shall violate this

section shall be liable to a fine of not more than $500 or any officer of such company responsible for the violation shall be liable to imprisonment of not more than 15 days.

Wisconsin Stat. § 192.005 provides: "Each provision of this chapter applies only to the extent that it is not contrary to or inconsistent with federal law or the constitution of the United States."

49 U.S.C. § 20106 (2008) provides in part:

Preemption

(a) National uniformity of regulation.—(1) 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.

(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—

(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.

(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—

. . . .

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

The preemption analysis required under what is now 49 U.S.C. § 20106 of the FRSA was described in *State v. Wisconsin Central Transp. Corp.*, 200 Wis. 2d 450, 457-58, 546 N.W.2d 206 (Ct. App. 1996), *aff'd by an equally divided court*, 209 Wis. 2d 278, 562 N.W.2d 152 (1997):

> In *CSX Transp.*, the Court . . . . focused its analysis on the two terms "related to" and "covering" as dispositive of Congress' preemptive intent.
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> The Court cited to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), in construing "related to." The Court there determined that the ordinary meaning of the phrase is broad. *Id.* at 383. The Court stated that the phrase "relating to" expressed a broad preemptive purpose, had an "expansive sweep" and was "conspicuous for its breadth." *Id.* at 383-84.
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> The *CSX Transp.* Court went on to consider the term "covering." The Court concluded that it is a more restrictive term. *CSX Transp.*, 507 U.S. at ___, 113 S. Ct. at 1738. The use of "relating to" in the saving clause and the more restrictive "covering" in the preemption clause suggests that the Congressional purpose was to allow states to enact regulations *relating to* railroad safety up to the point that federal legislation enacted a provision which specifically *covered* the same material. *See generally id.*
>
> Use of these two terms in this statute led the Court to conclude that preemption will be found only if the federal regulations "substantially subsume the subject matter of the relevant state law." *Id.* at 1738. The "substantially subsumes" test requires a showing that FRSA regulations cover the same subject matter as state law. They must do more than "touch upon" or "relate to" the subject matter of the state law. *See id.*

(Italics in original).

The issue of whether states and local units of government may enact anti-blocking statutes and ordinances prohibiting trains from obstructing roads at train crossings for more than a specified period of time was most recently addressed in *Village of Mundelein v. Wisconsin Central Railroad*, 882 N.E.2d 544 (Ill. 2008), *cert. filed*, No. 07-1355 (April 24, 2008). In *Mundelein*, 882 N.E.2d at 553, the court held that a municipal anti-blocking ordinance prohibiting non-moving trains from blocking railroad crossings for more than ten minutes except in circumstances beyond the control of the railroad company relates to and covers the same subject matter as federal regulations setting maximum operating speeds for different classes of track, federal regulations restricting the movement of trains until air brakes are sufficiently tested, and federal regulations concerning grade crossing safety that sometimes require trains to stop before proceeding through a crossing. The court held that "[t]aken together, the overall

structure of these regulations substantially subsumes the subject matter of the movement of trains at grade crossings." *Mundelein*, 882 N.E.2d at 553. The court then reasoned that the FRSA preempted the anti-blocking ordinance because "[t]he effect of the ordinance, and its subject matter, is to regulate the movement of trains at highway grade crossings" in that a "train may be required to adjust its speed or length to clear the crossing within 10 minutes to avoid violating the ordinance." *Mundelein*, 882 N.E.2d at 552, 555. The court relied in part upon *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993), which held that the FRSA preempts any state regulation of train speed. The court also held that the anti-blocking ordinance could not be preserved under the savings clause of the FRSA because of the incompatibility of the ordinance with federal regulations on train speed and air-brake testing and the burden placed by the ordinance upon interstate commerce. *Mundelein*, 882 N.E.2d at 556.

