

Approved April 15, 1988
Date

MINUTES OF THE House COMMITTEE ON Transportation

The meeting was called to order by Rex Crowell at
Chairperson

1:30 ~~am~~ p.m. on January 28, 1988 in room 519-S of the Capitol.

All members were present except: Representatives Justice and Laird
Representative Wilbert

Committee staff present:

Bruce Kinzie, Revisor of Statutes
Hank Avila, Legislative Research
Donna Mulligan, Committee Secretary

Conferees appearing before the committee:

Mr. Michael Germann, Kansas Association of Railroads
Mr. Francis E. Bliss, F. E. Bliss Solid Wastes

The meeting was called to order by Chairman Crowell, and he announced the main order of business would be to receive requests for bills.

Mr. Michael Germann, Kansas Association of Railroads, requested the Committee introduce a bill relating to regulating the speed of trains when traveling through municipalities. (See Attachments 1 and 2)

A motion was made by Representative Spaniol to introduce the request as a Committee bill. The motion was seconded by Representative Shore. Motion carried.

Mr. Francis E. Bliss, F. E. Bliss Solid Wastes, passed out a letter which had been written to the National Solid Wastes Management Association in 1984 from Kansas Department of Revenue. (See Attachment 3)

Mr. Bliss requested that legislation be introduced providing a 35 percent fuel tax exemption for refuse trucks.

A motion was made by Representative Gross that this be introduced as Committee legislation. The motion was seconded by Representative Freeman. Motion carried.

The meeting was adjourned at 1:50 p.m.


Rex Crowell, Chairman

G. E. W. 11

_____ Bill No. _____

By

AN ACT relating to train speeds; amending K.S.A. 12-1633, 12-1634, 14-434 and 15-438 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 12-1633 is hereby amended to read as follows: 12-1633. The governing body of cities of the first and second class shall have the power to regulate the crossings of railway and street-railway tracks and provide precautions and prescribe rules regulating the same; and to regulate the running of street railways or cars ~~and railway engines and cars~~ in the city, and to prescribe rules relating thereto and to govern the speed thereof; and to make other and further provisions, rules and regulations to prevent accidents at crossings and on tracks of railways, and to prevent fires from engines, and to require all railway companies to erect viaducts over or tunnels under their tracks at the crossings of streets.

From and after the effective date of this act no rule, regulation or ordinance adopted by the governing body of any city of the first or second class regulating the running of railway engines and cars or governing the speed thereof shall be of any force or effect, and the same shall be and hereby is declared null and void.

The governing body shall have power to require any railroad company or companies owning or operating any railroad or street railway track or tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or over or tunnels under such street or streets and over or under any such tracks or tracks, including the approaches of such viaduct, viaducts or tunnels as may be deemed and declared by the governing body to be necessary for the convenience, safety

Attach. 1

or protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance to be necessary for the convenience, safety or protection of the public, the governing body shall provide for appraising, assessing and determining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided by law for the purpose of ascertaining and determining damages to property owners by reason of the change in grade of any street, except that such damage shall be paid by such railway company or companies. The amount of damage thus ascertained and awarded shall, upon notice by the city, be promptly paid by the railway company or companies interested and if any such company shall fail to pay the same within ten days from receipt of notice of the amount thereof, then the amount so awarded shall become a lien in the proportion to the amount each railway company shall pay--if more than one company is concerned--upon the right of way and all property of such railway company and the collection thereof may be enforced by the city in an action against such railway company or companies so failing to pay. The width, height and strength of any such viaduct or tunnel and the approaches thereto, the material to be used therefor, and the manner of construction thereof, shall be as required by the governing body.

When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, either upon, above or below the grade, or where any street-railway company intersects and crosses the track or tracks of any railroad company, the proportion thereof and of the approaches thereto to be constructed by each, and the proportion of cost to be borne by each, shall be determined by the governing body. It shall be the duty of any railroad company or companies or street-railway company, upon being required, as herein provided, to erect, construct, reconstruct

or repair any viaduct or tunnel, to proceed within the time and in the manner required by the governing body, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies or street-railway company to fail, neglect or refuse to perform such duty, and upon conviction, any such company or companies or the superintendent or other officer having charge of such railway company or street railway in the district or division where such viaduct or tunnel is to be erected or repaired, shall be fined one hundred dollars, or imprisoned in the county jail not less than thirty days, and each day such companies or officers shall fail, neglect or refuse to perform such duty shall be deemed and held a separate offense; and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct, or repair any viaduct or tunnel as may be required by ordinance as herein provided.

