

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

Strategies for Exercising Local Control to Address Nuisance, Liability and Economic Issues

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THURSDAY, APRIL 11, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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

Strafford Live Webinar  
April 11, 2019



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projects that keep life moving\*

# The Basics

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

# 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



# 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 Preemption

- 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 Preemption

- *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

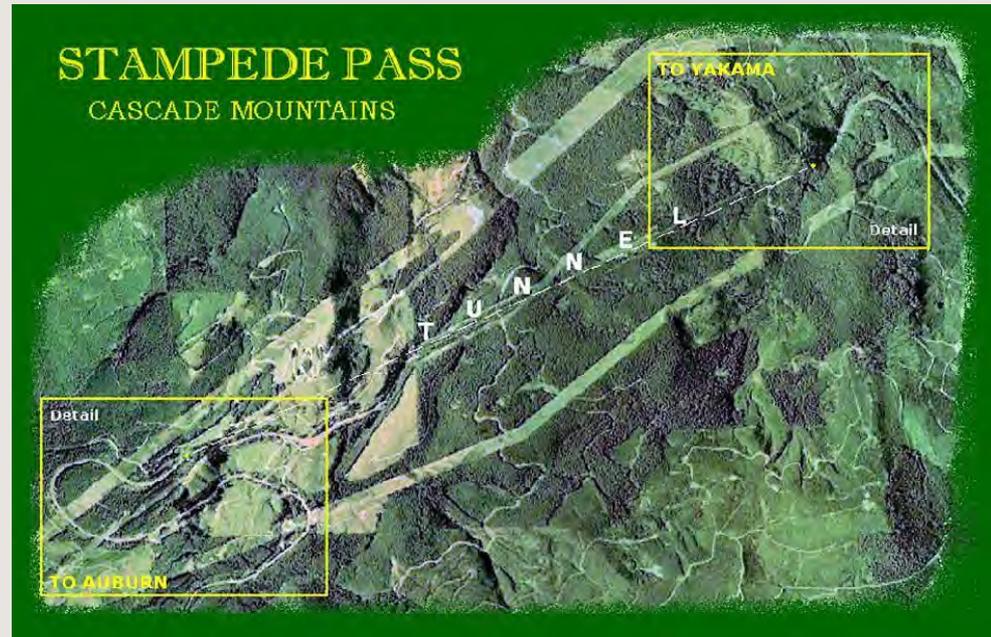
- Railway Labor Act, National Mediation Board
- Railroad Retirement/Railroad Unemployment Insurance
- Labor Protection
  - STB
  - Collective Bargaining
  - Transit Industry
  - FELA

# ***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 reliance on 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 pervasive and comprehensive federal regulatory schemes” (450 U.S. 311,318)

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

1. Does legislative history of ICCTA help city? No!
  - 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.

# Concurrent Jurisdiction

- STB and Courts have concurrent jurisdiction to consider matters of ICCTA preemption. *14500 Limited LLC*, STB Finance Docket No. 35788, at 2 (June 5, 2014); *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 811 (5th Cir. 2011); *City of Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1280 (Ohio 2012).
- However, STB will typically decline to exercise its jurisdiction if the matter is already pending before a court, unless the court asks for the STB's views. *Maumee & W. R.R. Corp.*, STB Finance Docket No. 34354, at 2-3 (Mar. 3, 2004).

# A Preemption Overview

- Generally Courts have classified preemption as
  - ✓ **Express:** The statute specifically contains preemption language such as 49 USC 10501(b) and 49 U.S.C. 11321.
  - ✓ **Implied:** This category in turn consists of **field preemption** where federal law so thoroughly occupies the area that there is no room for state or local regulation: STB jurisdiction over railroad rates and service, mergers, and industry entry/exit and **conflict preemption** where federal law only displaces state or local law at odds.

