Testimony of Adam Weiskittel
BNSF Railway Company
State of Kansas Senate Committee on Transportation
March 7, 2023 Hearing Regarding Kansas SB 271

Introduction

My name is Adam Weiskittel and I am the Assistant Vice President and Associate General Counsel, Operations for BNSF Railway Company. I appreciate the chance to speak with you today about the bill under consideration by which the State of Kansas seeks to regulate both the length of trains BNSF is allowed to move and how BNSF is allowed to utilize its track infrastructure near grade crossings.

My testimony focuses on the legal aspects of the proposed legislation, and why we believe it would clearly be preempted by federal law and thus unenforceable. The statutes and case law that I cite in this testimony is attached hereto. But before I address that topic, I would like to spend a moment describing BNSF's approach to safety.

BNSF's Approach to Safety

At BNSF, we believe that every accident and injury is preventable. Operating without accident or injury is a core part of BNSF's vision and values, and our focus is on preventing accidents from happening in the first place. We do that by nurturing a culture of compliance and commitment within BNSF, and closely partnering with our customers and the communities in which we operate.

Our safety culture is continuously reinforced and improved through multi-faceted employee safety training and compliance programs, as well as significant capital investments that enable us to both maintain our network in world-class condition and pursue technology advancements that will increase the safety of our operations going forward. Since 2014, BNSF has invested approximately $40 billion in our network, and will invest $3.96 billion in our network in 2023 alone. Over the last five years, we have invested approximately $970 million in our infrastructure in Kansas, including $248 million in 2022 alone.

Because the vast majority of the public's interaction with BNSF is through grade crossings, promoting grade crossing safety is also an essential part of BNSF's operations and safety culture. In recent years, we've made significant investments in maintaining and improving the more than 29,000 grade crossings on our network. We also worked closely with cities, counties and states to identify crossings that can be closed, and have closed over 6,600 crossings since the year 2000.

This commitment to our safety culture has resulted in BNSF leading the industry in reducing the occurrence of rail equipment incidents over the past decade. Today 99.99% of all hazardous materials shipments on BNSF reach their destination without a derailment caused release. BNSF's safety

performance has been part of significant improvement by the entire rail industry as well. Since 2000, the rail industry has achieved a 31% reduction in its train accident rate, and a 64% reduction in its hazmat accident rate. Simply put, rail is the safest mode of land transportation in the United States.

Federal Regulation of the Rail Industry

Now I will address the legal problems we see with SB 271. I'll start with a brief overview of how the federal government regulates the US rail industry, before turning specifically to why we think that federal law clearly preempts the bill.

There has been a federal agency dedicated to regulating the railroad industry since 1887, when Congress created the Interstate Commerce Commission. Today there are two federal agencies primarily devoted to regulating the freight rail industry. The first is the Surface Transportation Board (or "STB") which Congress created in 1995 as a successor to the Interstate Commerce Commission. The second is the Federal Railroad Administration (or "FRA"), which was created in 1966 as part of the U.S. Department of Transportation. And depending upon what type of activity we are engaged in on any given day, there may be another dozen federal agencies separate and apart from the STB and FRA that are actively regulating some part of our operations.

The STB derives much of its statutory authority to regulate the rail industry from the Interstate Commerce Commission Termination Act, which is commonly referred to as ICCTA (49 USC § 10101, *et seq.*). While the preemptive power of the ICC's federal regulation of the rail industry had already long been recognized by the courts, ICCTA explicitly stated that the STB's jurisdiction over transportation by rail carriers and the operation of their networks is *exclusive*. 49 USC § 10501(b). Congress defined the broad scope of the STB's exclusive authority to include, among other things, the movement and storage of locomotives, railcars, and equipment, and the operation of a railroad's side tracks or facilities. 49 USC § 10102(9).

While Congress granted the STB that broad authority, Congress also reserved for the U.S. DOT the power to regulate "every area of railroad safety" via the Federal Railroad Safety Act (or "FRSA"). 49 USC § 20103(a). In the FRSA, Congress mandated that the regulation of railroad safety "shall be nationally uniform to the extent practicable", 49 USC § 20106(a), and explicitly preempted any state laws attempting to address any issue that is already covered by FRA regulation. Id. The only exception from FRSA

preemption is for state laws that are necessary to address an essentially local safety hazard, and do not unreasonably burden interstate commerce.

