Linda Willard

DEPARTMENT OF JUSTICE
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#90001

NO.
STATE OF NEBRASKA
OFFICIAL
JAN 11 1990
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: January 11, 1990

SUBJECT: LB 419; Federal Preemption of State Legislation Regulating Hours of Service for Railroad Employees

REQUESTED BY: Senator David Bernard-Stevens
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

LB 419 would amend Neb.Rev.Stat. §74-902 (Reissue 1986) dealing with the duty times of employees of railroads and other common carriers. Among other things, that statute prescribes maximum consecutive hours of duty for such employees. The federal Hours of Service Act, 45 U.S.C. §61 et seq., also prescribes maximum hours of service for railroad employees, and otherwise regulates employee service. You now ask, "Whether LB 419 . . . preempts federal law." From discussions with your staff, and from our review of the testimony presented at the committee hearing on LB 419, we understand that the focus of your opinion request is actually whether the federal Hours of Service Act preempts the provisions of LB 419. We believe that it does, and our conclusion is discussed below.

Article I, Section 8, Paragraph 3 of the United States Constitution, commonly known as the Commerce Clause, grants Congress the power to regulate interstate commerce. Union Pacific Railroad Company v. Woodahl, 308 F.Supp. 1002 (D.Mont. 1970). Article VI, Paragraph 2 of the United States Constitution, the Supremacy Clause, provides that the federal Constitution and laws are the supreme laws of the land. ATS Mobile Telephone v. Curtin Call Communications, Inc., 194 Neb. 404, 232 N.W.2d 248 (1975). These provisions, considered together, indicate that state regulation of interstate commerce can be preempted by federal regulation in the same area. Our supreme court has set out a three-part test for determining when such preemption occurs:

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> First, did Congress intend to preempt the area? Second, do the state and federal laws irreconcilably conflict? Third, by the very nature of the subject regulated, is there a need for national uniformity? The answer must be "no" to all three questions if the state regulation is to be upheld.

ATS Mobile Telephone v. Curtain Call Communications, Inc., supra at 407, 232 N.W.2d at 250. We believe that LB 419 fails at least the first two of the tests set out by our supreme court. As a result, federal legislation must control.

When Congress unmistakably enters a field and enacts legislation to govern that field, state laws regulating that aspect of commerce must fail. ATS Mobile Telephone, Inc. v. General Communications Company, Inc., 204 Neb. 141, 282 N.W.2d 16 (1979). This result is required whether Congress specifically directs such a result or whether such a result is required by the purpose of the act. Id.

The federal Hours of Service Act was initially enacted in 1907. There are several cases which indicate that this legislation concerning hours of service so completely occupies the field as to prevent state legislation on the same subject. For example, in Northern Pacific Railway Company v. State of Washington, 222 U.S. 370 (1912), the United States Supreme Court held that the Hours of Service Act precluded a state, even during the period of time from the Act's passage to its effective date, from making or enforcing local regulations limiting hours of labor. The Court stated:

> . . . the enactment of Congress of the law in question [the Hours of Service Act] was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state.

Northern Pacific Railway Company, 222 U.S. at 378. Similarly, in Erie Railroad Company v. People of the State of New York, 233 U.S. 671 (1914), the Supreme Court held that the subject of hours of labor of employees specified in the Hours of Service Act was so far removed from state regulation as to invalidate provisions of state law prescribing shorter days of work for certain classes of employees. See also, Southern Railway Company v. Railroad Commission of Indiana, 236 U.S. 439 (1915); State v. Wabash Railway Company, 238 Mo. 21, 141 S.W. 646 (1911); State v. Chicago, Milwaukee and St. Paul Railway Company, 136 Wis. 407, 117 N.W. 686 (1908); State v. Missouri Pacific Railway Company, 212 Mo. 658, 111 S.W. 500 (1908). On the basis of these various cases, we believe that Congress intended to preempt the area of hours of service for railroad employees. As a result, LB 419 fails the initial portion

of the three-part test for preemption described by our supreme court.

We also believe that certain provisions of LB 419 are in conflict with federal law. Section 1 of LB 419 provides:

> It shall be unlawful for any common carrier or its officers or agents to require or permit any employee to be or remain on duty for a longer period than 12 consecutive hours. Whenever any employee of such common carrier has been continuously on duty for 12 hours, he or she shall be at the tie-up or tie-off duty point and relieved from all duties within such 12 hour period so that his or her total time on duty shall not exceed 12 hours.

(Emphasis supplied). As noted in your opinion request, the language in §1 of LB 419 emphasized above is intended "to clarify and delineate that railroad employees should actually be at their terminal within 12 hours of duty."

The federal Hours of Service Act does not contain language which requires that railroad employees must be at their terminal at the end of their duty shift. Moreover, 45 U.S.C. §61(3) provides that time on duty for purposes of computation of maximum allowed duty periods shall commence when an employee reports for duty and terminate when the employee is released from duty. Part (c) of that same subsection further provides that time on duty shall include:

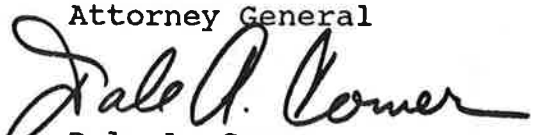
> Time spent in deadhead transportation by an employee to a duty assignment: provided, the time spent in deadhead transportation by an employee from duty to his final release shall not be counted in computing time off duty.

(Emphasis supplied). It seems to us that these portions of 45 U.S.C. §61, by specifically excluding "deadhead transportation by an employee from duty to his final release" from time on duty, contemplate that employees will not necessarily be at their terminal at the end of their duty shift. Consequently, LB 419 would conflict with the federal statute by requiring a different result.

For these various reasons, we believe LB 419 is preempted by the federal Hours of Service Act. If LB 419 were enacted into law, its provisions could not be enforced in the face of the federal legislation.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:

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