The governing body shall also have power, whenever any railroad company or companies or street-railway companies shall fail, neglect or refuse to erect, construct or reconstruct or repair any viaduct, viaducts or tunnel, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of the same by contract or in such other manner as may be provided by ordinance and assess the cost thereof against the property of such railroad company or companies or street-railway company, and such cost shall be a valid and subsisting lien against such property, and also shall be a legal indebtedness of such company or companies in favor of such city, and may be enforced and collected by suit in any court having jurisdiction.

Sec. 2. K.S.A. 12-1634 is hereby amended to read as follows: 12-1634. The governing body of all cities of the first and second class in a county having a population of over 90,000 shall have the power to regulate the crossings of

railway and street railway tracks and provide precautions and prescribe rules regulating the same; and to regulate the running of street railways or cars ~~and-railway-engines-and-cars~~ in the city, and to prescribe rules relating thereto and to govern the speed thereof; and to make other and further provisions, rules and regulations to prevent fires from engines, and to require all railway companies to erect viaducts over or tunnels under their tracks at the crossings of streets.

From and after the effective date of this act no rule, regulation or ordinance adopted by the governing body of any city of the first or second class in a county having a population of over 90,000 regulating the running of railway engines and cars or governing the speed thereof shall be of any force or effect, and the same shall be and hereby is declared null and void.

The governing body shall have power to require any railroad company or companies owning or operating any railroad or street railway track or tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or over or tunnels under such street or streets and over or under such tracks, including the approaches of such viaduct, viaducts or tunnels as many be deemed and declared by ordinance to be necessary for the convenience, safety or protection of the public.

Whenever any such viaduct shall be deemed and declared by ordinance to be necessary for the convenience, safety or protection of the public, the governing body shall provide for appraising, assessing and determining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided by law for the purpose of ascertaining and determining damages to property owners by reason of the change in grade of any street, except that such

damage shall be paid by such railway company or companies. The amount of damage thus ascertained and awarded shall, upon notice by the city, be promptly paid by the railway company or companies interested, and if any such company shall fail to pay the same within ten days from receipt of notice of the amount thereof, then the amount so awarded shall become a lien in the proportion to the amount each railway company shall pay, if more than one company is concerned, upon the right of way and all property of such railway company, and the collection thereof may be enforced by the city in an action against such railway company or companies so failing to pay. The width, height and strength of any such viaduct or tunnel and the approaches thereto, the material to be used therefor, shall be as required by the governing body.

When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, either upon, above or below the grade, or where any street railway company intersects and crosses the track or tracks of any railroad company, the proportion thereof and of the approaches thereto to be constructed by each, and the proportion of cost to be borne by each, shall be determined by the governing body. It shall be the duty of any railroad company or companies or street railway company, upon being required, as herein provided, to erect, construct, reconstruct or repair any viaduct or tunnel, to proceed, within the time and in the manner required by the governing body to erect, construct or reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies or street railway company to fail, neglect or refuse to perform such duty, and upon conviction, any such company or companies or the superintendent or other officer having charge of such railway company or street railway in the district or division where such viaduct or tunnel is to be erected or repaired shall be fined one hundred dollars, and each day such companies or

officers shall fail, neglect or refuse to perform such duty shall be deemed and held a separate offense; and in addition to the penalty herein provided, any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct or repair any viaduct or tunnel as may be required by ordinance as herein provided.

The governing body shall also have power, whenever any railroad company or companies or street railway companies shall fail, neglect or refuse to erect, construct or reconstruct or repair any viaduct, viaducts or tunnel, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of the same by contract, or in such other manner as may be provided by ordinance, and assess the cost thereof against the property of such railway company or companies or street railway company, and such cost shall be a valid and subsisting lien against such property, and also shall be a legal indebtedness of such company or companies in favor of such city, and may be enforced and collected by suit in any court having jurisdiction. Or in lieu of enforcing the collection of the costs of said improvement by a suit at law, the city may issue internal improvement bonds of the city as provided by law to pay for said work, and special assessments shall be levied against the property of such railroad company or companies or street railway as above provided to pay said bonds and interest.