Congress purposefully created this federal regulatory scheme in recognition of the critical role that the national rail network plays in our economy, and with the intent to implement uniform rail operating and safety standards across the country. Congress wanted to avoid a patchwork of regulations adopted by individual states with potentially parochial interests. The courts have interpreted both ICCTA and the FRSA in a broad manner consistent with that intent.

A Long Line of Court Cases Have Made Clear that SB 271 Would be Preempted by ICCTA and/or the FRSA

SB 271 includes two main provisions that appear intended to address public safety issues related to the operation of trains and other rail equipment through and around grade crossings. The first is a provision that would prohibit a railroad from operating any train that exceeds 8,500 feet in length on any main line or branch line. The second is a provision that would prohibit a railroad from storing rolling stock on sidings within 250 feet of a grade crossing. SB 271 would then empower law enforcement officers or designees of the Kansas Department of Transportation to enter railroad property to inspect for violations, which would be punishable by fines up to $100,000 per day the violation is occurring.

The State of Kansas's attempt to regulate the movement and storage of trains and rail equipment on main track and side tracks would clearly be preempted by the exclusive jurisdiction Congress gave to the STB via ICCTA. While we need look no further than the language of ICCTA itself to reach that conclusion, the long history of court decisions interpreting the authority of the STB—and the ICC before it—nevertheless confirms it.

In 1945 the Supreme Court of the United States struck down an attempt by the State of Arizona to limit the length of trains moving through the state to no more than 70 freight cars. *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945). Even nearly 80 years ago and well before ICCTA was enacted, the Supreme Court recognized that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as *only* Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system." Id. at 771. Notably, the Supreme Court observed that limiting the length of trains passing through the state actually made rail operations *less* safe. By limiting the length of each train, a greater number of shorter trains had to pass through the state and the number of accidents increased. Statistically speaking, SB 271 seems destined to produce the same outcome.

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When faced with state attempts to regulate rail operations near and through grade crossings in recent years, federal and state courts interpreting ICCTA have uniformly reached the same conclusion—that ICCTA preemption invalidates those state laws. This includes the Court of Appeals of Kansas, which held in 2018 that Kansas's blocked crossing law was invalid because it had the effect of managing or governing rail transportation. *State v. BNSF Ry. Co.*, 56 Kan. App. 2d 503 (2018). It also includes the United States Court of Appeals for the 10th Circuit, whose jurisdiction includes appeals taken from federal courts in the State of Kansas. Just last year, the 10th Circuit held that a similar Oklahoma blocked crossing law was invalid due to ICCTA preemption. *BNSF Ry. v. Hiett,* 22 F. 4th 1190 (10th Cir. 2022).

States attempting to regulate rail operations near and through grade crossings sometimes assert that those state laws are safety related measures that implicate the FRA's regulatory authority under the Federal Rail Safety Act, not the STB's authority under ICCTA. They argue that the laws are then saved from FRSA preemption because they are needed to address an essentially local safety hazard. But the courts have consistently rejected those arguments as well.

As one example, late last year the Supreme Court of Ohio invalidated a state law intended to ensure that stopped trains did not prevent emergency responders from using grade crossings. State v. CSX Transp., 200 N.E.3d 215 (Ohio 2022). The court followed the long line of legal precedent finding that such issues do not qualify as "essentially local safety hazards" and thus remain within the exclusive dominion of the Federal Railroad Administration with its mandate to promulgate nationally uniform rail safety laws.

Conclusion

The provisions of SB 271 dictating to railroads how they must assemble and operate trains, and how they may or may not use their property to store their equipment, may be well intentioned efforts to address public safety concerns. However, they are also indisputably efforts by the state to regulate in areas that Congress has reserved for the STB and the FRA, and thus would be unenforceable. Congress's creation of a federal regulatory regime for the rail industry appropriately recognizes the critical role that the industry plays in our national economy. It also allows the expert federal agencies to craft uniform national rules that best ensure the safe and efficient operation of trains throughout the country, including here in Kansas.

I appreciate the opportunity to deliver this testimony today, and would be happy to answer any questions you have.