

# Railroad Law 101

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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



# 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



# ICCTA PREEMPTION – 49 USC 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.

# A Preemption Overview

- Generally Courts have classified preemption as
  - ✓ **Express:** The statute specifically contains preemption language such as 49 USC 10501(b).
  - ✓ **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.

# 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).

# STB's view of preemption

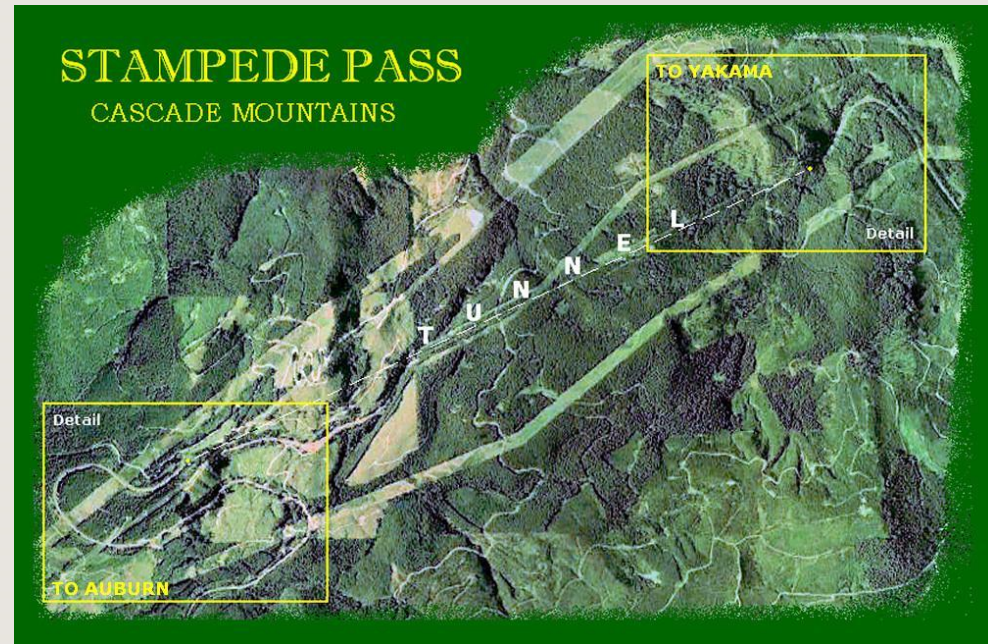
- The STB typically analyzes a preemption claims as either **categorical** in which conflicting regulation is per se prohibited or **as applied** requiring a detailed factual analysis. See discussion in *Thomas Tibbs, et al – Petition for Declaratory Order*, FD 35792, served 10/31/2014 (damage suit for 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.

# ***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 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)***

*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.

# Who Can Claim Preemption?

- The activity must constitute transportation by an STB-licensed rail carrier. *Tri-State Brick and Stone Petition for Declaratory Order*, FD 34824 (STB served Dec. 11, 2007). See discussion at slide 32 about activities facilitating transportation.
- 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.

# 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, *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 Grasso –Petition for Declaratory Order*, FD 35652, 7/31/2017 (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 transportation).
- Car storage.
- Solid Waste, contaminated dirt, and construction and demolition debris (“C&D”) unless moving in original sealed containers.

# Does Not Cover, con't

- “Public transportation” (by rail) provided by a “local government authority” – i.e., Public Transit – is generally outside the jurisdiction of the STB, and generally not eligible for preemption. 49 USC 10501(c)(2); *Peninsula Corridor Joint Powers Board-Petition for Declaratory Order*, FD 35929 (STB-served July 2, 2015).



# Then why worry about preemption?

- Shared rights of way with freight railroad.
- Shared tracks with freight railroad.
- Crossings between transit rail and freight rail lines.
- Desire or need for additional property owned by freight railroad.

# Connected to the freight network, for better -

- Preemption for construction of improvements that will benefit freight railroad as well as transit – exemption from local and state regulations (including environmental).
  - Construction of passing siding by agency / owner of right of way and tracks with freight easement. *North San Diego Transit Board*, FD 34111 (STB- served August 21, 2002)(preemption applies because improvements benefit freight service (and Amtrak).
  - Stabilization and repair of right of way owned by 2 passenger agencies. *Northwest Pacific Railroad*, FD 35977 (STB-served April 25, 2016) (guidance only that suggests preemption of Calif. Environmental Quality Act based on other cited decisions).

# For better, con't

But, compare –

- Electrification for commuter services; Calif. Environmental Quality Act not preempted. *Peninsula Corridor Joint Powers Bd.*, FD 35929 (STB-served July 2, 2015)(owner subject to mass transit exemption; electrification no impact on the freight carrier).

## and for worse -

- Inability to restrict or interfere with freight rail operations. *North Coast Railroad Authority and Northwestern Pacific Railroad Company v. Sonoma-Marín Area Rail Transit District*, FD 36077 and NOR 42148 (STB-served November 3, 2016) (interim decision requesting additional information).
- Limited ability to condemn railroad rights of way. *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011)(transit agency denied condemnation of freight railroad right of way that was being leased by agency).

# Condemnation of freight rail property generally

- The STB and some courts have ruled that condemnation is a form of “regulation” and thus preempted. *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*.
- Limited ability to condemn if rights sought do not interfere with the target carrier’s ability to provide rail service (including right of way maintenance and possible expansion needs). But to test that, you will need to seek a declaratory ruling from the STB and the railroad will likely challenge your petition.