Sec. 3. K.S.A. 14-434 is hereby amended to read as follows: 14-434. The council shall have power to regulate levees, depots, depot grounds, and places of storing freight and goods, and to provide for the passage of railways through the streets and public grounds of the city; also to regulate the crossings of railway tracks and to provide precautions and prescribe rules regulating the same, ~~and to regulate the running of railway engines, cars and tracks within the limits of said city, and to prescribe rules relating thereto, and to govern the speed thereof;~~ and to make any other and further

provisions, rules and restrictions to prevent accidents at crossings, and on the tracks of railways, and to prevent fires from engines.

From and after the effective date of this act no rule, regulation or ordinance adopted by the council regulating the running of railway engines and cars or governing the speed thereof shall be of any force or effect, and the same shall be and hereby is declared null and void.

Sec. 4. K.S.A. 15-438 is hereby amended to read as follows: 15-438. The council shall have power to regulate levees, depots, depot grounds and places for storing freight and goods, and to provide for the passage of railways through the streets and public grounds of the city; also, to regulate the crossings of railway tracks, and to provide precautions and prescribe rules regulating the same, ~~and to regulate the running of railway engines, cars and tracks within the limits of said city, and to prescribe rules relating thereto, and to govern the speed thereof;~~ and to make any other and further provisions, rules and restrictions to prevent accidents at crossings and on the tracks of railways, and to prevent fires from engines.

From and after the effective date of this act no rule, regulation or ordinance adopted by the council regulating the running of railway engines and cars or governing the speed thereof shall be of any force or effect, and the same shall be and hereby is declared null and void.

Sec. 5. K.S.A. 12-1633, 12-1634, 14-434 and 15-438 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

lowing further limited discovery on the jurisdictional issue with regard to defendant Berube is reasonable. Order accordingly.

ORDER

In accordance with memorandum filed this date, it is ORDERED:

1. Defendants' motion to dismiss the complaint for lack of personal jurisdiction as to defendants Thoroughbred Racing Protective Bureau and Thoroughbred Racing Association is denied.

2. Defendants' motion to dismiss the complaint for lack of personal jurisdiction as to defendants Victor Wickman and Kenneth Graf is allowed.

3. Plaintiff's motion for further limited discovery on the jurisdictional issue with regard to defendant Paul Berube is allowed.

4. Defendants' motion to dismiss the complaint for lack of personal jurisdiction as to defendant Paul Berube is continued pending completion of discovery.



Karen Sue SISK, Wife, Heir-At-Law and Next of Kin of Gerald R. Sisk, Jr., Deceased, and Christopher A. and Matthew R. Sisk, Minors, By and Through Karen Sue Sisk, Their Mother, Natural Guardian, and Next Friend, Plaintiffs.

v.

NATIONAL RAILROAD PASSENGER CORPORATION; the Atchison, Topeka and Santa Fe Railway Company; and the City of Cimarron, Kansas, Defendants.

No. 85-1744-K.

United States District Court,
D. Kansas.

Nov. 12, 1986.

Wrongful death action was brought for damages arising from automobile-train

accident. On parties' motions to dismiss and motions in limine, the District Court, Patrick F. Kelly, J., held that: (1) local ordinance limiting speed of trains was preempted by federal law and thus was inadmissible for purpose of showing railroad's negligence, and (2) evidence of widow's remarriage was admissible for limited purpose of establishing decedent's motive for alleged suicide.

Motions granted in part and denied in part.

1. Municipal Corporations ⇌735

Under Kansas law, city was immune from liability for failure to enforce train speed limit ordinance. K.S.A. 75-6104(c).

2. Municipal Corporations ⇌735

Under Kansas law, city was not liable for failure to remove site obstructions on property owned by railroad or for failing to inspect railroad's property to determine whether it contained hazard to public safety. K.S.A. 8-2011, 75-6104(j).

3. Federal Civil Procedure ⇌2515

Whether city was negligent in failing to improve surface of railroad crossing presented factual question precluding summary judgment, in wrongful death action arising out of train-automobile accident, where it was unclear what condition of surface was beyond the point of railroad's responsibility and whether surface condition had any causal connection to accident. K.S.A. 66-227.

