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The Local Regulation of Interstate Railroads: What Part of "Plenary" Don't You Understand?

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I. PREFACE

The intent of this paper is to try to demystify some of the unusual issues that municipal attorneys encounter in trying to understand the railroad industry and the federal regulatory scheme that controls it. Since many of these matters derive from the history of railroads and the agencies that regulate them, it will be useful to take a short historical journey so that what appear today to be incomprehensible legal anomalies can be understood as part of a once more-robust system of economic regulation. This will not only make these concepts easier to work with, but will provide some handy insights into possible sources of information and guidance in dealing with railroads in both the transactional and litigation setting. Of course, this review will be made much more interesting due to the fascinating history of railroads in America, particularly in light of their particular influence upon the political and historical development of this great state of California.

II. REGULATORY OVERVIEW

A. Railroads, America's First Regulated Industry

1. The Role of Railroads

In many ways, the history of railroads in America parallels our nation's territorial and economic development. From their role in providing supplies to the combatants during the Civil War to the linking of our two coasts in the 1880's, the railroads quickly overtook water-borne cargo vessels as a means of transportation and communication, only to be themselves overtaken in the mid-20th century by trucks and highways. Railroads have thus passed through a number of boom and bust cycles, and are now seeing a resurgence as the country's demand for imported goods draws ever-increasing numbers of shipping containers to our ports[1], requiring prompt movement to the interior of the country, a natural task for the railroad.

This recent boom in rail shipments has exacerbated the sometimes tenuous relationship that freight railroads have had with the localities through which they pass, as the noise and congestion they can cause become more obvious in our increasingly dense urban areas. At the same time, concerns with traffic congestion and global warming have sparked renewed interest in passenger rail service and potential high-speed rail systems, which have been successful in Europe and Asia. As policy initiatives promote transit-oriented and infill development, the location and development of rail facilities takes on an even greater significance, which makes an understanding of the railroad regulatory environment ever more necessary for many municipal law practitioners.

2. The Power of Railroads

In the process of stimulating and supporting economic growth, and as a side-effect of their tremendous financial and physical impact on the nation, railroads have triggered a variety of legal and governmental responses. Through generous land grants and franchise arrangements, governments encouraged railroad development, seeking the significant economic benefits that railroad service would bring. Railroads were given large tracts of land (in the West, these were often in a checkerboard pattern of alternate

[1] "New Era Dawns for Rail Building," Wall Street Journal, February 13, 2008, p.1.

sections) and even provided with outright financial subsidies to construct new lines. As the transportation of goods by railroad became more vital to commerce and the railroads began to exert a monopolistic stranglehold on the nation's economy, legislative action was demanded to control abuses and protect shippers from unfair treatment by the railroads. Railroads were viewed, particularly by farmers in the West, as charging discriminatory rates and favoring certain interests above others. Railroads were also perceived, with significant justification in California, as exerting a corrupting force on state and local governments through their exercise of unbridled influence and participation in outright corruption.[2] In California, the Central Pacific and Southern Pacific Railroads, and the "Big Four" who controlled them, exercised significant influence over the state government, to the extent of even personally filling positions of leadership. This influence eventually prompted the institution of progressive political structures, such as the initiative and referendum, to preserve the ability of the people to control their own government.

3. Interstate Commerce Act of 1887

Concerns regarding the rate practices of railroads and their impacts on commerce on a national level lead Congress to create, in 1887, the Interstate Commerce Commission (ICC), the first independent regulatory agency in our nation's history. The initial purpose of the ICC was to restrict rate discrimination (the practice of giving one shipper preferential rates over others) and provide some rate stability to shippers and railroads. As might be expected with an initial foray into economic regulation, the ICC required several legislative fixes to effectively accomplish its purpose.