# Condemnation generally, con't

So what's the standard?

*Maumee & Western* teaches us:

“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.”

# Condemnation generally, con't

- **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)
- *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 generally, con't

Examples of successful condemnations:

- Easement for road crossing and subsurface utilities. *Maumee & Western Railroad Corporation And RMW Ventures, LLC-Petition For Declaratory Order*, 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 generally, con't

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*, FD34425 (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 generally, con't

What About:

- Condemnation of operating rights over rail freight line for passenger service?
- Use of adjoining right of way for high voltage electric lines where railroad claims electrical interference?

# Options for transit providers:

- 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).

# Stop that train?

- 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



# Federal Law Enacted 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 USC §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

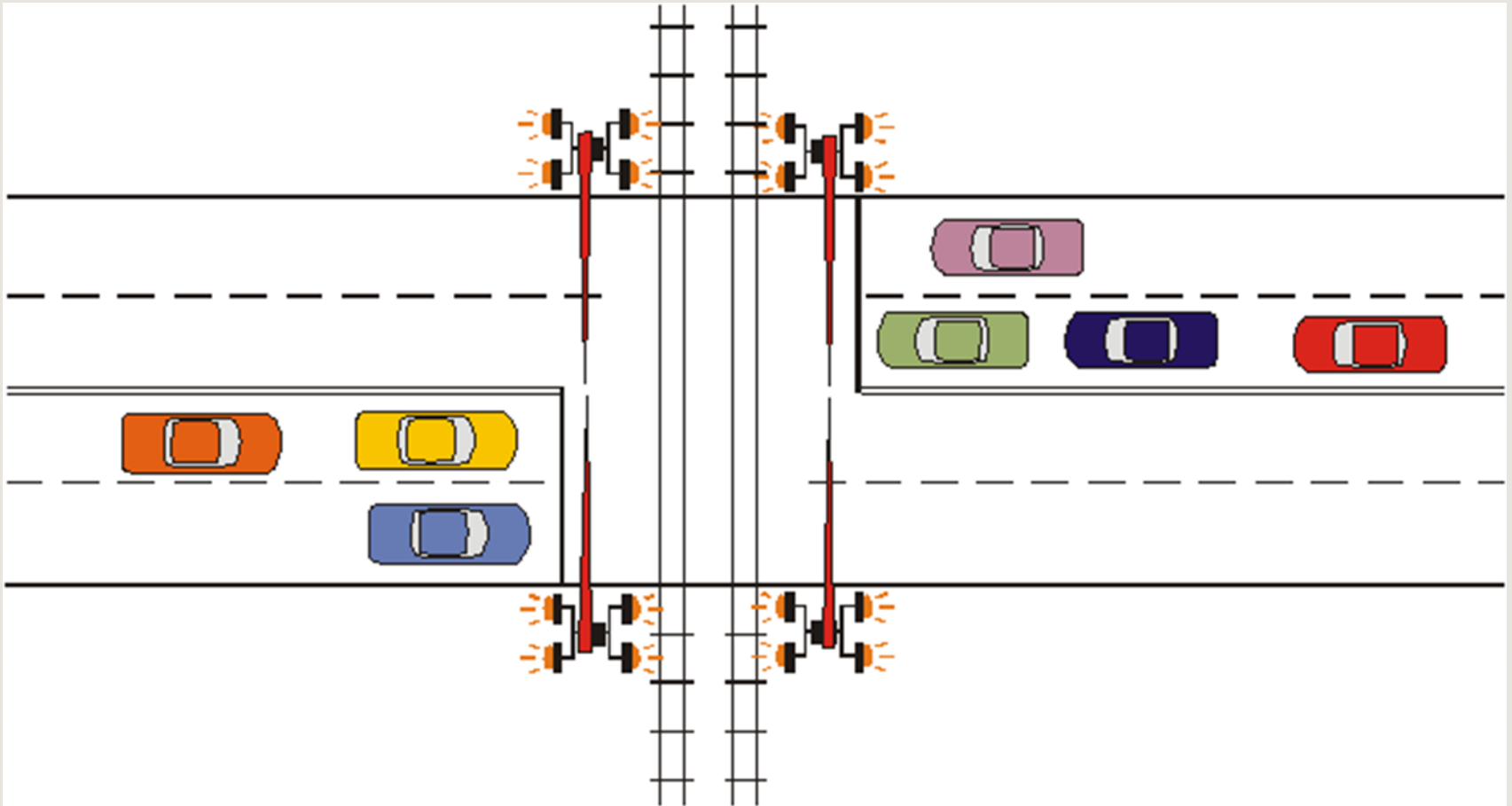
# Basic Requirements for a Quiet Zone:

- 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 block traffic:
    - 4 quadrant gates
    - 2 quadrant gates with median strip
    - One way traffic with gates

# Four Quadrant Gates



# Alternate Safety Measures

For crossing that don't or can't features SSM's, Alternative Safety Measures (ASM's) can be used:

- 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
- Can include 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, unless you can get the railroad to chip in)
- Potential sources of funding:
  - Assessment Districts
  - Developer Mitigation Fees
  - Grants
  - Bond Proceeds
  - Sales or Other Taxes

# 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

# 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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