4. States ⇌18.21

Local ordinance limiting speed of trains through city to 50 miles per hour was preempted by Federal Railroad Safety Act, which imposes uniform national railroad safety standards, and thus local ordinance was void and unenforceable and evidence of ordinance, as well as train's speed at time of crossing accident, was inadmissible for purpose of showing railroad's negli-

gence. Federal Railroad Safety Act of 1970, § 101 et seq., 45 U.S.C.A. § 421 et seq.; U.S.C.A. Const. Art. 6, cl. 2.

5. Death ⇐60

Under Kansas law, evidence of widow's remarriage is inadmissible for purpose of mitigation of damages in wrongful death action.

6. Death ⇐60

Rule that remarriage of widow is inadmissible for mitigation of damages in wrongful death action did not preclude accurate and true identification of widow if she decided to testify.

7. Death ⇐61

Fact of widow's remarriage was admissible, in wrongful death action, for limited purpose of supporting allegation decedent's death was deliberate act of suicide, because widow's remarriage soon after husband's death to very person she had allegedly planned to leave decedent for may have been probative toward establishing motive for alleged suicide.

Richard D. Cordry, of Michaud, Cordry, Michaud, Hutton & Hutton, Wichita, Kan., for plaintiffs.

Charles W. Harris, of Curfman, Harris, Stallings & Snow, Wichita, Kan. for defendant railroads.

Harry Bleeker, of Turner & Boisseau, Great Bend, Kan. for City of Cimarron.

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

This case is before the court on a motion to dismiss by defendant The City of Cimarron, Kansas, and motions in limine by plaintiffs, and by defendants National Railroad Passenger Corporation, and The Atchison, Topeka and Santa Fe Railway Company (Railroad). The court heard arguments on these motions on September 24, 1986. The court ruled on the city's motion to dismiss at that time, but took the motions in limine under advisement. Having now thorough-

ly reviewed the substance of these motions, the court is prepared to rule.

This case arises from an automobile and train collision which occurred at a crossing in Cimarron, Kansas, on October 10, 1984, resulting in the death of Gerald R. Sisk, Jr. Plaintiffs—the widow and children of the deceased—claim the accident would not have occurred but for the negligence of defendants in maintaining an extrahazardous crossing at the intersection in question. Specifically, plaintiffs claim the railroad was negligent in exceeding the speed limits set by the Cimarron ordinance, in failing to evaluate the safety needs and install the appropriate traffic control devices, gates and other safety warning devices at the crossing, in failing to improve the crossing surface, in failing to properly sound the train whistle, in failing to maintain the crossing free of weeds and shrubs which limited sight distance, and in authorizing speeds up to 90 miles per hour for passenger trains through the City of Cimarron. Plaintiffs further maintain defendant City of Cimarron was negligent in failing to enforce the speed limit as set by ordinance, in failing to remove brush and shrubs from the crossing, in failing to improve the crossing surface and install gates with flashing signal lights. The defendants deny the crossing was ultrahazardous or that they were negligent in any manner. They contend the decedent's death was the result of a deliberate action—a suicide.

[1, 2] The City of Cimarron (City) has moved the court to dismiss three of plaintiffs' claims against it: (1) failure to enforce the speed limit; (2) failure to remove brush, weeds and shrubs; and (3) failure to improve the crossing surface. Consistent with the court's statements at the hearing, the city's motion is granted as to the claim for failure to enforce the speed limit, as the Kansas Tort Claims Act, K.S.A. 75-6104(c), immunizes the city from liability for "failure to enforce a law, whether valid or invalid, but not limited to, any ... ordinance." Also, defendant's motion is granted as to the claim for failure to remove road obstructions as the property in ques-

Cite as 647 F.Supp. 861 (D.Kan. 1986)

tion is owned by the railroad; therefore, pursuant to K.S.A. 8-2011 the city has no duty to remove obstructions or inspect for obstructions on property belonging to another. Further, K.S.A. 75-6104(j) immunizes the city from liability for failure to inspect property which does not belong to the government to determine whether it contains a hazard to public safety.

[3] However, the court denies the motion to dismiss the claim that the defendant city was negligent in failing to improve the surface of the crossing. Pursuant to K.S.A. 66-227, the railroad's "surface responsibility" extends only two feet from the outside rails. Questions of fact remain as to the condition of the surface beyond that point and any causal connection to the accident.

The railroad has moved the court for an order in limine precluding the admission in evidence of the city's ordinance limiting the speed of trains through the city to 50 miles per hour. Defendant railroad claims the ordinance is void *ab initio* under the doctrine of federal preemption.