4. Esch-Cummins Transportation Act of 1920

The demands of World War I led President Woodrow Wilson to nationalize the nation's rail system. Following the war, as control of the nation's rail system was returned to private industry, Congress acted to revise further the scope of federal regulation of the again privately-held railroads. With the Esch-Cummins Transportation Act of 1920, (P.L. 66-152, 41 Stat. 456), the ICC was charged with setting minimum rates and controlling the extension and abandonment of routes. This began the policy of requiring "cross-subsidization" of routes, a practice that required a railroad to use the profits generated from one route to cover losses from other routes. That practice helped ensure that more areas of the country would continue to have rail access, but also bred inefficiencies in railroad service. These inefficiencies would, in the 1970's, ultimately threaten the economic viability of the nation's large rail carriers and lead to the "deregulation" policies of that decade and the decades to follow. This policy also cemented the regulatory structure under which the railroads have a "common carrier" obligation to provide freight service over all of their "active" rail lines and must seek federal authority to "abandon," or halt, service to particular lines before actually terminating such service. The presence of this regulatory arrangement is particularly relevant to the ability of local governments to control rail properties.

[2] California law contains a number of provisions aimed at limiting the influence of railroads on government, including the prohibition on elected officials accepting free travel under penalty of forfeiture of office. (*See* Art. XII, § 7 Cal.Const.)

5. ICC Termination Act of 1995

Although there have been numerous changes to the role of the ICC over the years, including the expansion of its control to the trucking, bus and water transport industries, the increasing desire to "deregulate" the rail and trucking industries lead to the Interstate Commerce Commission Termination Act of 1995 (ICCTA). The ICCTA replaced the ICC with an administrative agency, the Surface Transportation Board, which operates under the control of the federal Department of Transportation. The STB focuses largely on the regulation of mergers and rail line extensions and abandonments, although it still exercises some rate-setting functions. However, with the adoption of the ICCTA, Congress also solidified the broad scope of federal control of the rail industry, thereby preempting many areas in which state and local governments might attempt to exercise control over railroads. Thus, while the federal government is reducing its control of railroad operations, it is also making sure that other levels of government do not interfere with the ability of railroads to function efficiently.

6. Overview of Railroad Regulatory Agencies

a. Surface Transportation Board

As stated above, the Surface Transportation Board, a three-member panel administered by the Department of Transportation, now regulates the economic affairs of the nation's interstate railroads. In keeping with the concept of deregulation, many of its procedures are fairly streamlined, with the aim of allowing the rail industry to function with a minimum of oversight of their business practices. This approach began in reaction to the insolvency of several of the major East Coast carriers in the 1970's, which lead to the Railroad Revitalization and Regulatory Reform Act (the "4R Act") of 1976 (P.L. 94-210; codified at 45 USC 801 et seq.), followed by the Staggers Rail Act in 1980 (P.L. 96-448) (which allowed railroads to abandon service on uneconomic routes) and eventually to the adoption of the ICCTA. The STB's main focus is in making sure that mergers and other reorganizations do not unduly affect the interests of shippers.

b. Federal Railroad Administration

The Federal Railroad Administration (FRA) was created by the Department of Transportation Act of 1966 (P.L. 89-670, 80 Stat. 931). The FRA establishes and enforces safety standards for the rail industry. According to its website, its purpose is to "promulgate and enforce rail safety regulations; administer railroad assistance programs; conduct research and development in support of improved railroad safety and national rail transportation policy; provide for the rehabilitation of Northeast Corridor rail passenger service; and consolidate government support of rail transportation activities." Working in conjunction with state regulatory agencies, such as the California Public Utilities Commission, the FRA attempts to ensure that the national railroad system is operated in a safe and efficient manner. It recently adopted a Final Rule, discussed below, which allows localities to ban the sounding of train horns within "quiet zones."

c. California Public Utilities Commission

Initially formed as the "Railroad Commission" through an amendment to the State Constitution in 1911, and later renamed in 1946, the California Public Utilities Commission (CPUC) serves the public interest by protecting consumers and ensuring

the provision of safe, reliable utility service and infrastructure at reasonable rates, with a commitment to environmental enhancement and a healthy California economy. With regard to railroads, it exercises "safety jurisdiction" over railroad/highway crossings and railroad operations in general, except when such regulations are preempted by federal control.