# STB's View of Preemption

- The STB typically analyzes a preemption claims as either **categorical** in which conflicting regulation is per se prohibited (rates and service, mergers, industry entry/exit), or
- **As applied** requiring a detailed factual analysis (indirect effects on railroad regulation). See discussion in *Thomas Tibbs, et al – Petition for Declaratory Order*, FD 35792, served 10/31/2014 (damage suit for property damage due to flooding caused by railroad maintenance preempted)
- State or local regulation may be preempted “as applied” as regulating, unreasonably burdening, or interfering with rail transportation. This is a very fact specific analysis.

# ICCTA Preemption – 49 U.S.C. 10501

(b) The jurisdiction of the Board over -

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

# FRSA Preemption – 49 U.S.C. 20106

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order –

- (1) is necessary to eliminate or reduce an essentially local hazard;
- (2) is not compatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

# Who Can Claim Preemption?

- The activity must constitute transportation by (or on behalf of) an STB-licensed rail carrier. *Tri-State Brick and Stone Petition for Declaratory Order*, FD 34824 (STB served Dec. 11, 2007).
- By rail carriers and non-operating owners of rail lines. *New York City Economic Development Corporation - Petition for Declaratory Order*, FD 34429 (STB-served July 15, 2004).
- And operating in interstate commerce subject to STB jurisdiction. (The railroad must be providing common carrier transportation, including a common carrier providing service to a customer under a rate contract.)

# Does Not Cover

- Tenants of railroad landowners, *Florida East Coast Ry. v. City of Palm Beach*, 110 F. Supp.2d 1367 (S.D. Fla. 2000).
- Rail customers, *Valero Refining Company – Petition for Declaratory Order*, FD 36036 (STB-served September 20, 2016); *SEA-3, Inc.-Petition for Declaratory Order*, FD 35853 (STB-served March 17, 2015); *Hi-Tech Transportation v. NJ*, 382 F.3d 295 (3d Cir. 2004).
- Landowners crossed by a common carrier rail line, *JGB Properties, LLC-Petition for Declaratory Order*, FD 35817 (STB-served May 22, 2015).

# Does Not Cover, con't

- Non-common carrier activities of railroads. *New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railway Construction*, FD 34797 (STB-served July 10, 2007) (activities must be “integrally related” to transportation); But compare *Del Grosso –Petition for Declaratory Order*, FD 35652 (STB-served July 31, 2017), *aff'd, Del Grosso v STB*, No. 17-1794 (1<sup>st</sup> Cir., August 8, 2018) (activities such as bagging, palletizing, and shrink-wrapping of the wood pellets come within the broad statutory definition of “transportation” at § 10102(9) because they facilitate the physical movement of property, and are not done solely to serve an unrelated purpose).

# Does Not Cover, con't

- Car storage.
- Solid Waste, contaminated dirt, and construction and demolition debris (“C&D”) unless moving in original sealed containers.
- Intrastate passenger service outside the national network, and public transportation by a local government authority (public transit). *Peninsula Corridor Joint Powers Board-Petition for Declaratory Order*, FD 35929 (STB-served July 2, 2015); 49 USC 10501(c)(2).

# Transloading Facility



# Transloading Activities

- A facility for transferring cargo between modes.
- No preemption unless conducted by railroad itself or railroad's agent under railroad's complete control.

# Transloading Activities, con't

- Compare, *The City of Alexandria, Virginia-Petition for Declaratory Order* , FD 35157 (STB-served Feb. 17, 2009 (transloader acted as an agent of the railroad and pursuant to its directions); *Grafton & Upton Railroad Company – Petition for Declaratory Order*, FD 35752 (STB-served Sept. 17, 2014) (LPG transload restructured to be owned and operated by railroad as part of transportation services).
- with *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, FD 35057 (STB-served Feb. 1, 2008) (transload provider was totally independent of the railroad); *Hi-Tech Transportation v. NJ*, 382 F.3d 295 (3d Cir. 2004).

# Transloading Activities, con't

- If the transloading operations are preempted, they cannot be indirectly regulated. *Norfolk Southern Railway v City of Alexandria*, 608 F.3d 150 (4th Cir. 2010) (ordinances and permits directed to truck use of streets serving facility preempted); *Vermont Railway v Town of Shelbourne*, No. 18-188 (2nd Cir. March 7, 2019) (environmental ordinance directed at road salt transloading facility preempted; not valid exercise of police powers as no meaningful health or safety goals).