Initially, the court was of the view that the speed of a train through a city was a matter of purely local concern: the city has an interest in protecting the safety of its citizens, and pursuant to an enabling statute (K.S.A. 15-438) the city is authorized to set the speed limit necessary to protect this interest. The court voiced this view at the time of the hearing; however, recognizing a legitimate question of preemption had been raised, the court took the matter under advisement.

[4] Having now reviewed the issue thoroughly, the court must find for the reasons stated below that the ordinance in question has indeed been preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.* (FRSA).

Historically, state and local governments had the right to enact laws to promote safety in railroad operations. *Missouri Pacific Railroad Co. v. Board of Greeley County Comm'rs*, 231 Kan. 225, 643 P.2d 188 (1982). The only restriction was that

the laws could not unduly burden interstate commerce. In Kansas, beginning in 1869, cities of the third class were enabled to enact railroad safety laws pursuant to K.S.A. 15-438, as follows:

The council shall have power to regulate levees, depots, depot grounds and places for storing freight and goods, and to provide for the passage of railways through the streets and public grounds of the city; also, to regulate the crossings of railway tracks, and to provide precautions and prescribe rules regulating the same, and to regulate the running of railway engines, cars and tracks within the limits of said city, and to prescribe rules relating thereto, and to govern the speed thereof, and to make any other and further provisions, rules and restrictions to prevent accidents at crossings and on the tracks of railways, and to prevent fires from engines.

This statute has remained unchanged since 1923.

At the same time, Kansas law imposed on the railroad the principal burden of installing train-activated warning devices at dangerous crossings. *See* K.S.A. 66-231a.

Then, in the 1970s, Congress, recognizing a need for uniform safety standards, enacted the Railroad Safety Act which imposed nationwide standards, reserving authority to the states for further regulation only under special circumstances. In conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads and increased funding to the federal aid program. Under the new program, the responsibility for railroad crossing improvements is to be shared 90% by the federal government and 10% by the state and local government. Therefore, as to federal aid projects, state law requiring railroads to share in the cost of work for the elimination of hazards at crossings shall not apply. The significance of the increased funding for railroad crossing improvement under the federal aid program is the government's recognition, in light of

its desire to preserve a national railroad transit system, that public safety at crossings is a matter of concern to the government rather than the railroad, and thus requiring the railroads to share in the cost was overly burdensome.

Likewise, in enacting the FRSA of 1970, Congress sought to eliminate the undue burden on public railroads caused by non-uniform railroad safety regulations:

To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce....

H.R.Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in [1970] U.S.Code Cong. & Ad. News 4104, 4110.

In enacting the FRSA, 45 U.S.C. § 421 *et seq.*, Congress' stated purpose was "to promote safety in all areas of railroad operations." 45 U.S.C. § 421.

Pursuant to the Act, the Federal Railroad Administration (FRA) established and adopted train speed regulations in conjunction with the adoption of track and roadbed standards and with signal standards. 49 C.F.R. §§ 213, 236. The purpose of these regulations is to establish safe train speeds under differing circumstances. The FRA has established safe operating speeds between 10 miles per hour and 110 miles per hour depending on the condition and curvature of the track and roadbed. These regulations are aimed at reducing the possibility of derailments and train collisions.

Within the City of Cimarron, the FRA has determined trains can operate safely at speeds of 50 miles per hour for freight and 90 miles per hour for passenger. However, the City of Cimarron has in effect an ordinance, No. 13-208, that sets a speed limit for trains passing through the city of 50 miles per hour.

Defendant railroad argues the ordinance has been preempted by the federal law because (1) the FRA has adopted standards regulating the speed of trains, and (2) the ordinance was established by a municipality rather than a state.

The supremacy clause of the United States Constitution establishes that when federal law conflicts with state or local law the federal law must control. Article VI, Clause 2. When reviewing whether a state law or municipal ordinance has been preempted by an act of Congress, the court must find an intent on the part of Congress to preempt the field. This intent may be discerned either through explicit or implicit language of the statute or through a direct conflict between the state and federal statute. *See, e.g., Ray v. Atlantic Richfield*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). In enacting the FRSA, Congress clearly stated its intent of preemption as follows:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

The legislative history further clarifies Congress' preemptive intent:

[T]he railroad industry has very local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement....

