MILAM COUNTY

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RQ-0299-GA

December 7, 2004

The Honorable Greg Abbott
Attorney General of the State of Texas
Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78701-2548

FILE # ML-44052-04
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Re: REQUEST FOR AG OPINION

Dear General Abbott:

This letter is a request for an opinion as to what extent, if any, federal law preempts the enforceability of the Texas "Anti-Blocking" Statute, Section 471.007, TEXAS TRANSPORTATION CODE. This request is made in my capacity as the elected County and District Attorney for Milam County, Texas, and is also submitted on behalf of the Honorable Eugene D. Taylor, County Attorney for Williamson County, Texas, and the Honorable Michael J. Bagley, County Attorney for Maverick County, Texas.

Background Statements

A. Milam County

Since June, 2002 law enforcement officers in Milam County have issued citations for obstructing a railroad crossing in about thirteen instances. Attached as Exhibit "A" are copies representing these citations along with a printout of the pertinent service call sheet if available. No attempt will be made to include those service calls where a citation, for whatever reason, was not issued. In some instances (citation #37622, case no. 29551), it was reported that train engines were "unoccupied"; in one citation (#4144/case no. 27655), it is reported the train blocked a crossing for over 4 hours. In most cases, any response by the railroad to a citation has been a motion to quash under preemption of the statute by federal law. It is the position of the Milam County Attorney that these cases should be held in abeyance until an opinion is delivered by the Attorney General of the State of Texas.

B. Williamson County

Taylor is an important municipality located in Williamson County, Texas. To provide some insight into the situation there, attached as Exhibit "B" is a a copy representing a letter dated October 7, 2004, from Taylor's City Manager, Mr. Frank Salvato, to his Williamson County Attorney, Gene Taylor, discussing his concerns regarding the issue of trains blocking intersections for extended periods of time.

C. Maverick County

Eagle Pass is the county seat of Maverick County, Texas. Attached as Exhibit "C" is a copy of a Factual Statement prepared by Mr. Heriberto Morales, Jr., City Attorney for Eagle Pass. Mr. Morales states that delays at railroad crossings have increased dramatically and continue to increase as a result of the trade with the Republic of Mexico.

Attached as Exhibit "D" is the brief that is required to be submitted with any opinion request. As the County and District Attorney of Milam County, Texas, my office is currently faced with the prosecution of a number of pending Anti-Blocking statute cases. The key issue in these cases is whether federal law has preempted the enforceability of the statute, and I respectfully request your opinion thereon for the benefit of my office and the other two counties represented herein. A copy of this letter is being forwarded to two other parties listed below because it is felt each may have an interest in responding on behalf of the railroad's point of view.

Sincerely,

Kerry M. Spears

Kerry M. Spears
County & District Attorney
Milam County, Texas

KMS/kp

cc: The Honorable Eugene D. Taylor
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cc: The Honorable Michael J. Bagley
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cc: Fred S. Wilson, Esquire
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QUESTION: TO WHAT EXTENT, IF ANY, DOES FEDERAL LAW PREEMPT THE ENFORCIBILITY OF THE TEXAS "ANTI-BLOCKING" STATUTE, SECTION 471.007 TEXAS TRANSPORTATION CODE?

DISCUSSION

1. **THE STATE STATUTE.** The present version of Sec. 471.007 became effective on September 1, 1999, and states that a railway company commits an offense if a train of the railway company obstructs for more than ten minutes a street, railroad crossing, or public highway. The previous version of Sec. 471.007 (effective September 1, 1995) stated an officer, agent, servant, or receiver of a railway company commits an offense if the person willfully obstructs for more than five minutes a street, railroad crossing, or public highway by permitting a train to stand on the crossing. It is reasonable to assume that the present version of the statute is intended to apply to both standing and moving trains that obstruct for more than ten minutes. No attempt will be made here to inquire into the legislative history of the statute over the years, but as will be discussed later herein, the distinction between a moving and standing train may have a bearing on the question at hand.

2. **FEDERAL LAW.** The three pertinent federal laws are the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the Federal Railway Safety Act (FRSA), and the Commerce Clause of the United States Constitution. Most arguments in favor of preemption seem to have a reference to one or more of these three. Each of these will be discussed separately hereafter.