# The Lautenberg Amendment



# The Lautenberg Amendment, con't

**“Micro short line railroad”**



# The Lautenberg Amendment, con't

## ***49 U.S.C. 10908-10909***

Legislative reaction to *NYS&W v. Jackson*, 500 F.3d 238 (2007) (generally holding that local environmental and permitting laws did not apply to NYS&W's waste transfer facility, but remanding case to the lower court for its failure to identify specifically which regulations were preempted).

# The Lautenberg Amendment, con't

Addressed abuses from operators of waste transfer facilities seeking to establish themselves as short line railroads to avoid state and local permitting requirements.

# **The Lautenberg Amendment, con't**

## ***49 C.F.R. 1155***

### ***Solid Waste Rail Transfer Facilities***

Allows STB to license transfer facilities, but eliminates preemption except for licensed facilities and for cargo transported in original sealed containers. Rule is so complex that no one has applied for a license. (May be simpler to seek usual state approvals for waste transfer facilities.)

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

Distinguish between “lines of railroad,” “exempt spurs,” and “private track.”

- “Line of railroad” provides through rail service as part of the national network. A fact-specific inquiry. Does the track “invade” new territory? Requires STB approval under 49 U.S.C. §§10901-2, or 10903.
- Preemption applies

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

“Exempt spur,” track typically used for switching, servicing, or storing of railroad equipment. The STB employs a “use test” for making that determination. Exempt from STB entry and exit licensing under 49 U.S.C. §10906.

Preemption applies.

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

A “private track,” track outside STB jurisdiction. Typically track inside a shipper’s plant or facility. Subject to local regulation but FRA safety regulation can apply.

No preemption. Subject to all local laws.

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

- STB construction authority required for new lines but not for exempt spurs. 49 U.S.C. §10901, §10906.
- “Improvements” and “ancillary” facilities may be built without STB approval and enjoy preemption because they form an “integral part” of the railroad's interstate operations. *Grafton & Upton Railroad – Petition for Declaratory Order*, FD 35779 (STB-served Jan. 27, 2014) (construction and operation of additional rail yard and storage tracks covered by preemption); *Union Pacific Petition for Declaratory Order*, FD 33611 (STB-served Aug. 21, 1998); *Friends of the Aquifer, City of Hauser, ID*, FD 33966 (STB-served Aug. 10, 2001); *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir.).

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

- Party building or acquiring its first line must get STB approval regardless of whether the line would otherwise constitute a line or a spur. *Effingham Railroad Company–Petition for Declaratory Order–Construction at Effingham, IL*, 2 S.T.B. 606 (1997). Pre-filing activity not exempt. Preemption applies once approved but cannot build until approved. *Suffolk and Southern Rail Road-Lease and Operation Exemption*, FD 35036 (STB-served Aug. 27, 2008); *DesertXpress Enterprises, LLC-Petition for Declaratory Order*, FD 34914 (STB-served June 27, 2007).

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

- No permitting or preclearance requirements, including building permits, zoning ordinances and environmental and land use permitting requirements. *Green Mountain RR v Vermont*, 404 F.3d 638, 643 (2d Cir. 2015); *Borough of Riverdale Petition for Declaratory Order*, FD 33466 (STB-served Sept. 10, 1999); *Boston And Maine Corporation Petition for Declaratory Order*, FD 35749 (STB-served July 19, 2013).
- What's left? Generally applicable, non-discriminatory regulations and permit requirements (electrical, plumbing and fire codes, direct environmental regulations for protection of health and safety). *Green Mountain*; *Grafton & Upton RR*, FD 35779 (STB-served Jan. 27, 2014).