Prior to the Illinois Supreme Court's decision in *Mundelein*, one federal court had flatly held that "if there is to be a limit on the amount of time that a train is permitted to block a crossing, it must come from the federal government." *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000), *aff'd*, 283 F.3d 812 (6th Cir. 2002). In Opinion No. GA-0331 (June 17, 2005), 2005 WL 1428666 (Tex. A.G.), the Attorney General of Texas later opined that a Texas statute very similar to Wis. Stat. § 192.292 is preempted by the FRSA. With respect to the FRSA, the Texas Attorney General noted that at least two other state attorneys general had previously opined that state and local anti-blocking statutes and ordinances either are preempted by or are likely to be held preempted by the FRSA. *See* Opinion No. 00-65 (December 15, 2000), 2000 WL 33122009 (Kan. A.G.) and Opinion No. 96-228A (December 23, 1997), 1997 WL 820505 (La. A.G.). The Texas Attorney General identified four cases holding that state and local anti-blocking statutes and ordinances are preempted in whole or in large part by the FRSA. *See City of Seattle v. Burlington Northern Railroad Company*, 41 P.3d 1169, 1174 (Wash. 2002); *Rotter v. Union Pacific R. Co.*, 4 F. Supp. 2d 872, 874 (E.D. Mo. 1998); *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); *CSX Transportation, Inc. v. City of Mitchell, Ind.*, 105 F. Supp. 2d 949, 951-52 (S.D. Ind. 1999). *See also CSX Transp., Inc. v. City of Plymouth, Mich.*, 86 F.3d 626 (6th Cir. 1996). After the Texas Attorney General issued his opinion, *Krentz v. Consolidated Rail Corporation & PA*, 910 A.2d 20, 32-36 (Pa. 2006) also held that an anti-blocking statute was preempted by the FRSA.

As indicated in *Mundelein*, 882 N.E.2d at 554, there is only one published decision holding that an anti-blocking statute or ordinance is not preempted in whole or in large part by the FRSA. *See State v. Wheeling & Lake Erie Railway Company*, 743 N.E.2d 513, 514 (Ohio App. 2000), citing an earlier unpublished decision of the same court. *See also Mitchell*, 105 F. Supp. 2d at 953, declining to enjoin enforcement of an anti-blocking statute in those instances where "trains were obstructing crossings in excess of ten minute[s] for reasons not attributable to compliance with mandatory federal law"; and *Lavigne v. CSX Transportation, Inc.*, 2002 WL 1424808, *10-12 (Mich. App., June 28, 2002), holding that an injunction prohibiting a railroad company from unreasonably obstructing a crossing over the landowner's driveway did not violate the FRSA.

Mundelein, 882 N.E.2d at 554, indicates that *Wheeling* relies upon an earlier Ohio decision that is "unpersuasive because it does not employ the statutory standards for addressing a claim of preemption under section 20106 of the FRSA." The preemption analysis required under the FRSA is described in *Wisconsin Central Transp. Corp.*, 200 Wis. 2d at 457-58. Judicial decisions that do not employ that analysis are unlikely to be accepted as valid interpretations of the FRSA.

The reasoning employed by the Illinois Supreme Court in *Mundelein*, 882 N.E.2d at 551-56, indicates that virtually all anti-blocking statutes and ordinances are preempted by the FRSA. The petition for writ of certiorari in *Mundelein* states that twenty eight states have enacted statutes similar to Wis. Stat. § 192.292. *See Mundelein*, 2008 WL 1892735 *25 n.1. If certiorari were granted in *Mundelein*, clarification of the legal issues presented by your request might well result.

In the meantime, it is my informal opinion that under current case law a court would likely hold that 49 U.S.C. § 20106 of the FRSA preempts enforcement of Wis. Stat. § 192.292, which prohibits trains, locomotives, or train cars from stopping upon or across highway or street crossings outside of cities for longer than ten minutes except where there is an accident.

Sincerely,

J.B. Van Hollen
Attorney General

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