3. **PRESUMPTION OF NON-PREEMPTION.** At the onset of any analysis, the state statute should have the benefit of a presumption that it has not been pre-empted by federal law. As stated in *Missouri Pacific Railroad v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987), you, "start with the assumption that the historic police powers of the states will not be superseded by the Federal Act unless that was the clear and manifest purposes of Congress", *Id* at 572-573, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218,230, 67 S. Ct. 1146,1152 (1947).

4. **INTERSTATE COMMERCE COMMISSION TERMINATION ACT OF 1995.** Any discussion of the ICCTA and the Texas Anti-Blocking Statute should probably begin with the case of *Friberg v. Kansas City Southern Railway*, 267 F.3d 439 (5th Cir. 2001).

Friberg involved allegations against Kansas City Railway on grounds of common law negligence and negligence per se based on the Texas Anti-Blocking Statute. According to the facts of this case, Kansas City Railway frequently allowed trains to block a rail crossing permitting ingress and egress to the Friberg's nursery business. These frequent

blockages caused a general decline in business finally resulting in the subsequent failure of the business.

The Fifth Circuit held, in relevant part, that the ICCTA has an express preemption provision that prohibits state regulation of railroads. *Friberg v. Kansas City Southern Railway Company*, 267 F.3d 439 (5th Cir. 2001). This regulatory authority rest solely with the Surface Transportation Board's federal regulatory power as provided under the ICCTA. Further, the Fifth Circuit observed that the language of the ICCTA itself states, "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law." ICCTA § 10501 (b)(2); *Friberg v. Kansas City Southern Railway Company*, 267 F.3d 439, 443 (5th Cir. 2001). "The regulation of railroad operations has long been a traditionally federal endeavor...and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." *Id.* As such, imposition of operating limitations such as the Texas Anti-Blocking Statute are preempted under the ICCTA as attempting to economically regulate the time a train can occupy a rail crossing by impacting on train speed, length and scheduling. *Id.*

It was argued at the trial court that the Texas Anti-Blocking Statute was a criminal statute and not an attempt at economic regulation of railroads. The Fifth Circuit refused to accept that the statute did not "reach into the area of economic regulation of railroads" and "impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains, with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty." *Id.* "Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad like those imposed by the Texas Anti-Blocking Statute..."*Id, 444.*

Although the case of *Friberg v. Kansas City* involved common law negligence claims, the Fifth Circuit's holding has the effect of precluding the State from imposing or enforcing any legislation involving railroads. The Fifth Circuit's broad interpretation of the ICCTA ultimately concludes that state laws whether intended to "economically regulate" the railroad or not is "economic regulation" and therefore preempted by the ICCTA.

However, after its broad decision finding the Anti-Blocking Statute preempted by the ICCTA, the Fifth Circuit adds a footnote, "It is important to note that we are not faced with, and do not herein decide, what impact the ICCTA would have upon a state provision pertaining strictly to such traditionally state controlled safety issues as local law enforcement and emergency vehicle access. That issue remains for another day and may have a substantially different result.", Id., 444, n.18.

The Fifth Circuit states that if an issue between the Texas Anti-Blocking statute and safety arises, preemption of state law under the ICCTA may be decided differently. This conclusion conflicts with the Fifth Circuit's broad interpretation of the ICCTA's preemption provision because a state law relating to railroads can be, if the court is

predisposed to find, tenuously held to impact on train speed, length and scheduling regardless of the legislative purpose of the state law.

The Fifth Circuit admits that safety issues are traditionally state controlled and at the same time takes a broad step to nullify that traditional state control. Following the Fifth Circuit's holding in *Friberg*, it would seem impossible to "strictly" legislate an area of safety involving law enforcement and emergency personnel on a state wide level while avoiding the Fifth Circuit pitfall of "economic regulation" which would impose, no matter how slight, operating limitations impacting on train length, speed and scheduling.