# Construction, Acquisition, Operation, or Abandonment of Railroad Lines and Facilities

- Reasonable for states and localities to request rail carriers to share plans with the community, use state or local best management practices in construction, implement appropriate precautionary measures, so long as fairly applied, provide representatives to meet with citizen groups and local government to address local concerns, and submit environmental monitoring and testing information to local government for reasonable period of time. *Joint Petition for Declaratory Order - Boston & Maine Corp. and Town of Ayer*, 5 STB 500, 511 (2001).
- Local requirements cannot be burdensome or discriminatory or intended (or applied) to delay a project forever, or have the effect of unduly restricting railroad operations or interstate commerce.

# Operations and Maintenance

- State and local economic and environmental regulation forbidden. States cannot regulate matters expressly left to the STB such as licensing, rates and service, mergers, etc.
- State regulation of station closures preempted. *CSX v. Georgia Public Service Comm'n*, 944 F. Supp. 1573 (N.D. GA. 1996).
- Local governments cannot dictate how railroads can route traffic including hazardous materials. *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662 (STB served Mar. 14, 2005).

# Operations and Maintenance, con't

- Local government cannot regulate railroad noise emissions. *Petition of Norfolk Southern Railway Company for Expedited Declaratory Order*, FD 35949 (STB-served Feb. 25, 2016).
- The amount of time trains can obstruct grade crossings cannot be regulated. *Indiana v Norfolk Southern Ry.*, 107 N.E.3d 468, 477 (Ind. 2018); *Kansas v BNSF Ry.*, 432 P.3d 77 (Kan. App. 2018); *Weyauwega v Wisconsin Central*, 919 N.W.2d 609, 624 (Wisc. App. 2018).

# Operations and Maintenance, con't

- ✓ Railroad maintenance practices
  - ✓ Regulated by FRA under Federal Rail Safety Act.
  - ✓ Brush cutting and noxious weed spraying
  - ✓ Tie replacement and disposal of old railroad ties
  - ✓ Property damage/flooding cases due to improper maintenance
- 
- There are many decisions on the subject of track and right of way maintenance and they go both ways.

# Condemnation of Rail Lines

- Federal preemption insulates interstate rail lines and railroad facilities from state and local laws including condemnation powers, unless and until they have been abandoned by the railroad in accordance with ICCTA.
- The STB and some courts have ruled that condemnation is a form of “regulation”. *Norfolk Southern Petition for Declaratory Relief*, FD 35196 (March 1, 2010)(condemnation of railroad property for a park); *Soo Line*; *Chicago Transit Authority v. UP*.

# Condemnation

- **Political subdivision versus utility condemnation claims**
- **Categorical preemption versus as applied preemption**
- *Soo Line v. City of St Paul*, 827 F. Supp.2d 1017 (D. Minn. 2010)(categorical)(pedestrian trail)(railroad won)
- *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011)(both categorical and as applied but decided on as applied basis)(involving transit agency condemnation of rail right of way even though already leased by agency)(railroad won)
- *Illinois State Toll Highway Authority-Petition for Declaratory Order*, FD 36075, Jan. 17, 2017 (pending case involving condemnation of rail yard for highway construction)

# Condemnation

- *Adrian & Blissfield-Petition for Declaratory Relief*, FD 36148, Jan. 31, 2018 (STB deferred to court, as applied standard).
- *City of Lincoln, Maumee* and *Eastern Alabama Railway* cases discussed below.

# Condemnation of Rail Lines

- **So what is the standard?** “Routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.”  
*Maumee & Western Railroad Corporation And RMW Ventures, LLC- Petition For Declaratory Order, FD 34354 (STB-served March 3, 2004).*
- Condemned rights must not interfere with the target carrier’s ability to provide rail service including right of way maintenance and possible expansion needs.
- To test if condemnation permissible, you will likely end up at the STB in a declaratory order proceeding with railroad opposition.

