

# I Hear That Train a Comin': The Local Regulation of Interstate Railroads



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## Agenda



- Federal Law and Regulation
- A Preemption Overview
- *City of Auburn v Surface Transportation Board*
- Applying *Auburn* (and ICCTA) to specific issues
- California Environmental Challenges
- Railroad Crossings and Quiet Zones
- High Speed Rail Issues
- Grade Separations



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## Interstate Commerce Act of 1887

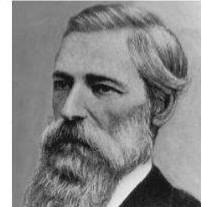
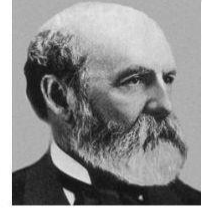


ICA was the:

- First federal law regulating a private industry

ICC was the:

- First federal regulatory agency



*The Big Four*

## 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

## Interstate Commerce Comm. Termination Act of 1995



- Abolished Interstate Commerce Commission (ICC)
- Established Surface Transportation Board (STB) under the U.S. Department of Transportation
  - Now independent agency per subsequent legislation
- More limited control of rail operations by federal agency

## Regulatory Agencies



### Surface Transportation Board

- Regulates construction, mergers, abandonments
- Readily searchable web site, but no digest of decisions available



## Regulatory Agencies



- Federal Railroad Administration (FRA) – Safety agency that regulates tracks, vehicles, speeds, and conducts safety inspections
- State Public Utilities Commission (PUC) - Regulates highway/rail crossings, safety issues (performs inspections in coordination with FRA)



## The Basis of Federal Jurisdiction



- **Commerce Clause – Art. I, §8, Cl. 3**  
 “Congress shall have the power to . . . regulate commerce . . . among the several states . . . .”
- **Supremacy Clause – Art. VI, Cl. 2**  
 “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . , shall be the supreme law of the land . . . .”



## The Basis of Federal Preemption



- *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] . . . .”

## The Basis of 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.)

## A Preemption Overview



- Generally courts have classified preemption as:
  - ✓ **Express:** The statute specifically contains preemption language such as 49 USC §10501(b) and 49 USC §11321.
  - ✓ **Implied:** Two types:
    - ✓ **Field preemption** where federal law so thoroughly occupies the field that there is no room for state or local regulation. For example, STB jurisdiction over railroad rates and service, mergers, and acquisitions/abandonment preempts the field.
    - ✓ **Conflict preemption** where federal law only displaces state or local law when in conflict.

## A Preemption Overview



### Categorical-per se preemption

As Applied-requires factual analysis to determine if law or regulation unreasonably burdens interstate commerce

## A Preemption Overview



ICCTA Statutory Preemption language (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. [Emphasis added.]



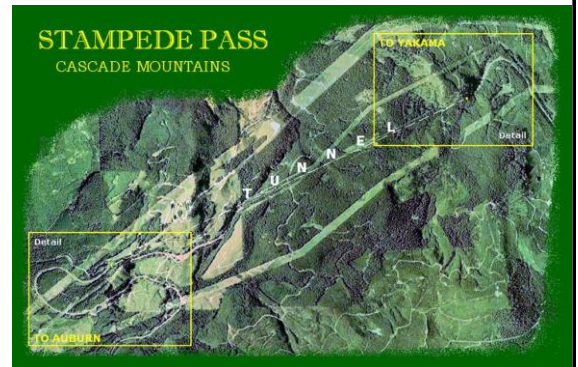
*City of Auburn v Surface Transportation Board, 154 F.3d 1025 (9th Cir. 1998)*



*Facts of City of Auburn case:*

BNSF sought STB approval to reacquire Stampede Pass line it had sold to short line operator and to utilize a track segment it used only for local traffic for interstate service

- 229 miles through the Cascades
- Auburn (near Seattle) is located at the western terminus of the line and was concerned with impacts of increased rail 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)*



Cities file court challenge to STB decision that had found that:

- i. Local environment permitting laws were preempted by ICCTA
- ii. Use of Environmental Assessment/FONSI was appropriate (i.e. 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 9<sup>th</sup> Circuit:

- There is no express preemption of local regulation in ICCTA
- 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 cites 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”

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



**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 . . . .”
- 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.

## Jurisdiction of STB/Role of Federal Courts



- STB and courts have concurrent jurisdiction to consider matters of ICCTA preemption.
- 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).
- Decisions of the STB can be appealed to U.S. Court of Appeals

## Who can claim preemption?



- STB-regulated rail carriers, operating in interstate commerce, and those operating on their behalf
- Non-operating owners of STB-regulated rail lines

## Who can claim preemption?



### What is an Interstate Railroad?

#### **Included:**

- Active
- Discontinued
- Abandoned (Note: not the same as easement abandonment)
  - Rails to Trails (“Railbanking”)

#### **Not included:**

- Purely intrastate operations, not connected to national rail system
- Tourist railroads (not point-to-point transportation)

## Who Can Claim Preemption?



### What parties cannot claim preemption?

- Tenants of a railroad
- Customers of a railroad (See *Valero*)
- Rail carriers performing non-carrier activities
- Intra-state passenger operators