It is acknowledged that many of the citations filed are issued due to the complaints of ordinary citizens who are unreasonably delayed in their travels as a result of the frequent railroad blockages. However, these same railroad blockages can prevent law enforcement and other emergency vehicles from performing their community service effectively and denying the citizens the level of service which they expect and deserve. Although law enforcement and emergency services have made tremendous strides over the years, it is still impossible to determine when or where an emergency might occur. When an emergency situation does arise, time is of the essence. Whether that emergency involves a choking child, armed suspect, or burning home, the emergency services in our county can be unreasonably frustrated. First, the law enforcement personnel are all too often responding to complaints of citizens concerning a railroad blockage. These calls for service take law enforcement personnel to remote areas they might not otherwise be, wasting both time and resources of an under budgeted service, and should an emergency arise during this time in another area of the county, increases their response time. Secondly, should an emergency arise in an area which requires traversing a rail crossing which is blocked by a train, there exists a corresponding increased risk of loss of life.

Providing for health, safety and welfare of the citizens of this state is both a proactive and reactive mission of all emergency services. The Texas Anti-Blocking Statute provides a means for assisting emergency personnel in meeting both the proactive and reactive mission by providing a means to ensure that, should an emergency arise, law enforcement and other emergency vehicles will be able to respond quickly without unreasonable delay. The quality of emergency service should not be allowed to be frustrated by the frequent and unnecessary blockage of railroad crossings; nor should that purpose be permitted to be diminished by the Fifth Circuit's broad interpretation of the ICCTA as preempting the Texas Anti-Blocking Statute by creating an economic impact by an otherwise necessary and valuable statute whose purpose is not economic regulation of railroads.

Of equal importance is the imposition of delay upon the citizens of our county who, in some cases live in a rural area, and are dependent upon home health care services to sustain their standard of living. While some delay may be inevitable, frequent delays of one hour in one instance and several hours over the course of a day, when accumulated, equates to unnecessary and unreasonable suffering.

The Supreme Court of Vermont in *In re Appeal of Vermont Railway* held the express preemption provision of the ICCTA to not be so broad. The case of *In re Appeal of Vermont Railway* involved the City of Burlington, Vt. and city ordinances applicable to Vermont Railways salt shed property; specifically the application of the city ordinances governing the property, expansion and use of the salt shed on the premises. *In re Appeal of Vermont Railway*, 769 A.2d 648, 171 Vt. 496 (Vt. 2000). Addressing the preemption provision of the ICCTA the Vermont Supreme Court, affirming the lower courts decision, held that "although Congress intended to preempt all state regulations of economic activity [of railroads through enactment of the ICCTA]...the states nevertheless retain the police powers reserved by the Constitution." *Id.* at 499. Further, there is a presumption that a state's police power "is not to be superceded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.*; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992)(quoting *Rice v. Santa Fe Inc.*, 331 U.S. 218, 230, 67 S.Ct. 1146 (1947). The presumption is that "state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *In re Vermont Railway*, 769 A.2d 499, 500; *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 716, 105 S.Ct. 2371 (1985).

Other court cases dealing with the ICCTA and state statutes have rendered decisions favoring the state statute. In *Union Pacific Railroad Company v. State of Oklahoma*, 990 P.2d 328 (Okla.Civ.App.1999), the Court of Civil Appeals of Oklahoma affirmed a decision of the Oklahoma Corporation Commission holding that the state law that required a railroad to fence its right of way was not preempted by the ICCTA because no federal law or regulation directly addressed the issue. In *Iowa, Chicago & Eastern Railroad v. Washington County*, 2003 U.S. Dist. LEXIS 25951 (2003), the railroad contended that it was not obligated to repair/replace four rail-highway bridges because the relevant state statute was preempted by the ICCTA. The court there found no conflict between the exclusive jurisdiction of the STB to regulate rail carriers economically and Iowa's power to regulate the safety of bridges at rail-highway crossings, *Id.*

5. **FEDERAL RAILROAD SAFETY ACT.** What effect does the Federal Railway Safety Act (FRSA) have on enforcement of the Texas Anti-Blocking Statute?