# Condemnation of Rail Lines

Examples of successful condemnations:

- Easement for road crossing and subsurface utilities. *Maumee & Western*, FD 34354 (STB-served March 3, 2004)(railroad lost)
- Easement for underground sewer line. *Eastern Alabama Railway, LLC-Petition for Declaratory Order*, FD 35583 (STB-served Feb. 22, 2012)(railroad lost)

# Condemnation of Rail Lines

Examples of unsuccessful condemnations:

- A 20' wide five block long easement along right of way for a pedestrian/bike trail and storm drainage improvements. *City of Lincoln Petition for Declaratory Relief*, FD 34425 (STB-served Dec. 8, 2003)(railroad won the first time).
- A parcel of railroad property for use as a public park in Birmingham, AL. *Norfolk Southern Railway Company Petition for A Declaratory Order*, FD 35196 (STB-served March 1, 2010)(railroad won).

# Condemnation of Rail Lines

- Re-installation of a road across 4 active tracks that was removed over 15 years previously. *City of Ozark – Petition for Declaratory Order*, FD 36014 (STB-served July 28, 2017, reconsideration denied Dec. 8, 2017).
- Installation of a road across active interchange tracks at the proposed location. *Wichita Terminal Assn. – Petition for Declaratory Order*, FD 35765 (STB-served June 23, 2015) (noting that it would be reasonable for state court to find that crossing at a different location would not unreasonably interfere with rail operations).

# Condemnation of Rail Lines

Some factors to consider in determining impact on railroad operations:

- Distinguish between *latitudinal* (typically utility line crossings, grade crossings, etc.) and *longitudinal* crossings.
- Distinguish between (permanent) *easements* and *licenses* or *leases*. See discussion in *Soo Line* and *Chicago Transit Authority v. UP* cases.

# Options for State or Local Officials

- State and local government can use their “police powers” to protect public health and safety but state or local actions must not be discriminatory.
- Railroads can be required to meet with local officials and interested parties, share site plans, etc.
- Permissible are reasonable compliance with codes involving fire, electrical, plumbing, and safety but must not be subjective or unduly delay projects. And the requirements must be readily available and easy to understand.

# Options for State or Local Officials

- First, confirm that line is within federal system of railroads.
- State or local agencies can enforce prior railroad commitments to abide by governmental requirements. *Town of Woodbridge v. Consolidated Rail Corporation*, FD 42053 (STB-served March 23, 2001).
- Property rights disputes belong in local or state courts. *Allegheny Railroad Company Petition for Declaratory Order*, FD 35388 (STB-served April 25, 2011).
- Once a line is fully abandoned it is subject to state and local law including as to damage caused by salvage. *Buddy and Holly Hatcher-Petition for Declaratory Order*, FD 35581 (STB-served Sept. 21, 2012).

# Options for State or Local Officials

Federal environmental laws are not preempted unless applied unreasonably. Where there are overlapping Federal statutes, they are to be harmonized, with each statute given effect to the extent possible. This includes Federal environmental statutory programs that are implemented in part by the states, including the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act as amended by Resource Conservation and Recovery Act, and the regulation of railroad safety under the Federal Rail Safety Act.

# California Rail Projects Face Legal Challenges

- Opponents have used environmental review laws to delay and obstruct rail projects in California
- Two major projects affected:
  - California High-Speed Rail Authority (statewide project)
  - North Coast Railroad Authority (Northern CA coast)
- STB rulings support pre-emption for interstate rail projects:
  - *Desert Express Enterprises* (FD 34914)
  - *CA High Speed Rail* (FD 35724)
- No preemption for intrastate - PCJPB (FD 35929)
- State Court rulings find bases for avoiding preemption, due to unique role of state agency acting in its proprietary capacity

# CA High Speed Rail Case: *Town of Atherton v. CAHSA* (2014) 228 Cal.App.4th 314

- Project opponents filed a series of legal challenges under the California Environmental Quality Act (CEQA), the state environmental review statute, causing delays
- For the first time, on appeal, CAHSRA raised claim that federal law preempts citizen suits to enforce CEQA, citing STB ruling it had sought
- Appeals court finds for challengers, ruling that “market participant” exception to federal preemption applied, as here state was acting as a market participant and not a regulator