B. Basis of Federal Jurisdiction

1. Commerce Clause

Pursuant to Article I, Section 8, Clause 3 of the U.S. Constitution, Congress is granted the power to "regulate commerce with foreign nations, and among the several states . . . ." While the Commerce Clause, particularly through the New Deal era, served as the basis for the extension of the federal government's role into many aspects of daily life, its most fundamental aim is to promote trade and commerce by allowing Congress to exert control over interstate commerce. By means of the Supremacy Clause (Article VI, Clause 2), this authority supersedes any rights of the states or local governments to control interstate commerce.

C. Need for Federal Uniformity

The need for uniform treatment of interstate carriers has been stated this way by the U.S. Supreme Court:

> The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. 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 Interstate Commerce Commission or with congressional policy as reflected in the Act. These state regulations have taken many forms. . . The common rationale of these cases is easily stated: "[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." Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co. (1981) 450 U.S. 311, 318-9. [Emphasis added.]

III. REGULATION OF RAIL LINE OWNERSHIP/OPERATION

A. Federal System of Railroads

1. Status of Rail Lines: Active/Discontinued/Abandoned

As discussed above, a key aspect of the federal regulatory system is the control of the acquisition and disposition of rail lines. "The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." (Id. at 321.) There are essentially three categories of such lines: active, discontinued and abandoned. Active lines are those rail lines that are within

federal jurisdiction and whose operators therefore have an affirmative obligation to provide common carrier freight service to shippers located on that line. If a line is either uneconomic to operate or subject to some other physical restriction that prevents operation, it may be placed in "discontinued" status, in which means its owner is still within the jurisdiction of the STB, but does not have an obligation to provide freight service. (*See* 49 CFR 1152.) The final category is "abandoned" which means the line is no longer in the federal regulatory system. Care should be taken not to confuse the term of art "abandoned," when used in the context of rail line regulation, with the abandonment of easement interests under real property law. Each state has its own law for determining the abandonment of easements. While a formal STB abandonment may indicate an intention to stop using an easement interest, under California law normally more is required to effect a legal abandonment of the interest, such as the removal of tracks and ties. (*See* Cal. Civil Code Section 887.050.)

When a railroad is seeking to abandon a line, it must file a proceeding with the STB, which conducts a thorough environmental and historical review to determine how such resources would be affected by the abandonment. This review, required under the National Environmental Policy Act and the National Historic Preservation Act, is conducted by STB staff, pursuant to regulations published at 49 CFR Part 1105. One other feature of the abandonment process is the requirement that the railroad accept "offers of financial assistance" from shippers or third parties who wish to subsidize service in order to keep the line open. The procedures for such offers appear at 49 CFR 1152.27. If a local government desires to force the abandonment of a line against the wishes of a railroad, it may file a request with the STB for an "adverse abandonment." (*See* Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket 34090, decided November 7, 2001.)

Lines eligible for abandonment are often the subject of proposals seeking to preserve the rights-of-way by "rail-banking" them for potential future service while allowing the community to use the lines in the interim for recreational trail purposes. Procedures for state and local government to participate in such matters are found at 49 CFR 1152.29. A group active in promoting the reuse of inactive rail lines is the Rails to Trails Conservancy (http://www.railstrails.org/index.html). A federal statute, the Rails-to-Trails Act (16 USC § 1247(d)) permitted railroads to hand lines over for trail use while purporting to preserve their property interests, but a number of claims have been filed on behalf of the holders of adjacent properties claiming reversionary property interests to the land underlying these easements. They have claimed that the termination of rail service and the removal of the tracks and ties triggers an abandonment of the easement interest under state real property law and that the continued use of the line by government agencies constitutes a taking. (*See* Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995), rev'd. Preseault v. United States, 100 F.3d 1525, 1530 (Fed. Cir. 1996).

2. Jurisdiction over Spurs/Sidetracks

One area of concern for local agencies is the control of spurs and sidetracks. These fall into a "gray" area, since they are clearly within the STB's jurisdiction under 49 USC 10501 (which is discussed in more detail below), but their use or abandonment is exempt from any prior approval requirement under 49 USC 10906.

