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# CONDEMNING RAILROAD PROPERTY

## The Impact of Federal Preemption

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# FEDERAL PREEMPTION GENERALLY

## The Supremacy Clause

United States Constitution, Article VI, Clause 2, Supreme Law of the Land

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”



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# FEDERAL PREEMPTION GENERALLY

## Court Analysis

- Preemption is not favored
  - Congress is presumed to defer to the states
- A state law is only preempted by federal law if it is the “clear and manifest purpose of congress.”



# FEDERAL PREEMPTION GENERALLY

## Categories of preemption

- Express Preemption
- Implied Preemption
  - Field Preemption
  - Conflict Preemption



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# FEDERAL PREEMPTION GENERALLY

## Examples of Federal Preemption

- Employee Retirement Income Security Act (ERISA)
- National Labor Relations Act (NLRA)
- Federal Cigarette Labeling and Advertising Act (FCLAA)
- Interstate Commerce Commission Termination Act (ICCTA)



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# INTERSTATE COMMERCE COMMISSION TERMINATION ACT

- ❑ 49 USC 10101, et seq
- ❑ ICCTA became law in 1995
- ❑ Eliminated the Interstate Commerce Commission
- ❑ Created the Surface Transportation Board (STB)
- ❑ STB granted exclusive jurisdiction over regulation of railroad transportation



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# INTERSTATE COMMERCE COMMISSION TERMINATION ACT

## ICCTA Preemption Statement:

“The remedies provided under this part with respect to regulation or rail transportation are exclusive and preempt the remedies provided under Federal or State law”



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# COURT TREATMENT OF ICCTA – Generally

## Categorical Preemption -Two broad categories

- Any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized
  - e.g. Environmental, land use permitting, preconstruction permitting
  
- State or local regulation of matters directly regulated by the STB
  - e.g. construction, operation, abandonment, line acquisitions, mergers, rates and services



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# COURT TREATMENT OF ICCTA – Generally

## “As Applied” Preemption Analysis

- State law is preempted under circumstances where the law “prevents or unreasonably interferes with railroad transportation.”



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# COURT TREATMENT OF ICCTA – Generally

## Examples of ICCTA preemption of State Law

- ❑ State law claims for negligence relating to construction of railroad tracks and roadbeds
  - Convert to federal claims
- ❑ District of Columbia terrorism regulations
  - Banned transportation of certain hazardous substances
- ❑ Michigan state statute limiting time a train can block a crossing (5 minutes)
- ❑ Preconstruction permitting
- ❑ Some zoning regulations (“as applied” analysis)



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# COURT TREATMENT OF ICCTA – Use of Eminent Domain

Condemnation is regulation when applied to railroads

- Use of state law to exert control over railroad property
- But does not fit within Categorical Preemption
  - ICCTA did not intend to preempt state eminent domain laws generally
- Courts use “As Applied” analysis in each instance



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# COURT TREATMENT OF ICCTA – Use of Eminent Domain

## “As Applied” Analysis

- ❑ Whether proposed condemnation will prevent or unduly interfere with railroad operations or pose undue safety hazards.
- ❑ Analysis can be made by State Court, Federal Court or STB
- ❑ Case by case analysis of facts



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# CASE STUDY

Wisconsin Central Ltd v. The City of Marshfield,  
160 F. Supp.2d 1009 (2000)

- ❑ Forum: United States District Court,  
Western District of Wisconsin
- ❑ Condemnor: City of Marshfield, Wisconsin
- ❑ Railroad: Wisconsin Central, Ltd.
- ❑ Project: Highway realignment and  
construction of railroad overpass
- ❑ Decision: PREEMPTED



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# CASE STUDY

Maumee & Western Railroad Corp., STB  
Finance Docket FD-34354-0, 2004 WL  
395835 (2004)

- ❑ Forum: Surface Transportation Board
- ❑ Condemnor: City of Napoleon, OH
- ❑ Railroad: Wisconsin Central, Ltd.
- ❑ Project: Road crossing and subsurface utilities
- ❑ Decision: NOT PREEMPTED



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# CASE STUDY

District of Columbia v 109,205.5 Square Feet of Land, 2005 WL 975745 (2005)

- ❑ Forum: United States District Court, District of Columbia
- ❑ Condemnor: District of Columbia
- ❑ Railroad: CSX Corporation
- ❑ Project: Pedestrian and Bicycle Trail
- ❑ Decision: NOT PREEMPTED



# CASE STUDY

City of Lincoln v. Surface Transportation Board, 414 F.3d 859 (2005)