# ***Friends of the Eel River v. NCRA (2017)***

## **3 Cal.5th 677**

- Local agency formed under state law sought to repair rail line for use by private railroad operator
- Environmental groups, concerned about potential impacts to sensitive river habitat, filed a challenge regarding NCRA's approval of a CEQA document for a project to rehabilitate the line, which had fallen into disrepair
- NCRA then rescinded its adoption of the CEQA document, claiming its project was exempt from CEQA per ICCTA and environmental groups sued
- After trial and appellate courts ruled for NCRA, the California Supreme Court took case for review

## ***Friends of the Eel River (cont'd)***

- After noting that NCRA had agreed to comply with CEQA as part of grant conditions for earlier projects, Court found no preemption, on the basis that state court rulings with regard to a subsidiary state agency were an exercise in “self-government,” which would not be subject to preemption unless the Congressional intent to preempt was clearly stated.
- Although it did not fully reject the “market participant” theory from *Atherton*, the court did not find it to be “fully on point.”
- Court also found that injunctive CEQA action to stop private firm from operating on the line would be preempted.
- Private firm unsuccessfully sought SCOTUS review, claiming its operations were impaired without the NCRA improvements.

# Franchises

- Franchises are rights to use public facilities, often including streets, and are often involved in rail crossings
- 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

City attempted to enforce state rule regulating blockage of grade crossings via criminal action, but rule found to be preempted.

# Crossing Safety

- At 55 mph, a train can take one mile to stop
- In order to be effective, the focus of safety measures must be on controlling cars and trucks, not stopping trains

# 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 the best safety device available
- Neighbors don't appreciate the horn noise

# The Horn Problem

- Horns are loud (>96 db)
- Horns are sounded about  $\frac{1}{4}$  mile from crossing
- (=15 second warning @ 60mph)
- Horns are sounded even when cross traffic is not visible, and at night

# Localities React to Noisy Horns

- Citizens press for action
- Localities attempt to ban train horns via local ordinances
- Railroads object on safety/liability grounds and turn to federal agencies for help, citing preemption

# Federal Action Needed to Control 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?”
- Federal law controls over local ordinances attempting to regulate horn use

# Congress Acts: PL 103-440

## 49 U.S.C. §20153

- 1994 statute required DOT to issue regulations requiring that train horns be sounded at public crossings
- But statute allows FRA to grant exemptions via a formal rulemaking process
- Such federal regulations will pre-empt non-compliant local bans
- Final Rule Codified at 49 CFR §222 and §229

# 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
- Some zones can be created simply by action by the local “public authority” following procedures outlined in the Quiet Zone Rule
- Other zones, which can’t meet the standards in the rule, require further federal review