IV. LOCAL REGULATORY ISSUES

Given the "pervasive and comprehensive" nature of federal control, it is not surprising that many efforts by municipalities to exert control over railroads have been less than successful. "One court noted that 'it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations.' CSX Transp., Inc. v. Georgia Public Service Comm., 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Indeed, the language is 'clear and broad,' and it is apparent that the 'ICCTA has preempted all state efforts to regulate rail transportation.' Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000)." Guckenberg v. Wisconsin Central Ltd. and Fox Valley & Western Ltd., 178 F.Supp.2d 954, 958 (E.D. Wisc., 2001)

Perhaps the leading case in this regard is the Ninth Circuit's decision in City of Auburn v. Surface Transportation Board 154 F.3d 1025 (9th Cir. 1998), in which the court considered a city's appeal from an STB decision to permit a railroad to acquire and operate a rail line. In the appeal, the city argued that the intent of the ICCTA was only to preempt economic regulation by local government, while permitting local government to exercise local land use and environmental regulation. In rejecting that argument, the court found that "the congressional intent to preempt . . . state and local regulations of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it." (Id. at 1031.)

Challenges to local regulations often occur in the course of litigation filed by cities in state court, which railroads then remove to federal court, where they convince judges to refer the matter to the STB due to the court's lack of jurisdiction over the matter. Despite the seemingly comprehensive preemptive sweep of the ICCTA, there nevertheless remain some areas where Congress has not indicated a need to control specific aspects of rail operations: "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for Declaratory Order (STB Finance Docket 34354, served March 2, 2004) These specific powers will be noted in the following discussion of a variety of issues that have arisen between cities and railroads.

A. Local Control over the Construction and Operation of Rail Lines and Facilities

With regard to almost all other potential projects that may be developed within a city's limits (other than those of some governmental agencies protected by intergovernmental immunity), a city would normally have legal authority to exercise the land use, environmental and building regulation under its police powers. However, that power does not necessarily extend to the approval of the construction of rail lines and facilities. Under 49 USC 10501(b)(2), the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks and facilities, even if the tracks are located, or intended to be located entirely in one State." Citing the language of 10501(b), another court stated "[I]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." (Friends of the Aquifer et al. (STB Finance Docket No. 33966, served August 15, 2001.)

In one STB decision, Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA (STB Finance Docket No. 33971, served May 1, 2001) the STB explained that "Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations." The STB went on to explain the range of local issues affected by this preemption:

> Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. *See* Stampede Pass, [2 ICC 2d 330]; City of Auburn, 154 F.3d at 1029-31. [¶] As the courts also have found in addressing the scope of section 10501(b), zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations. Austell [Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997)]; Ridgefield Park [Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000)]. Moreover, in Ridgefield Park the court found that section 10501(b) precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility because to do so would infringe on the Board's exclusive jurisdiction over the location and operation of railroad facilities.

The STB then sought to explain the limited range in which local control was permissible:

> This does not mean that all state and local regulations that affect railroads are preempted. As we stated in Stampede Pass, 2 S.T.B. at 337-38, and Riverdale I [Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999)], state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally is not preempted. Id. at 8-9; Flynn [Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000)], While a locality can not require permits prior to construction, the courts have found that a railroad can be required to notify the local government when it is undertaking an activity for which another entity would require a permit and to furnish its site plan to the local government. Ridgefield Park. [750 A.2d 57.]

After noting that cities may enforce a voluntary agreement of a railroad[3], the Board noted the potential application of federal environmental regulations:

> Finally, nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the SDWA. *See* Stampede Pass, 2 I.C.C.2d at 337 & n.14; Riverdale I at 7.26 Thus, the lack of a specific environmental remedy at the Board or under state and local laws (as to construction projects such as this, over which the Board lacks licensing power) does not mean that there are no environmental remedies under other Federal laws. [¶]Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

A similar explanation of permissible local control was provided by the STB in Stampede Pass:

> [E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

[3] "Furthermore, a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments, and "voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." Township of Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc., STB Finance Docket No. 42053 (STB served Dec. 1, 2000), at 5 (Woodbridge)."

