

Local Regulation of Railroads: Guidance for Municipal Attorneys on Navigating the Complexities of Federal Preemption

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projects that keep life moving..

THE BASICS

- Surface Transportation Board
- Federal Railroad Administration
- Labor Issues
- The Courts - FEHA

Interstate Commerce Act of 1887

Imposed regulation of railroads:

- Prohibited discrimination among shippers
- Required publication of rates



Deregulation – 1976-1995

Combatting “the disappearing railroad blues,” Congress enacted new laws aimed at making railroads solvent:

- 4R Act (1976) – Fewer controls on rates
- Staggers Rail Act of 1980– More deregulation, allows railroads to share tracks
- Interstate Commerce Commission Termination Act (ICCTA) of 1995

ICCTA of 1995

- Abolished Interstate Commerce Commission (ICC)
- Established Surface Transportation Board (STB) under the U.S. Department of Transportation
 - Now independent based on recent legislative changes
- More limited control of rail operations by federal agency

STB



The STB

- Jurisdiction: Interstate Commerce
 - Rail (all), Water (some), Motor Carrier (some)
 - ... “exclusive and plenary”
 - Commerce – rates; sales, leases and use agreements; abandonments

Other Agencies

- Federal Railroad Administration (FRA) – Safety Agency that regulates tracks, vehicles, speeds, and conducts safety inspections
- State Public Utilities Commission (PUC)



Basics for Federal Jurisdiction

- Commerce Clause – Art. I, §8, Cl. 3
- Supremacy Clause – Art. VI, Cl. 2



- **PREEMPTION –**

- 49 U.S.C. 10502

- 49 U.S.C. 11321

Federal Pre-Emption

- Remember the key words: “exclusive and plenary”
- *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co. (1991) 450 U.S. 311:*

“The ICA is among the most pervasive and comprehensive of federal regulatory schemes Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the [ICC]”

Federal Pre-Emption

- *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co. (1991) 450 U.S. 311:*

“[There] can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive. [Citation.] Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.”

(Id. at 318-9.)

- IT'S ALL ABOUT SAFETY
- 49 U.S.C. §20106:
 - National Uniformity of Regulation
 - Preemption of State Law

- 49 CFR Part 209, Appendix A
 - Joint Use of Rail Lines
 - “Connection” of “electric interurban rail system” to interstate rail system

What is an Interstate Carrier?

- Active
- Discontinued
- Abandoned (not the same as easement abandonment)
- Rails to Trails (“Railbanking”)– *Grantwood Village v. Missouri Pacific Railroad Company*
- Railroads that look wholly Intrastate
- Tourist railroads, plant railroads not included (not point-to-point)

Railway Labor: Also a World Unto Itself

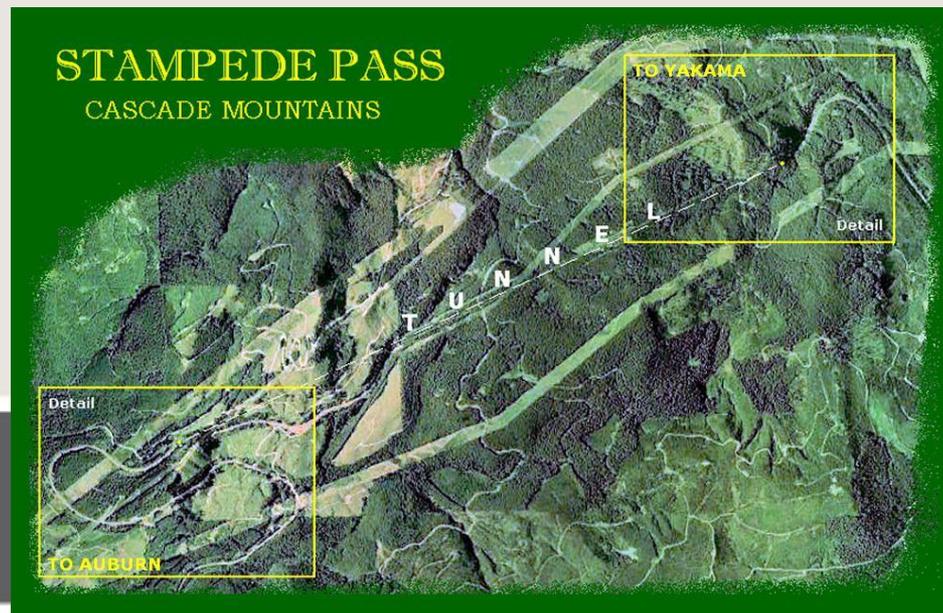
- Railway Labor Act, National Mediation Board
- Railroad Retirement/Railroad Unemployment Insurance
- LABOR PROTECTION
 - STB
 - Collective Bargaining
 - Transit Industry
- FELA

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

Auburn:

Cities file legal challenges to the re-opening of Stampede Pass line

- 229 miles through the Cascades
- Auburn at Western terminus – near Seattle N/S line



City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

BNSF sought STB approval to reacquire line it had sold to short line operator and segment it used only for local traffic

- STB prepared Environmental Assessment (EA) under National Environmental Policy Act (NEPA)

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

City challenged STB decision that found that:

- i. Local environment permitting laws were preempted by ICCTA
- ii. STB's use of Environmental Assessment
(i.e. finding that no Environmental Impact Statement (EIS) needed to be prepared)

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

City of Auburn contentions on appeal to 9th Circuit:

- City claims no express preemption of local regulation:
 - Says Congress meant to preempt economic regulation, not “essential local police power required to protect the health or safety of citizens.”