- ❑ Forum: United States Court of Appeals, Eighth Circuit
- ❑ Condemnor: City of Lincoln, Nebraska
- ❑ Railroad: Lincoln Lumber Company & Omaha, Lincoln & Beatrice Railway Co.
- ❑ Proposed taking: Storm sewer and pedestrian and bicycle trail
- ❑ Decision: Storm Sewer – NOT PREEMPTED  
Pedestrian and bicycle trail - PREEMPTED



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# CASE STUDY

Buffalo Southern Railroad Inc. v Village of Croton-on-Hudson, 434 F. Supp.2d 241 (2006)

- ❑ Forum: United States District Court, Southern District of New York
- ❑ Condemnor: Village of Croton-on-Hudson
- ❑ Railroad: Buffalo Southern Railroad, Inc.
- ❑ Project: Municipal office space and storage lot for salt, sand and municipal vehicles
- ❑ Decision: PREEMPTED



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# CASE STUDY

Fort Bend County, Texas v. Burlington Northern and Santa Fe Railway Company, 237 S.W.3d 355 (2007)

- ❑ Forum: Court of Appeals of Texas
- ❑ Condemnor: Fort Bend County, Texas
- ❑ Railroad: Burlington Northern and Santa Fe Railroad Company
- ❑ Proposed taking: Roadway easement for railroad crossing
- ❑ Decision: PREEMPTED



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# CASE STUDY

New Orleans & Gulf Coast Railway Company v. Barrois, 533 F.3d 321 (2008)

- ❑ Forum: United States Court of Appeals, Fifth Circuit
- ❑ Condemnor: Various Louisiana Property Owners
- ❑ Railroad: New Orleans & Gulf Coast Railway Company
- ❑ Proposed taking: Private at-grade crossings
- ❑ Decision: NOT PREEMPTED



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# CASE STUDY

Island Park, LLC v. CSX Transportation, 559 F.3d 96  
(2009)

- ❑ Forum: United States Court of Appeals, Second Circuit
- ❑ Condemnor: NY Dept of Transportation
- ❑ Railroad: CSX Transportation
- ❑ Proposed taking: NYDOT and CSX sought closure of private railroad crossing
- ❑ Decision: NOT PREEMPTED – Crossing was not rail transportation and its closure would not interfere with railroad transportation



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# CASE STUDY

Franks Investment Company v. Union Pacific Railroad Co., 593 F.3d 404 (2010)

- ❑ Forum: United States Court of Appeals, Fifth Circuit
- ❑ Condemnor: None – Private property owner seeking state law prescriptive easement rights to existing crossing
- ❑ Railroad: Union Pacific
- ❑ State law action: State law possessory right claim (similar to prescriptive easement)
- ❑ Decision: NOT PREEMPTED – Crossing found not to interfere with railroad operations



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# CASE STUDY

Norfolk Southern Railway Company and The Alabama Great Southern Railway Company, STB Finance Docket NO. 35196, 2010 WL 691256 (2010)

- ❑ Forum: Surface Transportation Board
- ❑ Condemnor: City of Birmingham, Alabama
- ❑ Railroad: Norfolk Southern
- ❑ Proposed taking: 18.86 acres (easement and fee) for a public park, including an amphitheater, walking trail and playground
- ❑ Decision: PREEMPTED



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# CASE STUDY

Union Pacific Railroad Company v. Chicago Transit Authority, 647 F.3d 675 (2010)

- ❑ Forum: United States Court of Appeals, Seventh Circuit
- ❑ Condemnor: Chicago Transit Authority
- ❑ Railroad: Union Pacific
- ❑ Proposed taking: Conversion of existing lease of railroad property to permanent easement
- ❑ Decision: PREEMPTED



# RECAP – WHAT DO CASES TEACH US ABOUT PREEMPTION

- ❑ Eminent domain CAN be used to acquire RR property...but only under the right circumstances
- ❑ “As Applied” Analysis – case by case
- ❑ Condemnation permitted if taking will not interfere with railroad operations or pose undue safety concerns.
- ❑ At-grade or underground crossings often are allowed
- ❑ Parallel takings not generally approved
- ❑ Total takings are never approved



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# PRACTICE TIPS

- ❑ Plan ahead
- ❑ Minimize interference with railway operation
- ❑ Narrow takings are favored – only take rights that are needed to get job done
- ❑ Limit use of surface (eliminate prohibition against structures)
- ❑ Consider method of installation



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# LAND USE REGULATION IN INDIANA

## What Commercial Lenders Need to Know

**THANK YOU !**

**Questions?**

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