Another example of permissible local regulation was noted in Rushing v. Kansas City Southern Railway Company (S.D. Miss. 2001) 194 F.Supp.2d 493, in which a federal court, acting in a case removed from state court that featured complaints of noise, vibrations and water runoff from a rail facility, dismissed the causes of action relating to the noise and vibration, but found that the claim regarding the runoff of rainwater was not preempted by the ICCTA. An further example is the Ridgefield Park case, in which the New Jersey Supreme Court found that a locality could require compliance with local fire, health, plumbing and other codes, but could not require approval of site plan as a condition of continued operation of the facility. The court specifically noted that the railroad was exempt from all local zoning controls. (750 A.2d 57 (2000)) In reaching this decision, the court relied upon the STB's ruling in Borough of Riverdale--Petition for Declaratory Order (4 S.T.B. 380, STB Finance Docket 33466, served September 10, 1999).

B. Nuisances

Actions to restrict railroads under state nuisance law are treated similarly to other attempts at local regulation. In Guckenberg v. Wisconsin Central Ltd. And Fox Valley & Western Ltd., 178 F.Supp.2d 954 (E.D. Wisc., 2001) a state court suit, which featured a claim that railway traffic near a couple's home constituted a nuisance, was removed to federal court, where the court granted summary judgment to the railroad based upon preemption under the ICCTA. The Guckenberg court went on to note similar rulings:

> This conclusion is supported by the applicable case law. In Friberg v. Kansas City Southern Railway Company, 267 F.3d 439 (5th Cir. 2001), plaintiffs brought a complaint alleging negligence and negligence per se in the defendants' operation of a side track. The district court denied the defendants' motion for summary judgment, but the Fifth Circuit reversed, holding as follows:
>
> > The language of the statute could not be more precise, and it is beyond peradventure that regulation of [the defendant's] train operations, as well as the construction and operation of the . . . side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides [**11] otherwise. The regulation [*959] of railroads has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort. Friberg, 267 F.3d at 443.
>
> Accordingly, the Friberg court dismissed the plaintiffs' common law causes of action because they were preempted by the ICCTA. In Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp., 163 N.J. 446, 750 A.2d 57 (N.J. 2000), the Supreme Court of New Jersey dismissed a nuisance claim, holding that "our courts cannot adjudicate common law nuisance claims against the Railroad because to do so would infringe on the STB's exclusive jurisdiction over the location and operations of railroad facilities." Village of Ridgefield, 750 A.2d at 67.

(178 F.Supp.2d at 958-9.)

C. Condemnation of Railroad Property

Localities seeking to acquire rail properties have also run into the issue of preemption. In Wisconsin Central Ltd. v. City of Marshfield 160 F.Supp.2d 1009 (W.D. Wisc. 2000), the court found that a city's attempt to acquire railroad land containing a passing track for a highway realignment was preempted by the ICCTA. (*See also* Commonwealth of Mass. v. Bartlett, 384 F.2d 819 (1st Cir. 1967), cert. denied 390 U.S. 1003; In re Metropolitan Transp. Auth. 32 A. 2d 943 (2006).) However, courts have also held that land that is owned by railroads but that does not constitute a "facility" under that definition in the ICCTA could be condemned. Union Pacific Railroad Co. v. State ex rel. Corp. Comm'n., (1999) 1999 Ok Civ. App. 99, 990 P.2d 328.

D. Franchises

Many railroads obtain franchises from local governments in order to cross or operate within public streets. A recent STB ruling involving a UP line in Salt Lake City, UT, provided that body's general views of how issues regarding franchise-related matters should be handled:

> [I]t is well settled that, without abandonment authority from the Board, a state or local order, regulation or civil enforcement action that would sever a line of railroad or prevent operation over it is precluded. *See* 49 U.S.C. 10501(b), 10903.
>
> Congress gave the Board exclusive and plenary authority over rail line abandonments, and Board authority is required before a railroad line can be lawfully abandoned. [Citations.] The courts have been clear that "[a]bsent . . . valid . . . abandonment [authority] . . . a state may not require a railroad to cease operations over a right-of-way." [Citations.] Thus, any party seeking the abandonment of a line of railroad, or discontinuance of rail service, must first obtain appropriate authority from the Board. [Citation.]
>
> The City's actions are admittedly to prevent reactivation of, [fn] and operation over, the Line. The City argues that the Franchise Agreement allows it to terminate UP's franchise rights with respect to the right-of-way and require UP to remove its tracks. Yet, even 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. [fn] The Board and the courts have consistently held that such local regulation is precluded. In *New Orleans Terminal*, 366 F.2d at 163-64, the court found unenforceable a Parish ordinance directing the Parish attorney to take action, by suit, or otherwise to compel the removal of rail street crossings. Similarly, in *Des Moines v. Chicago & N.W. R. Co.,* 264 F.2d 454, 457-60 (8th Cir. 1959), the court found that the city could not, by suit, oust a railroad from use of city streets upon "forfeiture" of a "grant" and "contract" without abandonment authority.

> In short, the abandonment of a line of railroad may occur only if authorized by the Board. *See* 49 U.S.C. 10903; 49 CFR 1152.

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

V. CROSSINGS

A. Crossings are a Safety Issue

The primary public concern at railroad crossings is safety. According to Operation Lifesaver (www.oli.org) , an industry group dedicated to reducing automobile/pedestrian/railroad collisions:

> -Approximately every two hours in the United States, either a vehicle or a pedestrian is involved in a collision with a train.
>
> -Nearly 50 percent of vehicle/train collisions occur at crossings with active warning devices (gates, lights, and/or bells).
>
> -A motorist is 20 times more likely to die in a crash involving a train than in a collision involving another motor vehicle.
>
> -On average, more people die in highway-rail grade crossing crashes in the United States each year than in all commercial and general aviation crashes combined.
>
> -Trains cannot stop quickly. The average train traveling at 55 mph takes a mile or more to stop. That's 18 football fields.

B. Types of Highway/Railroad Crossings

Highway/railroad crossings are regulated on the state level; in California, this is handled by the California Public Utilities Commission pursuant to Section 1201 et seq. of the Public Utilities Code. Under section 1201: "No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade . . . without having first secured the permission of the commission." According to the PUC, there are three types of crossings, public crossings (ones for public streets that have received the permission of the PUC), private crossings, which do not involve public roadways and are not regulated by the PUC, and a third category, "publicly-used crossings" which exist on private property but are used by the public. This third category is disfavored by the PUC due to the potential for the public to be injured at an unregulated crossing.

C. Use of Train Horns

A commonly-used safety appliance for rail operations is the train horn, which is customarily sounded at each railroad grade crossing. Although often lyrically cited in literature and song, train horns are extremely loud (100 db+) and disruptive not only at the intersections at which they are blown, but some distance on each side, where they

are sounded to provide the proper temporal warning prior to the train's arrival at the crossing. This distance increases depending upon the speed of the train. In many communities, particularly those with intermittent rail service, attempts have been made to limit or prevent railroads from sounding train horns at intersections by establishing "quiet zones." Quiet zones are segments of rail lines in which railroads are prohibited from routinely sounding rail horns at rail/roadway grade crossings.

D. Establishment of Quiet Zones

A recent federal law (Public Law 103–440, which added section 20153 to title 49 of the United States Code), required the Secretary of Transportation (whose authority in this area has been delegated to the Federal Railroad Administrator under 49 CFR 1.49) to issue regulations that require the use of locomotive horns at public grade crossings, but granted authority that would allow for exceptions to that rule, including the creation of quiet zones under certain circumstances. Under a Final Rule issued on April 27, 2005, the Federal Railroad Administration (FRA) adopted a regulation which sets forth a process by which localities can implement quiet zones on segments of rail lines under their jurisdiction. (70 FR 21844, amended at 71 FR 47614; codified at 49 CFR Parts 222 and 229.)