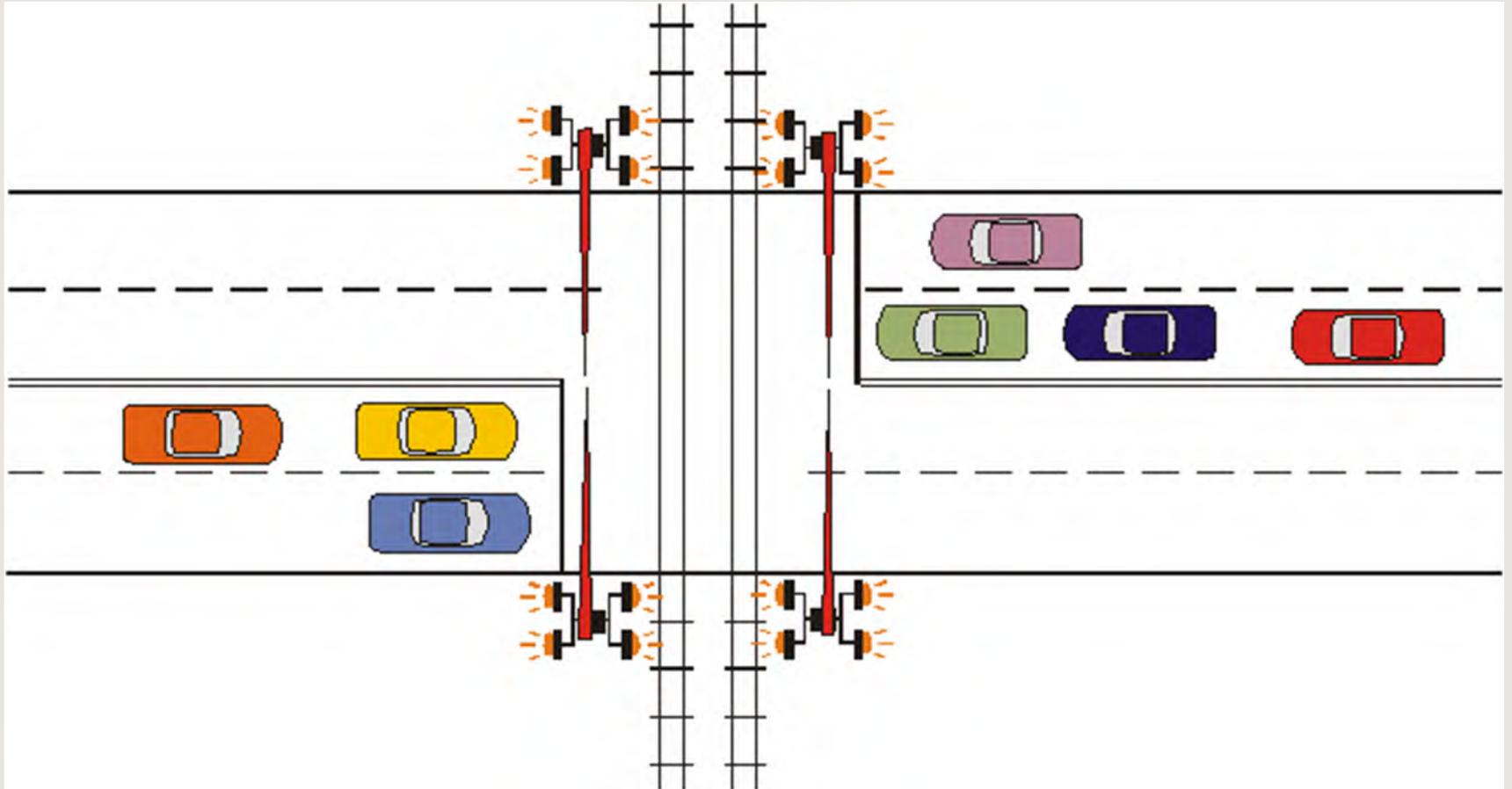
# Basic Requirements for a Quiet Zone

- Must be at least ½ mile long
- All crossings in zone must have:
  - Flashing lights
  - Crossing gates
  - Signs re: absence of horns
  - Power out indicators
  - Constant warning time devices (if practical)

# FRA Approval Requirements

- No FRA approval is required if:
  - Supplemental Safety Measures (SSM's) are in place at each crossing
  - SSM's include measures that effectively block traffic:
    - 4 quadrant gates
    - 2 quadrant gates with median strip
    - One way traffic with gates

# Four Quadrant Gates



# Alternate Safety Measures

- For crossings that don't or can't use SSM's, Alternative Safety Measures (ASMs) can be used:
- Use of ASMs requires FRA approval
- Involve measures that don't qualify as SSM's
- Key Policy Feature: OK to use "corridor approach" to average risks within quiet zone
- A mix of measures can be used to reduce risk level below risk if horn was present

# Implementation 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, unless you can get the railroad to chip in)
- Potential sources of funding:
  - Assessment Districts
  - Developer Mitigation Fees
  - Grants
  - Bond Proceeds
  - Tax Revenues

# Railroad Concerns

Railroads are concerned with safety, but often view crossings as city issue:

- Railroads primary focus is on freight movements
- Railroads have other capital priorities for their \$\$\$
- Liability issues are of concern
- Freight railroads have little incentive to fund crossing improvements to facilitate establishment of quiet zones

# 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)

# More Information



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