The FRSA was enacted in 1970 to "promote safety in every area of railroad operations and reduce railroad related accidents and incidents [and] shall prescribe regulations and issue orders for every area of railroad safety." 49 USC 20101 (2002); 49 USC 20103 (2002). The FRSA also provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. [1] A state may 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. [2] A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order:

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

49 USC § 20106 (2002). A federal statute that expressly calls for preemption of matters "relating to" the subject matter of that statute, preempts "actions having a connection with or reference to "that subject matter." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037 (1992). Therefore, a FRSA challenge to an adopted or existing law requires an analysis of whether the "laws, regulations, or orders relate to railroad safety"; a determination of whether the law "relates to" or "is connected with or [makes] reference to" railroad safety. 42 U.S.C. § 20106 (2002).

The question raised is whether the Texas Anti-Blocking Statute "relates to" is "connected with or references railroad safety" such that it is therefore preempted by the FRSA.

A similar issue was raised in *CSX Transportation, Inc. v. City of Plymouth* involving a Michigan statute not unlike the Texas Anti-Blocking Statute. The Michigan Anti-Blocking Statute states, "A railroad shall not permit a train to obstruct vehicular traffic on a public street or highway for longer than five minutes at any one time...." *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir 2002); *Mich. Comp. Laws Ann.* § 462.391. The Michigan Anti-Blocking Statute is similar to the Texas Anti-Blocking Statute which states, "a railway company commits an offense if a train of the railway company obstructs for more than ten minutes, a street, railroad crossing, or public highway." Tx. Transp. Code Ann. § 471.007(a) (Vernon Supp. 2001).

The Michigan Attorney General argued at trial that the Michigan Anti-Blocking Statute is not preempted under the FRSA by virtue of the first savings clause of 49 USC § 20106 because "there are no federal regulations that cover the subject matter of the state statute." *CSX Transportation, Inc. v. City of Plymouth*, 283 F. 3d 816 (6th Cir. 2002). The Sixth Circuit, affirming the trial courts holding of preemption stated, "[t]o the extent that the Michigan [Anti-Blocking] statute would force CSXT to modify the length of its trains, the Supreme Court long ago held that state regulation of train length violates the Commerce Clause." *Id., 817; S. Pac. Co. v. Arizona*, 325 U.S. 761, 65 .S.Ct. 1515 (1945). "There are also numerous federal regulations that cover the speed at which trains may travel and the stops that trains must make to test their air brakes." *Id.* Preemption under the FRSA exist "only if the federal regulations *substantially subsume* the subject matter of the relevant state law." *CSX Transportation, Inc. v. Eastervood*, 507 U.S. 658, 664, 113 S.Ct. 1732 (1992)(emphasis added); *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812, 816-817 (6th Cir. 2002).

The Sixth Circuit, concluding that the first savings clause of the FRSA is inapplicable, reasoned that federal regulations already exist covering train speeds, lengths and air brake testing, and therefore the subject matter of the Michigan Anti-Blocking statute is "substantially subsumed" by those federal regulations.

In order for the Sixth Circuit to conclude that the first savings clause of 49 U.S.C. § 20106 is inapplicable, an artfully constructed bridge was created to fill a gap in federal law in order to impose preemption of an otherwise neutral and federally unregulated area of state concern. Allowing the federal courts to proceed in this fashion renders the tenth amendment a nullity. If federal law is permitted to be so broadly interpreted, virtually any state law can be held to "relate to" or "be connected with" a federal law and the Supremacy Clause used as a tool of oppression.

It stands to reason that had Congress intended the FRSA to be so broadly interpreted such that preemption could be found to exist in areas of railroad safety, it would not have included in the language of the FRSA phrases such as "uniformity...to the extent practicable." Further, it would be unnecessary to provide for a savings clause permitting states to "adopt or continue enforce 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.*" 49 U.S.C. 20103 (2002)(emphasis added). The language of the FRSA prescribes strict interpretation and to conclude a federal law, regulation or order "substantially subsumes" an area of state concern where no federal law, regulation or order addresses that area is illogical.

Currently, there are no laws prescribed by the Secretary of Transportation regulating the amount of time a train may block a rail crossing and consequently interfere with the states constitutional right to provide for the health, welfare and safety of its citizens. The creation of a link between existing federal laws and regulations pertaining to train length, speed and air brake testing and the health, welfare and safety of a state's citizens taxes the imagination. The first savings clause of the FRSA does not preempt this area of State law and should not be broadly interpreted to create such preemption.