1. Supplemental Safety Measures

Under certain circumstances, it allows local authorities who regulate streets (such as cities or counties generally) to implement a quiet zone without obtaining the approval of the FRA or the rail operators using the line. For example, if certain specified safety measures (termed "Supplementary Safety Measures" or "SSM's") are implemented on all crossings on a segment, the locality only needs to provide a notice to the FRA and affected railroads. The pre-approved SSM's are measures that have been proven to be effective in preventing or limiting collisions, such as four-quadrant gates, gates with medians or channelization devices that prevent cars from driving around the gates, one-way streets with gates or the complete closure of a grade crossing. All warning signals at such crossings are also required to have certain other features, such as constant warning time devices and power-out indicators. The FRA concluded that these combined measures largely eliminate the chances that a collision could occur, thereby minimizing the impact of the horn ban upon safety. Thus, if a proposed quiet zone contains crossings featuring SSM's throughout, then it can be implemented by action of the locality. Moreover, if a proposed quiet zone has such a low risk of collisions (termed the "Quiet Zone Risk Index") that it is below a national standard (the "Nationwide Significant Risk Threshold") through the implementation of SSM's [at some intersections], then a quiet zone can also be established without FRA approval.

The federal rule is silent with regard to any process for force railroads to comply with requests of localities to implement quiet zones. Thus, at least as far as the FRA is concerned, it appears feasible and permissible for railroads to block quiet zones. Moreover, the rulemakers flatly refused to prohibit railroads from requiring indemnity agreements as a condition of allowing quiet zones to proceed. Therefore, railroads' demands for indemnity protection may serve as an impediment to localities interested in establishing quiet zones.

2. Alternate Safety Measures

In those instances in which it is not feasible to utilize SSM's, the regulations permit localities to apply for FRA approval of a quiet zone that uses other types of safety measures, which are deemed "Alternative Supplementary Measures" or "ASM's." ASM's include measures that would qualify as SSM's but are not fully compliant (such as medians where there is insufficient distance from an adjacent intersection to qualify). Other ASM's include an enforcement program for violators, public education programs, etc. For potential quiet zones that do not feature SSM's at all crossings, the FRA has adopted an innovative system of risk analysis that utilizes mathematical formulas to determine if these alternative measures, when applied to a crossing with particular traffic patterns, creates a crossing that is as safe as it would have been if horn sounding was required. This process does require the approval of the FRA and allows the affected rail carriers to participate in such a proceeding. Although some of the ASM's can be implemented without railroad cooperation, the railroad can nevertheless participate in the FRA proceeding to consider the approval of any quiet zone that features ASM's. There is a very complicated formula that applies to these situations.

E. Legal Issues Relating to Quiet Zones

Although the procedures for establishing quiet zones are clearly laid out in the regulations, all of the issues related to this process were not addressed by the Final Rule. For example, the rulemakers purposely chose to remain silent on the issue of liability. By permitting the elimination of a time-tested safety measure, the Final Rule was certain to raise concerns regarding liability. These concerns were clearly stated in the comments submitted on the Interim Rule. However, in the Final Rule the FRA held that the mere failure to sound the horn would not be the basis for a finding of liability. By so stating, the FRA essentially dismissed the concerns of both localities and the railroad industry, stating:

> FRA does not expect that future lawsuits will not arise over accidents within quiet zones, as such lawsuits may be due to factors other than the lack of an audible warning. However, this final rule is intended to remove failure to sound the horn, failure to require horn sounding, and prohibitions on sounding of the horn, at grade crossings located within duly established quiet zones, as potential causes of action. We expect that courts, following Norfolk Southern v. Shanklin, 529 U.S. 344 (2000) and CSX v. Easterwood, 507 U.S. 658 (1993), will conclude that this regulation substantially subsumes the subject matter of locomotive horn sounding at highway-rail grade crossings, as well as at private grade and pedestrian crossings that are located within a quiet zone. As a result, a federal standard of care defined by this rule will replace the standard of care that would otherwise apply at highway rail grade crossings in each State, with the exception of those highway-rail grade crossings described in section 222.3(c). (Since the rule does not apply to the highway-rail grade crossings described in section 222.3(c), the standard of care required under State law will continue to apply at those crossings.) Local governments and railroads will benefit equally from the federal standard of care.