## Who Can Claim Preemption?



### What about transloaders?

- Transloaders shift freight from one mode to another
- If the party transloading freight is the carrier or an agent directed by the carrier-Yes (and City can't indirectly interfere with its operations, either)
- If the party is independent of railroad-No—Activities can be regulated

## Applying *Auburn* (and ICCTA) to specific issues:



- Construction of new or expanded rail lines
- Operation of Rail Service
- Condemnation
- Franchises
- Environmental Review
- Crossings

## Construction



- STB authority required for construction or extension of existing lines
- Construction of spurs, side tracks, ancillary facilities, while not requiring STB approval, are nevertheless protected from interference by local jurisdictions
- Local jurisdictions may not impose permitting or pre-clearance requirements, including zoning or other land use permit requirements

## Operations



Local jurisdictions may not:

- Regulate economic issues
- Control station closures
- Apply burdensome or discriminatory regulations
- Unduly restrict the operations of interstate carriers

Local jurisdictions may:

- Conduct environmental monitoring
- Apply building and zoning codes (but not pre-construction reviews)



## Condemnation



- 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).

## Condemnation



State court condemnation actions barred:

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

Alternatives:

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

## Condemnation



- “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).*
- Condemnation cannot interfere with the railroad’s ability to provide rail service, including right of way maintenance and possible expansion needs.
  - 300 year test
- STB involvement may be needed to determine if taking is permissible.

## Condemnation



Useful factors to apply:

- Longitudinal Uses—Takes that require a strip of the railroad right-of-way, particularly if they will create a “pinch-point” or otherwise interfere with future expansion of the railroad will likely be preempted.
- Transverse Uses—Crossings for utilities, roadways and similar uses are likely to not be preempted, as they can be designed so as not to interfere with existing operations or future expansion

## Franchises



Railroads often rely on franchise rights when tracks cross city streets

- 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.”

## Environmental Review



Courts find state law requiring reviews are preempted:

- City of Encinitas (construction of side track for commuter rail) (*North San Diego County Transit Development Board*—Petition for Declaratory Order)
- *Green Mountain Railroad Corp. v State of Vermont* (D.C. Vermont 2003) 1003 U.S. Dist. LEXIS 23774
- Recent Del Mar situation—erosion of ocean bluffs below tracks raise issues of city and Coastal Commission jurisdiction

## California Rail Examples—Use of CEQA to block rail projects



- STB rulings support pre-emption for interstate rail projects:
  - Desert Express Enterprises (FD 34914)
  - CA High Speed Rail (FD 35724)
- Two major projects affected by CEQA challenges:
  - California High-Speed Rail Authority (statewide project)
  - North Coast Railroad Authority (Northern CA coast)
- State court rulings find bases for avoiding preemption, due to unique role of state
- No preemption for intrastate passenger operations- PCJPB (FD 35929)

## Environmental Review—California Examples



*Town of Atherton v. CAHSRA* (2014) 228 Cal.App.4<sup>th</sup> 314

- HSR project opponents filed a series of legal challenges under CEQA, causing delays to the project
- For the first time on appeal in one case, CAHSRA raised a claim that federal law preempts citizen suits to enforce CEQA, citing STB ruling it had sought finding it was an interstate carrier
- 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

## Environmental Review—California Examples



### *Friends of the Eel River v. NCRA* (2017) 3 Cal.5th 677

- North Coast Railroad Authority, local agency formed under state law, sought to repair rail line for use by private freight operator
- Environmental groups, concerned about potential impacts to sensitive river habitat, filed a challenge to NCRA's approval of a CEQA document for a project to rehabilitate the line, which had fallen into significant 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.

## Environmental Review—California Examples



### *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.

## Crossings



- *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4<sup>th</sup>  
State rule regulating blockage of grade crossings, and city proceeding attempting criminal law enforcement, found to be preempted.
- Similar holdings: *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).

## Summary—Guidelines for Local Regulation



### What types of regulation are permissible?

- 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).
- State and local government can use their “police powers” to protect public health and safety but state or local actions must not be discriminatory.

## Railroad Crossings: An Issue of Life and Death



- 2231 Car/Train Collisions
- 260 Fatalities
- 846 Injuries
  - Source: Operation Lifesaver/Federal Railroad Administration (2018)

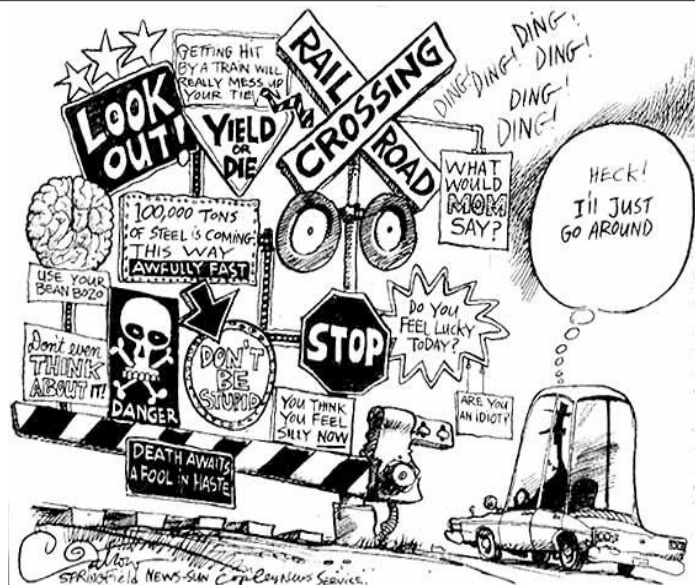
## Crossing Signals—Not Always Enough!





