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Solicitor General Says Fed. Law Preempts State Train Laws

By **Sydney Price**

Law360 (November 22, 2023, 7:20 PM EST) -- U.S. Solicitor General Elizabeth Prelogar filed a brief on behalf of the federal government arguing that federal law trumps an Ohio statute regulating highway and roadway rail crossings, backing the state Supreme Court's 2022 decision siding with railroad giant CSX Transportation Inc.

The Ohio Supreme Court justices **asked** the federal government for its opinion on the issue in March. In her **response** filed Tuesday, Prelogar said the court correctly ruled last year that the state cannot enforce a law that penalizes railroads if their trains block grade crossings for more than five minutes, finding that federal law governing railroad operations preempts the Ohio statute.

Ohio hit CSX with charges of violating the state law five times in Union County in 2018, and CSX promptly fought to have the charges dismissed.

In the brief, Prelogar urged the U.S. Supreme Court to **deny the state's request** to hear the case.

The state argued the Ohio Supreme Court's decision was "fractured" and demonstrated how courts have "struggled to find a consensus rationale for displacing the states' traditional authority over grade crossings."

Ohio Revised Code **Section 5589.21** makes it a first-degree misdemeanor to block a railroad crossing with a stopped train for more than five minutes. Ohio's law addresses an important matter of public safety, and life-and-death stakes are involved, according to the petition.

But Prelogar said Tuesday that railroads have been subject to comprehensive federal regulation for more than a century.

"The broad authority conferred on those agencies has reflected a federal 'determin[ation] that a uniform regulatory scheme is necessary to the operation of the national rail system,'" she said, quoting 1982 Supreme Court decision **United Transportation Union v. Long Island Rail Road Co**.

Ohio takes issue with the state Supreme Court's finding that its anti-blocking statute was preempted by the Interstate Commerce Commission Termination Act of 1995, the sweeping federal law establishing that the economic regulation and deregulation of railroad transportation falls exclusively within the federal government's domain. The ICCTA created the Surface Transportation Board, an independent adjudicatory board, and gave it exclusive jurisdiction over railroad rates, service disputes, mergers and other nonsafety rail issues.

The Ohio justices had also held that the Federal Railroad Safety Act — which includes a limited exception allowing the U.S. transportation secretary and the states to regulate certain aspects of railroad safety — still did not provide a safe harbor for Ohio to enforce its law.

But Ohio said the FRSA leaves room for state regulation. The state law is a public safety measure meant to ensure the unhindered flow of emergency responders across railroad crossings, Ohio has said.

Prelogar said that in granting the Surface Transportation Board exclusive jurisdiction over those matters, Congress eliminated the limited concurrent jurisdiction that state authorities previously had

enjoyed over certain aspects of rail transportation.

"The FRSA cannot be read to create a loophole in the ICCTA that would permit a patchwork of state and local regulation over rail transportation simply because the regulations also happen to touch on 'safety-related' matters," the brief stated.

The Ohio statute "has the effect of managing or governing rail transportation because it directly and expressly regulates and imposes liability on 'railroad compan[ies]' engaged in rail transportation," Prelogar said.

This isn't the first time appellate courts have similarly found other state anti-blocking statutes were preempted by federal law.

In January 2022, the Tenth Circuit sided with BNSF Railway Co. by ruling that Oklahoma could not enforce its blocked crossing statute against railroads because it similarly ran afoul of the ICCTA.

Oklahoma's statute fines railroad operators for occupying grade, or street-level, crossings. The statute reads, "No railcar shall be brought to rest in a position which blocks vehicular traffic at a railroad intersection with a public highway or street for longer than 10 minutes."

Oklahoma petitioned the U.S. Supreme Court to consider the case, but the **high court declined** to do so.

Representatives of the parties did not immediately respond to requests for comment Wednesday.

The U.S. Department of Justice is represented by Elizabeth Prelogar, Brian M. Boynton, Edwin S. Kneedler, Sopan Joshi, Abby C. Wright and Jennifer L. Utrecht.

Ohio is represented by Zachery P. Keller, David W. Phillips and Samantha M. Hobbs.

CSX is represented by Andrew E. Tauber and Brandon Duke of Winston & Strawn LLP, and Terrance K. Davis and Nicholas T. Stack of Shumaker Loop & Kendrick LLP.

The case is State of Ohio v. CSX Transportation Inc., case number 22-459, in the U.S. Supreme Court.

--Additional reporting by Linda Chiem. Editing by Dave Trumbore.