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

Court rejects City's position--opinion notes long history of judicial recognition that rail operations need to be regulated at the federal, not local, level

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

Auburn court cited Chicago and North Western Transportation Company v. Kalo Brick and Tile Company:

- Interstate Commerce Act (ICA) is “among the most persuasive and comprehensive federal regulatory schemes” (450 U.S. 311,318)

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

Does legislative history of ICCTA help city? **No!**

1. 49 U.S.C. §10501(b)(2): STB will have exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities”
2. Remedies are exclusive and preempt local law

***City of Auburn v Surface Transportation Board*, 154 F.3d 1025 (9th Cir. 1998)**

Auburn court noted that STB also has exclusive authority over rail line mergers and acquisitions and stated:

- “[A] rail carrier participating in that approved or exempted transaction is exempt from . . . all other law, including state and municipal law...”

City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)

Also rejected City's NEPA challenge, finding the Environmental Assessment was adequate and the preparation of an Environmental Impact Statement was not required.

Applying Auburn (and ICCTA) to specific issues:

- Construction and Operation
- Environmental Review
- Nuisances
- Condemnation
- Franchises
- Crossings

Construction and Operation

Courts find state law controls are preempted:

- Boston and Maine and Town of Ayer (Joint Petition for Declaratory Order to STB) (Auto unloading facility)
- *Amer. Assn. of RR v. South Coast AQMD* (diesel idling)

Some exceptions:

- Enforcement of public health and safety regulations where it does not interfere with rail operations (Stampede Pass, Riverdale)
- Voluntary Agreements (Township of Woodbridge)
- Enforcement of Clean Water Act (Humboldt Baykeeper)

Environmental Review

Courts find state law requiring reviews are preempted:

- City of Encinitas (construction of side track for commute rail) (North San Diego County Transit Development Board – Petition for Declaratory Order to STB)
- *Friends of the Eel River v. North Coast Rail Authority* (Cal. Supreme Court Case No S222472).
- *City of Atherton v. California High Speed Rail Authority* ((2014) 228 Cal.App.4th) (Challenge to CA High Speed Rail Project)
- *Green Mountain Railroad Corp. v State of Vermont* (D.C. Vermont 2003) 1003 U.S. Dist. LEXIS 23774

Nuisances

- *Gluckenberg v. Wisc. Central Ltd.*
- *Friberg*
- *Village of Ridgefield Park*

Courts, STB reject local attempts to regulate noise, etc. from rail operations

- Recent STB Decision:
Norfolk Southern Railway received confirmation that Delaware statute restricting locomotive idling is preempted

Condemnation

State court condemnation actions barred:

- *Commonwealth v. Bartlett* (1st Cir. 1967) 384 F.2d 819
- *Wisconsin Central Ltd. V. City of Marshfield* (W.D. Wisc. 2000)
160 F. Supp. 2d 1009
- *In re Metropolitan Transportation Authority* (2006) 823
N.Y.S.2d 88

Options:

- Condemnation of non-rail properties permitted
- Potential to have track removed from federal jurisdiction
by means of “adverse abandonment”

Franchises

- Union Pacific Railroad Company - Petition for Declaratory Order, STB Finance Docket No. 34090 (Decided: November 7, 2001):

“[E]ven assuming that the City's interpretation of the Franchise Agreement is correct, its enforcement of the Franchise Agreement is no less an attempt to regulate the abandonment of an interstate line of railroad than if the City promulgated laws for the same purpose.”
- *New Orleans Terminal*, 366 F.2d at 163-64,
- *Des Moines v. Chicago & N.W. R. Co.*, 264 F.2d 454, 457-60 (8th Cir. 1959),

Crossings

- People v. Burlington Northern Santa Fe Railroad (2012) 209 Cal.App.4th
 - State rule regulating blockage of grade crossings found to be preempted
- Not a preemption issue exclusively but a serious concern that merits some discussion