H.R.Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in [1970] U.S.Code Cong. & Ad. News 4104, 4110.

Moreover, courts which have applied the Act have found an intent to preempt. See *National Assoc. of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11 (3d Cir. 1976); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.1973), cert. denied 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105; *Atchison, Topeka & Santa Fe RR. Co. v. Illinois Commerce Comm.*, 453 F.Supp. 920 (N.D.Ill.1977).

Although the clear intent of Congress was to establish nationally uniform control of railroad safety, the Act—in § 434—specifically authorizes “exceptions” from this uniformity. The first exception applies when no federal regulation has been adopted which covers the subject matter of the law in question. In this case, federal regulations covering the precise subject matter—train speed—have been enacted. Therefore, the first exception is inapplicable.

Under the second exception, the state may continue in force a more stringent law if (1) the state law is necessary to eliminate or reduce an essentially local safety hazard, (2) the law is not incompatible with any federal measure, and (3) the law does not unduly burden interstate commerce. See *Donelon*, 474 F.2d at 1112. Clearly, a law reducing the speed limit within a city in order to protect public safety is more stringent than, and not incompatible with, the rail speed limits set by federal regulation. However, to fall within the second exception the law must clearly have been enacted at the state level. *Id.* at 1112. See also *City of Cleveland v. Consolidated Rail Corp.*, 82 C.R.B. 2730 (Cleveland Mun.Ct., Apr. 4, 1983) (local ordinance of 35 mph preempted by F.R.S.A.). The ordinance in question herein was enacted at the local level. Thus, it does not fall within this second exception.

Plaintiffs argue that K.S.A. 15-438 is a clear delegation to local governments of the state's authority to pass laws excepted from the FRSA under § 434. Because this statute was enacted in 1869, some 100 years prior to the passage of the FRSA, and because it is obviously contrary to the

clear purpose of the FRSA as it would allow for a multitude of differing local safety standards, this court is of the view that it has been preempted by the FRSA and should not be given effect. Therefore, the local speed limit ordinance in question herein is rendered void and unenforceable.

Plaintiffs contend the ordinance should be admissible to show negligence. Plaintiffs cite *Thomas v. Illinois Central Gulf RR. Co.*, 592 F.2d 1366 (5th Cir.1979), and *Shibley v. St. Louis-San Francisco Ry. Co.*, 533 F.2d 1057 (8th Cir.1976), two federal cases in which evidence of local speed limit ordinances were admitted on the issue of the railroads' negligence. However, these cases are unpersuasive as preemption by the FRSA was not discussed and it can only be presumed that the issue was never raised.

By finding the local speed limit ordinance unenforceable, the court does not intend to convey that it is unconcerned with public safety. The court is simply of the view that Congress intended the railroad safety laws to be nationally uniform due to the public interest that is served by the railroads. In areas where the federal government has not acted, Congress intended that only states—and not local governments—could act. To hold otherwise would be a licensing of widely variant and confusing safety ordinances enacted by a multitude of local governments. In order for a city to protect its safety interests, it must notify the Kansas Corporation Commission that it believes a particular crossing is hazardous. The Corporation Commission may then order the installation of safety devices (K.S.A. 66-231a) or determine what other safety measures are necessitated. In this way, the public's safety is adequately protected.

Because the Cimarron speed limit ordinance is void and unenforceable due to federal preemption, evidence of the ordinance, as well as the train's speed at the time of the accident, will be inadmissible for the purpose of showing the railroad's negligence.

The plaintiffs have filed a motion in limine to preclude defendants from introducing into evidence or mentioning during voir dire or opening or closing statements the following: (1) that plaintiff Karen Sue Sisk, wife of decedent, has remarried; (2) any services being provided Karen Sue Sisk by her new husband; (3) the financial status of Karen Sue Sisk or any money she has received from Social Security; (4) that the decedent's death may have been a suicide. Defendants concede that the collateral source rule precludes introduction of evidence of the widow's financial status or any monies she has received since her husband's death, as her damages are to be ascertained from the date of death. Therefore, the court need address only the admissibility of the widow's remarriage and the defense of suicide.