The Sixth Circuit further affirmed the trial courts ruling that the second savings clause provides no help for the Michigan Anti-Blocking because "the Michigan law is applicable to the entire state, the statute is not concerned with 'eliminating an essentially local hazard." *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812, 816 (6th Cir. 2002). When analyzed narrowly, this conclusion serves its preemption based purpose. However, local concerns can and do exist on a state wide level. By legislating on a state wide level, uniformity of laws in the state is established, thereby providing for the needs for the health, welfare and safety of the state's citizens. The enforcement of the law bestowed upon local law enforcement addressing the local needs of its local citizenry.

The Sixth Circuit does not address the second prong of the second savings clause in *CSX Transportation, Inc. v. City of Plymouth* which leaves us questioning whether the second prong would meet the same fate as the first. Our conclusion is that even if one takes the position that the Michigan Anti-Blocking Statute, like the Texas Anti-Blocking Statute, loosely "relates to" *railroad safety* or is "substantially subsumed" by other federal laws regarding railroad safety, it still can not be argued that the statute is incompatible with a federal law, regulation, or order of the United States Government where that federal law, regulation or order addressing the issue we are herein concerned with is non-existent.

Again, in order to bridge the gap, the FRSA must be broadly interpreted to conclude preemption which is contrary to the language of the FRSA calling for strict interpretation. There are court cases that have found in favor of the state law or statute when confronted with a claim of preemption by the FRSA. In *Tyrrell v. Norfolk Southern Railway*, 248 F.3d 517 (6th Cir. 2001), the court held that because no current federal regulation or action covered the subject matter of minimum track clearance, the Ohio state regulation was not preempted by FRSA. In *CSX Transportation v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732 (1993), Justice White found that in a wrongful death action, an allegation of negligence for failing to maintain adequate warning devices at the particular crossing was not preempted, while the allegation of excessive speed was because there existed specific federal regulations setting the maximum speeds of trains on each class of track. In *Southern Pacific Transportation v. Maga Trucking*, 758 F. Supp. 608 (U.S. Dist. Nev. 1991), the court held that a claim for damages due to negligent maintenance of a railroad crossing was not preempted by the FRSA. In another case, *Rushing v. Kansas City Southern Railway*, 185 F.3rd 496 (5th Cir. 1999), the plaintiff complained, among other things, about excessive train whistles as a nuisance, and the railway argued preemption under the FRSA. The Court held there was a genuine issue of fact as to whether the train sounded its whistle for safety purposes, and found against preemption by the FRSA. In another federal case, in the carefully balanced decision of *CSX Transportation v. City of Mitchell, Indiana*, 105 F. Supp. 2d 949 (U.S. Dist. So. Indiana 1999), the railroad had sought summary judgment in its suit to halt enforcement of a state statute similar to the Texas Anti-Blocking statute. The railroad won its summary judgment, but in granting it, the Court made findings that included a finding that the statute could be enforced if after appropriate investigation it was determined that the train was obstructing a crossing in excess of ten minutes for reasons not attributable to compliance with mandatory federal law, *Id.* at 953. The court found three areas which would prohibit enforcement which were (a) the train was performing federally mandated air-brake tests, (b) the train was operating at federally mandated speed limits and/or physically moving at some point during the ten-minute obstruction threshold limit, and/or (c) the train was waiting for the positioning of a flagman (or flagmen) at certain crossings during the train's operations, *Id.* 952-953. Finally in another case out of the Sixth Circuit, in *Norfolk & Western Railway v. City of Oregon*, 2000 U.S. App. LEXIS 6712 (6TH Cir. 2000) (not recommended for full-text publication, see 6th Cir. Rule 28(g)), the Court discussed an interesting approach in considering a FRSA preemption attack on a city ordinance that prohibited obstruction for longer than 5 minutes, but exempted moving trains and trains engaged in switching, loading or unloading. The problem in the City of Oregon was that the railroad had a yard where engines and railcars were attached together and built into trains, and before a completed train could start out, federally mandated air brake tests had to be completed which evidently resulted in chronic obstruction of certain city streets. The trial court had held that the only plausible means of compliance with the city ordinance was the old Plymouth formula of either shorter trains (namely, more trains) or increased train speed, both of which were related to railroad safety. However, in *Oregon*, the Sixth Circuit remanded the case back for the trial court to consider whether there was another plausible means of compliance, namely, reconfiguration of the railroad yard. On remand, the city did not produce any evidence, and the railroad won based on the testimony of its terminal superintendent that within the