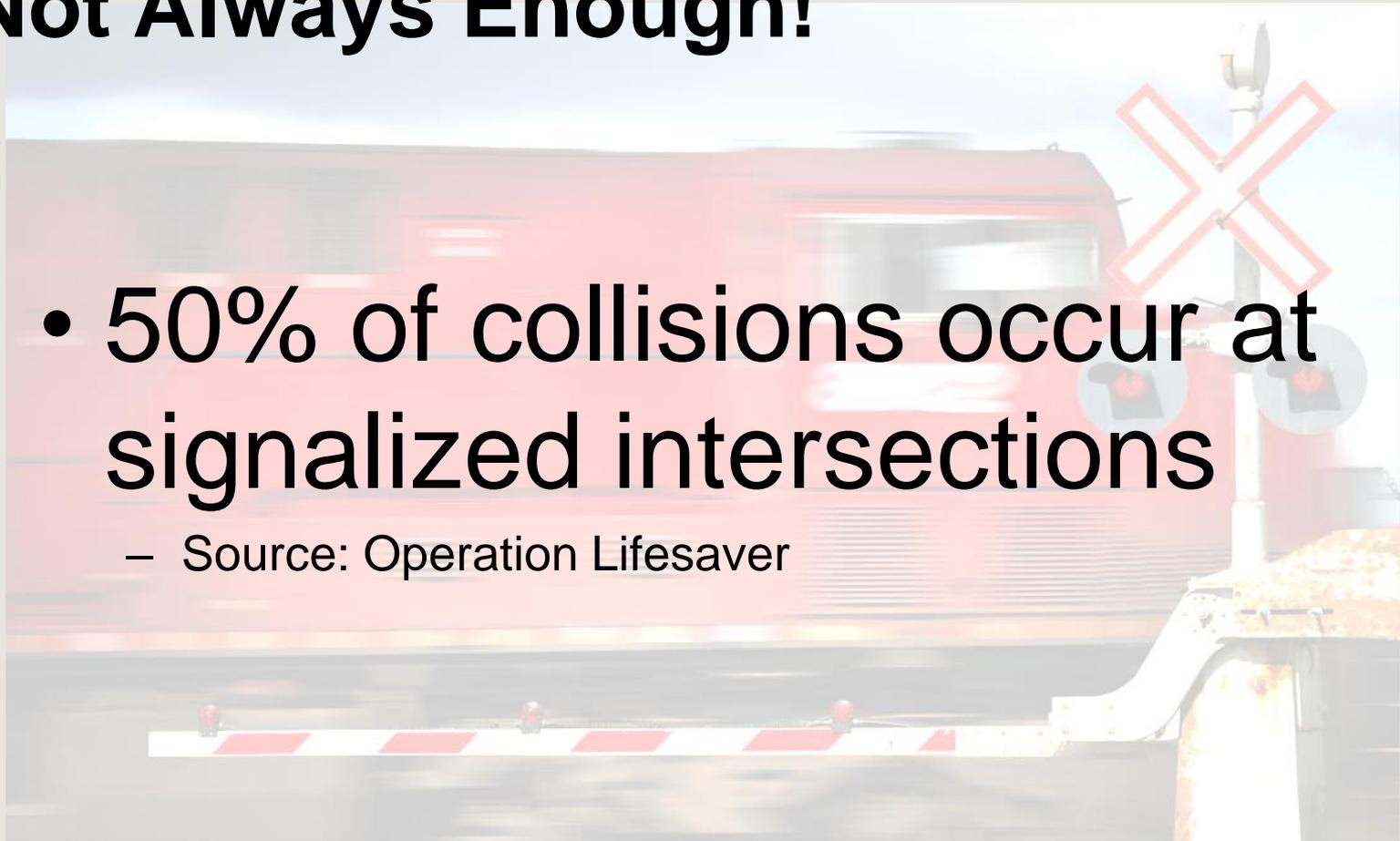
Stop that train?

- Not gonna happen
- At 55 mph, a train can take one mile to stop
- Safety focus must be on controlling cars and trucks

Crossing Signals— Not Always Enough!

- 50% of collisions occur at signalized intersections

– Source: Operation Lifesaver



Sound the horn!

- Locomotive engineers rely on horns for safety
- Horns are noisy but the best safety device available

Federal Law Controls Local Attempts to Limit Noisy Horns

- Federal law is supreme regarding regulation of interstate commerce
- Federal law is plenary with regard to railroad operations
- “What part of ‘plenary’ don’t you understand?”

Congress Acts: PL 103-440

49 USC §20153

- 1994 statute requires DOT to issue regulations requiring that train horns be sounded at public crossings
- Allows FRA to grant exemptions via rulemaking process
- Regulations will pre-empt non-compliant local bans

Who can establish quiet zones?

- “Public Authorities” = agencies “responsible for traffic control or law enforcement” (i.e. cities, counties etc.)
- **Not** railroads, nor the state PUC

What can be done?

- Localities can now declare quiet zones under the conditions specified in the FRA rule

Alternate Safety Measures

- Require prior FRA approval
- Allows use of measures that don't qualify as SSM's
- OK to use "corridor approach" to average risks within quiet zone
- Education/enforcement program (including photo enforcement)

Issues for Cities and Counties

- Who pays for intersection improvements?
 - Federal rule is silent on this point
 - If you want a quiet zone, must you pay for it? (Answer: probably!)
- Potential sources of funding:
 - Assessment Districts
 - Developer mitigations
 - Grants
 - Bond Proceeds
 - Sales Tax

Railroad Concerns

- Railroads focused of freight movement
- Railroads have other capital priorities for their \$\$\$
- Liability issues are of concern

Addressing Liability

- Text of rule is silent on liability
- Federal law preempts certain state law actions, such as:
 - Actions based on creation of quiet zones
 - Actions for failure to sound horn
- FRA declined to require localities to indemnify RR's
- RR's may demand indemnity in exchange for making improvements (no prohibition in rule)

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