[5] Under Kansas law, evidence of a widow's remarriage is inadmissible for the purpose of mitigation of damages. *Pape v. Kansas Power & Light Co.*, 231 Kan. 441, 647 P.2d 320 (1982); see also *Fudge v. City of Kansas City*, 239 Kan. 369, 379, 720 P.2d 1093 (1986). In *Fudge*, the Kansas Supreme Court held the trial court did not abuse its discretion by precluding voir dire of the jurors about whether any of them knew the widow (by her new name) or her current husband. See also *Nichols v. Marshall*, 486 F.2d 791 (10th Cir.1973).

[6] This court has no quarrel with the rule that the remarriage of the widow is inadmissible for mitigation of damages. Clearly, the cause of action for wrongful death arises at the time of death, and damages are to be determinable at that time. *Pape*, 231 Kan. at 447, 647 P.2d 320. This is not to say, however, that the widow's true identity must—under all circumstances—be concealed from the jury. In this regard, if and when the widow testifies, she will be accurately and truly identified.

[7] In the case at bar, the defendants contend the proximate cause of Gerald Sisk's death was a deliberate action on his part. The court will deny plaintiffs' motion in limine seeking to bar this defense. In

order to prove suicide, defendants must establish a motive. The defendants herein allege decedent was despondent because of his wife's intent to leave him for another man. In the court's view, the widow Sisk's remarriage on the heels of her husband's death to the very person she had allegedly planned to leave decedent for may indeed be probative toward establishing a motive. Accordingly, the fact of her remarriage will be admitted for this limited purpose.

Even if suicide were not at issue herein, the court would not be willing to acquiesce in any "facade", the thrust of which would allow the widow to be sworn in under a name which is no longer her own. Additionally, proper instructions will preclude the jury from considering remarriage per se when assessing damages. Therefore, the court declines to invoke Rule 403 to exclude all evidence of the widow's remarriage. Accordingly, plaintiffs' motion in limine is denied as to the evidence of remarriage and suicide.

IT IS ACCORDINGLY ORDERED this 12 day of November, 1986, that defendant The City of Cimarron's motion to dismiss is granted in part and denied in part; defendants National Railroad Passenger Corporation and The Atchison, Topeka & Santa Fe Railway Company's motion in limine is granted; and plaintiffs' motion in limine is granted in part and denied in part. It is further ordered that plaintiffs' motion to amend their complaint, adding a count of negligence against the City of Cimarron, is granted.

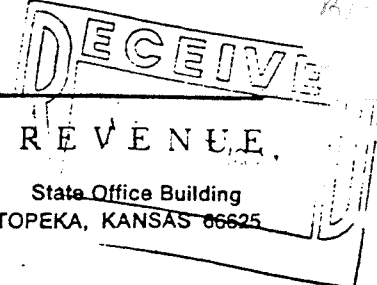




Kansas
DEPARTMENT OF REVENUE.

November 1, 1984

State Office Building
TOPEKA, KANSAS 66625



Ann H. Mattheis
National Solid Wastes Management Assn.
1730 Rhode Island Ave NW Tenth Floor
Washington, D.C. 20036

Re: Fuel Usage by Refuse
Vehicles

Dear Ms Mattheis:

In a review of your extensive tests and subsequent report we have determined that a 35% fuel tax exemption for single unit refuse trucks is a reasonable percentage and is hereby approved for tax reporting in Kansas.

We wish to caution you that certain conditions must be met before consideration can be made for any non-taxable purchases of diesel fuel or application for refund of gasoline tax.

Diesel fuel users must purchase their fuel in bulk lots and must be licensed as a Special Fuel User. They would then purchase their diesel fuel without the state fuel tax, from their dealer, and remit the state tax to this office for the road use of their vehicles.

Gasoline users must purchase their gasoline in quantities of 40 gallons or more from a licensed motor vehicle fuel distributor. The user must apply a motor-vehicle fuel refund permit from this department and file claims for refund of taxes paid for power take off units. These claims cannot be paid if the fuel was purchased 12 months prior to the filing of the claim for refund.

If your members have any questions concerning the procedure for claiming this off road usage on the Kansas reports, please have them contact the Kansas Department of Revenue, Sales & Excise Tax Bureau, Motor Fuel Tax Audit Unit, State Office Building, Topeka, Kansas 66625, or telephone No. (913) 296-2412.

Sincerely,

Wayne F. Elmore
Wayne F. Elmore, Supervisor

MOTOR FUEL TAX AUDIT UNIT
SALES & EXCISE TAX BUREAU

Attach. 3