present boundaries of the rail yard there was no way to reconfigure the tracks resulting in compliance, nor could they acquire more land due to the presence of a creek and a road. The interesting point here is that the Sixth Circuit clearly indicates that if there had been a **"plausible means of compliance"** by the railroad, then its ruling on preemption could have been different. The resulting question is whether this same "plausible means of compliance" approach be applied to cases under the Texas Anti-Blocking Statute. As examples: under some circumstances would it not be plausible for the railroad to lengthen tracks in areas of chronic obstruction to reduce or eliminate the problem?; under some circumstances would it not be plausible for the railroad to otherwise reconfigure tracks to lessen or eliminate chronic obstruction of crossings?; under certain circumstances, would it not be plausible for the railroad to "break" a train where the train will obviously be obstructing a crossing for an extended period?; and would it not be plausible for the railroad to provide better coordination of relief crews to avoid "abandoned" trains obstructing crossings?

6. THE COMMERCE CLAUSE. Does the Texas Anti-Blocking Statute infringe upon interstate commerce such that it is preempted by the Commerce Clause?

The Sixth Circuit in *CSX Transportation, Inc. v. City of Plymouth* ruled that the district court erred in concluding that the Michigan statute violated the Commerce Clause by applying an improper standard. *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 818 (quoting *Moharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 549 (6th Cir.2001)(repudiating burden of "direct" or "indirect" test). To find that the Michigan Statute violates the Commerce Clause, it must be determined that the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id.*

Analyzing the Texas Anti-Blocking Statute under this standard, it is difficult to conclude that requiring a railroad not to block a rail crossing for longer than ten minutes is "clearly excessive" when one considers the local benefits derived from the restriction and the reasonable alternatives available to the railroads to prevent blockage of rail crossings where blockage would exceed ten minutes (see argument against preemption under the ICCTA supra). Therefore, in light of the "clearly excessive" burden standard, it is argued that Texas Anti-Blocking Statute does not violate the Commerce Clause.

7. CONCLUSION.

There is a strong argument that *Friberg's* sweeping declaration of absolute preemption was too broad and made without adequate consideration of the intent of Congress. Other voices are being raised in concern over the purported preemptive effect of the ICCTA into state and local laws concerning zoning, building codes, and even the environment. See Maureen E. Eldredge, *Comment: Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549 (Spring, 2004). Clearly, there must be a window of enforceability of the Anti-Blocking Statute where public health and safety are involved; even the *Friberg* court saw that window in its footnote 18. The heart of the matter is that you can't tell ahead of time when a rail crossing will be needed by an ambulance rushing to save a life, by a policeman or a fireman, or by the husband trying to

get his pregnant wife to an urgent doctor's appointment. The state statute must be enforceable to promote, as much as possible, unobstructed crossings at all times of the day and night. The trend would appear to be that trains are on average getting longer. Train crews have hourly work limitations and must be replaced periodically by fresh crews; in some instances, a train may even be "abandoned" because its replacement crew has been delayed. Some meaningful balance must be attempted between the right of the railroad to perform its function and the public good. To view the Anti-Blocking Statute as only enforceable when emergency crews need to use a crossing is too narrow and certainly not prophylactic. One possible productive approach would be one similar to the one taken by Judge Sarah Evans Barker in *CSX Transportation v. City of Mitchell, Indiana*, 105 F.Supp.2d 949, (U.S. Dist. So. Indiana 1999). In this approach, you demand a thorough investigation of each incident on a case by case basis, and you prohibit enforcement of the statute **only** in those specific areas, eg. federally mandated air brake testing, where preemption has been clearly accepted. In addition, even in circumstances where on the surface it appears there may be preemption, a "plausible means of compliance" test used by the Sixth Circuit could be applied to test the validity of the preemption.

We respectfully ask the Attorney General, after due consideration, to render an opinion upholding the enforceability of Sec. 401.007, TEXAS TRANSPORTATION CODE, under the specific circumstances to be set out therein.