## Stop that train?

- At 55 mph, a train can take one mile to stop
- Safety focus must be on controlling cars and trucks
- Locomotive engineers rely on horns for safety



## The Horn Problem:



- Horns are loud (>96 db)
- To provide required 15 second warning, horns are sounded about ¼ mile from crossing (¼ mi.=15 second warning @ 60mph)
- Noise impacts are felt for ½ mile

## Localities React to Noisy Horns



- Citizens press for action to limit horn use
- Localities attempt to ban train horns via local regulations
- Railroads object on safety/liability grounds; turn to federal agencies for help, citing preemption

## Congress Acts: PL 103-440 49 USC §20153



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

## FRA Rulemaking Delay



- 1994 Statute
- 2000 Notice of Proposed Rule
- 2003 Interim Final Rule
- 2005 Final Rule (70 FR 21844)
- Amended Rule (71 FR 47614)
  - Codified at 49 CFR §222 & 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

## Basic Requirements



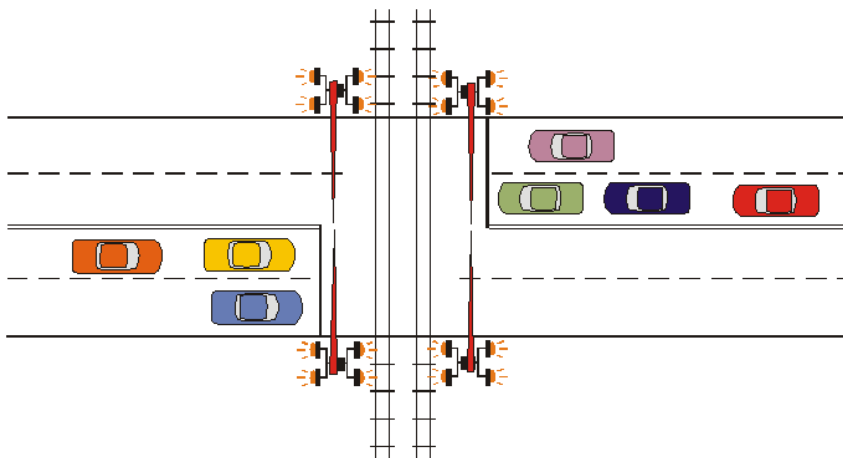
- Must be at least ½ mile long
- All crossings in zone must have:
  - Flashing lights
  - Crossing gates
  - Signs re: absence of horns
  - Power out indicators
  - Constant warning time devices (if practical)

## FRA Approval Requirements



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

## 4-Quadrant Gates



## 4-Quadrant Gate # Showing delay feature on exit gates



## FRA Approval Requirements



- No FRA approval is required if:
  - Quiet Zone Risk Index is equal to or below either...
    - Nationwide Significant Risk Threshold
    - Risk Index with Horns
  - OK to add SSM's to get below these thresholds

**Suggestion: Get engineer to do calculations!**

## Alternate Safety Measures



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

## Issues for Cities and Counties



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



## Railroad Concerns



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

## Addressing Liability



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

## California High Speed Rail



- Many conflicts and problems with this project, some self-inflicted
- Right of Way Certification Process—basic rule not followed (get control before you start to build!)
- Utility Issues (PUC General Order 176 sets clearances, which differ from PUC General Order 95)
- Need dedicated right-of-way for high speed (+125 mph) operation, effective crossing barriers to exceed 110 mph
- Use of existing rail lines likely to trigger grade separations

## Railroad Grade Separation Projects



- CPUC may require construction of a grade separation
- Funding can come from various sources:
  - Street and Highways Code §190 funding—CPUC develops priority list
  - County/regional transportation funds
  - Railroad (Freight, commuter, HSR)
- Railroads have strong focus on safety
  - Flagging
  - Design requirements
  - Insurance and Risk Management Terms
- Pay attention to utilities, especially fiber optic relocations, as delays can be costly

## City of Emeryville-South Bayfront Bicycle/Pedestrian Bridge Project



### Video

- <https://www.youtube.com/watch?v=lwxFaJ8xZn4>

- Wide RR right-of-way separates new shopping district from rest of city
- Railroad (Union Pacific) requires that bridge be assembled off-site and dropped into place
- Arrangements made with UP to close all tracks for 4 hours while bridge is put in place
- Also required construction of wooden platform over tracks to hold crane
- Long effort to protect project funds, acquire real estate, get UP buy-in was successful



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